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REPORT

arrest

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REPORT

ON

ARREST

July, 1986

The Honourable Ray Hnatyshyn, P.C., M.P.,
Minister of Justice
and Attorney General of Canada,
Ottawa, Canada

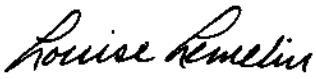
Dear Mr. Minister:

In accordance with the provisions of section 16 of the *Law Reform Commission Act*, we have the honour to submit herewith this Report, with our recommendations on the studies undertaken by the Commission on arrest.

Yours respectfully,

Allen M. Linden
President

Gilles Létourneau
Vice-President



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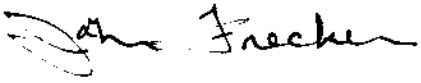

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Introduction

The law of arrest is a fundamental aspect of criminal procedure. It authorizes the use of coercive powers of the state to deprive an individual of his or her liberty in order to satisfy certain public interests such as compelling that individual to appear in court to answer to criminal charges or providing an opportunity for agents of the state to engage in investigative activities by which to seek evidence of an offence. The law of arrest is thus a pivotal factor in the balance between the liberty of the individual citizen and the need for society as a whole to maintain an effective means of law enforcement as a precondition of liberty.

Like other functional aspects of criminal procedure, the law of arrest forms part of a social mechanism intended to carry out the substantive aims of the criminal justice system, that is, convicting the guilty while protecting the innocent. It also allocates authority and responsibility among officials in that system. These aims must be attained in a manner that commands the respect of the community by virtue of its fairness and reliability.[1] We are convinced that the law of arrest in Canada can be reformed to attain these ends in a far better way than it does now. However, certain basic principles must be kept firmly in view when this reform is being carried out. The first principle is the "rule of law," and its constitutional embodiments, which require that any interference with the liberty of a citizen be clearly authorized by a positive disposition of the law.[2] The second is the principle of restraint which dictates that the criminal law should be used in a manner that interferes with rights and freedoms only to the extent necessary for the attainment of its purpose.[3]

The Commission has been particularly concerned to ensure that in this sensitive area of police powers there be a full opportunity for consultation on its proposed recommendations. Working Paper 41, *Arrest*,[4] has been the subject of extensive discussion in a structured consultation process which has involved the police, defence counsel, Crown counsel, judges and law professors. As with all our Working Papers, information on the *Arrest* Working Paper was released through the media with an invitation to the general public to address responses to the Commission. As a result of these deliberations and

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1. See Peter Arenella, "The Warren and Burger Courts' Competing Ideologies" (1983), 72 *Georgetown Law Journal* 185, p. 188, for a discussion of these functions of criminal procedure.

2. The *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, which is Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11, in its preamble, states that "... Canada is founded upon principles that recognize ... the rule of law."

3. See: Law Reform Commission of Canada, *Our Criminal Law* [Report 3] (Ottawa: Supply and Services, 1977) *passim*; and Government of Canada, *The Criminal Law in Canadian Society* (Ottawa: Supply and Services, 1982), p. 5. The latter document is the basic policy statement in relation to which the present review of criminal law and procedure in Canada is being undertaken.

4. Law Reform Commission of Canada, *Arrest* [Working Paper 41] (Ottawa: Supply and Services, 1985).

responses, some of our original proposals have been significantly modified. However, the general structure of this Report and the approach adopted in most of our recommendations reflect basic policy considerations which are addressed in detail in the Working Paper. Accordingly, this Report is best read in conjunction with the earlier Paper. The salient differences in the two texts will be noted in the commentary following the recommendations in this Report.

This Report is divided into four chapters. Chapter One discusses the basic principles that should underlie the law of arrest, describes in general terms the need for reform and presents other areas of criminal procedure which may require reform upon the implementation of the proposals in this Report. Chapter Two contains the detailed recommendations for reform of the law of arrest, followed in each case by a commentary on how the recommendation relates to the present law and implements the general policy objectives of reform established in Chapter One. Chapter Three provides a summary of our recommendations while Chapter Four puts these recommendations in the form of model legislation.

CHAPTER ONE

Present Arrest Law and the Need for Reform

I. Introduction

The purpose of this chapter is not to set out in detail the present law of arrest in Canada nor to present a critique of every aspect of it. For such an analysis, the reader is referred to Working Paper 41, *Arrest*,[5] and to the commentary following each recommendation in Chapter Two of this Report. Rather, it is our intention here to discuss the basic principles that should underlie the law of arrest, to set out the general parameters of the reform proposed by the Commission, and to clarify the limitations imposed upon these reform proposals by the nature of the subject and by the structure of the *Criminal Code* review process of which this Report is just one part. A segment of this chapter will be devoted to each of these topics.

II. Basic Principles and the Law of Arrest

The general principles which should form the foundation of the law of arrest in Canadian society can best be discussed under three rubrics: the rule of law, the standards of the *Canadian Charter of Rights and Freedoms*, and the principle of restraint. It is in relation to these principles that the Commission must make proposals for an arrest regime which will strike an appropriate balance between the liberty of the individual and effective law enforcement.

A. The Rule of Law

The *Constitution Act, 1982* asserts that Canada is founded upon principles that recognize the "rule of law." The full sense and import of that phrase have been the subject of extensive debate among jurists since the Middle Ages.[6] For the reform of the

5. *Ibid.*

6. For a brief exposition of the nature and origin of the concept of the rule of law, see E.C.S. Wade and Godfrey Phillips, *Constitutional Law*, 8th ed. (London: Longmans, 1970), p. 62 ff.

law of arrest, however, the classical exposition found in the first two of Dicey's "meanings" of the rule of law form an apposite statement of its essential principles. For Dicey:

> It means in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary powers, and excludes the existence of arbitrariness, of prerogative or even of wide discretionary power on the part of government ....[7]

In addition to this first meaning of the rule of law, Dicey enunciates a second meaning, which has become generally recognized by jurists. He states that it means

> equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts.[8]

While the meanings of the rule of law have been broadened, extended and modified over the years since the first publication of Dicey's treatise,[9] the essential and unassailable importance of his formulations for the law of arrest is clear. First, the law of arrest, establishing as it does the authority to interfere with the liberty of the individual in the name of society at large, must enunciate the nature of this authority in clear, unambiguous terms which structure the exercise of discretion by citizens, police or judicial officials within established limits. Second, the rules establishing the nature of the authority to arrest provide the basis for the accountability of those who purport to exercise this authority, and those exceeding or abusing the limits of authority must expect to be found legally responsible. The recommendations in Chapter Two of this Report, in accordance with Dicey's first meaning of the rule of law, establish statutory rules to govern virtually all aspects of the law of arrest in relation to criminal procedure. These rules attempt to structure the authority of citizens, police officers and judicial officials in such a manner as to exclude arbitrary action and set clear limits on the exercise of discretion. Moreover, the standards of reasonableness and other statutory formulations in which the authority to arrest is cast are intended to allow for judicial review of the abuse of such authority in accordance with the second of Dicey's meanings of the rule of law.

While a substantive interpretation of the rule of law in relation to arrest requires the exercise of authority in accordance with established rules, the principle of the rule of law also has implications for the *form* in which a reformed law of arrest ought to be cast. The rules governing arrest must be simple, clear, coherent and comprehensive, while not sacrificing substance to mere elegance in drafting. The arrest rules regulate encounters between police and citizens which may be brief, emotionally charged and potentially dangerous. To be an effective guide for action to both the agent of the state and the individual, these rules must be straightforward, unambiguous, internally consistent, and available from a single authoritative source. As the discussion in Part III of this chapter will demonstrate, the various statutes and judicial rulings which comprise the law of arrest in Canada at present do not meet these standards. We have attempted to meet them in our recommendations in Chapter Two.

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7. A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. with Introduction by E.C.S. Wade (London: MacMillan, 1967), p. 202.

8. *Id.*, pp. 202-3.

9. See, for example: Wade and Phillips, *supra*, note 6, Chapter 5; H.W.R. Wade, *Administrative Law*, 4th ed. (Oxford: Clarendon Press, 1977); and J.T. Thorson, "A New Concept of the Rule of Law" (1960), 38 *Can. Bar Rev.* 238.

B. The Standards of the Charter

The *Canadian Charter of Rights and Freedoms* embodies many aspects of the rule of law. Moreover, its pre-eminent status in the Canadian Constitution provides courts with standards by which to adjudge our laws and the power to strike down governmental action inconsistent with the Charter.[10] It also provides the means to fashion appropriate remedies for breach of Charter rights.[11] Certain of the constitutional standards in the Charter, by express reference or necessary implication, have a direct bearing upon the law of arrest. This reference to arrest in a constitutional document is not surprising, given the pivotal nature of arrest in relationships between the state and the individual. However, these Charter provisions of necessity do not elaborate a comprehensive structure for the law of arrest, and must be viewed as principles according to which minimum standards can be fashioned.

At least four provisions of the *Canadian Charter of Rights and Freedoms* have a direct impact on the law of arrest. These are sections 7, 9, 10 and 12.[12] Charter sections 7 and 9 do not mention the word "arrest" specifically, but clearly establish general principles by which the law of arrest must be evaluated. Section 7 protects "... life, liberty and security of the person." The object of an arrest is to deprive the subject of his or her liberty and the manner of doing so may endanger life or security. Section 7 is thus relevant to the law of arrest. Similarly, section 9 enunciates "... the right not to be arbitrarily detained or imprisoned," and an arrest may be classified as either a detention or a form of imprisonment. Both sections provide somewhat abstract limitations on the scope of the rights enumerated. Section 7 states that one is not to be deprived of one's rights to life, liberty or security of the person "... except in accordance with the principles of fundamental justice." Section 9 protects against "arbitrary" detention or imprisonment. The Commission is confident that its recommendations for reform in this Report will advance the principles of fundamental justice and inhibit arbitrariness in the law of arrest.

Another Charter provision which does not mention arrest by name, but which is conceivably relevant to arrest, is section 12. Under this section, "[e]veryone has the

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10. The *Constitution Act, 1982*, as enacted by the *Canada Act 1982* (U.K.), 1982, c. 11. Section 52(1) reads as follows:

    > The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

11. The *Canadian Charter of Rights and Freedoms*, s. 24(1), reads as follows:

    > Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

12. A literal use of American consitutional doctrine might incorrectly lead one to think that Charter section 8, which guarantees the right to be secure against "unreasonable search or seizure," has application to our subject. This confusion arises because the American Bill of Rights contains no specific reference to "arrest." Constitutional arguments in relation to arrests have therefore revolved around the meaning of "seizure," since arrest has been characterized for constitutional purposes as a "seizure of the person." The wording of the Charter obviates the need for such an indirect approach in Canadian constitutional discourse.

right not to be subjected to any cruel and unusual treatment or punishment." Experience over the centuries must make the legislator alert to the dangers of making changes in criminal procedure which, while put forward in all good faith, may authorize cruel and unusual treatment. The Commission believes that its recommendations are consistent with the Charter's prohibition against such measures.

Arrest is specifically mentioned in section 10 of the Charter which reads as follows:

> **10.** Everyone has the right on arrest or detention
>
> (*a*) to be informed promptly of the reasons therefor;
>
> (*b*) to retain and instruct counsel without delay and to be informed of that right; and
>
> (*c*) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

The constitutional entrenchment of *habeas corpus* as a means by which to test the validity of arrest and detention is an example of one of the ways in which the Charter embodies the concept of the rule of law. The legality of an arrest may also be challenged in civil and criminal proceedings, as well as in administrative procedures where police officers are involved. The recommendations made in Chapter Two of this Report are intended to be consistent with the Charter and with the continuation of these traditional methods by which to ensure respect for the rule of law in relation to arrest.

The right to be informed promptly of the reasons for an arrest or detention is an example of a minimum standard stated at the level of principle which is an appropriate subject for further elaboration in an arrest regime. There has developed in the case-law and doctrinal commentary a certain degree of controversy over the scope and content of the "right to reasons" and other notice requirements. These issues are addressed in detail in our recommendations in Chapter Two because we think they are of sufficient importance to be resolved in legislation, rather than waiting for the courts to elaborate the nature of the right through interpretative rulings.

C. The Principle of Restraint

Every aspect of reform of the law of arrest requires making decisions about how to strike a fair balance between individual interests in liberty and privacy on the one hand, and efficient methods of law enforcement and crime control on the other. To some extent this is a false dichotomy since it is a truism that there can be no individual liberty in a society that is effectively disrupted by criminal elements. But in another sense the dilemma is a real one, for private rights are sometimes destined to conflict with public rights.

A fundamental aspect of a free and democratic society is that citizens are free to go about their business unimpeded by the state unless their conduct is prohibited or regulated by law. The principle of legality[13] embodies the notion that one cannot be convicted of

13. See Law Reform Commission of Canada, *The General Part: Liability and Defences* [Working Paper 29] (Ottawa: Supply and Services, 1982).

a crime unless one has engaged in specifically prohibited conduct with the requisite state of mind in relation to that conduct. The procedural corollary of the principle of legality is that a citizen is not to be deprived of his or her liberty and brought to trial unless there are reasonable grounds to believe that he or she has committed a particular crime and is lawfully answerable for that prohibited behaviour. An arrest or detention which is not directly related to the substantive goals of criminal law, that is, those of sanctioning the breach of society's most important rules, must be scrutinized very carefully and viewed with great concern. Any other approach would be inconsistent with the principle of restraint.

We are guided in these matters by the statement of the principle of restraint adopted by the Government of Canada in the document entitled *The Criminal Law in Canadian Society* which governs the *Criminal Code* review. The point is there made that the criminal justice system ought to be seen as the "ultimate recourse" available to society along a continuum of informal and formal conventions, customs and institutions.

> Restraint should be used in employing the criminal law because the basic nature of criminal law sanctions is punitive and coercive, and, since freedom and humanity are valued so highly, the use of other non-coercive, less formal, and more positive approaches is to be preferred whenever possible and appropriate.[14]

While these remarks were made in the context of discussion concerning the use of substantive criminal law as opposed to less coercive regulatory law, they are equally applicable, in the context of criminal procedure, to the use of arrest as opposed to less intrusive means of assuring an accused's appearance in court to answer to criminal charges. Moreover, the principle of restraint ought to be applicable not only to the question of why and when an arrest may lawfully be made, but also to how and where it ought to be authorized.

III. Arrest, Criminal Law and the Need for Reform

At present, authority to arrest is granted to various people for purposes of compelling an accused person to appear for trial, preventing interference with the administration of justice, and preventing continuation or repetition of crime. In Canada, arrest powers exist by virtue of both federal and provincial statutes,[15] and some provincial and federal non-criminal statutes adopt, by reference, the arrest procedures found in the *Criminal Code*.[16] This Report is exclusively concerned with arrest in relation to criminal procedure. The Commission's federal jurisdictional mandate precludes the making of recommendations for reform of arrest powers in relation to provincial offences. However, in the consultation process, we discussed with representatives of provincial Attorneys General the possibility

14. *Supra*, note 3, p. 42.

15. See *supra*, note 4, pp. 15-26.

16. *Ibid.*

that the focus of our recommendations on arrest in relation to "true crime" may mean that a continuation of the provincial practice of adopting by reference federal arrest powers for non-criminal offences may be inappropriate. Similarly, the Commission's Administrative Law Project has taken under advisement the question of whether the arrest powers in the *Criminal Code* are or should be used in relation to federal non-criminal offences. The recommendations in this Report will, then, address the need for reform of arrest law within the ambit of criminal law and procedure. In this context, it is clear that the present law of arrest is deficient both in its form in relation to the various sources of arrest law, and in much of its content, or the policies enunciated therein. These two areas are the subject of Part III of this chapter.

A. Sources of Arrest Law and Codification

Someone seeking to know when, why, how and where a police officer may make an arrest to enforce the criminal law must presently peruse provisions at disparate points in the *Criminal Code*, be aware of the judicial interpretations given to those *Code* sections, be familiar with separate common law rules in scattered cases which have never been included in the codified law, and understand the impact which the *Canadian Charter of Rights and Freedoms* may have upon all of these sources of arrest law. The uncertainty created by the interplay of these various sources does not do justice to the requirements of the rule of law. If one aspect of the rule of law is to structure the authority of the state in a clear and concise manner so that citizens and officials may know their respective rights, the law of arrest leaves room for considerable improvement.

The law of arrest, occupying as it does the cutting edge between state authority and individual rights, deserves to be based on clearly expressed and accessible principles. Lawyers specializing in criminal law have difficulty setting out the rules governing arrest. It is equally difficult for police officers to know and apply the law with accuracy. How can the citizen determine the bounds of his or her rights? The law of arrest needs to be codified in a simple, clear, coherent and comprehensive statutory statement which is consistent with the Charter, and which can form an easily understood guide in arrest situations. It is this challenging task of codification which our Report attempts to meet.[17]

B. The Substantive Content of the Reform

Without duplicating the detailed discussion following the recommendations in Chapter Two of this Report, it is important at this juncture to present a summary statement of the substantive areas of arrest law which need reform.

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17. See Law Reform Commission of Canada, *Towards a Codification of Canadian Criminal Law* [Study Paper] (Ottawa: Information Canada, 1976), pp. 21-4.

The very meaning of the word "arrest" and the range of factual situations to which it applies form the first area for analysis. This is not merely an academic concern with definitions. The definition of arrest will determine the time at which the legal status of the individual and his or her relationship to the state alter. The rights, duties and liabilities of both the arrested person and the arrester are transformed at this point. The present law provides that an arrest may occur where there has been "touching with a view to detention," thus creating an arrest where the ordinary citizen might naturally think that there had been a mere attempt at an arrest. A revised definition will be proposed to bring the law into accord with the public's appreciation of what an arrest is.

An issue related to the definition of arrest is the problematic status of the person who has been asked to "come to the station" to answer questions or otherwise assist police in their investigation. Such persons may feel under a compulsion to comply with police requests, but if the compliance can be characterized as voluntary, the person has traditionally been viewed as not being under arrest, and is therefore not afforded the procedural and constitutional safeguards given to an "arrested" person. Our recommendations deal directly with persons in this ambiguous situation so that they will know what their rights and obligations are.

The *Criminal Code* sections authorizing arrest without warrant are highly complex. They rely on the distinction between summary conviction offences and indictable offences, and distinguish between various "arrestable" circumstances in terms of whether the offender is fleeing, whether the offence is on or in relation to property, or whether there has been a breach of the peace. The recommendations in Chapter Two will attempt, in the interest of clarity, certainty, and restraint, to simplify the provisions authorizing arrest without fundamentally altering the present balance between police powers and citizens' rights. In doing so, the intention is to propose recommendations in statutory language which will form a clear guide to action "on the street" and reasonable standards for *ex post facto* judicial evaluation where litigation arises from an arrest.

The principle of restraint which was embodied in the reform of arrest provisions in the early 1970s (which provisions are known as the *Bail Reform Act*)[18] is reformulated in relation to arrest without warrant in our recommendations. The *Bail Reform Act* provisions elaborated a range of circumstances where arrest should not occur. Our recommendations are based, rather, on an expanded duty to release following an arrest without warrant. Moreover, these same principles are to be applied explicitly in relation to the issuance of arrest warrants in our recommendations. Present *Code* provisions allow for the issuance of an arrest warrant in lieu of a summons or confirmation of an appearance notice where it is "in the public interest." This vague phrase provides no explicit criteria for the issuance of arrest warrants and, as a standard for the exercise of judicial discretion, is arguably contrary to the rule of law and the principle of restraint.

While the issuance of an arrest warrant is clearly an important step in a criminal proceeding, the procedures governing this decision-making process in the existing *Code* sections are sparse at best. Our recommendations attempt to ensure that those who are

18. *Bail Reform Act*, R.S.C. 1970 (2nd Supp.), c. 2.

issuing warrants will conscientiously engage in a genuine evaluation of the circumstances of each individual case, rather than merely rubber-stamp requests. Furthermore, our proposals would establish a simple record of the proceedings, which would aid in resolving any subsequent dispute over the validity of the warrant and the issuing process. This too is in accordance with basic notions of the rule of law and of restraint by state officials in a democratic society. The question of when a person arrested pursuant to a warrant ought to be released is a matter closely related to the law of bail or "judicial interim release." For that reason, we defer our recommendations on this question to a subsequent work on Compelling Appearance, Interim Release and Pretrial Detention.

Our consultations revealed a major problem with the execution of so-called "Canada-wide warrants." While the aim is laudable, the statutory basis for such warrants is, in its present form, questionable. The manner of arresting and holding suspects in relation to offences that have occurred outside of the jurisdiction in which the arrest has been made, may also be open to question. Our recommendations in this area represent an effort to bring the law into accord with modern, computer-based police record keeping while maintaining efficiency and consistency with the rule of law.

The *Canadian Charter of Rights and Freedoms* states that everyone has the right on arrest or detention to be informed promptly of the reasons therefor. But a host of problems remain unaddressed by this statement of principle. Common law cases defined what adequate reasons might be, and approved of circumstances which were thought to be exceptions to this rule. Our recommendations canvass these issues, as well as problems in the language of notification, in an effort to restate clearly and improve certain aspects of the present law.

Police authority to enter private property without warrant to effect an arrest has been the subject of recent judicial scrutiny and continuing public concern. Our recommendations chart a middle course which will give the police the authority they need to make effective arrests and prevent danger to life and limb, while not authorizing unrestrained and warrantless police entry on private property.

IV. Related Issues outside the Scope of This Report

As mentioned in the Introduction to this Report, the law of arrest may provide an opportunity for investigation or the exercise of police powers which are in some ways subsidiary to arrest. Some of these are: the use of force to effect an arrest; searches incident to arrest; questioning of suspects; and obtaining forensic evidence. Furthermore, arrest may precipitate the commencement of a criminal proceeding and thus be related to a number of procedural issues, such as: detention for purposes other than compelling appearance; compelling appearance by summons or appearance notice; judicial interim release; and disclosure of evidence. Finally, as arrest law is normally triggered by the presence of a substantive offence; therefore, circumscribed by principles of substantive rather than procedural law, it must be analyzed in this broader substantive context. The

Commission has made its final views known in Reports to Parliament on some of these issues. On others, the Commission's position is either unformed or in the preliminary form of Working Papers on which consultations are being undertaken. The purpose of this final section is to set out those related areas on which the Commission has made a Report to Parliament and those where work is in progress, in order that the arrest recommendations in Chapter Two can be evaluated more comprehensively.

A. Prior Recommendations on Police Powers related to Arrest

The Commission has reported to Parliament recently on *Questioning Suspects*,[19] on *Search and Seizure*,[20] and on *Obtaining Forensic Evidence*.[21] The way in which each of these areas relates to our recommendations on arrest must be made explicit, and thus each will be dealt with in turn below.

(1) Questioning Suspects

In its Report entitled *Questioning Suspects*, the Commission seeks to give form to two principles: the right of an accused to remain silent, and the need for a complete and accurate record of any statement made by an accused person and the circumstances in which it was made. On these principles are based our recommended additions to the *Criminal Code* which would govern the admissibility of statements obtained from a "suspect." The latter is defined as:

> ... any person who a police officer has reasonable and probable grounds to believe has committed an offence and, notwithstanding the generality of the foregoing, *includes any person under arrest or detention*, any person who is an accused within the meaning of section 448 of this Act, and any person charged with an offence.[22] [Emphasis added]

An important facet of our reform of the law of arrest is its integration with the regime we proposed for questioning suspects. In our Report 23, we recommended that the occasion of an arrest trigger the application of the rules governing the questioning of suspects. This is emphasized in a recommendation which states that the requirement to give a warning before taking a statement "does not apply where the police officer is acting under cover and the suspect is not under arrest or detention."[23] Thus, while the

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19. Law Reform Commission of Canada, *Questioning Suspects* [Report 23] (Ottawa: Supply and Services, 1984).

20. Law Reform Commission of Canada, *Search and Seizure* [Report 24] (Ottawa: Supply and Services, 1984).

21. Law Reform Commission of Canada, *Obtaining Forensic Evidence* [Report 25] (Ottawa: Supply and Services, 1985).

22. *Supra*, note 19, draft section 447.1, p. 11.

23. *Supra*, note 19, draft subsection 447.2(3), p. 12.

questioning suspects rules apply in a variety of circumstances in addition to arrest, it is clear that they are mandatory when an arrest has occurred. The recommendations in the present Report defining arrest and establishing the point in time at which an arrest occurs have been drafted with this fact in mind. However, this Report makes no explicit recommendations concerning admissibility of statements following, for example, an unlawful arrest. The recommendations in our Report 23, *Questioning Suspects*, deal generally with this issue.

(2) Search Incident to Arrest

In our Report 24, *Search and Seizure*, the Commission made recommendations concerning search incident to arrest. We placed searches incident to arrest in the exceptional category of those kinds of searches which may be conducted without a warrant. The most important recommendations concerning search incident to arrest are as follows:[24]

> 19. (1) A peace officer may search without a warrant a person who has been arrested, where the search is reasonably prudent in the circumstances.
>
> (2) A peace officer searching a person pursuant to subsection (1) may also search without warrant the spaces within the person's reach at the time of the arrest.
>
> 20. In addition to objects of seizure, [defined primarily to be takings or evidence of an offence or contraband] a peace officer searching a person pursuant to section 19 may seize without warrant
>
> (*a*) a weapon or other thing that could assist the arrested person to escape or endanger the life or safety of the arrested person, the peace officer or a member of the public; and
>
> (*b*) anything necessary to identify the arrested person.
>
> 22. A peace officer may search for and seize an object of seizure without a warrant when
>
> (*a*) he has arrested a person who is in control of, or an occupant of, a movable vehicle; and
>
> (b) the officer believes on reasonable grounds that:
>
> (i) an object of seizure is to be found in the vehicle; and
>
> (ii) the delay necessary to obtain a warrant would result in the loss or destruction of the object of seizure.

These recommendations from the *Search and Seizure* Report are set out at length because they demonstrate vividly yet another context in which arrest forms the threshold for the use of police investigative procedures which go well beyond the narrow purpose of arrest to compel appearance at trial.

It is important to note the limitations on search incident to arrest contained in these recommendations. Not every arrest justifies a search of the person. Such searches are to occur only where it is reasonably prudent in the circumstances, and the examples of evidence, weapons and identifying objects mentioned in the recommendations are consistent with the pre-existing common law rules. These limitations are significant for our

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24. *Supra*, note 20, pp. 35-8.

recommendations on arrest in this Report since our proposed scheme, while imposing on police a duty to release where possible subsequent to arrest, will broaden slightly the range of offences in relation to which an arrest may occur. It is essential that needless searches of the person not be inadvertently authorized by a combination of new proposals on search and seizure and new proposals on arrest. We believe we have avoided this pitfall. Nevertheless, it must be recognized that while the primary purpose of arrest in criminal procedure is to compel appearance, this is an area where the arrest mechanism has traditionally had these investigative measures resting "piggy-back" style on it.

(3) Obtaining Forensic Evidence

In our Report entitled *Obtaining Forensic Evidence*, the Commission put forward a basic framework for, though not a complete codification of, a regime governing the manner in which investigative procedures in respect of a suspect ought to be statutorily regulated. The basic premise underlying our recommendations in that Report is that an investigative procedure ought to be permitted, in principle, only where the subject has consented to it or a judicial order authorizing the procedure has been granted. However, certain exceptions to this principle are recommended which relate to the law of arrest. The first of these recommended exceptions is worded, in part, as follows:

> [A] peace officer should be authorized to carry out, or cause to be carried out, in the absence of a judicial order and without the expressed consent of the subject, an investigative procedure ... [as defined] ... where:
>
> (a) the subject of the proposed procedure has been *arrested* for an *offence punishable with imprisonment for five years or more*;
>
> (b) the peace officer on reasonable grounds believes that the carrying out of the proposed procedure will provide probative evidence of, or relating to, the *offence for which the subject has been arrested*; ....[25] [Emphasis added]

Furthermore, a second exception is expressed in the following manner:

> [A] peace officer should be authorized to carry out, or to cause to be carried out, without the express consent of the subject, the fingerprinting and/or photographing of the subject
>
> (a) where
>
> (i) *the subject* of the proposed procedure *is in lawful custody* charged with an indictable offence, or has been apprehended under the *Extradition Act* or the *Fugitive Offenders Act*; and
>
> (ii) the peace officer on reasonable grounds believes that the carrying out of the proposed procedure is necessary to establish or record the identity of the subject: ....[26] [Emphasis added]

By these exceptions, peace officers are entitled to undertake the authorized investigative procedures where the person is "arrested" or "in lawful custody," and case-law indicates

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25. *Supra*, note 21, pp. 39-40.

26. *Supra*, note 21, p. 41.

that a person lawfully arrested is, indeed, in lawful custody.[27] Once again the making of an arrest generally, or an arrest for certain offences, becomes the threshold point at which investigative procedures become authorized. This is another recognition that the purpose of an arrest goes beyond merely compelling the appearance of an accused for trial, and in drafting our recommendations in relation to arrest in Chapter Two we have taken this into account.

B. Work in Progress related to Arrest

Our work in progress on areas relating to the law of arrest can be conveniently coupled under two headings, "Substantive Law" and "Procedural Law," each of which is the subject of discussion below.

(1) Substantive Law

The degree of force which can be employed in effecting an arrest is part of the larger question of the use of force generally by persons authorized to take actions in the administration or the enforcement of the law. This topic is addressed in our Working Paper 29 entitled *The General Part: Liability and Defences*.[28] While the original proposals made in that Working Paper may have to be modified slightly to take into account the particular problems of arrest, these matters are the subject of a separate process of consultation and will not be dealt with in this Report.

A similar situation exists with respect to the Special Part of the criminal law dealing with the definition of particular offences. Clearly the extent to which police officers or others may interfere with the liberty of individuals by means of arrest will be determined in part by the kinds of conduct that the law defines as "criminal." Several categories of offences, including public order offences and offences against the person, are of special importance for our recommendations on arrest. This is particularly so since, as will be seen in Chapter Two, we recommend abolition of a power of arrest for breach of the peace because this power is so vague as to offend against the principle of legality. However, to ensure that police have the necessary power to intervene in circumstances where disorder is imminent, public order offences and offences against the person must be defined in such a way that police officers may arrest malefactors and maintain public order with an adequate degree of preventive authority. These matters are the subjects of Working Papers presently being drafted by the Commission, which will be released for consultation in due course.

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27. See *R.* v. *Whitfield*, [1970] S.C.R. 46.

28. *Supra*, note 13, p. 111 ff.

(2) Procedural Law

A number of important procedural matters intimately linked to arrest are under consideration or have yet to be dealt with by the Commission. The first of these is compelling appearance of accused persons to appear for trial by means other than arrest. While summonses and appearance notices have worked well and do not require a substantial overhaul, these forms of process need to be reviewed in order to simplify and clarify both the statutory language and the modes of issuance associated with them and make them compatible with our recommendations on arrest. In a similar vein, the portions of the present *Criminal Code* covering release of persons arrested pursuant to a warrant and bail, or "judicial interim release" as it is known since the *Bail Reform Act*, require simplification in drafting. These matters will be dealt with in our forthcoming work on Compelling Appearance, Interim Release and Pretrial Detention.

A much more difficult task is being undertaken by the Commission concerning remedies in relation to criminal procedure. We presently envisage the drafting of a complete Code of Criminal Procedure which would contain a Part on general remedies available for the breach of rules governing the investigative process. These remedies might apply to arrest, search and seizure, questioning suspects and the obtaining of forensic evidence. For this reason, we have varied our practice on the treatment of sanctions for the breach of investigative procedural rules in Reports to Parliament to date. In some cases we have proposed remedies in the individual Reports,[29] while in other cases we have deferred making recommendations until the completion of our Working Paper on Remedies.[30] In our Working Paper we gave a good deal of attention to the question of sanctions against unlawful arrest and custody.[31] However, in this Report on *Arrest*, while we provide that arrest and subsequent custody is unlawful when it is made in breach of our arrest regime, we think it proper to defer making recommendations on sanctions to a comprehensive treatment in our forthcoming Working Paper on Remedies. In the meantime, the traditional civil, criminal and administrative sanctions will apply.

29. *Supra*, notes 19 and 21.

30. *Supra*, note 20, p. 8.

31. *Supra*, note 4, pp. 121-30.

CHAPTER TWO

Recommendations for Reform

I. Introduction

The purposes of a power to arrest were alluded to briefly in Chapter One, but it is essential at this point to analyse these purposes more closely. The basic premise on which the law of arrest must be founded is that, generally, no one may be arrested unless there are reasonable grounds to believe that he or she has committed an offence. It is difficult to gainsay this proposition, based as it is upon the principle of legality. Yet, it cannot be overemphasized that the powers of arrest we propose apply only where a substantial quantum of suspicion exists in relation to a specific individual.

Once it is believed upon reasonable grounds that a person has committed an offence, there is a variety of considerations that inform the decision whether or not to arrest that person. These considerations relate to the essential purposes of the arrest power. One of the main purposes of arrest is to compel an accused to appear at trial to answer a criminal charge. As this purpose is shared with other less intrusive criminal procedures (that is, issuance of an appearance notice or a summons), consideration must be given to the necessity to take a person into custody rather than merely issue documentary notice to ensure that person's attendance at trial. Thus, in our view, an arrest may be made in circumstances where documentary notice would be ineffective, such as where the person's identity or place of residence is unknown or where there is reason to believe that he or she would not comply with a written command to appear.

There are other purposes for which a power to arrest is justified once it has been determined that there are reasonable grounds to believe that someone has committed an offence. Sometimes it is necessary to arrest someone in order to conduct investigative tests that can only be carried out while he or she is in custody. Arrest also serves as a means by which to protect other broad social interests, such as the integrity of the administration of justice and public safety. For example, where there is fear that an accused will tamper with evidence or interfere with witnesses, that person's arrest will be justified. Similarly, if there are reasonable grounds to believe that an accused will persist in unlawful conduct or will otherwise jeopardize public safety, it would obviously be prudent, and to our minds legally justified, to take custody of that person.

Although it may be tempting to view certain of these purposes for the power to arrest as paramount and others as subsidiary, in practice this cannot be so. Arrest may, for example, be completely unnecessary in some cases to compel appearance at trial, but

justified by a need to prevent the continuation or recurrence of a criminal offence. As such, we have avoided ranking the purposes underlying the arrest power. We must be careful not to confuse the purposes for arrest with those relating to bail and release of accused persons. Different considerations apply to these latter procedures. As the *Criminal Code* presently recognizes, the *primary* purpose for continuing custody of an accused by denying bail is to compel the accused's appearance at trial. By contrast, in making the initial decision to take a person into custody, the primary consideration will always be determined by the particular circumstances facing the arresting person.

Once the purposes for arrest have been articulated, some may think it reasonable to require that arrests be made only in circumstances where it is clear that at least one of these purposes is being served. Much as it may be desirable in theory to require those who have reasonable grounds to believe that a criminal offence has been committed to consider these underlying purposes *prior* to making any arrest, this is both impractical and misleading. It is impractical in the sense that people contemplating making a warrantless arrest on reasonable grounds will usually not have time to contemplate whether the purposes of the arrest power would be properly served in the circumstances facing them. Often the exigencies of the situation will require action first, reflection later. Because of this reality, it would be misleading to structure the power to arrest such that its exercise would be dependent upon a *prior* determination of its necessity in relation to the purposes specified above. In effect, this would result in people being taken into custody while a determination was made as to whether their arrest was merited. Indeed, it is this fictional approach in the present law which we seek to avoid here. On the other hand, where an arrest warrant is sought, we think it reasonable to require peace officers to demonstrate in advance the need to take a person into custody.

Of course, we realize that the upshot of this approach to warrantless arrests leaves a broad discretion to the arresting person to decide whether or not to detain or take into custody someone reasonably suspected of committing a criminal offence. We are of the opinion, however, that it is preferable to recognize the realities of policing and ensure that people subjected to custody are afforded and informed of their rights and duties, than to accept the obvious shortcomings of the present law. However, as a means of counterbalancing the broad discretion to arrest without warrant, we have coupled it with a duty to release the arrested person immediately if custody is not justified by its underlying purposes.

In the presentation of our recommendations in this chapter, we make a distinction between "principal recommendations" and "corollary recommendations." The principal recommendations are those which describe in positive terms the comprehensive regime for the law of arrest which we propose. To the degree possible, these recommendations are framed in language acceptable for use by statutory drafters in the present *Criminal Code*. Anticipating the inclusion of these arrest provisions in the present *Code* even before we make final our projected Code of Criminal Procedure, we include in this Report, under the heading "Corollary Recommendations," a list of those sections of the present *Criminal Code* which would require repeal or revision in order to be rendered consistent with our arrest regime.

II. Principal Recommendations

The provisions proposed for our comprehensive arrest regime are organized and presented under six headings which may contain one or more recommendations. These headings are: "A. Defining Arrest"; "B. Authority to Arrest without Warrant"; "C. Warrants and Telewarrants for Arrest"; "D. Notice Requirements"; "E. Entry on Property to Effect Arrest"; and "F. Unlawful Arrest."

A. Defining Arrest

RECOMMENDATION

1. (1) An arrest occurs where:

(a) a person submits to custody upon being told to do so; or

(b) a person is physically taken into custody.

(2) Where a person is requested to remain with or accompany a peace officer voluntarily, such person:

(a) may refuse to accompany or remain with the peace officer unless arrested under subsection (1) or under a statutory duty to remain with or accompany the peace officer; and

(b) shall be informed of his rights and duties under paragraph (a).

Comment

We think it necessary both to define arrest and to distinguish "arrest-like" circumstances in order that would-be arresters, suspects and citizens generally may clearly understand their rights and obligations. It is necessary to establish a legal description of the factual circumstances which constitute an arrest for purposes of criminal procedure in order to pinpoint the moment at which an arrest occurs. It is at this moment when relations between state and individual alter, when the suspect loses the right to resist what would otherwise be an unlawful assault, and when the right to reasons, the right to counsel and the right to be informed thereof come into play. On the other hand, there are potentially ambiguous circumstances that require clarification, where police may "ask" a person to "come to the station" to assist with an investigation without placing the person under arrest.

Subsection (1) of the recommendation defines arrest as either submission to a verbal command or request to submit to custody, or a physical apprehension of the suspect. This would vary slightly the present case-law, which defines arrest as the pronouncement

of words of arrest followed by submission to the process or "the actual touching of a person's body with a view to detention." The latter phrase allows arrest by mere touching, and creates anomalous results where a suspect may never have submitted to arrest, may never have been under physical control, and yet may be successfully convicted of having escaped from lawful custody.[32] We propose that the law be brought in line with the public's perception that an arrest involves real compulsion, and not the technicalities of mere touching. Of course in any disputed case, whether or not a person actually submitted to custody, or was physically taken into custody, will be matters of fact for determination by a judge or jury upon the available evidence.

Subsection (2) of this recommendation attempts to come to grips with the ambiguous status of a person involved in the investigation of an offence, but who is not arrested. Paragraph (2)(a) is merely a restatement of the present law, based on principles of common law as modified by statutes imposing particular duties. The common law position was always that one was free to go about one's business without interference unless placed under arrest. There has been increasing statutory encroachment upon this common law position through breathalyzer laws, provincial Highway Traffic Acts, and similar legislation which expressly or impliedly impose on members of the public a duty to remain with or accompany peace officers for stated narrow purposes.

Paragraph (2)(b) is new law which would impose a duty upon peace officers seeking voluntary assistance to inform such volunteers of their rights and duties. A suggestion was made to us during the consultation process that this would amount to inviting people not to comply with what is perceived to be a civic duty to assist police officers in the investigation of offences when the spontaneous reaction of many citizens is to co-operate willingly. It is our view that those who wish to co-operate with police will not be deterred from doing so simply by being reminded that their assistance is voluntary. The obligation should rest upon the one who has the power to arrest to say clearly if he is arresting a person or not.

The practical combined effect of paragraphs (2)(a) and (2)(b) will be to require peace officers either to make an arrest because they have reasonable grounds for doing so as specified in Recommendation 2(1), *infra*, or clearly indicate that an arrest is not being made. The upshot is that people will be informed of the reasons for arrest and their right to counsel, told that they have a legal duty to remain with or accompany the peace officer, or told that their assistance is entirely voluntary. No reasons for a request to remain with or accompany the police officer need be given and no right to be told of the right to counsel arises unless the person is actually arrested or detained. However, peace officers would have an obligation to comply with the notice requirements we propose[33] and the duty to give reasons if a person whose original participation was voluntary subsequently became a suspect.[34] Once the requisite quantum of suspicion was present in relation to that person, the notice requirements for arrest and the requirements of section 10 of the Charter would obtain.

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32. *R.* v. *Whitfield*, *supra*, note 27.

33. See *infra*, Recommendation 7.

34. As defined in our Report 23, *Questioning Suspects*, *supra*, note 19.

It is our view that these proposals defining and distinguishing arrest implement both the principles of the rule of law and the principle of restraint. The discretionary authority of the agent of the state is defined in a clear and workable manner.

B. Authority to Arrest without Warrant

(1) Authority of Peace Officers

RECOMMENDATION

2. (1) A peace officer may arrest without warrant:

(a) a person who he believes on reasonable grounds has committed or is committing a criminal offence;

(b) a person who he believes on reasonable grounds is about to commit a criminal offence likely to cause personal injury or damage to property; or

(c) a person for whom he has reasonable grounds to believe there is a warrant outstanding which may be executed in the territorial division in which the person is found.

(2) Where an arrest is made pursuant to this recommendation or Recommendation 3, a peace officer having custody of the arrested person shall release the person as soon as possible, unless the peace officer has reasonable grounds to believe 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 authorized by statute;

(d) to prevent interference with the administration of justice;

(e) to prevent the continuation or repetition of a criminal offence; or

(f) to ensure the protection or safety of the public.

Comment

This recommendation is central to many other aspects of this Report in that it authorizes peace officers to arrest without warrant; that is, without prior judicial or other administrative control over the interference with the liberty of a particular citizen. Our approach is to establish a simple, clear and broad authority to arrest in relation to criminal offences, coupled with a duty to release immediately in the absence of defined circumstances. This approach differs from that taken in the *Bail Reform Act* as embodied in section 450 of the present *Criminal Code*. That section allows for a broad and relatively

unfettered power of arrest in relation to most indictable offences, and a duty "not to arrest" in less serious offences where the peace officer "has reasonable and probable grounds to believe that the public interest, ... may be satisfied without so arresting the person, ..."[35] Our consultation revealed, however, that in practice people suspected of having committed offences were being held for indeterminate periods of time (in the back of police cars, at police stations or elsewhere) in order to determine whether the "public interest" could, in fact, be satisfied without "making an arrest." In our view, such persons are arrested in all but name, and ought to be accorded the status of arrested persons with its attendant rights unless told, pursuant to paragraph 1(2)(b), that remaining with or accompanying the peace officer is purely voluntary.

We believe that subsection (1) of this recommendation authorizes arrest in simple, straightforward and understandable language. Subsection (2), which imposes a duty to release arrested persons as soon as possible except where continued custody is justified for explicitly enumerated reasons, structures the authority of the peace officer to keep a person in custody. We believe that these provisions reinforce the rule of law while carefully implementing the principle of restraint. The result assists police officers engaged in the investigation of offences and the apprehension of suspects, while protecting individual citizens against prolonged or unnecessary police custody.

The opening words of subsection (1) authorizing arrest are crucial. They state that the peace officer *may* arrest without warrant, clearly indicating, as mentioned above, that this is a discretionary authority and not a mandatory duty. This leaves open to the peace officer the use of a summons, appearance notice or arrest with warrant rather than immediate arrest, to compel attendance in court under appropriate circumstances.

Paragraph (1)(a) then defines the circumstances circumscribing that authority in relation to three elements: (i) the type of offence, (ii) the officer's grounds for belief, and (iii) the time of the commission of the offence, each of which we will examine in turn. Our recommendation would authorize arrest without warrant by peace officers for "criminal offences," by which is meant both offences punishable upon indictment and those punishable by way of summary conviction. We think the present law makes distinctions between summary conviction and indictable offences which, though they may be understood by peace officers, are of little meaning to the general public. We wish to do away with the use of these distinctions for the purpose of authorizing arrests.

The peace officer is authorized to arrest only where he or she "has reasonable grounds" for belief. The present *Criminal Code* uses the language "reasonable and probable grounds." Key to either formulation is the concept, well entrenched in the case-law, that use of the word "reasonable" in this context implies an *objective* standard for evaluating the conduct of the person who makes an arrest. It is insufficient that the arrester honestly believed that he or she had grounds to make an arrest; the circumstances must be such that the reasonable person in the place of the arrester would also, as determined by the judge or jury, have believed that he or she had grounds to make an

35. *Criminal Code*, s. 450(2)(*d*). All references to the *Criminal Code* are to R.S.C. 1970, c. C-34, as amended.

arrest. Our consultations revealed a lack of consensus on whether the words "and probable" ought to be added to the "reasonable grounds" notion. Some consultants urged that the connotations of the phrase "reasonable and probable grounds" are such as to require greater certainty than mere "reasonable grounds," and that a change to the latter phrase might be interpreted by peace officers and courts as requiring a lesser standard of certainty for arrest than in the present law.[36] However, we are convinced that on balance the simpler phrase "reasonable grounds" incorporates the objective test of the previous law, and that the word "probable" can be abandoned as being mere surplusage.

Paragraph (1)(a) uses the words "has committed or is committing" signifying the authorization of warrantless arrests by peace officers in relation to past or present offences where the requisite reasonable grounds for belief exist. Unlike the present law, which authorizes arrest for summary conviction offences only where the person is found "apparently" committing the offence, our recommended formulation would allow arrest for past summary conviction offences. In our view, this extension of the power of arrest is justified given the small number of true summary conviction offences in the *Criminal Code*, and given the *quid pro quo* of a rigorous duty of immediate release in subsection (2) of the recommendation.[37]

Paragraph (1)(b) would authorize warrantless arrests where the peace officer reasonably believes that a person is "about to commit" an offence that poses a danger to personal safety or property. The question of whether police should have such a power also occasioned comment during our consultations. In strict terms, the authorization of arrests in such circumstances may be perceived as being contrary to one of the main purposes of arrest, that of compelling appearance for trial; for, if a police officer successfully intervenes, the commission of an offence will not occur. We are of the view, however, that a preventive role for peace officers is appropriate in limited circumstances, such as where there is a risk of personal injury or property damage. Two observations are necessary here. First, the practical effect of the apparent breach with principle in allowing arrest where an offence is about to be committed is reduced when one remembers that it is an offence to attempt a crime,[38] and therefore, we are suggesting little more than a limited arrest power for attempted offences, freed from all the technicalities of the substantive law in that area. Secondly, the maintenance of the authority to arrest where someone is "about to commit" a serious offence is intimately linked to our corollary Recommendation 13, *infra*, which advocates abolition of the power to arrest for breach of the peace and apprehended breach of the peace.

Paragraph (1)(c) of this recommendation, authorizing arrest without warrant where there are reasonable grounds for belief that a warrant is outstanding, may seem at first

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36. Some consultants, in making this argument point to the recent case of *Hunter* v. *Southam Inc.*, [1984] 2 S.C.R. 145 where the Supreme Court of Canada struck down sections of the *Combines Investigation Act*, R.S.C. 1970, c. C-23, authorizing the issuance of search warrants on the grounds that "reasonable search and seizure" under section 8 of the *Canadian Charter of Rights and Freedoms* requires that, in principle, search warrants be issued only on "reasonable and probable grounds."

37. This is the one area where we have reservations concerning the appropriateness of the applicability of our arrest regime to non-*Criminal Code* federal offences and to provincial offences.

38. *Criminal Code*, s. 24.

blush to be a contradiction in terms. Why should an arresting officer not possess the warrant at the time of the arrest? The practical reality of policing is that there is usually not time to obtain the warrant if one encounters the suspect, as is likely, on a routine patrol or traffic check. This is particularly the case where, for reasons of security and in the interests of the liberty of the individual, only one original of a warrant is issued and police officers are generally informed of the existence of an outstanding warrant in relation to a particular individual by virtue of a check through CPIC, the national, computerized police information system. There are, thus, situations in which the existence of an arrest warrant becomes a judicially certified statement of the fact that there are reasonable grounds to arrest a particular person, even when the peace officer making the arrest may not have the requisite "reasonable grounds for belief" to make an arrest. Our proposed retention of "Canada-wide warrants" also necessitates this provision. However, the territorial aspects of this form of authorization of warrantless arrests by peace officers will be discussed below in relation to Recommendation 6.

While subsection (1) of this recommendation grants the authority to arrest in simple yet comprehensive terms, the duty to release as soon as possible found in subsection (2) implements the purposes of arrest. It is extremely important to note that while our recommendation asserts a duty to release as soon as possible, any failure to do so would be sanctioned in practice by the requirements of the Charter and the *Criminal Code* to bring an arrested person, who is not released by police, before a justice for a "bail" or judicial interim release hearing. The normal outside limit at present is twenty-four hours. Our recommendations here are not intended to alter present law concerning these matters, and consideration of any changes in this area is being deferred until completion of our work on Compelling Appearance, Interim Release and Pretrial Detention.

Under subsection (2), continued custody can be justified where there are reasonable grounds to believe that such custody is required to compel appearance in court, to establish the identity of the person, to conduct investigative procedures, to prevent interference with the administration of justice, or the continuation or repetition of an offence, or to ensure protection of the public. These exemptions from the duty of immediate release apply to all criminal offences and correspond to the purposes of arrest.

The authority to continue custody where there are reasonable grounds to believe that the person will fail to appear in court voluntarily in response to a summons or appearance notice arguably needs no explanation. Similarly, one cannot serve a summons or appearance notice on someone whose identity, including place of residence, is unknown. Reasonable grounds for belief that continued custody is necessary to conduct investigative procedures authorized by statute may, however, be a matter of some controversy. Present law need not confront this issue directly since, in relation to serious offences, there is no duty to release or not to arrest, where grounds for arrest exist. Case-law has allowed police to take "reasonable" investigative measures during the period up until a bail or release hearing[39] and sometimes thereafter.[40] Thus, while not explicitly authorizing arrest for investigative purposes, present law allows investigation once the suspect is arrested.

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39. *Dallison* v. *Caffery*, [1964] 2 All E.R. 610 (C.A.).

40. *R.* v. *Precourt* (1976), 36 C.R.N.S. 150 (Ont. C.A.).

In our Report 25, *Obtaining Forensic Evidence*, discussed in Chapter One, we recommend certain statutory provisions regulating investigative procedures, and we are of the view that there must be an explicit recognition of the legitimacy of these procedures in legislating exemptions to our proposed general duty to release arrested persons as soon as possible. Two further matters require comment in this regard. First, we would permit continued custody only for investigative procedures authorized by statute, not for all those which may have been allowed at common law. Secondly, we propose this exemption to the duty to release on the understanding that to be consistent with our tradition of the right to remain silent, it should not authorize custody *solely* for the purpose of questioning. On the other hand, we recognize that if a suspect is kept in custody for purposes corresponding to other specified exemptions, such persons may properly be questioned in accordance with the rules set down in our Report 23, *Questioning Suspects*, discussed in Chapter One.

The exemption from the duty of immediate release because of a reasonable belief in a need to prevent interference with the administration of justice is based on a number of considerations. We are primarily concerned here with the preservation of evidence from likely attempts to destroy physical objects or suborn witnesses. However, we prefer a more general phrase which might encompass other forms of interference with the administration of justice without resorting to the vagueness of the term "public interest" employed in the present *Criminal Code* subsections 450(2) and 455.3(4). Similarly, the exemption based on a reasonable belief in the need to ensure the protection or safety of the public is an attempt to go beyond prevention of the continuation or repetition of a particular offence, which we recognize as a separate exemption, to the need to protect a wider spectrum of interests without invoking the unacceptably broad "public interest" standard. It may be, for example, that the release of particular persons might give rise to public disorders capable of endangering the life of the suspect or of others. In such circumstances, an exemption from the duty of immediate release may be justifiable for the protection or safety of the public.

(2) Authority of Private Citizens

RECOMMENDATION

3. (1) Subject to subsection (3), anyone may arrest without warrant:

(a) a person who he believes on reasonable grounds is committing or has just committed a criminal offence; or

(b) a person whom he has been told by a peace officer to arrest.

(2) Anyone, other than a peace officer, who makes an arrest pursuant to this recommendation shall deliver the arrested person to a peace officer as soon as possible.

(3) No one may arrest a person under this recommendation if a peace officer present at the scene has announced his determination that an arrest should not be made in relation to that criminal offence.

Comment

There is a live policy issue as to whether arrests by private citizens ought to be authorized in modern society or whether police forces ought to have a monopoly on the power to conduct such actions on behalf of the public. We recommend retention of the power of private citizens to arrest. This authority is in some measure a relic of the era of the ancient hue and cry, although it takes its modern form in the *Criminal Code* in section 449. In advocating retention of a power of citizen arrest, we must, as always, be concerned with ensuring that conditions for the exercise of this public authority be clearly set out in accordance with the rule of law, the Charter, and the principle of restraint. This being so, we will comment briefly on the circumstances in which arrest by private citizens may be undertaken, as well as the duties placed upon the private arrester following the arrest.

Subsection (1) of the recommendation would grant discretionary authority (''may'') to any person to arrest without warrant either for recent offences or where a request to do so comes from a peace officer. Present *Code* section 449 authorizes citizen arrest through the use of both the ''finds committing'' and ''on reasonable and probable grounds'' formulations. Circumstances in which an arrest may be made are differentiated according to the classification of offences, whether the person is being freshly pursued by authorities, and by reference to ownership of property. This needless complexity ignores the reality of the fact that, with the possible exception of arrests by security guards, citizens will not normally understand the intricacies of criminal procedure and will, in all probability, be ignorant of the exact wording of the authorizing statute. We think our proposal adequately protects the citizen who acts in good faith in an emergency situation, while not promoting unnecessary confrontation between private citizens.

Paragraph (1)(a) authorizes the citizen to act upon reasonable grounds for belief, thus protecting the citizen who, in arresting someone, makes an honest mistake of fact which might have been made by a reasonable person in his or her circumstances. Moreover, it would allow an arrest where the arrester reasonably believes that a person is committing, or has just committed, a criminal offence. As mentioned previously, the phrase ''criminal offence'' is understood to include both summary conviction and indictable offences, thus further simplifying the present law. Finally, our recommendation would authorize arrest by private citizens for offences which are being, or have just been, committed. While we wish to authorize reasonable actions by citizens in relation to contemporaneous offences, we also wish to encourage resort to public authorities by complaint to police or the laying of an information where the offence has become ''stale.''

Paragraph (1)(b) of this recommendation reflects the policy underlying the present arrest law and is in accordance with present legal duties upon citizens to assist peace officers in the execution of their duty. Paragraph 118(*b*) of the *Criminal Code* makes it an offence to omit, ''without reasonable excuse, to assist a public officer or peace officer in the execution of his duty in arresting a person or in preserving the peace, after having reasonable notice that he is required to do so, ...'' Our recommendation authorizing arrest by a private citizen when told by a peace officer to do so is really the other side

of the public duty recognized in the paragraph 118(*b*) offence. The logic of the recommendation implies that the officer would bear the legal responsibility for any wrongful actions which he or she might have required a private citizen to carry out.

In addition to the relatively narrow range of circumstances in which arrest by a citizen would be authorized under our recommendation, the principle of restraint is embodied in the duties imposed upon those having custody of the arrested person. These duties are expressed in subsection (2) of this recommendation as well as in Recommendation 2(2) discussed above. The private citizen is placed under a duty to deliver a person whom he or she arrests to a peace officer as soon as possible. This is a restatement of the present law. The peace officer, in turn, is bound by the duty to release as soon as possible following arrest, subject to the various exemptions found in Recommendation 2(2) in relation to arrest without warrant. These limiting duties imposed upon private citizens and police officers in relation to arrests by private citizens are, of course, complemented by the notice requirements discussed below in Recommendation 7 which make a distinction between arrests by private citizens on the one hand, and arrests by peace officers and security guards on the other.

Subsection (3) of this recommendation makes it clear that where police are present and decide not to arrest a person, the wishes of the police should govern. We feel that the judgment of trained police officers as to whether an arrest is necessary or justified should prevail over what may be overzeal on the part of private citizens.

Mention has been made in passing of arrests by private security guards, and this important area merits more detailed comment. While the foregoing paragraphs may suggest that we take as our paradigmatic case the situation of the individual private citizen faced with an emergency arrest, we are fully cognizant of the fact that the vast bulk of so-called citizens' arrests are made by security guards. Research has shown that the private security industry is growing at a rate faster than public police forces, and the security guard has become a familiar figure in Canadian shopping malls, industrial sites and apartment buildings. Regulation of this industry is by provincial statutes, and it is fair to say that the training received by these private security guards is extremely uneven. For this reason, we think it appropriate to subsume arrest by security guards under the law governing arrests by private citizens, with its limited range of arrestable offences, and with the requirement to deliver arrested persons to peace officers immediately. On the other hand, we think that for purposes of the notice requirements found in Recommendation 7, the special situation of the person whose regular employment duties involve law enforcement demands treatment more in accordance with standards required of peace officers.

C. Warrants and Telewarrants for Arrest

Our recommendations concerning warrants for arrest fall under three headings: "Grounds for Issuance of Authorization"; "Procedure for Issuance of Authorization"; and "Territorial Limits of an Arrest Warrant." Each will be dealt with in turn in the following discussion.

(1) Grounds for Issuance of Authorization

RECOMMENDATION

4. (1) Subject to subsection (2) and Recommendation 5, a justice may issue a warrant to compel the attendance of an accused where the justice has reasonable grounds to believe that the person named in an information has committed the criminal offence therein alleged.

(2) A justice shall not issue a warrant under this recommendation unless he has reasonable grounds to believe such issuance is necessary:

(a) to ensure that the person will appear in court;

(b) to conduct investigative procedures authorized by statute;

(c) to prevent interference with the administration of justice;

(d) to prevent the continuation or repetition of a criminal offence; or

(e) to ensure the protection or safety of the public.

(3) A warrant for arrest shall be in Form A (found in the Appendix to this Report).

Comment

This recommendation is concerned in the first place with the issuance of process to compel appearance for trial, and secondly with the criteria governing the issuance of a warrant or telewarrant as opposed to confirmation of an appearance notice or issuance of a summons. As such, it is premised upon the continuation of the existing practice of laying an information as the formal commencement of a criminal proceeding, and upon the continued use of the appearance notice and summons as alternatives to arrest for compelling appearance. As mentioned in Chapter One, our full recommendations on this matter are deferred to a subsequent Report. It must be mentioned at this point that we are concerned in this Report with the issuance of *initial process* for compelling appearance. Thus, we address the issue of the relationship between warrants of first instance and other documentary forms of notice of criminal proceedings. We are not concerned with what are known as "bench warrants"; that is, warrants issued by a judge when an accused fails to appear as required in an appearance notice, summons or judicial interim release order.

Subsection (1) of this recommendation provides discretionary authority ("may") to a justice to issue process where there are reasonable grounds to believe that the person named in an information has committed the criminal offence alleged in it. The reasonable grounds standard is the same objective test recommended for peace officers' powers of arrest without warrant. The rule of law and Charter principles protecting against arbitrary

arrest and detention, if nothing else, prevent us from recommending a less stringent standard. Since the laying of an information and the seeking of a warrant are neither a preliminary inquiry nor a trial, it is our view that a more stringent test would be equally improper. By using the phrase "has committed the criminal offence," our recommendation is also consistent with the principle of legality and Charter prohibitions against arbitrary detention. Arrest warrants are to be issued only in relation to identified criminal conduct and not apprehended crime. While it is appropriate to authorize a police officer on the scene to intervene and arrest a person who "is committing" or is "about to commit" a criminal offence, arrest warrants are issued to compel appearance for trial for an actual offence, not as a form of injunctive relief in relation to feared misconduct.

Subsection (2) of this recommendation embodies both the rule of law and the principle of restraint in that it gives priority to the use of documentary notice of criminal proceedings unless reasonable grounds exist for the issuance of an arrest warrant or telewarrant. As such, we believe this recommendation to be a clear improvement over the present subsection 455.3(4) of the *Criminal Code* which speaks of making out a case which "disclose[s] reasonable and probable grounds to believe that it is necessary in the public interest to issue a warrant for the arrest of the accused." In our view, reference to a vague standard such as "the public interest" provides no basis on which to make a reasoned decision in accordance with law. By enumerating the factors to be taken into account, our recommendation provides a coherent standard to guide justices in making their decisions, and also a standard to apply in any subsequent judicial review of the justices' decisions.

The grounds enumerated for issuance of a warrant in subsection (2) of this recommendation implement the purposes for arrest described in the Introduction to this chapter, and are parallel to the exemptions from the peace officer's duty of immediate release following arrest set out in Recommendation 2. Most important is the concern to ensure that the person will appear in court. Arrest warrants regularly issue because a suspect's whereabouts are unknown or because there are reasonable grounds for belief that he or she will flee if given notice of the criminal charge outstanding. The issuance of a warrant for the purpose of conducting authorized investigative procedures is important, particularly in relation to offences where the pertinent evidence cannot be obtained through other investigative measures. As in the case of the exemption from the peace officer's duty to release after arrest, reference to prevention of interference with the administration of justice is directed primarily at the destruction of evidence, but is drafted broadly enough to cover other related matters. The issuance of a warrant for arrest to prevent the continuation or repetititon of an offence, as opposed to on-the-spot arrest without warrant for that purpose, is a less likely, but nevertheless possible, scenario which ought to be provided for in the proposed legislation. Arrest of suspects with the intention of ensuring the protection or safety of the public goes beyond prevention of continuation or repetition of offence, to the possible commission of other offences by the suspect or others. We are convinced that an explicit enumeration of the factors justifying arrest, rather than documentary notice of criminal proceedings, better upholds the rule of law and vindicates the principle of restraint than does the reference in the present law to "the public interest" as the sole criterion for making these critical decisions. We do not address here, however, the question of the peace officer's duty or power to release a person who has been

arrested pursuant to a warrant. This matter is more closely related to the issues which arise in relation to bail or "judicial interim release." As such, we propose to deal with this question in our forthcoming work on Compelling Appearance, Interim Release and Pretrial Detention.

Subsection (3) merely specifies that a warrant for arrest is to be in Form A. The present *Criminal Code* provides an optional standard-form arrest document in Form 7 of Part XXV which serves both as warrant of first instance or bench warrant depending on which of the optional clauses is used. We propose that Form A as found in the Appendix to this Report be adopted for use in the context of arrest warrants of first instance.

Our Form A, which in many ways follows *Code* Form 7, departs from the present law in order to implement our recommendations. The changes can be described briefly. The warrant is addressed not only to peace officers in the jurisdiction of issuance, but to those in any territorial division in which the warrant may be executed. This is to allow the reforms regarding "Canada-wide" or other such warrants described below in Recommendation 6. The standard-form recitals then reflect the policy grounds enumerated for the issuance of warrants rather than documentary notice of criminal proceedings which are found in subsection (2) of Recommendation 4. These require more factual specificity than the standard recitals in the present Form 7 which generally refer only to the *Code* section being invoked and not the factual basis for its invocation. The command to arrest is worded in a more flexible fashion so as to allow a return of the arrested person not only to the jurisdiction of trial, but also to a court competent to deal with matters of judicial interim release in another territorial division, consistent with our proposed policy in Recommendation 6. Finally, the optional signature provision reflects our proposal in Recommendation 5 that telewarrants be made available.

(2) Procedure for Issuance of Authorization

RECOMMENDATION

5. (1) An applicant seeking a warrant for arrest shall:

(a) appear before the justice in person to swear an affidavit upon oath in Form B (found in the Appendix to this Report) as to the requirements of subsection 4(2); or

(b) swear such an affidavit upon oath by telephone or other means of telecommunication where the applicant has reasonable grounds to believe it is impracticable to appear in person.

(2) A justice shall not issue a warrant for arrest unless:

(a) where the application is made under paragraph 5(1)(a), he has:

(i) examined the information by which the charge was laid;

(ii) questioned the applicant about the reasons advanced for the issuance of a warrant rather than the issuance of a summons or the confirmation of an appearance notice, if any; and

(iii) heard the evidence of other witnesses where he considers it necessary or desirable to do so; or

(b) where the application is made under paragraph 5(1)(b), he has:

(i) examined or heard the information by which the charge was laid;

(ii) questioned the applicant about the reasons advanced for the issuance of a warrant rather than a summons or the confirmation of an appearance notice, if any; and

(iii) questioned the applicant about the circumstances which make it impracticable for the applicant to appear personally to obtain a warrant.

(3) A justice hearing an application for the issuance of a warrant by telephone or other means of telecommunication shall record verbatim:

(a) the information by which the charge was laid, if the information is not in the possession of the justice; and

(b) the affidavit in Form B required by subsection (1).

(4) Where a justice issues a warrant by telephone or other means of telecommunication:

(a) the justice shall complete and sign the warrant in Form A;

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

(5) The information or its transcription, the affidavit of the applicant in Form B or its transcription, and the warrant or a copy of the warrant in Form A shall be filed with the court.

Comment

The issuance of an arrest warrant has rightly been held to be the exercise of a judicial discretion and, though of necessity *ex parte*, a process subject to rules of natural justice as well as jurisdictional control. Since the passage of the Charter, the procedures for issuance of warrants must be "in accordance with the principles of fundamental justice" and not capable of being interpreted as authorizing "arbitrary detention." Charter section 10 refers to *habeas corpus* which is, of course, the hallowed traditional remedy for challenging unlawful detention, and other Charter remedies may be available depending upon how the courts interpret Charter section 24. These formulations and remedies are existing legal means by which to implement the requirements of the rule of law. In our view, the procedures for issuance of warrants under the present law are, on the one hand, insufficiently stringent to ensure an adequate exercise of judicial discretion in normal circumstances and, on the other, insufficiently flexible to cope with particularly exigent circumstances. For this reason, we propose a new application procedure for obtaining arrest warrants in normal circumstances, and a telewarrant procedure for exigent circumstances. In both cases we advocate the creation of a simple written record of the proceeding to be retained by the justice issuing the warrant until such time as the proceeding in relation to which the warrant was issued has terminated.

At present, the documentary basis for the issuance of process by a justice, whether summons, confirmation of appearance notice or warrant, is the laying of the information which charges the accused with a criminal offence. On receipt of the information and on the basis of discussion with the informant and sometimes other witnesses, the justice will decide what form of process to issue "in the public interest." A warrant may then issue with no formal statement as to why it was issued other than that appearing on its face in accordance with Form 7, and with no written record of the reasons for its issuance. Since a warrant shall not be issued pursuant to Recommendation 4(2) unless the justice has reasonable grounds to believe it is necessary for one of the enumerated reasons, we believe that a separate sworn affidavit should be presented by the applicant where he or she seeks not only to lay a charge, but also to justify the issuance of a warrant for arrest. We suggest that this document be Form B, found in the Appendix to this Report. In the exigent circumstances of the telewarrant application, the justice receiving the application by telephone or other means of telecommunication would be required to transcribe the sworn matters onto Form B, and also transcribe the matters in the information when it is not in his possession.

Paragraphs (1)(a) and (2)(a), when read together, give the full picture of the normal procedure proposed for issuance of arrest warrants. The applicant, who may or may not be an informant laying the charge with an information at the same time, swears the affidavit in person before the justice. The justice may or may not wish to hear from other witnesses. The phrasing of the recommendation is intended to encourage a genuine interchange between applicant and justice so as to avoid a "rubber-stamp" mechanism. Lastly, the requirement in subsection (5) to file the information, affidavit and warrant as a record of the proceeding will provide a proper basis for any future consideration of the propriety of the process.

The use of telewarrants in relation to powers of search was recommended by the Commission in its Report entitled *Writs of Assistance and Telewarrants*.[41] We think the concept has a valid application in the area of arrest as well. Exigent circumstances may arise where the proposed system for obtaining arrest warrants is too cumbersome to be effective. One of the prime uses of the arrest warrant is to authorize large numbers of police officers, who may have no personal knowledge of the case, to arrest the suspect, and in Recommendation 6 we propose that the "Canada-wide" warrant be regularized. Peace officers may, therefore, wish to authorize police in another territorial division to arrest a suspect who is in flight at the moment when an application for an arrest warrant is being made. Similarly, Recommendation 8 would clearly establish the general principle that arrests in dwelling-houses are to be done, after judicial authorization, by a peace officer in possession of a warrant. Police may legitimately wish to obtain a warrant to arrest a suspect who is known to be in a particular dwelling and whose flight may be anticipated. Consideration of these types of exigent circumstances has led us to the conclusion that a procedure for judicial authorization of telewarrants is justifiable in the field of arrest as well as search.

41. Law Reform Commission of Canada, *Writs of Assistance and Telewarrants* [Report 19] (Ottawa: Supply and Services, 1983), pp. 79-102.

Paragraphs (1)(b) and (2)(b) and subsections (3) and (4) of this recommendation structure the process of obtaining a telewarrant. Since subsection 4(1) authorizes the issuance of a warrant for arrest only in relation to "an information," the telewarrant procedure described here assumes the existence of an information before the application, or, possibly, a telephonic procedure for the laying of informations. The details of this latter proposition will be left for exploration in our work on Compelling Appearance. Our recommendation would authorize an applicant to swear an affidavit on oath by telephone or other means of telecommunication, and require reciting the contents of the information where the latter is not in the justice's possession. It would then restrict the issuance of the warrant to those circumstances where the justice is satisfied not only that there are reasonable grounds for belief in the necessity for a warrant to be issued, but also that it is impracticable for the applicant to go through the normal procedures. Form B includes an optional paragraph in which the reasons why a personal appearance is impracticable should be stated. These matters would be transcribed on Form B by the justice. The peace officer would then draw up a facsimile arrest warrant on the justice's instructions. The justice would also fill in and sign a warrant, and the record of the proceeding would consist of the justice's transcription of the information, the transcription of Form B and the original of the warrant signed by the justice.

(3) Territorial Limits of an Arrest Warrant

RECOMMENDATION

6. (1) A justice may issue a warrant for execution in a territorial division or may specify that the warrant may be executed anywhere in the province or anywhere in Canada.

(2) Where a person has been arrested and there are reasonable grounds to believe that a warrant is outstanding for such person which originated in a territorial division other than that in which the person was arrested, such person:

(a) shall be released as soon as possible by the officer in charge in accordance with conditions in section 453.1 of the *Criminal Code*; or

(b) shall be taken as soon as possible before a justice in the territorial jurisdiction in which he is found, to be dealt with according to the general provisions of the *Criminal Code* concerning judicial interim release.

(3) Where a person arrested pursuant to subsection (2) is kept in custody pending a decision from authorities in the territorial division from which the warrant originated as to whether the person is required for trial in that territorial division, such person shall be released at the expiration of no more than four days, unless within that period such a decision is made.

(4) Upon the arrest of a person named in a warrant issued under this Part, the warrant shall expire.

(5) Upon the expiration of a warrant under subsection (4), every reasonable effort should be made to remove all information pertaining to the warrant from the computerized police data base as soon as practicable.

Comment

In a state which is divided into various territorial units for purposes of trial jurisdiction and division of labour in the administration of criminal justice, the question of the territorial reach of an arrest warrant arises. We believe that equitable enforcement of the criminal law among Canadians across the country requires Parliament to recognize the so-called "Canada-wide warrant" in legislation. As we noted in our *Arrest* Working Paper,[42] statutory provisions governing the territorial enforceability of arrest warrants in the present law are uncertain and self-contradictory. The general principle exemplified by older provisions in the *Criminal Code* was that justices could only issue arrest warrants for execution in the territorial division for which they were appointed, and that execution in another territorial division required endorsement of the warrant itself to that effect by a justice of that territorial division. Without amendment of the older provisions, the revisions of the *Bail Reform Act* introduced what is apparently a basis for arrest anywhere in Canada in relation to *indictable* offences. Our approach in subsection (1) of this recommendation is to establish the general principle that a warrant for arrest may be executed in a territorial division, while granting the issuing justice a discretion to expand the geographical limit of the warrant where he or she wishes to do so. This approach will maintain the principle of uniformity while allowing for a practical response to the circumstances of individual cases.

Anomalies have arisen under the present law where arrests have been made pursuant to warrants designated by police as "Canada-wide," but where the Crown has decided for a variety of practical reasons not to bring the accused back to the originating jurisdiction for trial. Cost of police escorts, death or absence of witnesses, or simply the lapse of time since the laying of what no longer appears to be such a serious charge, are among the factors used to justify such decisions. Under the present *Criminal Code* subsection 454(2), a person can be kept in custody for up to six days awaiting a Crown decision on the return for trial, and normal rules for obtaining judicial interim release are not applicable. Some notable cases have arisen where, following a decision not to return an accused for trial, the arrest warrant has not been removed from the CPIC computer information system and the suspect is rearrested only to go through custody prior to release without trial for a second time.

In our view, subsection (2) of our recommendation would go some way toward alleviating the difficulty. Persons who are encountered in a second jurisdiction, through a routine traffic check, for example, could be released by an officer in charge or by a justice in accordance with the general principles and procedures in the *Code* if there was

42. *Supra*, note 4, pp. 110-2.

no reason to believe that their custody was necessary to ensure appearance at trial, or for the safety and protection of the public. Moreover, we recommend that the maximum period for incarceration while awaiting a decision from prosecuting authorities in the originating jurisdiction be reduced from six to four days. If the suspect was arrested in the territorial division in which the warrant was issued, he or she would normally be brought before a justice within twenty-four hours, and such justice is empowered to grant the Crown a three-day period to prepare its case for a hearing at which to "show cause" why bail should be denied.

Expiration of the warrant as set out in subsection (4), is designed to prevent rearrest after release on a decision not to transport the accused back for trial. The primary practical problem, however, is ensuring that police are informed of the expiration so that the warrant will be removed from the computerized police information system. We recommend in subsection (5) that all reasonable effort be taken to erase any information relating to an expired warrant from the data base. We have not, however, included a provision to this effect in our model legislation. This should not be interpreted in any way as representing an absence of commitment to our recommendation. Rather, we feel that the issues of record keeping and privacy in the criminal process merit greater attention, and that model legislation to address these issues should await a fuller exploration of this sensitive area. We note that legislation governing records generated by the criminal process is not without precedent given that the *Young Offenders Act* contains a regime covering record keeping in relation to proceedings under that Act, including a duty to destroy records in certain circumstances.[43]

We are aware of the fact that, because we do not advocate cancellation of the information laying the charge, our proposed system creates what might appear to be a semi-exile where an accused feels constrained not to return to the jurisdiction of the crime. A second warrant or summons might be issued on the information. This does not seem to us to be improper. The accused is still alleged to have committed an offence and has not been tried for it. On the other hand, if the Crown fails to take its opportunity to return an accused for trial, the accused may well seek a Charter remedy at a subsequent trial, based on the argument that there has been a breach of the right to be tried within a reasonable time guaranteed by Charter paragraph 11(*b*).

D. Notice Requirements

The *Canadian Charter of Rights and Freedoms* guarantees the right, on arrest or detention, to be promptly informed of the reasons therefor. While the courts may develop interpretive standards as to what this right means in practice, we think that there has been sufficient dispute in the past over the meaning of the "right to reasons" that legislative standards ought to be adopted to flesh out the meaning of this Charter guarantee. We have done this in one rather lengthy recommendation which will be the subject of commentary here.

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43. *Young Offenders Act*, S.C. 1980-81-82-83, c. 110, s. 45.

RECOMMENDATION

7. (1) Anyone who arrests a person shall, at the time of making the arrest, state the reason for the arrest.

(2) A peace officer or person employed as a security guard who arrests a person, or a peace officer who receives an arrested person into custody pursuant to Recommendation 3, shall, in addition to complying with subsection (1), provide upon request:

(a) his name;

(b) his badge number; and

(c) the name of his police force or employer.

(3) A peace officer who receives an arrested person into custody pursuant to Recommendation 3 shall comply with subsection (1) upon request.

(4) Where compliance with subsections (1), (2) or (3) is rendered impracticable by

(a) flight, resistance or continuation of the offence by the arrested person, or

(b) the incapacity of the arrested person,

a person having custody of the arrested person shall comply with subsections (1), (2) or (3), as the case may be, within a reasonable period of time.

(5) Anyone who arrests a person is in compliance with the requirement of subsection (1) where he:

(a) generally informs the person being arrested of the facts which form the grounds for the arrest;

(b) shows the person being arrested the warrant authorizing the arrest; or

(c) where it is not feasible for the arresting peace officer to be in possession of the warrant at the time of the arrest, informs the person of the offence for which the arrest warrant has been issued.

(6) Where a peace officer who has arrested a person, or who has received into custody a person arrested by a private citizen, has reasonable grounds to believe that the arrested person may be unable to understand the language spoken in complying with the notice requirements of this recommendation, the peace officer shall make every reasonable effort to ensure that compliance is achieved at the first reasonable opportunity in a language understood by the arrested person.

Comment

The right to be told the reasons for one's arrest was an element of a lawful arrest at common law. Failure to give reasons could render the arrest unlawful and the perpetrator civilly and criminally liable. This common law heritage embodies the recognition that the right to reasons for an arrest forms an integral part of the rule of law. Being told the reasons for an arrest allows the suspect to understand the substance of the charge and attempt to clarify any errors or misunderstandings which may be at the bottom of the action. It is also fundamental to the exercise of procedural rights to which the suspect is entitled in order to conduct his or her defence. The requirement to give reasons for arrest provides, in addition, a very practical reinforcement of the principle of restraint by encouraging police officers to be open, careful and thoughtful about the way in which citizens are treated. As such, it is an essential vehicle for maintaining public respect for the administration of justice.

Before we embark upon the detailed commentary for this recommendation, a word on the right to counsel is in order. Section 10 of the Charter mentions not only the right to be informed promptly of the reasons for arrest, but also states that "[e]veryone has the right on arrest or detention ... to retain and instruct counsel without delay and to be informed of that right; ...." Thus, a new element is added to the notice requirements to be complied with by those making an arrest. This element is not discussed in this Report because we take the view that, while it is extremely important, the right to counsel and the right to be informed thereof do not form part of a lawful arrest in the same manner as does the right to reasons for arrest. The right to reasons for an arrest is a fundamental aspect of the arrest itself, and failure to give reasons has traditionally been sanctioned by civil and criminal liability based on the unlawfulness of the arrest *per se*. The failure to provide a lawfully arrested person with the information that he or she has the right to counsel, or failure to provide an opportunity to exercise that right, is contrary to the Charter and the proper subject of an application for a remedy in accordance with section 24 of the Charter. Such action, however, should not necessarily be seen to affect the validity of the arrest itself.

Subsection (1) of our recommendation restates and elaborates upon the Charter right to reasons for arrest. A duty is placed upon anyone who makes an arrest, including private citizens, to give reasons. This constitutes a departure from our earlier position in that we would no longer require the arrester to state that a person is under arrest. Since we define "arrest" in Recommendation 1 as submission to custody upon being told to do so or actual physical custody, it is our view that words of arrest are superfluous at this stage.

This general duty to provide reasons is subject to exceptions laid out in subsection (4), and is explained in subsection (5). The latter interpretative guide is necessary to correct what we view as difficulties which arose in the cases interpreting subsection 29(2) of the *Criminal Code*, the present statutory statement of the right to reasons.

Peace officers and security guards have special duties imposed upon them in subsections (2) and (3). These duties go beyond the requirements of the present law, but

were considered to be important by participants in our consultation process. The duty to provide name, badge number and police force or employer upon request is particularly important in large urban centres where numerous police forces and private security agencies may operate. The importance of the phrase "upon request" is that an arrest is lawful where this information is not provided unless the suspect demands it. In our Working Paper, we recommended that these notice requirements be mandatory for peace officers and security guards. However, based on opinions expressed during the course of our consultations, we have decided that these requirements should be complied with only upon the request of the person being arrested. We feel that an arrest should not be rendered unlawful, with all of the criminal, civil and administrative sanctions that may flow from it, simply because complete notice was not given.

Subsection (3) reflects our concern with ensuring procedural fairness in the event of a citizen arrest. While subsection (1) imposes a duty to give reasons upon private citizens making an arrest, we recognize that the initial information given by a private citizen may not be as full as that received from a trained peace officer. As such, where a person requests an explanation for his or her arrest at the time of delivery to a peace officer, the peace officer should, in our view, be compelled to provide reasons for the arrest. In addition, it seems proper to ensure that a peace officer who has received a person into custody after an arrest, gives his or her name and police force when requested to do so. This duty is provided for in subsection (2). This information may be of practical importance simply in order to permit counsel, if contacted immediately following an arrest, to locate his or her client.

Subsection (4) defers the time of compliance with the notice requirements previously discussed, in the event that immediate compliance is rendered impracticable by the actions of the arrested person in response to the arrest or by his or her incapacity, most usually as the result of impairment by drugs or alcohol, at the time of the arrest. Depending upon the interpretation which will be given by our courts to the phrase in the Charter "to be informed promptly," this may be a rare example in this Report where the constitutional validity of a proposal may rest on section 1 of the Charter. However, the meaning given to the word "promptly" in a given case will certainly depend, to some extent, on the particular circumstances of the arrest. Even if delay in providing reasons in such circumstances is held to offend the duty to inform an arrested person "promptly" of the reasons for the arrest, we would argue that it is a reasonable limit which is demonstrably justifiable in our free and democratic society. Such a limitation was recognized by the common law and is reformulated in the language of the "feasibility" of giving reasons in the present *Code* section 29. We think our formulation of the "limit," if it be such, is an improvement over both the common law and *Code* section 29.

Subsection (6) imposes a duty on peace officers to make every reasonable effort to ensure that compliance with the notice requirements is achieved at the first reasonable opportunity in a language understood by the arrested person. The duty is imposed in flexible language, and we think that it could be met by the use of a telephone to contact a translator when necessary. In a mobile modern world and in a country with a constitutionally recognized multicultural heritage, we find it curious that such a provision is not already a formal part of our law. Certainly, in our consultations it met with universal approval.

E. Entry on Property to Effect Arrest

Our concern here is whether there are definable areas of private space into which agents of the state may not intrude for the purpose of arrest, or may only intrude for limited reasons or in accordance with particular procedures. Is one's home really one's castle for purposes of the law of arrest? Most importantly, this issue determines the degree to which the principle of restraint ought to be shaped by a desire to protect certain values over others. To a lesser extent, the issue relates to the rule of law and the legal requirements which ought to structure limitations on the discretion of public agents in this area. Our deliberations and consultations have led us to conclude that protecting the family dwelling over other forms of property from unnecessary intrusions is appropriate, and that one procedural mechanism to accomplish this is the general requirement for possession of warrants for arrest. Furthermore, only peace officers, not private citizens, ought to be authorized to enter premises for the purpose of making arrests. The two recommendations which follow, dealing with non-consensual entry on private property to effect an arrest, reflect these conclusions.

(1) Private Dwellings

RECOMMENDATION

8. (1) Subject to subsections (2), (3) and (4), a peace officer may only enter a private dwelling without consent to effect an arrest where the peace officer:

(a) is in possession of a warrant for arrest;

(b) believes on reasonable grounds that the person to be arrested is in the private dwelling; and

(c) has announced his presence, identity, and a demand to enter, and has waited a reasonable period of time before entry.

(2) A peace officer need not comply with paragraph (1)(a) where:

(a) the arrest is being made without warrant pursuant to paragraph 2(1)(c) because the warrant is in another territorial division, and it is impracticable to obtain the warrant for the purpose of the arrest;

(b) there are reasonable grounds to believe that the person to be arrested is committing or is about to commit an offence likely to endanger life or cause serious bodily harm; or

(c) the peace officer is in fresh pursuit of the person to be arrested and owing to the likelihood of the person's escape or the inability otherwise to identify him, it would be impracticable to obtain a warrant.

(3) Paragraph (2)(c) applies where a citizen is in fresh pursuit of a person to be arrested who enters a private dwelling and the peace officer arrives in the course of the pursuit.

(4) A peace officer need not comply with paragraph (1)(c) where he has reasonable grounds to believe that to do so would endanger the life of the peace officer or that of another person.

Comment

This recommendation embodies the principle that, subject to certain exceptions, non-consensual entry into private dwellings by peace officers to effect arrest should only be permitted where there has been prior judicial scrutiny of the need to arrest, and where documented evidence of that need can be presented to the occupant. In other words, no forcible entry into a dwelling to conduct an arrest is generally permitted except by peace officers with a warrant. Subsection (1) of the recommendation elaborates on this principle to establish three conditions for non-consensual entry to arrest: possession of the warrant, reasonable grounds for belief that the suspect is there, and proper announcement.

We propose exceptions in subsections (2), (3) and (4) to the general rule established in subsection (1). Subsection (2) contains three exceptions to the warrant requirement in paragraph (1)(a). Paragraph (2)(a) provides an exception which would preserve the efficacy of the "Canada-wide," or at least multi-jurisdictional, arrest warrant. Statutory recognition of this exception to the requirement actually to possess a warrant would, in effect, codify the Supreme Court of Canada's decision in *Eccles* v. *Bourque*.[44] There, the court ruled that peace officers were entitled to enter private premises to effect an arrest of a person for whom there existed outstanding arrest warrants, even though the warrants had not been endorsed in the jurisdiction in which the arrest occurred. According to *Eccles* v. *Bourque*, such an entry would be lawful only where there are reasonable grounds to believe that the person sought is on the premises and a proper announcement has been made. These requirements are contained in paragraphs (1)(b) and (1)(c) of our recommendation.

Until recently, it was unclear whether the existence of an outstanding arrest warrant was crucial to the result reached in the case. However, the Supreme Court has now ruled that the issuance of an arrest warrant need not precede the exercise of the peace officer's power to enter premises to arrest a person believed to have committed an indictable offence. In *R.* v. *Landry*,[45] Dickson C.J.C. held, for the majority, that the presence of outstanding warrants was not a necessary prerequisite to the exercise of the power of entry recognized in *Eccles* v. *Bourque*. Rather, the warrants merely provided evidence of reasonable grounds to believe that the person sought had committed an indictable offence.[46] The judgment did endorse the requirements that there be reasonable grounds to believe that the person sought is on the premises and that a proper announcement be given prior to entry.[47]

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44. [1975] 2 S.C.R. 739.

45. *R.* v. *Landry* (1986), 65 N.R. 161 (S.C.C.).

46. *Id.*, pp. 171-2.

47. *Id.*, p. 174.

It is our view that the requirement for a warrant operates as an important check on the powers of the police to intrude into private dwellings. Elsewhere, the Supreme Court has itself recognized the importance of prior judicial authorizations for the exercise of intrusive powers, particularly in light of the Charter's protection against unreasonable search and seizure.[48] We find it significant that the *Landry* case arose prior to passage of the Charter. Thus, the court was not compelled to consider the impact of the right to security of the person recognized in section 7 of the Charter upon the common law powers it recognized. *Landry*, as the court itself notes, cannot then be regarded as the final word on the power of entry into private premises to make a warrantless arrest. In order to give effect to the Charter right to security of the person, we would require peace officers to possess a warrant prior to entering private premises for purposes of an arrest, subject only to the exceptions in subsections (2) and (3). Given the fact that we have advocated removing the distinction between summary and indictable offences as an operative factor in the law of arrest, it becomes necessary to employ standards governing recourse of the use of this power of entry which accord due deference to the need to preserve the privacy and security of the individual within his dwelling. This is especially the case in instances where what is involved is the investigation of minor, non-violent crimes.

Paragraph (2)(b) would relieve an arresting peace officer from the requirement to possess a warrant where there are reasonable grounds to fear commission of a dangerous offence. Similarly, paragraph (2)(c) would create an exception from the warrant requirement in situations of fresh pursuit. As pointed out by La Forest J. in his dissent in *R.* v. *Landry*,[49] these exceptions were specifically recognized at common law. These exigent circumstances, in our view, justify intrusion upon the privacy and security interests of individuals in their dwellings. The necessity for the former exception is obvious. In the latter case, we think that peace officers ought to be able to pursue a suspect even though he has gained entry to someone's house if it would be impracticable to obtain a warrant for that purpose. Thus, where there is a serious risk of escape by a person who is pursued immediately upon commission of an offence, or there is no means of identifying the person so that a warrant could be obtained, a peace officer would be entitled to continue his pursuit into a private dwelling, without a warrant, in order to effect the person's arrest.

Subsection (3) of this recommendation would extend the power to enter private dwellings to peace officers who arrive in the course of a citizen's pursuit of a suspect. In situations of fresh pursuit, we believe there is sufficient certainty that the person pursued is indeed the person reasonably believed to have committed a criminal offence that there would be a minimal risk of imposition on the privacy rights of citizens in their homes in permitting an exception from the warrant requirement. What constitutes "fresh pursuit" will be a question of fact in each case, but generally, it means a continuous and active pursuit of the suspect.[50]

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48. See, for example, *Hunter* v. *Southam Inc.*, *supra*, note 36, pp. 160-1.

49. *Supra*, note 45, p. 189.

50. See R.E. Salhany, *Canadian Criminal Procedure*, 4th ed. (Toronto: Canada Law Book, 1984), pp. 46-7.

Subsection (4) would exempt a peace officer from the requirement to make an announcement prior to entering private dwellings whenever there were reasonable grounds to believe that the announcement would endanger his life or that of another person. This is a general exception that would apply whether or not the peace officer was in possession of a warrant. Therefore, taken together, subsections (2), (3) and (4) would relieve a peace officer from both the warrant and announcement requirements in the situations set out in paragraphs (2)(a), (b) and (c), and subsection (3), if the announcement would constitute a risk to the life of the arresting officer or anyone else. For example, in a situation of fresh pursuit, a peace officer would not be required to possess a warrant or make an announcement prior to entering a private dwelling where entry was necessary to prevent the suspect's escape and an announcement would pose a risk to the officer's or an occupant's life.

The circumstances where we would allow entry to private dwellings should be regarded as exhaustive. We have considered the possibility of permitting entry to a private dwelling pursuant to a warrant where an unidentified person who is reasonably believed to have committed a criminal offence is known to be inside. Under our present scheme, such a person could be arrested without a warrant in a public place, but could only be arrested in a private dwelling without consent if he were freshly pursued there upon a reasonable belief that he had committed a crime, or there were reasonable grounds to believe that he was committing or about to commit an offence likely to endanger life or cause serious bodily harm. In the absence of these latter criteria, the police would be unable to enter the dwelling to make an arrest. We realize that this would require police either to wait until the suspect emerged to make an arrest, or to determine the suspect's identity through investigation. Once the suspect's identity was known, the police could discover whether a warrant was already in existence or seek a warrant empowering them to enter the premises. However objectionable this state of affairs may be, we have concluded that it is preferable to allowing entry to private dwellings for the arrest of unidentified suspects, even if a special warrant based upon a detailed description of the person sought were created for the purpose.[51] To our minds, it would be impossible to reduce the risk of intrusion upon the rights of individuals to security of the person and to be secure against unreasonable search and seizure to a constitutionally acceptable level, given the difficulty of describing suspects with precision. Such a warrant would inevitably create unacceptably broad powers of entry. We refrain from recommending provision for these powers out of a recognition that the threshold to a private dwelling must also be regarded as a legal threshold. As such, the power to enter private dwellings for purposes of arrest must, in our view, be limited to those circumstances set out in Recommendation 8.

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51. Although paragraph 456(1)(*a*) of the *Code* merely requires that a warrant of arrest "name or describe the accused," this does not appear to permit the issuance of warrants to arrest unknown persons; see Salhany, *id.*, p. 66, note 22.

(2) Premises Other Than Dwellings

RECOMMENDATION

9. (1) A peace officer may, without consent, enter premises other than a private dwelling to effect an arrest with or without warrant where the peace officer:

(a) has reasonable grounds to believe that the person to be arrested is on the premises; and

(b) has announced his presence, identity, and demand to enter, and has waited a reasonable period of time before entry.

(2) A peace officer need not comply with the requirements of paragraph (1)(b) where there are reasonable grounds to believe that to do so would endanger the life of the peace officer or that of another person.

Comment

This recommendation, as contrasted with the previous one, reflects our position that the privacy interests protected in relation to other premises are not as great as those relating to dwellings. Some questions were raised about the desirability of a warrant requirement in relation to some other categories of private premises, but we think we are on safe ground in authorizing warrantless entry for arrest when, for example, a patrolman sees a burglar in an empty jewellery store at night. To suggest a warrant requirement or to rationalize entry in such circumstances on a theory of implied consent seems unnecessary. The difficult case may be where the peace officer is refused entry to business premises or a private club, but we think that the privacy interests here are not nearly so pressing as in relation to a family dwelling. The rule of warrantless entry for arrest which we propose for premises other than dwellings is based closely upon the presently applicable common law.

The general rule of announcement prior to entry for premises other than dwellings, proposed in subsection (1), is made the subject of an exception in subsection (2), where there is a serious danger to the police officer or others. The exception from the announcement requirement applies to situations where the peace officer's or another person's life is endangered. The rationale for this exception is identical to that advanced for the analogous exception in the preceding recommendation. It may be well to point out that neither in the case of private dwellings nor other premises do we recommend relaxing the general principles to allow easy entry for arrest where there is a subsidiary concern for the destruction of evidence. We have already advanced an elaborate set of recommendations concerning search in Report 24, *Search and Seizure*, and we think that adding an additional "exigent circumstance" exemption to entry for arrest, when merely concerned with preservation of evidence, would have the effect of compromising our proposed regime for search and seizure.

F. Unlawful Arrest

RECOMMENDATION

10. An arrest or subsequent custody is unlawful where it is in breach of the procedures providing for arrest or custody in Recommendations 2 to 9.

Comment

By stating that an arrest or custody is unlawful where it is made in breach of our regime, we lay the foundation for civil, criminal or administrative proceedings against a person who makes an unlawful arrest or keeps a person in unlawful custody. This was the approach of the common law where unlawful arrest might give rise to civil or criminal liability. To the extent that our recommendations would clarify the definition of arrest, impose a duty to release following arrest, provide for more detailed notice requirements, and alter the law of forcible entry to effect arrest, there would be a concomitant alteration in the scope of potential civil, criminal or administrative proceedings against the wrongful arrester or custodian. However, we operate on the premise that if our recommendations governing arrest are reasonable, practical and fair, then the modes of assuring adherence to them ought to be rigorous. Although we considered and made specific recommendations concerning alternative sanctions for wrongful arrest and subsequent custody in our Working Paper,[52] we prefer to leave final recommendations on this subject for our forthcoming work on Remedies. In the meantime, current civil, criminal and administrative sanctions would apply.

Civil suits against an unlawful arrester are matters covered by the common law of tort, or by the articles of the Civil Code of Lower Canada on delictual and quasi-delictual responsibility. As a federal body, the Law Reform Commission of Canada cannot propose change in a provincial area of legislative authority in relation to property and civil rights. On the other hand, the common law of tort and the Québec law of civil responsibility do recognize that the exercise of lawful statutory authority provides a defence in civil actions. To this extent the authorizing character of our arrest regime, combined with the statement in this recommendation that failure to comply with the rules renders the arrest unlawful, does have the effect of laying the basis for a civil action under provincial law.

Criminal responsibility for the unlawful arrester would arise through the application of the general principles of criminal liability and various substantive offences. As our recommendations note in Working Paper 29, *The General Part: Liability and Defences*, the exercise of lawful authority is, and must continue to be, a defence to criminal charges. However, our statement in this recommendation would mean that, depending upon the facts of the situation, a variety of criminal charges might be laid by public authorities or an unlawfully arrested person, where the rules of the arrest regime are not complied

52. *Supra*, note 4, pp. 121-30, Recommendations 27 and 28.

with. Assaults, forcible confinement, homicide offences or wilfully disobeying a statute are all charges which might be brought into play depending upon the facts of the unlawful arrest. This is all, of course, consistent with the present law, and our recommendation would continue to allow an application of these traditional principles embodying the rule of law and the concept of restraint.

Provincial Police Acts provide complaint procedures and administrative remedies where police officers have failed to abide by codes of professional conduct. These codes of professional conduct require police, *inter alia*, to abide by the law, and they provide sanctions ranging from demerits on an employment record to dismissal for failure to do so. Our recommendation concerning the unlawfulness of arrests not in accordance with the rules of our proposed regime could also give rise to these administrative measures.

III. Corollary Recommendations

As our discussion in Chapter One indicated, the Commission is planning to draft a Code of Criminal Procedure which would present, in a complete and coherent package, our final views on criminal procedure as a whole. In the meantime, however, it has been our recent practice to draft our Reports to Parliament in such a form that proposals can be adopted by amending the present *Criminal Code* prior to becoming part of our proposed Code of Criminal Procedure. Consistent with this recent practice, the corollary recommendations below demonstrate the ways in which we envisage our arrest regime being integrated with provisions in the present *Criminal Code*. This may mean repeal or revision of some aspects of Part XIV of the *Code*, "Compelling Appearance of Accused before a Justice and Interim Release," and of that segment of Part I of the *Criminal Code* which is entitled "Protection of Persons Administering and Enforcing the Law."

A. Reform of *Code* Part XIV: Compelling Appearance of Accused before a Justice and Interim Release

RECOMMENDATION

11. Upon the enactment of the provisions proposed in Recommendations 1 to 7, and 10, the following sections of the *Code* dealing with compelling appearance and interim release should be revised accordingly:

(a) section 448 — definitions;

(b) sections 449 and 450 — arrest without warrant;

(c) subsection 181(2) — arrest without warrant in gambling and lottery offences;

(d) subsection 191(2) — arrest without warrant for gambling in public conveyances;

(e) section 451 — issuance of appearance notice by peace officer where arrest is not permitted under subsection 450(2);

(f) section 452 — release from custody by peace officer after warrantless arrest;

(g) sections 455.3 and 455.4 — issuance of process to compel appearance upon laying an information;

(h) sections 456 to 456.3 — contents and execution of warrants.

Comment

The implementation of this recommendation will involve repeal or revision of many of the sections in Part XIV of the *Code* in response to our proposals on definition of arrest, authority to arrest without warrant, police officers' duty to release, notice requirements and warrants for arrest. Also, special arrest powers set out elsewhere in the *Code* would no longer be necessary.

Section 448 of Part XIV would be amended to include the definition of arrest which we proposed in Recommendation 1. Arrest would be defined in the *Code* for the first time.

Sections 449 and 450 of the *Criminal Code* which presently authorize arrest without warrant would be repealed in their entirety, to be replaced by Recommendations 1(2), 2 and 3. Thus, in addition to peace officers' and private citizens' powers of arrest without warrant, this Part would contain a provision regulating the "voluntary investigation" problem. Further, the separate arrest powers of subsections 181(2) and 191(2) ought to be repealed as being redundant in the light of the arrest powers proposed in Recommendations 2 and 3.

Sections 451 and 452 of the *Code* authorize the issuance of appearance notices and provide for release of the accused by peace officers. These provisions would require revision in order to make them consistent with the duty to release from custody after warrantless arrest set out in Recommendation 2.

Sections 455.3 and 455.4 of the *Code* describe the process of laying an information before a justice and the issuance of summonses and warrants. These provisions would require revision in order to implement Recommendations 4, 5 and 6 concerning warrants and telewarrants for arrest. Other provisions in Part XIV of the *Code*, such as those relating to an accused's appearance before a justice, the confirmation of appearance notices and the release of persons arrested pursuant to a warrant will be the subject of closer examination in our work on Compelling Appearance, Interim Release and Pretrial Detention.

Sections 456 to 456.3 of the *Code* set out the contents of warrants of arrest and rules for their execution. These provisions would also require amendment in order to implement Recommendations 4, 5 and 6.

B. Reform of *Code* Part I: Protection of Persons Administering and Enforcing the Law

RECOMMENDATION

12. Upon enactment of the provisions of Recommendation 7, section 29 of the *Criminal Code* should be repealed.

Comment

We think that the notice requirements in Recommendation 7 ought to appear in the *Criminal Code* along with the provisions on arrest. To the extent possible, all of the rules applying to arrest ought to appear together in the *Code* for ease of reference and application. Thus, we would substitute our notice requirements for those presently set out in section 29 of the *Code*, and insert them in Part XIV rather than in Part I.

It should be mentioned that the proper placement of Recommendations 8 and 9 in the scheme of the present *Criminal Code* is, perhaps, an example of a somewhat arbitrary choice between Part I and Part XIV. Pursuant to our recommendations, Part XIV would contain all provisions defining and authorizing the elements of a lawful arrest both with and without warrant. We take the view that Recommendations 8 and 9, which cover an area now regulated by case-law only, have more in common with these sections in the *Code* than with those under the rubric "Protection of Persons Administering and Enforcing the Law" in Part I. This flows from the perception that entry on property to effect an arrest involves the execution of a specific power provided for in Part XIV, rather than protection of those enforcing the criminal law. Thus, we would place our Recommendations 8 and 9 in Part XIV, rather than in Part I.

RECOMMENDATION

13. Sections 30 and 31 of the *Criminal Code* should be repealed, and any supplementary common law rules in relation to arrest for breach of the peace, or apprehended breach of the peace, should be abrogated by statute.

Comment

Recommendation 2 is drafted in such a way as to cover situations where an arrest would be justified to prevent a serious breach of the peace. Peace officers would be entitled to arrest those who are about to commit criminal offences which are "likely to cause personal injury or damage to property." These words are analogous to those used in section 745 of the *Code*, which provides a procedure for compelling the appearance of anyone who a person fears will commit such an offence. As we noted in our Working Paper on *Arrest*, "breach of the peace" is nowhere defined satisfactorily, and authorizing an arrest in relation to undefinable conduct is contrary to the rule of law and the principle of legality.[53] Our recommendation would connect the arrest power to defined criminal offences, providing a principled means for solving the same problem. Our consultations uncovered confusion concerning the nature of prosecutorial discretion in relation to arrest for a so-called "breach of the peace." Some police officers claimed they arrest for "breach of the peace" thinking that if they named the offence which the impugned conduct might form, they would be forced to lay charges. Thus, in minor circumstances where they wished to let malefactors off with a "warning," they tended to arrest for "breach of the peace" rather than naming an offence, such as "causing a disturbance." Of course, the Crown and the police always have a discretion not to prosecute in appropriate circumstances. In the event that this recommendation is adopted, proper exercise of prosecutorial discretion should be clearly taught in police training. In bringing our law more into line with the principle of legality here, we do not wish to undermine the principle of restraint by precipitating the laying of criminal charges in circumstances where they have not, in the past, been thought necessary.

53. *Supra*, note 4, pp. 88-9.

CHAPTER THREE
Summary of Recommendations

Primary Recommendations

Defining Arrest

1. (1) An arrest occurs where:

(a) a person submits to custody upon being told to do so; or

(b) a person is physically taken into custody.

(2) Where a person is requested to remain with or accompany a peace officer voluntarily, such person:

(a) may refuse to accompany or remain with the peace officer unless arrested under subsection (1) or under a statutory duty to remain with or accompany the peace officer; and

(b) shall be informed of his rights and duties under paragraph (a).

Authority to Arrest without Warrant

2. (1) A peace officer may arrest without warrant:

(a) a person who he believes on reasonable grounds has committed or is committing a criminal offence;

(b) a person who he believes on reasonable grounds is about to commit a criminal offence likely to cause personal injury or damage to property; or

(c) a person for whom he has reasonable grounds to believe there is a warrant outstanding which may be executed in the territorial division in which the person is found.

(2) Where an arrest is made pursuant to this recommendation or Recommendation 3, a peace officer having custody of the arrested person shall release the person as soon as possible, unless the peace officer has reasonable grounds to believe 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 authorized by statute;

(d) to prevent interference with the administration of justice;

(e) to prevent the continuation or repetition of a criminal offence; or

(f) to ensure the protection or safety of the public.

3. (1) Subject to subsection (3), anyone may arrest without warrant:

(a) a person who he believes on reasonable grounds is committing or has just committed a criminal offence; or

(b) a person whom he has been told by a peace officer to arrest.

(2) Anyone, other than a peace officer, who makes an arrest pursuant to this recommendation shall deliver the arrested person to a peace officer as soon as possible.

(3) No one may arrest a person under this recommendation if a peace officer present at the scene has announced his determination that an arrest should not be made in relation to that criminal offence.

Warrants and Telewarrants for Arrest

4. (1) Subject to subsection (2) and Recommendation 5, a justice may issue a warrant to compel the attendance of an accused where the justice has reasonable grounds to believe that the person named in an information has committed the criminal offence therein alleged.

(2) A justice shall not issue a warrant under this recommendation unless he has reasonable grounds to believe such issuance is necessary:

(a) to ensure that the person will appear in court;

(b) to conduct investigative procedures authorized by statute;

(c) to prevent interference with the administration of justice;

(d) to prevent the continuation or repetition of a criminal offence; or

(e) to ensure the protection or safety of the public.

(3) A warrant for arrest shall be in Form A (found in the Appendix to this Report).

5. (1) An applicant seeking a warrant for arrest shall:

(a) appear before the justice in person to swear an affidavit upon oath in Form B (found in the Appendix to this Report) as to the requirements of subsection 4(2); or

(b) swear such affidavit upon oath by telephone or other means of telecommunication where the applicant has reasonable grounds to believe it is impracticable to appear in person.

(2) A justice shall not issue a warrant for arrest unless:

(a) where the application is made under paragraph 5(1)(a), he has:

(i) examined the information by which the charge was laid;

(ii) questioned the applicant personally about the reasons advanced for the issuance of a warrant rather than the issuance of a summons or the confirmation of an appearance notice, if any; and

(iii) heard the evidence of other witnesses where he considers it necessary or desirable to do so; or

(b) where the application is made under paragraph 5(1)(b), he has:

(i) examined or heard the information by which the charge was laid;

(ii) questioned the applicant about the reasons advanced for the issuance of a warrant rather than a summons or the confirmation of an appearance notice, if any; and

(iii) questioned the applicant about the circumstances which make it impracticable for the applicant to appear personally to obtain a warrant.

(3) A justice hearing an application for the issuance of a warrant by telephone or other means of telecommunication shall record verbatim:

(a) the information by which the charge was laid, if the information is not in the possession of the justice; and

(b) the affidavit in Form B required by subsection (1).

(4) Where a justice issues a warrant by telephone or other means of telecommunication:

(a) the justice shall complete and sign the warrant in Form A;

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

(5) The information or its transcription, the affidavit of the applicant in Form B or its transcription, and the warrant or a copy of the warrant in Form A shall be filed with the court.

6. (1) A justice may issue a warrant for execution in a territorial division or may specify that the warrant may be executed anywhere in the province or anywhere in Canada.

(2) Where a person has been arrested and there are reasonable grounds to believe that a warrant is outstanding for such person which originated in a territorial division other than that in which the person was arrested, such person:

(a) shall be released as soon as possible by the officer in charge in accordance with conditions in section 453.1 of the *Criminal Code*; or

(b) shall be taken as soon as possible before a justice in the territorial jurisdiction in which he is found, to be dealt with according to the general provisions of the *Criminal Code* concerning judicial interim release.

(3) Where a person arrested pursuant to subsection (2) is kept in custody pending a decision from authorities in the territorial division from which the warrant originated as to whether the person is required for trial in that territorial division, such person shall be released at the expiration of no more than four days, unless within such period such a decision is made.

(4) Upon the arrest of a person named in a warrant issued under this Part, the warrant shall expire.

(5) Upon the expiration of a warrant under subsection (4), every reasonable effort should be made to remove all information pertaining to the warrant from the computerized police data base as soon as practicable.

Notice Requirements

7. (1) Anyone who arrests a person shall, at the time of making the arrest, state the reason for the arrest.

(2) A peace officer or person employed as a security guard who arrests a person, or a peace officer who receives an arrested person into custody pursuant to Recommendation 3, shall, in addition to complying with subsection (1), provide upon request:

(a) his name;

(b) his badge number; and

(c) the name of his police force or employer.

(3) A peace officer who receives an arrested person into custody pursuant to Recommendation 3 shall comply with subsections (1) upon request.

(4) Where compliance with subsections (1), (2) or (3) is rendered impracticable by

(a) flight, resistance or continuation of the offence by the arrested person, or

(b) the incapacity of the arrested person,

a person having custody of the arrested person shall comply with subsections (1), (2) or (3), as the case may be, within a reasonable period of time.

(5) Anyone who arrests a person is in compliance with the requirement of subsection (1) where he:

(a) generally informs the person being arrested of the facts which form the grounds for the arrest;

(b) shows the person being arrested the warrant authorizing the arrest; or

(c) where it is not feasible for the arresting peace officer to be in possession of the warrant at the time of the arrest, informs the person of the offence for which the arrest warrant has been issued.

(6) Where a peace officer who has arrested a person, or who has received into custody a person arrested by a private citizen, has reasonable grounds to believe that the arrested person may be unable to understand the language spoken in complying with the notice requirements of this recommendation, the peace officer shall make every reasonable effort to ensure that compliance is achieved at the first reasonable opportunity in a language understood by the arrested person.

Entry on Property to Effect Arrest

8. (1) Subject to subsections (2), (3) and (4), a peace officer may only enter a private dwelling without consent to effect an arrest where the peace officer:

(a) is in possession of a warrant for arrest;

(b) believes on reasonable grounds that the person to be arrested is in the private dwelling; and

(c) has announced his presence, identity, and a demand to enter, and has waited a reasonable period of time before entry.

(2) A peace officer need not comply with paragraph (1)(a) where:

(a) the arrest is being made without warrant pursuant to paragraph 2(1)(c) because the warrant is in another territorial division, and it is impracticable to obtain the warrant for the purpose of the arrest;

(b) there are reasonable grounds to believe that the person to be arrested is committing or is about to commit an offence likely to endanger life or cause serious bodily harm; or

(c) the peace officer is in fresh pursuit of the person to be arrested and owing to the likelihood of the person's escape or the inability otherwise to identify him, it would be impracticable to obtain a warrant.

(3) Paragraph (2)(c) applies where a citizen is in fresh pursuit of a person to be arrested who enters a private dwelling and the peace officer arrives in the course of the pursuit.

(4) A peace officer need not comply with paragraph (1)(c) where he has reasonable grounds to believe that to do so would endanger the life of the peace officer or that of another person.

9. (1) A peace officer may, without consent, enter premises other than a private dwelling to effect an arrest with or without warrant where the peace officer:

(a) has reasonable grounds to believe that the person to be arrested is on the premises; and

(b) has announced his presence, identity, and demand to enter, and has waited a reasonable period of time before entry.

(2) A peace officer need not comply with the requirements of paragraph (1)(b) where there are reasonable grounds to believe that to do so would endanger the life of the peace officer or that of another person.

Unlawful Arrest

10. An arrest or subsequent custody is unlawful where it is in breach of the procedures providing for arrest or custody in Recommendations 2 to 9.

Corollary Recommendations

11. Upon the enactment of the provisions proposed in Recommendations 1 to 7, and 10, the following sections of the *Code* dealing with compelling appearance and interim release should be revised accordingly:

(a) section 448 — definitions;

(b) sections 449 and 450 — arrest without warrant;

(c) subsection 181(2) — arrest without warrant in gambling and lottery offences;

(d) subsection 191(2) — arrest without warrant for gambling in public conveyances;

(e) section 451 — issuance of appearance notice by peace officer where arrest is not permitted under subsection 450(2);

(f) section 452 — release from custody by peace officer after warrantless arrest;

(g) sections 455.3 and 455.4 — issuance of process to compel appearance upon laying an information;

(h) sections 456 to 456.3 — contents and execution of warrants.

12. Upon enactment of the provisions of Recommendation 7, section 29 of the *Criminal Code* should be repealed.

13. Sections 30 and 31 of the *Criminal Code* should be repealed, and any supplementary common law rules in relation to arrest for breach of the peace, or apprehended breach of the peace, should be abrogated by statute.

CHAPTER FOUR
Model Legislation

Arrest Defined

1. (1) An arrest occurs when:

(*a*) a person submits to custody after being told to do so; or

(*b*) a person is physically taken into custody.

(2) Where a peace officer requests a person who has not been arrested to remain with or accompany him, he shall inform the person of any legal duty to comply with the request and, if none exists, of the person's right to refuse.

Arrest without Warrant by Peace Officer

2. A peace officer may arrest without warrant:

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

(*b*) a person who he believes on reasonable grounds is about to commit a crime that is likely to cause personal injury or damage to property; or

(*c*) a person for whose arrest he has reasonable grounds to believe there is a warrant in force that may be executed in the territorial division in which the person is found.

Arrest without Warrant by Any Person

3. (1) Anyone may arrest without warrant:

(*a*) a person who he believes on reasonable grounds is committing or has just committed a crime; or

(*b*) a person whom he has been told by a peace officer to arrest.

(2) Anyone, other than a peace officer, who arrests a person without a warrant shall deliver the person to a peace officer as soon as practicable.

(3) No one may arrest a person for a crime if a peace officer present at the scene of the intended arrest has made it known that the person should not be arrested for that crime.

Release after Arrest

4. A peace officer who arrests a person without a warrant or into whose custody a person is delivered in accordance with subsection 3(2) shall, as soon as practicable, release the person, unless the officer has reasonable grounds to believe 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 authorized by statute;

(*d*) to prevent interference with the administration of justice;

(*e*) to prevent the continuation or repetition of a crime; or

(*f*) to ensure the protection or safety of the public.

Warrants for Arrest after Laying Charge

5. An applicant shall apply for a warrant for arrest from a justice by swearing an affidavit under oath in Form B (found in the Appendix to this Report):

(*a*) in person; or

(*b*) where the applicant has reasonable grounds to believe that it is not practicable to appear in person, by telephone or other means of telecommunication.

6. A justice may issue a warrant for the arrest of a person named in an information where:

(*a*) he has reasonable grounds to believe that the person has committed the crime identified by the information; and

(*b*) he has reasonable grounds to believe that the warrant is necessary:

(i) to ensure that the person will appear in court;

(ii) to conduct investigative procedures authorized by statute;

(iii) to prevent interference with the administration of justice;

(iv) to prevent the continuation or repetition of a crime; or

(v) to ensure the protection or safety of the public.

7. (1) Before issuing a warrant for arrest, a justice shall:

(*a*) examine or have read to him the information;

(*b*) question the applicant about the reasons advanced for the issuance of a warrant rather than the issuance of a summons or the confirmation of an appearance notice;

(*c*) where the application is made in person, hear the evidence of other witnesses where he considers it necessary or desirable to do so; or

(*d*) where the application is made by telephone or other means of telecommunication, question the applicant about the circumstances which make it impracticable for the applicant to appear in person to obtain a warrant.

(2) Where an application is made for a warrant by telephone or other means of telecommunication, the justice shall record verbatim:

(*a*) the contents of the information if the information is not in the possession of the justice; and

(*b*) the contents of the affidavit sworn in Form B.

(3) A warrant for arrest shall be in Form A (found in the Appendix to this Report).

(4) Where a justice issues a warrant by telephone or other means of telecommunication:

(*a*) the justice shall complete and sign the warrant in Form A; and

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

(5) The information or its transcription, the affidavit of the applicant in Form B or its transcription and the warrant or a copy of the warrant in Form A shall be filed with the court.

8. A justice may issue a warrant for execution in a specified territorial division, anywhere in the province or anywhere in Canada.

9. (1) Where a peace officer arrests a person in one territorial division on a reasonable belief that a warrant is in force for the arrest of the person in another territorial division:

(*a*) the officers in charge shall release the person as soon as practicable under one of the conditions described in paragraphs 453.1(*e*), (*f*) or (*g*) of the *Criminal Code*; or

(b) the person shall be taken as soon as practicable before a justice in the territorial division in which he is found, to be dealt with according to the general provisions of the *Criminal Code* dealing with judicial interim release.

(2) Where a person referred to in subsection (1) is kept in custody pending a decision as to whether he is required to appear for trial in the other territorial division, the person shall be released at the expiration of no more than four days, unless within that period the decision is made.

(3) A warrant expires when the person named in the warrant is arrested.

Notice Requirements

10. (1) Anyone who arrests a person shall, at the time of making the arrest, state the reasons for the arrest.

(2) A peace officer into whose custody a person has been delivered in accordance with subsection 3(2) shall, if requested to do so, state the reasons for the arrest.

(3) A peace officer or a person employed as a security guard who arrests a person or a peace officer into whose custody a person has been delivered in accordance with subsection 3(2) shall identify himself, if requested to do so, by providing his name, badge number and the name of his police force or employer.

(4) Where compliance with subsections (1) or (2) is rendered impracticable, a person having custody of the arrested person shall state the reasons for the arrest at the first reasonable opportunity.

(5) Anyone who arrests a person or a peace officer into whose custody a person has been delivered in accordance with subsection 3(2), states the reason for the arrest if he:

(*a*) generally informs the arrested person of the facts which form the grounds for the arrest;

(*b*) where a warrant for arrest has been issued, shows the person being arrested the warrant, or, where that is not practicable, informs the person of the offence for which the warrant has been issued.

(6) Where a peace officer who has arrested a person or into whose custody a person has been delivered in accordance with subsection 3(2) has reasonable grounds to believe that the arrested person is unable to understand the language spoken in complying with this section, the peace officer shall make every reasonable effort to ensure that the information is given at the first reasonable opportunity in a language understood by the arrested person.

Entry on Property to Effect Arrest

11. (1) A peace officer may enter a private dwelling without consent to arrest a person where the peace officer:

(*a*) is in possession of a warrant for arrest;

(*b*) believes on reasonable grounds that the person to be arrested is in the private dwelling; and

(*c*) identifies himself as a peace officer, makes a demand to enter, and waits a reasonable period of time before entering.

(2) A peace officer need not comply with paragraph (1)(*a*) where:

(*a*) he has reasonable grounds to believe there is a warrant in force that may be executed in the territorial division in which the person to be arrested is found and it is impracticable to obtain the warrant for the purpose of the arrest;

(*b*) he has reasonable grounds to believe that the person is committing or is about to commit an offence likely to endanger life or cause serious bodily harm;

(*c*) he is in fresh pursuit of the person and due to the likelihood of escape or the inability to identify the suspect otherwise, it would be impracticable to obtain a warrant; or

(*d*) he arrives in the course of a citizen's fresh pursuit of the person and due to the likelihood of escape or the inability to identify the suspect otherwise, it would be impracticable to obtain a warrant.

(3) A peace officer need not comply with paragraph (1)(*c*) where he has reasonable grounds to believe that to do so would endanger his life or that of another person.

12. (1) A peace officer may, without consent, enter premises other than a private dwelling to arrest a person with or without warrant where the peace officer:

(*a*) has reasonable grounds to believe that the person is on the premises; and

(*b*) identifies himself as a peace officer, makes a demand to enter and waits a reasonable period of time before entering.

(2) A peace officer need not comply with paragraph (1)(*b*) where he has reasonable grounds to believe that to do so would endanger his life or that of another person.

Unlawful Arrest

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