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Law Reform Commission
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Commission de réforme du droit
du Canada

CRIMINAL LAW

arrest

Working Paper 41

Canada

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Catalogue No. J32-1/41-1985
ISBN 0-662-53801-3

Law Reform Commission
of Canada

Working Paper 41

ARREST

1985

Notice

This Working Paper presents the views of the Commission at this time. The Commission's final views will be presented later in its Report to the Minister of Justice and Parliament, when the Commission has taken into account comments received in the meantime from the public.

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

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Introduction

The law of arrest is a fundamental aspect of criminal procedure. It legitimates the use of the coercive powers of the state to deprive the individual of his or her liberty in order to compel that individual to appear in court to answer to criminal charges. An arrest may also provide the opportunity for agents of the state to engage in a variety of investigative activities. Reform of the law of arrest can thus be contemplated only in conjunction with a consideration of the purposes of criminal procedure in the Canadian criminal justice system. It has been suggested that the basic purposes served by criminal procedure are three in number:

First, criminal procedure must provide a process that vindicates substantive criminal law goals Second, criminal procedure must provide a dispute resolution mechanism that allocates scarce resources efficiently and that distributes power among state officials. Finally, criminal procedure can perform a legitimization function by resolving state-citizen disputes in a manner that commands the community's respect for the fairness of its processes as well as the reliability of its outcomes.¹

Each of these purposes is highly relevant to the law of arrest and its reform.

The law of arrest, as all aspects of criminal procedure, must be consistent with the substantive goals of the criminal law. The Commission has previously classified the goals of the criminal law under the general headings: humanity, freedom and justice.² The substantive criminal law defines and provides sanctions for acts which violate common sense standards of humanity (murder, sexual assault, robbery, and so forth), and also defines the limits on the behaviour of the authorities with penalties for their breach. In these matters, the Commission has taken the view that the function of the criminal law is to reaffirm fundamental values and that only acts which contravene fundamental values ought to be classified as offences.³ This is the principle of *restraint*.⁴ This principle is

1. Peter Arenella, "The Warren and Burger Courts' Competing Ideologies" (1983), 72 *Georgetown Law Journal* 185, p. 188. This article contains a thought-provoking analysis and creative reconstruction of standard dogma about criminal procedure.

2. Law Reform Commission of Canada, *Our Criminal Law*, [Report 3] (Ottawa: Minister of Supply and Services Canada, 1977), pp. 7-9.

3. *Ibid.*, p. 19.

4. The Government of Canada has recently endorsed this principle in its policy document entitled *The Criminal Law in Canadian Society* (Ottawa: Ministry of Justice, 1982), p. 5 where it enunciates one of the first principles of criminal law in the following language:

The criminal law should be employed to deal only with that conduct for which other means of social control are inadequate or inappropriate and in a manner which interferes with individual rights and freedoms only to the extent necessary for the attainment of its purpose.

directly applicable in the context of arrest. If criminal procedure is to vindicate the principle of restraint which is fundamental to the substantive criminal law, one must ensure that authorities are authorized to interfere with individual liberty and freedom via the arrest process only where circumstances of necessity render less liberty-intrusive alternatives inadequate.

The law of arrest clearly serves the second purpose of criminal procedure in that it allocates power and resources among state officials. In this context, the authority exercised by the agent of the state is one which transforms legal relations between state and individual. A peace officer who arrests an individual puts that individual in lawful custody, from which escape is an offence, and deprives the citizen of a right to resist what would, without the authority to arrest, amount to an unlawful assault. Shall a peace officer be entitled to arrest a citizen without warrant, or ought the matter to be the subject of a decision by a judicial officer? When ought the private citizen to be authorized to make an arrest on behalf of the state? If an arrest is to be made, how must it be done, and to what degree can force be used or rights of property violated? What sanctions are to be available when the lawful authority to arrest has been exceeded, and who has the power to invoke these sanctions? A legal regime governing arrest must provide answers to these questions, and in doing so will allocate power and authority among state officials in a manner which will have profound effects upon the liberty and freedom of Canadian citizens.

The law of arrest regulates what may be the first contact between the individual and the state, and the key initial step in what must be an effective system of criminal justice. In so doing it will most certainly relate to the legitimation function of criminal procedure. The Commission has stated that freedom and justice are guiding values in our criminal law. To the extent that the presumption of innocence and the concept of *nulla poene sine lege* are fundamental to our system of criminal justice and its legitimacy,⁵ the law must recognize that arrest occurs at the pretrial stage prior to a determination of guilt or innocence. The arrested person is not to be treated as if he or she is guilty, even though the arresting person may have made a legitimate assumption that this is in fact the case. On the other hand, effective arrest procedures are an important aspect of the arsenal of deterrent aspects of the criminal justice system. Failure to balance adequately the interests of the state in effective enforcement and the interests of individuals and society in a *fair* procedure will cast the legitimacy of the criminal justice system into doubt.

While restraint and fairness must be basic watchwords in the elaboration of an arrest regime which will allocate power and authority to state officials in restricting individual freedoms, there are formal and technical concerns which the law reformer must also keep in mind. Any attempt to codify an area of law must also be expressed with the greatest simplicity, clarity, comprehensiveness and coherence possible. These directing concepts

5. *Supra*, note 2, p. 8. The Government of Canada, in its policy document, *supra*, note 4, has of course recognized these principles. The difficulty is in striking the balance between the interests of "crime control" and "due process." A classical analysis of this problem is found in Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford U. Press, 1968), pp. 174-204. For a helpful critique of this approach, see Arenella, *supra*, note 1.

are nowhere more important than in relation to the law of arrest. Simplicity and clarity in the law of arrest are essential because the legislative pronouncements are to guide private citizens and police officers in encounters which will be brief, emotionally charged, perhaps dangerous, and of prime concern to the police functions of enforcing the law and of vital interest to an individual's liberty. The rules must be as straightforward as possible while not sacrificing any essential interests to mere elegance in drafting. Moreover, an arrest regime must be both comprehensive and coherent if it is to accomplish the goals of simplicity and clarity. The rules in the *Criminal Code* governing the various aspects of arrest must be consistent with one another, and to the extent possible, a single arrest regime in the *Code* ought to serve the purposes of arrest in relation to all federal offences rather than having separate rules relating to separate substantive areas. A simple, clear and coherent arrest regime in the *Criminal Code* will greatly assist both the private citizen and the police officer in understanding their correlative rights and duties. So much the better if all concerned can be certain that such encounters will only be regulated by one set of rules.

The simplicity, clarity, coherence and comprehensiveness of an arrest regime are also important in that the law of arrest will form the groundwork for a whole series of pretrial procedures. Custodial interrogation, investigative tests, search and seizure, and judicial interim release are aspects of criminal procedure which will be affected by the manner in which the arrest regime is structured. While these areas are the subject of separate Studies from the Commission, this Working Paper attempts to keep its effect on these areas in view when elaborating recommendations for the reform of the law of arrest.

This Working Paper is divided into two parts. Part One presents a synopsis of the law of arrest as it presently exists in Canada. It consists of three chapters, the first of which describes the constitutional framework in which the law of arrest must be grounded. Chapter Two, by far the longest chapter in this Part, briefly sets out the law of arrest in relation to a number of headings: purposes and definitions, detention and investigative procedures, compelling appearance by means other than arrest, arrest without warrant, notice requirements of a lawful arrest, powers necessary to effect a lawful arrest, and enforcement of the rules of arrest. Chapter Three then evaluates the present law and states the need for reform in relation to the principles and technical concerns addressed above in this Introduction.

Part Two of this Working Paper makes recommendations for reform, and explains the rationale behind such recommendations, roughly in accordance with the order in which the present law is analyzed in Part One. A summary of recommendations is found at the end of Part Two. The Working Paper concludes with two appendices: lists of federal and provincial statutes containing arrest powers, the better to enable readers to follow the reasoning in the text.

PART ONE:
THE PRESENT CANADIAN LAW
OF ARREST

CHAPTER ONE

Arrest and the Constitution

I. Introduction

The principles governing arrest are a fundamental aspect of any legal system which give practical shape to relations between the state and individual citizens. As such it is not surprising that certain basic propositions about arrest have become enshrined in constitutional documents. In Canada, the *Canadian Bill of Rights* and more importantly the *Canadian Charter of Rights and Freedoms* have provisions which explicitly or by necessary implication impinge upon the law of arrest. These fundamental documents, naturally enough, bear certain similarities to analogous constitutional provisions in other countries, such as the *Bill of Rights* contained in the amendments to the American constitution, as well as to international treaty instruments which have attempted to set cross-cultural or transnational standards for relations between state and individual. Comparative reference to such external sources is now demanded by the *Canadian Charter of Rights and Freedoms* which specifically requires interpretation which will set the rights and freedoms contained in it in the context of what can be "demonstrably justified in a free and democratic society." The second section of this chapter will be devoted to a consideration of the broad constitutional principles, largely as expressed in the *Canadian Charter of Rights and Freedoms*, which create the framework for the law of arrest in Canada. However, the working out of the general principles of arrest in particular legislative form is complicated by the fact that Canada is a federal state with legislative authority shared between the Parliament of Canada and the provincial legislatures. This Working Paper, given the legislative mandate of the Law Reform Commission of Canada, is almost exclusively oriented to the "federal" law of arrest. But it is important at the outset to highlight the constitutional division of legislative authority in relation to the law of arrest in order to point out the sources for a provincial law of arrest which may or may not overlap with federal legislation. In addition, it is useful to describe various non-*Criminal Code* arrest powers in order to understand the full context within which *Criminal Code* arrest powers operate. This task of examining the division of legislative authority and the statutory provisions creating arrest powers will be the subject of the third section of this chapter.

II. Arrest, Detention and the *Canadian Charter of Rights and Freedoms*

While the general principles encapsulated in the phrase "rule of law" are of signal importance for the reform of law and arrest, the principles entrenched in the *Constitution Act, 1982*⁶ will play the pre-eminent role in shaping the parameters of the subject. The Constitution 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.⁷ A federal or a provincial enactment⁸ which is contrary to the Constitution may be declared by a court being called upon to apply it to be of no force or effect.⁹ This, of course, is of particular significance to the law of arrest since several provisions of the *Canadian Charter of Rights and Freedoms* under the heading "Legal Rights" are expressly or implicitly directed toward issues of arrest and detention.¹⁰ It is these provisions which are the subject of discussion here.

The Charter rights which will be of concern here are those contained in sections 7, 9, 10, and 12. Section 8, guaranteeing the freedom from unreasonable search or seizure, will not be considered. In Canada, this right will perhaps be invoked in relation to search incident to arrest, but will in all likelihood not be relevant to the arrest itself. This is to be distinguished from the situation in the United States, where the Fourth Amendment, containing the rights set out in section 8 of the Charter, has been interpreted to mean seizure not only of goods, but also of persons. In Canada, such interferences with liberty ought to be dealt with by section 9, which guarantees freedom from arbitrary detention or imprisonment, a clause without a direct American counterpart.¹¹

While the principle of constitutional primacy has been enshrined in the Canadian Constitution in such a manner as to allow the courts to strike down legislation which runs counter to constitutional provisions, those engaged in the process of law reform must remember that the doctrine of the supremacy of Parliament has not been entirely abandoned. By virtue of the legislative override, Parliament or the legislature of a province may expressly declare that an enactment shall operate notwithstanding the fact that it may infringe upon the fundamental freedoms and the legal rights guaranteed by the

6. The *Constitution Act, 1982*, as enacted by the *Canada Act 1982* (U.K.) 1982, c. 11, proclaimed in force April 17, 1982.

7. *Ibid.*, s. 52(1).

8. *Ibid.*, s. 32.

9. For examples of the exercise of this power see, *inter alia*: *Reference re s. 94(2) of the Motor Vehicle Act*, R.S. B.C. 1979, c. 288 (1983), 33 C.R. (3d) 22 (B.C. C.A.); *R. v. Cook* (1983), 56 N.S.R. (2d) 449 (C.A.).

10. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, *supra*, note 6, sections 7, 9, 10 and 12.

11. But see *R. v. Powell* (1983), 10 W.C.B. 485 (B.C. Ct. Ct.), where a blood sample taken from an accused was excluded. The court held that the accused was not detained, and that therefore no section 9 or 10 violation took place, but that she did not give the sample voluntarily, and therefore it had been obtained by an unreasonable search and seizure, in violation of section 8.

Charter.¹² This of course means that social policy disputes concerning the ambit of, for example, police powers of arrest may receive their initial airing in a judicial forum, but are then susceptible of final resolution in the political arena. However, the attitude of Canadian legislators and the Canadian public to the use of the override provisions in the federal context has yet to be revealed in any practical sense. This mention of the legislative override as part of the general constitutional backdrop to the reform of criminal procedure is not to be construed as an indication that significant use of the override would be required in relation to any of the proposals in this Working Paper, but rather to indicate the breadth of the context in which many of the potentially controversial issues raised here might find their ultimate resolution.

Reference to the *Canadian Charter of Rights and Freedoms*¹³ and the principle of constitutional primacy now operative by virtue of the *Constitution Act, 1982*, invites immediate comparison with the pre-existing constitutional regime and, in particular, with the impact of the *Canadian Bill of Rights*¹⁴ on the law of arrest. It is trite to state that the present judicial capacity to strike down legislation which is deemed contrary to provisions of the Charter or to fashion a broad range of remedies for violations of Charter rights goes far beyond the authority which courts possessed or were willing to exercise under the *Canadian Bill of Rights*. Conventional wisdom would have us believe that the Charter has superseded the *Canadian Bill of Rights*, and so indeed it has in most respects. However, from the formal legal point of view, the *Canadian Bill of Rights* is still part of federal law,¹⁵ and law reform in the federal sphere must adhere to its tenets to the extent that they may differ from, while not contravening, the Charter. More importantly, law reform proposals in general and particularly proposals for reform of the law of arrest, must proceed with an awareness of how the courts treated certain issues turning on the interpretation of phrases in the *Canadian Bill of Rights* which have close counterparts in the *Canadian Charter of Rights and Freedoms*.

A. Life, Liberty and Security of the Person

The guarantee in section 7 of the *Canadian Charter of Rights and Freedoms* of the "right to life, liberty and security of the person" and the concomitant "right not to be deprived thereof except in accordance with the principles of fundamental justice" set the general parameters of the law of arrest. The exact scope of this section is a matter of extensive debate which is presently unilluminated by any authoritative judicial statements from the Supreme Court of Canada. There is a division of opinion as to whether the

12. *Supra*, note 10, s. 33. For an analysis of the use of this provision in Québec see *Alliance des Professeurs de Montréal v. Attorney-General of Québec* (1983), 9 C.C.C. (3d) 268 (Qué. S.C.).

13. Hereafter, the *Canadian Charter of Rights and Freedoms* may be referred to simply as the Charter.

14. *Canadian Bill of Rights*, R.S.C. 1970, Appendix III, as amended by 1970-71-72, c. 38, s. 29.

15. For a discussion of the Canadian judicial attitude to the *Canadian Bill of Rights*, see Walter S. Tarnopolsky, *The Canadian Bill of Rights*, 2nd ed. (Toronto: McLelland and Stewart, 1975).

section is to have a "substantive" as well as a "procedural" reach.¹⁶ Without entering upon the merits of the case to be made for either side in this debate, the following brief remarks are offered to outline the potential impact of section 7 on the law of arrest.

The right to life as guaranteed in section 7 of the Charter relates to arrest insofar as it limits the acceptable degree of force which can be used in effecting arrests. The use of deadly force is currently allowed under Canadian law, either in self-defence or to prevent the escape of suspects.¹⁷ However, it is arguable that the use of deadly force as a general rule to apprehend suspects is inconsistent with a guaranteed right to life, and that "fundamental justice" ought only to allow deadly force where the person making the arrest must act in self-defence. This controversy will not be pursued in this Working Paper, but is the subject of recommendations in the Law Reform Commission's Working Paper 29.¹⁸

The right to liberty is the section 7 provision which is most likely to be infringed by broad arrest powers or by the abuse, on the part of the arresters, of constitutionally valid arrest powers. This right, along with the right not to be arbitrarily detained or imprisoned in section 9, sets the bounds for legislative definition of the purposes of the law of arrest and the grounds justifying arrest in particular circumstances, since arrest is the classic form of interference by the state with the liberty of the citizen. The classic or paradigmatic nature of the relationship between liberty and the law of arrest is recognized in the drafting of the *European Convention* where Article 5 states in part: "No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law ..." ¹⁹ and there follows a list of situations of detention or arrest for purposes related to the administration of justice, educational supervision of minors, public health, public order, deportation and extradition. Given the paradigmatic role of arrest in relation to liberty, its purposes and the grounds justifying its use must clearly be in accordance with the principles of fundamental justice. This must be the standard by which reform proposals are to be judged. The Law Reform Commission of Canada ought not to advocate proposals which are contrary to the principles of fundamental justice in this regard, even if such proposals might be "reasonable limits demonstrably justified in a free and democratic society."

16. An example of the "procedural" interpretation may be found in *R. v. Potma* (1983), 18 M.V.R. 133 (Ont. C.A.) per Robins J. A. at p. 143; the more controversial "substantive" interpretation of section 7 was adopted in *Reference re s. 94(2) of the Motor Vehicle Act, R.S.B.C. 1979, c. 288, supra*, note 9, now on appeal to the Supreme Court of Canada. See also Morris Manning, *Rights, Freedoms and the Courts: A Practical Analysis of the Constitution Act, 1982* (Toronto: Emond-Montgomery, 1982), pp. 257-262.

17. See *Criminal Code*, R.S.C. 1970, c. C-34, s. 25(4).

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

19. *The European Convention for the Protection of Human Rights and Fundamental Freedoms*, the text of which (with extracts from the 1st and 4th Protocols) can be found *inter alia* in *The Canadian Charter of Rights Annotated* (Aurora: Canada Law Book Inc., 1984); and in R. M. McLeod, J. D. Takach, H. F. Morton and M. D. Segal, *The Canadian Charter of Rights: The Prosecution and Defence of Criminal and Other Statutory Offences* (Toronto: Carswell, 1983).

The right to security of the person may be given a broad interpretation to include, *inter alia*, economic, social and privacy aspects as well as physical integrity.²⁰ In the context of the law of arrest, it must mean that the use of force employed be consistent with the least possible interference with the bodily integrity of the suspect. Furthermore, following upon arrest the suspect's personal safety is to be assured, and conditions of custody are to be such as to maintain food, warmth, clothing, shelter and generally humane conditions.²¹

The concept of "principles of fundamental justice" takes a particular meaning in the context of arrest and detention. Certain general principles, however, are clearly applicable. Most important of these is that the notion of "principles of fundamental justice" establishes an external standard beyond the notion of "as authorized by law" or beyond the "deprivation by due process of law" as found in the *Canadian Bill of Rights* and restrictively interpreted by the Supreme Court of Canada.²² To the extent that the words "principles of fundamental justice" have been viewed from a procedural point of view, interpretation and application have tended to focus on their application to the adversarial trial process or the resolution of issues through the adversarial trial process. However, in applying such principles to arrest and detention, issues of fundamental justice may have to be resolved in the absence of the trial as the source of sanction or leverage for the parties involved. For example, in determining whether the procedures for taking breath samples are or have been followed in accordance with the principles of fundamental justice, the practical importance of the determination of the issue will have its sanction in whether evidence is admissible at trial. In determining whether a suspect who has been arrested has been arrested in accordance with the principles of fundamental justice, the results of such a determination are unlikely to be related to, or to influence, the outcome of any trial involving such an accused. Unlike evidence, an accused is not to be excluded from the trial.

While we acknowledge that the arrest context may differ from others for the purposes of defining applicable principles of fundamental justice, it is nevertheless useful to analyze the issue in terms of the familiar labels of *substantive* and *procedural* justice. Fundamental substantive justice would then relate to issues of the purpose of arrest or detention and the particular grounds justifying the exercise of arrest powers. Here, the standards of such fundamental substantive justice must relate to a legitimate purpose for the exercise of the power, such as compelling a recalcitrant accused to appear in court for trial, and establishing a sufficient degree of *certainty* concerning the suspect's having committed illegal conduct to justify the invocation of the criminal process. Fundamental procedural justice would relate to the standards governing the manner in which arrest or detention is carried out - whether the deprivation of liberty or security was necessary by comparison with a less "rights-intrusive" procedure, whether it was carried out with an explanation

20. See Patrice Garant, "Fundamental Freedoms and Natural Justice," being Chapter 9 in W. S. Tarnopolsky and G. A. Beaudoin, *The Canadian Charter of Rights and Freedoms: Commentary* (Toronto: Carswell, 1982).

21. *Ibid.*, p. 264.

22. See for example, *Curr v. The Queen*, [1972] S.C.R. 889.

of reasons, whether an opportunity to contact counsel or relatives was made available - all these aspects of arrest or detention are appropriately analyzed under the rubric of fundamental procedural justice.

B. Arbitrary Detention or Imprisonment

The right contained in section 9 of the Charter - "not to be arbitrarily detained or imprisoned" - had its Canadian forerunner in the *Canadian Bill of Rights* and has close parallels in the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights* which prohibit "arbitrary arrest or detention." The right not to be arbitrarily detained or imprisoned is also analogous to the rights relating to liberty and security of the person enunciated in section 7 of the Charter. For the purposes of the law of arrest, the scope of the words "arbitrarily" and "detained" is of the utmost importance.

The breadth of the key concept of detention has been a matter of some dispute in Canadian case-law both under the *Canadian Bill of Rights* and the Charter. A broad interpretation of detention might equate it with any forced limitation on one's freedom of movement or a compulsory restraint on one's liberty. Such an interpretation would potentially include such measures as random road-blocks, stops for breathalyzer demands, and the requirement for attendance to provide fingerprints, and tends to equate detention with any interference with what might be characterized as one's section 7 right to liberty. This broad interpretation of detention has been rejected by several Canadian courts which have held that road-blocks,²³ breathalyzer stops,²⁴ and attendance for fingerprinting are *not* detention.²⁵ While many recent Charter decisions follow this line, a significant number hold that some of those interferences which are "less than an arrest" do qualify as detention within the meaning of the Charter.²⁶ For the purposes of reform of the law of arrest, this controversy is clearly of great significance. Some forms of interference with individual liberty may be defined as "detention" under section 9. These will be unconstitutional if authorized or carried out arbitrarily, and even if constitutional, will trigger the concomitant rights to be informed of reasons, to retain and instruct counsel and to challenge the detention via *habeas corpus* (all found in section 10 of the Charter).²⁷ Other forms of interference with individual liberty may not be designated as detention and will be regulated under the Charter, if at all, by section 7.

23. *Knowlton v. The Queen* (1973), 21 C.R.N.S. 344 (S.C.C.).

24. *Chromiak v. The Queen* (1979), 12 C.R. (3d) 300 (S.C.C.).

25. *Re Jamieson v. The Queen* (1982), 70 C.C.C. (2d) 430 (Qué. S.C.).

26. See, for example, *R. v. Therens* (1983), 5 C.C.C. (3d) 409 (Sask. C.A.); *R. v. Ahearn* (1983), 4 C.C.C. (3d) 454 (P.E.I. S.C.); *R. v. McDonald* (1983), 9 W.C.B. 439 (N.B. Q.B.); *R. v. Watchel* (1983), 32 C.R. (3d) 264 (B.C. Prov. Ct.). On the other hand, the *Chromiak* decision is followed in *R. v. Altseimer* (1983), 1 C.C.C. (3d) 7 (Ont. C.A.); *R. v. Rahn* (1984), 7 D.L.R. (4d) 438 (Alta. C.A.); *R. v. Trask* (1983), 6 C.C.C. (3d) 132 (Nfld. C.A.). There is as yet no Supreme Court of Canada decision under the Charter on the matter, but *Therens* is currently on appeal.

27. On these issues see, generally, François Cheyrette, "Protection upon Arrest or Detention and against Retroactive Penal Law," being Chapter 10, in Tarnopolsky and Beaudoin, *supra*, note 20.

The second aspect of section 9 of the Charter which will impinge upon a reform of the law of arrest is the concept of arbitrariness. The drafting history of this section of the Charter and comparison with other international documents lead to the conclusion that the arbitrariness standard is one which promotes judicial control over the substantive content of authorizing legislation as well as over the manner of *enforcement* of statutes authorizing detention.²⁸ Wording which might merely have prohibited detention or imprisonment "except on grounds and in accordance with procedures established by law"²⁹ was found in the first draft and rejected in later discussion.³⁰ A useful criterion for the measurement of arbitrariness, and one which has received widespread judicial approval in Canada describes arbitrary conduct in the following manner: "...arbitrary conduct means unreasoned or unreasonable conduct, i.e., without reference to an adequate determining principle or standard."³¹ In the reform of the law of arrest this means that legislation setting out the purposes and grounds justifying arrest must do so with reference to adequate determining principles and standards. This is really to set out obvious expectations about such reform. However, it does indicate that the standard of arbitrariness in section 9 of the Charter establishes broad controlling principles which overlap with the similar principles of fundamental justice in section 7 insofar as the law of arrest is concerned.³²

C. Rights and Treatment on Arrest

The manner in which an arrest is to be effected, and the rights of a person arrested are governed by several provisions of the Charter. As was mentioned above, the section 7 right to security of the person may have an impact on the way in which a lawful arrest is to be carried out. Here we are concerned with the rights guaranteed in sections 10 and 12 of the Charter: the right to be informed of the reasons for arrest, the right to counsel and the right not to be subjected to any cruel or unusual treatment.

28. For example, in *R. v. Bowley* (1983), 10 W.C.B. 67 (Ont. Prov. Ct.) an accused who was kept at a police station overnight before being questioned, because there was no night shift of investigators, was held to be arbitrarily detained. Similarly, in *R. v. Corinthian* (1983), 10 W.C.B. 9 (Ont. Prov. Ct.), a woman detained by customs agents solely because she was black, had a loose blouse, and was arriving from Jamaica was held to be arbitrarily detained.

29. For the text of earlier drafts, see McLeod, *supra*, note 19, Appendix C.

30. Indeed, recent cases have argued that the fact that a detention is authorized under some statute is not a guarantee that the detention is not arbitrary. A court must scrutinize the procedure itself to see that it is not capricious, unreasonable, or unjustifiable (*Re Mitchell and The Queen* (1983), 6 C.C.C. (3d) 193 (Ont. H.C.J.)), though the court must not simply substitute its own opinion for that of the legislature (*R. v. Konechny* (1983), 38 C.R. (3d) 69 (B.C. C.A.)).

31. *Levitz v. Ryan* (1972), 9 C.C.C. (2d) 182 (Ont. C.A.).

32. For example, a number of cases have held that an accused held longer than the twenty-four hours allowed by the *Criminal Code* before being taken to a magistrate has been arbitrarily detained. See *R. v. Erickson* (1984), 11 W.C.B. 344 (B.C. Cty. Ct.); *R. v. Sybrandy* (1983), 9 W.C.B. 328 (Ont. Prov. Ct.); *R. v. Berry* (1983), 9 W.C.B. 440 (Ont. Prov. Ct.). See also, however, *R. v. Cogan* (1983), 11 W.C.B. 130 (Man. Prov. Ct.), which holds that although such action constitutes a violation of the Charter, the appropriate remedy is not a stay, but damages.

Paragraph 10(a) of the Charter states that on arrest or detention³³ the suspect has the right "to be informed promptly of the reasons therefor." This language was also found in subparagraph 2(c)(ii) of the *Canadian Bill of Rights*. The general right to be informed of the reasons for arrest was a common law condition of validity of a lawful arrest.³⁴ Entrenchment of this right in the Charter will provide potential for a wide range of sanctions through Charter section 24 against those who fail to give reasons on the making of an arrest.³⁵ Case-law, both prior and subsequent to the Charter, would lead one to conclude that, aside from the problem of the meaning of "arrest" or "detention" triggering the right, the major problem for reforming the law of arrest in this area will revolve round the word "promptly." Basically, the issue is how soon is prompt, and what are the circumstances which may stretch the idea of promptness.³⁶ A difficulty which arises only since the Charter, and results from the apparent limitation on the scope of the Charter's applicability in section 32, is whether private citizens making arrests would be bound to comply with this section of the Charter. Another issue is the content or degree of detail of "reasons" given by the arresting person. Here, there is clearly a distinction to be drawn between the reasons given for detention or arrest under paragraph 10(a) and the right under paragraph 11(a) of any person charged with an offence "to be informed without unreasonable delay of the specific offence."

The "right to counsel" on arrest or detention in its Charter incarnation is composed of two branches which are found in paragraph 10(b). The first is the right to retain and instruct counsel without delay, and the second is the right to be *informed* of the right to counsel. From a formal point of view, the reform of the law of arrest is not affected *per se* by the right to counsel.³⁷ Unlike the failure to give reasons, a failure to give an arrested person the opportunity to retain and instruct counsel will not result in the invalidity of the arrest *per se*. However, the behaviour of some Canadian courts to date would indicate that a result-oriented approach to the issue of the right to counsel may lead to a restrictive interpretation of the concept of "detention," thereby limiting the availability of the right to counsel.³⁸ Thus, to attempt reform of the definitions of arrest or detention without taking this situation into account would be counter-productive.

33. This right does not arise if one is issued a summons. *R. v. Baldinelli* (1982), 70 C.C.C. (2d) 474 (Ont. Prov. Ct.).

34. See discussion, *infra*, Chapter Two, Section VI.

35. See discussion, *infra*, Chapter Two, Section VIII.

36. In *R. v. Mason* (1983), 9 W.C.B. 384 (B.C. S.C.), for example, the accused was taken to the police station, having been told that he was wanted for questioning. In fact, he was a murder suspect, and was not informed of this until three hours later. Holding that "prompt" under the Charter was a more stringent requirement than "feasible" in section 29 of the *Criminal Code*, the court held that there were no circumstances justifying the delay, and therefore that the accused's paragraph 10(a) rights had been violated. Cf. *R. v. Raffai* (1983), 9 W.C.B. 206 (Sask. Prov. Ct.) where it was held that the right to instruct counsel "without delay" meant before one had changed one's legal position, but did not necessarily mean immediately.

37. Though some recent case-law suggests that the right to be informed of the right to counsel places a large responsibility on arresting officers. See, for example, *R. v. Ireland (No. 1)* (1983), 11 W.C.B. 172 (Ont. Dist. Ct.), and *R. v. Shields* (1983), 10 W.C.B. 120 (Ont. Cty. Ct.), both of which hold that, if it is clear that an accused does not know how to reach a lawyer, the police officer must assist him or her in doing so.

38. *Chromiak v. The Queen*, *supra*, note 24, exemplifies this approach.

The final Charter provision to be considered in relation to a suspect's rights on arrest or detention is the right in section 12 not to be subjected to any cruel and unusual treatment or punishment. This same language is also found in both the Canadian and American Bills of Rights. On the other hand, analogous provisions in the *U.N. Covenant on Civil and Political Rights* (Article 6) and the *European Convention* (Article 3) prohibit torture as well as inhuman or degrading treatment or punishment. While legislators reforming the law of arrest would certainly not contemplate language authorizing actions which might contravene this provision of the Charter, the activities of Canadian police forces have not been entirely without blemish in this regard.³⁹ The drafting of provisions governing the law of arrest must unfortunately, therefore, be undertaken with a view to minimizing the opportunity for such reprehensible conduct.

III. Federal and Provincial Arrest Powers

The constitutional authority to enact legislation authorizing arrest in relation to offences is to be found in the familiar provisions of sections 91 and 92 of *The Constitution Act, 1867*.⁴⁰ Federal authority to enact arrest legislation clearly falls under the heading in subsection 91(27) whereby the Parliament of Canada is empowered to enact legislation concerning:

The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

That the power of arrest is a question of "procedure in criminal matters" seems never to have been challenged. Thus, the arrest powers of the *Criminal Code* are well within the ambit of this heading of legislative competence.

However, other arrest powers not grounded in subsection 91(27) also exist. There are found in an number of federal and provincial Acts which fall under sections of *The Constitution Act, 1867* dealing with matters other than criminal law. For example, in the federal sphere, the arrest powers in the *National Defence Act*⁴¹ are, it may be argued, incidental to the purposes of the Act, which fall validly under subsection 91(7), giving the federal government authority over "Militia, Military and Naval Service, and Defence," while the arrest powers of the *Immigration Act*⁴² are incidental to federal authority under subsection 91(25), "Naturalization and Aliens."

39. For example, see Ontario Public Complaints Commissioner, *Report on the Investigation of Allegations Made against Some Members of the Metropolitan Toronto Police Hold-up Squad* (Toronto, 1984).

40. *The Constitution Act, 1867*, formerly known as the *British North America Act, 1867*, 30-31 Vict., c. 3 (U.K.), until its name was changed by section 53 of the *Constitution Act, 1982*, and proclaimed in force April 17, 1982. It is hereafter referred to simply as *The Constitution Act, 1867*.

41. *National Defence Act*, R.S.C. 1970, c. N-4, s. 132.

42. *Immigration Act*, R.S.C. 1970, c. I-2, s. 15.

In the provincial sphere, several subsections of section 92 are relevant. Some powers of arrest may be incidental to the subsection 92(14) authority over

The Administration of Justice in the Province, including the Constitution, Maintenance and Organization of Provincial Courts, both of Civil and Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

Certainly any provincial “penal” offences, as authorized under subsection 92(15),

The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section

might require arrest powers. Other provincial powers of arrest may be justified under subsection 92(7), dealing with hospitals and health care, or subsection 92(13), “Property and Civil Rights in the Province.”

To understand these non-*Criminal Code* arrest powers, it will be best to consider in more detail each of the provincial and federal spheres. The various powers of arrest can, in these two jurisdictions, be classed into a few categories, and usefully compared to see the various purposes that arrests are intended to serve. Provincial powers shall first be considered, followed by a study of federal non-*Criminal Code* arrest powers.⁴³

A. Provincial Arrest Powers

The powers of arrest found in provincial statutes fall into four main categories: arrest for prosecution, arrest to keep the peace, arrest for treatment, and arrest to facilitate process.

(1) Arrest for Prosecution

The primary intention behind the *Criminal Code* arrest powers is to apprehend and take before trial those who break any of the other provisions of the *Code*. The largest group of provincial arrest powers (about a third) work on the same model. Typically, an Act will proscribe certain forms of conduct, and then bestow a general non-warrant arrest power on peace officers to arrest those committing the offences.

43. This study is based on computer searches of federal statutes, computer searches of the statutes of British Columbia, Alberta, Manitoba, Ontario, and New Brunswick, and a manual search of the statutes of Nova Scotia. In the cases of the computer searches, the words “arrest” and “detention” were sought. This method does leave open the possibility that some arrest powers have been missed. In some cases, statutes describe what amounts to an arrest power without using the word “arrest”: the *Pawnbrokers Act*, R.S.C. 1970, c. P-5, s. 10(1), for example, provides that a pawnbroker who suspects that goods being pawned by a person do not belong to that person “may seize and detain such person and goods and shall deliver immediately such person and goods into the custody of a peace officer or constable.”

In addition to these specific powers, it is also generally the case that the *Criminal Code* arrest powers apply to provincial statutes. This is the case because of the *Summary Conviction or Offence Acts* of most of the provinces. The *Alberta Summary Convictions Act*, for example, incorporates by reference all of the provisions of the *Criminal Code* dealing with summary conviction matters, and in particular adopts sections 448 to 454, sections 457 to 457.6, and sections 457.8 to 459. The *Nova Scotia Summary Proceedings Act* adopts Part XXIV of the *Criminal Code*, which concerns summary conviction offences and which in turn adopts the arrest provisions of sections 449 and 450 of the *Criminal Code*.

However, one difference between provincial arrest powers for prosecution and *Criminal Code* arrest powers is in the types of offences for which arrests may take place. The provincial arrest powers are intended to help enforce regulatory Acts. In each province, there is a highway traffic Act, and a liquor control Act. The other provincial arrest powers are found in an assortment of wildlife, parks, forests, firearms, and trespass Acts. In each case, a certain type of behaviour is being regulated. The *Ontario Highway Traffic Act*⁴⁴ governs the use of roads, the requirements for licences, and similar things. The *New Brunswick Parks Act*⁴⁵ governs the use of park facilities, regulating building, fires, visits, and so forth. The *Alberta Wildlife Act*⁴⁶ sets out hunting seasons, allowable weapons, and so on. In each case, the offences for which one may be arrested are simply breaches of the rules set out in each Act.

One further difference between *Criminal Code* and provincial arrest powers flows from this regulatory nature. This difference is that the provincial arrest powers are generally bestowed not just on peace officers, but also on particular provincial officials. Forest services officers may arrest under the *New Brunswick Forest Fires Act*,⁴⁷ fishery officers under the *Alberta Fish Marketing Act*,⁴⁸ and so on. The reason for this is fairly clear: since the provincial Acts are essentially regulatory, those whose job it is to enforce the regulations must have the powers of arrest necessary for that task.

The *Criminal Code* at the moment has two sets of criteria for the use of arrest powers: peace officers can arrest someone found committing a summary conviction offence, or someone who is on reasonable and probable grounds believed to have committed an indictable offence. These same two standards, in the same or similar words, are found in the provincial offences. There are some small variations: the *Manitoba Wildlife Act*⁴⁹ allows for arrest "upon witnessing" a violation of the Act, and the *British Columbia*

44. *Highway Traffic Act*, R.S.O. 1980, c. 198.

45. *Parks Act*, S.N.B. 1980, c. P-2.1.

46. *Wildlife Act*, R.S.A. 1980, c. W-9.

47. *Forest Fires Act*, R.S.N.B. 1973, c. F-20, s. 37.

48. *Fish Marketing Act*, R.S.A. 1980, c. F-12, s. 15.

49. *The Wildlife Act*, R.S.M. 1970, c. W140, s. 70.

*Liquor Control and Licensing Act*⁵⁰ allows an officer to arrest anyone “suspected of contravening” a particular section. However, the intent behind the phrases seems to be the same.⁵¹

One final comparison to be made between provincial and *Criminal Code* arrest powers is the disposition of the accused following an arrest. In this area, there is very little difference between the provincial arrest powers and those in the *Criminal Code*. All provinces have their own provincial offences Act, setting out provisions for what is to be done following arrests. Some provinces set out fully their own rules, while others largely adopt sections of the *Criminal Code*. In either event, there is very little substantive variation from jurisdiction to jurisdiction.

(2) Arrest to Keep the Peace

The *Criminal Code* provisions relating to arrest for breach of the peace are problematic, in that they do not define what constitutes a breach of the peace. To a lesser extent, this same difficulty is found in the case of provincial arrest powers to keep the peace. These powers do not do anything to clarify what constitutes a breach of the peace. However, the provincial powers are less problematic, because they are more closely circumscribed. These arrest powers are the only other significant group of provincial non-warrant arrest powers, but each of them is closely limited as to the situations to which it is applicable.

The paradigm is the provincial or municipal election Act of each province examined, excepting Ontario.⁵² These Acts give to returning officers (and occasionally other officials) the power to detain anyone disturbing the “peace and good order” at an election until the polls close. In essence, this is really a power of detention rather than arrest, since it is simply aimed at preventing disturbances during the election, rather than at prosecution. It is in this sense that the powers are limited: the Act does not make any clearer what constitutes a breach of the peace, but the power to arrest exists only in a few persons for a short time and for a particular purpose. Similar to these elections Acts are: the *Alberta Railway Act*,⁵³ allowing train conductors to eject passengers creating a disturbance (when the train next stops); the *Ontario Legislative Assembly Act*,⁵⁴ *Small Claims Court Act*,⁵⁵

50. *Liquor Control and Licensing Act*, R.S.B.C. 1979, c. 237, ss. 43, 47.

51. There is, however, no clear rule by which the different criteria are assigned. In the *Criminal Code*, the stricter “finds committing” clause is used for the less serious, summary conviction offences, while the wider “reasonable and probable grounds” clause is used for more serious offences. Among the provincial offences, the wider ground is used for all the highway traffic Acts, but also for several other Acts, such as the *Alberta Fish Marketing Act*, R.S.A. 1980, c. F-12, which do not seem to set out comparatively more serious offences.

52. *Election Act*, R.S.B.C. 1979, c. 103; *Municipal Act*, R.S.B.C. 1979, c. 290; *Election Act*, R.S.A. 1980, c. E-2; *The Election Act*, R.S.M. 1970, c. E30; *The Local Authorities Elections Act*, S.M. 1970, c. 40, s. 69(2); *Elections Act*, R.S.N.B. 1973, c. E-3; *Municipal Elections Act*, S.N.B. 1979, c. M-21.01; *Elections Act*, R.S.N.S. 1967, c. 83; *Municipal Act*, R.S.N.S. 1967, c. 192.

53. *Railway Act*, R.S.A. 1980, c. R-4, ss. 200, 201.

54. *Legislative Assembly Act*, R.S.O. 1980, c. 235, s. 47.

55. *Small Claims Court Act*, R.S.O. 1980, c. 476, s. 182.

and *Provincial Courts Act*,⁵⁶ and the *British Columbia County Court Act*,⁵⁷ all of which give power to particular people to keep order in particular circumstances.

In addition to these powers, powers of arrest which amount to powers of temporary detention are also found in Manitoba, New Brunswick, and Alberta Acts dealing with intoxicated persons.⁵⁸ These Acts allow peace officers to arrest people who are intoxicated in public and are creating a nuisance. The period of detention is limited, and the arrest is not intended to lead towards a prosecution - it is merely aimed at getting drunk people off the streets until they are sober.

(3) Arrest for Treatment

This category of provincial arrest powers is almost a subdivision of the peace-keeping arrest powers, but is distinct enough to rate a separate heading. All of the provinces studied have one or more Acts allowing for people to be arrested or detained for purposes of medical treatment of some description. Any long-term detention requires a court order, but short-term detentions can occur without a warrant. Not surprisingly, given the aim of the Acts containing these powers, they have no real counterpart in the *Criminal Code*. Another consequence of the different intention of these Acts - health care, rather than punishment - is that even the short-term detentions are longer than those allowed in the *Criminal Code* or in provincial offence Acts. Initial detentions of up to three days are not uncommon. Indeed, the *Ontario Mental Health Act*⁵⁹ allows for an initial detention for observation of 120 hours.

Each of the provinces has some sort of mental health Act, allowing for the detention under some circumstances of people seeming to suffer from a mental illness. In addition to these, most provinces have Acts governing treatment for venereal disease or some other communicable disease, and some have Acts for the detention of intoxicated persons on a long-term basis.

Compared to the *Criminal Code*, provincial powers of arrest for treatment are very broad. Ontario's *Venereal Diseases Prevention Act*⁶⁰ allows a medical health officer to order the arrest of anyone who has been named under oath as a contact and who, in the medical health officer's opinion, has a history showing he or she may have venereal disease. This Act also carries the power to enter any house or dwelling without a warrant to examine people and order the removal of anyone having venereal disease. Similarly, the *Manitoba Narcotic Drug Addicts Act*⁶¹ allows a medical officer, when "credibly

56. *Provincial Courts Act*, R.S.O. 1980, c. 398, s. 20.

57. *County Court Act*, R.S.B.C. 1979, c. 72, s. 20.

58. *Liquor Control Act*, R.S.A. 1980, c. I-17, s. 77; *The Intoxicated Persons Detention Act*, R.S.M. 1970, c. 190, ss. 2, 3; *Intoxicated Persons Detention Act*, R.S.N.B. 1973, c. 1-14, s. 2.

59. *Mental Health Act*, R.S.O. 1980, c. 262, ss. 9-11.

60. *Venereal Diseases Prevention Act*, R.S.O. 1980, c. 521, ss. 4, 27.

61. *The Narcotic Drug Addicts Act*, R.S.M. 1970, c. N10, s. 3.

informed'' that a person is an addict, to order that person to submit to treatment until cured, with the threat of detention for refusal or failure of the treatment.

(4) Arrest to Facilitate Process⁶²

The *Criminal Code* contains a great number of provisions allowing for what might be called secondary arrests of an individual resulting from a primary offence. Bench warrants may be issued in a wide range of circumstances: if an accused fails to respond to an appearance notice or summons, or fails to return after a recess at trial, or violates some condition of parole, he or she may be re-arrested. Many similar provisions exist in provincial Acts, but as a rule, rather than helping to facilitate the prosecution of criminal offences, they exist to facilitate some civil process. Given the jurisdictions of the federal and provincial governments, of course, this should come as no surprise.

Some of the provincial powers to facilitate process are essentially criminal in nature, and are very similar to the *Criminal Code* provisions. The British Columbia *Correction Act*⁶³ allows for the arrest of anyone breaking the conditions of his or her parole. The New Brunswick *Summary Convictions Act*⁶⁴ and the Ontario *Provincial Offences Act*⁶⁵ allow for the arrest of someone who fails to answer a summons or recognizance. More frequently, however, it is some civil process which is being facilitated. Indeed, as a rule the potential detention is only to enforce compliance with some court order, and is conditional on non-compliance, rather than being intended as a punishment.

There are really two subcategories into which this category should be divided. Provincial Acts can be aimed either at the enforcement of a particular individual's civil rights, or they can be aimed at easing the function of some provincial official.

Typical of the Acts to enforce civil rights are the Ontario *Family Law Reform Act*,⁶⁶ *Fraudulent Debtors Arrest Act*,⁶⁷ and *Master and Servant Act*.⁶⁸ Each of these allows for the arrest of a person who owes money and is thought about to leave the province. Similarly, the Manitoba *Parents' Maintenance Act*,⁶⁹ the Nova Scotia *Collection Act*,⁷⁰

62. This is an instance where arrest powers not turned up by the computer search might still be found. It is noteworthy that the list of arrest powers in this category for Nova Scotia, which was searched manually, is about double the size of the other provincial lists. This is particularly a category where the arrest powers are phrased in different language: typical is the Nova Scotia *Parents' Maintenance Act*, R.S.N.S. 1967, c. 221, which provides, when a person has ignored a summons, that "the magistrate may issue a warrant to apprehend such person and bring him or her before the magistrate to explain the default and to be further dealt with according to law."

63. *Correction Act*, R.S.B.C. 1979, c. 70, s. 27.

64. *Summary Convictions Act*, R.S.N.B. 1973, c. S-15, ss. 11, 12, 29.

65. *Provincial Offences Act*, R.S.O. 1980, c. 400, ss. 41, 55, 139.

66. *Family Law Reform Act*, R.S.O. 1980, c. 152, ss. 24, 28, 29, 58.

67. *Fraudulent Debtors Arrest Act*, R.S.O. 1980, c. 177, ss. 2, 41.

68. *Master and Servant Act*, R.S.O. 1980, c. 257, s. 4.

69. *The Parents' Maintenance Act*, R.S.M. 1970, c. P10, s. 7.

70. *Collection Act*, R.S.N.S. 1967, c. 39.

and the British Columbia *Small Claim Act*⁷¹ all allow for the arrest of individuals in order to enforce claims of other individuals against them. The New Brunswick *Trespass Act*⁷² allows the owner or occupier of lands to arrest any trespasser who refuses to give his or her name, although the trespasser must be released upon compliance. In addition to these, all of the provinces have, in various securities Acts, provisions for the interprovincial enforcement of warrants for securities offences.

The provincial officials' tasks which are assisted by arrest powers are found in the New Brunswick *Assignments and Preferences Act*,⁷³ the Manitoba *Surveys Act*,⁷⁴ and the British Columbia *Land Survey Act*⁷⁵ and *Coroners Act*.⁷⁶ Each of these Acts allows for the arrest of persons who fail to comply with requests of various provincial officials, either by refusing to serve on a coroner's jury, failing to assist a surveyor in determining a boundary by providing documents, or similar acts.

B. Federal Non-Criminal Code Arrest Powers

The federal powers of arrest not found in the *Criminal Code* fall into five categories: arrest for prosecution, arrest to keep the peace, powers of detention, arrest to facilitate process, and other codes.

(1) Arrest for Prosecution

This category is again the major source of alternate arrest powers. There are at least thirteen federal Acts containing powers of arrest relating specifically to infractions against those Acts.⁷⁷ All of these powers of arrest are executable without warrant. In addition, there are four treaties relating to fishing and sealing which include limited arrest powers, again without warrant.

In the provincial category, all of the Acts in this section are related to regulatory offences. The situation is somewhat more complicated in the federal sphere. Many of the Acts are simply regulatory. The *Explosives Act*,⁷⁸ *Fish Inspection Act*,⁷⁹ *Fisheries*

71. *Small Claim Act*, R.S.B.C. 1979, c. 387.

72. *Trespass Act*, S.N.B. 1983, c. T-11.2, s. 7.

73. *Assignments and Preferences Act*, R.S.N.B. 1973, c. A-16, s. 26.

74. *The Surveys Act*, R.S.M. 1970, c. S240, ss. 22, 63.

75. *Land Survey Act*, R.S.B.C. 1979, c. 216, s. 9.

76. *Coroners Act*, R.S.B.C. 1979, c. 68, s. 32.

77. Once again, this is a category in which additional arrest powers might be found. Many federal statutes refer not to the power to arrest, but to the power to apprehend.

78. *Explosives Act*, R.S.C. 1970, c. E-15.

79. *Fish Inspection Act*, R.S.C. 1970, c. F-12.

Act,⁸⁰ *Animal Contagious Diseases Act*,⁸¹ *Meat and Canned Foods Act*,⁸² or *National Parks Act*,⁸³ for example, set out offences which are regulatory in nature, governing the manufacture and sale of explosives, licensing and standards in various fields, and so on. Other Acts extend these regulations to and beyond the borders of Canada. The *Customs Act*⁸⁴ and *Excise Act*⁸⁵ for example, set rules governing the importation of various items. The *Coastal Fisheries Protection Act*⁸⁶ allows for the arrest of foreign ships illegally straying into Canadian waters, or not obeying regulations while present. Similarly, Acts implementing four conventions - the *North Pacific Fisheries Convention Act*,⁸⁷ the *Northern Pacific Halibut Fisheries Convention Act*,⁸⁸ the *Pacific Fur Seals Convention Act*,⁸⁹ and the *Pacific Salmon Fisheries Convention Act*⁹⁰ - provide for the arrest of anyone from the convention countries violating the terms of the agreement (though the subsequent disposition of arrested individuals depends on their nationality). But other Acts provide for arrest because of acts that are more criminal than regulatory in nature. The *Canada Elections Act*⁹¹ allows for the arrest of anyone attempting to vote illegally. The *Canada Shipping Act*⁹² authorizes the arrest of anyone interfering with a ship or crew, or illegally boarding a ship. The *Official Secrets Act*⁹³ punishes possible offences against national security. Thus, the federal powers of arrest outside of the *Criminal Code* are not as neatly categorized as the provincial arrest powers.

In other respects, however, this category does not differ greatly from the provincial arrest powers. It is once again the case that the powers of arrest are given to police officers, and to officials who will need to enforce the particular Acts. Thus, the appropriate inspectors may arrest under the *Animal Contagious Diseases Act*, the *Fish Inspection Act*, or the *Meat and Canned Foods Act*; customs and excise officers may arrest under the *Customs Act* and the *Excise Act*; the master of a ship may arrest under the *Canada Shipping Act*.

Conditions for arrest similar to those in the *Criminal Code* are also found in the federal Acts. Most common is arrest on a "finds committing" basis, though some variation in wording occurs: the *Excise Act*, for example, refers to arrest of someone the officer "detects in the commission" of the offence, while the *Fisheries Act* allows for the arrest

80. *Fisheries Act*, R.S.C. 1970, c. F-14.

81. *Animal Contagious Diseases Act*, R.S.C. 1970, c. A-13.

82. *Meat and Canned Foods Act*, R.S.C. 1970, c. M-6.

83. *National Parks Act*, R.S.C. 1970, c. N-13.

84. *Customs Act*, R.S.C. 1970, c. C-40.

85. *Excise Act*, R.S.C. 1970, c. E-12.

86. *Coastal Fisheries Protection Act*, R.S.C. 1970, c. C-21.

87. *North Pacific Fisheries Convention Act*, R.S.C. 1970, c. F-16.

88. *Northern Pacific Halibut Fisheries Convention Act*, R.S.C. 1970, c. F-17.

89. *Pacific Fur Seals Convention Act*, R.S.C. 1970, c. F-33.

90. *Pacific Salmon Fisheries Convention Act*, R.S.C. 1970, c. F-19.

91. *Canada Elections Act*, R.S.C. 1970 (1st Supp.), c. 14.

92. *Canada Shipping Act*, R.S.C. 1970, c. S-9.

93. *Official Secrets Act*, R.S.C. 1970, c. O-3.

of anyone the officer finds committing or preparing to commit an offence. Grounds similar to reasonable and probable cause are found in the *Coastal Fisheries Protection Act*, which allows an officer to arrest anyone he “reasonably suspects” of an offence against the Act, and the *Explosives Act* and *Customs Act*, which allow arrest of someone the officer suspects of an offence. The widest arrest grounds, perhaps not surprisingly, are found in the *Official Secrets Act*, which allows for the arrest of anyone found committing, reasonably suspected of having committed, having attempted to commit, or being about to commit an offence against the Act. Many of these variations are not very significant, although arrest merely on suspicion is a power which could easily be abused.

(2) Arrest to Keep the Peace

This category of federal arrest powers is a very small one, and is very similar to the provincial arrest powers for the same purpose. Only two federal Acts, apart from the *Criminal Code*, provide for arrest for purposes of keeping order: the *Canada Elections Act*⁹⁴ and the *Canada Temperance Act*.⁹⁵ Both Acts envision the same circumstances: that a returning officer at an election may need to keep order at a polling station by arresting trouble makers. The *Canada Elections Act* gives a returning officer power to arrest anyone “disturbing the peace and good order” at an election, while the *Canada Temperance Act* extends the same power to the returning officer at a referendum, to arrest for disturbances at the polling. In each case, the returning officer has the power to imprison the offender until the close of polls.

The *Canada Elections Act* also bestows one further arrest power, which is partly for keeping the peace, and partly for purposes of prosecution. A revising officer who is correcting voters lists after an enumeration may appoint constables, who have the power to arrest anyone attempting to impersonate another person, or creating a disturbance or impeding the revising process.

(3) Powers of Detention

This is a category which is similar to the preceding one, but because it deals with longer-term detentions and is not generally based on keeping the peace (except in a very wide sense), it is worth a separate category of its own. Several federal statutes create powers to detain individuals for particular purposes for periods of days, without arresting them on any charge, or indeed without having an arrest or offence in view. These powers exist both with and without warrants.

Powers not based on a warrant are found in the *Immigration Act, 1976*⁹⁶ and *Quarantine Act*.⁹⁷ Both of these statutes have similar purposes: to prevent the entry into Canada

94. *Canada Elections Act*, R.S.C. 1970 (1st Supp.), c. 14, ss. 18, 49(2).

95. *Canada Temperance Act*, R.S.C. 1970, c. T-5, s. 76.

96. *Immigration Act, 1976*, S.C. 1976-77, c. 52, ss. 12, 20, 23.

97. *Quarantine Act*, R.S.C. 1970 (1st Supp.), c. 33, ss. 8, 8.1.

of “undesirable” people. The *Quarantine Act* allows a quarantine officer to require anyone who he reasonably believes is ill, has or carries an infectious disease, is infested with insects which carry disease, or has been recently near a person meeting the second or third conditions, to submit to a medical examination. If the person refuses the examination, or is confirmed to be infectious by the examination, the quarantine officer can vaccinate the person, or detain the person for the incubation period of the disease. A quarantine officer has a similar power in the case of dangerous, non-infectious diseases, to require an examination, with detention for default (or illness). The *Immigration Act, 1976* allows an immigration officer to detain temporarily someone entering the country until he or she can be examined by a senior immigration officer. The senior immigration officer must hold an inquiry as soon as reasonably practicable, and may only detain the person, pending that inquiry, if there is reason to believe that he or she would present a danger to the public, or would not appear at the inquiry. In the case of an American citizen, the person must be allowed to return to the United States until an adjudicator is available.

The only other powers of detention in federal statutes are based on court orders. Under the *Young Offenders Act*,⁹⁸ as under the *Criminal Code*, offenders can be detained in order to determine their fitness to stand trial. Under yet-to-be-proclaimed sections of the *Narcotic Control Act*,⁹⁹ offenders may, after conviction, be detained for observation for up to seven days, and may be detained indeterminately for treatment.

(4) Arrest to Facilitate Process

Like the provincial arrest powers to facilitate process, the majority of such powers are not aimed at compelling appearance for trial at first instance, but at other purposes. The *Young Offenders Act*¹⁰⁰ contains some provisions for arrest because of breach of release or parole conditions, but for the most part the arrest powers in federal statutes are intended to ease the task of those performing certain functions.

The *Land Titles Act*,¹⁰¹ for example, allows for the arrest and imprisonment for up to six months of anyone refusing to answer a summons to deliver up needed certificates. The *Customs Act*¹⁰² allows for the arrest and detention of anyone feared likely to leave the province without satisfying a penalty or forfeiture that is threatened. The *Bankruptcy Act*¹⁰³ and *Winding-up Act*¹⁰⁴ allow for the arrest of anyone thought about to abscond with company property after an assignment or bankruptcy, or failing to attend as a witness at court. The *Immigration Act, 1976*¹⁰⁵ includes a number of arrest powers to enforce

98. *Young Offenders Act*, S.C. 1980-81-82-83, c. 110, s. 13.

99. *Narcotic Control Act*, R.S.C. 1970, c. N-1, ss. 16, 17.

100. *Young Offenders Act*, S.C. 1980-81-82-83, c. 110, ss. 10, 23, 35.

101. *Land Titles Act*, R.S.C. 1970, c. L-4, s. 155.

102. *Customs Act*, R.S.C. 1970, c. C-40, s. 256.

103. *Bankruptcy Act*, R.S.C. 1970, c. B-3, ss. 134, 136, 138.

104. *Winding-up Act*, R.S.C. 1970, c. W-10, ss. 118, 120.

105. *Immigration Act, 1976*, S.C. 1976-77, c. 52, ss. 104, 105, 107, 114.

attendance at hearings. In each of these cases, the arrest and detention are not intended as a punishment, but rather as a means of enforcing compliance with the requirements of particular Acts and officials. In the *Land Titles Act*, for example, the detention must cease if the required document is produced.

(5) Other Codes

Unique to the federal arrest powers is a group of statutes that sets up what might be thought of as parallel codes, each governing certain specific areas. These codes are found in the *National Defence Act*,¹⁰⁶ the *Royal Canadian Mounted Police Act*,¹⁰⁷ the *Visiting Forces Act*,¹⁰⁸ the *Canada Shipping Act*,¹⁰⁹ and the *Government Vessels Discipline Act*.¹¹⁰ Each code governs only a certain group of people: for example, the *National Defence Act* sets out "service offences," and provides that some armed services personnel have the authority to arrest other personnel committing any such offence. The *Canada Shipping Act* allows for the arrest, by the Master, Mate, or Ship's Husband of a ship, of anyone deserting that ship. The *Royal Canadian Mounted Police Act* sets out a number of service offences that apply to RCMP officers.

In general, the purpose behind these acts is one of internal discipline. Although prosecutions are possible, and some of the offences might be seen as criminal - accepting a bribe under the *Royal Canadian Mounted Police Act* for example - many are simply to keep order. The *Government Vessels Discipline Act*, for example, allows for the prosecution of someone deserting a ship, but also allows for a justice of the peace or RCMP commissioner simply to send the offender back to his ship.

C. Conclusion

Before we leave this subject, two final things should be noted: the relative frequency of the use of arrest powers, and the relationships among these powers.

The *Criminal Code* arrest powers are by far the most frequently used. In 1980, there were 2,692,159 offences committed in Canada. Of these, 452,812 were offences against provincial statutes, primarily liquor offences. Federal offences other than drug offences (which use *Criminal Code* arrest powers) made up 45,589 of the total. *Criminal Code* offences accounted for 2,045,399. Thus, the arrest powers in the *Criminal Code* are by far the most significant.¹¹¹

106. *National Defence Act*, R.S.C. 1970, c. N-4.

107. *Royal Canadian Mounted Police Act*, R.S.C. 1970, c. R-9.

108. *Visiting Forces Act*, R.S.C. 1970, c. V-6.

109. *Canada Shipping Act*, R.S.C. 1970, c. S-9.

110. *Government Vessels Discipline Act*, R.S.C. 1970, c. G-12.

111. *The Criminal Law in Canadian Society*, *supra*, note 4.

The *Criminal Code* powers, in fact, have a direct impact on the other two spheres. Subsection 27(2) of the *Interpretation Act*¹¹² provides that:

All the provisions of the *Criminal Code* relating to indictable offences apply to indictable offences created by an enactment, and all the provisions of the *Criminal Code* relating to summary conviction offences apply to all other offences created by an enactment, except to the extent that the enactment otherwise provides.

Thus, all federal Acts creating offences but not creating arrest powers use the *Criminal Code* powers of arrest.

The relationship between the *Criminal Code* and provincial arrest powers is not as straightforward. As noted previously, several provinces incorporate sections of the *Criminal Code* into their provincial offence Acts. In these cases, all provincial statutes setting out offences but not creating specific arrest powers will use the *Criminal Code* arrest powers. An alternative to this, however, is found in the Ontario *Provincial Offences Act*.¹¹³ Section 2 of that Act notes that the purpose of the Act is to replace the old procedures, including the incorporated sections of the *Criminal Code*, "with a new procedure that reflects the distinction between provincial offences and criminal offences." In this new procedure, there are generally no powers of arrest without warrant.¹¹⁴ Those committing offences are to be given offence notices or summonses, and arrest warrants can be issued if these are ignored. However, at first instance no power of arrest exists except where specially created in particular Acts.

It is important to stress at this juncture the fact that this Working Paper is concerned with arrest for the purposes of *criminal procedure only*. It may be that the adoption by the federal Parliament of recommendations for reform proposed here may necessitate a re-examination of the policy of the federal *Interpretation Act* or provincial summary proceedings Acts which adopt *Criminal Code* arrest powers for the prosecution of regulatory offences. This caveat will not be reiterated elsewhere in this Working Paper, but its importance is not to be underestimated.

112. *Interpretation Act*, R.S.C. 1970, c. I-23.

113. *Provincial Offences Act*, R.S.O. 1980, c. 400.

114. Limited exceptions to this rule are found in subsection 128(2) and section 129, which respectively allow arrest without warrant by a police officer who has reasonable and probable grounds to believe that a warrant is in force in Ontario, or by anyone who has reasonable and probable grounds to believe that someone has committed an offence and is escaping from and freshly pursued by a police officer who has lawful authority to arrest that person.

CHAPTER TWO

Arrest in Criminal Law

I. Introduction

The purpose of this chapter is briefly to outline the law of arrest and detention in Canada, with particular reference to criminal procedure in the constitutional sense, over which the Parliament of Canada has legislative authority. The purposes, scope and definition of arrest are discussed in relation to detention or interference with individual liberty which may not constitute full arrest. The general framework of the arrest powers, with and without warrant, is then described before a detailed analysis of the grounds for arrest without warrant is made. The manner of effecting a legal arrest is then set out, including notice requirements and the right to enter upon private property to effect arrest. The chapter concludes with a discussion of the sanctions by which the criminal justice system seeks to maintain the integrity of the arrest procedures as described.

II. Arrest and Detention: Purposes and Definitions

As is clear from the preceding chapter, the purpose of an arrest or detention can vary broadly with the purpose of the statute which establishes the power. Broadly speaking, legitimate purposes of arrest or detention might be classified as either protective or repressive.¹¹⁵ Protective purposes, which may also be described as preventive, include

115. See L. H. Leigh, *Police Powers in England and Wales* (London: Butterworths, 1975), p. 29 where the author uses the terminology "preventive, punitive and protective." Some of these broad purposes for arrest or detention which are not related to criminal procedure *per se* are recognized as legitimate in *The European Convention for the Protection of Human Rights and Fundamental Freedoms*, Article 5 of which states in part:

No one shall be deprived of his liberty save in the following cases and in accordance with procedure prescribed by law:

- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

the invocation of the power to arrest or detain in order to prevent the commission of an offence,¹¹⁶ terminate a breach of the peace,¹¹⁷ or to detain a person who may constitute a danger to himself or to others.¹¹⁸ Repressive purposes are those where the object of arrest or detention is to compel attendance in court for the trial of an offence or to gain evidence in relation to an offence. The *Criminal Code* uses the word "arrest" in authorizing the interference with a person's liberty for some protective purposes and some repressive purposes. The *Criminal Code* also authorizes interference with liberty for repressive purposes which are nonetheless *not* labelled "arrest" and, more surprisingly, have not been labelled "detention." Conversely, it is clear that arrest for some protective purposes, as broadly defined above, is not properly a matter of criminal procedure at all and is not found in the *Criminal Code*, but rather in other federal and provincial statutes.

In order to sort out present terminology in relation to these diverse purposes, this section of the present chapter will examine the purposes of "arrest" as the word is presently used in the *Criminal Code*, and will then examine Canadian judicial pronouncements on the meaning of "arrest" in the context of criminal procedure. Secondly, the concept of "detention" will be analyzed in the context of the present case-law and in relation to examples of interference with liberty which are not "arrest," as understood by Canadian judges in interpreting police powers. Finally, this section must contrast the narrow judicial interpretation of the words "arrest" and "detention" for purposes of criminal proceedings with the broad meaning traditionally given to the notion of "arrest" in civil actions for false imprisonment.

A. The Purpose of Arrest

The primary purpose of arrest in criminal procedure is to compel the appearance of an accused to stand trial for the commission of an offence.¹¹⁹ Thus, the main sections authorizing arrest in the *Criminal Code* appear under the title "Compelling Appearance of Accused before Justice and Interim Release."¹²⁰ However, arrest is only one mechanism whereby this purpose can be accomplished. The *Criminal Code* also provides for compelling the appearance of an accused by appearance notice¹²¹ or summons.¹²² Since these methods are less invasive of the individual's liberty than arrest, it is clear that arrest is to be used where it is feared that the accused will not respond to a summons or appearance

116. E.g., *Criminal Code*, R.S.C. 1970, c. C-34, paragraph 450(1)(a).

117. E.g., *Criminal Code*, R.S.C. 1970, c. C-34, subsection 31(1).

118. This is typical of provincial mental health legislation described in the previous chapter where the label "commitment" may be used, rather than "arrest" or "detention" but where the immediate effect on the liberty of the subject is the same.

119. See D. J. Pavlich, "Law of Arrest," Chapter III of Jerome J. Atrens, Peter T. Burns, and James P. Taylor, *Criminal Procedure: Canadian Law and Practice* (Vancouver: Butterworth, 1981), p. III-5.

120. This is the heading under Part XIV of the *Criminal Code*.

121. *Criminal Code*, R.S.C. 1970, c. C-34, section 451.

122. *Criminal Code*, R.S.C. 1970, c. C-34, section 455.3.

notice. *Criminal Code* paragraph 450(2)(e) directs the police officer to issue an appearance notice where “he has no reasonable grounds to believe that, if he does not so arrest the person, the person will fail to attend in court” Indeed, the appearance notice mechanism was established by amendments to the *Criminal Code* known as the *Bail Reform Act*,¹²³ the primary purpose of which was to prevent unnecessary pretrial incarceration of accused persons. However, this reform also made implicit certain secondary purposes for arrest which had previously been part of police motivation but never recognized in legislation. In structuring the police officer’s discretionary decisions between making an arrest or issuing an appearance notice to a suspect in less serious offences, *Criminal Code* subsection 450(2) directs the officer to consider the “public interest” defined *inter alia*, by the need to:

- (i) establish the identity of the person.
- (ii) secure or preserve evidence of or relating to the offence, or
- (iii) prevent the continuation or repetition of the offence or the commission of another offence
....¹²⁴

These secondary purposes give legitimacy to various police practices which amount to holding a suspect for purposes of investigation rather than merely compelling appearance, but *only* where there are grounds for belief that an offence has been committed. Establishing the identity of the accused or the suspect, might be viewed merely as a necessary pre-condition to the issuance of a summons or an appearance notice; however, in the investigation of certain offences this process might involve procedures of a potentially wide-ranging nature. Certainly the direction to arrest rather than issue an appearance notice, where there is a public interest “in obtaining or preserving evidence” relating to the offence, might be invoked to justify maintaining a subject in custody while various premises or witnesses are investigated; such procedures become increasingly removed from the primary purpose for the arrest, that of compelling attendance to answer to the charge.

If the primary purpose of an arrest is to secure attendance in court where the suspect is to be charged with the commission of any offence, there flows the logical proposition that an arrest is only justified where there are grounds to believe that the suspect has committed an offence.¹²⁵ This view of the primary purpose of the law of arrest assumes that the nature of criminal procedure and the role of the state in this context is primarily “repressive.” However, to the extent that there is a “protective” function for police officers and a duty to intervene in situations to prevent crime, there is a narrow range of exceptional circumstances under which an arrest may occur where a person is about to commit an offence and where such person, not having committed an offence, will not be “compelled to appear” for trial.¹²⁶ On the assumption that the grounds for an arrest

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

124. *Criminal Code*, R.S.C. 1970, c. C-34, paragraph 450(2)(d).

125. This is the general basis for the different grounds of arrest set out in *Criminal Code*, R.S.C. 1970, c. C-34, sections 449, 450.

126. This is the basis for the present power to arrest where a police officer has reasonable and probable

exist, the secondary purposes enumerated above determine whether an arrest is necessary in relation to the less intrusive ways in which to compel attendance or satisfy investigative needs.

B. Defining Arrest

If stating the purposes of arrest is a relatively straightforward exercise, defining arrest and separating arrest from the related concepts of detention and custody have provided the courts with surprising difficulty. The reasons for the difficulties are found in the varying circumstances in which courts have had to grapple with these concepts and the differing interests to be protected in these cases. The necessity to define arrest may arise in a civil action for false arrest,¹²⁷ in a criminal action for assaulting or obstructing a police officer in the execution of duty,¹²⁸ or a criminal proceeding which alleges an escape from lawful custody.¹²⁹ A definition of arrest elaborated in one context may not fit well in another. For example, in false imprisonment suits, false arrest can be defined broadly to encompass virtually any forced limitation upon physical freedom which is not based on lawful authority to interfere.¹³⁰ On the other hand, legally authorized restraint upon a person's physical freedom which would amount to false imprisonment without such legal authority may not be a lawful *arrest* but yet may constitute a form of lawful *detention*. The person who accompanies a police officer to the station to provide a breath sample pursuant to a breathalyzer demand has *not* been arrested but certainly is being detained in accordance with lawful authority. Nevertheless, while the person responding to a breathalyzer demand has not been arrested for purposes of criminal procedure, someone impersonating a police officer who compelled attendance of another through a false breathalyzer demand would no doubt be liable in a *civil* suit for false "arrest."

In the context of criminal procedure, the Supreme Court of Canada gave its imprimatur to the definition of arrest found in *Halsbury's Laws of England*:

Arrest consists of the actual touching of a person's body with a view to his detention. The mere pronouncing of words of arrest is not an arrest, unless the person sought to be arrested submits to the process and goes with the arresting officer¹³¹

grounds to believe that a person is "about to commit" an indictable offence in *Criminal Code*, R.S.C. 1970, c. C-34, paragraph 450(1)(a).

127. For example, see *Christie v. Leachinsky*, [1947] A.C. 573 (H.L.); *Koechlin v. Waugh* (1958), 11 D.L.R. (2d) 447 (Ont. C.A.); and *R. v. Acker* (1970), 9 C.R.N.S. 371 (N.S. C.A.).

128. *R. v. Hurlen* (1959), 17 D.L.R. (2d) 603 (Ont. C.A.); *R. v. Biron* (1976), 23 C.C.C. (2d) 513 (S.C.C.).

129. *R. v. Whitfield*, [1970] S.C.R. 46 (1970), 1 C.C.C. 129.

130. For example, see John G. Fleming, *The Law of Torts*, 4th ed. (Sydney, Australia: Law Book Co., 1971), p. 28.

131. *Supra*, note 129, citing *Halsbury's Laws of England*, 3rd ed. (London: Butterworth, 1955), vol. 10, p. 342.

From this one can infer that an arrest may be effected in one of two ways: (i) touching with a view to detention, even where the suspect may not submit voluntarily; or (ii) stating that the suspect is under arrest where the suspect submits. In the *Whitfield* case, the definition of arrest was crucial to the determination of whether the accused had been in lawful custody in order to sustain a charge of escape from lawful custody. Relying on the first branch of Halsbury's definition, the Supreme Court held that there had been an arrest where the accused driver of the car was merely touched by a police officer through the open car window while stopped at a traffic light before the car sped through the intersection. Argument in the case revolved round the proposition that there could only be a "true arrest" where there was "actual custody" and that reliance on a literal interpretation of the first branch of the Halsbury definition would give rise to the concept of a "technical arrest" where there was no physical custody. This argument was rejected by the court, in part, by distinguishing case-law which appeared to require physical custody on the grounds that it was old authority relating only to the civil liability of sheriffs attempting the arrest of absconding debtors in civil actions. Thus the *Whitfield* case defines as a lawful arrest that which the ordinary citizen might justifiably think of as an *attempted* arrest, and does so in a manner which demonstrates the proposition that the definition of arrest thought to be appropriate for one purpose (determining the civil liability of sheriffs arresting debtors) may not be viewed as appropriate for another purpose (determining whether or not an accused was in lawful custody).¹³² The upshot of the matter, however, was the adoption by the Supreme Court of Canada of a controversial "non-custodial" definition of arrest which seems to have been accepted by the courts as controlling for general purposes of criminal procedure.¹³³

A semantic problem arises in deciding whether or not to distinguish between "lawful" and "unlawful" arrests. Some would argue that the *Whitfield* definition of arrest merely describes two sets of factual interactions between arrester and suspect which may bring about an arrest, and that the arrest is lawful if the arrester has the lawful authority to bring about such conditions and does so in a proper manner, while it is unlawful if the arrester does not have this authority.¹³⁴ In this view, physical restraint, or submission to physical restraint, is the essence of arrest and this concept is virtually synonymous with "detention," "custody," or "imprisonment," all of which can also be qualified as "lawful" or "unlawful." This view seems to predominate the law governing the tort of false arrest or false imprisonment. The plaintiff is entitled to recover where the defendant has put physical constraints upon his or her freedom of movement without lawful authority, and the label used (that is, arrest, detention, custody, imprisonment, stop) to describe

132. The court seems to have been aware that it is being pushed to its conclusion in part because *Whitfield* had been charged with escaping lawful custody rather than with obstructing a police officer in the execution of his duty. The latter charge, on the facts, would on all probability have led to a conviction in circumstances where the definition of arrest would have been irrelevant. See the reasons of Judson J. in *Whitfield*, *supra*, note 129.

133. The *Whitfield* definition of arrest has been widely cited. See, for example: *R. v. Biron* (1975), 4 N.R. 45 (S.C.C.); *R. v. O'Donnell* (1982), 55 N.S.R. (2d) 6 (C.A.); *R. v. Boughton* (1975), 23 C.C.C. (2d) 395 (Alta. S.C.A.D.); *R. v. Zajner* (1977), 36 C.C.C. (2d) 417 (Ont. C.A.).

134. This approach is exemplified by Glanville Williams, "Requisites of a Valid Arrest," [1954] *Crim. L. Rev.* 6; see also the discussion of this problem in David Telling, "Arrest and Detention: The Conceptual Maze," [1978] *Crim. L.R.* 320.

such constraint is essentially irrelevant.¹³⁵ According to this view, once one determines the factual existence of the arrest (or detention, custody, imprisonment or stop) one must then address the issue of its lawfulness. In the case of arrest, one would consider whether there were grounds for arrest, whether reasons were given, whether excess force was used, and so on.

A second approach would use the word "detention" to describe broadly factual situations where there has been a compulsory restraint upon liberty or freedom of movement, while the word "arrest" is confined to the situations where the lawful authority to arrest has been properly exercised.¹³⁶ In this view, to describe an arrest as "lawful" is superfluous - any attempt to arrest which is tainted by an improper use of authority is merely a detention, and cannot be properly described as an arrest at all. An apparent virtue of this second approach to try to distinguish between detention as a factual condition, and arrest as the exercise of lawful authority, is the ability to define "custody" as that condition or status which flows from a compulsory restraint upon liberty or freedom of movement which is accomplished by various forms of exercise of lawful authority. This could include custody after arrest or custody following a bail hearing,¹³⁷ or custody upon remand for psychiatric examination.¹³⁸ This definitional approach is tempting. The word "arrest" does seem to connote an exercise of *lawful* authority. Statutory draftsmen do sometimes seem to adopt such an intuitive approach. After all, the bail provisions of the *Criminal Code* do speak of making orders for the "detention of the accused in *custody*" as if the latter is a legitimated status rather than mere verbal surplusage. However, this attempt to impose definitional clarity runs counter to habit and convenient usage. *Criminal Code* section 133 creates the offence of escaping from "lawful custody," implying that there can be custody which is *not* lawful even though the definitional purist might like to define this factual condition as "detention." Moreover, a refusal to use the term "unlawful arrest" gives rise to terminological problems when one describes an attempt to arrest which is vitiated by some illegality such as the absence of grounds or the failure to give reasons. Does it really help to insist on calling such a situation a "purported" arrest rather than an "unlawful" one where the actor involved believed himself or herself to be lawfully arresting someone? Surely not.

C. Defining Detention

The futility and, perhaps in policy terms, the danger of refusing to qualify the words "arrest," "detention" and "custody" as either lawful or unlawful in this attempt to give them exclusive and authoritative definition, is highlighted by recent controversy in Canadian criminal courts about the word "detention." There is a good deal of truth in the

135. See *supra*, note 130, pp. 28-31.

136. See David N. Clarke and David Feldman, "Arrest by Any Other Name," [1979] *Crim. L.R.* 702.

137. E.g., via *Criminal Code*, R.S.C. 1970, c. C-34, s. 457(5).

138. E.g., pursuant to *Criminal Code*, R.S.C. 1970, c. C-34, s. 465(1)(c)(ii).

common sense observation that, in ordinary usage, "detention" seems to connote a broad range of limitations on liberty from the relatively short-lived, trivial and unofficial on the one hand, to the official imposition of a period of incarceration on the other. The common law, of course, did not countenance any interference with individual liberty other than through lawful arrest.¹³⁹ Forms of lawful detention short of arrest are thus creatures of statute.¹⁴⁰ The common thread binding these categories of detention, from the most trivial to the most intrusive, is the notion that the restraint on one's liberty or freedom of movement is compulsory, not voluntary. Certainly Ritchie J. of the Supreme Court of Canada in *Chromiak v. The Queen* recognizes this connotation when he states: "the words 'detain' and 'detention,' as they are used in s. 2(c) of the *Bill of Rights*, in my opinion, connote some form of compulsory restraint"¹⁴¹ However, controversy has developed first as to the degree of factual intrusion upon liberty or freedom of movement which is necessary to qualify as detention, and secondly, whether certain constitutional rights arise only where the detention is *lawful* or of a certain degree of factual intrusiveness. Both issues have arisen in breathalyzer demand situations where argument has centred round the provisions either of the *Canadian Bill of Rights* or the *Canadian Charter of Rights and Freedoms*.

The degree of factual intrusiveness required to characterize an interference with liberty as a detention was the subject of comment by the Supreme Court of Canada in two cases involving an interpretation of the *Canadian Bill of Rights*, prior to the advent of the *Canadian Charter of Rights and Freedoms*. In the case of *Brownridge v. R.*¹⁴² the accused had been placed formally under arrest, and the issue of right to counsel did not turn on the definition of detention; however, Pigeon J. stated in an *obiter dictum*:

The legal situation of a person who, on request, accompanies a peace officer for the purpose of having a breath test taken is not different from that of a driver who is required to allow his brakes to be inspected or to proceed to a weighing machine under ss. 39(6) or 78(3) of the *Highway Traffic Act*, R.S.O. 1970, c. 202.

Pigeon J. then asserted that such a person is not "arrested or detained," that "detained means held in custody," and that the right, pursuant to the *Canadian Bill of Rights*, to counsel on the part of those "detained" was not triggered by a breathalyzer demand.¹⁴³ In *Chromiak v. The Queen*,¹⁴⁴ another "right to counsel" case which arose in the context of a demand to submit to a roadside screening breath test, Ritchie J. explicitly applied

139. *Rice v. Connolly*, [1966] 2 Q.B. 414, [1966] 2 All E.R. 649 (D.C.), p. 652; Glanville Williams, "Demanding Name and Address" (1950), 66 *L.Q.R.* 465; Michael Zander, "When Is Arrest Not an Arrest" (1977), *New Law Journal* 352, p. 379.

140. See David Lanham, "Arrest, Detention and Compulsion," [1974] *Crim. L. Rev.* 288. *Moore v. The Queen*, [1970] 1 S.C.R. 195, 43 C.C.C. (2d) 83 highlighted these problems in Canada, as can be adjudged from its ensuing commentaries: E. G. Ewaschuk, "What's in a Name? The Right against Self-Incrimination" (1979), 5 C.R. (3d) 307; A. Grant, "*Moore v. The Queen*: A Substantive, Procedural and Administrative Nightmare" (1979), 17 *Osgoode Hall L.J.* 459.

141. *Chromiak v. The Queen*, *supra*, note 24, p. 307.

142. *Brownridge v. R.*, [1972] S.C.R. 926, 18 C.R.N.S. 308.

143. *Ibid.*, p. 321.

144. *Supra*, note 24, p. 307.

Pigeon J.'s dictum from *Brownridge*, in holding that the accused who had not been formally arrested "was not a person who had, while 'arrested or detained,' been deprived of the right to 'retain and instruct counsel without delay.'" In reaching this conclusion, Ritchie J. made the statement, cited above, that detention nevertheless connotes "some form of compulsory restraint." With respect, it is difficult to see how a demand by a police officer to stop, engage in various physical sobriety tests, and provide a breath sample for a roadside testing device, all under pain of being charged with an offence for refusal to comply with the demand to provide the breath sample, can be viewed other than as "compulsory restraint." To restrain has been defined as to "check or hold in from, keep in check or under control or within bounds, repress, keep down, confine, imprison."¹⁴⁵ In addition, restraint has been defined as a "stoppage, check, controlling agency or influence."¹⁴⁶ While Mr. Chromiak might not have been imprisoned or confined in any colloquial sense, surely he had been stopped and was being kept in check and controlled in a compulsory manner. There is no logical reason why statutory interpretation ought to do violence to the ordinary meaning of language in this context. If one can characterize the argument in *Chromiak* as being concerned in some sense with the degree of factual intrusion upon liberty or physical freedom of movement, surely from an ordinary practical view, there has been sufficient intrusion to constitute detention.

There is, however, a policy viewpoint which is important in the context of the *Canadian Bill of Rights*, but no longer controlling since the *Canadian Charter of Rights and Freedoms*, which may have pushed the Supreme Court to the apparently illogical conclusion reached in *Chromiak*. This reason relates to the second area of controversy mentioned above, namely, the issue as to whether constitutional rights flow only from a "lawful detention," which is of a certain degree of intrusiveness at that. The *Canadian Bill of Rights* appears to guarantee a right to counsel in seemingly absolute terms once a condition of detention obtains. To provide an opportunity to retain and instruct counsel in situations of trivial interference with liberty or physical restraint might impose unnecessary limitations on police or official investigation where serious breach of rights is not at issue. The roadside breath sample in *Chromiak* may provide a helpful example. The evidence obtained through such a test, while it might provide reasonable and probable grounds for a demand for a full-fledged breathalyzer test capable of giving samples for analysis, or alternately might be admissible (if not conclusive) evidence on a charge of impaired driving, does not provide evidence capable of forming complete proof of an offence. If one couples this with the fact that the procedure is not really a lengthy or seriously intrusive one, it is understandable that a court might conclude that a right to retain and instruct counsel ought not to flow from a person's being stopped for a roadside breathalyzer screening. Since the advent of the *Canadian Charter of Rights and Freedoms* however, this result, if desirable, can be attained without distorting the meaning of the word "detention." Surely a trivial detention is no less a "detention" by virtue of its minimally intrusive character. On the other hand one may argue that it is a reasonable limit, which might be demonstrably justified in a free and democratic society, *not* to provide an opportunity to retain and instruct counsel in the circumstances of the roadside

145. *The Concise Oxford Dictionary*, 5th ed. (Oxford: Oxford University Press, 1969).

146. *Ibid.*

screening. It is important to point out, however, that section 1 of the *Canadian Charter of Rights and Freedoms* requires that the reasonable limits be *prescribed by law*. The adoption of a broad definition of detention might thus entail the use of override provisions of the Charter and the addition of a legislative provision in the roadside screening section of the *Criminal Code* to the effect that "compliance with a demand pursuant to this section shall be deemed not to be detention for purposes of section 10(b) of the *Canadian Charter of Rights and Freedoms*."

This view is consistent with the approach taken by the majority of the Saskatchewan Court of Appeal in *R. v. Therens*.¹⁴⁷ In that case the court held that the *Brownridge/Chromiak* interpretation of the meaning of detention was not applicable to the interpretation of that word in the *Canadian Charter of Rights and Freedoms*. Therens, the accused, had been stopped at the scene of a motor vehicle accident and given a demand to accompany the police officer to provide a breath sample for analysis without being informed of his right to counsel. Despite the fact that he was at no point formally arrested and had been entirely co-operative with the police, the Court of Appeal held that he had been detained and that the police had denied his right to be informed of the right to counsel pursuant to paragraph 10(b) of the *Canadian Charter of Rights and Freedoms*. Speaking for the majority, Tallis J. specifically declined to make any comment on whether a stop for a roadside breath test would be a detention entailing the right to counsel. However, he did specifically support a broad definition of detention in the following passage:

Our nation's constitutional ideals have been enshrined in the Charter and it will not be a "living" charter unless it is interpreted in a meaningful way from the standpoint of an average citizen who seldom has a brush with the law. The fundamental rights accorded to a citizen under s. 10(b) should be approached on the basis of giving the word "detention" its popular interpretation: in other words, its natural and ordinary meaning. The implementation and application of the Charter should not be blunted or thwarted by technical or legalistic interpretations of ordinary words of the English language. Using this approach, our citizens will not be placed in a position of feeling that the statements in the Charter are only rights in theory. If these rights are to survive and be available on a day-to-day basis, we must resist the temptation to opt in favour of a restrictive approach. If a restrictive approach is adopted in defining the word "detain," then this will be tantamount to saying that the law does not recognize rights under s. 10(b) as applying to an accused before arrest.¹⁴⁸

The impact of such an approach may be to cast upon legislatures a burden of stating that various statutory investigative procedures which are not arrest but which are capable of characterization as "detention" are *not* to carry the Charter right to retain and instruct counsel. Since these procedures ought to be few in number, such a burden is not too onerous a one for Parliament to bear.

147. *R. v. Therens*, *supra*, note 26. The issue has also been considered in the following cases: *R. v. Altseimer*, *supra*, note 26; *R. v. Currie* (1983), 4 C.C.C. (3d) 217 (N.S. S.C.A.D.); *R. v. Trask*, *supra*, note 26; *R. v. Mallard* (1984), 26 M.V.R. 238 (P.E.I. S.C.); *R. v. Rahn*, *supra*, note 26, in each of which the *Chromiak* approach was followed, and *R. v. Ahearn*, *supra*, note 26; *R. v. Watchel*, *supra*, note 26 where *Chromiak* was not followed.

148. *R. v. Therens*, *supra*, note 26, pp. 423-24.

The issue as to whether constitutional rights only flow from a “real detention” is a seemingly anomalous one which results from certain *dicta* employed by Ritchie J. in *Chromiak* in justifying a narrow interpretation of the word “detention.” He states:

... the language of s. 2(c)(iii) [of the *Canadian Bill of Rights*], which guarantees to a person “the remedy by way of *habeas corpus* for the determination of the validity of his detention and for his release if the detention is not lawful,” clearly contemplates that any person “detained” within the meaning of the section is one who has been detained by due process of law.¹⁴⁹

This language cannot be taken literally, since a *habeas corpus* application would be taken to challenge the *lawfulness* of a detention, and success, by definition, would mean that the person had not been detained by due process of law. Such an interpretation would render the operation of this provision of the *Canadian Bill of Rights* nugatory. The importance of rejecting this approach is emphasized by the fact that paragraph 10(c) of the *Canadian Charter of Rights and Freedoms* uses the same language, and some courts seem tempted to adopt this interpretation.¹⁵⁰ However, in the context in which he used it, Ritchie J. seems to have implied that detention only results where there has been a purported exercise of that sort of lawful authority which might result in “physical custody” in the sense in which it is described above. If this is the proper interpretation to put on the passage, then it merely becomes another form of argument about defining detention in terms of degrees of intrusiveness upon an individual’s liberty or physical freedom of movement and is subject to the criticisms outlined above.

D. Concluding Remarks on Definitional Problems

A reform of the federal law of arrest cannot purport to provide Canadian courts with an authoritative interpretation of the word “detention” as it appears in the *Canadian Charter of Rights and Freedoms*. Even if it were thought possible to enumerate the various combinations and permutations of legislatively described behaviour which might constitute detention, courts would not be bound by legislative pronouncements defining detention unless explicit use was made of the override provisions of section 32 of the *Canadian Charter of Rights and Freedoms*. On the other hand, the reform ought to provide a clear definition of arrest and explain how the concept of arrest relates to certain forms of investigation by police.

149. *Supra*, note 24, p. 307.

150. This approach is implicitly adopted with reference to the Charter by MacDonald, J. A. in *R. v. Currie*, *supra*, note 147, pp. 230-231.

III. Investigative Procedures and Detention

The tradition of the common law has been to impose upon police officers broad general duties in the enforcement of the law, but to provide them with strictly limited powers and authority to interfere with the liberty and property of private persons in the enforcement of such duties.¹⁵¹ Police Acts in Canada have reinforced the status of police officers as agents of the state with broad powers,¹⁵² but legislatures have been willing to grant specific powers commensurate with the duties only in rare instances. Canadian courts have found themselves faced with strong pressures to elaborate ancillary powers to enable police to carry out general duties more efficiently, and the result has been a body of contradictory case authority for which the underlying principles remain unclear. This section of the present chapter will briefly explore issues which arise in relation to three types of situations: (i) where the police request citizens "voluntarily" to assist them with an investigation; (ii) limited statutory powers authorizing police interference with individual liberty; (iii) a handful of cases which countenance limited ancillary powers in the enforcement of general duties.

A. Voluntary Co-operation with Police Investigation

While one might wish to recognize a civil or moral duty on the part of all citizens to co-operate with and assist the police in carrying out their duties to investigate criminal offences, the common law refused to convert this moral duty into a legal one. A citizen had no duty at common law to answer questions, nor was there a duty to accompany or assist police in an investigation unless the officer lawfully arrested the person.¹⁵³ On the other hand, the police have always been at liberty to ask a person questions and they routinely request that citizens accompany them to the police station to answer questions. There appears to be general judicial agreement that, in the absence of compulsion, voluntary compliance with a police request to attend at the police station or accompany police for other purposes does not constitute an arrest.¹⁵⁴ The line between a persuasive request to accompany the officer and compulsion amounting to arrest, is clearly a fine one. However, it is one which is familiar to police officers who know that voluntary

151. Leigh, *supra*, note 115, p. 29.

152. Typical is the *Police Act*, S.N.S. 1974, c. 9, s. 11(4) which reads in part:

... all provincial constables are charged with the enforcement of the penal provisions of all the laws of the Province, and any penal laws in force in the Province ...

or, the *Police Act*, S.A. 1971, c. 85, s. 3(1):

Every member of the Alberta Provincial Police has the power and it shall be his duty to

(a) perform all duties that are assigned to police officers in relation to:

(i) the preservation of the peace;

(ii) the prevention of crime and offences against the laws in force in Alberta.

153. *Rice v. Connolly*, *supra*, note 139; *Kenlin v. Gardner*, [1967] 2 Q.B. 510; *Koechlin v. Waugh*, *supra*, note 127; *Williams*, *supra*, note 139.

154. *R. v. Acker*, *supra*, note 127; *R. v. Dedman* (1981), 59 C.C.C. (2d) 97 (Ont. C.A.).

assistance, which is *not* an arrest or detention, does not give rise to the right to counsel or the right to be informed thereof, and by definition does not require the citizen's being given the *reasons* for arrest or detention. This is clearly an area capable of exploitation by police where persons may not know of their right to refuse to accompany police in the absence of formal arrest.¹⁵⁵

The Supreme Court of Canada has displayed ambivalence toward this traditional common law position. In *Moore v. The Queen*¹⁵⁶ the majority found that the direction to police officers in subsection 450(2) of the *Criminal Code* not to arrest in minor cases except where the public interest in such factors as finding the identity of the accused makes it necessary, imposed a reciprocal statutory duty upon citizens to identify themselves to the police. While the court restricted its rule to circumstances where the person has been observed by the officer in the act of committing one of the classes of offences listed in subsection 450(2), the case is a clear break with the common law tradition in that it seeks to justify a power of interference with individual rights commensurate with the general police duty to investigate crime and compel appearance of accused persons in the least liberty-intrusive fashion.¹⁵⁷

B. Specific Statutory Powers of Investigation

As the previous section of this chapter indicated, the Supreme Court of Canada has held that a police request that a person stop to provide a sample of breath in a roadside breath test is not an arrest or detention, but rather the compliance with a statutory investigative process.¹⁵⁸ This, it may be argued, is inconsistent with the common law approach described above which would call such stoppage an arrest, but it is entirely consistent with *Moore v. The Queen*¹⁵⁹ and the Supreme Court's apparent desire to give powers to police which match their general duties to investigate offences. Similarly, the power to stop motor vehicles at will in order to inspect motor vehicle registrations and drivers' licences, which is standard in provincial highway traffic legislation, is not seen as a power of arrest or detention.¹⁶⁰ However, failure to stop is an offence, and the stop may provide police with a surreptitious means of criminal investigation.

155. This ambiguity can in some cases be helpful to an accused. In *R. v. Sellers* (1983), 11 W.C.B. 60 (Sask. Prov. Ct.), the accused was asked to accompany an officer for investigation, but instead turned and fled. As he had not been arrested, and as the police have no power to detain for investigation, Sellers was found not guilty on a charge of escaping lawful custody.

156. *Moore v. The Queen*, *supra*, note 140.

157. The case is not without difficulties of interpretation on its facts and has been the subject of a lively controversy. See: Ewaschuk, *supra*, note 140; Grant, *supra*, note 140.

158. *Chromiak v. The Queen*, *supra*, note 24.

159. *Moore v. The Queen*, *supra*, note 140.

160. *R. v. Dedman*, *supra*, note 154.

C. Powers Ancillary to General Duties

The traditional common law position has been that a police officer takes himself or herself outside of the execution of duty when he or she is responsible for interfering with persons or property in a manner not specifically authorized by positive law. The Supreme Court of Canada, however, has been willing on some occasions to find that police officers *are* in the execution of duty on the basis of rather vague statutory authority, and yet unwilling to do so on other occasions. The springboard for this flexible approach has been the English case of *R. v. Waterfield*, wherein the court states:

In the judgment of this court it would be difficult, and in the present case it is unnecessary, to reduce within specific limits the general terms in which the duties of police constables have been expressed. In most cases it is probably more convenient to consider what the police constable was actually doing and in particular, whether such conduct was *prima facie* an unlawful interference with a person's liberty or property. If so, it is then relevant to consider whether (a) such conduct falls within the general scope of any duty imposed by statute or recognized at common law, and (b) whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty.¹⁶¹

This approach converts the issue from one of whether the particular police action was specifically *authorized* to one of whether it was *justifiable*. The Supreme Court has used the doctrine to justify cordoning off public streets and restricting access by members of the public¹⁶² and entry on private property to investigate the commission of an offence.¹⁶³ The obvious problem with the doctrine is that general police duties are extremely wide, and a test of whether or not an action is a "justifiable interference" with liberty or property is not sufficiently precise to be any real safeguard to fundamental rights and freedoms. After all, section 1 of the *Canadian Charter of Rights and Freedoms* does require that limitations on rights be demonstrably justifiable in a free and democratic society and be *prescribed by law*. This concern may underlie a rejection of the open and somewhat free-wheeling approach of *Waterfield* in the case of *Colet v. The Queen*¹⁶⁴ where the court refused to find that an authorization to seize a restricted weapon justified the power to search a dwelling in order to make the seizure.

IV. Compelling the Appearance of an Accused

If the primary purpose of an arrest is to compel the appearance of an accused, it is important to set an analysis of arrest powers in the context of the alternative means available to accomplish this task. It is useful to separate those means of compelling

161. *R. v. Waterfield*; *R. v. Lynn* (1964), 48 Cr. App. R. 42.

162. *Knowlton v. The Queen*, *supra*, note 23.

163. *R. v. Stenning* (1970), 10 D.L.R. (3d) 224 (S.C.C.).

164. *Colet v. The Queen* (1981), 57 C.C.C. (2d) 105 (S.C.C.).

appearance which require judicial authorization at the initial stages, and those which may occur at the immediate initiative of the private citizen or police officer without judicial authorization.

A. Action Prior to Judicial Authorization

Action to require a suspect to attend court to face charges may be initiated by private citizens or police officers prior to seeking judicial authorization. The private individual may make an arrest without warrant and must deliver the arrested person to the police forthwith.¹⁶⁵ In this event, the laying of charges before a justice, either by the individual or by the police to whom the suspect has been delivered, occurs *after* the arrest. The arrested person may be held in custody pending a decision on "bail" by a justice¹⁶⁶ or may be released by the officer in charge prior to that time.¹⁶⁷ The citizen who observes a crime but who is not lawfully entitled, or does not wish, to make an arrest may complain to the police or seek judicially authorized intervention by the laying of a private information.¹⁶⁸

Since the passage of the *Bail Reform Act*,¹⁶⁹ the police have had a number of options with respect to compelling the attendance of persons before the courts to face charges. Arrest without warrant is the primary "non-judicially authorized" method of compelling appearance, and the only one available in relation to serious offences.¹⁷⁰ For less serious offences, police are directed not to arrest, but rather to issue the offender an appearance notice which tells the person what offence he or she is alleged to have committed, where and when she or he is to appear in court, and whether to appear at a specified time and place for fingerprinting and so forth.¹⁷¹ Even where a police officer has arrested a person in relation to less serious offences, he or she may release the person with the intention

165. *Criminal Code*, R.S.C. 1970, c. C-34, s. 449. This provision will be the subject of detailed analysis in the succeeding section of this chapter.

166. *Criminal Code*, R.S.C. 1970, c. C-34, s. 457.

167. *Criminal Code*, R.S.C. 1970, c. C-34, s. 453.

168. *Criminal Code*, R.S.C. 1970, c. C-34, s. 455. This section states the right of "[a]ny one who, on reasonable and probable grounds, believes that a person has committed an indictable offence [to] lay an information" The information is "private" only in the sense that it is laid by a citizen, rather than a police officer or other agent of the state. Such "private" informations are, of course, statistically insignificant but of great importance for the principle of public participation in the administration of criminal justice in Canada. Note that section 728 makes the provisions of Part XIV concerning compelling appearance applicable to summary conviction as well as indictable offences.

169. *Bail Reform Act*, R.S.C. 1970 (2nd Supp.), c. 2, proclaimed in force January 3, 1972.

170. *Criminal Code*, R.S.C. 1970, c. C-34, ss. 449 and 450. "Serious offences" are all those *other* than the classes of offences mentioned in subsection 450(2).

171. *Criminal Code*, R.S.C. 1970, c. C-34, subsection 450(2) sets out the offences for which appearance notices may be issued.

Appearance notices are defined in section 448 as the "notice in Form 8.1 issued by a peace officer." The form, in fact, refers not to "fingerprinting" as such, but rather to appearance "for the purposes of the *Identification of Criminals Act*."

of compelling appearance by way of summons or appearance notice where there are reasonable and probable grounds to believe that the person will attend in court and where other considerations of the public interest do not militate in favour of retaining the person in custody.¹⁷² Where there has been an arrest and the arresting officer fails to release the person, the officer in charge¹⁷³ may release with the intention to compel by summons or appearance notice, or may have the person enter into a recognizance without sureties.¹⁷⁴ These powers of the officer in charge apply not only to the category of less serious offences, but also to any offence which is punishable by imprisonment for five years or less.¹⁷⁵

Thus, while the private citizen has a choice between making an arrest and “reporting” the matter to police or judicial officials for action, the police have a relatively broad range of possibilities open to them prior to seeking judicial authorization or judicial sanction for actions already taken.

B. Judicially Authorized Action

Judicial authorization to compel the appearance of an accused follows the laying of an information. An information may be laid by “[a]nyone [including a police officer] who, on reasonable and probable grounds, believes that a person has committed an indictable offence,”¹⁷⁶ and is to be laid by the police where they have previously issued an appearance notice or released an arrested person from custody.¹⁷⁷ Thus, a justice may be called upon to issue a summons or warrant to compel appearance of a suspect,¹⁷⁸ or to confirm or cancel an appearance notice, a promise to appear or a recognizance where these have been issued by the police.¹⁷⁹

The procedure by which such process may be issued or police documents cancelled is relatively straightforward.¹⁸⁰ An information, which is a document for which standard

172. *Criminal Code*, R.S.C. 1970, c. C-34, section 452. The public interest considerations are the same as those cited in subsection 450(2).

173. *Criminal Code*, R.S.C. 1970, c. C-34, section 448, defines “officer in charge” as
the officer for the time being in command of the police force responsible for the lock-up or other place to which an accused is taken after arrest or a peace officer designated by him for the purposes of this Part who is in charge of such place at the time an accused is taken to that place to be detained in custody.

174. *Criminal Code*, R.S.C. 1970, c. C-34, section 453.

175. *Criminal Code*, R.S.C. 1970, c. C-34, paragraphs 453(1)(a) to (d).

176. *Criminal Code*, R.S.C. 1970, c. C-34, section 455.

177. *Criminal Code*, R.S.C. 1970, c. C-34, section 455.1.

178. *Criminal Code*, R.S.C. 1970, c. C-34, sections 455.3 and 456.1.

179. *Criminal Code*, R.S.C. 1970, c. C-34, section 455.4.

180. *Criminal Code*, R.S.C. 1970, c. C-34, sections 455.3 and 455.4 set out virtually identical procedures for the initial issuance of process and for the confirmation or cancellation of police documents.

forms are provided in the *Criminal Code*,¹⁸¹ is sworn to by the informant before a justice. The justice is directed by the *Criminal Code* to hear and consider, *ex parte*, the allegations of the informant and the evidence of witnesses, where he or she considers it desirable or necessary to do so. Where evidence is heard from witnesses, it is to be taken upon oath, and a record of the proceeding is to be maintained.¹⁸² The receipt of the information is the exercise of a ministerial function,¹⁸³ and is one which cannot be controlled by the Crown in a private prosecution.¹⁸⁴ The decision as to whether or not to issue process is the exercise of a judicial discretion, and cannot be challenged as long as the justice acts properly within his or her jurisdiction.¹⁸⁵ Controversy exists concerning the degree to which the issuance of process may be a "bureaucratic" one. Earlier authority would seem to indicate that it may be sufficient if the justice receives and considers the written information on oath without conducting an oral hearing.¹⁸⁶ Recent cases reject this approach and require the justice actually to *hear* the allegations, with the concomitant opportunity to question the informant, prior to issuance of a summons or warrant.¹⁸⁷

The *Criminal Code* provides that where a justice before whom an information has been laid "considers that a case has been made out for compelling the accused to attend before him" to answer to the charge, the justice, depending upon the circumstances, will choose between confirming an appearance notice (or recognizance or promise to appear)¹⁸⁸ previously issued by a police officer, or issuing a summons or warrant.¹⁸⁹ It is interesting that there is little authority on the standard to be applied by the justice in his or her "consideration" of whether a case has been made out. To be consistent with the police officer's power to arrest without warrant, the test must at the very least be reasonable and probable grounds for belief that an offence has been committed.¹⁹⁰ Mere suspicion is not enough, but it is doubtful that a test more stringent than the "reasonable and probable grounds" test is necessary.¹⁹¹

181. Form 2 in accordance with the *Criminal Code*, R.S.C. 1970, c. C-34, section 455.2.

182. *Criminal Code*, R.S.C. 1970, c. C-34, subsections 455.3(3) and 455.4(2).

183. *R. v. Jean Talon Fashion Centre Inc.* (1975), 22 C.C.C. (2d) 223 (Qué. Q.B.).

184. *Dowson v. The Queen* (1983), 7 C.C.C. (3d) 527 (S.C.C.).

185. *R. v. Coughlan, ex parte Evans*, [1970] 3 C.C.C. 61 (Alta. S.C.).

186. *Ex parte Archambault* (1910), 16 C.C.C. 433 (Qué. Q.B.); *R. v. Mitchell* (1911), 19 C.C.C. 113 (Ont.H.C.J.); *R. v. Harrison* (1918), 29 C.C.C. 420 (B.C. S.C.).

187. *R. v. Brown* (1975), 28 C.C.C. (2d) 398 (Ont. Prov. Ct.); *R. v. Jeffrey* (1976), 34 C.R.N.S. 283 (Ont. Prov. Ct.).

188. *Criminal Code*, R.S.C. 1970, c. C-34, section 455.4.

189. *Criminal Code*, R.S.C. 1970, c. C-34, section 455.3.

190. Issuance of a summons solely to obtain information under the *Identification of Criminals Act* and not to compel appearance has been held to be invalid: *Re Michelsen and The Queen* (1983), 4 C.C.C. (3d) 371 (Man. Q.B.).

191. *Dumbell v. Roberts*, [1944] 1 All E.R. 326 (C.A.).

(1) Summons

The summons is a formal document which is directed to the accused and which sets out the charge as well as the time and place at which the accused is to appear in court.¹⁹² It may also require the accused to attend at a particular place for fingerprinting or identification, and state the consequences of failing to carry out its directions.¹⁹³ The summons is only binding upon the accused if it is personally delivered to the accused, or given to a person at the accused's usual place of residence.¹⁹⁴

The summons and the appearance notice essentially give the accused notice of the time and place of the proceeding and rely upon the accused to respond. As such, they are the least liberty-intrusive means of compelling attendance in court. The arrest warrant, on the other hand, is directed to police officers¹⁹⁵ and orders that the accused be "forthwith arrested" and brought before a justice.¹⁹⁶ While a person who is arrested may be released on "bail," the decision to issue an arrest warrant is premised on the view that a summons or appearance notice is insufficient in the circumstances. However, recognizing the serious nature of the decision to arrest rather than give documentary notice of proceedings, the *Criminal Code* directs that the justice "shall issue a summons to the accused unless the allegations of the informant or the evidence of any witness ... disclose reasonable and probable grounds to believe that it is necessary in the public interest to issue a warrant for the arrest of the accused."¹⁹⁷ Similar language in the *Criminal Code* empowers the justice to issue a warrant for arrest even though an appearance notice or summons may have been issued previously and thought adequate.¹⁹⁸

Important here are the factors to be taken into account when one is determining whether it is "necessary in the public interest" to issue a warrant rather than employ the less liberty-intrusive alternatives. Older authority suggests that the appropriate factors to keep in mind are the seriousness of the charge, the strength of the case against the accused, and the probability of the accused's appearing in answer to a summons or appearance notice.¹⁹⁹ One might, in light of the presumption of innocence, question the appropriateness of the seriousness of the charge and the strength of the case against the accused as factors if these were to be taken in isolation from the problem of probability of appearance. On the other hand, it may be appropriate for a justice to take into account the factors enumerated in the *Criminal Code* as relevant to the police officer's decision whether to issue an appearance notice or make an arrest.²⁰⁰ These include such things as

192. *Criminal Code*, R.S.C. 1970, c. C-34, subsection 455.5(1).

193. *Criminal Code*, R.S.C. 1970, c. C-34, subsections 455.5(4) and (5).

194. *Criminal Code*, R.S.C. 1970, c. C-34, subsection 455.5(2). Nor can a summons be issued to be served outside Canada: *Re Shulman and The Queen* (1975), 23 C.C.C. (2d) 242 (B.C. C.A.).

195. *Criminal Code*, R.S.C. 1970, c. C-34, section 456.2.

196. *Criminal Code*, R.S.C. 1970, c. C-34, section 456.

197. *Criminal Code*, R.S.C. 1970, c. C-34, subsection 455.3(4).

198. *Criminal Code*, R.S.C. 1970, c. C-34, section 456.1.

199. *O'Brien v. Brabner* (1885), 49 J.P. Jo. 227.

200. *Criminal Code*, R.S.C. 1970, c. C-34, subsection 450(2).

the need to secure and preserve evidence of the offence, and the need to prevent the continuation or repetition of the offence. As such, they premise an arrest on secondary purposes rather than on the primary purpose of compelling attendance in court to answer to the charge. As mentioned in section II of this chapter, these secondary purposes are operative only where there are reasonable grounds for belief that an offence has been committed, and that the arrest can be supported on that basis first premise.

(2) Arrest with Warrant

The manner of carrying out arrests *with* warrant as well as *without* warrant will be discussed in sections VI and VII of this chapter. However, it is important to note here the expansive shield which protects police officers who ground their authority for action on the existence of an arrest warrant. An arrest warrant will usually be directed to *all* the police officers within the territorial jurisdiction of the justice by whom it is issued,²⁰¹ and may be executed by an officer even though the officer is outside the jurisdiction for which he or she has been appointed.²⁰² As long as he or she acts in good faith, the police officer is justified in executing an arrest warrant notwithstanding that it is defective or issued without jurisdiction.²⁰³ In addition, *Criminal Code* section 28 shelters from criminal liability the person armed with a warrant who acts in good faith and on reasonable and probable grounds but arrests the wrong person. Finally, a peace officer may arrest a person without warrant where he or she has reasonable and probable grounds to believe that a warrant is in force within the territorial jurisdiction in which the person is found.²⁰⁴ Thus, the existence of a warrant becomes the basis for arrest without warrant.²⁰⁵ This expansion of authority takes on a national dimension where the process of “backing” a warrant for execution in a Canadian jurisdiction other than the one of original issuance is used.²⁰⁶ The upshot of the matter is that the process of issuance of a warrant by a justice who acts upon the information on oath, and only rarely with other evidence, is potentially to authorize an arrest anywhere in Canada by police officers who have no personal knowledge of the circumstances in which the arrest warrant was issued other than the description of the offence on the face of the warrant or on the computerized police information system.²⁰⁷ Problems with the interplay among the law authorizing issuance of warrants, the CPIC computer system, and inadequate provisions in the *Criminal Code* for use upon arrest outside the “authorizing jurisdiction” justify reform in this area.²⁰⁸

201. *Criminal Code*, R.S.C. 1970, c. C-34, section 456.2.

202. *Criminal Code*, R.S.C. 1970, c. C-34, section 456.3.

203. *Criminal Code*, R.S.C. 1970, c. C-34, subsection 25(2).

204. *Criminal Code*, R.S.C. 1970, c. C-34, paragraph 450(1)(c).

205. See *Eccles v. Bourque*, [1975] 2 S.C.R. 739.

206. *Criminal Code*, R.S.C. 1970, c. C-34, section 461.

207. This system is known as CPIC, which stands for Canadian Police Information Centre.

208. See Chapter Eight, *infra*, for a full discussion of this issue.

V. Arrest without Warrant

Arrest without warrant may be undertaken by private citizens and by peace officers in accordance with the general provisions of sections 449 and 450 of the *Criminal Code*.²⁰⁹ Other federal and provincial statutory provisions create arrest powers in relation to particular situations,²¹⁰ but do not, as a rule, purport to create a general regime for the regulation of arrest without warrant. Powers of arrest without warrant are the most sensitive and potentially controversial aspect of the law of arrest since they authorize actions by individuals and police which profoundly affect individual liberty, but which are unsupervised by any process of prior authorization or consultation, be it judicial or otherwise. There follows an examination of the general provisions of the *Criminal Code* and related case-law setting out grounds for arrest without warrant, first in relation to private citizens and then in relation to police.

A. By Private Citizens

Arrest without warrant by a private citizen for felonies or pursuant to a hue and cry is a traditional element of common law arrest powers which long pre-dates the existence of organized police forces.²¹¹ The advent of police gave the traditional arrest powers of the English constable a practical extension, but did not displace the legal authority of the private citizen to make arrests without warrant in appropriate circumstances. These powers found legislative expression in what has become section 449 of the *Criminal Code*, and they have taken on a new importance, it may be argued, with the recent burgeoning of the private security industry in Canada.²¹²

Criminal Code section 449 authorizes the private citizen ("anyone") to arrest without warrant a person found in basically three sets of circumstances: where an indictable

209. Other general provisions in the present *Criminal Code*, R.S.C. 1970, c. C-34, governing the law of arrest are: ss. 25 to 31; ss. 451 to 456.2; and s. 728.

210. The *Criminal Code* itself provides such anomalous powers in subsections 181(2) and 191(2). Other statutory provisions are discussed in Chapter Two, *supra*.

211. Glanville Williams, "Arrest for Felony at Common Law," [1954] *Crim. L.R.* 408.

212. For recent Canadian studies on the private security industry see: C. D. Shearing, and P. C. Stenning, *Private Security and Private Justice: The Challenge of the 80's* (Montréal: The Institute for Research on Public Policy, 1982); P. C. Stenning and C. D. Shearing, *Search and Seizure Powers of Private Security Personnel*, [Study Paper prepared for the Law Reform Commission of Canada] (Ottawa: Minister of Supply and Services Canada, 1979); as well as the following studies published by the Criminology Institute of the University of Toronto: M. B. Farnell and C. D. Shearing, *Private Security: An Examination of Canadian Statistics, 1961-1971* (1977); D. J. Freedman and P. C. Stenning, *Private Security, Police and the Law in Canada* (1977); F. Jeffries, *Private Policing: An Examination of In-House Security Operations* (1977); P. C. Stenning and M. F. Cornish, *The Legal Regulation and Control of Private Policing in Canada* (1975).

Security personnel will have the arrest powers of the private citizen unless they have been deputized as "special constables."

offence has been committed; where there is fresh pursuit; and where offences are committed in relation to private property.²¹³ In relation to the first of these sets of circumstances, the private citizen may arrest "a person whom he finds committing an indictable offence."²¹⁴ Thus, for serious offences, the citizen may make an arrest without warrant, but only where he or she witnesses the commission of the indictable offence. There is no authorization to arrest where he or she has been informed of the commission of the offence in the past, or anticipates the commission of an offence in the future. Older authorities held that the "finds committing" power precluded the individual from being protected in the event of his making an error.²¹⁵ Such errors may easily arise where the observer misperceives the facts, or believes that the actual behaviour observed constitutes an indictable offence when it does not. However, more recent cases have held that a person may be justified in making an arrest, and therefore he is immune from civil or criminal liability, where an offence is "apparently committed" even if the person charged might later be acquitted.²¹⁶ It is worthy of note that for procedural purposes, and arrest in particular, hybrid or dual character offences may be treated as indictable offences.²¹⁷

The second set of circumstances in which the private citizen may arrest is where he or she has reasonable and probable grounds to believe that a person "has committed a criminal offence, and is escaping from and freshly pursued by persons who have lawful authority to arrest that person."²¹⁸ [Emphasis added] This modern manifestation of the ancient hue and cry relates to "criminal offences" which phrase has been interpreted to mean federal statutory offences whether indictable or summary conviction.²¹⁹ Belief that the person has committed the offence and is the subject of the "hot pursuit" must be based on reasonable and probable grounds which provides some latitude for making an honest error without being civilly or criminally liable for a wrongful arrest. The test for determining whether there were reasonable and probable grounds for belief in the existence of the requisite circumstances is whether a reasonable person in the position of the arrestee would have believed that the requisite conditions for the arrest existed.²²⁰ Mere suspicion is not enough, and arrest on such a basis will attract civil or criminal liability.²²¹

213. *Criminal Code*, R.S.C. 1970, c. C-34, section 449.

214. *Criminal Code*, R.S.C. 1970, c. C-34, paragraph 449(1)(a).

215. For example, see *R. v. Hurlen*, *supra*, note 128; *Attorney-General of Saskatchewan v. Pritchard* (1961), 130 C.C.C. 61 (Sask. C.A.).

216. *R. v. Cunningham and Ritchie* (1979), 49 C.C.C. (2d) 390 (Man. Co. Ct.) applying *R. v. Biron*, *supra*, note 128. This line of reasoning has recently been approved and, it may be argued, extended in *Roberge v. R.* (1983), 4 C.C.C. (3d) 304 (S.C.C.).

217. Hybrid or dual character offences are those which may be proceeded with by indictment or by way of summary conviction at the option of the Crown. See *R. v. Huff* (1979), 50 C.C.C. (2d) 324 (Alta. C.A.).

218. *Criminal Code*, R.S.C. 1970, c. C-34, paragraph 449(1)(b).

219. *R. v. Pollard* (1917), 39 D.L.R. 111 (Alta. C.A.); *R. v. Suchaki*, [1924] 1 D.L.R. 971 (Man. C.A.); *R. v. Seward*, [1966] 4 C.C.C. 166 (Yukon Mag. Ct.).

220. For discussion of the meaning of "reasonable and probable grounds" in the arrest context, see *inter alia*: *Dumbell v. Roberts*, *supra*, note 191; *Christie v. Leachinsky*, *supra*, note 127; *Koechlin v. Waugh*, *supra*, note 127; *Kennedy v. Tomlinson* (1959), 20 D.L.R. (2d) 273 (Ont. C.A.); and *Chartier v. Attorney-General of Québec* (1979), 48 C.C.C. (2d) 34 (S.C.C.).

221. See the cases cited *ibid.*, especially *Chartier v. Attorney-General of Québec*.

The third general set of circumstances in which a private citizen may arrest relates to persons found "committing a criminal offence on or in relation to that [private property]." ²²² It is to be noted that while the authority is temporally restricted to circumstances of actual commission (or "present apparent commission"), it extends beyond indictable offences to include summary conviction offences. Furthermore, this authority is of particular relevance to private security guards since it extends to arrest not only by the "owner or person in lawful possession of property" but also by persons "authorized by the owner or by a person in lawful possession of property." ²²³ [Emphasis added]

Regardless of which set of circumstances has formed the basis for the private citizen's arrest, such citizens are directed to "forthwith deliver the person to a peace officer." ²²⁴ "Forthwith" has been interpreted to mean not instantly but rather as soon as is reasonably practicable under all the circumstances. ²²⁵ This provision and its interpretation reflect the fact that the administration of justice is a public matter rather than a private one, and that a person deprived of his or her liberty by another is to be dealt with according to law by the appropriate authorities in a reasonably brief period of time.

While the general sets of circumstances in which a private citizen may arrest can be labelled briefly as "indictable offences, hot pursuit, and in relation to property," it can be seen that such a generalization over-simplifies the complexity of language in section 449 of the *Criminal Code*. The citizen is not safe in arresting another person unless he or she understands such distinctions as those between indictable and summary conviction offences, between finding someone committing an offence and having reasonable and probable grounds that they have committed an offence, between owning and being in lawful possession of property and so on. It might be well for the private citizen also to be aware that under section 30 of the *Criminal Code*, he or she may lawfully detain persons to prevent a renewal of a breach of the peace, and that if in charge of a vehicle, aircraft or vessel, he or she has special powers of arrest under subsection 191(2). With rare exceptions, of course, people do not possess such knowledge; they act upon their sense of urgency or necessity in the circumstances, and the rights and duties of those affected are sorted out, if at all, on an *ex post facto* basis. A reformed law of arrest ought to reflect this reality.

B. By Peace Officers²²⁶

The peace officer has all of the powers of arrest without warrant accorded the private citizen under section 449, ²²⁷ as well as powers granted specifically to peace officers. The

222. *Criminal Code*, R.S.C. 1970, c. C-34, subsection 449(2).

223. *Criminal Code*, R.S.C. 1970, c. C-34, paragraph 449(2)(b).

224. *Criminal Code*, R.S.C. 1970, c. C-34, subsection 449(3).

225. *R. v. Cunningham and Ritchie*, *supra*, note 216.

226. The term "peace officer" is defined very broadly in *Criminal Code*, R.S.C. 1970, c. C-34, s. 2, and includes a list of persons who are not usually thought of as "police" but who, by virtue of their status as "peace officers" have broad arrest powers. The Commission is presently studying the issue of the definition of "peace officer," but for the purposes of discussion in this text "police officer" and "peace officer" will be used interchangeably.

227. *R. v. Dean*, [1966] 3 C.C.C. 228 (Ont. C.A.).

peace officer is granted authority by section 450 to arrest without warrant under differing sets of conditions in relation to indictable offences, "criminal" offences, and persons for whom warrants have been issued. This section also directs police *not* to arrest in relation to certain less serious offences, where appearance notice or summons may be sufficient to ensure an offender's appearance in court as discussed above in "IV. Compelling the Appearance of an Accused." Additional powers of arrest are given to peace officers by *Criminal Code* section 31 in relation to breach of the peace, and by subsection 181(2) in relation to common gaming houses. The present segment of this chapter will concentrate on the grounds for arrest and the limitations thereto recognized in section 450 of the *Criminal Code*, and will briefly relate these to the other powers of arrest mentioned. It is convenient to organize the analysis of police powers of arrest in accordance with the traditional formulae authorizing arrest powers, namely, "reasonable and probable grounds for belief" and "finds committing," both of which are employed in section 450.

A peace officer may arrest without warrant a person who has committed an indictable offence²²⁸ or is committing a criminal offence.²²⁹ The operative notion here appears, on the surface, to be the fact of the offender's actual commission of an offence. In the first case, a police officer would no doubt be justified after the fact in arresting a person who has committed an indictable offence, whether or not there were reasonable grounds for arrest perceived by the police officer at the time of an arrest. This may cover the police officer who acts on mere suspicion or a lucky hunch. The policy thrust here might be said to be the protection of police officers who bring serious criminals to justice whether or not the action might have appeared reasonable at the outset. The arrest power framed with reference to a person the officer "finds committing a criminal offence" uses superficially similar language, yet the policy contained in the formulation is oriented to a different objective. As noted earlier, a criminal offence means either an indictable offence or an offence punishable on summary conviction. To the extent the phrase authorizes arrest without warrant for an *indictable* offence, it is redundant since the circumstances will be covered by the "has committed" provision just discussed as well as by some of the "reasonable and probable grounds" powers to be discussed shortly. The importance of the provision authorizing the arrest of those found committing a criminal offence is the fact that it is the major, and in some senses the only, provision authorizing arrest in relation to summary conviction offences. The effect is to prohibit arrest without warrant for summary conviction offences committed in the past or out of sight of the arresting officer, and there is certainly no power to arrest someone who may be "about to commit" a summary conviction offence. The policy is to restrict police interference with individual liberty in the least serious offences, and require police officers with knowledge of such offences to compel attendance in court by way of summons, or perhaps in an extraordinary case, justify to a justice the need for an arrest warrant in the circumstances. However, as noted in relation to private citizens' arrest powers, the "finds committing" provisions have recently been interpreted to allow arrest where the police officer finds a person "apparently committing" a criminal offence, thus broadening police powers of arrest in relation to these minor offences and enlarging the scope of liability against a person who

228. *Criminal Code*, R.S.C. 1970, c. C-34, paragraph 450(1)(a).

229. *Criminal Code*, R.S.C. 1970, c. C-34, paragraph 450(1)(b).

might resist arrest in such circumstances.²³⁰ While reasonable and probable grounds for belief that a person is committing a summary conviction offence are not sufficient to justify an arrest,²³¹ it is clear that the “apparently committing” notion moves the arrest power for minor offences closer to the reasonable and probable grounds formulation. This trend in the jurisprudence is certainly justifiable in policy terms and ought, in the interests of technical simplicity and clarity, to be reflected in reformed legislative provisions.

The peace officer’s powers to arrest without warrant based on “reasonable and probable grounds for belief” are essentially three in number, and give police officers a wide scope for interference with individual liberty as well as a broad protection against liability for “reasonable” error. A police officer may arrest without warrant a person who he believes on reasonable and probable grounds has committed or is about to commit a criminal offence, or for whom he or she has reasonable and probable grounds to believe an arrest warrant is in force in the territorial jurisdiction in which the person is found.²³² The authority to arrest where there are reasonable and probable grounds to believe that a person *has committed* an offence is an essential power if the police are to respond meaningfully to, and use information gained from, the general public. The police officer may not have seen the murder committed but must be authorized to act where solid and reasonable information is obtained from witnesses or credible sources which leads to the belief that a particular suspect is responsible for the crime. The reasonable grounds formulation in relation to persons “about to commit an indictable offence” is understandable but problematic.²³³ A “hypothetical” standard is necessary in relation to anticipated offences, rather than those committed in the past. However, the notion of arrest for “future offences” involves a preventive concept of the arrest power which may be susceptible of abuse. On the one hand, criminal law punishes those who have committed unlawful acts, not those who contemplate illegal acts. On the other hand, if the maintenance of order and the protection of the public are goals of the criminal justice system, the price to be paid for reactive rather than proactive policies may not be worth the price. Arrest without warrant where there are reasonable and probable grounds to believe that a warrant is in existence would appear to be a contradiction in terms. However, less formal information can become the basis for reasonable grounds on which to base an arrest without warrant, and thus reasonable grounds for belief that a justice has issued a warrant must *a fortiori* provide grounds for arrest.

In all of the above situations in which police officers are authorized to act on the basis of reasonable and probable grounds for belief, it is the *objective* standard for the evaluation of the propriety or legality of such actions which is the key to public accountability and to the maintenance, at least in principle, of fundamental freedoms. Since there is no prior judicial authorization in these circumstances, it is the “after-the-fact” analysis of what a reasonable person *ought* to have done in the circumstances which gives a trier

230. See *R. v. Biron*, *supra*, note 128; *R. v. Fuhr*, [1975] 4 W.W.R. 403 (Alta. S.C.A.D.).

231. *R. v. Stevens* (1976), 33 C.C.C. (2d) 429 (N.S. S.C.A.D.). See also *Roberge v. R.*, *supra*, note 216.

232. *Criminal Code*, R.S.C. 1970, c. C-34, paragraphs 450(1)(a) and (c).

233. *Kennedy v. Tomlinson*, *supra*, note 220.

of fact a basis for reviewing actions and calling to account those who make unreasonable errors in the purported exercise of these arrest powers.²³⁴ Mere suspicion or the honestly held yet unreasonably mistaken subjective views of an arresting police officer are not, and ought not to be, reasonable and probable grounds for the purposes of the authority granted by these provisions of the *Criminal Code*.

While the primary regime establishing police powers of arrest without warrant is found in the sections of the *Criminal Code* just analyzed, it must be remembered that there is a variety of miscellaneous statutory arrest powers which may modify these general principles. Some, for example²³⁵ *Criminal Code* subsection 181(2) which authorizes police to take into custody anyone found in a common gaming house, overlap the provisions of the general arrest regime. Others, such as the powers to arrest those found committing a breach of the peace, or believed on reasonable and probable grounds to be "about to join in or renew the breach of the peace," extend the general powers of police arrest without warrant.²³⁶ In order for private citizens and police officers to be able to comprehend their rights and duties *vis-à-vis* one another in potential arrest situations, it is imperative that these miscellaneous arrest provisions be brought, to the extent possible, under the umbrella of a single comprehensive scheme.

While police officers have broad authority to arrest without warrant in relation to any criminal offence, an important aspect of the *Bail Reform Act* of the early 1970s was to include in *Criminal Code* subsection 450(2) a direction *not* to arrest in less serious offences except where the public interest requires an arrest. The operative mechanism for accomplishing the task of compelling appearance by police officers without an arrest was the appearance notice or "ticket" described in the previous section of this chapter. The purpose of this discussion is not to go over that ground again, but rather to point out the weaknesses of the present appearance notice scheme as a limitation on the exercise of police powers of arrest without warrant. *Criminal Code* subsection 450(2) appears to give police a firm direction not to arrest in the less serious indictable offences which are tried by magistrates only, in dual character offences and in summary conviction offences, unless the public interest requires it. The "public interest" is then broadly defined to include the need to establish the identity of the accused, the need to secure or preserve evidence or the need to prevent the continuation or repetition of the offence. However, what is given with one hand is almost entirely taken away with the other. The direction not to arrest is deprived of any real potential for enforcement by subsection 450(3) which in general provides that a police officer who arrests when he or she need not, in relation to one of these less serious offences, is nevertheless within the execution of his or her duty, as long as there exist grounds for arrest in accordance with the broad general powers

234. See note 220, *supra*, and the text relating thereto.

235. See authorities cited in note 220, especially *Chartier v. Attorney-General of Québec*.

236. *Criminal Code*, R.S.C. 1970, c. C-34, section 31. For a discussion of these powers, see Glanville Williams, "Arrest for Breach of the Peace," [1954] *Crim. L. Rev.* 578; *Frey v. Fedoruk*, [1950] S.C.R. 517; *R. v. Biron*, *supra*, note 128; and *R. v. Lefebvre* (1982), 67 C.C.C. (2d) 466 (B.C. Prov. Ct.). See also the discussion in Chapter One, Section III of this text under the heading "Federal and Provincial Arrest Powers."

for arrest without warrant described above.²³⁷ There may remain a possibility for civil suit against a police officer who arrests contrary to the statutory direction of subsection 450(2), but it is cold comfort to a person who can be successfully charged with assaulting a peace officer in the execution of his duty, that he might have grounds to recover nominal damages in a civil action against the officer. Subsection 450(3) almost turns subsection 450(2) into a charade and no analogous provision must be allowed to appear in a reformed law of arrest.

VI. Notice Requirements

The *Canadian Charter of Rights and Freedoms*, section 10, provides that "[e]veryone has the right on arrest or detention (a) to be informed promptly of the reasons therefore; [and] (b) to retain and instruct counsel without delay and to be informed of that right" The right to be given reasons has been traditionally a fundamental aspect of the law of arrest in Canada, and will be the focus of the bulk of the discussion in this section. The recently evolved right to be informed of the right to counsel will receive less lengthy consideration.

A. Right to Reasons for Arrest

The right to be told the true reasons for arrest at the time of an arrest was recognized by the common law as such an essential element of the arrest process that failure to adhere to the requirement vitiated the legality of the arrest rendering the arrester civilly liable.²³⁸ The principle found Canadian legislative expression in what is now subsection 29(2) of the *Criminal Code* which reads:

It is the duty of every one who arrests a person, whether with or without warrant, to give notice to that person, where it is feasible to do so, of

- (a) the process or warrant under which he makes the arrest, or
- (b) the reason for the arrest.

The *Code* provision alludes to the fact that in certain circumstances it may not be feasible to give reasons for arrest, and this creates a tension with the provisions of both the *Canadian Bill of Rights*²³⁹ and the *Canadian Charter of Rights and Freedoms* which do

237. *R. v. Adams* (1972), 21 C.R.N.S. 257 (Sask. C.A.); *R. v. McKibbin* (1973), 12 C.C.C. (2d) 66 (B.C. C.A.).

238. *Christie v. Leachinsky*, *supra*, note 127; *Koechlin v. Waugh*, *supra*, note 127; *Kennedy v. Tomlinson*, *supra*, note 220; *R. v. Acker*, *supra*, note 127.

239. *Canadian Bill of Rights*, R.S.C. 1970, Appendix III, subparagraph 2(c)(i).

not, on their face, provide such an exception. Indeed, the latter documents assert in an uncompromising fashion that the person is to be informed of the reasons for arrest *promptly*. These and other difficult issues, by relating to the implementation of the right to reasons, can usefully be tackled by the separation of the arrest with warrant from the situation of the arrest without warrant.

Where an arrest is made pursuant to a warrant, the *Criminal Code* assumes that the requirement for notification of the reasons for arrest can be met by producing the warrant upon request (although some suspects may be illiterate, blind, and so on). Subsection 29(1) imposes a duty upon the person executing a warrant "to have it with him, where it is feasible to do so, and to produce it when requested to do so." Subsection 29(2), reproduced above in the text, imposes the duty to give notice of the warrant under which he makes the arrest, *or* in the alternative, to give notice of the reasons for arrest. Finally, subsection 29(3) states that failure to comply with subsections (1) and (2) does not "of itself" deprive a person who executes a warrant or makes an arrest, of protection from criminal liability. The result is that a person making an arrest with warrant ought to have it and to produce it on request, and if he or she does so, this will be deemed to be compliance with the requirements of notification of reasons for arrest. On the other hand, the section will support the interpretation that a person may validly arrest with warrant by merely verbally informing the person of the existence of the warrant or by telling him or her the reasons for arrest, as long as there is no request to produce the warrant. Presumably subsection 29(3) would even operate to protect the person who has the arrest warrant but refuses to produce it, only giving reasons for the arrest orally. This somewhat convoluted analysis is further complicated by the fact that a police officer may arrest *without* warrant a person for whom he has reasonable and probable grounds to believe a warrant for arrest is in force in the territorial jurisdiction,²⁴⁰ and the Supreme Court has held that there is no duty on the person invoking this arrest-*without*-warrant provision to obtain possession of the warrant.²⁴¹ In fact, the Supreme Court has de-natured the policy behind the notice requirement in its section 29 manifestation by holding that a police officer arresting *without* warrant, on the basis of there being a warrant in existence elsewhere in the jurisdiction, need only inform the accused of the fact that the warrant exists ("notice of the warrant"), and need not provide any information as to the nature of the charge.²⁴² This Kafkaesque result must be reversed in a reformed law of arrest.

The situation of the "true" arrest without warrant gives rise to problems concerning the implementation of notice provisions which are less esoteric. The main difficulties here are: (a) the extent of the duty to give reasons where they are "obvious"; (b) the extent to which one is required to give reasons for arrest where the arresting person is faced with resistance, flight or an incapacitated suspect; and (c) the sufficiency of the "content" of the reasons. Common law authority suggests that reasons for arrest need

240. *Criminal Code*, R.S.C. 1970, c. C-34, paragraph 450(1)(c). See the discussion of this problem in the preceding section of this chapter.

241. *Gamracy v. The Queen* (1973), 12 C.C.C. (2d) 209 (S.C.C.). But, cf. *Richard v. The Queen* (1974), 27 C.R.N.S. 337 (Qué. S.C.).

242. *Ibid.*

not be given where the situation makes the reasons for the arrest obvious.²⁴³ However, the wording of the *Canadian Charter of Rights and Freedoms*, the *Canadian Bill of Rights*, and *Criminal Code* section 25 all seem to preclude this approach. From a policy perspective, the literal application of their provisions seems preferable. While the reasons for arrest may appear to be obvious to a police officer, the facts and the law may appear to be different in the eyes of the alleged offender. Where the suspect takes no action to make the giving of reasons "unfeasible," surely the duty to give reasons must be complied with, even though they might seem obvious to some.²⁴⁴ Immediate provision of reasons for arrest may be unfeasible where the suspect resists arrest or flees from the would-be arrester.²⁴⁵ Similarly, the accused's incapacity to understand the reasons for arrest by virtue of impairment by drugs or alcohol²⁴⁶ or other medical causes may render informing him or her of reasons for arrest ineffective. In all of these situations, it would seem reasonable to assert that the "promptness" requirement of the Charter and *Canadian Bill of Rights* could be met by informing a suspect of the reasons for arrest as soon as the impediment is no longer operative. The "right to reasons" is however, sufficiently ambiguous that statutory clarification in a reformed law of arrest is highly desirable.

The sanctions for failure to give reasons for arrest lie in civil liability of the arrester for false imprisonment and in the right of the person detained to resist an arrest for which reasons are not given.²⁴⁷ Subsection 29(3) gives the arrester who fails to provide reasons for an arrest, with an ambiguous protection from criminal liability. The extent to which subsection 24(1) of the *Canadian Charter of Rights and Freedoms* may provide a remedy has yet to be seen. The adequacy of presently existing civil, criminal, and Charter remedies must be weighed carefully in the process of reform.

B. Right to Be Informed of Right to Counsel

Full consideration of the issues involved in the right to counsel upon the accused's arrest or detention is outside the scope of this Working Paper. However, to the extent that *Canadian Charter of Rights and Freedoms* paragraph 10(b) enshrines not only the right to counsel but also a right to be *informed* of that right upon arrest or detention, a new element has been added to the notice requirements to be complied with by those making an arrest.²⁴⁸ A number of courts have considered this provision of the Charter,²⁴⁹

243. *Christie v. Leachinsky*, *supra*, note 127.

244. *R. v. Oake* (1981), 61 C.C.C. (2d) 129 (N.S. Ct. Ct.).

245. *Christie v. Leachinsky*, *supra*, note 127.

246. For example, see *R. v. Beaudette* (1957), 118 C.C.C. 295 (Ont. C.A.).

247. See the authorities cited in note 238. See also the discussion concerning sanctions for unlawful arrest in the last section of this chapter.

248. As with the right to be told the reasons for arrest, there may be limitations on this right. See, for example, *R. v. Yelland* (1983), 11 W.C.B. 246 (Sask. Prov. Ct.), where it was held that it had been acceptable not to inform the accused of his right to counsel, since he had been too intoxicated to understand this right.

249. *R. v. Nelson* (1982), 3 C.C.C. (3d) 147 (Man. Q.B.); *R. v. Comeau* (1982), 55 N.S.R. (2d) 170 (N.S.

and remedies such as the exclusion of evidence under Charter subsection 24(2)²⁵⁰ or a dismissal of charges under Charter subsection 24(1).²⁵¹ But there seems to be no suggestion that the right to be informed of the right to counsel is an element of the arrest *per se* such that failure to comply with the requirement might render the arrest unlawful. Surely this is correct. Failure to provide the reasons for arrest makes the arrest unlawful and may engage the civil and even criminal liability of the wrongful arrestor. Failure to provide a lawfully arrested person with the information that he or she has a right to counsel is contrary to the Charter and the proper subject of remedial action at the discretion of the court, but does not affect the validity of the arrest itself.

VII. Powers Necessary to Effect an Arrest

In order to carry out a lawful arrest effectively it may be necessary to search the arrested person for weapons which might be used against the arrestor. The use of force may be required to overcome resistance to an arrest or to prevent flight. It may also be necessary to enter private property in order to effect the arrest. The first of these powers has been reviewed in a separate Working Paper from the Commission entitled *Police Powers - Search and Seizure in Criminal Law Enforcement*.²⁵² Similarly, the use of force in carrying out acts authorized in the administration of justice is treated in the Commission's Working Paper entitled *The General Part - Liability and Defences*.²⁵³ The present law governing entry on private property to effect an arrest is the subject of this section.

Entry upon private property to effect an arrest is not specifically regulated by any provision of the *Criminal Code*. The wording of section 25 is sufficiently general that one might have thought that it could be expansively interpreted to cover the problem, but such an approach has not found favour with the Supreme Court of Canada.²⁵⁴ One is thrown back upon the common law for guidance, but the authorities are in a state of confusion.²⁵⁵ It is helpful to analyze the issues according to whether the entry is sought to make an arrest with, or to make an arrest without, warrant; in the latter circumstance, the cases suggest a distinction must be made between dwellings and other forms of private property.

S.C.A.D.); *R. v. Cuff* (1983), 6 C.C.C. (3d) 311 (B.C. Ct. Ct.); *R. v. Ahearn*, *supra*, note 26; *MacDonald v. R.* (1983), 20 M.V.R. 255 (N.B. Q.B.).

250. *R. v. Nelson*, *supra*, note 249.

251. *R. v. Comeau*, *supra*, note 249.

252. Law Reform Commission of Canada, *Police Powers - Search and Seizure in Criminal Law Enforcement*, [Working Paper 30] (Ottawa: Minister of Supply and Services Canada, 1983).

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

254. In *Eccles v. Bourque*, *supra*, note 205, four justices held that section 25 does not authorize entry on private property to effect arrest pursuant to section 450, while the remaining five justices expressly declined to make a pronouncement upon the issue.

255. Helpful but divergent reviews of the relevant case-law may be found in Leigh, *supra*, note 115, pp. 167-196, and in W. F. Foster and Joseph E. Magnet, "The Law of Forcible Entry," [1977] 15 *Alta. L.R.* 271.

There seems to be general agreement that where police officers are armed with a warrant for the arrest of a person who is alleged to have committed a criminal offence, they may forcibly enter private premises including dwellings, without the consent of the occupier if they have reasonable and probable grounds to believe that the person sought to be arrested will be found within, and if notification of presence and purpose has been made and a demand to enter refused.²⁵⁶ It would appear that the announcement and demand for entry may be dispensed with in exigent circumstances, such as saving an occupant from death or injury, prevention of the destruction of evidence, and in circumstances of hot pursuit.²⁵⁷ It can thus be said that the police officer's power of forcible entry to effect an arrest with warrant is a very broad one.

There is a good deal of controversy surrounding forcible entry upon private property to effect an arrest *without* warrant. Some authority²⁵⁸ supports the following view expressed in *Halsbury's Laws of England*:

A constable has no general right of entry into private property for the purpose of ... effecting an arrest; every invasion of private property, however slight, is a trespass, and no person has the right to enter property except by consent or strictly in accordance with some lawful authorization.²⁵⁹

This sentiment is strengthened by the traditional view that "one's home is one's castle."²⁶⁰ However, the Supreme Court of Canada in *Eccles v. Bourque* adopted the position that the rules described above as being applicable to arrest *with* warrant were also applicable in the situation of arrest without warrant.²⁶¹ It may be that *Eccles v. Bourque* will be restricted to situations of arrest without warrant under *Criminal Code* paragraph 450(1)(c) where a warrant has been issued, although this limitation is not clear from the reasons of the Court.²⁶² Even if the most restrictive view of the authorities is adopted, there is a general exception at common law allowing entry upon premises by police without warrant or by private citizens to prevent death or injury to persons on the premises.²⁶³ If the case of *Eccles v. Bourque* is assimilated to the warrant scheme, and one can say

256. See *inter alia*, *Semayne's Case* (1604), 5 Co. Rep. 91a, 77 E.R. 194 (resolution three); *Re Curtis* (1756), Post 135, 168 E.R. 67; *Burdett v. Abbott* (1811), 14 East 1, 104 E.R. 501. The situation with respect to civil cases is different: *Johnson v. Leigh* (1815), 6 Taunt 246, 128 E.R. 1029; *Morrish v. Murray* (1844), 13 M & W 53, 153 E.R. 22.

257. *Eccles v. Bourque*, *supra*, note 205; *R. v. Custer* (1984), 12 W.C.B. 89 (Sask. C.A.).

258. *Great Central R. Co. v. Bates*, [1921] 3 K.B. 578; *Davis v. Lisle*, [1936] 2 K.B. 434; *Morris v. Beardmore* (1980), 71 Cr. App. R. 256; *Finnigan v. Sandiford*; *Clowser v. Chaplin* (1981), 73 Cr. App. R. 153.

259. *Halsbury's Laws of England*, 4th ed. (London: Butterworths, 1976), vol. 11, pp. 85-86.

260. *Semayne's Case*, *supra*, note 256; *R. v. Landry* (1981), 63 C.C.C. (2d) 289 (Ont. C.A.) (leave to appeal to S.C.C. granted).

261. *Supra*, note 205. This interpretation of *Eccles v. Bourque* is implicitly rejected by the Ontario Court of Appeal in *Landry*, *supra*, note 260.

262. Clarification of this issue may be forthcoming shortly with the Supreme Court decision in *R. v. Landry*, *supra*, note 260.

263. *Robson v. Hallett*, [1967] 2 Q.B. 939; *Handcock v. Baker* (1800), 2 Bos. & P. 260, 126 E.R. 1270; *Bailey v. Wilson*, [1968] Crim. L. Rev. 617; *R. v. Custer*, *supra*, note 257.

that there is no general principle allowing forcible entry to dwellings to effect arrest without warrant, it may be argued that there is a limited power of the police to enter premises other than dwellings to effect arrest. In *R. v. Stenning*²⁶⁴ forcible entry of private premises was excused by the Supreme Court of Canada where police officers were operating within the scope of their general duty to investigate an offence, and where the conduct, although “*prima facie* a trespass,” was a “justifiable use” of the powers associated with the general duty.²⁶⁵ This case might be explained in terms of English cases concerning an implied licence to enter upon unlocked private premises in certain circumstances,²⁶⁶ but such a limitation is not evident in the court’s reasoning.

VIII. Enforcement

If the police abuse powers of arrest, the integrity of the whole arrest regime requires effective sanctions in order to ensure that unlawful practices do not become standard modes of procedure. Present law recognizes a number of different sanctions which tend to inhibit wrongful behaviour on the part of police: self-defence against an unlawful arrest, civil suit against the wrongful arrester, criminal charges against the wrongful arrester, administrative sanctions under Police Acts, and possible new remedies under the *Canadian Charter of Rights and Freedoms* such as the exclusion of evidence or the dismissal of charges. A full study of remedies in relation to criminal procedure is being undertaken by the Commission in a separate Working Paper; however, each of these remedies will be examined briefly. One must admit at the outset that, with the possible exception of the Charter remedies which have yet to be fully tested by the courts, the practical effectiveness of the present sanctions against unlawful arrest leaves much to be desired.

A. Self-Defence and Unlawful Arrest

The mythology of the common law is that one is entitled to defend oneself against an unlawful arrest by anyone, including a police officer, and from time to time this rhetoric is vindicated in the courts.²⁶⁷ The practical truth, however, is that it is always dangerous to resist a police officer who is attempting to make an arrest. A person’s knowledge that he or she is perfectly innocent of any offence is no assurance that a police

264. *R. v. Stenning*, *supra*, note 163.

265. The implications of this doctrine discussed in section II.C. of this chapter, *supra*, are far-reaching. It was explicitly relied upon by counsel for the federal Department of Justice in the latter’s rejection of the findings of the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police (McDonald Commission) (see the Commission’s *Report* (Ottawa: Minister of Supply and Services Canada, 1981), and the opinion to the Ministry of Justice from the firm Lang, Michener, Cranston, Farquharson and Wright, dated July 14, 1981, referred to in a press release from the Ministry of Justice dated August 27, 1981).

266. See Leigh, *supra*, note 115, p. 174.

267. *R. v. O’Donnell and Cluett* (1983), 3 C.C.C. (3d) (N.S. S.C.A.D.).

officer may not have reasonable and probable grounds to believe that the person has committed an offence. Even where powers of arrest are framed in the language of “finds committing,” the courts have enlarged the scope of the arrest authority by the interpretation that the phrase really means “finds apparently committing.”²⁶⁸ The margin for error on the part of both police officers and private citizens is being enlarged by the courts at the expense of the citizen’s right of self-defence against unlawful arrest. Safe assertion of one’s right of self-defence against unlawful arrest requires not only knowledge of the circumstances of innocence in relation to the facts of an alleged offence, but also a knowledge of the information on which the police officer acts and an understanding of the state of the law which are beyond the ken of most mortals.

B. Criminal Charges

In accordance with *Criminal Code* section 26,²⁶⁹ criminal charges can be laid against those who use force and exceed their authority when purporting to make a lawful arrest.²⁷⁰ Depending upon the nature and quality of the act which constitutes the excess, the person might be charged with assault, assault causing bodily harm, forcible confinement,²⁷¹ or homicide offences where death occurs. Once again it is important to stress that mere innocence on the part of the arrested person, or the use of force in arresting an innocent person will not result in the laying of criminal charges against the arrestor. As long as there are grounds for arrest and the force used is within the broad limits of section 25 of the *Criminal Code* as discussed above, there will be no basis for criminal charges. Where the legal basis for laying criminal charges does exist, there are practical and political factors which may inhibit its use. While public officials (police, prosecutors, the Attorney General) may prosecute police in cases of gross misbehaviour which come to the attention of the public or the media,²⁷² there are strong institutional pressures to downplay, if not cover up, incidents of police misconduct.²⁷³ The wronged individual may have the financial resources and the perseverance to bring a private prosecution against a wrongful arrestor, but unlike the civil action, there is no prospect of financial gain, and there is the possibility that the Crown may intervene to stay the proceeding if such action is perceived as likely to damage the government’s political standing.²⁷⁴

268. *R. v. Biron*, *supra*, note 128; *R. v. Cunningham and Ritchie*, *supra*, note 216.

269. *Criminal Code*, R.S.C. 1970, c. C-34, s. 26.

270. *R. v. Lesley* (1860), 8 Cox. C.C. 269; *R. v. Linsberg and Leics* (1905), 69 J.P. 107; *Savard and Lizotte v. The King*, [1946] S.C.R. 20.

271. The offence of forcible confinement is drafted in such a manner that awkward problems of interpretation arise in relation to its use as a sanction against an unlawful arrest. See Bruce P. Archibald, “The Law of Arrest” in Vincent M. Del Buono, ed., *Criminal Procedure in Canada* (Toronto: Butterworth, 1982), p. 125.

272. *R. v. O'Donnell and Chuet*, *supra*, note 267.

273. The slowness of the federal government of Canada to respond to complaints which ultimately led to the creation of the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police in the late 1970s may be a case in point.

274. *Ex parte Dawson* (1981), 62 C.C.C. (2d) 286 (Ont. C.A.) and *Dowson v. The Queen*, *supra*, note 184.

C. Civil Actions

An unlawful arrest or unlawful attempted arrest may found an action in tort if: (a) there are no grounds for making the arrest;²⁷⁵ (b) proper reasons are not given for the arrest;²⁷⁶ (c) excessive force is used; (d) the normal powers incident to arrest are exceeded;²⁷⁷ or, (e) in effecting an arrest, the arresting person causes injury through negligence.²⁷⁸ In Québec, there may be an action under Article 1053 of the *Civil Code* in analogous circumstances.²⁷⁹ The defendants in a civil action may include not only the person who physically makes the arrest but also those responsible for instigating the arrest by another person²⁸⁰ as well as superiors such as the chief of police, the municipality²⁸¹ or the Attorney General,²⁸² who may be vicariously liable by virtue of various statutory provisions.²⁸³

For reasons inherent to the structure of tort law and also because of the judicial interpretation which section 25 has received, the head of tort liability under which damages can be recovered may depend upon whether or not the impugned actions connected with the arrest were intended or unintended actions. An intended arrest which is effected without proper grounds, without compliance with the requirement to provide reasons for the arrest or without adherence to other formalities of execution, may be the basis for a false imprisonment suit.²⁸⁴ In such circumstances, it cannot be said that the activity is "required or authorized by law," and as such the arrestor is not protected from civil liability by section 25 even though he may have acted on what he thought were reasonable and probable grounds. In this respect, the reference in section 25 to justification if the person "acts on reasonable and probable grounds" can have application only to actions which are authorized or required by the common law or other statutes. Section 25 itself does not authorize all activities which might be undertaken on a purported exercise of lawful authority merely because the person making the arrest thought there were reasonable

275. *Christie v. Leachinsky*, *supra*, note 127.

276. *Koechlin v. Waugh*, *supra*, note 127; *R. v. Acker*, *supra*, note 127.

277. *Priestman v. Colangelo and Smythson*; *Priestman v. Shynall and Smythson* (1959), 124 C.C.C. 1 (S.C.C.).

278. *Beim v. Goyer*, [1966] 4 C.C.C. 9 (S.C.C.). A thoughtful article on the broad issue of the civil action as a sanction for police misconduct is Paul C. Weiler, "The Control of Police Arrest Practices: Reflections of a Tort Lawyer," in A. M. Linden, ed., *Studies in Canadian Tort Law* (Toronto: Butterworths, 1968), p. 416.

279. *Prime v. Keiller, Rainville and the City of Montreal*, [1943] R.L. 65; reprinted at [1968] R.L. 405.

280. *Perry v. Fried* (1972), 32 D.L.R. (3d) 589 (N.S. S.C.).

281. R. M. Parker, "Suing the Municipal Police Officer" (1978), 1 *Advocates Q.* 329.

282. *Chartier v. Attorney-General of Québec*, *supra*, note 220.

283. It was the common law position that neither the municipality nor the Crown was liable for the tortious acts of constables. For a discussion of the problems caused by this situation in Nova Scotia where the common law still prevails, see Judge Nathan Green's *Report of the Commission to Review the Police Act and Regulations* (Halifax, 1981), pp. 67-70.

284. W. E. Horkins, "False Arrest Today," [1973] *Law Society of Upper Canada Special Lectures* 241.

and probable grounds for his actions.²⁸⁵ This latter interpretation of section 25 must be avoided in order to prevent an entirely tautological meaning being given to the section. If force is intentionally used to effect an unlawful arrest, the same reasoning applies, making the arrester civilly liable for battery as well as false imprisonment despite section 25. If the force is excessive, then an action for battery will lie. In these latter circumstances, however, the liability attaches only if the force used exceeds what is allowable by virtue of the interplay between subsections (1), (3) and (4) of section 25. The damages recoverable by way of these intentional torts will normally reflect the notion of compensation for actual harm done through the usual principles applicable to special and general damage awards. However, punitive damages may be available where the circumstances of the false arrest are particularly outrageous or scandalous.²⁸⁶ But this is only the case where no criminal proceeding has been taken against the person making the unlawful arrest.²⁸⁷ Here, of course, is another disincentive to prosecute privately a wrongful arrester in a criminal proceeding.

Where, in the course of an arrest, damage is occasioned by virtue of the arrester's unintended action and not as the result of his unintended use of force in the carrying out of an arrest, recovery may be had through the tort of negligence.²⁸⁸ In this situation, section 25 is said to be inapplicable since there is no intentional activity "authorized, or required by law" but rather an unintended action bringing about harm in a negligent fashion. The difficult choice for the court, one susceptible to the influence of many factors which may not be made explicit in a judgment, is whether or not to classify a particular action as intentional or unintentional. The seemingly contradictory results of the cases of *Priestman v. Colangelo* and *Beim v. Goyer*,²⁸⁹ typify the problem. In any event, only special and general damages will be available, since negligently caused damage is not susceptible to the application of the principles of punitive damages.²⁹⁰

The conclusion which must be drawn, following an analysis of civil actions as a remedy for wrongful arrest, is that they are legally complex and thus uncertain, as well as very expensive. Reform would be desirable here, but the provincial jurisdiction over civil law²⁹¹ may inhibit federal reform initiatives.

285. *Eccles v. Bourque*, *supra*, note 205.

286. *Basil v. Spratt* (1918), 44 O.L.R. 155 (C.A.); *Eagle Motors (1958) Ltd. v. Makaoff* (1970), 17 D.L.R. (3d) 222 (B.C. C.A.).

287. *Amos v. Vawter* (1969), 6 D.L.R. (3d) 234 (B.C. S.C.); *Natonson v. Lexier*, [1939] 3 W.W.R. 289 (Sask. K.B.).

288. *Beim v. Goyer*, *supra*, note 278.

289. *Priestman v. Colangelo and Smythson*, *supra*, note 277; *Beim v. Goyer*, *supra*, note 278. Both involved teenage car thieves fleeing police. In *Priestman*, the police were held not to be liable for the deaths of innocent bystanders, while in *Beim*, the officer was liable for shooting the fleeing thief.

290. *Kayior v. Lions Driving Range Ltd.* (1962), 35 D.L.R. (2d) 426 (B.C. S.C.).

291. *The Constitution Act, 1867*, s. 92(13).

D. Administrative Sanctions

Most provinces have police Acts under which procedures are established whereby citizens may make complaints concerning what they consider to be improper actions on the part of police officers.²⁹² It is normal for the first stage of such complaint procedures to involve an investigation of the matter within the police department in order to settle any difficulties between a citizen and the police on an informal basis where possible. If the internal investigation finds the citizen's complaint to be groundless, then the citizen will normally be entitled to pursue the matter before an administrative tribunal charged with the responsibility of hearing formal complaints. The sanctions available in the event of a finding of police misconduct are of a disciplinary nature ranging from a demerit, which may go on an officer's record and affect prospects for promotion, to suspensions and dismissal. As such, these procedures do not present the advantage of a potential damage award as would a civil action in the context of misconduct which amounted to wrongful arrest. However, the complaint procedure may be particularly appropriate in circumstances of an arrest carried out in an unseemly manner which, though lawful, might constitute conduct unbecoming a police officer for which disciplinary action would be in order. Given the broad protection afforded an arresting officer by the law, this may often be the only recourse open to a disgruntled citizen.

E. Charter Remedies

The *Canadian Charter of Rights and Freedoms* provides possibilities for two general types of sanctions in the event of the breach of a Charter right in the arrest process.²⁹³ The first is a dismissal or stay of criminal proceedings under Charter subsection 24(1) where a Charter right has been infringed in the arrest process.²⁹⁴ The second is the exclusion of evidence obtained subsequent to an unlawful arrest where its admissibility would bring the administration of justice into disrepute.²⁹⁵ While the broad possibilities here are readily understandable, it is not within the scope of this Working Paper to speculate upon the manner in which the courts might elaborate such remedies. However, certain statutory reforms in this regard are proposed in Part Two, *infra*.

292. *The Police Act*, S.A. 1973, c. 44; *Police Act*, R.S.B.C. 1979, c. 331; *The Provincial Police Act*, R.S.M. 1970, c. P150; *Police Act*, S.N.B. 1977, c. P-9.2; *Police Act*, S.N.S. 1974, c. 9; *Police Act*, R.S.O. 1980, c. 381; *Police Act*, R.S.P.E.I. 1974, c. P-9, also *Police Act*, S.P.E.I. 1977, c. 28 (not proclaimed); *Police Act*, R.S.Q. 1977, c. P-13; *The Police Act*, R.S.S. 1978, c. P-15.

293. Charter rights which impinge upon the arrest process are discussed, *supra*, in Chapter Two.

294. See discussion of this issue in *R. v. Dorey* (1983), 9 W.C.B. 165 (N.S. S.C.A.D.); *R. v. Coglan*, *supra*, note 32; *R. v. Berry*, *supra*, note 32; *R. v. Sybrandy*, *supra*, note 32.

295. See discussion of exclusion in *R. v. Therens*, *supra*, note 26; *R. v. Manninen* (1983), 8 C.C.C. (3d) 193 (Ont. C.A.); *R. v. Chapin* (1983), 43 O.R. (2d) 458 (C.A.); *R. v. Stevens* (1983), 35 C.R. (3d) 1 (N.S. S.C.A.D.); *R. v. Collins* (1983), 33 C.R. (3d) 130 (B.C. C.A.); *R. v. Cohen* (1983), 33 C.R. (3d) 151 (B.C. C.A.). See particularly the discussion of exclusions for reasons relating to arrest in *R. v. Charlton* (1983), 9 W.C.B. 439 (B.C. Prov. Ct.).

CHAPTER THREE

The Need for Reform

In order to assess the law of arrest as described in the preceding chapter, one must consider it in terms of the substantive and technical principles governing the reform of criminal procedure as posited in the Introduction to this Working Paper. The first substantive principle was the idea that restraint must characterize an arrest regime which perforce authorizes interference with personal liberty and privacy. The second may be stated as a requirement for balance between the interests of effective law enforcement and the rights of the individual, including the necessity to ensure mechanisms to maintain the balance. The third principle was to ensure a rational and cost-efficient allocation of power and authority among the various persons who might be involved in the application and enforcement of an arrest regime. At the technical level, the law of arrest must be evaluated in accordance with its clarity and simplicity, particularly from the point of view of those invoking and those affected by the rules. Furthermore, there is the need for internal and external coherence and comprehensiveness. With these evaluative criteria in mind, a review of the areas of arrest examined in Chapter Two reveals a substantial need for reform.

The definition of arrest provided by the *Whitfield* decision, while simple from the point of view of the police officer, does not accord with the common citizen's perception of arrest as a custodial matter. Clarity and simplicity would be better served by a custodial definition of arrest, as would the principle of fairness where persons not arrested from a common sense point of view can be charged with escaping lawful custody. Further definitional problems arise, of course, in relation to the concept of "detention short of arrest." While it is beyond the scope of this Working Paper to resolve all the issues in relation to defining detention for the purposes of the *Canadian Charter of Rights and Freedoms*, common types of investigatory procedures and their relationship to arrest must be further explored; otherwise the coherence of the arrest regime in relation to contiguous areas of criminal procedure will be brought into question.

At present the purposes of a lawful arrest in criminal procedure are not clear. Particularly in respect of indictable offences, there is no general direction to police officers to implement principles of restraint when invoking their powers of arrest. Where principles of restraint are recognized in relation to less serious offences by *Criminal Code* subsection 450(2), the operation of the restraint concept is blurred by the protection afforded the arresting officer in subsection 450(3). A clear statement of the purposes of a lawful arrest will help to clarify the scope of appropriate application of the restraint principle to arrest for all offences, not merely for minor ones.

As the result of ambivalence toward the concept of restraint embodied in the *Bail Reform Act*, the structuring of the alternatives to arrest without warrant (that is, appearance notice, summons, arrest with warrant) is incomplete in relation to the full range of offences, and is accomplished in a series of sections in the *Criminal Code* (451 to 456.3) which are drafted in a highly complex manner, making them very difficult to understand. Thus in both form and substance, the organizational structure by which the mechanisms for compelling the appearance of an accused are related to one another requires significant reform.

The provisions of the *Criminal Code* authorizing arrest without warrant by both private citizens and police officers are drafted in language which, with the accretion of statutory interpretation of the courts over the years, has taken on a somewhat Byzantine complexity of form. At the same time, these provisions underwent a reduction in differences in terms of substance. If the distinctions between arrest on "reasonable and probable grounds" and arrests based on "finds committing" powers are being reduced on understandable grounds of policy, reformed statutory provisions ought to recognize the merit of these interpretations while finding means to ensure the continued practical application of the restraint principle. In addition, consideration must be given to removing from the ambit of arrest without warrant the grounds of arrest for "breach of the peace." The content of the phrase is exceedingly vague in present-day Canadian criminal law, and such a catch-all ground for arrest may be argued to be contrary to the substantive principle of *nulla poene sine lege*.

The present case-law and statutory provisions concerning notification of the reasons for arrest are not only difficult to reconcile with the requirements of the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*, but are of uncertain purport. Furthermore, the rules governing notice requirements are scattered among constitutional documents, ordinary statutes and various cases with the result that it is difficult for the most assiduous observer to gather an authoritative statement of the law. Thus, in the interests of substantive fairness, as well as the technical attributes of good legislation, reform of the law of arrest in this area is required.

The domain of police powers necessary to effect an arrest is one of the most difficult areas of the law of arrest to state with clarity, and one in relation to which the principle of restraint needs greatest application. The present state of confusion in the law with respect to entry upon private property to effect arrest requires reform from all possible points of view whether substantive or technical.

The mechanisms for enforcement of the rules which make up the present arrest regime are deficient. The structure of the law of arrest, undervaluing the principle of restraint as it does, reduces the effectiveness of adversarial proceedings against police officers whether in a civil, criminal or administrative context, by clothing police officers with broad powers of arrest which can be over-used with impunity. The integration of principles of restraint as grounds for the exercise of broad powers of arrest can effectively combine efficient police powers with a means of sanctioning their abuse. Finally, the potential presented by section 24 of the *Canadian Charter of Rights and Freedoms* as a

source for effective means to ensure compliance with the rules of any arrest regime must be explored. It may be that legislative reform can speed up the process of creating sanctions in relation to the trial of an unlawfully arrested accused which might otherwise evolve at an extremely slow pace in the process of judicial decision making.

This encapsulated summary of the reasons why reform of the law of arrest is necessary is intended only to provide an overview of the concerns which will be addressed more concretely in relation to each set of issues in Part Two.

PART TWO:
REFORM OF THE LAW OF ARREST

CHAPTER FOUR

Principles, Purposes and Definitions

I. Introduction

As was stated in the main Introduction of this Working Paper, the principles underlying the reform of the law of arrest must be those of simplicity, clarity, coherence and comprehensiveness in order best to inform citizens and police officers of their rights and duties in potential arrest situations. In implementing these formal principles, the substance of the law expressed thereby must strike an appropriate balance between the interests of efficient crime control on the one hand, and the freedom of the citizen as protected through appropriate standards of fundamental justice on the other. This balance must be struck with an awareness of the aspirations of Canadian citizens to ensure full implementation of constitutional principles and rights, as well as an awareness of the practical needs of policing in a modern society. Finally, this reform must be undertaken with the knowledge that the concepts of arrest and detention are at the cutting edge in the relationship between state and individual; that their formulation may set the tone for attitudes in other facets of criminal procedure. Therefore, *restraint* and *fairness* must be the watchwords.

II. The Purposes of Arrest

At present, authority to arrest is lawfully authorized for a number of purposes which might generally be described as compelling appearance for trial, preventing interference with the administration of justice, and maintaining public order. The existence of an interrelationship among these purposes determines the policy options which underlie: the drafting of grounds for arrest by police officers and private citizens; the drafting of grounds for issuance of arrest warrants by justices of the peace; and, the relationship between the use of arrest to compel appearance as opposed to the use of documentary notice of criminal proceedings.

The primary purpose of the arrest in criminal procedure is to compel the appearance for trial of a person charged with an offence. This purpose is shared in part with mechanisms for documentary notice to appear given to accused persons (presently called the

appearance notice and summons, issued by police and courts respectively) which depend for their effectiveness upon the voluntary compliance of the accused. The distinction between arrest, on the one hand, and documentary notice of criminal proceedings on the other, is the use, or threatened use, of force to deprive the accused person of his or her freedom in order to *ensure* attendance in court. If the principle of restraint in the use of the power of the state is to be taken seriously in this context, then arrest in relation to this primary purpose is justified where there are reasonable grounds for belief in the existence of two conditions: (i) that an offence has been committed, and (ii) that voluntary mechanisms of documentary notice are insufficient to ensure attendance in court to answer to the charge. At present, these principles of restraint are applied in a modified way to less serious offences. For more serious offences, there is unrestrained authority to arrest where there are grounds to believe that the offence has been committed.

Preventing interference with the administration of justice and maintaining public order are secondary purposes for arrest in the sense that they normally come into play only where there are reasonable grounds to believe an offence has been committed and there are thus reasons to compel a person to appear in court to answer to a charge. These secondary purposes are partially recognized in the present *Criminal Code* paragraph 450(2)(d) which makes reference to (i) establishing the identity of the suspect, (ii) securing or preserving evidence, and (iii) preventing the continuation or repetition of offences. The first of these is in part an aspect of the primary purpose of ensuring attendance in court since, in the absence of knowledge of the accused's identity, effective documentary notice requesting attendance cannot be issued. The preservation of evidence, including that relating to identity, is essential to the administration of justice in relation to proceedings against the suspect, since without these things the prosecution will fail. Preventing the continuation or repetition of offences is central to both the maintenance of public order and an appropriate justification for an arrest where an offence has been committed and a suspect ought to be brought to trial. These purposes are secondary in that they concern *not* whether a person ought to be compelled to appear to answer charges, but rather whether arrest is required to accomplish not only this purpose but other ends as well. If the primary purpose of ensuring appearance in court can be assured by way of voluntary compliance with documentary notice, and yet there are reasonable grounds to believe that the effect of immediate use of this procedure will be the destruction of evidence, the tampering with witnesses, or the continuation of an offence (whether it be impaired driving or a psychopathic homicidal spree), sole reliance on the primary purpose as an exclusive basis for elaborating grounds for arrest is unworkable. The right of the citizen to the greatest possible freedom must here yield to the public interest in efficient crime control. This interrelationship between primary and secondary purposes for arrest, which finds partial expression in the present *Criminal Code* since the *Bail Reform Act*, ought to form the central policy thrust of a reformed law of arrest.

There are circumstances, however, where the purpose of maintaining public order may properly be elevated to the status of a primary ground for arrest. This occurs where a peace officer has reasonable grounds to believe that someone is about to commit a criminal offence. Police Acts cast a broad general duty upon police officers to maintain order and to prevent crime. The present *Criminal Code* paragraph 450(1)(a) provides a

peace officer with authority to arrest without warrant where there are reasonable and probable grounds to believe that a person is *about* to commit an indictable offence. This preventive purpose must be recognized as a legitimate aspect of the role of arrest in the maintenance of public order. Police ought to be able to restrain and arrest a person who is about to drive a car while drunk, about to rob a bank or about to commit a murder, in order to protect the safety of members of the public and maintain order in a preventive sense. Where the arrested person may not have gone "beyond mere preparation" thereby committing the offence of attempt, the arrest will not necessarily be for the purpose of compelling attendance in court to answer charges. The arrested person will be released and such arrest can only be justified on the grounds of a policy which recognizes a preventive aspect of the maintenance of public order as a legitimate purpose of arrest in criminal procedure.

RECOMMENDATION

1. That as at present, the authority to arrest should be used to compel the attendance of an accused person in court to answer criminal charges only where documentary notice of criminal proceedings is inadequate for this purpose because of a need:

- (1) to prevent the accused person's interference with the administration of justice by any means, including failing to appear, concealing identity, destroying evidence, or tampering with witnesses; or**
- (2) to maintain the safety of the public and public order by preventing the continuation or repetition of criminal offences, and in limited circumstances, by preventing apprehended criminal offences.**

III. The Definition of Arrest

As described in Part One, arrest in Canada is nowhere defined in the *Criminal Code*. However, it has been defined judicially as either (i) "touching" with a view to detention, or (ii) words of arrest followed by submission. This definition creates the anomalous possibility that what in practical terms is an "attempted" arrest can be defined as an actual arrest where touching occurs. On the other hand, it does allude to the two paradigmatic sets of circumstances which may bring about the loss of freedom: (i) the actual use of force to bring a suspect under control or into physical custody; or (ii) a statement requesting the suspect to submit to the control or custody of the arrester followed by the suspect's compliance. In the interests of simplicity, clarity and coherence, arrest ought to be defined in the *Criminal Code*. The law ought to be rid of the false technicality of the "arrest by mere touching" in the absence of actual, physical custody. This conceptual clarity can be attained with no loss to effective law enforcement. The suspect who avoids arrest by flight can be charged with resisting or wilfully obstructing a peace officer in the execution of his duty. Nothing is gained from the arrest by touching which then merely allows the charge to be laid under the offence of escaping lawful custody.

The *Whitfield* definition of arrest is exclusively a description of factual circumstances which amount to an arrest, and makes no statement concerning the requirements for a "lawful" arrest. An arrest is not lawful unless there are grounds authorizing the exercise of the arrest power, nor is it lawful unless properly executed; for example, through compliance with requirements such as giving reasons for the arrest and so forth. A definition of arrest involving lawfulness, in effect, would require a restatement or even an over-simplification of the whole of the law of arrest. However, an "objective" definition of arrest in phenomenological terms is valuable in order to determine not only how an arrest is accomplished but also the moment in time when the arrest occurs. This moment is crucial as it pinpoints the time at which legal relations between individual and state alter, the time when the suspect loses his or her right to resist what would otherwise be an unlawful assault, and the time at which a suspect is in lawful custody rather than at liberty. The starting point for resolving these issues is to state that an arrest occurs when a person submits to custody at the request of the arrestor, or when a person is taken into physical custody by an arrestor.

The above discussion proposes reform of the definition of arrest based on what might be termed objective criteria. These criteria are objective in the sense that an external, reasonable observer would be capable of giving evidence in court on such issues as whether a police officer physically restrained a suspect, whether words of arrest were spoken by the arresting person, whether the suspect submitted, whether reasons were given for the arrest, and so forth. However, reform of the law of arrest must come to grips with the voluntary "accompaniment" or "assistance" issue, and clarify the status and rights of persons in such circumstances. The citizen who is asked by a police officer to come to the station in order to answer questions, and who complies with such a request is, at present, not under arrest, unless the request is stated in such a manner that compulsion is clearly implied. As seen from the officer's point of view, there may be suspicions but not reasonable grounds to make an arrest. Information obtained through questioning of the suspect, examination of police records or other investigation during the period of voluntary assistance by the suspect may dispel these suspicions or may confirm them and provide grounds for arrest. If the latter is the case, a police officer might prevent the suspect from leaving, even though, to that point, no formal arrest had been made. Seen subjectively from the citizen's point of view, an "innocent" person might genuinely wish to assist police in the investigation of a crime in order to clear himself or herself or solve the crime, or a "guilty" person might not wish to bring further suspicion upon himself or herself by failing to co-operate with police. Either person might, in all probability, be unaware of the fact that one can legally refuse to accompany an officer for questioning unless one is actually arrested.

These situations are ambiguous, and this ambiguity is exploited by police. By requesting voluntary accompaniment, police can, under present law, argue that neither arrest nor detention exists, and that the constitutional right to counsel and the right to be informed thereof are not operative. This, of course, is a very real problem. Counsel will almost invariably advise clients not to speak to police until they have had an initial interview, if at all; yet suspects' statements are presently key to police work. On the other hand, the ignorant, timid, or genuinely co-operative person ought not to have his or her right to silence prejudiced by failure to be obstructionist, and police ought not to take unfair

advantage of suspects if suspicion in the mind of the officer has reached the point of reasonable grounds for arrest and release is not contemplated by the officer. Therefore, a reform of the law of arrest ought, at the very least, to require police officers who request persons to accompany them voluntarily for purposes of investigation to inform such persons of their right to refuse to do so. Compliance with this statutory duty by police officers would have the effect of ensuring that citizens would be aware of their formal legal right to refuse to accompany an officer, and inhibit any tendency on the part of police to exploit the ambiguities of the present law. Police failure to comply with this requirement would leave courts in a better position to draw the inference that the person who accompanied the police officer did not do so voluntarily but was rather compelled to submit to custody. In this latter case, the police officer would then be arresting the individual and would thus be under a duty to provide constitutionally required reasons for arrest, to inform the person of his or her right to counsel, and to comply with the requirements of the regime governing lawful arrests.

This proposal to define arrest in objective terms and to impose a duty on police officers, in essence, to tell people of their right to refuse to co-operate where not arrested, may assist in clarifying the time of arrest and the time of change of the relative status of the arrested person with its concomitant shift of rights and duties. It does not, however, deal with two important but distinct sets of concerns which are often expressed relating to this grey area of pre-arrest investigation. The first is the so-called "detention, short of arrest" and the second is the problem of incriminating statements obtained by police prior to and following arrest.

Insofar as the *Criminal Code* or other federal or provincial statutes may impose duties on citizens to accompany police to provide breath samples, or to do such things as stop their motor vehicles on request and provide driver's permits or motor vehicle registration certificates for inspection, there will still be statutorily authorized detentions or "stops" which are not arrests for the purposes of criminal law. Clearly an officer should inform persons of their duty to stop, and such situations fall outside the previously discussed circumstances where the officer would inform the person of his or her right to refuse to co-operate. On the contrary, he or she is under a statutory duty to do so. On the other hand, the courts may or may not find that such stops are detentions or arrests within the meaning of section 10 of the *Canadian Charter of Rights and Freedoms* hence giving rise to constitutional rights to reasons and counsel. At this point in time it is premature to attempt the elaboration of a regime of rules governing these disparate statutory duties to stop.

The second set of concerns relates to questioning suspects. In all likelihood, police will, in accordance with the rule suggested above, inform persons of their right to refuse to accompany them voluntarily for the purposes of investigation and yet will receive the co-operation of citizens without having to place them formally under arrest. Such persons may be asked questions and may provide incriminating answers rather than adhering to their right to remain silent. This, however, is not an area which is properly governed under the heading of "arrest." It is a matter of the proper procedural rules governing police questioning and thus falls within the purview of the laws of evidence on the admissibility of statements made to persons in authority. These issues are the subject of

a detailed Working Paper recently published by the Commission and they fall outside the scope of this Working Paper on *Arrest*. However, it is important to point out that the Working Paper on *Questioning Suspects* provides a protective regime which requires a warning on the right to silence only where the police officer “has reasonable grounds to believe that a person is implicated in the commission of a criminal offence.”²⁹⁶ Such grounds may appear only after the individual’s voluntary accompaniment of a police officer.

RECOMMENDATIONS

2. That arrest be defined statutorily in the following terms.

An arrest occurs where:

- (1) a person submits to custody upon being requested to do so by the arrester;**
or
- (2) a person is taken into physical custody by the arrester.**

3. That where a person is requested to remain with, or accompany, a peace officer voluntarily for purposes of investigation, such a person shall be informed of his or her right to refuse to do so.

296. Law Reform Commission of Canada, *Questioning Suspects*, [Working Paper 32] (Ottawa: Minister of Supply and Services Canada, 1984), p. 48.

CHAPTER FIVE

Arrest without Warrant

I. Introduction

As discussed in Part One, authority to arrest has traditionally been structured according to the bifurcation between arrest with warrant and arrest without warrant. In formal terms, the arrest with warrant should provide safeguards to protect against arbitrary or unnecessary use of the state's power to arrest since the person seeking another's arrest must justify his or her request to a justice and present reasons, thus giving the opportunity to take a second look at the necessity for an arrest.²⁹⁷ In practical terms, the vast bulk of arrests are made without warrant. The necessity for powers of arrest without warrant in relation to the purposes of arrest set out in Chapter Four need hardly be argued at length. Whether one has in mind the primary purpose of compelling appearance in court, or the secondary purposes of preventing interference with the administration of justice and ensuring public safety and order, circumstances encountered daily by police officers come to mind in which the administration of justice would be thwarted if an arrest warrant were required in every case. Police, confronted with a murderer whose avowed purpose is to flee the jurisdiction, cannot be compelled to seek arrest warrants. Yet the authority to deprive the person who is presumed innocent until proved guilty, of his or her liberty, must be stated in terms which are as clear and concise as possible while embodying the principle of restraint. Anything less would surely be contrary to the principles of fundamental justice in section 7 of the *Canadian Charter of Rights and Freedoms*.

As noted previously, Canadian criminal law has long abandoned the common law approach which equated the constable's powers of arrest with those of the private citizen. On the police officer are imposed broad duties with respect to the enforcement of the law and the maintenance of order in society which, it will be argued, necessitate granting the police officer the authority to arrest without warrant in terms wider than those of the private citizen. Nevertheless, there are also situations in which the citizen's arrest power is still relevant even with the advent of modern policing. The purpose of this chapter is to make recommendations concerning the precise definition of the conditions for which the law ought to authorize arrest. The authority for arrest by police officers will be

297. Chapter Three, *supra*, describes the present process for the issuance of arrest warrants, while Chapter Six, *infra*, makes recommendations for reform.

discussed first, followed by discussion of the citizen's arrest power. The chapter will then conclude with a discussion of arrest powers in relation to so-called breaches of the peace. This chapter will not address issues surrounding the manner of executing or carrying out an arrest. These matters will be left to Chapters Seven and Eight.

II. Authority for Police Arrest without Warrant

As described in Part One, statutes creating and governing police forces generally impose broad duties on police officers for the prevention of crime, the maintenance of order and the enforcement of the law. In the fulfilment of these duties, however, any police interference with the rights of others must be clearly established by legal authority. To cast the law of arrest in language borrowed from the *Canadian Charter of Rights and Freedoms*, in pursuance of their duties, police can interfere with a citizen's liberty by arrest only within the *limits prescribed by law*. This is an extremely important principle which underlies all of the recommendations in this Working Paper but which, in and of itself, is not the appropriate subject for a particular recommendation.

The breadth of the police officer's duties and responsibilities does have an impact on the scope of his or her authority to arrest in contrast with that of the private citizen. While the private citizen may be content with protecting immediate self-interest from injury by others, the police officer acts on behalf of society as a whole. The investigation of offences and the process of acting upon the reports and requests of citizens impose a requirement for police to act with reliance upon reasonable information derived from others, in addition to the officer's personal observations in a given situation. Failure to provide police with the authority to act on such information would cripple their ability to carry out the general duties imposed upon them. On the other hand, given the potentially broad range of situations in which police officers may be constrained to consider arresting individuals, the statutory authorization for arrest powers must also ensure that the decision to arrest is made with full awareness of the principle of restraint and the necessity to consider the feasibility of alternatives to arrest which are less liberty-intrusive.

In analyzing the basis for recommendations respecting the authority to arrest without warrant, whether of police or private citizens, we find it convenient to separate the conditions or factors giving rise to such authority into two categories: those relating to the offence, and those for release relating to the alleged offender. These categories are the subject-matter of the following two subsections of this chapter.

A. Conditions for Arrest relating to the Alleged Offence

Conditions relating to the alleged offence are: (1) the grounds for belief that an offence has been committed by the particular suspect; (2) the nature of classification of

the alleged offence; and (3) the time of the commission of the alleged offence in relation to the time of the proposed arrest. Each of these must be dealt with in turn.

(1) The Existence of an Alleged Offence

As noted in Part One of this Working Paper, whether an offence has been committed by the alleged offender has, for the purposes of arrest, been determined primarily through either of two formulae: "reasonable and probable grounds for belief" and "finds committing." The first of these formulae provides an authority to arrest which allows greater latitude for error than the second. If the arrestee may act where he or she has reasonable and probable grounds to believe that an offence has been committed by a suspect, the arrest is lawful though an offence may *not*, in fact, have been committed. Surely this formulation of arrest powers is in accordance with the broad duties of the police officer. The police officer would rightly be criticized for failing to act where reasonable information would lead to the belief that an offence had been committed by a particular person.

This conception of reasonable expectations about how police ought to act in the furtherance of their general duties perhaps underlies the judicial expansion of the phrase "finds committing." The phrase has a temporal aspect which will be discussed below. However, insofar as the issue of the existence or non-existence of an alleged offence is concerned, "finds committing" seemingly connotes a power to arrest only where an offence has, in fact, been committed. In this view, there is no ground for error and one who arrests a person later acquitted on the charge has exceeded his or her authority to arrest. As described in Part One, the courts have resisted this approach and have interpreted the "finds committing" power to read "apparently finds committing." This allows for a margin of error, and insofar as the existence of the offence is concerned, effectively conflates the "reasonable grounds for belief" and "finds committing" standards.

A possible rationale for the distinction between the "reasonable grounds for belief" standard and the strict view of "finds committing" lies in the use of the "finds committing" standard as the sole criterion for arrest in less serious offences. Unless the person is caught in the act, so the argument goes, summons should always be used for less serious offences. If the proposals for restraint in relation to all offences as recommended below are adopted, then this argument for the maintenance of the distinction falls away. On this basis, and in the light of the general duties of police, it becomes appropriate to frame police powers of arrest in relation to the existence or non-existence of an offence solely in terms of "reasonable grounds for belief."

On the assumption that "reasonableness" connoting an objective standard as presently understood by the courts is the appropriate standard for authorizing arrest by police in the circumstances here under discussion, the issue arises as to whether the statutory formulation should merely be "reasonable grounds to believe" rather than "reasonable and probable." The courts interpret the present *Criminal Code* standard of "reasonable and probable" as a global expression encompassing "reasonableness," and that "probable" is not here meant in any strict statistical sense. On one reading the word reasonable in this context *includes* the notion of "probability" in a non-statistical sense. Thus, in

relation to the existence or non-existence of an offence, the probable standard seems superfluous. On the other hand, concerning the issue of the *identity* of the person who committed the offence, the idea of probability can have an impact. If one cannot say that the suspect probably did it, it appears unreasonable to make an arrest. Yet, one can envisage situations where it can be said there is no statistical probability that a suspect committed the offence, but common sense notions of reasonableness would require an arrest. If a police officer observed a murder from a distance and chased the murderer into an apartment where he or she found three people, and if the police officer were unable to identify one of the three as the murderer, there is no statistical probability that any one of the three committed the offence. One can conclude that there would be reasonable but not probable grounds for arrest in relation to each of the three suspects, assuming that the conditions relating to an alleged offender, to be discussed below, are fulfilled. If the murderer had run into a bar where there were thirty people, the arrest of all thirty would, it may be argued, not be reasonable. The point of this illustration is that reasonableness is a more helpful criterion than probability. Thus, on the assumption that the word "probable," where not superfluous, is potentially dysfunctional in relation to the purposes of arrest, police powers of arrest in relation to the existence of an offence committed by a particular offender ought to be expressed in terms of "reasonable grounds for belief" rather than "reasonable and probable grounds for belief."

The final issue which must be discussed under this heading is whether or not a statutory definition of reasonableness in relation to grounds for arrest ought to be included in the new provisions. Canadian and English courts have been loath to give precise context to the notion of reasonableness, in the interests of maintaining flexibility in the evaluation of circumstances in particular cases.²⁹⁸ Certainly reasonableness is presently used to imply an objective test which goes beyond the mere subjective belief of an arrester. The reasonable police officer in the position of the arresting officer must be notionally capable of making the same assessment of the facts. An enumeration of the factors which enter into the forming of a reasonable belief that an offence has occurred and that a particular suspect committed it, is possible at a certain level of abstraction. It might include the nature of any information from an informant, a victim or other law enforcement agency, (including the completeness of the information, the reliability of the informant, and so forth), physical evidence obtained from the scene of a crime, direct observation by the officer, or the degree of experience of the arresting officer.²⁹⁹ However, such an enumeration can never be complete, and attempts to define reasonableness are of limited value.³⁰⁰ For this reason, no attempt to define reasonableness ought to be undertaken. Nevertheless, for reasons to be elaborated in Chapter Six, *infra*, reasonable grounds for belief in the existence of an arrest warrant ought to provide reasonable grounds for arrest.

298. See the discussion in Chapter Two, Section V entitled "Arrest without Warrant" and the sources cited therein.

299. These factors, among others, are discussed at length in Wayne R. LaFare, *Arrest: The Decision to Take Someone into Custody* (Boston: Little, Brown and Company, 1965), pp. 244-299.

300. American Law Institute, *A Model Code of Pre-Arrest Procedure* (Washington, D.C.: 1975), Section 120.1(2) and (3) defines reasonable cause and conditions its determination in the following manner:

(2) *Reasonable Cause.* "Reasonable cause to believe" means a basis for belief in the existence of facts which, in view of the circumstances under and the purpose for which the standard is applied,

(2) The Classification of Offences

As previous discussion reveals, arrest powers under present Canadian law may vary as to whether or not an offence is indictable or punishable on summary conviction. The general principle is that powers of arrest in relation to summary conviction offences are not as broad as those for indictable offences. This principle is heavily reflected in English law which makes a clear distinction between "arrestable offences" and "non-arrestable offences."³⁰¹ The American Law Institute's *Model Code of Pre-Arrest Procedure* would also make distinctions, between felonies and misdemeanors for purposes of differentiating varying degrees of arrest power.³⁰² Australian law, on the other hand, has not made this distinction and virtually all offences are arrestable.³⁰³

At first blush, differentiating between arrest powers upon the basis of classification of offences makes sense. If an offence is trivial, one ought not to be arrested for it. However, there are summary conviction offences³⁰⁴ carrying very light sentences for which one can make a cogent argument for the need to arrest (for example, fighting in a public place) and serious indictable offences³⁰⁵ which might rarely call for an arrest (for example, corruption by holders of judicial office). In fact, present Canadian law only implements the classification distinction to a partial degree. Police officers presently have the power to arrest for all criminal offences, including summary conviction offences, where they "find a person committing" the offence. It is only where the summary conviction offence has occurred in the past or out of the officer's view that he or she is not authorized to make an arrest.

At issue here are the principle of restraint and the idea that people should only be arrested where it is necessary to do so to accomplish one of the purposes of arrest. Classification of offences is an inefficient means of accomplishing this end since its use requires so many exceptions and qualifications as to make the exercise more cumbersome

is substantial, objective, and sufficient to satisfy applicable constitutional requirements. An arrest shall not be deemed to have been made on insufficient cause hereunder solely on the ground that the officer is unable to determine the particular crime which may have been committed.

(3) *Determining Reasonable Cause.* In determining whether reasonable cause exists to justify an arrest under this Section, a law enforcement officer may take into account all information that a prudent officer would judge relevant to the likelihood that a crime has been committed and that a person to be arrested has committed it, including information derived from any expert knowledge which the officer in fact possesses and information received from an informant whom it is reasonable under the circumstances to credit, whether or not at the time of making the arrest the officer knows the informant's identity.

301. In principle, offences carrying punishment of five years' imprisonment or more are arrestable offences while those carrying lesser punishment are not. This general rule is, however, subject to many statutory exceptions. For a general discussion of this situation in England on this issue, see Leigh, *supra*, note 115, pp. 60-73. See also, Royal Commission on Criminal Procedure (U.K.), *Report* (London: HMSO, 1981), pp. 46-49.

302. *Supra*, note 300, section 120.1(1).

303. Law Reform Commission of Australia, *Report No. 2, Criminal Investigation* (Canberra: Australian Government Publishing Service, 1975), pp. 14-16.

304. *Criminal Code*, R.S.C. 1970, c. C-34, section 171.

305. *Criminal Code*, R.S.C. 1970, c. C-34, section 108.

and confusing than useful. Thus, the principle of restraint ought to be addressed in relation to all offences under the heading “Conditions for Release relating to the Alleged Offender.” The classification of offences as serious or less serious by any name or criteria ought not to be invoked for purposes of defining police powers of arrest without warrant.

(3) Time of Commission of an Alleged Offence

As touched upon above, the time of commission of the alleged offence, in relation to the time of an intended arrest, is presently employed to distinguish between certain situations where an arrest is permissible and other situations where it is not. Police officers are entitled, under present Canadian law, to arrest without warrant for indictable offences committed in the *past*. They may arrest for any offence which is being committed in the *present* whether indictable or punishable on summary conviction. Furthermore, an arrest for *future* “offences” is permitted where a police officer, on reasonable and probable grounds, believes a person is “about to commit” an indictable offence.³⁰⁶

Here the *time* of the commission of offences is tied to *classification* of offences, presumably in the interests of implementing an imprecise notion of the principle of restraint. The result is an over-inclusive scheme for most offences and an under-inclusive result for summary conviction offences. All past, present and some “future” indictable offences are potentially arrestable without necessary application of the principle of restraint. Only “present” summary conviction offences are arrestable when, even consistent with rational application of the principle of restraint, arrests might be justifiable for some past summary conviction offences.

Casting police powers of arrest without warrant in terms of “reasonable grounds for belief” and abandoning the classification of offences as a determinant of these powers can be accompanied by a simplification of the temporal aspect of the problem. Thus, subject to the principle of restraint as discussed in the next section, police officers ought to be entitled to make an arrest where they have reasonable grounds to believe that a person has committed or is committing an offence (that is, arrest for present or past offences).

If the only purpose of an arrest were to compel the appearance of an accused in court, arrest for “future offences” would be objectionable. The criminal law does not normally punish or control people for their unlawful intentions, only for their unlawful acts. However, present law enlarges the scope of the police officer’s arrest powers to encompass situations where the offence is to occur in the immediate future (“about to commit”). Such a preventive role for the criminal law is certainly justifiable in social policy terms, and the broad definition of the police officer’s duties in respect of maintaining order and enforcing the law militates in favour of such an approach. As was mentioned in Chapter Four, this approach amounts to elevating the concept of public safety and order to the level of a primary purpose for arrest. Some might object that this creates a

306. All of this is in section 450 of the *Criminal Code* and is discussed in Chapter Two, Section V, *supra*.

potential for unjustifiable police interference with individual liberty where there is no “unlawful” conduct. However, one must remember that it is an offence to *attempt* a crime. Use of the wording “about to commit” allows a preventive power of arrest while freeing the arrest power from the complexities of the substantive law of attempts. The net result does not, in practical terms, sacrifice individual liberty to an undue enlargement of police powers. Moreover, use of this terminology will allow arrests in what are presently viewed as “breach-of-the-peace” situations without the need of a separate arrest power for this purpose (a subject which is treated in greater detail in Section IV of this chapter).

B. Conditions for Release relating to the Alleged Offender

Conditions for release relating to the alleged offender are, in essence, the embodiment of the principle of restraint in relation to the primary and secondary purposes for arrest set out in Chapter Four. These conditions require analysis at the level of principle in relation to the reforms proposed above in describing conditions relating to the alleged offence. The principles having been established, the mechanism by which police officers and others involved in the administration of justice can make operational these principles requires some explication.

(1) Restraint and Police Arrest without Warrant

The effect of casting police powers of arrest without warrant in terms of “reasonable grounds for belief that a person has committed, is committing or is about to commit an offence” would be to broaden the present scope of police powers of arrest. As mentioned above, this simplification would remove the application of the restraint principle as it presently operates, by enlarging the formal scope for “reasonable errors in judgment,” by removing limitations on arrest linked to classification of offences and by allowing arrest for past summary conviction offences.

If the conditions for arrest relating to the nature of the offence are broadened, there must be a countervailing imposition of the principle of restraint in conditions for immediate release relating to the offender. An examination of the purposes of arrest, in contrast with the use of documentary notice to ensure attendance in court as undertaken in Chapter Four, reveals that arrest is to be invoked where it appears that the offender cannot be trusted to turn up voluntarily or seems likely to interfere with the administration of justice or with public safety or public order. Application of the principle of restraint in this context requires use by police of documentary notice of criminal proceedings except where the offender is a person in relation to whom the primary and secondary purposes of arrest are relevant. In other words, a duty of immediate release must be imposed unless the police officer has reasonable grounds to believe that the alleged offender will not appear in court in response to an appearance notice or summons, or unless he has reasonable grounds to believe that the alleged offender will interfere with the administration of justice in relation to the proceeding, or will interfere with public safety or public

order. Since the administration of justice and interference with public safety and public order are broad concepts, it is advisable to draft the statutory provisions imposing the duty of release in more precise terms. Thus, the police officer must be under a duty to release as soon as is possible, unless there are reasonable grounds: to believe that continued custody is necessary to ensure that the person will appear in court; to establish the identity of the person; to preserve evidence relating to the offence (other than obtaining statements from the person); or, to prevent the continuation or repetition of the offence or the continuation of another offence.

Such a proposal is a significant change in the existing law. At present, in relation to serious indictable offences, police officers are authorized to make an arrest where grounds exist which are described above as “conditions in relation to the offence.” A police officer making an arrest for serious indictable offences is under no *duty* to release on the basis of factors relating to the principle of restraint, although the officer in charge may have a discretion to do so in limited circumstances.³⁰⁷ Present law makes a partial recognition of the principle of restraint in relation to less serious indictable offences, hybrid offences and offences punishable on summary conviction.³⁰⁸ Police officers are directed not to arrest for these less serious offences where what are called in this Working Paper the primary and secondary purposes of arrest do not require it. In such cases, the appearance notice or summons is available.³⁰⁹ However, this direction not to arrest does not embody the principle of restraint as a full duty to release or a condition of arrest.³¹⁰ The peace officer who has grounds for arrest in the sense of conditions relating to the offence, and who arrests in ignoring the release possibility, is deemed to be acting lawfully and in the execution of duty for proceedings under the *Criminal Code* or any other federal statute.³¹¹ For other proceedings, presumably including suits against a police officer for false arrest, a burden of proof is cast upon a plaintiff to allege and prove that a police officer made an arrest for one of these less serious offences without analyzing the statutory factors which relate to the purposes of arrest and the principle of restraint.

Within the context of the reforms proposed here, there are two alternatives possible for the implementation of the principle of restraint. The first is to make consideration of “less liberty-intrusive alternatives” a *condition of arrest*, and in essence to say that one cannot arrest unless there are reasonable grounds for belief that documentary notice of criminal proceedings will be insufficient in the circumstances. This was the basis for proposals from the Australian Law Reform Commission³¹² and is the form of drafting in relation to less serious offences in the present *Criminal Code* subsection 450(2). The second alternative is to grant the authority to arrest outright on the basis of reasonable

307. *Criminal Code*, R.S.C. 1970, c. C-34, section 453.

308. *Criminal Code*, R.S.C. 1970, c. C-34, subsection 450(2).

309. *Criminal Code*, R.S.C. 1970, c. C-34, sections 451 and 455.3.

310. *Criminal Code*, R.S.C. 1970, c. C-34, section 453.1.

311. *Criminal Code*, R.S.C. 1970, c. C-34, subsection 450(3). For further discussion of this problem, see Chapter Two, Section VIII. *supra*, and Chapter Nine, *infra*.

312. *Supra*, note 303.

grounds for belief that an offence has been committed, is being committed or is about to be committed, followed by a *duty to release immediately* where there are no reasonable grounds for belief that documentary notice will be insufficient.

At the outset, the first alternative appears very attractive. It suggests that there would be no arrests where summons or appearance notice would suffice, and seems to be a more complete embodiment of the principle of restraint than the second alternative which appears to be a stark arrest followed by release. Experience with *Criminal Code* subsection 450(2) suggests, however, that there are grave problems with the practical implementation of the first alternative, and these problems relate to difficulties of timing which might be termed "slippage." Where a police officer stops someone who he or she has reasonable grounds to believe has committed a criminal offence, how much time is the officer allowed to make the determination as to: whether the person is providing true information about his or her identity; whether the person has a criminal record with a history of failure to appear in court; or, whether the person may destroy evidence relating to the offence? Clearly *some* reasonable period of time must be allowed for the determination of these questions, and present police practices, insofar as it can be accurately determined, would indicate that police assume they have considerable latitude in this regard. If the law is drafted such that there is no *arrest* until these matters are determined, the person who is asked to sit in the back seat of the police car while the arrest officer gets on the radio or punches requests into the computer is in a kind of limbo of indeterminate legal status. The reality, of course, is that this person is detained, and if any attempt were made to leave, the person would in all likelihood be restrained and informed that he or she was, in fact, under arrest. It is also the reality that police use the convenient ambiguity of this period of slippage under present *Criminal Code* subsection 450(2) adopting the view that persons in such limbo are not under arrest, and therefore need not yet be told reasons for arrest or be told of their right to counsel.

The second alternative for implementing the principle of restraint (that is, arrest with a duty to release immediately), is a more honest, straightforward approach which avoids the pitfalls of ambiguity in the first alternative. It allows the definition of arrest in Recommendation 2, *supra*, to be put into effect with full rigour, and increases the importance of the duty to inform people in the "voluntary assistance" situation of their right to refuse to remain with, or accompany, a police officer as required in accordance with Recommendation 3. It advances the point in time at which the police officer must inform a suspect of the reasons for his or her arrest and of his or her right to counsel. Finally, it removes the artificiality from the situation from the police officer's point of view. The officer will be able (confidently) to arrest an alleged offender on proper legal grounds and then seek assistance in making what is, in fact, a decision about whether to release, rather than about whether to arrest.

(2) Restraint and Documentary Notice of Proceedings

The real key to the application of the principle of restraint in the context of a potential police arrest without warrant, is the availability of mechanisms for documentary notice of the time and place of the proceeding against the accused. As described above, present

law allows the police officer who decides not to arrest a suspect for less serious offences, to give the person an appearance notice on the spot, or seek a summons after the laying of an information against the suspect before a justice. The summons may be appropriate where there is some question in the mind of the police officer as to whether the conduct in question is actually an offence, or where for some other reason an officer wishes to delay making a decision or wishes to have the decision made by a judicial official. In general, however, it is the appearance notice or "ticket" which can be given by a police officer to an alleged offender at the time of the offence or at the time of initial contact between the officer and the alleged offender which makes the application of the principle of restraint practical in the majority of police/citizen encounters.

Continued availability of the documentary notice of proceedings in the form of an appearance notice issued by a police officer as an alternative to arrest is an important aspect of the reform proposed in this Working Paper. Appearance notices have become a familiar aspect of police procedure since their introduction through the *Bail Reform Act* in 1970.³¹³ They are an efficient and effective means by which a police officer can require attendance in court without the delay and uncertainty of the process of seeking a summons from a justice for service at a later date by yet another police officer. The savings to the public in terms of time and money are evident, and the police officer who makes the initial contact with the alleged offender has the satisfaction of disposing of the matter without being forced to choose between two less-than-satisfactory alternatives: arrest and summons.

Given the availability and practicality of the appearance notice, as well as its familiarity to police officers across the country, there ought to be no technical impediment to the recognition of the principle of restraint in relation to the offender as a duty of immediate release. The practical impediment to the implementation of the restraint principle is the difficulty of ensuring legally enforceable compliance with the duty to release as soon as is possible, in the absence of reasonable grounds for belief in the need for continued custody. The question of sanctions in relation to these proposals on the law of arrest is discussed in detail in Chapter Nine. Suffice it to state here that the protection accorded, in present *Criminal Code* subsection 450(3), to police officers who fail to consider the alternative of release and documentary notice is incompatible with the principle of restraint, and indeed, with the principle of accountability of police officers for their actions.

RECOMMENDATIONS

4. A peace officer may arrest without warrant a person who he or she believes on reasonable grounds has committed, is committing or is about to commit a criminal offence.

5. That where an arrest is made pursuant to Recommendations 4, 7 or 8, the peace officer having custody of the arrested person shall release the person as soon

313. R.S.C. 1970 (2nd Supp.), c. 2. See *Criminal Code*, R.S.C. 1970, c. C-34, sections 451 and 453.3.

as possible with a view to compelling his or her appearance by means of an appearance notice or summons, unless there are reasonable grounds to believe that continued custody is necessary:

- (1) to ensure that the person will appear in court;
- (2) to establish the identity of the person;
- (3) to preserve evidence relating to the offence; and
- (4) to prevent the continuation or repetition of the offence, or the commission of another offence.

6. That for the purposes of Recommendation 4, reasonable grounds for a police officer's belief that a warrant is outstanding within the jurisdiction for the arrest of a person are also reasonable grounds for an arrest without warrant.

III. Authority for Citizen Arrest without Warrant

At common law the private citizen was accorded power to arrest for felonies committed in his or her presence, and to arrest pursuant to the raising of a hue and cry.³¹⁴ As Part One indicates, the present *Criminal Code* might generally be said to authorize the private individual to arrest those found committing indictable offences, those being pursued by others who have authority to arrest, and those committing offences in relation to the private individual's property.³¹⁵ The private citizen, however, is under a duty to deliver an arrested person to the police "forthwith."³¹⁶ This reflects the fact that, unlike the police officer, the private citizen is not under a legal duty to maintain social order; nor is the private citizen usually trained to handle the practical or legal aftermath of the making of an arrest.

Some might recommend the abandonment of private citizens' arrest powers in a modern state possessing efficient, trained police forces upon which the citizenry has generally come to rely in the enforcement of the criminal law. This would be a mistake. Citizen arrests may be rare, but the private individual may encounter circumstances which require immediate action and which cannot await referral to the police. A person who is violently attacked and capable of restraining his or her assailant until the arrival of the police ought not to be prevented from doing so where the alternative would be the complete escape of the malefactor. Citizens in remote communities of Canada which may not have the benefit of regular or immediate police service ought not to be required to submit to disruptive criminal behaviour when an arrest is the only way to bring this to a halt. To use an example closer to the norm, it may be too much to expect of the person whose

314. *Supra*, note 211.

315. See discussion in Chapter Two; see also *Criminal Code*, R.S.C. 1970, c. C-34, section 449.

316. *Criminal Code*, R.S.C. 1970, c. C-34, subsection 449(3). For the meaning of this phrase see Chapter Two.

premises have just been burgled to refrain from taking the intruder into custody and conveying him or her to the police station. Nevertheless, in accordance with the golden rule of “do unto others as you would have them do unto you,” it is reasonable to expect the private citizen to make an arrest only under circumstances, and in a manner, consistent with the principle of restraint. A reformed law of arrest must therefore reflect the fact that while citizens, unlike police, have no legal duty to maintain order, there may be situations where an immediate threat to person, property or community may justify the arrest of an alleged offender, so long as this is carried out in the least liberty-intrusive manner consistent with the circumstances.

The above paragraphs, somewhat like the present *Criminal Code*, are written in a style which conveys the impression that citizens’ arrests are, for the most part, carried out by an individual who has been personally attacked or whose invaded premises are a dwelling. In fact, it is safe to assert that the vast majority of so-called private citizen arrests are carried out by security personnel hired to protect private commercial property. The private security guard is common in Canadian shopping malls, office buildings and apartments, and what has come to be labelled the private security industry has been the subject of close analysis.³¹⁷ Adequate legal controls on the organization and regulation of this industry may or may not be forthcoming. Discussion of them is certainly not within the purview of this Working Paper. However, it seems that private security guards, in the absence of some status as special constables, cannot and ought not to be assimilated to the category of “police officer” for the purposes of their authority to arrest. Neither does there appear to be a compelling reason to create a separate level of arrest powers to accommodate private security guards. Such organizations are primarily serving private, if sometimes extensive, interests and do not share the general public duties of police officers. On the other hand, the elaboration of proposals for the reform of the arrest powers of the private citizen must be undertaken with a keen awareness of the commercial or business context in which most private citizen arrests will continue to occur, and the particular potential of such arrests for abusive interference with individual liberty.

Before turning to the conditions of a lawful arrest, we must consider briefly the manner in which the law ought to label the private citizen, for designating his or her arrest powers, in contrast to those of the police officer. The present law authorizes “any one” to arrest pursuant to the conditions outlined in section 449 of the *Criminal Code* while authorizing “peace officers” to arrest by virtue of the authority conferred in section 450. It has also been held that “any one” includes a peace officer. This approach has caused little confusion and no substantial difficulty, and it is recommended that the private person be designated by the words “any one” in the reform proposals. Such an approach would place private security guards firmly within the ambit of private citizen arrest powers.

In presenting the basis for recommendations respecting the citizen’s authority to arrest without warrant, we will follow the approach adopted in relation to the analysis

317. See *inter alia*, Stenning and Shearing, *Search and Seizure Powers of Private Security Personnel*, *supra*, note 212, and the other studies cited *supra*, note 212.

of police powers of arrest without warrant. Conditions relating to the nature of the alleged offence will be analyzed in one subsection which will be followed by another devoted to the conditions relating to the offender.

A. Conditions for Arrest relating to the Alleged Offence

As with police officers' authority to arrest without warrant, those powers of the private citizen may conveniently be analyzed under three headings: the existence of the offence, the classification of the offence and the time of commission of the offence. To these must be added the particular issue of private citizen arrests in response to police requests for assistance.

(1) The Existence of an Alleged Offence

As with police officers' powers of arrest, the present law defining the private citizen's powers to arrest without warrant is framed both in terms of "reasonable and probable grounds" for belief that an offence has occurred, and "finds committing" an offence.³¹⁸ Here too, courts have displayed a willingness to conflate the categories to some degree by interpreting "finds committing" as "finds apparently committing,"³¹⁹ thus allowing the arresting citizen some margin of error in the determination of the existence of an offence before incurring civil or criminal liability. From the perspective of law reform, two possible responses to this development may usefully be contrasted. The first is to argue that since private citizens do not have the law enforcement duties of police officers, private citizen arrest powers should be defined as narrowly as possible so as to shift to the arresting citizen the risks of error when interfering with the liberty of others. The other possible response is to accept the somewhat broader scope of the "apparently finds committing" notion on the view that if private citizens are to have arrest powers where there is an immediate threat to person, property or community interests, then granting *some* latitude for reasonable error is necessary in order to allow private citizens to respond to crime within the scope of a common sense notion of reasonableness.

Present law which distinguishes between "reasonable and probable grounds" powers for some purposes and "finds apparently committing" for others is, on the one hand, too complex to be a guide to the private citizen faced with what is essentially an emergency arrest and, on the other, too similar to create meaningful differences in outcome. If the private citizen's arrest power is framed in terms of "reasonable grounds for belief that a criminal offence is being committed," the law is simplified by avoiding two different authorizing standards. Furthermore, the use of the term "reasonable" imports an objective standard which may not be implicit in the phrase "apparently committing." Finally, the

318. *Criminal Code*, R.S.C. 1970, c. C-34, section 449.

319. *R. v. Cunningham and Ritchie*, *supra*, note 216.

use of the term "reasonable" rather than the phrase "reasonable and probable" is advanced for the same reasons discussed above in relation to police officers' powers of arrest without warrant.

(2) The Classification of Offences

The present law allows citizens to arrest without warrant for indictable offences in some circumstances, and for both indictable and summary conviction offences in others.³²⁰ For the ordinary private citizen who is reacting to an immediate crisis and who has no training in the intricacies of criminal procedure, these distinctions are surely meaningless as a guide to behaviour. This would be the case even if the citizen were aware of the existence of the statutory wording which is, of course, highly unlikely. The private security guard whose business requires some knowledge of the law of arrest is less deserving of sympathy in these circumstances; however, such concerns ought not to inhibit an improvement in the law *vis-à-vis* the well-meaning ordinary citizen. The problem can be solved by framing arrest power in the wording "reasonable grounds to believe that a *criminal* offence is being committed." To the extent that such a formulation may broaden the private citizens' arrest power somewhat, the principle of restraint can be embodied in the countervailing conditions described below under the heading "Conditions for Release relating to the Alleged Offender" as well as in the limitations relating to the time of the offence discussed immediately hereafter.

(3) Time of Commission of an Alleged Offence

The present law permits private citizens to arrest without warrant only when offences are being *presently* committed, except in the circumstances of hot pursuit which will be discussed below. In fact, the major virtue of the "finds committing" or "finds apparently committing" language, is its connotative emphasis on the present tense in describing the circumstances in which arrest may be authorized. If the "finds apparently committing" wording is to be abandoned for "reasonable grounds to believe," there are, nevertheless, strong policy reasons for restricting citizen arrest powers to offences being committed or having been committed in the immediate past. The reasons lie in the distinction between the public duties of the police officer for the enforcement of the law and the status of the private citizen who may have moral but not legal duties in this regard. Since arrest, by definition, involves interference with the liberty of another, it is consistent with the principle of restraint not to authorize private citizen arrest powers except where there is an *immediate* threat to person, property or community interest. Where an offence has been committed, the threat is past and the damage done, it seems appropriate to require the private citizen to call upon officials involved in the administration of justice to investigate the matter. This would occur in most circumstances by the citizen's reporting the matter to the police, but could also be accomplished by the laying of an information.

320. *Criminal Code*, R.S.C. 1970, c. C-34, section 449.

While citizens ought not to be authorized to arrest in relation to "stale" offences, a literal application of the "presently committing" notion would be unduly restrictive. The home owner who sees a burglar leave his house and run down the street ought not to be liable for false imprisonment in the event of a successful pursuit, merely because the offence was complete and no longer continuing at the time of the arrest. A statutory formula which meets these difficulties would be to authorize arrest by citizens where there are reasonable grounds to believe that a person "is committing or has just committed a criminal offence."

(4) Citizen Assistance to Peace Officers

The private citizen presently has the authority to arrest without warrant a person who on reasonable and probable grounds he believes has committed a criminal offence and who is escaping from, and is freshly pursued by, persons who have lawful authority to arrest that person.³²¹ This allows broad power to the ordinary citizen to arrest for offences which may have occurred in the past, where someone, whether private citizen or police officer with lawful authority to arrest, is in "hot pursuit." If the principle underlying the private citizen's arrest power is reasonable belief concerning the present commission of an offence which is threatening life, property or community interest, it is difficult to justify the private citizen's authority to arrest where the "hot pursuit" is that of another private individual. If the damage has been done, and the threat is passed, then the matter is one for the police and the public authorities, except in the "just committed" circumstances described above.

When the hot pursuit is that of the police, however, there are different considerations. Police are under a public duty to enforce the law and may, from time to time, require the assistance of members of the general public in carrying out an arrest. As drafted, Recommendation 7 concerning arrest without warrant by private citizens would not authorize assistance to police officers under these circumstances. Such authorization ought to be included as an additional arrest power of private citizens for the reasons of principle just cited, as well as to allow compliance with section 118 of the *Criminal Code*, which punishes the failure to assist police officers in the execution of duty. An analogue of this offence might appear in a revised *Criminal Code*, and Commission personnel working on specific offences are aware of this interrelationship. Thus, the citizen ought to be empowered to arrest without warrant where he or she is requested to do so by a peace officer who is pursuing a suspect for the purpose of making an arrest.

321. *Criminal Code*, R.S.C. 1970, c. C-34, paragraph 449(1)(b).

B. Conditions for Release relating to the Alleged Offender

Where a police officer arrests without warrant, the principle of restraint, as embodied in the language of Recommendation 5, requires release of the alleged offender as soon as is possible unless there are reasonable grounds for belief that continued custody is required for specific reasons relating to the administration of justice and the maintenance of public order. Similarly, a person arrested by a private citizen ought to be released unless there are serious reasons for continued custody. However, the private citizen making an arrest will not usually be trained (with the possible exception of private security personnel) in the details of the law of arrest, nor will the private citizen be empowered to issue documentary notice of criminal proceedings upon arrest. Thus a requirement for the private citizen to deliver an arrested person to a peace officer as soon as possible, combined with the same duty to release which would normally be imposed upon a police officer who makes an arrest without warrant, is the most practical manner in which to comply with the principle of restraint. The peace officer's duty to release, contained in Recommendation 5, has been drafted with this connection to private citizen arrest powers in mind.

RECOMMENDATIONS

7. That subject to Recommendations 8 and 9, anyone may arrest without warrant a person who the arrester has reasonable grounds to believe is committing or has just committed a criminal offence.

8. That anyone may, at the request of a peace officer, arrest without warrant a person being pursued by the officer for the purpose of making an arrest.

9. That anyone who makes an arrest pursuant to Recommendations 7 or 8 shall deliver the arrested person to a peace officer as soon as possible.

IV. Breach of the Peace

As the discussion in Part One of this Working Paper indicated, the common law recognized the power of constables and citizens to arrest or detain for breach of the peace.³²² This ancient doctrine arose at an early period of English law when the number of common law crimes was relatively restricted, inhibiting the constable's intervention by arrest in minor disorders. The doctrine also precedes the emergence of organized police forces. The notion of "breach of the peace" was broadly defined, allowing the constable latitude to maintain order in the community where powers of arrest for a specific crime might not be available. In addition, the law allowed the constable to call upon the assistance of other individuals to assist him in the maintenance of order. Conversely,

322. Williams, *supra*, note 236.

individuals might apprehend malefactors and turn them over to the constable. Present *Criminal Code* sections 30 and 31 which authorize arrest or detention for breach of the peace reflect this common law history.

The legal and social conditions which gave rise to the power of arrest for breach of the peace in medieval England are no longer found in the Canada of the latter part of the twentieth century. The criminal law is comprehensively set out in statute, and includes offences such as causing a disturbance³²³ and unlawful assembly³²⁴ which, particularly when combined with the "parties" provisions of the criminal law and an "about to commit" arrest power as recommended above, completely occupy the field of a "breach of the peace" arrest power. The continued existence of such vague provisions is superfluous. It is also contrary to constitutional requirements of certainty in the law authorizing police interference with individual liberty, and contrary to the principle of restraint. On the assumption that substantive offences in relation to public disturbances and disorders will continue to exist in a revised *Criminal Code*, new provisions on criminal procedure ought to omit any reference to authority to arrest without warrant for the so-called "breach of the peace."

Consultations on an earlier draft of this Working Paper revealed a misunderstanding in certain quarters about the relationship between the standard regime of arrest powers in *Criminal Code* sections 449 and 450 and the arrest powers for "breach of the peace." In particular, some police officers are under the impression that if they arrest pranksters or other minor trouble-makers under the breach-of-the-peace provisions, then they need not be charged with an offence, but if they arrest for causing a disturbance, an offence in the *Criminal Code*, then charges must be laid. This, of course, is not the case. Police, as agents of the Crown, have a discretion as to whether charges will be laid in relation to any conduct which may constitute an offence. Abolition of the powers of arrest for breach of the peace can thus be abolished with no harm to effective policing, but it would be a tragic irony if principles of restraint were subverted by police sentiment to the effect that if they arrest someone for an offence they must inevitably charge him. Administrative policy makers in most police departments are aware of this difficulty, but it is important that police training institutions and policy manuals for officers on the beat stress the discretionary nature of laying criminal charges. Otherwise an attempt to implement principles of restraint through the abolition of the vague and uncertain breach of the peace arrest powers might have the unintended effect of bringing unnecessarily harsh criminal sanctions to bear against minor malefactors whose improper conduct might normally find sufficient sanction in the arrest which brings the offence to a halt.

RECOMMENDATION

10. That in a revised scheme of the law of arrest no authority be granted to police officers or private citizens to arrest for "breach of the peace."

323. *Criminal Code*, R.S.C. 1970, c. C-34, section 171.

324. *Criminal Code*, R.S.C. 1970, c. C-34, section 64.

CHAPTER SIX

Judicial Process to Compel Appearance

I. Introduction

According to the recommendations made so far in this Working Paper, police, on their own initiative, may compel the attendance of a suspect in court by means of arrest or appearance notice. This chapter is concerned with the role of judicial officers in the process of compelling attendance at trial. The laying of an information before a justice accusing an individual of having committed an offence is the formal commencement of a criminal proceeding.³²⁵ It is at this point that the justice will determine whether the accused ought to be arrested (in which case a warrant will be issued), or whether documentary notice of the charge and the criminal proceeding will be sufficient (in which case a summons will be issued or any appearance notice previously issued by a police officer will be confirmed). In making this decision, the justice must keep in mind the primary and secondary purposes for an arrest as described in Chapter Four, and weigh these against the principle of restraint. In some respects this process is akin to judicial interim release or bail, but the two must not be confused. A consideration of judicial interim release or bail is outside the scope of this Working Paper.

This chapter is divided into four sections, the first being the introduction. The second will examine arrest warrants by considering the circumstances under which they may be sought in preference to arrest without warrant. The third will set out the conditions under which a warrant for arrest ought to be granted by a justice. The fourth discusses the procedure by which the process to compel appearance ought to be issued. At the end of the chapter the recommendations for reform proposed in the previous sections are reiterated.

II. Arrest with and without Warrant

The arrest powers proposed in the preceding chapter are sufficient to allow arrest without warrant in a wide range of circumstances. However, there are many instances in which an arrest warrant will be sought as an initial step in compelling the appearance

325. *Criminal Code*, R.S.C. 1970, c. C-34, section 455.

of an accused before a court even where arrest without warrant might be possible.³²⁶ It may be that an information has been laid by a private citizen who has knowledge of the commission of an offence, but who, by virtue of the restricted nature of the private citizens' arrest powers, has no authority to make an arrest, even though there is reason to believe one is necessary in relation to either the primary or secondary purposes for arrest. Police, whose proposed authority to arrest without warrant is substantially broader than that of the private citizen, will also have reason, from time to time, to seek an arrest warrant.

The most important reason for police to seek an arrest warrant is that a suspect has fled or cannot be located. The existence of an arrest warrant issued to police officers in the jurisdiction will provide an officer who encounters the person named in the warrant, with the reasonable grounds for belief that the person has committed an offence and can thus be arrested *without* warrant. While this might at first seem to be contradictory, the existence of an arrest warrant as reasonable grounds for belief to substantiate an arrest *without* warrant is a highly desirable method by which to provide police with some measure of certainty concerning information about whom to arrest. The knowledge that a warrant for arrest is outstanding in the jurisdiction is a far more certain basis for reasonable belief that a suspect has committed an offence than rumour circulating in the police station, although a court might easily find that an arresting officer, who had been told by another experienced officer that "X" was being sought for the commission of a crime, had reasonable grounds for making an arrest. Hence, the necessity for Recommendation 6 set out above.

There are other reasons why an arrest warrant may be sought by police in the first instance. To the extent that the *Canadian Charter of Rights and Freedoms* provides the possibility that evidence obtained pursuant to an *illegal* arrest might be excluded so as not to bring the administration of justice into disrepute, police may wish to provide greater certainty of the legality of the arrest by first obtaining a warrant even if arrest without warrant is a possibility. Also, where police are of the view that the person to be arrested may likely be argumentative or resist, or where the circumstances of the case make the arrest sensitive for political or other reasons, police may wish to obtain a warrant for arrest as a means to obviate potential criticism.³²⁷ Finally, the effect of Recommendations 4 and 5 of this Working Paper will be to impose civil and possibly criminal liability on a police officer who fails to release an arrested person when there are not proper grounds for continued custody - making an arrest with warrant will protect the officer from such liability.

326. This chapter is not concerned with the issuance of "bench warrants." These are warrants for arrest issued by a trial judge where the accused has failed to appear in court in response to documentary notice of the criminal proceeding or after release on "bail." Their issuance is not a matter of controversy. The principle of restraint has been invoked and the accused's response has been found wanting. The need to issue a warrant for arrest by virtue of the primary purpose of forceably compelling the accused's attendance in court is manifest. For the present authority to issue bench warrants, see *Criminal Code*, R.S.C. 1970, c. C-34, ss. 456.1(2)(a) and (b), 507.1, and 728.

327. For a discussion of these reasons *inter alia*, in the American context, see LaFave, *supra*, note 299, pp. 36-52.

III. Conditions for Issuance of Process to Compel Attendance

As mentioned previously, the initial opportunity for the issuance of an arrest warrant occurs with the commencement of the criminal proceeding by the laying of an information before a justice. A “justice,” as defined in section 2 of the *Criminal Code* means a justice of the peace or a magistrate. While it may be that in some jurisdictions only magistrates issue warrants for arrest, in most jurisdictions it will be a justice of the peace. Faced with the range of persons of diverse educational backgrounds and experiences who may be acting as justices of the peace, it is important that the statutory provisions authorizing issuance of arrest warrants set out clearly the procedures required and the criteria for making the decisions.³²⁸

In issuing an arrest warrant, a justice must make a reasoned decision according to criteria which are clearly set out in a statutory provision. The present statutory provision does not make these criteria explicit. *Criminal Code* section 455.3 states that a justice may issue a summons or warrant “where he considers that a case for doing so is made out” in the “public interest” without stating any guidelines for making this judgment. Without standards, a decision reasoned according to law becomes literally impossible and the statement of reasons for the purpose of reviewing the correctness of the decision is likewise impossible.³²⁹ It is therefore essential that a reform of the law of arrest include explicit criteria by which a justice must govern his or her decision in issuing process to compel attendance at trial.

The conditions which must be present for the lawful issuance of process by a justice to compel attendance are essentially those discussed earlier which must govern the police officer faced with a decision whether to make an arrest without warrant or to issue an appearance notice. As in that earlier discussion, it is convenient to analyze the matter under two headings: (1) “Conditions relating to the Alleged Offence;” and (2) “Conditions relating to the Alleged Offender.”

A. Conditions relating to the Alleged Offence

Since the laying of an information which triggers the justice’s decision-making process is the commencement of the criminal proceeding, and since the issuance of process is the exercise of a judicial function, it might at first seem appropriate to impose on a justice issuing process, a standard more stringent than that of a police officer arresting without warrant. Ought a justice, for example, to apply the standard of the justice sitting in a preliminary inquiry, and not issue process (either warrant, summons or confirmation

328. For the present “criteria,” see *Criminal Code*, R.S.C. 1970, c. C-34, subsection 455.3(4), and the discussion of this issue in Chapter Two, Section IV entitled “Compelling the Appearance of an Accused.”

329. See *R. v. Coughlan, ex parte Evans*, *supra*, note 185.

of appearance notice), unless satisfied that there is a “*prima facie* case” or “... evidence upon which a reasonable jury properly instructed could return a verdict of guilty?”³³⁰ The answer must surely be no. There may be, according to an objective standard, reasonable grounds to believe that the accused committed the alleged offence, and yet the absence of admissible evidence on some aspect of the offence which would make the preliminary inquiry test too stringent. To make this distinction is to recognize that the arrest occurs at the investigatory stage where suspicion has fallen on the alleged offender, but where the Crown has not necessarily completed its case.

It is recommended that, subject to the discussion concerning the principle of restraint in the next subsection, a justice be entitled to issue a warrant for arrest or issue process to compel the attendance of the accused in court to answer to the charge, where he or she has reasonable grounds to believe that the person named by the informant has committed the offence alleged in the information. This standard of “reasonable grounds to believe” is the same as that governing the police officer, or for that matter the private citizen, making an arrest without warrant. While the arresting police officer may or may not have direct personal knowledge of facts in the case, the justice most certainly will not. Herein, of course, lies the importance of an oral hearing and procedures to be discussed below. Before the justice is to authorize the extensive powers of an arrest warrant, or the less intrusive command of the summons or confirmed appearance notice, he or she must personally be convinced by the informant of the reasonable grounds for belief that an offence has been committed and that the person accused in the information has committed it.

B. Conditions relating to the Alleged Offender

Where a justice is convinced there are reasonable grounds to believe that an offence has been committed by the alleged offender (who has thereby become an *accused* in indictable matters or a *defendant* in summary conviction matters), the next step is to determine whether an arrest warrant or documentary notice of criminal proceedings is the appropriate means of compelling attendance. Consistent with analysis previously presented in this Working Paper, this decision ought to be made in accordance with the principle of restraint as put forward in the primary and secondary purposes for arrest. These purposes are recognized only implicitly, if at all, in the present law as expressed in the *Criminal Code*, subsection 455.3(4) which states that the justice:

... shall issue a summons to the accused unless the allegations of the informant or the evidence of any witness ... disclose reasonable and probable grounds to believe that it is necessary in the public interest to issue a warrant for the arrest of the accused.

330. For the test on a preliminary inquiry, see *United States of America v. Shephard*, [1977] 2 S.C.R. 1067, 30 C.C.C. (2d) 424, and *inter alia* Edward L. Greenspan and Marc Rosenberg, “The Preliminary Inquiry,” in Del Buono, ed., *supra*, note 271, pp. 305-309. For a case in which the *prima facie* standard was used in relation to a justice issuing process, see *Marsil v. Laucot* (1914), 25 C.C.C. 223 (Qué.).

The nature of the public interest must be made explicit in the statutory provisions setting out the justice's task by direct reference to the applicable factors described in relation to the purposes of arrest.

The nature of this public interest lies primarily in the assessment of whether the accused is likely to turn up in court in response to documentary notice of the criminal proceeding, whether he or she is likely to interfere with the administration of justice in the case, or whether public safety or public order may be disrupted if the accused is left at large. These general secondary purposes for arrest were cast in the more concrete language of "preserving evidence" or "preventing the continuation or repetition of an offence" in the drafting of Recommendation 5 concerning the police officers' duty to release after an arrest without warrant. However, there may be good reason to retain the more general language of "preventing the interference with the safety of persons or the disruption of public order" in the statutory criteria for the issuance of arrest warrants. Unlike the police officer who makes a decision on the spot, the justice will decide the issue upon the basis of reasons advanced by the police or Crown prosecutor in circumstances which afford some time for reflection. In serious or highly publicized cases, there may be reason to fear for the safety of an accused or to anticipate a violent public reaction if a suspect is left at large pending trial. To restrict the issuance of an arrest warrant in these volatile cases, even where a person is believed likely to turn up and unlikely to interfere with evidence or to repeat the offence, may be an inadequate response to public expectations. To authorize arrest with warrant where there are reasonable grounds to believe it necessary to prevent interference with public safety or the disruption of public order may cover this situation in a more fitting manner, without reverting to the former, more vague standard of issuing arrest warrants "in the public interest." Therefore, the reformed law of arrest ought to state that a justice who is convinced that process should issue to compel the attendance of an accused to answer to the charge, shall issue a summons or confirm an appearance notice unless there are reasonable grounds to believe that a warrant for arrest should issue. The latter would consist either of reasonable grounds to believe that the accused will not appear in court in response to a summons or appearance notice, or reasonable grounds to believe that the arrest is necessary to preserve evidence relating to the offence, to prevent the continuation or repetition of an offence, or to prevent interference with the safety of persons or disruption of public order.

IV. Procedure for Issuance of Judicial Process

The present law rightly classifies the issuance of an arrest warrant as the exercise of a judicial function.³³¹ An arrest warrant carries with it the imprimatur of an official act of the criminal justice system. It may authorize an indeterminate number of police officers to carry out the most fundamental interference with an accused's liberty.³³² As such it must not become, or be seen to become, a mere rubber stamp for the unsupported

331. See *supra*, note 185.

332. *Criminal Code*, R.S.C. 1970, c. C-34, section 456.2.

allegations of an informant. On the other hand, the laying of an information is presently an *ex parte* matter; that is, only the Crown and its witnesses, if any, are heard: it can hardly be otherwise.³³³

Under existing law, the justice *must* hear the allegations of the informant which are in writing and made under oath,³³⁴ and *may* hear supplementary evidence.³³⁵ Whether the informant must give oral evidence is a matter of some dispute, and practices differ. At any rate, a record of evidence is required only where a witness other than the informant testifies. Reasons for any decision, whether it be to issue a summons, confirm an appearance notice or issue a warrant, need not be given.

The imposition of a cumbersome procedure, which would discourage the seeking of arrest warrants and encourage arrests without warrant, would be undesirable. But present procedures must be improved to ensure that justices issuing arrest warrants consider information put before them in a context which will enable them actually to satisfy themselves as to its sufficiency. In accordance with these proposals, a police officer may be authorized to make an arrest without warrant where he or she *personally* has reasonable grounds to believe that the suspect has committed, is committing or is attempting to commit a criminal offence. Before a justice extends that power to all police officers in the jurisdiction, he or she must also be personally convinced that there are reasonable grounds to believe that an offence has been committed and process ought to issue. Reformed procedures for the issuance of arrest warrants must ensure that an oral hearing, however brief, precedes the issuance of an arrest warrant. This would not mean that the police officer investigating a case would always have to appear as an applicant for a warrant, but it would mean that a court liaison officer doing so on behalf of the police department would have to be well informed. The justice whose curiosity is piqued by an anomalous feature of an informant's affidavit must feel free to probe the factual basis of the alleged offence and the need for a warrant rather than documentary notice.

In order to reinforce the duty upon the justice to exercise properly his or her judicial discretion in determining whether to employ documentary notice of the criminal proceeding or issue a warrant for arrest, it would be valuable for the justice to note briefly the reasons for arrest on an appropriately short form which would then be kept by the justice. Aside from reinforcing the judicial nature of the process, the notations on such a form might provide the basis for resolving any subsequent dispute about the propriety of the issuance of an arrest warrant. It would be inappropriate to make any such notation on the information which is sworn before the justice as the commencement of the proceeding since this information may be the document which forms the basis of the subsequent trial. Any statement as to reasons for arrest rather than issuance of summons might be deemed to be prejudicial and cannot appear on any document which the trial judge might see prior to determining the accused's guilt or innocence or to sentencing in the event of a verdict of guilty.

333. *Criminal Code*, R.S.C. 1970, c. C-34, section 455.3.

334. *Criminal Code*, R.S.C. 1970, c. C-34, section 455, and see also the discussion in Chapter Two, Section IV.

335. *Criminal Code*, R.S.C. 1970, c. C-34, section 455.3.

RECOMMENDATIONS

11. That the laying of an information on oath in writing before a justice, by a person who has reasonable grounds to believe that the offence has been committed by the person named in the information, be the first point at which a judicial determination will be made as to whether to issue a warrant for arrest or to compel the attendance of the accused by the issuance or confirmation of documentary notice of the criminal proceeding.

12. That, subject to Recommendation 13, a justice may issue or confirm process to compel the attendance of an accused, where he or she has reasonable grounds to believe that the person named in the information has committed the offence as therein alleged.

13. That a justice shall not issue a warrant for the arrest of a person unless the justice has reasonable grounds to believe such issuance is necessary:

- (1) to ensure that the person will appear in court;
- (2) to preserve evidence relating to the offence;
- (3) to prevent the continuation or repetition of the offence, or the commission of another offence; or
- (4) to prevent interference with the safety of persons or the disruption of public order.

14. That the applicant seeking an arrest warrant shall appear before the justice in person, and that no warrant for arrest shall issue unless the justice has had an opportunity to question the applicant personally about the reasons advanced for the issuance of a warrant for arrest as opposed to issuance or confirmation of documentary notice of the criminal proceedings.

15. That a notation shall be made on an appropriate form, to be kept by the justice, of the reasons for the issuance of a warrant rather than the confirmation of an appearance notice, if any, or the issuance of a summons.

CHAPTER SEVEN

Notice Requirements for a Lawful Arrest

I. Introduction

This chapter will make recommendations concerning notice requirements or conditions for effecting a lawful arrest. The preceding two chapters on the conditions necessary for an arrest have been concerned with the questions “why” and “when” to make an arrest; the concern here is with “how.” The discussion about grounds for arrest revolved around the application of the principle of restraint. The principle of restraint is incidentally reinforced by the requirement to provide the reasons for arrest in that it inhibits police officers who might be tempted to arrest on vague general suspicion, in the hope that further investigation or questioning upon arrest would provide evidence of a particular offence. In logical terms, however, restraint cannot be the primary foundation for elaborating the details of the requirement to give reasons and other information. In any discussion of the notice requirements for effecting a lawful arrest, the guiding principle must be fairness, in both a technical-legal, and a broader social sense. Fairness in a social sense is important here because an arrest may be the first moment of contact between the suspect and the criminal justice system. The person who is to be deprived of his or her freedom may be, and for purposes of the proceeding is presumed to be, innocent. Such a person ought, according to ordinary canons of courtesy and civility, to be told the nature of what is happening. If he or she is treated with fairness in this elementary social sense, it is possible that misconceptions may be cleared up, innocent explanations given, and unnecessary custody avoided. Failure of an arresting person to act openly and fairly may engender unnecessary hostility, provoke a violent response, and create an understandable disrespect for those involved in law enforcement and for the law itself.

Fairness must also operate at the moment of arrest in order to reflect principles of fundamental justice in their constitutional and procedural senses. From the moment of arrest, the suspect is implicated in the commission of an offence and is entitled, both in terms of the provisions of the *Canadian Charter of Rights and Freedoms* and the traditions of our system of criminal justice, to rights which will enable him or her to make an effective defence to the charge. Thus, the right to be informed of the reasons for one's arrest has been considered at common law a condition of a lawful arrest - unjustifiable failure to provide reasons will render the arrest *unlawful*.³³⁶ This right and other procedural

336. See: *Christie v. Leachinsky*, *Koechlin v. Waugh*, and *R. v. Acker*, *supra*, note 127; *R. v. Oake*, *supra*, note 244.

requirements are conditions of a lawful arrest, just as “having reasonable grounds” is a condition of a lawful arrest. For this reason, the primary recommendations made here concerning notice requirements impose a mandatory duty upon a person making an arrest, by use of the word “shall.” These notice requirements are the subject of this chapter. Other powers incidental to the making of a lawful arrest, such as the territorial validity of an arrest warrant or the entry onto private property, are excluded from this chapter and appear in Chapter Eight. The reason is that, while these powers might be described as aspects of the *manner* of making an arrest, they are not conditions or formal requirements of a *lawful* arrest.

This chapter is divided into this Introduction and three subsequent sections. Section II describes the notice requirements of a lawful arrest, including the self-identification of the arresting person, and the statement of the fact of arrest and reasons therefor. In relation to these topics, this section will also address problems of language and translation. Section III will discuss circumstances under which non-compliance with these notice requirements may be justified. Section IV will briefly analyze the effect of unjustified non-compliance with these notice requirements, following which the recommendations made in the previous section will formally be set out.

II. Notice Requirements of a Lawful Arrest

In order to arrest lawfully an alleged offender, the arresting person must, in principle, be required to identify himself or herself, tell the alleged offender that he or she is under arrest, and state the reasons for the arrest. The reasons for these requirements and their nature in practice will be the subject of discussion here. The related issues of informing the suspect of the right to remain silent and the right to counsel, and the use which may be made of any statement made by an arrested person are not conditions of a lawful arrest and will not be discussed. Furthermore, many of these matters are the subject of Working Paper 32 published by the Commission, entitled *Questioning Suspects*.

A. Self-Identification by the Arresting Person

The identity of the person purporting to make an arrest will be an important factor in the response of an alleged offender. A plain-clothes police officer with grounds for arrest may be mistaken for a private citizen who would have no grounds for making an arrest. The officer's act of identifying himself or herself may make the difference between peaceful submission or strenuous resistance to the arrest procedure. If a police officer is uniformed, then a suspect may be expected to assume that the arrest is being made by police, but there remains the question of whether the person to be arrested should be entitled to know the officer's name, number and police force. On the one hand, it might seem needlessly technical to require an arresting officer to give this full degree of iden-

tification, particularly if this is made a condition of a lawful arrest. On the other hand, is there really any hardship for a trained police officer simply to say "I am Constable Jones, number 'X' of 'Y' police force and I'm placing you under arrest for 'Z'?" The alleged offender is then dealing with someone at least nominally identified, and it may be important evidence in a subsequent dispute over the lawfulness of the arrest process. Furthermore, since in many urban areas there may be a number of different municipal, provincial or federal police forces operating in contiguous or even overlapping jurisdictions, identification of the officer's force, as well as name and number, becomes important. This is information to which, in the interests of fairness, the alleged offender is entitled.

While one may wish, in the interests of fairness, to impose a duty on a trained police officer to make full self-identification when conducting an arrest, ought the same requirement to be imposed upon private citizens making an arrest? If so, ought there to be a distinction made between paid security guards and the ordinary citizen? In relation to the security guard, whose employment duties require the enforcement of the law and potential resort to the process of arrest to do so, the justification for imposing an identification requirement is perhaps self-evident. The issue is more complex, however, in relation to ordinary citizens. Should the ordinary citizen be exposed to sanction for unlawful arrest where there has merely been a failure to identify himself or herself? In principle, the answer to this question ought to be yes. The private citizen who conducts an arrest, whether security guard or not, intentionally deprives another of a fundamental freedom. It is not unreasonable to expect the private citizen who undertakes such a drastic action to state who he is, what he is doing and why he is doing it. This may be particularly important where the private citizen is not a security guard and not in uniform; whose role in the situation is thus not readily apparent. However, recommendations in this area should be drafted in such a manner as to allow courts some discretion over the degree to which the notice requirements might be imposed on private citizens in the circumstances of any particular case. A full duty to comply with notice requirements can then be imposed on the peace officer to whom the private citizen delivers the arrested person.

B. Information on the Fact of and Reasons for Arrest

Notions of fairness require that an alleged offender being placed under arrest, be informed of that fact and be informed of the reasons for it. Here, of course, these principles of fairness are embodied in section 10 of the *Canadian Charter of Rights and Freedoms* which states, in part, "[e]veryone has the right on arrest or detention ... to be informed promptly of the reasons therefor." The working out of these principles in practice will differ according to whether the arrest is being made with or without warrant.

Where an arrest is being made with warrant, the police officer, after identifying himself or herself, must state that the alleged offender is being arrested in accordance with a warrant for arrest, and produce the warrant for the accused's examination. Since the warrant is judicial authorization to arrest the accused, and since it will set out briefly the offence in respect of which the accused is charged, production of the warrant for

inspection can be deemed to be compliance with the fairness requirement to notify an alleged offender of the fact of an arrest and of the reasons for it. This would not prevent the police officers conducting the arrest from orally providing further details, although no requirement can be imposed to do so, since the arresting officers may have no knowledge of the offence other than that which appears on the face of the warrant.

If one takes the view that an arrest warrant, as a judicial authorization for arrest containing a clear statement of the offence, is the best vehicle for informing an accused of the reasons for arrest, then it becomes desirable to impose a duty on a police officer who makes an arrest in the knowledge of the existence of a warrant, to have the arrest warrant with him or her for production at the time of arrest. This duty, however, cannot be an absolute one since, as the present law recognizes, there may be many circumstances where it is not feasible for the officer to do so.³³⁷ A sudden encounter with a dangerous suspect, or information that a suspect who has been avoiding apprehension is near at hand when the warrant is in a distant location, are obvious examples. For these reasons, the authority to arrest without warrant where there are reasonable grounds for belief that a warrant exists was advocated in Chapter Five.

It is, of course, in the context of arrest without warrant that the greatest problems arise in respect to informing an alleged offender of the arrest process and of the reasons for arrest. Where the arrest without warrant occurs by virtue of a statement "You are under arrest," followed by the alleged offender's submission, a requirement to state the fact of the arrest appears superfluous. But it may be that, by virtue of the dangerousness of the suspect or the nature of the circumstances, the arrest is accomplished by seizing or immobilizing the suspect before informing him or her that the process is an arrest. In such circumstances, the alleged offender must be told immediately that this is an arrest and must be given the reasons for it.

Timing, in these circumstances, is a matter of some importance. Both the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights* provide that the alleged offender be told the reasons for arrest "promptly."³³⁸ This language connotes urgency but does allow some flexibility. If a statement of the fact of, and reasons for, an arrest are viewed as conditions of a lawful arrest, then statutory language setting out the general principle must state that reasons are to be given *at the time* of arrest. As the next section will describe, however, there are circumstances of justifiable non-compliance with this requirement which might delay the giving of reasons, and yet still fall within the ambit of "promptness."

The most difficult issue concerning reasons for arrest relates to the amount of detail which must be contained in the reasons. Present law absolves the arresting person from using technical language, as long as the substance of the offence is conveyed to the alleged offender.³³⁹ Where the police officer or citizen is operating on the basis of personal

337. *Criminal Code*, R.S.C. 1970, c. C-34, subsection 29(2). See also the discussion in Chapter Three and the cases, *supra*, note 336.

338. *Canadian Charter of Rights and Freedoms*, section 10; *Canadian Bill of Rights*, subparagraph 2(c)(i).

339. See *Christie v. Leachinsky*, *supra*, note 127 and discussion in Chapter Three.

knowledge of the alleged offence or even where a police officer's reasonable grounds are derived from secondary sources, he or she ought, if possible, to provide the arrested person with a statement about what conduct is being impugned, or the name of the offence for which he or she is being arrested, or both. Clearly, in most situations, it would be desirable in the interests of fairness to provide both, but this may be impossible or even misleading. While the alleged offender may be arrested for his or her responsibility for the death of a person which occurred during a drunken tavern brawl and the person can be told so, stating that the offence to be charged is manslaughter rather than murder might be misleading. In any event, the suspect has a right to be informed of the wrongful conduct for which he is being arrested or the specific offence with which he or she will be charged, as a condition of a lawful arrest.

If this standard is to be adhered to for all cases of arrest without warrant, special attention must be directed to the situation in which a suspect is arrested without warrant because there are reasonable grounds to believe that a warrant for the suspect's arrest is outstanding but where it is not feasible to obtain the warrant. Can the person merely be told that he or she is being arrested for an outstanding warrant, as the present case-law would have it,³⁴⁰ or ought a reformed law of arrest to impose the requirement that the nature of the impugned conduct or the name of the offence be provided to the accused? In accordance with the principle of fairness, surely the latter is the case. Moreover, in a world where police cars and officers on the beat have two-way radios which give them virtually instant contact with their police station and its computerized information, such a requirement does not impose an unacceptable burden on police officers making arrests.

C. Language and Translation

Being informed of the reasons for one's arrest is of little value if one does not understand the language used by the arresting person. This is a problem which may be particularly sensitive in an officially bilingual state, but it is essentially a problem involving elements of fairness in any society or jurisdiction where there are likely to be people who do not speak the language of the linguistic group from which the majority of law enforcement officers are drawn. While the private citizen who makes an arrest and who is required to turn an arrested person over to police forthwith may not be the proper subject of a duty to cope with a language barrier, police are in a different situation. Under normal circumstances, police ought to be able to provide a means to inform an arrested person of the reasons for his or her arrest within a reasonable period of time. The services of an interpreter who can convey the relatively simple message that the alleged offender has been arrested for a particular reason can be obtained at little or no cost, and the matter might even be resolved over the telephone. Therefore, the reformed law of arrest must impose a duty on police officers who arrest a person who does not understand the language

340. *Gamracy v. The Queen*, *supra*, note 241.

of the arresting officer to obtain the services of an interpreter to inform the suspect of the reasons for his or her arrest as soon as is practicable. The sanction for failure to do so ought to be to vitiate the validity of the arrest.

III. Justified Non-Compliance with Notice Requirements

The present law, which recognizes the requirement to provide the true reasons for an arrest as a requisite aspect of a lawful arrest, also recognizes the fact that the alleged offender may inhibit compliance with these requirements by such actions as flight, physical resistance, or the very fact that the person is in the midst of committing a violent offence which must be stopped. These circumstances must, of necessity, be reflected in any reformulation of the law of arrest. Similarly, a person whose physical or mental condition prevents him or her temporarily from understanding the nature of, or reasons for, an arrest ought to be told these things again when the temporary disability is no longer present. Impairment by alcohol or drugs is the most likely scenario here, although circumstances of the person suspected of an offence who has suffered an injury such as a concussion during the commission of the offence or at the time of arrest are not far-fetched. Thus flight, violence or incapacity on the part of the alleged offender may prevent the arresting person from complying *immediately* with the duty to provide the suspect with reasons for arrest, and the initial validity of the arrest is not subject to question. However, a person who is in custody as a result of this incomplete arrest procedure must, in accordance with constitutional requirements and procedural fairness, be informed of the reasons for arrest as soon as is practicable. Failure to do so will take the process outside the ambit of the Charter direction to inform the accused of reasons for arrest "promptly." Furthermore, mandatory language in the statutory provisions setting out the procedures for arrest ought to make clear that this failure will also result in the arrest being deemed to be unlawful from the time at which reasons could reasonably have been given.

Present case-law also absolves the arresting person from providing reasons for arrest where the circumstances are such that it is obvious that the suspect must know the general nature of the alleged offence for which he or she is arrested.³⁴¹ While this may appear to be practical at first glance, it is submitted that this practice is contrary to present statutory and constitutional requirements and is wrong in principle. The *Canadian Charter of Rights and Freedoms* states that the person is to be told the reasons for arrest *promptly*, and no exception is made for circumstances where it may be argued that the reasons are obvious. Similarly, the present *Criminal Code* provides that the person is to be told the reasons for arrest where it is feasible to do so. Presumed obviousness does not make conveying the information unfeasible. The real problem here is the potential for unfairness. While the nature of the alleged offence may be obvious to a trained police officer, it may not be so even to a relatively well-educated citizen. The complexity of the Canadian legal

341. *Christie v. Leachinsky*, *supra*, note 127.

system is such that most citizens are, in fact, ignorant of the vast majority of offences. While the substantive law may, for policy reasons, deny an excuse to the person who is ignorant of or makes a mistake of law, this notion ought not be transferred to the law of arrest. Omitting this questionable common law exception from the requirement to give reasons in a reformulated law of arrest will occasion no practical difficulty for those making arrests - they will simply have to be explicit about what they are doing.

IV. The Effect of Unjustified Non-Compliance

This chapter proposes that, as a matter of general principle, at the time of arrest, an arrested person must be informed of the identity of the arresting person, of the fact that the detention is an arrest, and of the reasons for the arrest. Unjustified non-compliance with these requirements is to render the arrest unlawful. This is the general effect of the present law, where the right to reasons for arrest *is* seen as a procedural requirement the absence of which may vitiate the lawfulness of the arrest. But the present law recognizes the requirement to give reasons as an essential element of a lawful arrest in a clouded fashion. The source of the principle is split among constitutional documents, the *Criminal Code* and the case-law, and there is no single clear statement that the right to reasons for arrest stands on the same footing, when one is determining the legality of an arrest, with provisions which set out the grounds for arrest. Furthermore, *Criminal Code* subsection 29(3) shields those who fail to give reasons from criminal responsibility. The reformed law of arrest must present these notice requirements simply, clearly and in mandatory language in order to ensure that their binding importance is obvious.

RECOMMENDATIONS

16. That subject to Recommendations 17 and 19,

(1) anyone arresting a person shall, at the time of making the arrest, state:

- (a) his or her name,**
- (b) the fact that the person is under arrest, and**
- (c) the reason for the arrest; and**

(2) a police officer shall, in addition, provide:

- (a) his or her badge number, if any, and**
- (b) the name of his or her police force.**

17. That where compliance with Recommendation 16 is rendered impracticable by:

- (1) the flight, resistance, or continuation of the offence by the arrested person;**
- (2) the incapacity of the arrested person; or**
- (3) the fact that the arrest was made by a private citizen**

a person having custody of the arrested person shall comply with Recommendation 16 at the first reasonable opportunity.

18. That insofar as the requirement to give reasons for arrest in Recommendation 16 is concerned, an arresting person shall be in compliance with this requirement where he or she:

- (1) generally informs the person being arrested of the facts which form the grounds for the arrest;**
- (2) shows the person being arrested the warrant authorizing the arrest; or**
- (3) informs the person of the offence for which an arrest warrant has been issued where it is not feasible for a peace officer to be in possession of the warrant at the time of the arrest.**

19. That where a peace officer, who has arrested a person or who has received in custody a person arrested by a private citizen, has reasonable grounds to believe that the arrested person may be unable to understand the language used by the arresting person in complying with the notice requirements of Recommendation 16, the peace officer shall make every reasonable effort to ensure that compliance with Recommendation 16 is achieved at the first reasonable opportunity, in a language understood by the arrested person.

CHAPTER EIGHT

Spatial Limits on the Authority to Arrest

Having delineated the nature of a lawful arrest for purposes of criminal procedure, including what it is, why and when it may be used and how it is to be carried out, the next concern is *where* it may be carried out. There are two dimensions to this problem.

In a state which is divided into various territorial units for the purposes of trial jurisdiction and division of labour in the administration of criminal justice, the question arises as to the extent of the geographical enforceability of warrants for arrest. Ought an arrest warrant to be in force outside the normal territorial jurisdiction of the judicial officer who issued the warrant? If so, what controls ought to surround the execution of warrants so as to ensure that the discretion to execute warrants over a large geographical area can be carried out in a cost-efficient manner which does not impose unnecessary hardship or injustice upon accused persons? This dimension of the “spatial limits” upon the authority to arrest is considered in the first section of this chapter.

The second dimension to this problem is whether there are definable areas of “private space” into which agents of the state may not intrude for the purposes of effecting arrest, or in any event can only intrude upon for limited reasons or in accordance with particular procedures. Is the home really a castle for the purposes of the law of arrest? This issue of entry upon private property will be examined in Section II of this chapter.

Recommendations concerning both aspects of spatial limits on the authority to arrest will be found at the end of this chapter.

I. The Territorial Aspects of a Warrant for Arrest

For the most part, warrants for arrest in first instance to compel attendance of an accused are issued by justices or provincial magistrates who may have limited jurisdictions. However, the *Criminal Code* rightly attempts to establish procedures and standards applicable across the country. These opposing factors have created particular difficulty insofar as execution of arrest warrants is concerned. This section of the present chapter will, in its first subsection, describe the tensions and apparent contradictions which characterize the present law concerning the extraterritorial execution of arrest warrants and relate the manner in which these tensions are exacerbated by present police and Crown practices.

The second subsection will set out the basis for recommendations which may restore a proper balance between the principles of restraint and fairness to an accused on the one hand, and the interests of the state in certain and effective means for compelling appearance on the other.

A. The Tensions in Present Law and Practice

In the present *Criminal Code*, the territorial aspects of the issuance and execution of arrest warrants are the subject of apparently self-contradictory provisions. In Part XIV under the heading "Compelling Appearance of Accused before a Justice and Interim Release," *Criminal Code* section 456.2 states that a warrant is to be "directed to the peace officers within the territorial jurisdiction of the justice, judge or court by whom or by which it is issued," a proposition which seems to imply that the territorial efficacy of an arrest warrant is linked to the jurisdiction of the judicial official by whom it is issued. This territorial principle seems to be reinforced in the *Criminal Code* section immediately following which states that a warrant may be executed by arresting an accused "wherever he is found within the territorial jurisdiction" of the issuing judicial officer, or "wherever he is found in Canada, in the case of fresh pursuit."³⁴² This territorial approach, even though extended in the case of fresh pursuit, clearly has great limitations, and the overcoming of these limitations appears to be the purpose of *Criminal Code* section 461. This section creates a procedure whereby a warrant sought to be executed outside the jurisdiction of the issuing justice may be endorsed or "backed" by a justice within the territory where the accused is believed to be and, having thus been made valid in the territorial jurisdiction, the warrant can then be executed. If these were the only provisions in the *Criminal Code* touching upon the subject, one might confidently assert that an accused sought on a warrant in one province who evaded capture by going to another province could only be arrested by seeking the original arrest warrant, having it transported to the second province, then having it endorsed by a justice and finally executed if the accused were still to be found. It is to be noted that the arrest-without-warrant powers of peace officers under paragraph 450(1)(c) of the present *Criminal Code* seem consistent with this territorial approach in that the paragraph authorizes the arrest without warrant of "a person for whose arrest he has reasonable and probable grounds to believe that a warrant is in force within the territorial jurisdiction in which the person is found."

The apparently mandatory nature of this cumbersome approach is, it may be argued, contradicted by other provisions of the *Criminal Code*. In Part XIX of the *Criminal Code* entitled "Procuring Attendance of Witnesses," section 631 states: "[a] warrant that is issued out of a superior court of criminal jurisdiction, a court of appeal, an appeal court or a court of criminal jurisdiction other than a magistrate acting under Part XVI may be executed anywhere in Canada." Furthermore, *Criminal Code* subsection 633(3) states:

342. *Criminal Code*, R.S.C. 1970, c. C-34, section 456.3.

“[a] warrant that is issued by a justice or magistrate pursuant to subsection (1) or (2) may be executed anywhere in Canada.” While subsection 633(3) is applicable only to bench warrants on its face, and while section 631 might be argued to be so limited by virtue of its position in the *Criminal Code*, what is clear is that *some* warrants of arrest may be executed anywhere in Canada regardless of the more restricted territorial jurisdiction of the judge or justice who issued them. These warrants may or may not be “warrants in force” in any jurisdiction in Canada at any given time and thus susceptible of grounding an arrest without warrant power under paragraph 450(1)(c) of the *Criminal Code*. They would certainly be warrants for arrest which might be executed without endorsement in any jurisdiction in Canada outside that of the issuing justice, and would ground an arrest without warrant power in a jurisdiction where the warrant has been physically *brought* into the jurisdiction.

While the provisions just discussed constitute a breach with the territoriality principle in the bench warrant context, *Criminal Code* subsection 454(2) appears to create a breach in reference to warrants of first instance. This subsection provides a mechanism for bringing before a magistrate a person who “has been arrested without warrant for an indictable offence alleged to have been committed in Canada outside the province in which he was arrested” and provides that the person may be remanded in custody for *six days* to await the endorsement procedure contemplated by section 461 mentioned above. The difficulty with the section is that it either conflicts with paragraph 450(1)(c) (which requires a warrant to be *in force in the territorial jurisdiction within which the person is found*), creates a broad arrest power in relation to indictable offences *alleged* to have been committed in Canada outside the province in which [the person] was arrested, or must rely for efficacy on the fact that the suspect has been arrested for another charge in the second jurisdiction and is being held awaiting instructions from the originating jurisdiction on the first charge. Paragraph 454(2)(a) imposes a clear duty to release the arrested person only where a justice “is not satisfied that there are reasonable and probable grounds to believe that the person arrested is the person alleged to have committed the offence.” The statutory and even constitutional bases for arrest and continued custody in relation to *Criminal Code* subsection 454(2) are thus somewhat uncertain.

Regardless of the legal uncertainties concerning the extraterritorial execution of arrest warrants, the practical outlines of police procedures are relatively clear. Warrants for arrest are obtained from a justice, and a decision will be made either by police or Crown officers as to the “geographical radius” of the warrant. The geographical radius is the distance within which the Crown will be prepared to pay the cost and expend the effort of sending police officers to escort the arrested accused *back* to the jurisdiction of issuance of the warrant, that is, the jurisdiction in which the trial is to occur. Some arrest warrants may be designated as “Canada-wide” while others may get a limited radius of “100 miles” or “anywhere in ‘X’ province.” The point of these designations, of course, is that they are entered on CPIC, the nation-wide police computerized information system.

Police will usually encounter a suspect when he or she is being investigated or arrested in relation to an offence in the second jurisdiction, at which time a routine computer search of the suspect’s name is conducted. If this computer search turns up an

outstanding warrant, police officers within the radius of the warrant will normally arrest the person and hold him or her until a decision is made by the issuing authorities as to whether they will come and pick up the arrested person. The decision will not hinge only on the facts which gave rise to the administrative decision to set the initial radius at a certain range. It may be that witnesses in the case are unavailable, or the case looks weaker for a variety of reasons, or that given the state of the budget this case no longer has the same priority. In such circumstances, the arresting authorities will be told by the originating authorities merely to release the prisoner. If the procedure is one which is operating under the authority of *Criminal Code* subsection 454(2), the accused person can spend up to six days in custody prior to release without trial.

In practice there are a number of aspects of this system which are a cause for concern. While most police forces make an attempt to review periodically the geographical radius of arrest warrants, there may at any time be an indeterminate number of arrest warrants on the system which will not be “honoured” if the suspect is arrested. The fact that the person is subsequently released does not mean that charges have been dropped in the originating jurisdiction. If he or she returns to the originating jurisdiction or comes within the ambit of any newly set arrest warrant radius, a prosecution may result. There are reported examples of circumstances where a person has been arrested several times and simply released because the original geographical radius was not altered after the initial decision not to honour it. Furthermore, subsection 454(2) is apparently being interpreted by some courts as providing no basis for judicial interim release while a decision is being awaited from the originating authorities.

In its most aberrant form, the above system may be highly unjust to those upon whom it is imposed. It may be that the accused did not leave the jurisdiction to escape the law. He or she may be well settled in the second jurisdiction, and might under normal circumstances be a prime candidate for judicial interim release. In accordance with principles of restraint and fairness, there ought to be a clear duty to release where conditions are appropriate. On the other hand, it is appropriate that persons who commit crimes in one part of Canada, particularly if it is a serious offence, be subject to arrest and transfer to the place of the crime for trial.

Police ought to have clear authority to arrest on a “Canada-wide” warrant in relation to serious offences without resorting to unnatural interpretations of the *Criminal Code* or to the subterfuge of holding charges. The recommendations found at the end of this chapter attempt to provide a resolution to this extremely thorny problem.

B. The Territorial Ambit of Arrest Warrants

Solutions to the tensions and contradictions described above can be envisaged under three headings: the geographical extent of validity of warrants for arrest, judicial discretion

with respect to release of those arrested for "extraterritorial warrants," and the effect on the warrant of carrying out an arrest in relation to it. These matters and recommendations in relation to them are the subject of this subsection.

As was suggested in Chapter Six, one of the most important reasons for seeking an arrest warrant in the context of an arrest regime where there are broad powers of arrest *without* warrant is to authorize judicially the extension of these without-warrant arrest powers both in terms of the persons who are authorized to arrest and the geographical ambit of the area in which an arrest may be conducted. If there is a unified system of criminal law and criminal procedure in Canada, there seems to be no reason in principle to limit formally the extent of the geographical validity of a warrant for arrest. If there are reasons which justify an arrest in the first instance in accordance with the principles in Recommendation 1 of this Working Paper, these reasons will, for the most part, be valid throughout Canada. On the other hand, it may be known at the outset that the Crown will not pay for the return of an accused beyond a certain geographical radius; it may be that on a previous warrant in relation to the charge the Crown has refused to return the accused to the originating jurisdiction; or it may be that the offence is of a very minor nature in relation to the impact on the accused of forced return to the original jurisdiction. In these cases it may be appropriate for the justice issuing the warrant to impose geographical limits on the execution of the warrant. These purposes can be accomplished by a statutory provision to the effect that a warrant may be executed by police officers anywhere in Canada, unless the warrant specifies otherwise. The difficulty in imposing any hard and fast rule is that the decision as to whether or not to expend public funds to return suspects for trial in originating jurisdictions is properly one for the executive branch of government. Furthermore, all the factors which will determine the outcome of such a decision cannot be known at the time of issuance. Thus, even where warrants might, in general, be executed anywhere in Canada in accordance with these proposals, there would still be a need for police and Crown authorities to set practical, administrative "return radii" in relation to particular warrants, and to review the adequacy of these limits on a periodic basis. Real control over potential injustices in this system can only be imposed through rules governing the treatment of the person arrested on extraterritorial warrants and the effect of any arrest on the continued validity of the warrant.

While this Working Paper is not concerned in general with judicial interim release, the difficulties with extraterritorial execution of arrest warrants cannot be solved without minor entry upon this subject. The generally applicable provisions of the *Criminal Code* concerning bail or judicial interim release state that an accused is to be released on his own undertaking without conditions unless the prosecutor, having been given a reasonable opportunity to do so, "shows cause" why the detention of the accused in custody is justified "or why any other order should be made."³⁴³ Subsection 454(2) of the *Criminal Code*, which governs the justice who is faced with a person arrested without warrant for an indictable offence alleged to have been committed outside the province, while not worded in explicitly mandatory form, certainly leaves the impression that where the justice is satisfied that the police have the right person, the authorities *ought* to be given

343. *Criminal Code*, R.S.C. 1970, c. C-34, subsection 457(1).

the full six days of custody to effect an endorsement of the warrant and a return of the prisoner. This is certainly not the only interpretation that the section is capable of bearing,³⁴⁴ but it seems to be the dominant one.

If the principle of Canada-wide validity of arrest warrants as recommended above is accepted, it ought to be accompanied by a statutory provision which clearly makes the general requirements of the law on bail applicable to the person arrested on an extraterritorial warrant. This would still give the Crown the possibility of three clear days detention before having to show cause for further custody,³⁴⁵ but it would make clear that the general judicial duty to release and the burden on the Crown to demonstrate the need for further custody are applicable in the circumstances under discussion. Moreover, an accused who is released will have a more appropriate opportunity to decide whether to plead guilty to the offence in the place where the arrest occurred or negotiate with the Crown a convenient time for return to the originating jurisdiction for trial. The six-day limit for detention as presently fixed by *Criminal Code* subsection 454(2) is reasonable as a *maximum* limit where no endorsement of warrant and transfer of prisoner are sought by the originating jurisdiction, after which release must be mandatory.³⁴⁶

Firmer prospects for judicial interim release pending determination of the issue of whether an accused will be escorted back to the province which originated a warrant will have only a moderate impact on the difficulties mentioned above. The most acute, if rare, problem is the situation where an accused is picked up on subsequent occasions following a decision to release. In practice this is the result of an administrative failure to remove or alter the extraterritorial enforcement radius of the warrant. Since the warrant has not been executed (the arrest having been made without warrant on the strength of a warrant outstanding elsewhere), it is still extant. The fair means of dealing with this situation is to create a power for the court which releases the accused after a decision not to "extradite" the accused to the province where the offence was committed to cancel the warrant. Such cancellation of a warrant would not affect the validity of the information commencing the proceedings and reissuance of process to compel appearance would be entirely in order. However, a justice asked to reissue process, who is made aware of the procedural history of the case, might impose geographical limits on the execution of a subsequent warrant if one were to be sought. Dismissal of proceedings following a decision not to seek the return of an out-of-province arrestee would not be in accordance with the public interest in bringing offenders to justice in serious cases. However, the Crown's lack of interest in proceeding with the matter might be a factor at a subsequent trial in determining whether the accused had been tried within a "reasonable time" pursuant to paragraph 11(b) of the *Canadian Charter of Rights and Freedoms*, and thus avoid the spectre of perpetual semi-exile for the accused who has been released but not acquitted.

344. *R. v. Ragan* (1974), 21 C.C.C. (2d) 115 (B.C. Prov. Ct.).

345. *Criminal Code*, R.S.C. 1970, c. C-34, section 457.1.

346. This approach would necessitate an amendment to *Criminal Code*, R.S.C. 1970, c. C-34, section 463 which requires a justice before whom an accused is brought, to "inquire into that charge and any other charge against that person." This direction to hold a preliminary inquiry would have to be restricted where the person is brought before the justice merely to sort out the consequences of an extraterritorial

II. Entry on Private Property to Effect a Lawful Arrest

Forcible entry onto private property to effect an arrest is an infringement of both individual liberty and privacy; or in the language of the common law, such action, if unjustified, amounts to a trespass to both person and property. Of course, there is no trespass where permission is given to enter upon the land or premises. Therefore, the real problem here is the extent to which arresting persons are to be authorized to make *forcible* (that is, non-consensual) entry onto private property.

At the level of principle, the issue as always is the balance to be struck between the interests of the state in ensuring a successful arrest and the interests of individual citizens in being secure from unnecessary and unreasonable interference with person and privacy. Within this context legal debate has been dominated by two different concerns: (i) the extent to which forcible entry onto private property to effect arrest ought to be restricted to persons authorized by warrant, and (ii) the extent to which the law ought to differentiate for this purpose between dwellings and other private premises. This section will proceed first to examine the principles which ought to govern forcible entry onto private property, particularly in relation to the above issues, and then will examine the precise factors which must be taken into account when setting out conditions authorizing such forcible entry. It should be made clear at the outset that in considering *when* entry on private property is to be authorized, the related issue of *how much force* can be used to make entry is analytically separate, and has been addressed by the Commission in its Working Paper on *The General Part*.³⁴⁷

A. Principles Governing Forcible Entry

The present Canadian case-law vacillates between a position which would severely restrict rights of forcible entry to effect arrest,³⁴⁸ and one which would grant broad powers in such circumstances.³⁴⁹ This ambivalence has its origins, from the doctrinal point of view, in the fact that the *Criminal Code* says nothing on the matter. Courts struggle with the question of the extent to which they must find powers forcibly to enter private property to effect arrest *implicit* in the provision which authorizes the arrest itself. Here, the policy imperatives of the policing function vie with the restrictive traditions of the common law in the process of statutory interpretation and judicial law making. The restrictive approach

arrest. It might in fact be preferable to amend *Criminal Code* section 435, which allows courts jurisdiction to take guilty pleas for offences committed out of province, so that trials might occur in the jurisdiction of arrest with consent of the accused and the Crown.

347. *Supra*, note 253.

348. As exemplified by *Colet v. The Queen*, *supra*, note 164; and *R. v. Landry*, *supra*, note 260. See the discussion in Chapter Two, Sections III.C and VII.

349. As exemplified by *R. v. Stenning*, *supra*, note 163 and *Eccles v. Bourque*, *supra*, note 205. See the discussion in Chapter Two, Sections III.C and VII.

rests upon the constitutional principle essential to the protection of liberty at common law which holds that there can be no interference by police or others with person or property which is not explicitly authorized by the law.³⁵⁰ A recent example of this approach by the Supreme Court of Canada is in the case of *Cole v. The Queen*³⁵¹ where police officers sought to enter a home under a warrant which authorized the seizure of certain weapons but which gave *no right of search*. The homeowner's resistance to the police was deemed lawful because the court adopted a restrictive interpretation of the criminal statute in favour of the citizen's rights and was unwilling to hold that a statutory power of seizure necessarily implied a statutory power to search for the thing to be seized.

At the other end of the spectrum lies *Eccles v. Bourque*³⁵² where common law powers of police officers were, it may be argued, given a substantial expansion to allow police entry into an apartment to effect an arrest without warrant, as long as certain procedural notice requirements were complied with. In this case, the court relied heavily on its assessment of the exigencies of effective policing in the circumstances. While the court was dealing with very different factual situations and was applying different sources of law in each case, allowing them to be distinguished for these reasons, the approaches to the problem of the power of police forcibly to enter private premises to carry out duties are based on widely diverging premises, methods and values.

These contradictory approaches are embedded in the common law. In striking down general search warrants in *Entick v. Carrington*, Lord Camden said:

By the laws of England every invasion of private property, be it ever so minute, is a trespass ... According to this reasoning, it is now incumbent upon the defendants to show the law by which the seizure is warranted.³⁵³

This restrictive approach to police powers is also evident in the rhetoric of *Semayne's Case* which introduced the oft-quoted phrase "The house of everyone is his castle."³⁵⁴ However, it is important to note that *Semayne's Case* is also the source for a proposition which is often cited to justify forcible police entry to effect arrest:

In all cases where the King is a party, the sheriff may break into the house, either to arrest or do other execution of the King's process, if he cannot otherwise enter. But he ought first to signify the cause of his coming, and make request to open the doors.³⁵⁵

These mutually opposed strands of thinking coexist uneasily and act as sources for legal propositions which courts use to justify their results in this difficult realm of value-judgment.

350. See the recent landmark case of *Hunter v. Southam Inc.* (1984), 14 C.C.C. (3d) 97 (S.C.C.).

351. *Supra*, note 164.

352. *Supra*, note 205.

353. *Entick v. Carrington* (1765), 19 St. Tr. 1029, 95 E.R. 807 (C.P.).

354. *Semayne's Case*, *supra*, note 256.

355. *Supra*, note 256, headnote, proposition 3.

As described in Part One, the upshot of this process, as it relates to forcible entry on private property to effect a lawful arrest, is seemingly to allow the would-be arrestor reasonably wide latitude based on vague, sometimes contradictory statements which provide police with few guidelines, individuals with few definable rights, and courts with little means of control. The attempt here will be to sketch out some general principles which relate to the role of the warrant and the status of the dwelling, and which relate to, but do not necessarily reflect, the present law.

The view is sometimes expressed that "at common law a citizen could deny entry to his home to a policeman without warrant...."³⁵⁶ While this statement is no longer an accurate description of the present law, it does reflect a notion of privacy and personal security which is an important value in Canadian society.³⁵⁷ The sanctity of the family dwelling is such in our legal tradition that, as with search, there ought to be no forcible entry into a private dwelling unless such entry is authorized by judicial authority. While the judicial process need not be elaborate, as pointed out in Chapter Six, the assumed safeguard for liberty and privacy lies in the requirement that the informant must personally convince the justice that there are reasonable grounds for issuing the warrant *and* for authorizing forcible entry upon private premises in order to effect the arrest. Exceptions to the principle, however, may be justifiable where there are threats of death or serious bodily harm. The net effect would be to give greater protection to privacy interests than enunciated by the case of *Eccles v. Bourque*, while still maintaining feasibility for police in life-threatening situations.

The Canadian law governing entry upon private property other than a dwelling appears to be governed at present by the ruling in *R. v. Stenning*.³⁵⁸ The principle there adopted from *dicta* in an English decision is that, *prima facie*, trespass to premises is lawful if effected within the general scope of a statutory or common law duty and if the manner in which the trespass is carried out makes it "justifiable." This vague doctrine presents no standard whatsoever. In relation to police officers, who have wide statutory duties to investigate offences and maintain law and order under police Acts and analogous statutes, the *Stenning* principle authorizes broad and uncontrollable interference with private property and individual liberty. Surely this is contrary to section 7 of the *Canadian Charter of Rights and Freedoms* and section 1, which provides that Charter rights are only to be subject to "reasonable limits prescribed by law" unless the override provisions are invoked. If a warrant requirement is viewed as too onerous in relation to effecting arrest on private premises other than a dwelling, then workable standards governing the appropriate factors which justify forcible entry must be elaborated to govern would-be arresters and those in possession of property.

356. *R. v. Landry*, *supra*, note 260, *per* Jessup J.A., dissenting.

357. In *Hunter v. Southam Inc.*, *supra*, note 350, the Supreme Court of Canada specifically recognizes that Charter section 8, concerning protections against unreasonable search and seizure, protects not only property but also privacy.

358. *Supra*, note 163.

B. Conditions of Lawful Entry upon Private Property to Effect Arrest

The conditions for lawful entry upon private property recommended here relate to forcible entry. They assume no change in the present law that entry by consent for such a purpose would be lawful. This is not a minor consideration. Police officers seeking entry on private property may be quite persuasive in convincing occupants to grant consent to enter, and this situation may be open to abuse. However, the recommendations below relating to dwellings and other private premises are designed to regularize police practice where occupants stand on their rights, while leaving open the grey area of "consent" to on-the-spot "negotiation" and subsequent judicial scrutiny.

(1) Forcible Entry upon a Private Dwelling

While the preceding discussion indicates that present Canadian law recognizes the "home as castle" notion more in the breach than in the observance, it is nevertheless an essential aspect of the cultural and political tradition of our Anglo-Canadian legal system. The idea that police officers may enter homes without proper authorization is abhorrent. This view underlies the Commission's recommendations in its Report to Parliament entitled *Writs of Assistance and Telewarrants* which holds to the fundamental precept that police powers of search and seizure should, as a rule, be exercised by judicial warrant issued before the event and upon particular information.³⁵⁹ Entry to effect an arrest has potentially greater repercussions for the liberty of the individual than does entry for the purposes of searching for evidence of offences, and it is difficult to see how the protections surrounding the former should be less stringent than those for the latter as is presently the case. If the telewarrant system proposed for search warrants were to be adopted in relation to entry into dwellings to effect arrest, the adverse impact on "efficiency of law enforcement" could be minimized.

There is one set of circumstances where the above proposal is not workable. This is the situation where a police officer has reasonable grounds to believe that a person in a particular dwelling is committing, or is about to commit, an offence which may endanger life or cause serious bodily harm. If, for example, the police receive a request to go to a house where someone with a gun is threatening the life of another, imposing a requirement to obtain beforehand a warrant would be patently foolish. On the other hand, the primacy of the interest in maintaining the sanctity of the private dwelling, subject only to judicially scrutinized breach, is paramount where there is no danger to life and limb.

Regardless of whether entry into the dwelling is by warrant or without warrant in the exigent circumstances just described, the manner of effecting entry is important to ensure recognition of the individual rights being invaded and to reduce the incidence of

359. Law Reform Commission of Canada, *Writs of Assistance and Telewarrants*, [Report 19] (Ottawa: Minister of Supply and Services Canada, 1983), p. 79. It may be argued that it is supported as well by the Supreme Court of Canada in *Hunter v. Southam Inc.*, *supra*, note 350, although that case involved a search warrant.

violent confrontation. The notice requirements of Chapter Seven stipulate that the arresting person identify himself or herself, inform the suspect of the fact of the arrest and of the reason for arrest. In respect of an entry into a dwelling, the principles of fairness necessitate the additional requirement to knock and wait for a reasonable period of time before forcing entry, as well as a requirement to have the arrest warrant available except in the exigent circumstances described above.

Given the proposed arrest powers of the private citizen as opposed to those of a police officer, the practical effect of the recommended powers to enter forcibly into private dwellings to effect arrest would be to restrict such authority to police officers or those assisting police officers. However, given the serious nature of the infringement of the property and privacy interests invaded, it is appropriate specifically to limit the authority to enter forcibly private dwellings to effect arrest to police officers. The law ought not to encourage the private enforcement of the criminal law in these circumstances. In the event that exigent circumstances lead a private individual to force entry to prevent apprehended death or serious bodily harm, under the Commission's proposals in the Working Paper on *The General Part*, a defence of necessity would be available in the event of criminal charges against the private arrester.³⁶⁰

(2) Forcible Entry into Premises Other Than Dwellings

Making a distinction between dwellings and other private premises for the purposes of the law governing forcible entry to effect an arrest is based on the assumption that our legal and political tradition regards the invasion of the privacy of the home as more serious than the invasion of other premises. Barging into a home to arrest someone ought to require judicial authorization, whereas entry into the office building, tavern, or private club is acceptable where the arresting person has reasonable grounds to believe the suspect is on the premises, and also has proper grounds to make the arrest. The effect of the proposal here is to impose the present standards of *Eccles v. Bourque*³⁶¹ for all property other than dwellings.

Generally, the reformulated law might take the following form: A police officer or person assisting a police officer is justified in forcibly entering premises other than a dwelling where such person has reasonable grounds to believe that a suspect, in relation to whom there exist lawful grounds to arrest, is on the premises, and where the person making the arrest gives notice of his or her presence and identity prior to forcing entry.

In accordance with present law, it seems appropriate to absolve the arresting person of the requirement to give notice of presence and identity where there exist certain exigent circumstances. Those usually the subject of comment are reasonable grounds for belief that there is a need: (i) to prevent death or serious injury; (ii) to prevent the destruction of evidence; and (iii) in circumstances of hot pursuit. Items (ii) and (iii), of course, would

360. *Supra*, note 253, pp. 91-97.

361. *Supra*, note 205.

broaden the circumstances of forcible entry without notice considerably. However, given the fact that such an extension would not apply to private dwellings, it is submitted that adopting these criteria strikes an appropriate balance between the protection of privacy and the effective enforcement of the law.

RECOMMENDATIONS

20. That a warrant for arrest be capable of execution anywhere in Canada, subject to any geographical limitations which might be imposed by the justice or judge issuing such warrant.

21. That where a person has been arrested without warrant because a peace officer has reasonable grounds to believe that there is a warrant outstanding in Canada for his or her arrest for a criminal offence alleged to have been committed in Canada outside the territorial division in which he or she was arrested, such person be taken before a justice in the territorial division where the arrest occurred or where such person is in custody and be dealt with according to the general provisions governing judicial interim release.

22. That where a person referred to in Recommendation 21 is remanded in custody, pending a decision as to whether he or she is to be returned to the territorial division in which the warrant for arrest was issued, such person shall be released at the expiration of no more than six days from the time of appearance before the justice.

23. That where a person has been arrested without warrant for an offence under the conditions described in Recommendation 21, and that person is released without trial rather than being returned to the territorial division in which the warrant for arrest was issued, the justice who releases the accused shall make an order cancelling the arrest warrant, and transmit such order to the justice who originally issued the warrant.

24. That subject to Recommendation 25, a peace officer may enter a private dwelling to effect an arrest:

- (1) where the peace officer is in possession of a warrant for arrest and believes on reasonable grounds that the person named in the warrant is on the premises; and,**
- (2) where the peace officer has announced his or her presence and identity, has made a demand to enter, and waits a reasonable period of time before entry.**

25. That a peace officer may enter a private dwelling without warrant and unannounced to effect a lawful arrest where:

- (1) he or she has reasonable grounds to believe**

- (1) he or she has reasonable grounds to believe**
 - (a) that the alleged offender is in the private dwelling, and**
 - (b) that the person is committing or is about to commit an offence likely to endanger life or cause serious bodily harm; or**
- (2) he or she is in hot pursuit of the alleged offender and has reasonable grounds to believe that the alleged offender has entered the private dwelling.**

26. That a peace officer may enter premises other than a private dwelling to effect a lawful arrest where the peace officer:

- (1) has reasonable grounds to believe that the person sought to be arrested is on the premises; and**
- (2) has given notice of his or her presence and identity and has made a demand to enter, but such notice shall not be required where there are reasonable grounds to believe that there is a need:**
 - (a) to prevent death or serious bodily harm;**
 - (b) to prevent the destruction of evidence; or**
 - (c) to maintain effective hot pursuit.**

CHAPTER NINE

Sanctions against Unlawful Arrest

I. Introduction

A set of rules to structure the discretion of those wishing to arrest must be accompanied by workable sanctions for non-compliance if the rules are not to be systematically subverted. The fundamental premise underlying this area of the law is the right of the citizen to his or her liberty unless the would-be arrestor acts with lawful authority and in a proper manner, and effective remedies must exist for breach of this right. Anything less would result in the promulgation of an illusory set of rights and duties where the agents of the state would be capable of riding roughshod over the rights of the individual.

Failure to adhere to many of the recommendations in this Working Paper could no doubt be construed as a breach of a number of provisions of the *Canadian Charter of Rights and Freedoms*. In such cases, the aggrieved person may apply to a court "to obtain such remedy as the court considers appropriate and just in the circumstances." While in theory the *Canadian Charter of Rights and Freedoms* thus gives courts a broad discretion to fashion appropriate remedies, it is probable that courts will continue to mould the remedies already familiar to them to the new context of the Charter. Thus the starting point for thinking about sanctions against unlawful arrest in relation to the recommendations made in this Working Paper must be the remedies traditionally recognized by the common law: self-help or self-defence against unlawful arrest, civil action against the wrongful arrestor, and criminal proceedings against the wrongful arrestor. To these must be added consideration of the administrative sanctions found in the various statutes and regulations governing discipline procedures for police forces, which are of more recent origin. These responses are, for the most part, initiated either in principle or in fact by the person wrongfully arrested and their primary focus for the imposition of the sanction is the wrongful arrestor. These remedies all pre-date the *Canadian Charter of Rights and Freedoms*. However, there are sanctions which originate with the Charter and which may sanction wrongful arrest through an effect on the proceeding for which the person was arrested; that is, by the dismissal of the proceeding or by an exclusionary rule of evidence.

A consideration of sanctions for unlawful arrest will be undertaken by the Commission as part of a study of remedies applicable to breaches of other provisions of the Code of Criminal Procedure which will result from the full-scale review of the *Criminal Code* of which this Working Paper is only a part. In other words, the Commission presently contemplates the creation of a remedies regime which might be applicable for failure to

adhere to rules in relation to search, post-seizure procedures, questioning suspects, discovery, and other matters of a procedural nature including arrest. On the other hand, the matter of remedies cannot be ignored in this Working Paper. One of the greatest deficiencies of the present law of arrest is the absence of effective, cost-efficient sanctions which will deter abuse of arrest powers and provide redress where such abuse occurs. The following discussion is a contribution to an ongoing debate concerning an appropriate scheme of remedies in a reformed Code of Criminal Procedure. As such, a number of issues will be raised concerning proposed remedies and their relation to the law of arrest. However, formal recommendations will only be made where the reform proposed relates strictly to arrest. To the extent that remedies will be discussed which are relevant to arrest but also find application in other procedural contexts, firm recommendations on such remedies will be deferred to the publication of the Commission's study devoted entirely to this topic.

II. Self-Defence against Unlawful Arrest

As discussed in Part One, self-defence or resisting an unlawful arrest is a dangerous business under the present law. So it would be too, if the recommendations of this Working Paper are adopted. Since the grounds for arrest recommended here are almost entirely based on "reasonable grounds for belief," it is virtually impossible for an alleged offender to say with certainty that a police officer, for example, does not have reasonable, albeit wrong, grounds to believe that he or she has committed a criminal offence. Similarly, it is difficult for the suspect to determine at the time of arrest that the same erroneous sources lead the police officer to the reasonable belief that the suspect is likely to interfere with the administration of justice in relation to the case and therefore merits being arrested rather than being released and given documentary notice of the criminal proceedings. In a subsequent civil or criminal action against the police officer, the alleged offender might succeed, but at the time, the innocent arrested person can rarely risk contradicting the police officer who claims to be acting on reasonable grounds.

The innocent suspect is on firmer ground concerning the notice requirements. If the requirements for self-identification by the arresting person and for notification of the fact of, and reasons for, arrest are necessary conditions of a lawful arrest, the person who does not make it unfeasible to obtain proper notice through his or her own initial resistance, flight or incapacity, may successfully resist the unlawful arrest, at least from a legal point of view. However, resistance or flight is almost never prudent since it is likely to precipitate a proportionably more forceful response from the arresting person whether such person may, at that point, be proceeding unlawfully by reason of failure to give reasons and so forth, or not.

The upshot of the matter is that the alleged offender, no matter how innocent, will rarely be legally justified in resisting arrest. However, this ought not to be the end of the matter. Present law may deal extremely harshly with the innocent person who presses his or her innocence with vigour. A police officer may be investigating a relatively minor

offence, and refusal by an innocent suspect to give his or her name may lead to an arrest. A minor scuffle resulting from initial physical resistance may lead to the laying of a charge of assaulting or obstructing a police officer in the execution of duty.³⁶² The innocent person has unwittingly parlayed legitimate protests of innocence over a minor matter into the laying of a serious criminal offence. Furthermore, the threat of such proceedings can easily be abused by police officers to keep innocent, although admittedly rude or unpleasant, suspects in line.

While such resistance by innocent persons cannot be *justified*, ought it not in some measure be *excused*? Ought the police to be able to charge successfully a person with the obstruction offence or even common assault where the situation has been brought about through police error, and where the obstruction was based on a reasonable belief that the accused was entirely innocent in the circumstances. In these circumstances the principle of restraint might be appropriately honoured by the creation, in relation to the obstruction charge, of a limited excuse based on reasonable mistake of law, with the safeguard of putting the burden of proving the excuse on the accused.³⁶³ In addition, the excuse ought not to be available to the person who resists or obstructs through the use of force which causes bodily harm. Thus, a person charged with assault or with obstruction or resisting a police officer in the execution of duty might be excused where it is proved, on a balance of probabilities, that he was innocent of the offence for which the arrest was made, and that he believed on reasonable grounds that the police officer had no authority to make the arrest in question, as long as the force used did not cause death or serious bodily harm.

The end result here would be to vindicate a common sense view that "two wrongs don't make a right." The arresting person, although wrong about the guilt of the alleged offender, would still be acting "in the execution of duty" and would thus be protected from liability of civil and criminal proceedings because he or she had reasonable grounds for belief. On the other hand, the innocent but over-zealous suspect would be protected from criminal proceedings which might otherwise result from the erroneous assessment of his or her rights in the circumstances, as long as the force used in response was not excessive. It is also to be noted that this would be a limited excuse in relation to a criminal proceeding, and is not a justification which would be operative in a civil suit against the "over-zealous innocent suspect." The purpose here would not be to encourage resistance to lawful arrest, but rather to reduce the prospect of abuse of obstruction charges (or threats of their use) in relation to essentially innocent persons. The result would maintain interests of efficient law enforcement while inhibiting situations which may bring the administration of justice into disrepute.

This proposed remedy, however, is not the proper subject of a formal recommendation in this Working Paper. Nor is it really to be seen as part of a remedy regime in

362. *Criminal Code*, R.S.C. 1970, c. C-34, section 246 (assaulting a peace officer in the execution of duty), and section 118 (resisting or wilfully obstructing a police officer in the execution of duty). For example, see *R. v. Biron*, *supra*, note 128.

363. For a discussion of the reasonable mistake of law defence in other contexts see, P. G. Barton, "Officially Induced Error as a Criminal Defence: A Preliminary Look" (1979-80), 22 *Crim. L.Q.* 314.

a Code of Criminal Procedure. It is rather in the nature of a suggestion for adoption by the Commission or Parliament when considering the section of a reformed *Criminal Code* dealing with offences against the administration of justice, or under whatever heading the present *Criminal Code* section 118 (offences relating to public or peace officer) might appear. In other words, this suggestion involves a limited excuse to a substantive offence and is most properly raised in connection with the revision of offences in the Special Part.

III. Proceedings against Those Abusing Authority to Arrest

Where an arrest has been made without authority, or where there has been an abuse of powers in the manner of executing the arrest, proceedings against the malefactor by way of civil suit, criminal action or administrative complaint (where a police officer is involved) are presently alternative sanctions, as discussed in Part One. The reformulation of the law of arrest as recommended in this Working Paper would do little to alter the nature of these remedies. However, the application of the principles of restraint and fairness in relation to the law of arrest require that, where rules are established in relation to arrest, failure to adhere to the rules entails the application of a sanction. This has always been the approach of the common law; however, certain provisions of the present *Criminal Code* relating to arrest compromise this basic principle in a manner which cannot be continued if the broad arrest and release provisions of Recommendations 4 and 5 of this Working Paper are adopted. The reference here is to *Criminal Code* subsection 450(3) which protects peace officers from criminal liability and shifts the burden of proof with respect to civil liability when there is a failure to release in relation to minor offences, where the public interest does not justify continued custody. Creating the impression that police officers can “have their cake and eat it too” by taking the sting out of sanctions for false arrest or improper continued custody only has the effect of bringing the administration of justice into disrepute. If the arrest rules are fair and give peace officers adequate powers to accomplish their duties, the police should be expected to abide by them. Therefore, the following discussion of civil, criminal and administrative remedies is premised on the recommendation that any provision analogous to the present subsection 450(3) which might have the effect of shielding police from the duty to release in Recommendation 5, must not appear as part of the arrest regime proposed in these recommendations.

A. Civil Proceedings

At common law, a civil action against the person who arrests without authority will take the form of a false imprisonment suit. If excessive force is used intentionally, the arrestee may be liable for battery, while unintended use of excessive force during an

arrest may render the arrester liable for negligence. The civil law of the province of Québec would impose civil responsibility on such persons pursuant to Articles 1053 and 1054 of the *Civil Code*.³⁶⁴

There are a number of situations in which these tort or delictual remedies would be available as a result of the recommendations in this Working Paper although they are not available now. A police officer who has reasonable grounds to believe that a person has committed an offence and who makes an arrest but fails to release where there are no reasonable grounds to believe that the person will interfere with the administration of justice, for example, could be found civilly liable. Under present law, this would not be possible in relation to indictable offences. In accordance with *Criminal Code* subsection 450(3), recovery would be possible for *Criminal Code* subsection 450(2) offences only where the plaintiff alleges and *establishes* that the police officer did not comply with the restraint requirements. Responsibility in civil proceedings cannot now occur where an arresting person fails to identify himself or herself, or to make reasonable efforts to comply with notice requirements in a language which the alleged offender understands at the first reasonable opportunity. This result, however, would be a possibility under these recommendations. Similarly, civil responsibility could occur pursuant to these recommendations in situations of forcible entry on private property under circumstances which would not give rise to civil responsibility under the present law. This slightly broader range of circumstances where police officers might be found liable in civil proceedings, results not from any alteration in the nature of civil proceedings, but rather from a more rigorous application of the principles of restraint and fairness in reformulating the law of arrest.

B. Criminal Proceedings

Criminal responsibility for unlawful arrest arises through the application of general principles of criminal law. A person who purports to arrest another, but who does not have the lawful authority to do so, may be committing an assault as defined in *Criminal Code* paragraph 244(1)(a) or may be committing the crime of forcible confinement contrary to *Criminal Code* section 247. Other *Criminal Code* offences might also be applicable.³⁶⁵ In particular, it might be argued that wilful failure to abide by the arrest provisions recommended here is an offence contrary to *Criminal Code* section 115.³⁶⁶ In accordance with present *Criminal Code* section 26, a person who does have lawful

364. See the discussion of this subject, *supra*, in Chapter Two, Section VIII.

365. For example, *Criminal Code*, R.S.C. 1970, c. C-34, section 171 (causing a disturbance), section 245.1 (assault with a weapon or causing bodily harm) and section 245.2 (aggravated assault). Note that the present colour of right defence in subsection 386(2) would in all likelihood prevent a conviction under section 387 (mischief) arising out of forcible entry on private property in relation to an unlawful arrest.

366. See *R. v. Parrot* (1979), 51 C.C.C. (2d) 539 (Ont. C.A.) (leave to appeal to S.C.C. refused *loc. cit.*).

authority to arrest and therefore uses force, but who employs excessive force, can be held criminally liable. Here, as above, the offence charged would vary with the circumstances and the nature of the excessive force, but could range from assault to murder.³⁶⁷

The comments made above concerning the expansion of civil liability for wrongful arrest are also applicable with respect to criminal liability. The recommendations in this Working Paper propose a law of arrest which could give rise to criminal liability for unlawful arrest, which is not the case under present law. To reiterate, the omission of any equivalent of present *Criminal Code* paragraph 450(3)(a) is an important aspect of the recommended system. The duty to release must be enforceable. In general, these proposals broaden aspects of the grounds for arrest, but put limitations on unnecessary custody through requirements to use documentary notice of proceedings and so on where possible. If a provision like paragraph 450(3)(a) were to be engrafted on these proposals, the net effect would clearly be the broadening of arrest powers with no counter-balancing sanctions or effective controls.³⁶⁸

Criminal liability for unlawful arrest where the unlawfulness results from failure to adhere to notice requirements will be expanded slightly by the implementation of the recommendations in this Working Paper. This is particularly true, given the absence of any provision analogous to the present *Criminal Code* subsection 29(3). However, if the notice requirements are both important and fair, an effective sanction is key to the maintenance of the integrity of the arrest regime.

C. Administrative Proceedings

Complaint procedures are available under provincial police Acts to members of the public who are unhappy with police actions.³⁶⁹ Unlawful arrest contravenes the standards found in regulations under such Acts and may thus be the foundation for disciplinary action against the police officers concerned. However, damages to a victim of an unlawful arrest are obviously not contemplated by these administrative schemes, and should the matter reach the stage of a formal complaint before a police commission, a complainant may end up bearing substantial legal fees in order to satisfy a sense that justice ought to be done. Thus, from the point of view of the victim in any particular case, this administrative sanction may be a waste of time and money.

367. With respect to use of deadly force, the recent demise of the partial excuse of "excessive self-defence," is of relevance here. See: *R. v. Gee* (1982), 68 C.C.C. (2d) 516 (S.C.C.); *R. v. Faid* (1983), 2 C.C.C. (3d) 513 (S.C.C.); and *Brisson v. The Queen* (1982), 69 C.C.C. (2d) 97 (S.C.C.).

368. It may be that a broadened criminal responsibility is also an illusory control if the Crown exercises its power to stay proceedings to protect its police. See *Criminal Code*, R.S.C. 1970, c. C-34, section 508 and *Ex parte Dowson*, *supra*, note 274. *Quaere*: Might the exercise of the stay for these purposes be in some circumstances contrary to the *Canadian Charter of Rights and Freedoms* section 7?

369. See for example, *Police Act*, S.N.S. 1974, c. 9 or *Police Act*, R.S.O. 1980, c. 381.

Police regulations and departmental guidelines may be among the most effective means generally to regulate police behaviour. The Commission has recognized this in its Study Paper, *Police Guidelines: Pretrial Eyewitness Identification Procedures*,³⁷⁰ where it suggests procedures which might be adopted voluntarily as police guidelines rather than put in the form of statutory provisions. A uniform set of police guidelines concerning arrest, the use of force and entry on private property drawn up in consultation with police departments across Canada might form a valuable supplement to the statutory guidelines proposed in this Working Paper. However, such a suggestion is not the appropriate subject for a formal recommendation in this Working Paper.

IV. Sanctions at the Trial of an Unlawfully Arrested Accused

Canadian courts have traditionally been loath to impose sanctions on misconduct by police officers or on those involved in the prosecution of a criminal matter in a manner which would lead to the acquittal of a person who, though wronged, may be guilty. The reticence of the Supreme Court of Canada to accept the doctrine of abuse of process³⁷¹ is a case in point, although attitudes on that issue may be in a state of flux.³⁷² Similarly, the resistance by Canadian courts to the development of a rule to exclude evidence obtained as a result of illegal actions has been met by the *Canadian Charter of Rights and Freedoms*, subsection 24(2) which directs courts to exclude evidence obtained in violation of Charter rights "if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute." In this context it is important to determine the extent to which one can expect Canadian courts to invoke Charter remedies in relation to the arrest process, and the extent to which statutory provisions consistent with the Charter ought to anticipate or guide judicial activity in this area. To this end, this section will consider: (i) abuses of arrest powers in relation to dismissals or stays of proceedings; and (ii) an exclusionary rule of evidence in relation to arrest irregularities.

A. Dismissal or Stay of Proceedings

As was pointed out in Chapter One, a wrongful arrest might be held to be contrary to sections 7 and 9 of the *Canadian Charter of Rights and Freedoms*, and the failure to give reasons for arrest promptly is contrary to Charter section 10. Assuming the infringement of a Charter right in an arrest, what remedy ought a court to consider "appropriate

370. Law Reform Commission of Canada, *Police Guidelines: Pretrial Eyewitness Identification Procedures*, [Study Paper] (Ottawa: Minister of Supply and Services Canada, 1983).

371. *Rourke v. The Queen* (1977), 35 C.C.C. (2d) 129 (S.C.C.).

372. *Amato v. The Queen* (1982), 69 C.C.C. (2d) 31 (S.C.C.); Don Stuart, "Amato: Watersheds in Entrapment and Abuse of Process" (1982), 29 C.R. (3d) 54.

and just in the circumstances" in accordance with Charter subsection 24(1)?³⁷³ Setting aside damages which relate to civil proceedings as discussed above, and exclusionary rules of evidence which will be discussed below,³⁷⁴ ought a court to dismiss or enter a stay of proceedings in the event of an unlawful arrest?

The answer, of course, hangs upon what might be considered "appropriate and just in the circumstances." Various scenarios can be envisaged. Where a person is charged with a very serious offence for which the Crown appears to have an excellent case, where no incriminating evidence was obtained subsequent to the unlawful arrest, and where the "unlawfulness" results from failure by the arresting officer to identify himself or herself and give reasons for the arrest, it is doubtful that a Canadian court would view a dismissal or stay as an appropriate and just remedy in the circumstances. On the other hand, where a person has been arrested for a minor offence carrying a small maximum fine and where the person was brought into custody with violence, in circumstances where there were no reasonable grounds for belief that an appearance notice would not have been sufficient, there might be some sympathy for the view that a dismissal or stay is appropriate and just in the circumstances.

A principle for distinguishing between circumstances where stay or dismissal is "appropriate and just" and those where it is not, may be found in a notion of proportionality as between the nature of the abuse suffered as a result of the wrongful arrest and the seriousness of the offence with which the person is charged. Where the indignity suffered or the injury received as a result of a wrongful arrest substantially outweighs the penalty which a court might impose upon conviction for the offence for which the person was arrested, it may be argued that it is appropriate and just to stay or dismiss the proceedings. It is possible that the Crown might exercise its discretion not to prosecute in such circumstances. It is equally possible that a vigorous prosecution would result in order to justify the unfortunate arrest. The questions from the perspective of law reform are whether a "proportionality principle" as outlined above can be expected to emerge from judicial decision and/or whether a statutory provision to that effect should be enacted.

The issue of whether a judicially created Charter remedy is or may be available must be separated from the question of whether a statutory remedy ought to be adopted here or in a subsequent Working Paper on Remedies in Criminal Procedure. It is entirely possible that breach of the statutory arrest scheme proposed here might not be seen by a court as an "arbitrary arrest," contrary to the Charter. For example, a police officer with reasonable grounds to believe that a suspect had committed an offence, might arrest a person who was obviously prepared to attend, pursuant to an appearance notice. Continued custody might be termed *unlawful* according to the recommendations in this Working Paper, but not arbitrary under the Charter since it was based on reasonable grounds insofar as the "existence" of the offence was concerned. In this case, there could be no Charter remedy under subsection 24(1), but the case might be appropriate for a statutory remedy of stay or dismissal if the "disproportionate" circumstances described above obtain.

373. See *supra*, notes 294 and 295.

374. See *supra*, note 295.

As noted at the outset of this chapter, firm remedies are crucial to the maintenance of the arrest regime proposed in this Working Paper. The statutory remedy of stay or dismissal proposed here is not within the mainstream of Canadian judicial thinking, where reliance on the traditional civil and criminal remedies has dominated. However, these civil and criminal proceedings have proved both costly and impractical as effective sanctions, which many suspect as being inadequate to keep law enforcement officials up to the mark. For this reason, it would be valuable to create a statutory provision authorizing judicial stay of proceedings or dismissal, where the detrimental effect on the accused of the unlawful arrest substantially outweighs the penalty which a court might impose upon conviction for the offence for which the person was arrested, and with which he or she is presently charged.

B. An Exclusionary Rule of Evidence

Subsection 24(2) of the *Canadian Charter of Rights and Freedoms* directs courts to exclude evidence obtained in a manner that infringes or denies any Charter rights, "if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute." One possible response to this problem in the context of a reformulated statutory regime for the law of arrest is to suggest that "evidence obtained as a result of an unlawful arrest is to be excluded." Or to maintain consistency with the Charter, "evidence obtained as a result of an unlawful arrest is to be excluded where the admission of it would bring the administration of justice into disrepute." However, the Commission has recognized that such a blunt instrument would be crude and unworkable.

Such a solution is unworkable because it is rarely the unlawful nature of an arrest *per se* which creates problems which might bring the administration of justice into disrepute. It is possible to argue that failure to notify an accused of the reasons for arrest promptly might lead the accused to make statements or allow the destruction of evidence which might prejudice his or her ability to make full answer and defence. In that example, the fact which made the arrest unlawful is also the source of prejudicial evidence against the accused which, if admitted, would bring the administration of justice into disrepute. In most instances, however, it will be events which occur while an accused is in custody and which might occur whether the arrest is lawful or not that will result in the gathering of unacceptably prejudicial evidence.

Statements taken after denial of a right to counsel, statements obtained by fear of prejudice or hope of advantage by the persons in authority, evidence procured through the use of investigative tests made without consent or without lawful authority - all of these circumstances ought to lead to the exclusion of evidence pursuant to Charter subsection 24(2). All may occur while an accused is in custody after an arrest, but in none of the circumstances ought the admissibility of evidence to hinge on the lawfulness or unlawfulness of the arrest. The Commission has already published two Working Papers

which recognize the importance of this distinction. The Working Paper entitled *Questioning Suspects*³⁷⁵ makes proposals governing the admissibility of statements obtained from persons who may or may not be in custody following a lawful arrest. Similarly, the Working Paper, *Investigative Tests*³⁷⁶ proposes a complex regime for the regulation of a number of procedures which involve exclusionary rules of evidence. As is appropriate, however, the admissibility of the evidence turns upon the propriety of the procedures, and not simply upon the issue of whether the subject was in custody following a lawful arrest. The exclusion of evidence following an unlawful search of the person subsequent to arrest raises the same issues. The exclusionary rule of evidence, if any, applicable in such circumstances, must be based upon the lawfulness of the search, which in turn will be based only in part upon the lawfulness of the arrest.

This Working Paper, then, can propose no blanket exclusionary rule concerning the admissibility of evidence obtained subsequent to an unlawful arrest. These matters must be dealt with in Working Papers covering the cognate areas in detail.

RECOMMENDATIONS

27. That in the implementation of the arrest regime provided for in these recommendations, there be no provision limiting civil or criminal liability where there has been a failure to comply with the rules authorizing an arrest.

28. That the sanction regime adopted in the Code of Criminal Procedure include a rule which would give judges discretion to stay or dismiss criminal proceedings where the accused has been unlawfully arrested and where the detrimental effects of the unlawful arrest substantially outweigh the penalty which the court might impose upon the accused if he or she is convicted.

375. *Supra*, note 296.

376. Law Reform Commission of Canada, *Investigative Tests*, [Working Paper 34] (Ottawa: Minister of Supply and Services Canada, 1984).

Summary of Recommendations

Purpose, Definitions and Scope

1. That as at present, the authority to arrest should be used to compel the attendance of an accused person in court to answer criminal charges only where documentary notice of criminal proceedings is inadequate for this purpose because of a need:

- (1) to prevent the accused person's interference with the administration of justice by any means, including failing to appear, concealing identity, destroying evidence, or tampering with witnesses; or**
- (2) to maintain the safety of the public and public order by preventing the continuation or repetition of criminal offences, and in limited circumstances, by preventing apprehended criminal offences.**

2. That arrest be defined statutorily in the following terms.

An arrest occurs where:

- (1) a person submits to custody upon being requested to do so by the arrester; or**
- (2) a person is taken into physical custody by the arrester.**

3. That where a person is requested to remain with, or accompany, a peace officer voluntarily for purposes of investigation, such a person shall be informed of his or her right to refuse to do so.

Arrest by Peace Officer

4. A peace officer may arrest without warrant a person whom he or she believes on reasonable grounds has committed, is committing or is about to commit a criminal offence.

5. That where an arrest is made pursuant to Recommendations 4, 7 or 8, the peace officer having custody of the arrested person shall release the person as soon as possible with a view to compelling his or her appearance by means of an appearance notice or summons, unless there are reasonable grounds to believe that continued custody is necessary:

- (1) to ensure that the person will appear in court;**

- (2) to establish the identity of the person;
- (3) to preserve evidence relating to the offence; and
- (4) to prevent the continuation or repetition of the offence, or the commission of another offence.

6. That for the purposes of Recommendation 4, reasonable grounds for a police officer's belief that a warrant is outstanding within the jurisdiction for the arrest of a person are also reasonable grounds for an arrest without warrant.

Arrest by Private Citizen

7. That subject to Recommendations 8 and 9, anyone may arrest without warrant a person who the arrester has reasonable grounds to believe is committing or has just committed a criminal offence.

8. That anyone may, at the request of a peace officer, arrest without warrant a person being pursued by the officer for the purpose of making an arrest.

9. That anyone who makes an arrest pursuant to Recommendations 7 or 8 shall deliver the arrested person to a peace officer as soon as possible.

Breach of the Peace

10. That in a revised scheme of the law of arrest no authority be granted to police officers or private citizens to arrest for "breach of the peace."

Warrants for Arrest

11. That the laying of an information on oath in writing before a justice, by a person who has reasonable grounds to believe that the offence has been committed by the person named in the information, be the first point at which a judicial determination will be made as to whether to issue a warrant for arrest or to compel the attendance of the accused by the issuance or confirmation of documentary notice of the criminal proceeding.

12. That, subject to Recommendation 13, a justice may issue or confirm process to compel the attendance of an accused, where he or she has reasonable grounds

to believe that the person named in the information has committed the offence as therein alleged.

13. That a justice shall not issue a warrant for the arrest of a person unless the justice has reasonable grounds to believe such issuance is necessary:

- (1) to ensure that the person will appear in court;
- (2) to preserve evidence relating to the offence;
- (3) to prevent the continuation or repetition of the offence, or the commission of another offence; or
- (4) to prevent interference with the safety of persons or the disruption of public order.

14. That the applicant seeking an arrest warrant shall appear before the justice in person, and that no warrant for arrest shall issue unless the justice has had an opportunity to question the applicant personally about the reasons advanced for the issuance of a warrant for arrest as opposed to issuance or confirmation of documentary notice of the criminal proceedings.

15. That a notation shall be made on an appropriate form, to be kept by the justice, of the reasons for the issuance of a warrant rather than the confirmation of an appearance notice, if any, or the issuance of a summons.

Notice Requirements

16. That subject to Recommendations 17 and 19,

- (1) anyone arresting a person shall, at the time of making the arrest, state:
 - (a) his or her name,
 - (b) the fact that the person is under arrest, and
 - (c) the reason for the arrest; and
- (2) a police officer shall, in addition, provide:
 - (a) his or her badge number, if any, and
 - (b) the name of his or her police force.

17. That where compliance with Recommendation 16 is rendered impracticable by:

- (1) the flight, resistance, or continuation of the offence by the arrested person;
- (2) the incapacity of the arrested person; or
- (3) the fact that the arrest was made by a private citizen

a person having custody of the arrested person shall comply with Recommendation 16 at the first reasonable opportunity.

18. That insofar as the requirement to give reasons for arrest in Recommendation 16 is concerned, an arresting person shall be in compliance with this requirement where he or she:

- (1) generally informs the person being arrested of the facts which form the grounds for the arrest;
- (2) shows the person being arrested the warrant authorizing the arrest; or
- (3) informs the person of the offence for which an arrest warrant has been issued where it is not feasible for a peace officer to be in possession of the warrant at the time of the arrest.

19. That where a peace officer, who has arrested a person or who has received in custody a person arrested by a private citizen, has reasonable grounds to believe that the arrested person may be unable to understand the language used by the arresting person in complying with the notice requirements of Recommendation 16, the peace officer shall make every reasonable effort to ensure that compliance with Recommendation 16 is achieved at the first reasonable opportunity, in a language understood by the arrested person.

Spatial Limits on Authority to Arrest

20. That a warrant for arrest be capable of execution anywhere in Canada, subject to any geographical limitations which might be imposed by the justice or judge issuing such warrant.

21. That where a person has been arrested without warrant because a peace officer has reasonable grounds to believe that there is a warrant outstanding in Canada for his or her arrest for a criminal offence alleged to have been committed in Canada outside the territorial division in which he or she was arrested, such person be taken before a justice in the territorial division where the arrest occurred or where such person is in custody and be dealt with according to the general provisions governing judicial interim release.

22. That where a person referred to in Recommendation 21 is remanded in custody pending a decision as to whether he or she is to be returned to the territorial division in which the warrant for arrest was issued, such person shall be released at the expiration of no more than six days from the time of appearance before the justice.

23. That where a person has been arrested without warrant for an offence under the conditions described in Recommendation 21, and that person is released without trial rather than being returned to the territorial division in which the warrant for arrest was issued, the justice who releases the accused shall make an order cancelling the arrest warrant, and transmit such order to the justice who originally issued the warrant.

24. That subject to Recommendation 21, a peace officer may enter a private dwelling to effect an arrest:

- (1) where the peace officer is in possession of a warrant for arrest and believes on reasonable grounds that the person named in the warrant is on the premises; and,**
- (2) where the peace officer has announced his or her presence and identity, has made a demand to enter, and waits a reasonable period of time before entry.**

25. That a peace officer may enter a private dwelling without warrant and unannounced to effect a lawful arrest where:

- (1) he or she has reasonable grounds to believe**
 - (a) that the alleged offender is in the private dwelling, and**
 - (b) the person is committing or about to commit an offence likely to endanger life or cause serious bodily harm; or**
- (2) he or she is in hot pursuit of the alleged offender and has reasonable grounds to believe that the alleged offender has entered the private dwelling.**

26. That a peace officer may enter premises other than a private dwelling to effect a lawful arrest where the peace officer:

- (1) has reasonable grounds to believe that the person sought to be arrested is on the premises; and**
- (2) has given notice of his or her presence and identity and has made a demand to enter, but such notice shall not be required where there are reasonable grounds to believe that there is a need:**
 - (a) to prevent death or serious bodily harm;**
 - (b) to prevent the destruction of evidence; or**
 - (c) to maintain effective hot pursuit.**

Sanctions

27. That in the implementation of the arrest regime provided for in these recommendations, there be no provision limiting civil or criminal liability where there has been a failure to comply with the rules authorizing an arrest.

28. That the sanction regime adopted in the Code of Criminal Procedure include a rule which would give judges discretion to stay or dismiss criminal proceedings where the accused has been unlawfully arrested and where the detrimental effects of the unlawful arrest substantially outweigh the penalty which the court might impose upon the accused if he or she is convicted.

APPENDIX I

Non-Criminal Code Federal Arrest Powers

Arrest for Prosecution

Animal Contagious Diseases Act, R.S.C. 1970, c. A-13, ss. 20, 43.
Canada Elections Act, R.S.C. 1970 (1st Supp.), c. 14, s. 49(2).
Canada Shipping Act, R.S.C. 1970, c. S-9, ss. 237, 246, 585.
Coastal Fisheries Protection Act, R.S.C. 1970, c. C-21, s. 6.
Customs Act, R.S.C. 1970, c. C-40, s. 142.
Excise Act, R.S.C. 1970, c. E-12, ss. 73, 76.
Explosives Act, R.S.C. 1970, c. E-15, s. 22.
Fish Inspection Act, R.S.C. 1970, c. F-12, s. 8.
Fisheries Act, R.S.C. 1970, c. F-14, s. 36.
Meat and Canned Foods Act, R.S.C. 1970, c. M-6, s. 45.
National Parks Act, R.S.C. 1970, c. N-13, s. 8.
North Pacific Fisheries Convention Act, R.S.C. 1970, c. F-16, s. 6.
Northern Pacific Halibut Fisheries Convention Act, R.S.C. 1970, c. F-17, s. 5.
Official Secrets Act, R.S.C. 1970, c. O-3, s. 10.
Pacific Fur Seals Convention Act, R.S.C. 1970, c. F-33, s. 10.
Pacific Salmon Fisheries Convention Act, R.S.C. 1970, c. F-19, s. 8.
Pawnbrokers Act, R.S.C. 1970, c. P-5, s. 10(1).

Arrest for Peace Keeping

Canada Elections Act, R.S.C. 1970 (1st Supp.), c. 14, ss. 18, 49(1).
Canada Temperance Act, R.S.C. 1970, c. T-5, s. 76.

Powers of Detention

Immigration Act, 1976, S.C. 1976-77, c. 52, ss. 12, 20, 23.
Narcotic Control Act, R.S.C. 1970, c. N-1, ss. 16, 17.
Quarantine Act, R.S.C. 1970 (1st Supp.), c. 33, ss. 8, 8.1.
Young Offenders Act, S.C. 1980-81-82-83, c. 110, s. 13.

Arrest to Facilitate Process

Bankruptcy Act, R.S.C. 1970, c. B-3, ss. 134, 136, 138.
Customs Act, R.S.C. 1970, c. C-40, s. 256.
Immigration Act, 1976, S.C. 1976-77, c. 52, ss. 104, 105, 107, 114.
Indian Act, R.S.C. 1970, c. I-6, s. 119.
Land Titles Act, R.S.C. 1970, c. L-4, s. 155.
Winding-up Act, R.S.C. 1970, c. W-10, ss. 118, 120.
Young Offenders Act, S.C. 1980-81-82-83, c. 110, ss. 10, 23, 25.

Other Codes

Canada Shipping Act, R.S.C. 1970, c. S-9, s. 244.

Government Vessels Discipline Act, R.S.C. 1970, c. G-12, s. 11.

National Defence Act, R.S.C. 1970, c. N-4, ss. 132, 137, 141, 214.

Royal Canadian Mounted Police Act, R.S.C. 1970, c. R-9, s. 28.

Visiting Forces Act, R.S.C. 1970, c. V-6, s. 12.

APPENDIX II

Provincial Arrest Powers

Arrest for Prosecution

British Columbia

Commercial Transport Act, R.S.B.C. 1979, c. 55, s. 16.
Firearm Act, R.S.B.C. 1979, c. 134, s. 6.
Land Act, R.S.B.C. 1979, c. 214, s. 62.
Liquor Control and Licensing Act, R.S.B.C. 1979, c. 237, ss. 43, 47.
Motor Vehicle Act, R.S.B.C. 1979, c. 288, s. 72.
Trespass Act, R.S.B.C. 1979, c. 411, s. 13.1.
Vancouver Charter, S.B.C. 1953, c. 55, s. 317(b).
Wildlife Act, R.S.B.C. 1979, c. 433, s. 47.

Alberta

Fish Marketing Act, R.S.A. 1980, c. F-12, s. 15.
Highway Traffic Act, R.S.A. 1980, c. H-7, s. 120.
Innkeepers Act, R.S.A. 1980, c. I-4, s. 10.
Liquor Control Act, R.S.A. 1980, c. L-17, c. 115.
Livestock Brand Inspection Act, R.S.A. 1980, c. I-21, s. 36.
Local Authorities Election Act, S.A. 1983, c. L-27.5, s. 121.
Motor Vehicle Administration Act, R.S.A. 1980, c. M-22, ss. 94, 95.
Public Health Act, R.S.A. 1980, c. P-27, s. 27.
Wildlife Act, R.S.A. 1980, c. W-9, s. 93.

Manitoba

The Corrections Act, R.S.M. 1970, c. C230, ss. 13, 56.
The Fires Prevention Act, R.S.M. 1970, c. F80, ss. 16, 22, 51.
The Forest Act, R.S.M. 1970, c. F150, s. 38.
The Highway Traffic Act, R.S.M. 1970, c. H60, ss. 135, 215.
The Liquor Control Act, R.S.M. 1970, c. L160, ss. 243, 244, 246, 248.
The Local Authorities Elections Act, S.M. 1970, c. 40, ss. 69(2), 232.
The Petty Trespasses Act, R.S.M. 1970, c. P50, s. 30.
The Wildlife Act, R.S.M. 1970, c. W140, s. 70.

Ontario

Game and Fish Act, R.S.O. 1980, c. 182, s. 10.
Highway Traffic Act, R.S.O. 1980, c. 198, s. 190.
Liquor Licence Act, R.S.O. 1980, c. 244, s. 54.
Motorized Snow Vehicles Act, R.S.O. 1980, c. 301, s. 15.
Municipal Act, R.S.O. 1980, c. 302, s. 230.
Provincial Offences Act, R.S.O. 1980, c. 400, ss. 25, 128, 129, 134.
Public Works Protection Act, R.S.O. 1980, c. 426, s. 5.
Trespass to Property Act, R.S.O. 1980, c. 511, ss. 9, 10.

New Brunswick

Fish and Wildlife Act, S.N.B. 1980, c. F-14.1, s. 21.
Forest Fires Act, R.S.N.B. 1973, c. F-20, s. 28.
Highway Act, R.S.N.B. 1973, c. H-5, s. 37.
Liquor Control Act, R.S.N.B. 1973, c. L-10, s. 162.
Motor Vehicle Act, R.S.N.B. 1973, c. M-17, s. 356.
Motorized Snow Vehicles Act, R.S.N.B. 1973, c. M-18, s. 15.
Parks Act, S.N.B. 1982, c. P-2.1, s. 12.
Theatres, Cinematographs and Amusements Act, R.S.N.B. 1973, c. T-5, s. 17.

Nova Scotia

Hotel Regulations Act, R.S.N.S. 1967, c. 127, s. 12.
Lands and Forests Act, R.S.N.S. 1967, c. 163, s. 195.
Liquor Control Act, R.S.N.S. 1967, c. 169, s. 124.
Motor Vehicle Act, R.S.N.S. 1967, c. 191, s. 235.
Summary Proceedings Act, S.N.S. 1972, c. 18, s. 5.
Theatres and Amusements Act, R.S.N.S. 1967, c. 304, s. 9.

Arrest for Peace Keeping

British Columbia

County Court Act, R.S.B.C. 1979, c. 72, s. 20.
Election Act, R.S.B.C. 1979, c. 103, ss. 149, 159.
Municipal Act, R.S.B.C. 1979, c. 290, ss. 139, 146.

Alberta

Election Act, R.S.A. 1980, c. E-2, s. 90.
Liquor Control Act, R.S.A. 1980, c. L-17, s. 77.
Railway Act, R.S.A. 1980, c. R-4, ss. 200, 201.

Manitoba

The Election Act, R.S.M. 1970, c. E30, ss. 24, 45, 102.
The Intoxicated Persons Detention Act, R.S.M. 1970, c. 190, ss. 2, 3.
The Local Authorities Elections Act, S.M. 1970, c. 40, s. 69(2).

Ontario

Legislative Assembly Act, R.S.O. 1980, c. 235, s. 47.

Liquor Licence Act, R.S.O. 1980, c. 244, s. 45.

Provincial Courts Act, R.S.O. 1980, c. 398, s. 20.

Small Claims Court Act, R.S.O. 1980, c. 476, s. 182.

New Brunswick

Child and Family Services and Family Relations Act, S.N.B. 1980, c. C-2.1, ss. 33, 36.

Corrections Act, R.S.N.B. 1973, c. C-26, s. 27.

Elections Act, R.S.N.B. 1973, c. E-3, ss. 38, 88.

Intoxicated Persons Detention Act, R.S.N.B. 1973, c. I-14, s. 2.

Municipal Elections Act, S.N.B. 1979, c. M-21.01, s. 32.

Nova Scotia

Elections Act, R.S.N.S. 1967, c. 83, s. 119.

Municipal Act, R.S.N.S. 1967, c. 192, s. 41.

Arrest for Treatment

British Columbia

Health Act, R.S.B.C. 1979, c. 161, ss. 7, 69.

Heroin Treatment Act, R.S.B.C. 1979, c. 166, ss. 5, 13.

Mental Health Act, R.S.B.C. 1979, c. 256, ss. 19, 20, 24.

Offence Act, R.S.B.C. 1979, c. 305, ss. 81, 82.

Venereal Disease Act, R.S.B.C. 1979, c. 422, s. 6.

Alberta

Mental Health Act, R.S.A. 1980, c. M-13, ss. 14, 15, 18, 19, 22, 23, 35, 43.

Venereal Diseases Prevention Act, R.S.A. 1980, c. V-2, ss. 9, 13.

Manitoba

The Mental Health Act, R.S.M. 1970, c. M110, ss. 7-9, 36, 44, 45, 54.

The Narcotic Drug Addicts Act, R.S.M. 1970, c. N10, s. 3.

Ontario

Child Welfare Act, R.S.O. 1980, c. 66, s. 21.

Liquor Licence Act, R.S.O. 1980, c. 244, s. 37.

Mental Health Act, R.S.O. 1980, c. 262, ss. 9-11, 14, 22, 26.

Sanatoria for Consumptives Act, R.S.O. 1980, c. 463, ss. 2, 3.

Venereal Diseases Prevention Act, R.S.O. 1980, c. 521, ss. 4, 27.

New Brunswick

Mental Health Act, R.S.N.B. 1973, c. M-10, ss. 8-10, 24.

Venereal Disease Act, R.S.N.B. 1973, c. V-2, s. 12.

Nova Scotia

Child Welfare Act, R.S.N.S. 1967, c. 31, ss. 19, 20, 88, 89.

Health Act, R.S.N.S. 1967, c. 247, ss. 78, 80.

Municipal Mental Hospitals Act, R.S.N.S. 1967, c. 202, s. 11.

Narcotic Drug Addicts Act, R.S.N.S. 1967, c. 205, s. 2.

Nova Scotia Hospital Act, R.S.N.S. 1967, c. 210, s. 15.

Arrest to Facilitate Process

British Columbia

Company Clauses Act, R.S.B.C. 1979, c. 60, s. 148.

Coroners Act, R.S.B.C. 1979, c. 68, s. 32.

Correction Act, R.S.B.C. 1979, c. 70, ss. 27, 41.

Land Survey Act, R.S.B.C. 1979, c. 216, s. 9.

Offence Act, R.S.B.C. 1979, c. 305, ss. 42, 43, 45, 50, 59, 80.

Securities Act, R.S.B.C. 1979, c. 380, s. 146.

Small Claim Act, R.S.B.C. 1979, c. 387.

Alberta

Alimony Orders Enforcement Act, R.S.A. 1980, c. A-40, ss. 7, 8.

Child Welfare Act, R.S.A. 1980, c. C-8, ss. 8, 69, 82, 84.

Companies Act, R.S.A. 1980, c. C-20, ss. 231, 233.

Corrections Act, R.S.A. 1980, c. C-26, s. 29.

Fatality Inquiries Act, R.S.A. 1980, c. F-6, s. 37.

Franchises Act, R.S.A. 1980, c. F-17, s. 54.

Maintenance and Recovery Act, R.S.A. 1980, c. M-2, ss. 15, 60.

Securities Act, S.A. 1981, c. S-6.1, s. 163.

Summary Convictions Act, R.S.A. 1980, c. S-26, s. 7.

Surveys Act, R.S.A. 1980, c. S-29, s. 73.

Manitoba

The Mental Health Act, R.S.M. 1970, c. M110, s. 53.

The Parents' Maintenance Act, R.S.M. 1970, c. P10, s. 7.

The Securities Act, R.S.M. 1970, c. S50, s. 146.

The Surveys Act, R.S.M. 1970, c. S240, ss. 22, 63.

Ontario

Commodity Futures Act, R.S.O. 1980, c. 78, s. 58.

Family Law Reform Act, R.S.O. 1980, c. 152, ss. 24, 28, 29, 58.

Fraudulent Debtors Arrest Act, R.S.O. 1980, c. 177, ss. 2, 41.

Master and Servant Act, R.S.O. 1980, c. 257, s. 4.

Ministry of Correctional Services Act, R.S.O. 1980, c. 275, s. 38.

Provincial Courts Act, R.S.O. 1980, c. 398, s. 29.

Provincial Offences Act, R.S.O. 1980, c. 400, ss. 41, 55, 139.
Securities Act, R.S.O. 1980, c. 466, s. 121.

New Brunswick

Arrest and Examinations Act, R.S.N.B. 1973, c. A-12, s. 1.
Assignments and Preferences Act, R.S.N.B. 1973, c. A-16, s. 26.
Security Frauds Prevention Act, R.S.N.B. 1973, c. S-6, s. 44.
Summary Convictions Act, R.S.N.B. 1973, c. S-15, ss. 11, 12, 29.
Trespass Act, S.N.B. 1983, c. T-11.2, s. 7.

Nova Scotia

Children of Unmarried Parents Act, R.S.N.S. 1967, c. 32, ss. 3, 4, 7.
Child Welfare Act, R.S.N.S. 1967, c. 31, ss. 19, 20, 29.
Collection Act, R.S.N.S. 1967, c. 39, ss. 10, 11, 21, 24, 30.
Companies Winding Up Act, R.S.N.S. 1967, c. 47, ss. 36, 52.
Court and Penal Institutions Act, R.S.N.S. 1967, c. 67, s. 29.
Fatality Inquiries Act, R.S.N.S. 1967, c. 101, s. 12.
Fire Prevention Act, R.S.N.S. 1967, c. 107, s. 9.
House of Assembly Act, R.S.N.S. 1967, c. 128, s. 32.
Justices' Courts Act, R.S.N.S. 1967, c. 158, s. 8.
Lands and Forests Act, R.S.N.S. 1967, c. 163, s. 64.
Municipal Courts Act, R.S.N.S. 1967, c. 197, s. 15.
Parents' Maintenance Act, R.S.N.S. 1967, c. 221, s. 6.
Provincial Land Surveyors Act, R.S.N.S. 1967, c. 243, s. 19.
Public Inquiries Act, R.S.N.S. 1967, c. 250, s. 4.
Securities Act, R.S.N.S. 1967, c. 280, s. 46.
Summary Proceedings Act, S.N.S. 1972, c. 18, s. 5(1).
Ticket of Leave Act, R.S.N.S. 1967, c. 305, s. 6.
Wives' and Children's Maintenance Act, R.S.N.S. 1967, c. 341, s. 8.