

**PROBLEMATIC ASPECTS OF THE RIGHT TO BAIL UNDER SOUTH
AFRICAN LAW: A COMPARISON WITH CANADIAN LAW AND
PROPOSALS FOR REFORM**

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SUMMARY

The right to bail has been a contentious issue for some time under South African law. In recent times many interested parties have proclaimed that bail is not granted judiciously.

This study investigates whether an equitable balance has been achieved between the individual's right to liberty and the interests of society under South African law. As part of the process the correct interpretation and application of the principles are proposed. This is effected by considering and comparing the relevant principles under contemporary Canadian and South African law, and the circumstances under which they operate.

The historical origins and the development of these principles up to 30 June 1999 are studied to clarify the principles and purpose of bail and to investigate the balance that existed at different times in history. The constitutional history of Canada confirms that the Canadian Charter and Charter jurisprudence are suitable sources of reference for human rights in South Africa.

The presumption of innocence as the fundamental principle underlying the right to bail is researched. It is also investigated whether the constitutional guarantees to bail are part of, or specific instances of the rights enumerated in section 7 of the Canadian Charter and section 12 of the South African Bill of Rights. If so, does that mean that there is a residual right to procedural fairness in terms of the last-mentioned sections? The scope of the respective enshrined rights provided for by sections 11(e) of the Canadian Charter and 35(1)(f) of the Final Constitution is also discussed in some detail. By dissecting these provisions an attempt is made to clarify their exact scope.

This is followed by a discussion of some of the principles and provisions that have caused the most controversy of late under South African law.

The first of these is the question of onus that is crucial in all proceedings, including bail applications. I also discuss the admissibility at the subsequent criminal trial of evidence tendered by the accused for purposes of bail proceedings, and the question of access to police information for purposes of the bail application under South African and Canadian law.

My conclusions indicate that the Canadian Charter is an excellent model to learn from. I show that the foundational basis on and structure within which the right to bail operates, is often misunderstood under South African law. It is also shown that the liberty right in the context of the right to bail, to a great extent favours the applicant under Canadian law, when compared to the South African situation. I indicate that the policy-makers have in their quest to find a balance overstepped the mark in combating crime, also if compared with the situation in Canada. A threshold constitutional protection of the right to bail is proposed, along with measures enhancing due process and an equitable balance between the liberty interests of the applicant (or accused) and the interests of society.

OPSOMMING

Die reg op borgtog is reeds vir 'n geruime tyd 'n omstrede aangeleentheid in die Suid-Afrikaanse reg. In die onlangse verlede het talle belanghebbende partye verklaar dat borgtog nie oordeelkundig toegestaan word nie.

Die studie ondersoek of 'n billike balans tussen die individu se reg op vryheid en die belange van die gemeenskap in die Suid-Afrikaanse reg bereik is. As deel van die proses word die korrekte interpretasie en toepassing van die beginsels voorgestel. Dit word bewerkstellig deur die oorweging en vergelyking van die relevante beginsels onder die huidige Kanadese en Suid-Afrikaanse reg en die omstandighede waaronder dit fungeer.

Die historiese oorsprong en ontwikkeling van hierdie beginsels tot en met 30 Junie 1999 word bestudeer om duidelikheid aangaande die beginsels en doel van borgtog te kry en om ondersoek in te stel na die balans wat histories bestaan het. Die konstitusionele geskiedenis van Kanada bevestig dat die "Canadian Charter" en "Charter"-regsleer gepaste verwysingsbronne vir menseregte in Suid-Afrika is.

Die vermoede van onskuld as die fundamentele beginsel onderliggend aan die reg tot borgtog word nagevors. Dit word ook nagevors of die grondwetlike waarborge op borgtog deel vorm van, of spesifieke verskynings is van, die regte uiteengesit in artikel 7 van die "Canadian Charter" en artikel 12 van die Suid-Afrikaanse handves van menseregte. Indien dit so is, beteken dit dat daar 'n residuele reg op regverdige prosedures in terme van laasgenoemde artikels is? Die omvang van die onderskeie verskanste regte vervat in artikel 11(e) van die "Canadian Charter" en artikel 35(1)(f) van die Finale Grondwet word ook uitvoerig bespreek. Deur die bepalinge te dissekteer word gepoog om die presiese omvang daarvan te verhelder.

Dit word gevolg deur 'n bespreking van sommige van die beginsels en bepalinge wat die meeste omstredenheid in die onlangse verlede in die Suid-Afrikaanse reg besorg het.

Die eerste hiervan is die vraag na die bewyslas, wat krities in alle verrigtinge insluitende borgaansoeke is. Ek bespreek ook die toelaatbaarheid by die opvolgende kriminele verhoor van getuienis aangebied deur die beskuldigde vir doeleindes van die borgaansoek, en die vraag om toegang tot die informasie gehou deur die polisie vir doeleindes van die borgaansoek onder die Suid-Afrikaanse en Kanadese reg.

My gevolgtrekkings dui aan dat die "Canadian Charter" 'n uitstekende model is om van te leer. Ek wys daarop dat die basis waarop, en struktuur waarbinne die reg op borgtog funksioneer, onder die Suid Afrikaanse reg dikwels misverstaan word. Dit word ook uitgewys dat die reg op vryheid in die konteks van 'n reg op borgtog, tot 'n groot mate die applikant onder Kanadese reg, wanneer dit vergelyk word met die Suid-Afrikaanse situasie, bevoordeel. Ek dui ook aan dat die beleidsmakers in hulle strewe om 'n balans te vind te vêr gegaan het om misdaad te bekamp, ook indien dit met die situasie in Kanada vergelyk word. 'n Drumpel grondwetlike beskerming van die reg op borgtog word voorgestel, tesame met maatstawwe wat 'n billike balans tussen die belange in vryheid van die applikant (of beskuldigde) en die belange van die gemeenskap bevorder.

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CONTENTS

SUMMARY	i
OPSOMMING	iii
ACKNOWLEDGEMENTS	v
CONTENTS.....	vi
ABBREVIATIONS AND ACRONYMS.....	xx
 CHAPTER 1 INTRODUCTION	
1.1 CONTEXTUAL BACKGROUND	2
1.2 AIM OF THE STUDY	10
1.3 IMPORTANCE OF THE TOPIC	12
1.4 OVERVIEW OF CHAPTERS	14
1.5 DIFFICULTIES AND LIMITATIONS OF THE STUDY	17
1.5.1 General	17
1.5.2 Difficulty in determining principles fuelled in some instances by South African legislature	18
1.5.3 Foundational confusion	19
1.5.4 Difficulty in comparative approach	21
1.5.5 Limitations	22
1.5.5.1 Scope	22
1.5.5.2 Time frame.....	22
1.5.5.3 Limitation in comparative approach	23
1.6 <i>MODUS OPERANDI</i> AND RESEARCH METHODOLOGY	24

1.6.1	<i>Modus operandi</i>	24
1.6.2	Research methodology	24
1.6.2.1	Interviews	25
1.6.2.2	Literature review	25
1.7	WORK ALREADY DONE IN THE FIELD	26

CHAPTER 2 HISTORICAL OVERVIEW OF THE ORIGINS AND DEVELOPMENT OF BAIL UNDER SOUTH AFRICAN LAW UP TO 30 JUNE 1999

2.1	INTRODUCTION	32
2.2	ROMAN LAW	33
2.2.1	Introduction	33
2.2.2	The <i>legis actio</i> -procedure	37
2.2.3	The <i>formulae</i> -procedure	41
2.2.4	<i>Cognitio extraordinaria</i>	44
2.2.4.1	Introduction	44
2.2.4.2	Before Justinian	45
2.2.4.3	Justinian law	46
2.3	ROMAN-DUTCH LAW	50
2.3.1	Introduction	50
2.3.2	Imprisonment	52
2.3.3	Military custody	53
2.3.4	Recognisance	55
2.3.5	Release to sureties	55
2.4	ENGLISH LAW	60
2.5	SOUTH AFRICAN LAW BEFORE THE INTERIM CONSTITUTION .	66
2.5.1	South African law before unification	66
2.5.1.1	The position in the Cape during the period 1652 - 1828	67

2.5.1.2	The position in the Cape during the period 1828 - 1910.....	68
2.5.1.3	The position in the Transvaal Republic.....	70
2.5.1.4	The position in the Orange Free State Republic ...	72
2.5.1.5	The position in Natal	73
2.5.2	South African law after unification	73
2.5.2.1	The period 1910 - 1955	73
2.5.2.2	The period 1955 - 1977: Statutory inroads into the right to bail.....	77
2.5.2.3	The period 1977 - 1994: The Criminal Procedure Act 51 of 1977	81
2.6	SOUTH AFRICAN LAW IN THE CONSTITUTIONAL ERA AFTER 1994	88
2.6.1	Introduction	88
2.6.2	The period 1994 - 30 June 1999	91
2.6.3	A summary of the position as at 30 June 1994	93
2.6.3.1	General.....	93
2.6.3.2	Arrest as method of securing attendance of accused in court	95
2.6.3.3	The granting of bail before conviction.....	97
2.6.3.3.a	General	97
2.6.3.3.b	The effect and conditions of bail	98
2.6.3.3.c	Bail before first appearance in lower court.....	98
2.6.3.3.d	Bail application in court.....	99
2.6.3.3.e	Appeal to superior court with regard to bail	103
2.6.3.3.f	Failure to observe conditions of bail	104
2.6.3.3.g	Failure of accused on bail to appear	105

2.6.3.3.h	Cancellation of bail	107
2.7	CONCLUSION	108

CHAPTER 3 CONSTITUTIONAL LAW OF CANADA

3.1	INTRODUCTION	113
3.2	THE HISTORICAL CONTEXT	114
3.2.1	Pre-colonial times	114
3.2.2	Colonial settlement and governance	115
3.2.2.1	A summarised history	115
3.2.2.2	Early colonial influences	116
3.2.3	The formation of the Canadian federation	118
3.2.4	The Constitution Act, 1867	120
3.2.5	The period after 1867 up to the 1950s	124
3.2.6	The 1950s - Judicial activism	127
3.2.6.1	General	127
3.2.6.2	“Criminal law” and “implied liberties” as approach	128
3.2.6.3	Criticism of approaches	130
3.2.7	Adoption of Bill of Rights - 1960	131
3.2.7.1	General	131
3.2.7.2	Impact of Bill of Rights on non-legislative matters	133
3.2.7.3	Impact of Bill of Rights on legislation	133
3.2.7.3.a	General	133
3.2.7.3.b	Pre-Bill legislation	134
3.2.7.3.c	Post-Bill legislation	137
3.2.7.4	Contents of Bill: Frozen rights?	140
3.2.8	The period 1960 up to 1980	143
3.2.8.1	Loss of enthusiasm by judiciary	143
3.2.8.2	Libertarian initiatives by politicians	145

3.2.8.2.a	Adoption of human rights legislation ..	145
3.2.8.2.b	The initiatives in adopting a charter ...	148
3.2.9	The period 1980 to 1982	154
3.2.10	The Constitution Act, 1982	159
3.2.11	1982 up to the end of June 1999	160
3.2.11.1	The judiciary	160
3.2.11.2	On the political front.....	164
3.3	THE JUDICIAL SYSTEM OF CANADA.....	165
3.3.1	Introduction	165
3.3.2	Federal courts	166
3.3.2.1	General.....	166
3.3.2.2	Supreme Court of Canada	167
3.3.2.3	Federal Court of Canada	168
3.3.3	Provincial courts.....	169
3.3.3.1	General.....	169
3.3.3.2	Federally appointed judges	171
3.3.3.3	Provincially appointed judges.....	172
3.4	CONCLUSION	174

CHAPTER 4 BAIL UNDER CANADIAN LAW

4.1	INTRODUCTION	177
4.2	BRIEF SURVEY OF BAIL UNDER CANADIAN LAW BEFORE THE BAIL REFORM ACT, 1970 - 71 - 72 (Can) c 37	179
4.3	INFLUENCE OF THE BAIL REFORM ACT AND THE POSITION AS AT 30 JUNE 1999	185
4.3.1	General	185
4.3.2	Arrest of accused by peace officer	188
4.3.3	Release from custody by peace officer	190

4.3.4	Release from custody by officer in charge	191
4.3.5	Judicial interim release	193
4.3.5.1	Appearance before a justice of the peace.....	193
4.3.5.2	The interim release hearing.....	194
4.3.5.3	Person before justice while not in custody	196
4.3.5.3.a	General	196
4.3.5.3.b	Conclusion.....	202
4.3.6	Bail review.....	204
4.4	CONCLUSION	207

CHAPTER 5 THE OPERATION OF THE PRESUMPTION OF INNOCENCE AND ITS ROLE IN BAIL PROCEEDINGS UNDER CANADIAN AND SOUTH AFRICAN LAW

5.1	INTRODUCTION.....	212
5.2	CANADIAN LAW.....	213
5.2.1	General	213
5.2.1.1	Application at trial.....	213
5.2.1.2	Application outside the trial context	217
5.2.2	Bail after conviction	223
5.2.2.1	Prelude	223
5.2.2.2	Pending sentence.....	224
5.2.2.3	Pending appeal or review	229
5.2.3	Bail pending new trial.....	235
5.3	SOUTH AFRICAN LAW	237
5.3.1	General	237
5.3.1.1	Application at trial.....	237
5.3.1.2	Application outside the trial context	240
5.3.2	Bail after conviction	244

5.3.2.1	Prelude	244
5.3.2.2	Pending sentence.....	246
5.3.2.3	Pending appeal or review	247
5.3.3	Bail pending new trial.....	249
5.3.4	Appraisal	249
5.4	CONCLUSION	252

CHAPTER 6 THE POSSIBLE RELIANCE OF AN APPLICANT IN BAIL PROCEEDINGS UNDER CANADIAN AND SOUTH AFRICAN LAW ON A RESIDUAL RIGHT TO PROCEDURAL FAIRNESS IN TERMS OF SECTION 7 OF THE CANADIAN CHARTER AND SECTION 12 OF THE FINAL CONSTITUTION RESPECTIVELY

6.1	INTRODUCTION	255
6.2	CANADIAN LAW.....	257
6.2.1	General	257
6.2.2	Appraisal	259
6.3	SOUTH AFRICAN LAW	260
6.3.1	General	260
6.3.2	Appraisal	267
6.4	CONCLUSION	272

CHAPTER 7 THE SCOPE OF THE RIGHT TO BAIL PROVIDED FOR BY SECTION 11(e) OF THE CANADIAN CHARTER AND SECTION 35(1)(f) OF THE FINAL CONSTITUTION

7.1	INTRODUCTION	275
7.2	CANADIAN LAW : THE SCOPE OF SECTION 11(e).....	277
7.2.1	General	277

7.2.2	"Any person"	278
7.2.3	"charged with an offence"	283
7.2.3.1	"charged"	283
7.2.3.2	"with an offence"	294
7.2.4	"has the right not to be denied ... bail"	302
7.2.5	"without just cause"	304
7.2.6	"reasonable"	306
7.3	SOUTH AFRICAN LAW: THE SCOPE OF SECTION 35(1)(f).....	309
7.3.1	General	309
7.3.2	"Everyone"	310
7.3.3	"who is arrested for allegedly committing an offence"	312
7.3.3.1	"who is arrested"	313
7.3.3.1.a	General	313
7.3.3.1.b	What constitutes arrest?	314
7.3.3.1.c	What constitutes detention?	316
7.3.3.1.d	When is one an accused?	317
7.3.3.1.e	Significance of and interrelationship between categories	317
7.3.3.2	"for allegedly committing"	319
7.3.3.3	"an offence"	320
7.3.4	"has the right to be released from detention"	324
7.3.5	"if the interests of justice permit"	325
7.3.6	"subject to reasonable conditions"	347
7.3.6.1	General	347
7.3.6.2	Release on bail without or with conditions as envisaged by chapter 9 before sentence and release on bail pending appeal or review without or with conditions as envisaged by chapter 30.....	347

7.3.6.3	Juvenile may be placed in place of safety or under supervision	349
7.3.6.4	Release on warning	350
7.4	CONCLUSION	351

CHAPTER 8 THE ONUS OF PROOF IN BAIL PROCEEDINGS

8.1	INTRODUCTION	357
8.2	CANADIAN LAW	359
8.2.1	Before the Bail Reform Act	359
8.2.2	The Bail Reform Act 1970 - 71 - 72 (Can) c 37	360
8.2.2.1	General.....	360
8.2.2.2	The Criminal Law Amendment Act 1974 - 75 - 76 (Can) c 93	361
8.2.2.2.a	General	361
8.2.2.2.b	The Criminal Code RSC 1970, c C - 34	363
8.2.2.2.b.1	Section 457(5.1).....	363
8.2.2.2.b.2	Section 457.7.....	363
8.2.2.2.c	The Criminal Code RSC 1985, c C - 46	365
8.2.2.2.c.1	Section 515(6).....	365
8.2.2.2.c.2	Section 522(2).....	371
8.3	SOUTH AFRICAN LAW	374
8.3.1	Before the Interim Constitution.....	374
8.3.1.1	General.....	374
8.3.1.2	The origin of the burden of proof on an applicant for bail.....	376
8.3.2	The Interim Constitution	378
8.3.2.1	General.....	378

8.3.2.2	Bail application not amenable to an onus in the true sense	379
8.3.2.3	Onus on the state	385
8.3.2.4	Appraisal of viewpoints	387
8.3.3	The Criminal Procedure Second Amendment Act 75 of 1995	388
8.3.3.1	General	388
8.3.3.2	Section 60(1)(a) of the Criminal Procedure Act ...	389
8.3.3.3	Section 60(11) of the Criminal Procedure Act.....	390
8.3.3.4	Court decisions.....	393
8.3.4	The Final Constitution	398
8.3.4.1	General.....	398
8.3.4.2	The influence of section 35(1)(f) on onus.....	398
8.3.5	The Criminal Procedure Second Amendment Act 85 of 1997 and position as at 30 June 1999	404
8.3.5.1	General.....	404
8.3.5.2	The present position.....	409
8.3.5.3	Constitutional scrutiny of the reverse onus in section 60(11).....	411
8.4	CONCLUSION	416

CHAPTER 9 THE ADMISSIBILITY AT THE SUBSEQUENT CRIMINAL TRIAL OF EVIDENCE TENDERED BY THE ACCUSED FOR PURPOSES OF THE BAIL PROCEEDINGS

9.1	INTRODUCTION	419
9.2	CANADIAN LAW	424
9.2.1	General	424
9.2.2	The use of prior testimony for purposes of cross-examination	429
9.2.3	"testifies" and "evidence so given"	432

9.2.4	“any proceedings” and “any other proceedings”	436
9.2.5	Derivative evidence	438
9.3	SOUTH AFRICAN LAW	441
9.3.1	General	441
9.3.2	Section 235 of the Criminal Procedure Act	443
9.3.3	Section 203 of the Criminal Procedure Act	445
9.3.4	Pre-constitutional jurisprudence	446
9.3.5	Case-law after the Interim Constitution	450
9.3.5.1	General	450
9.3.5.2	The right against self-incrimination in the context of bail	450
9.3.5.3	The link between the right against compelled pre- trial self-incrimination and the trial	453
9.3.5.4	The compulsion to testify	456
9.3.6	Case-law under the Final Constitution	458
9.3.7	The constitutionality of section 60(11B)(c)	460
9.3.8	Derivative evidence	465
9.3.9	Critical appraisal.....	468
9.4	CONCLUSION	476

**CHAPTER 10 ACCESS TO INFORMATION HELD BY POLICE OR STATE
OFFICIALS FOR PURPOSES OF BAIL APPLICATION**

10.1	INTRODUCTION	478
10.2	CANADIAN LAW.....	480
10.2.1	General.....	480
10.2.2	General duty to disclose	482
10.2.2.1	Summary conviction offences.....	482
10.2.2.2	Indictable offences.....	483

10.2.3 Appraisal of duty to disclose for purposes of bail hearing	490
10.3 SOUTH AFRICAN LAW	491
10.3.1 General.....	491
10.3.2 General duty to disclose	494
10.3.3 Duty to disclose for purposes of bail hearing	499
10.3.4 Appraisal of duty to disclose for purposes of bail hearing	501
10.4 CONCLUSION	514

CHAPTER 11 CONCLUSIONS AND RECOMMENDATIONS

11.1 INTRODUCTION	518
11.2 ARE THE CANADIAN CHARTER AND CHARTER JURISPRUDENCE SUITABLE SOURCES OF REFERENCE FOR HUMAN RIGHTS AND PARTICULARLY THE RIGHT TO BAIL IN SOUTH AFRICA?	519
11.3 HOW DOES THE RIGHT TO BAIL UNDER SOUTH AFRICAN LAW COMPARE WITH THE RIGHT UNDER CANADIAN LAW?.....	524
11.3.1 General.....	524
11.3.2 The scope of the right.....	526
11.3.3 The foundational basis and structure	528
11.3.3.1 General.....	528
11.3.3.2 The presumption of innocence.....	528
11.3.3.3 The right to “freedom and security”	530
11.3.4 The principles in general.....	531
11.3.4.1 General.....	531
11.3.4.2 Arrest and appearance in court	532
11.3.4.3 Remand in custody	532
11.3.4.4 Onus	534
11.3.4.5 Terms of release.....	534

11.3.4.6	Role of presiding officer	535
11.3.4.7	Authority to grant bail.....	536
11.3.4.8	Constitutional standard	537
11.3.4.9	Use at trial of evidence by an applicant for bail..	539
11.3.4.10	Discovery	540
11.3.4.11	Bail pending sentence	541
11.3.4.12	Bail pending appeal.....	542
11.3.4.13	Review	542
11.4	HAS AN EQUITABLE BALANCE BEEN ACHIEVED BETWEEN THE INTERESTS OF SOCIETY AND THE INDIVIDUAL'S RIGHT TO LIBERTY UNDER SOUTH AFRICAN LAW?	544
11.5	RECOMMENDATIONS.....	552
11.5.1	General.....	552
11.5.2	The right to freedom and security.....	553
11.5.3	The constitutional right to bail.....	554
11.5.4	Terms of release.....	556
11.5.5	"Exceptional circumstances".....	557
11.5.6	Self-incrimination	559
11.5.7	Disclosure	559
11.5.8	"Automatic review"	560
11.5.9	Bail after hours	563
11.5.10	Remand in custody	565
11.5.11	Sections 60(4), 60(9) and 60(10) of the Criminal Procedure Act	566
11.6	CONCLUDING REMARKS.....	567

ANNEXURES

A: SELECTED PROVISIONS OF THE CANADIAN BILL OF RIGHTS,



1960.....	569
B: SELECTED PROVISIONS OF THE CANADIAN CHARTER	572
C: SELECTED PROVISIONS OF THE SOUTH AFRICAN BILL OF RIGHTS	575

SOURCES

A: TABLE OF CASES.....	579
B: TABLE OF SELECTED ENACTMENTS	610
C: SELECTED OTHER SOURCES.....	616
D: BIBLIOGRAPHY	619

ABBREVIATIONS AND ACRONYMS

(The abbreviations and acronyms appear in alphabetical order. Where an abbreviation or acronym is repeated the meaning appears from the context.)

Alta CA	Alberta Court of Appeal/Alberta Supreme Court Appellate Division
Alta LR	Alberta Law Reports
Alta QB	Alberta Court of Queen's Bench
AR	Alberta Reports
BC Co Ct	British Columbia County Court
BCCA	British Columbia Court of Appeal
BCLR	British Columbia Law Reports
BCLR	Butterworths Constitutional Law Reports
BCSC	British Columbia Supreme Court
CC	Constitutional Court
CCC	Canadian Criminal Cases
CCC	Criminal Code of Canada
CPC	Carswell's Practice Cases
CJQB	Chief Justice of the Queen's Bench
CODESA	Convention for a Democratic South Africa
Cox	Cox's Criminal Cases
CPA	Criminal Procedure Act
Cr App R (S)	Criminal Appeal Report, Sentencing
Cr App R	Criminal Appeal Report

CR	Criminal Reports
CRNS	Criminal Reports, New Series
CRR	Canadian Rights Reporter
Ct Martial App Ct	Court Martial Appeal Court
DLR	Dominion Law Reports
DPP	Director of Public Prosecutions
EHRH	European Human Rights Reports
FC	Canada Law Reports, Federal Court
FC	Final Constitution
Fed Ct TD	Federal Court, Trial Division
FOIA	Freedom of Information Act
FLQ	<i>Front de Libération du Québec</i>
FTR	Federal Trial Reports
HL	House of Lords
IC	Interim Constitution
KBD	King's Bench Division
Man CA	Manitoba Court of Appeal
Man KB	Manitoba Court of King's Bench
Man Prov Ct	Manitoba Provincial Court
Man QB	Manitoba Court of Queen's Bench
Man R	Manitoba Reports
MVR	Motor Vehicle Reports
NB Co Ct	New Brunswick County Court

Nfld & PEIR	Newfoundland & Prince Edward Island Reports
Nfld CA	Newfoundland Court of Appeal
NR	National Reporter
NS Co Ct	Nova Scotia County Court
NS Prov Ct	Nova Scotia Provincial Court
NSCA	Nova Scotia Court of Appeal/ Nova Scotia Supreme Court Appeal Division
NSR	Nova Scotia Reports
NSSC	Nova Scotia Supreme Court
OAC	Ontario Appeal Cases
Ont CA	Ontario Court of Appeal
Ont Div Ct	Ontario Divisional Court
Ont HCJ	Ontario High Court of Justice
Ont Prov Ct	Ontario Provincial Court
Ont Prov Div	Ontario Provincial Division
OR	Ontario Reports
PC	Privy Council
PEISC	Prince Edward Island Supreme Court
PEITD	Prince Edward Island Trial Division
QBD	Queen's Bench Division
Que CA	Quebec Court of Appeal
Que SC	Quebec Superior Court
RCMP	Royal Canadian Mounted Police

RSC	Revised Statutes of Canada
SA	South African Law Reports
SACC	South African Journal of Criminal Law and Criminology
SACR	South African Criminal Law Reports
Sask CA	Saskatchewan Court of Appeal
Sask QB	Saskatchewan Court of Queen's Bench
Sask R	Saskatchewan Reports
SCC	Supreme Court of Canada
SCR	Canadian Law Reports, Supreme Court
WCB	Weekly Criminal Bulletin
WWR	Western Weekly Law Reports