CHAPTER 4

BAIL UNDER CANADIAN LAW

4.1 INTRODUCTION

Under the contemporary Canadian law the provisions governing pre-trial

incarceration are mainly to be found in the Criminal Code RSC 1985.[1] It is a system that gives due consideration to the right to security and freedom of the individual concerning arrest, detention and release and is in line with the move towards strong protected rights. However, the regulations have not always been as libertarian. The Bail Reform Act of 1970[2] introduced a change in attitude towards pre-trial incarceration. In this chapter the changed attitude of the Canadian Parliament towards pre-trial release is illustrated. To provide a proper picture of the change in attitude towards pre-trial incarceration, and the structure within which the principles of arrest and pre-trial release operate, the changes to arrest are also briefly mentioned.[3] The immediate history of the system before the Bail Reform Act is discussed to demonstrate this change in attitude, and to complement the English-law roots of bail.

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1 Sections 493 to 529.5 as amended. The Report of the South African Law Commission (1994) 25 refers to the Bail Reform Act as the Act regulating bail in Canada, even quoting a section as an example. This is misleading as the position with regards to bail in Canada is governed by the Criminal Code of Canada as amended by the Bail Reform Act. The section quoted is furthermore contained in the Criminal Code RSC (1970) and not in the Bail Reform Act. The Law Commission also failed to take into account that the Revised Statutes of Canada commenced on 12 December 1988 which resulted in changes to the numbering. The full bench of the Witwatersrand Local Division in *Ellish v Prokureur-Generaal, Witwatersrand* 1994 (5) BCLR 1 (W) 8 similarly indicated that with regards to bail in Canada the Bail Reform Act is followed. This could also be misleading as the position with regards to bail in Canada after 1988 is governed by the Criminal Code of Canada RSC 1985, the respective sections in the Canadian Charter, and in theory the Bill of Rights of 1960.

2 1970 - 71 - 72 (Can) c 37.

3 It also aids in the comparison with South African law. While both the Canadian and South African law provides for principles of arrest and pre-trial release, some principles of pre-trial release under Canadian law are treated as principles of arrest under South African law. Section 503 of the Criminal Code, for example, which provides that an arrested person must be brought before a justice within 24 hours forms part of the "release provisions" under Canadian law (see par 4.3.5.1). Under South African law section 50 of the Criminal Procedure Act provides that an arrested person must be brought before court within 48 hours. However, section 50 forms part of the "arrest" provisions (see par 2.6.3.2).

The immediate history of the system before the Bail Reform Act is therefore discussed, the principles of arrest are briefly mentioned, and a general overview of the structure of pre-trial release is given. In conclusion the contemporary principles are compared with the principles under South African law.

4.2 BRIEF SURVEY OF BAIL UNDER CANADIAN LAW BEFORE THE BAIL REFORM ACT, 1970 - 71 - 72 (Can) c 37

At common law the sole object of arrest was to ensure the appearance of the accused[4] before court.[5] The purpose of bail was not to mete out punishment but merely to secure the attendance of the prisoner at the trial.

The right of a person accused of a crime to seek bail in the years prior to 1970 was guaranteed by the Bill of Rights,[6] but the power to grant bail was specifically provided for and contained in the Criminal Code.[7]

If a person was arrested before 1970 there was technically no way in which he could be released, until after his appearance before a justice of the peace.[8]

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4 In terms of section 493, part XVI RSC 1985 an "accused" in part XVI includes a person to whom a peace officer has issued an appearance notice under section 496, and a person arrested for a criminal offence. MacIntosh (1995) 73 indicates that if the offence is indictable the named person is an accused under the Code. If it is a summary conviction matter he is called a defendant.

5 *R v Rose* (1898) 18 Cox CC 717.

6 Section 2(f), 1960 (Can) c 44.

7 Sections 451, 463 - 465, 484, 710(2).

8 Although section 2(f) of the Bill of Rights recognised the right not to be deprived reasonable bail without just cause.

After the arrest the peace officer was required to bring the accused before a justice and no release could be effected until a justice dealt with the matter.[9] However, in practice, the accused was often released on the posting of cash bail by the peace officer without legal authority. The practice to release persons arrested for minor crimes existed in most areas of the country although the procedure was not authorised by the Code or any other law. The procedure was also not uniform throughout Canada.[10]

The procedures for causing an accused to appear without being arrested were limited, and was done by way of summons.[11] If a suspect was arrested with or without a warrant he had to be physically taken before a justice.[12] Prior to the changes made by the Bail Reform Act in 1970 there was no provision for the issuance of an appearance notice[13] or a promise to appear.[14]

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9 See sections 451 and 710 of the Criminal Code prior to the 1970 amendment.

10 Teed & Shannon (1982) 60 *Can Bar Rev* 720 720 and further.

11 Section 440 of the Criminal Code prior to the 1970 amendment.

MacIntosh (1995) 82 indicates that a summons to appear is similar to an appearance notice, except that it is signed by a justice of the peace, or a judge, rather than by a police officer. A summons will order the accused in the name of the Queen to attend court at a given time or on a particular day. If the accused is required to attend for fingerprinting, a statement to this effect will be made in the summons. In terms of section 493 of the RSC "summons", means a summons in form 6 issued by a justice or judge.

12 Section 438(2) of the Criminal Code prior to the 1970 amendment.

13 MacIntosh (1995) 81 indicates that an appearance notice informs the accused of the alleged offence and specifies the date that he has to appear in court. Under RSC 1985 the notice will inform the accused that a failure to appear is a criminal offence under section 145(5) of the Code. If it is an indictable or a hybrid offence the notice will require the accused to have his fingerprints taken in accordance with the Identification of Criminals Act RSC 1985 c I - 1 and will specify the time and place for the prints to be taken. In terms of section 493 RSC an "appearance notice" means a notice in form 9 issued by a peace officer.

If the accused appeared before a justice, regardless of how he got there, two different procedures were applicable.

The first approach applied where the accused was charged on a summary conviction offence.[15] If the accused was arraigned and he pleaded not guilty, the court was to proceed with the trial.[16] However, the court had the jurisdiction to postpone or to adjourn the matter before or during the trial. Where the trial was adjourned the court could:

- allow the accused to be at large;
- commit the accused to prison;
- discharge the accused upon his recognisance[17] with or without securities or upon depositing such sum of money as the court directed.[18]

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14 MacIntosh *ibid* indicates that a promise to appear is similar to an appearance notice. Here the accused promises to appear at the time and place indicated in the notice or to have his fingerprints taken as specified. In terms of section 493 RSC 1985 a "promise to appear" means a promise in form 10.

15 The present Code RSC 1985 c C - 46 divides offences into three classifications, namely indictable offences, summary conviction offences and hybrid or dual procedure offences. Summary conviction offences are the less serious crimes in the Criminal Code and also many offences created by other Acts of Parliament. Section 787(1) of the same Code provides for a maximum fine and term of imprisonment or both for someone convicted of such an offence. The rules pertaining to summary conviction offences are set out in part XXVII of the present Criminal Code. See MacIntosh (1995) 73, 74.

16 Section 707(1) of the Criminal Code prior to the 1970 amendment.

17 MacIntosh (1995) 82 indicates that a recognisance is an acknowledgement to the Crown that the accused will owe a certain amount of money in the event that he fails to attend court or have fingerprints taken as required. In terms of section 493, RSC 1985 "recognizance" when used in relation to a recognisance entered into before an officer in charge, or other peace officer, means a recognisance in form 11. When used in relation to a recognisance entered into before a justice or judge, means a recognisance in form 32.

A different procedure was followed if the charge was for an indictable offence.[19] When the accused appeared before a justice irrespective of whether he was brought there by arrest, due to the issuance of summons or merely by chance, the justice had to enquire into the charge.

The justice had the jurisdiction to grant the accused bail at any time before committal for trial as a result of the preliminary enquiry.[20] The accused could be admitted to bail if he:

- entered into a recognisance with securities;
- entered into a recognisance and deposited an amount directed by the justice; or
- entered into a recognisance without more.

When an accused was charged with a serious offence there were limitations upon the power of the justice and only a judge of a superior court could grant bail.[21] Bail granted by a justice only lasted until the completion of the preliminary enquiry.

Once the accused was committed to stand trial following a preliminary enquiry, a new bail application had to be lodged. The application had to be made to a

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18 Section 710(1) of the Criminal Code prior to the 1970 amendment.

19 Indictable offences include the most serious crimes such as murder, robbery and treason which are punishable by life imprisonment, as well as some indictable offences which are only punishable by two years imprisonment.

20 Section 451 of the Criminal Code prior to the 1970 amendment.

21 Section 464 *ibid.*

magistrate or judge being judicial officers of at least one step higher in the judicial hierarchy than the justice.[22] The purpose of bail remained to ensure the appearance of the accused at the trial.[23]

Where the accused was entitled to bail as of right in the case of misdemeanours at common law, the court under the Criminal Code prior to 1970, had the discretion to grant bail in the case of equivalent summary conviction offences. For indictable offences the propriety of bail was to be determined with reference to the accused's probability of appearing at his trial, which was the object of bail, and not with reference to his supposed guilt or innocence.[24] In *Re Robertson*[25] Coleridge J as far back as 1854 said that the sole test as to whether or not an accused shall be admitted to bail was the consideration as to whether he was likely to appear at the trial.

Regardless of this basic principle, the courts started a trend to refuse bail on considerations other than the probability of the accused standing his trial. This included the probability of guilt, severity of the crime and the possibility of further criminal or unlawful action.

In *Re Johnson's Bail Application*,[26] the factors that had to be considered when exercising the discretion to grant bail were thoroughly dealt with. The court held that the following factors should be considered:

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22 Section 463(i) *ibid*.

23 *McIntyre v Recorders Court* (1947) RL 357 (Que).

24 *Ex Parte Fortier* (1902) 6 CCC 191 (Que CA).

25 (1854) 23 CJQB 286.

26 (1958) 122 CCC 144 (Sask QB).

- the nature and seriousness of the charge;
- the strength of the Crown's case;
- the character and co-operation of the accused and the ties that are likely to bind him to remain in the jurisdiction;
- whether or not there is likely to be a delay in the prosecution.

Some courts also endeavoured to develop a distinction between granting bail prior to the preliminary hearing and granting bail after the accused has been committed for trial.[27]

In *R v Russell*[28] the doctrine of refusing bail or release from arrest for fear of endangering the public peace was discussed for the first time but not determined.

Grounds other than the probability of the appearance of the accused including the probability of danger to the public therefore gradually crept into the judicial system as reasons for refusing bail.[29] This unregulated discretion and variety of processes led to uncertainty and differing chances of release across the country.

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27 *R v Hawken* (1944) 81 CCC 80 (BCSC). In this case the basic concept of assurance of appearance was acknowledged but the trend of the courts to differentiate was recognised.

28 (1919), 32 CCC 66, 29 Man R 511 (Man KB).

29 See *Re N* (1945) 87 CCC 377 (PEISC) where the court took into consideration that the accused suffered from a communicable disease which would have endangered the public if he was permitted to remain at large. See also *R v Russell*, *ibid*.

4.3 INFLUENCE OF THE BAIL REFORM ACT AND THE POSITION AS AT 30 JUNE 1999[30]

4.3.1 General

The Bail Reform Act introduced a liberal and enlightened system of compelling attendance and pre-trial release. The Act intended to rectify the problems concerning bail by making fundamental changes to the bail procedure and to the rights of individuals. The Act:

- provided for uniformity of the principles of arrest and release;
- endeavoured to avoid imprisonment before trial; and
- provided for only one release instead of two successive bail applications.

The premise of the Bail Reform Act is that the accused is innocent until proven guilty. However, the Act allows for a person's custody after arrest if there are grounds for believing that a further crime might be committed.[31]

The prior practice of detaining an accused until an appearance was made before a justice was virtually reversed. In terms of the Bail Reform Act the principle was adopted that a suspect was not to be arrested, and if arrested, was to be released, if at all possible, prior to appearance before a justice and in

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30 The Bail Reform Act commenced on 3 January 1972 and amended the Criminal Code with regards to bail as of that date. However, the Revised Statutes of Canada (1985) were proclaimed in force on December 12 1988. This consolidation resulted in changes to the section numbers of the Canadian Criminal Code as well as other federal statutes. Because the courts have interpreted many of the relevant sections regarding bail under the consolidation of the 1970 revised statutes (Criminal Code RSC 1970) reference will also be made to the position before 1988.

31 See section 452(1)(f)(iii) [1970].

any event before his preliminary enquiry or trial. Where once the authority to release an arrested person rested with the judicial officers some of these powers were transferred to the peace officer who arrested the accused or the officer in charge of the lock-up. Since the advent of Act, there appears to be no reported decision relating to an improper refusal to release an arrested person before his appearance before a justice.[32]

When dealing with a refusal of a justice to release an arrested person, several courts have discussed the philosophy behind these changes effected by the Bail Reform Act. In *R v Thompson*[33] Anderson J while dealing with a review of a refusal to grant bail on a possession of narcotics charge in 1972, stated that in his opinion the legislation should be interpreted in a liberal manner. In the first instance he based his opinion on the fact that the legislation when read as a whole, seems to indicate that all accused persons should be released pending trial, except where it is clearly shown by the Crown that it is necessary that an accused should not be released. Secondly, in comparing the new legislation[34] with the old provisions it appeared to the judge that the intention of the new legislation was to prevent unnecessary detention. The new legislation seemed to give greater consideration to the offender and less to the nature of the offence. He continued:[35]

> Parliament must be taken to have assumed the risk that under the new legislation it would be to some degree less likely that as many accused persons would appear for trial as would be the case under the old system. Parliament

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32 This is probably due to the brief lapse of time before an actual appearance before a justice. This results in insufficient time for a person arrested or detained in violation of the Code, to apply for a *habeas corpus* or other remedy.

33 (1972), 7 CCC (2d) 70, 18 CRNS 102 (BCSC).

34 Inclusive of section 457 to 457.8 of the Criminal Code.

35 At 71 CCC.

> must also be taken to have assumed that it was better to take the aforesaid risks than keep large numbers of accused persons in custody pending trial. It is not, therefore for the Court to substitute its views for those of Parliament by applying the 'old' rules to avoid the risk which must have been foreseen by Parliament prior to the enactment of the *Bail Reform Act*.

In *R v Quinn*[36] in an appeal from a refusal by a justice to grant bail Anderson Co Ct J of Nova Scotia explained the underlying principle of the relevant sections of the Code. He held that the basic philosophy still was that prior to conviction, all those persons who did not constitute a danger to the public, and who will show up for trial, ought not to be detained in custody. This, he said, prompted Parliament to enact the Bail Reform Act.

It is therefore not surprising that the scheme of the 1985 Criminal Code is to secure the release of persons in all but the most serious cases, unless the public interest dictates that a release should not be made. Major changes were also made relating to arrest.[37]

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36 (1977) 34 CCC (2d) 473 (NS Co Ct). The accused was charged with possession of narcotics.

37 However, an extract from the *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* of 1996 as cited by Friedland & Roach (1997) 204 seem to indicate that the excessive detention of untried prisoners were not reduced by the Bail Reform Act. In 1992/93 49% of admissions to Ontario prisons were unsentenced prisoners of whom the majority had not been tried. By 1993/94 the remand admissions accounted for 54% of the provincial prison population. The report also seems to indicate that the new liberal approach did not resolve the trend of higher admission rates for people classified as Black, South Asian, Asian or Arab. In 1992/93 for example admission rates for people classified as Black, South Asian, Asian or Arab were at least twice as high as their sentenced admission rates. For people classified as Aboriginal or White the remand and sentenced admission rates were virtually identical. The report also shows that approximately 18% of people found not guilty at trial had been denied bail. Again there is a disparity in that 21% of black accused have this unfortunate experience while it only happens to 14% of white accused.

4.3.2 Arrest of accused by peace officer

The former section 435 (before 1970) allowed a peace officer to arrest a person without a warrant:

- who had committed an indictable offence, or
- who on reasonable and probable grounds had committed or was about to commit an indictable offence, or whom he found committing an indictable offence.

These grounds were re-enacted[38] and another ground allowing arrest by a peace officer without a warrant was added:

> who he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVII in relation thereto, is in force within the territorial jurisdiction in which the person is found.

However, new provisions were added which limit these rights of arrest. A peace officer shall not arrest a person without a warrant for:[39]

- an indictable offence over which a provincial court judge has absolute jurisdiction and which does not provide for a penalty of five years or more;[40]
- an offence for which a suspect may be prosecuted by indictment or for which he may be punished on summary conviction;

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38 As sections 450(1) [1970] and 495(1) [1985].

39 See sections 450(2) [1970] and 495(2) [1985] which qualify sections 450(1) [1970] and 495(1) [1985] respectively.

40 An offence in terms of section 483 [1970), 553 [1985].

- an offence punishable on summary conviction, in any case where he has reasonable grounds[41] to believe that the public interest, having regard to all the circumstances including the need,
  - to establish the identity of the person;
  - to secure or preserve evidence of or relating to the offence, or;
  - to prevent the continuation or repetition of the offence or commission of another offence, may be satisfied without so arresting the person.[42]

The peace officer must not have any reasonable grounds to believe that if he does not so arrest the person, the person will fail to attend in court, in order to be dealt with according to law.[43]

If no arrest is made, the peace officer may issue to the person an appearance notice[44] or go before a justice and lay an information[45] as has been done in the past.[46]

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41 And probable grounds [1970].

42 In other words where he believes that the public interest can best be served by compelling the accused's appearance by other means.

43 See sections 450(2) [1970] and 495(2) [1985].

44 Section 451 [1970]; 496 [1985].

45 A formal accusation in the form of an indictment against a person for some criminal offence without the intervention by a grand jury. See *Black's Law Dictionary* (1990) 779.

46 Section 455 [1970], for indictable offences, and section 723 [1970] for summary conviction offences.

4.3.3 Release from custody by peace officer

However, if a peace officer arrests a person for an offence described in section 450(2) [1970];[47] 495(2) [1985][48] he shall as soon as practicable release the person from custody with the intention of compelling his appearance. This can be done by summons, or the peace officer may issue an appearance notice and thereupon release the person. If reasonable grounds[49] exist to indicate that it is necessary in the public interest that the person be detained,[50] or his release be dealt with under another provision, or reasonable grounds[51] indicate that the person will fail to attend the court if released from custody, the person does not have to be released.[52]

Subsequent sections of the Criminal Code similarly respect the release of the persons who have been arrested prior to their being brought before a justice.

These sections provide that if a peace officer is of the belief that arrest is necessary, he must still release the person arrested after giving him an appearance notice except in certain cases. Where a peace officer has not

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47 Section 452(1).

48 Section 497(1).

49 And probable grounds [1970].

50 Regard must be had to all the circumstances including the need to:

- establish the identity of the person
- secure or preserve evidence of the offence or relating to the offence, or
- prevent the continuation or repetition of the offence or the commission of another offence.

51 And probable [1970].

52 Excluding arrests made for an offence allegedly committed in another province or territory (section 452(1) [1970]).

released an arrested person, or where a person has been arrested by any person other than a peace officer and delivered to a peace officer, there is provision for an officer in charge to effect release.[53]

If a person has been arrested and not released on an appearance notice, either because it is an indictable offence for which the peace officer is not authorised to effect the release, or the arresting officer is of the belief that it is not in the public interest to do so, there is in effect a review by a superior.

4.3.4 Release from custody by officer in charge[54]

Release from arrest *without* a warrant is provided for under the following circumstances:[55]

- for indictable offences punishable with imprisonment of five years or less,
- an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction,
- an offence punishable on summary conviction, or
- any other offence that is punishable with imprisonment of five years or less.

after refusal of release by a peace officer, or after arrest by a civilian and delivery to a peace officer.

In these cases the officer in charge shall release the person:

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53 Section 453(1) [1970]; 498(1) [1985].

54 He is defined as the person in command of the Police Force responsible for the lock-up to which the person arrested is taken on his arrest.

55 See section 453(1) [1970]; 498(1) [1985].

- with the intention to issue a summons;
- upon his promise to appear; or
- upon entering into a recognisance or for a person not an ordinary resident upon entering into a recognisance with a cash deposit

unless the officer in charge has reasonable grounds[56] to believe that it is necessary in the public interest, that the person be detained in custody or his release should be dealt with under another provision, or that if released, he will fail to attend in court.

Provision now also exists for the release from custody by an officer in charge where arrest was made *with* a warrant.[57] Where a person who has been arrested with a warrant by a peace officer is taken into custody for an offence other than one mentioned in section 522, the officer in charge may, if the warrant has been endorsed by a justice under section 507(6):

- release the person on the person's giving a promise to appear;
- release the person on the person's entering into a recognizance before the officer in charge without sureties in the amount not exceeding five hundred dollars that the officer in charge directs, but without deposit of money or other valuable security; or
- if the person is not ordinarily resident in the province in which the person is in custody or does not ordinarily reside within two hundred kilometers of the place in which the person is in custody, release the person on the person's entering into a recognisance before the officer in charge without sureties in the amount not exceeding five hundred dollars that the officer in

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56 And probable grounds [1970].

57 In terms of section 499(1) RSC 1985.

charge directs and, if the officer in charge so directs, on depositing with the officer in charge such sum of money or other valuable security not exceeding in amount or value five hundred dollars, as the officer in charge directs.

It seems that the Criminal Code warrants only a limited number of situations in which a person is to be arrested and detained in custody. A person must either be released on an appearance notice or a promise to appear, or on the indication that a summons will be issued, or on a recognisance with or without sureties or a cash deposit. However, where the accused is kept in custody the Code requires a prompt appearance before a justice.[58]

4.3.5 Judicial interim release

4.3.5.1 Appearance before a justice of the peace

In terms of section 454(1) [1970]; 503(1) [1985] a person arrested with or without a warrant shall be detained in custody by the peace officer and be taken before a justice of the peace within twenty-four hours of being arrested.[59] The section applies where a person has been arrested with or without a warrant by a peace officer, or where a person has been delivered to a peace officer[60] and is not released by a peace officer or officer in charge.[61]

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58 Section 454(1) [1970]; 503(1) [1985].

59 In accordance with the principles stated in the section.

60 Under section 449(3) [1970]; 494(3) [1985].

61 Under the provisions of section 451, 452 or 453 [1970]; 497, 498, 499 [1985]. Section 503(1) provides as follows:

4.3.5.2 The interim release hearing

When an accused is taken before a justice the same principle, namely that an arrested person should not be detained in custody, applies. The accused shall be released on the order of a justice upon his giving of an undertaking without conditions unless the prosecution, having been given a reasonable opportunity to do so, shows cause otherwise.[62] The principle of release before trial is affirmed and it is up to the prosecutor to convince the judge that incarceration is necessary and that none of the intermediary solutions are appropriate.[63]

However, the original legislation was modified by the Criminal Law Amendment Act 1974 - 75 - 76 (Can) c 93 by placing the onus on the accused in a limited

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(a) where a justice is available within a period of twenty-four hours after the person has been arrested by or delivered to the peace officer, the person shall be taken before a justice without unreasonable delay and in any event within that period, and

(b) where a justice is not available within a period of twenty-four hours after the person has been arrested by or delivered to the peace officer, the person shall be taken before a justice as soon as possible,

unless, at any time before the expiration of the time prescribed in paragraph (a) or (b) for taking the person before a justice,

(c) the peace officer or officer in charge releases the person under any other provision of this Part, or

(d) the peace officer or officer in charge is satisfied that the person should be released from custody, whether unconditionally under subsection (4) or otherwise conditionally or unconditionally, and so releases him.

62 Unless a plea of guilty is accepted. See section 457(1) [1970]; 515(1) [1985]. This section sets out the duties of a justice before whom a person in custody is taken. (Under the Criminal Code RSC 1970, c C - 34 sections 457 - 459.1 governed what is called judicial interim release.)

63 For example an undertaking with conditions, recognisance to pay a sum of money with or without sureties and deposit of a sum of money.

number of offences, including murder, to show that his detention is not justified.[64] Apart from these limited instances it is clearly the intention of the Code that a person arrested and in custody must be taken before a justice, and shall be released unless cause is shown. The court shall direct an enquiry to the prosecution if there is any objection to the release. If there is an objection, the prosecution will be given an opportunity to show cause. This might result in a remand of the case for the accused to attend a bail hearing.

A justice may before or at any time during the course of the proceedings under section 515, adjourn the proceedings and remand the accused in custody on application by the prosecution or the accused. However, no adjournment may be for more than three clear days, without the consent of the accused.[65]

Section 518(1) in addition provides that a justice may subject to paragraph (b)[66] in any proceeding pursuant to section 515 make such enquiries, on oath or otherwise of and concerning the accused as he considers desirable.

However, it appears that the Bail Reform Act has in the past been considered to be too enlightened by some provincial court judges. This situation arose where a person appeared before a justice while not in custody.

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64 See *R v Quinn* (1977), 34 CCC (2d) 473 476, 34 NSR (2d) 481 (NS Co Ct). This was done by way of sections 457(5.1) and 457.7 of the 1970 Code and is now reflected in sections 515 and 522 of the 1985 Code.

65 See section 516 [1985].

66 The justice may not examine the accused concerning the alleged offence.

4.3.5.3 Person before justice while not in custody

4.3.5.3.a General

A practice has developed in some provincial courts where a person, while not in custody, appeared before a justice, and the information was read to him. If he pleaded not guilty, or asked to have the matter set over for plea, there appears to have been a practice by some provincial court judges to enquire from the prosecutor whether there was any objection to his release. If the prosecutor objected the accused was remanded in custody.[67] This practice does not seem to be authorised by the Criminal Code.

The Crown can only object to a person's release when he has been "taken" before a justice while in custody.[68] However, there are a number of different situations where an accused will appear before a justice although he is not so "taken". The following possibilities exist:

- If for example an accused voluntary appears before a justice because he believes a charge will be made, or because an information has been laid before a justice.
- Where a summons is issued, either without an arrest,[69] or after he is arrested, and subsequently released.[70]
- After an appearance notice before arrest.[71]

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67 Teed & Shannon (1982) 60 *Can Bar Rev* 720.

68 In terms of section 457 [1970]; 515 [1985].

69 Section 455 [1970]; 507(4) [1985].

70 Section 453.1(2) [1970]; 498 [1985].

71 Section 451[1970]; 496 [1985].

- If an appearance notice has been issued after his arrest with a subsequent release.[72]
- After a promise to appear has been given after his arrest and the person is subsequently released.[73]
- After a recognisance has been given after his arrest and he is subsequently released.[74]
- Finally, after a recognisance has been given, and a cash deposit is made after his arrest with a subsequent release.

The question is whether the justice has the right or the jurisdiction on the initial appearance of the person to interfere with his freedom if he has not been arrested, or if he has been arrested and released. May the justice order his detention, or even ask the prosecutor if he objects to his release?

As indicated, the Crown can only object to a person's release when he has been "taken before" a justice.[75] In order to be "taken before" a justice it follows that a person must at the time be in "custody". He must therefore actually be detained or imprisoned.[76] From a reading of sections 452(1) [1970];

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72 Section 452(1) [1970]; 497(1) [1985].

73 Section 354(1)(f)) [1970]; 498(1)(f) [1985]

74 Section 453(v) [1970]; 498 [1985].

75 In terms of section 457 [1970]; 515 [1985].

76 *Black's Law Dictionary* (1990) 384 indicates that the term "custody" has been understood to include persons under restraint of liberty such as persons on bail or own recognisance for purposes of *habeas corpus* proceedings. See also section 453.3(3) discussed later on in this paragraph. However, on the wording and in the context of section 457 [1970]; 515 [1985] the term custody can only be understood to refer to physical detention or actual imprisonment. In the context under discussion the options of bail and recognisance only become available if just cause for release from custody has been proven.

497(1) [1985] or 453(1) [1970]; 498(1) [1985] it is clear that when a person is arrested, he is detained.[77] If the person is for example released by way of an appearance notice or promise to appear he is not in custody, in this context, because he must appear in court. The person is also not in custody when he voluntary appears in court and is charged with an offence. It is submitted that the person is not "taken before" the justice as is meant by section 454(1) [1970]; 503 [1980] or 457(1) [1970]; 515(1) [1985]. Because he is not in "custody" he cannot be released.

This conclusion is confirmed by the 1970 Criminal Code which specifically provided that a person at large on an appearance notice issued by a peace officer, or a promise to appear given to, or a recognisance entered into before an officer in charge, is deemed to be in custody for a specific purpose only:[78]

> An appearance notice issued by a peace officer or a promise to appear given to, or a recognizance entered into before an officer in charge may, where the accused is alleged to have committed an indictable offence, require the accused to appear at the time and place stated therein for the purposes of the *Identification of Criminals Act*, and a person so appearing *is deemed for the purposes only of that Act, to be in lawful custody* charged with an indictable offence.[79]

Where an accused has promised to appear or is given a summons or an appearance notice, the promise to appear, summons or appearance notice continues in force until the trial of the accused is completed. This situation

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77 See also the term "arrest" in *Black's Law Dictionary* (1990) 109: "To deprive a person of his liberty by legal authority ... for the purpose of holding or detaining him ... ."

78 See section 453.3(3).

79 My emphasis. Apart from this section where a legal fiction of custody for a particular purpose is created, this section recognises that a person who has been released is not in custody at all. The "fiction" is not included in the wording of the 1985 Criminal Code.

applies to a person who was not arrested and also to someone who was arrested and released before appearing before a justice.[80]

Similarly if a justice who receives an information,[81] summons an accused to appear in court to answer to a charge of an offence,[82] the accused is not "taken" before the justice pursuant to section 457(1) [1970]; 515(1) [1985].

In summary it can be said that the prosecution may only object to a person's release, where such person is physically detained or incarcerated at the relevant time and is taken before a justice. The prosecution cannot object where a person appears pursuant to an appearance notice, or a promise to appear, recognisance or summons, since the person is not in custody, nor has he been taken before a justice.

When a person has been taken before a justice and has been released,[83] provision is made for the cancellation of such release. The release will only be after cause has been shown by the prosecution. The form of release can also be changed from the original release if the justice so chooses.[84]

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80 See section 457.8(1) [1970]; 523(1) [1985].

81 Other than an information in terms of section 505 [1985] and subject to section 523(1) [1985]. Section 505 provides that an information shall be laid before a justice where an appearance notice has been issued to an accused under section 496, or an accused has been released under section 497 or 498.

82 Under section 455.3 [1970]; 507(1) [1985].

83 In terms of section 457(1), (2), (5.1) or (5.3); 515(1), (2), (6) or (7) [1985] section 457.8(2) [1970]; 523(2) [1985].

84 Section 523(2) provides as follows:

> Notwithstanding subsections (1) and (1.1),
>
> (a) the court, judge or justice before which or whom an accused is

Section 523(2) only applies to the situation where a justice has made an order for the detention or release of an accused. It does not give a justice the authority to order the detention of an accused to whom an appearance notice has been given, or who is compelled to appear in court by way of summons.

In *R v Agawa*[85] the distinction between an appearance before a justice or judge by a person who has not been arrested or has been arrested and released prior to his appearance before a justice, and appearance by a person who has been arrested and released by order after appearance before a justice, is set out. In terms of this decision an accused who has been released by reason of an order made by a justice under section 457 [1970] can have his order of release revoked. But if an accused is before the court not by reason of an order, but

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being tried, at any time,

(b) the justice, on completion of the preliminary inquiry in relation to an offence for which an accused is ordered to stand trial, other than an offence listed in section 469, or

(c) with the consent of the prosecutor and the accused or, where the accused or the prosecutor applies to vacate an order that would otherwise apply pursuant to subsection (1.1), without such consent, at any time

(i) where the accused is charged with an offence other than an offence listed in section 469, the justice by whom an order was made under this Part or any other justice,

(ii) where the accused is charged with an offence listed in section 469, a judge of or a judge presiding in a superior court of criminal jurisdiction for the province, or

(iii) the court, judge or justice before which or whom an accused is to be tried,

may, on cause being shown, vacate any order previously made under this Part for the interim release or detention of the accused and make any other order provided for in this Part for the detention or release of the accused until his trial is completed that the court, judge or justice considers to be warranted.

85 (1977) 36 CCC (2d) 444 (Ont Prov Ct).

pursuant to an appearance notice (or presumably any other reason) he is not there by virtue of an order of release and section 457.8(2) [1970][86] does not apply. A justice will then not be able to revoke his release.

The question begs to be asked if there is any control over a person who has been released prior to his court appearance or has not been arrested at all prior to his court appearance. What can therefore be done if a person at large on an appearance notice or after a summons has been issued or an undertaking or recognisance has been given is about to break the law? The Criminal Code provides that where a justice is satisfied that there are reasonable and probable grounds to believe that an accused has violated or is about to violate any summons, appearance notice, undertaking or recognisance, he may issue a warrant for that person's arrest. Upon the arrest and appearance of this person in court, the judge shall cancel the summons, appearance notice, undertaking or recognisance and order that this person be detained in custody.[87] But before the order is made the accused must be given a reasonable opportunity to show why his detention in custody is not justified.[88]

A further anomalous situation which may occur, is where a person who is under arrest and in custody is before the court and the original charge for which he was arrested and brought before court is withdrawn and a new information is preferred.

It is submitted that once the initial information is withdrawn the effect of the summons, notice to appear or promise to appear ceases and the accused is

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86 Section 523(2) [1985]. See footnote 84.

87 Section 458(1) [1970]; 524(1) [1985].

88 Section 458(4) [1970]; 524(4) [1985].

before the justice voluntarily. On his appearance before the justice the prosecutor thus withdraws the information before plea and prefers a new information with a different charge.

When the new information is laid and the accused is asked to plead, he is in the situation of being before the justice, not by virtue of any requirement, but in effect at that moment voluntarily or per chance. It is submitted that the justice has no authority to require his detention for a "show cause".

4.3.5.3.b Conclusion

It follows that a justice may only cause the detention of a person in three situations:

- Where he is brought before the justice after arrest and while in custody and the Crown establishes that his detention is required.[89]
- If there has been an arrest and an order for interim release, when the prosecution has satisfied the court or a justice, after a hearing and proper grounds has been shown, that an order for interim release should be vacated.[90]
- When a justice is satisfied that there is a probability of a violation of the summons or appearance notice, or an indictable offence has been committed after a summons, appearance notice, promise to appear, undertaking or recognisance, and he has issued a warrant for the arrest,

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89 Section 457(1) [1970]; 515(1) [1985].

90 Section 457.8(2) [1970]; 523(2) [1985].

and an opportunity has been given to the accused to show cause why the detention is not justified.[91]

It is submitted that it is clear that a justice does not have the authority in the first instance to order the detention of an accused who has been given an appearance notice, or promise to appear or summons and is not still under arrest.

These sections show that the intention of the Bail Reform Act is firstly to avoid arrest, by providing for no arrest except under certain circumstances. Secondly if an arrest is required the intention is to avoid keeping a person in custody by providing that a peace officer shall release, or in more serious cases his supervisor shall release. Thirdly if a person is in custody to minimise the length of custody by providing that he must be released on appearance before a justice unless there is cause shown against his release.

It is submitted that to direct a peace officer not to arrest a person or to release him after arrest, and then subject him to incarceration pending a hearing on an objection by the prosecution, is to defeat the entire purpose of the legislation.

Any practice whereby a person who appears before a justice, and who is not in custody, is subject to a prosecutor's request to "show cause" why he should not be incarcerated appears to be unwarranted and contradicts both the intent and the wording of the Criminal Code.

Therefore, it is suggested that a person who appears before a justice voluntarily without the requirement of an appearance notice, promise to appear or summons, cannot be detained by a justice under the Criminal Code. It can

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91 Section 458 [1970]; 524 [1985].

certainly be argued that it would be improper to arrest him as he is already before the court, and the basic purpose of an arrest is to ensure his appearance before a justice. To issue a summons also seems unreasonable as the person is already before the court. One might argue that the justice could direct a peace officer to effect the arrest of the accused whom he finds before him voluntarily, but it is submitted that such action would be contrary to the intent of the Criminal Code and would probably constitute a false arrest. The object of the arrest is to ensure the appearance before a justice and if the person is already before the justice without an arrest, the object of arrest has been fulfilled and any arrest would be redundant.

4.3.6 Bail review

A review may be sought by either the prosecutor or the accused.[92] Where a justice makes an order that an accused be detained in or released from custody, or released on certain conditions,[93] or makes or vacates an order on completion of the preliminary enquiry concerning the offence for which he is to stand trial,[94] the accused or prosecutor may have the order of the justice reviewed by a judge at any time before the trial.[95] The party that seeks the review must give the other party two clear days notice.[96] The accused must be present at the hearing if the judge so orders or if the prosecutor or the accused

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92 Section 520 deals with the rights of an accused to seek a review. Section 521 deals with the rights of the prosecutor to do the same.

93 Under sections 515(2), (5), (6), (7), (8) or (12) if the accused seeks a review and under sections 515(1), (2), (7), (8) or (12) if the prosecutor seeks a review.

94 Under section 523(2)(b). Other than an offence listed in section 469.

95 Section 520(1) and 521(1).

96 Section 520(2) and 521(2).

or his counsel so requests.[97] The hearing may be adjourned upon the application of either the accused or the prosecutor. If the accused is in custody the adjournment may not be for more than three clear days unless the accused consents to a longer adjournment.[98]

At such a hearing the judge will consider the record of proceedings before the justice and any additional evidence which may be presented by the accused or the Crown.[99] The reviewing judge will not set aside the initial order simply on the basis that he would not have come to the same conclusion as the justice.[100] At such a hearing the accused, if he is to succeed, must show that his detention is not justified. In such event the judge will vacate the order previously made by the justice and make any other order provided for in section 515 that he considers to be warranted.[101] Where the application is brought by the prosecution, the judge shall either dismiss the application, or if the prosecutor shows cause, vacate the order previously made by the justice and make any other order provided for in section 515 that he considers to be warranted.[102]

Section 525 provides that where an accused has been charged with an offence other than an offence listed in section 469,[103] and has been held in custody for

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97 Section 520(3) and 521(3).

98 Section 520(4) and 521(4).

99 Section 520(7) and 521(8).

100 See MacIntosh (1995) 88.

101 Section 520(7)(e).

102 Section 521(8).

103 And is not detained in respect of any other matter.

a period of ninety days, the person having custody of the accused shall apply to a judge to fix a date for hearing to determine whether he should be released from custody.[104] A similar provision applies in the case of summary conviction offences, but the time for such action is thirty days, rather than ninety.[105] This section provides for a review of the detention of an accused person when that person's trial has been delayed and has not commenced. The section only applies where the accused is held on a detention order, and not where bail has been set and the accused is unable to meet the conditions of bail.[106] This section also does not apply where the accused has applied unsuccessfully for a review of the detention, as in that case his remedy is to apply under section 520 for a further review.

Upon receipt of the application the judge must fix a date for the hearing.[107] He must also direct that notice be given to the prosecutor and the accused and to such other persons and in the manner specified by him.[108] At the hearing the judge will consider whether the accused or the prosecutor has been responsible for any unreasonable delay.[109] If the judge is not satisfied that the detention of the accused is justified within the meaning of section 515(10)[110] he must

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104 Section 525(1).

105 Section 525(1).

106 Where he is being held by virtue of section 519.

107 Section 525(2).

108 *Ibid*.

109 Section 525(3).

110 See par 7.2.5.

release the accused.[111] Where the release of the accused is not ordered the judge may give directions to expedite the trial of the accused.[112]

4.4 CONCLUSION

The Bail Reform Act has made fundamental changes to the principles and administration of arrest and detention. It has established the principle that detention before conviction is to be avoided and that in some instances it even cannot be effected without a warrant.

If ever there was a concept that pre-trial release was a privilege, it was discarded by the Bail Reform Act. The Bail Reform Act has put Canada at the forefront of those nations that value the liberty of the individual and subscribe to the notion of the presumption of innocence.

In general comparison it appears that an accused under Canadian law has an advantage over his South African counterpart.[113]

Both systems provide that a peace officer may make an arrest without a warrant only in certain circumstances. Even though the unlawful arrest can surely be contested in court under both systems, the detainee under Canadian law is advantaged in that the Criminal Code directs the arresting officer to release such person as soon as practicable hereafter. In certain instances of arrest without a warrant there is even in effect a review by a superior under Canadian law. There is no such review under South African law.

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111 Section 525(4).

112 Section 525(9).

113 See the South African principles in par 2.6.3.

If arrest is effected legally, the Criminal Code of Canada provides that the arrested person must be brought before a justice of the peace without delay, and in any event within a twenty-four hour period after arrest. Where a justice is not available in this time period, the arrested person shall be taken before a justice as soon as possible. Under South African law an arrested person who is similarly not released by a police official or the prosecuting authority has to be brought before a lower court as soon as possible, but not later than forty-eight hours after arrest. If the forty-eight hours expire outside court hours or an ordinary court day, the accused must be brought before a lower court not later than at the end of the first court day.

The accused under Canadian law is further advantaged, in that the enquiry as to whether the accused should be released on bail or otherwise, may not be postponed upon application by the accused or the prosecution for more than three clear days at a time, without the permission of the accused. Under South African law, the enquiry may be postponed by the court for not more than seven days at a time.

Under Canadian law the presiding officer has the power to act inquisitorially, but the system is basically accusatorial. Under South African law a greater responsibility is cast upon the presiding officer in that he is obliged to act inquisitorially. Also, it seems where the reverse onus applies.[114] The Criminal Procedure Act expressly instructs the court not to act as a passive umpire. If neither side raises the question of bail, the court must do so.[115] If the party that carries the burden of proof does not of his own accord adduce the

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114 See par 8.3.5.1 - 8.3.5.2.

115 Section 60(1)(c).

necessary evidence, the court must take the initiative.[116] Even where the prosecution does not contest bail, the court must still make up its own mind.[117]

Under Canadian law we find the principle that only the Supreme Court may grant bail for certain serious offences.[118] Under South African law the regional court has been allocated with the duty to consider bail for the "most serious" offences.[119] The high court in South Africa would only have to consider bail if the case has already been transferred to it, and a bail application is hereafter instituted. On the same principle the regional court would also have to consider the bail application for a "lesser" offence once the case has been transferred to it.

The Criminal Code of Canada provides that the accused or the prosecutor may have any order made by the justice reviewed by a judge on two clear days notice at any time before the trial. While the hearing may be adjourned, the adjournment may not be for more than three clear days if the accused is in custody.[120] At such a hearing the judge will consider the record of proceedings before the justice and any additional evidence which may be presented by the accused or the Crown. The reviewing judge will not set aside the initial order simply on the basis that he would not have come to the same conclusion as the justice. Under South African law an aggrieved accused may appeal to a superior court against the refusal of bail by a lower court, or the imposition of any condition of bail, and also the amount of bail. Conversely the attorney-

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116 Section 60(3).

117 Section 60(10).

118 Listed in section 469 of the Canadian Criminal Code.

119 Mentioned in schedule 6 of the Criminal Procedure Act.

120 Unless the accused consents.

general may appeal to a superior court having jurisdiction against the decision of a lower court to release the accused on bail, or against the imposition of a condition of bail. An appeal with regard to bail is analogous to an ordinary appeal despite the principle that a bail application should be heard as soon as possible. There is no provision that additional information be furnished to the high court hearing the appeal. The judge can therefore only intervene if he is satisfied that the magistrate was wrong. An appeal to the Supreme Court of Appeal is limited to a superior court's decision to release an accused on bail.

The Criminal Code of Canada furthermore provides for "automatic review" in those instances where the trial is delayed and the accused is held on a detention order. If a person has custody of an accused charged with an offence other than an offence listed in section 469 for ninety days,[121] and the trial has not commenced, he must fix a date for a hearing before a judge to determine whether there is just cause for release. At the hearing the judge will consider whether the accused or the prosecutor has been responsible for any unreasonable delay. In the case of summary conviction offences the period is thirty days. There is no such automatic review procedure under South African law.

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121 And who is not detained in respect of any other matter.