IN THE COURT OF APPEAL OF NEWFOUNDLAND AND LABRADOR

Citation: *R. v. Penunsi*, 2018 NLCA 4
Date: January 19, 2018
Docket: 201501H0083

BETWEEN:

ALBERT PENUNSI — APPELLANT

AND:

HER MAJESTY THE QUEEN — RESPONDENT

Coram: Green C.J.N.L.*, White and Hoegg JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (G) 201408G0091
(2015 NLTD(G) 141)

Date of Hearing: October 21, 2016
Judgment Filed: January 19, 2018

Reasons for Judgment by Hoegg J.A.
Concurred in by Green C.J.N.L. and White J.A.

Counsel for the Appellant: Jessica Tellez
Counsel for the Respondent: Iain Hollett

* Green C.J.N.L. elected supernumerary status and resigned as Chief Justice on December 1, 2017.

Hoegg J.A.:

INTRODUCTION

[1] This appeal concerns whether a person against whom an Information under section 810.2 of the *Criminal Code* (*Code*) has been laid can be subjected to a show cause hearing under the judicial interim release provisions of section 515 of the *Code* when he or she first appears in court in relation to the Information.

[2] Section 810.2 is in Part XXVII of the *Code* under the heading "Sureties to Keep the Peace". It is one of the sections commonly referred to as the peace bond provisions. It provides that any person who has reasonable grounds to fear that another person will commit a serious personal injury offence can, with the consent of the Attorney General, lay an Information seeking to have that other person ordered to enter into a recognizance to keep the peace and be of good behavior, appear in court as required, and possibly abide by other conditions.

[3] The process is initiated by the person in fear (the "informant") swearing an Information before a judge, and the judge, if satisfied that the Information is in order, causing the parties (the informant and the defendant) to appear in court in relation to the Information (section 810.2(2)). At this first appearance the defendant can agree to enter into a proposed recognizance, and if he or she does so, he or she is then excused from the court in the knowledge that he or she is liable to prosecution if the recognizance is breached. If the defendant does not agree to enter into the proposed recognizance, the judge orders the parties to appear on a scheduled date for a merits hearing.

[4] If the judge is not satisfied after the merits hearing that the informant has reasonable grounds for fear, the proceeding ends. If the judge is satisfied after the merits hearing that the informant has reasonable grounds for fear, the judge may order the defendant to enter into a recognizance to keep the peace and be of good behavior and abide by any other conditions the judge imposes for a period not exceeding 12 months (section 810.2(3)). If the defendant has been previously convicted of a serious personal injury offence, the duration of the recognizance can be for a period of up to two years (section 810.2(3.1)). Section 810.2(4) provides that the judge may incarcerate a defendant who refuses to enter into an ordered recognizance for up to 12 months.

[5] A defendant who appears on a section 810.2 peace bond Information by way of summons is free to leave the Court once a merits hearing date is set because a judge would have no jurisdiction to detain him or her. It is when the defendant appears under arrest to respond to a section 810.2 Information that the issue comes into focus. This is because when a defendant appears under arrest, there must be a process to release him or her. Accordingly, resolution of the "show cause" question in this case involves deciding whether a Provincial Court Judge ("judge" or "Judge") has the power under section 810.2(2) to issue an arrest warrant in order to cause a defendant to appear.

BACKGROUND

[6] Albert Penunsi was nearing the end of a lengthy prison sentence when a Royal Canadian Mounted Police (RCMP) officer laid a section 810.2 Information against him. The Information stated that the officer had reason to believe Mr. Penunsi would commit a serious personal injury offence upon his release, and it sought to have him bound to enter into a recognizance with conditions. Upon the officer swearing the Information, a judge issued a warrant for Mr. Penunsi's arrest.

[7] The arrest warrant was never executed. However, a couple of days before Mr. Penunsi was due to be released from custody, he was escorted by an RCMP officer from jail to court where he appeared before a different judge to respond to the Information.

[8] At the appearance the Judge set a date for a merits hearing, which date was after the date of Mr. Penunsi's scheduled release from prison. The Crown then requested the opportunity to show cause why Mr. Penunsi ought to be required to sign an undertaking with conditions pursuant to the judicial interim release provisions of section 515 of the *Code* pending the merits hearing.

[9] The Judge denied the Crown's request, saying he did not have the jurisdiction to subject Mr. Penunsi to a show cause hearing because the judicial release provisions of the *Code* did not apply to section 810.2 Informations. The Judge added that even if he did have jurisdiction to do so, he would decline to exercise it in Mr. Penunsi's case. Accordingly, Mr. Penunsi was taken back to jail to serve the remaining time in his sentence after which he was released with no restrictions on his liberty.

[10] The Crown sought review of the Judge's decision in Supreme Court by way of *certiorari*, requesting a declaration that the section 515 judicial release provisions of the *Code* are applicable to section 810.2 proceedings and that the Judge had a statutory duty to conduct a show cause hearing on the Crown's request.

[11] On the date set for the merits hearing, and before the *certiorari* application was heard, Mr. Penunsi voluntarily entered into a section 810.2 recognizance with conditions. The section 810.2 proceedings concerning him were therefore at an end. Nevertheless, when the *certiorari* application was subsequently called before a Justice of the Supreme Court Trial Division (Justice), the Crown requested that the matter proceed so that the applicability of the judicial release provisions to section 810.2 could be decided by a superior court.

[12] The Crown argued that despite the mootness of Mr. Penunsi's case, its *certiorari* application ought to be heard "because of the need to clarify the law and guide future practices". The Justice agreed, relying on the Supreme Court of Canada decision in *Mission Institution v. Khela*, 2014 SCC 24 [2014] 1 S.C.R. 502, which held that a court can exercise its discretion to decide a moot issue where there is a need to clarify the law.

[13] The Justice decided that the section 515 provisions of the *Code* do apply to section 810.2 Informations, and that the Judge erred by refusing to conduct a show cause hearing on the Crown's request. The Justice accepted that a judge can compel a party's initial appearance respecting a section 810.2 Information by issuing a warrant of arrest, and consequently reasoned that the judicial release provisions of the *Code* would have to apply so as to provide a procedure by which such an arrested person could be released. Accordingly, he ruled that the Judge ought to have allowed the Crown to show cause why Mr. Penunsi ought to have been detained or released on conditions.

[14] Mr. Penunsi appeals the Justice's decision.

[15] Despite the mootness of the issue in this case, the Crown maintains that it would be useful to have a decision from this Court on the applicability of the judicial release provisions to section 810.2 so as to govern their future conduct in this province. In this regard I also note the Justice's comments at paragraph 22 of his decision to the effect that appellate guidance on the issue would be welcome (2015 NLTD(G) 141).

[16] While a decision from this Court respecting the applicability of the judicial release provisions of the *Code* to a section 810.2 proceeding will

have no direct effect on Mr. Penunsi, I agree that a decision from this Court would be useful to the future conduct of such proceedings. Section 810.2 proceedings are not uncommon, and their use raises concerns respecting both protection of the public and individual liberty interests. Moreover, there is jurisprudential conflict on the issue. Accordingly, despite there being no live controversy between the parties, I am of the view that it is "in the interests of justice" (*R. v. Smith*, 2004 SCC 14, [2004] 1 S.C.R. 385, at paras. 32-38 and *Mission Institution*, at paras. 13-14) that this Court decide whether the judicial release provisions of the *Code* apply to section 810.2 proceedings. (See also *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 and *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66 at para. 2.)

ISSUE

[17] Broadly stated, the issue is whether the section 515 judicial interim release provisions of the *Code* apply to proceedings respecting section 810.2 Informations.

[18] The reviewing Justice's reasoning, as well as the authorities he relied on to arrive at his decision, rest on the proposition that because section 810.2(2) authorizes a judge to issue a warrant of arrest in order to cause a party to appear at first instance in relation to a section 810.2 Information, the section 515 judicial release provisions must apply to section 810.2 proceedings so as to provide a process by which the arrested person can be released. Accordingly, it must be decided whether section 810.2(2) empowers a judge to cause a defendant to a section 810.2 Information to appear at first instance by issuing a warrant for the defendant's arrest.

[19] The Crown has asked the Court to rule on the issue as it relates to all peace bond Informations. Because this case arises from a section 810.2 proceeding, I will focus on whether section 810.2(2) of the *Code* empowers a judge to issue a warrant of arrest in order to cause a defendant to a section 810.2 Information to appear. Whether a judge can issue an arrest warrant to bring defendants to other peace bond Informations before the court will be touched on in the course of this decision.

The Crown's Position

[20] The Crown maintains that the Judge was required to subject Mr. Penunsi to a show cause hearing on its request. The Crown's position presumes that Mr. Penunsi appeared before the court under arrest. The Crown argues that section 810.2(2) empowers a judge to issue a warrant of

arrest in order to cause a defendant to be brought before the court at first instance respecting a section 810.2 Information. Its argument rests on the interrelation of various parts and sections of the *Code* to support the application of the judicial release provisions of section 515 to section 810.2 once certain words and expressions in sections 515(1), 795 and 507 are modified.

[21] The Crown's argument goes like this:

- Section 810.2(8) provides that section 810(5) applies to recognizances made under section 810.2 with such modifications as the circumstances require.
- Section 810(5) in turn provides that the provisions of Part XXVII (summary convictions) apply to section 810 proceedings with such modifications as the circumstances require.
- Section 795 provides that the provisions of Part XVI (compelling appearances) apply to Part XXVII (summary convictions) insofar as they are not inconsistent with Part XXVII and with any necessary modifications. Part XVI (compelling appearances) includes the power of arrest (sections 504 and 507) and the judicial interim release provisions (section 515).

In other words, the Crown argues that the powers of arrest and detention pass from their home in Part XVI to Part XXVII because of section 795; from Part XXVII to section 810 because of section 810(5), and from section 810(5) to section 810.2 because of section 810.2(8). At each stage, the power of arrest is subject to necessary modifications, which the Crown argues are minor.

Mr. Penunsi's Position

[22] Mr. Penunsi's position is that the Judge did not err in refusing the Crown's request for a show cause hearing because section 515 does not apply to appearances under section 810.2. Mr. Penunsi argues that the language in sections 507, 515(1) and 795 cannot be interpreted to confer jurisdiction on a judge to order a show cause hearing under section 515 respecting a proceeding under section 810.2. Mr. Penunsi says he was not an "accused who [was] charged with an offence" or "taken before a justice" "in respect of that offence" as required by section 515(1), and his appearance on the section 810.2 Information was not "to answer to a charge of an

offence" within the meaning of section 507. He emphasizes that he was neither charged with an offence nor appearing in respect of an offence charged. Rather, he was a defendant responding at first instance to a section 810.2 peace bond Information. Mr. Penunsi maintains that the modifications to the sections of the *Code* necessary to give effect to the Crown's position are far from minor, and that they alter the meaning of the sections involved. He also argues that if section 810.2(2) included the power of arrest, it would not have been necessary for Parliament to have enacted section 810.2(4), which provides for the imprisonment of a person who refuses to enter into a recognizance.

[23] Mr. Penunsi maintains that Parliament made a "thoughtful and exact" and "deliberate" decision to protect the civil liberties of Canadians while protecting their safety by providing specific and different authority (section 810.2(2)) to compel the appearances of defendants to section 810.2 peace bond Informations, and that the specific and different authority does not include the power to issue a warrant of arrest to cause a defendant such as himself to appear.

The Legislation

[24] The sections of the *Code* relevant to this matter are 504, 507, 507.1, 515, 795, 810 and 810.2.

[25] Section 504 provides that a person who believes on reasonable grounds that another person has committed an indictable offence (or a summary conviction offence) may lay an Information against that other person. Section 507 empowers a justice who receives such an Information to issue a warrant of arrest for the person charged if there are reasonable grounds to believe that it is necessary in the public interest to issue a warrant. Section 507 reads:

> (1) Subject to subsection 523(1.1), a justice who receives an information laid under section 504 by a peace officer, a public officer, the Attorney General or the Attorney General's agent, other than an information laid before the justice under section 505, shall, except if an accused has already been arrested with or without a warrant,
>
> (a) hear and consider, *ex parte*,
>
> (i) the allegations of the informant, and
>
> (ii) the evidence of witnesses, where he considers it desirable or necessary to do so; and

> (b) where he considers that a case for so doing is made out, issue, in accordance with this section, either a summons or a warrant for the arrest of the accused to compel the accused to attend before him or some other justice for the same territorial division to answer to a charge of an offence.
>
> …
>
> (4) Where a justice considers that a case is made out for compelling an accused to attend before him to answer to a charge of an offence, he shall issue a summons to the accused unless the allegations of the informant or the evidence of any witness or witnesses taken in accordance with subsection (3) discloses reasonable grounds to believe that it is necessary in the public interest to issue a warrant for the arrest of the accused.
>
> …
>
> (Emphasis added.)

[26] Section 507.1 provides that a judge may issue an arrest warrant when an Information alleging the commission of an offence is laid by a private citizen:

> (1) A justice who receives an information laid under section 504, other than an information referred to in subsection 507(1), shall refer it to a provincial court judge or, in Quebec, a judge of the Court of Quebec, or to a designated justice, to consider whether to compel the appearance of the accused on the information.
>
> (2) A judge or designated justice to whom an information is referred under subsection (1) and who considers that a case for doing so is made out shall issue either a summons or warrant for the arrest of the accused to compel him or her to attend before a justice to answer to a charge of the offence charged in the information.
>
> . . .
>
> (9) Subsections (1) to (8) do not apply in respect of an information laid under section 810 or 810.1.
>
> (Emphasis added.)

[27] Notably, section 507.1(9) (enacted in 2002) specifically excludes the application of 507.1 to Informations laid under sections 810 and 810.1 of the peace bond provisions. Parliament has therefore expressly provided that a judge does not have the power to arrest a defendant to a section 810 or 810.1

peace bond Information. There is no reference to section 810.2 in section 507.1.

[28] Section 515(1) of the judicial release provisions reads:

> (1) Subject to this section, where an accused who is charged with an offence other than an offence listed in section 469 is taken before a justice, the justice shall, unless a plea of guilty by the accused is accepted, order, in respect of that offence, that the accused be released on his giving an undertaking without conditions, unless the prosecutor, having been given a reasonable opportunity to do so, shows cause, in respect of that offence, why the detention of the accused in custody is justified or why an order under any other provision of this section should be made and where the justice makes an order under any other provision of this section, the order shall refer only to the particular offence for which the accused was taken before the justice.
>
> (Emphasis added.)

[29] Section 795 reads:

> The provisions of Parts XVI and XVIII with respect to compelling the appearance of an accused before a justice, and the provisions of Parts XVIII.1, XX and XX.1 in so far as they are not inconsistent with this Part, apply, with any necessary modifications, to proceedings under this Part.

[30] Section 810(5):

> (5) The provisions of this Part apply, with such modifications as the circumstances require, to proceedings under this section.

[31] The pertinent provisions of sections 810.2 read:

> (1) Any person who fears on reasonable grounds that another person will commit a serious personal injury offence, as that expression is defined in section 752, may, with the consent of the Attorney General, lay an information before a provincial court judge, whether or not the person or persons in respect of whom it is feared that the offence will be committed are named.
>
> (2) A provincial court judge who receives an information under subsection (1) may cause the parties to appear before a provincial court judge.

> (3) If the provincial court judge before whom the parties appear is satisfied by the evidence adduced that the informant has reasonable grounds for the fear, the judge may order that the defendant enter into a recognizance to keep the peace and be of good behaviour for a period that does not exceed 12 months.
>
> …
>
> (8) Subsections 810(4) and (5) apply, with such modifications as the circumstances require, to recognizances made under this section.
>
> (Emphasis added.)

ANALYSIS

Preamble

The use of section 810.2 in this case

[32] On appeal, Crown counsel explained that a section 810.2 Information was laid against Mr. Penunsi because there were concerns about him resorting to violence when he reentered the community upon his release from prison. Counsel further explained that Mr. Penunsi's lengthy custodial sentence did not allow for a period of probation to follow his release, and that a section 810.2 recognizance would provide police with some control over him, thereby offering a measure of protection to the community and minimizing the risk of criminal conduct. Counsel stated that the Crown had not been seeking to detain Mr. Penunsi in custody, but simply wanted some conditions put on him pending the merits hearing.

Discussion

The difference between section 810.2 proceedings and criminal prosecutions

[33] Informations laid under section 810.2 and the other peace bond provisions found in Part XXVII of the *Code* do not allege or relate to committed offences. Rather, they relate to present circumstances which give rise for concern that offences may be committed. Put another way, they are directed at preventing criminal conduct by imposing positive obligations on persons to keep the peace and be of good behavior and abide by additional conditions, on pain of prosecution. The provisions are directed to preventing crime and have been found to be a valid exercise of the federal criminal law power found in section 91 of the *Constitution Act, 1867* (*R. v. Budreo*

(2000), 46 O.R. (3d) 481, 183 D.L.R. (4th) 519 (C.A.), leave to appeal to SCC refused, 28230 (May 3, 2001) at paras. 27-34).

[34] When an Information alleging the commission of a criminal offence comes before a judge, the usual provisions for compelling the appearance of the accused or defendant found in Part XVI of the *Code* apply. In the case of the peace bond sections of the *Code,* Parliament has enacted specific and different authorizing provisions to compel appearances of the parties – sections 810(2), 810.1(2) and 810.2(2). This case concerns section 810.2(2) which reads:

> A provincial court judge who receives an information under subsection (1) may cause the parties to appear before a provincial court judge.

However, section 810.2(2) does not state the mechanism or procedure by which such appearances are to be effected. (Neither do sections 810(2) and 810.1(2)).

[35] If a person is brought before a judge under an arrest warrant and he or she is not otherwise in custody, it goes without saying that he or she remains under arrest until released by the judge. (See the lucid reasoning in *R. v. Nowazek*, 2017 YKSC 8 at paras. 18 to 23 on this point.) Under section 515(1) of the *Code*, a judge is required to release an accused or a defendant on an undertaking to appear "unless the prosecutor, having been given a reasonable opportunity to do so, shows cause, *in respect of that offence*, why the detention of the accused in custody is justified or why an order under any other provision of [section 515] should be made".

[36] In this case, Mr. Penunsi appeared before the Judge as a defendant to a section 810.2 Information, not as a person charged with having committed an offence. Because he was already in custody respecting an unrelated matter, he was arguably not under arrest respecting the section 810.2 Information. (Recall that the warrant for Mr. Penunsi's arrest which had been issued in respect of the section 810.2 Information had not been executed.) If Mr. Penunsi had already been released from prison and had appeared before the Judge as a free man having been caused to appear by a summons issued in relation to the section 810.2 Information, the Judge would have had no authority to detain him regarding the section 810.2 proceeding and therefore no duty to accede to the Crown's request for a show cause hearing.

[37] The fact that Mr. Penunsi's arrest status when he appeared before the Judge may not have been in relation to the section 810.2 Information

supports the Judge's view that he had no jurisdiction to subject Mr. Penunsi to a show cause hearing. However, it may be arguable that Mr. Penunsi was under arrest in relation to the section 810.2 Information because he was taken to the court by an RCMP officer who knew that a warrant had been issued for Mr. Penunsi's arrest in relation to the section 810.2 Information and who in all likelihood gave him no choice about whether to go with him to court and probably "touched him" en route. In any event, the question the parties are asking the Court to answer is whether a defendant to a section 810.2 Information can be arrested so as to be caused to appear in relation to it.

Reasoning

[38] Both Mr. Penunsi and the Crown argue that the provisions of the *Code* support their respective positions. The Crown asserts that words and phrases in sections 507, 515, and 795 can be modified and interpreted so as to permit the arrest of defendants to peace bond Informations and the consequential application of section 515. Mr. Penunsi says that the modifications and interpretations required to give effect to the Crown's arguments are substantial, offensive to the principles of statutory interpretation, and not in accordance with the scheme of the peace bond provisions of the *Code*.

[39] In *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, Chief Justice McLachlin summarized the modern approach to statutory interpretation. At paragraph 33, she adopted the words of E. A. Driedger at p. 87 of *Construction of Statutes* (2nd ed. 1983), saying:

> "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." …

[40] Green C.J.N.L. elaborated on this principle in *Archean Resources Ltd. v. Newfoundland (Minister of Finance)*, 2002 NFCA 43, 215 Nfld. & P.E.I.R. 124, leave to appeal to SCC refused, 29390 (March 20, 2003) in the course of interpreting the meaning of a provincial statutory provision. At paragraph 29 he stated:

> The greater the precision and circumstance-specific the text and the clearer the indicators of legislative objective, the more controlling will those factors be with respect to an outcome in a particular case. In the end, however, the court must seek to reconcile the text and the legislative objectives with a result that is perceived to be fair and just in the particular circumstances of the individual case. It is in this latter context that notions of general fairness, and common law, social

> and constitutional values are engaged and are sought to be harmonized with the other factors of text and legislative objective.
>
> (Emphasis added.)

[41] The law of statutory interpretation encompasses several presumptions which assist in interpreting statutory provisions so as to reconcile "text and legislative objectives with a result that is perceived to be fair and just". Relevant to this case are the presumption against tautology and the presumption of consistent expression.

[42] The presumption against tautology is described by Ruth Sullivan at page 210 of *Sullivan on the Construction of Statutes*, 5th ed. (Markham, ON: LexisNexis, 2008):

> **Governing principle.** It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. Every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose.
>
> …
>
> … every word and provision found in a statute is supposed to have a meaning and a function. For this reason courts should avoid, as much as possible, adopting interpretations that would render any portion of a statute meaningless or pointless or redundant.

[43] Ms. Sullivan describes the presumption of consistent expression in the same volume beginning at page 214:

> It is presumed that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meanings. Another way of understanding this presumption is to say that the legislature is presumed to avoid stylistic variation. Once a particular way of expressing a meaning has been adopted, it is used each time that meaning is intended. Given this practice, it makes sense to infer that where a different form of expression is used, a different meaning is intended.
>
> The presumption of consistent expression applies not only within statutes but across statutes as well, especially statutes or provisions dealing with the same subject matter.

[44] See also *Rizzo and Rizzo Shoes*,[1998] 1 S.C.R. 27 at paras. 20-21.

[45] Mr. Penunsi argues that use of the word "parties" in sections 810.2(2) and (3) to describe those whom a judge is empowered to bring before the court in relation to a section 810.2 Information supports his position that section 515 does not apply to defendants in section 810.2 proceedings. He argues that section 810.2(2) cannot possibly have been meant to empower a judge to cause an informant, who is also a party to a peace bond Information, to be arrested in order to appear. Consequently, he maintains that section 810.2 must be interpreted to restrict the means by which parties can be caused to appear to means which could apply to both informants and defendants, and that such means would not include the power to issue a warrant of arrest.

[46] The Crown argues that just because Section 810.2(2) is stated to apply to "the parties" does not mean that the judge must apply the power to informants and defendants in the same manner.

[47] I share Mr. Penunsi's position on this issue. Let me explain.

[48] The *Code* provides several ways to compel defendants and accuseds to appear in relation to criminal charges. There is no provision to compel the Crown to appear. If the Crown does not appear on a criminal proceeding, the proceeding is dismissed for want of prosecution. Likewise, if an informant does not appear when a peace bond Information is called in court, the proceeding is dismissed for want of prosecution, it being understood that the informant no longer wishes to proceed. It therefore stands to reason that Parliament did not intend for informants on peace bond Informations, like the Crown in the prosecution of a criminal charge, to be caused to appear under a warrant of arrest.

[49] The Crown's argument that the power of arrest in section 810.2(2) applies only to defendants and not to informants conflicts with the reference in the section to "parties". Why would Parliament use the word "parties" when it could have used the word "defendant"? It must be presumed that Parliament's use of the word "parties" was deliberate (the presumption of consistent expression) and that it used the word "parties" to mean both informants and defendants. Additionally, issuing a warrant for a defendant could present an impractical situation. It is the informant who goes to a judge to initiate process against a defendant. At that time, the informant is either advised or summonsed to appear in court on a certain date when the defendant will be present. If the judge issues an arrest warrant for a defendant to a peace bond proceeding, the judge would not be able to summons the informant to appear when the defendant was appearing

because it would not be known when the defendant would be appearing. If and when the defendant was arrested and brought to court, someone would have to contact the informant and "cause him or her to appear", presumably on short notice, while the defendant languishes in wait. I note that this potential problem could be somewhat, but not entirely, alleviated by the section 810.2 requirement for the Attorney General's consent, but only if the Attorney General took over prosecution of the matter. In this regard, I note that the Attorney General consenting to an Information is not the same as the Attorney General assuming carriage of a matter. To my mind the intended, and practical, course of action is for a judge to be able to cause both the informant and defendant to appear at the same time by summonsing them to appear on the same date to move forward with the proceeding.

[50] More importantly, Parliament's enactment of special provisions to compel appearances on peace bond Informations – sections 810.2(2), 810(2) and 810.1(2) – indicates that Parliament's scheme for dealing with peace bond Informations is different from its scheme respecting Informations alleging criminal charges. Compelling appearances of accuseds and defendants in relation to criminal charges is effected through the general provisions in Part XVI of the *Code*. The language used in the peace bond sections is not only different, but unique; it does not appear in other parts of the *Code*. Simply put, Parliament legislated special and different provisions, in this case section 810.2(2), to empower judges to compel the appearances of parties to peace bond Informations. It would not have been necessary for Parliament to do so if Part XVI applied by operation of section 795 as the Crown argues. The special provisions show Parliament's acknowledgement that a defendant to a peace bond Information is of a different character than a defendant to a criminal charge. Part XVI applies to Part XXVII only insofar as it is not inconsistent with it. The different provisions for compelling appearances regarding peace bond proceedings are an obvious inconsistency with the Part XVI provisions for compelling appearances of accuseds and defendants. It "may" have been open to Parliament to rely on the procedures for compelling appearances in Part XVI to apply to peace bond proceedings, but it chose not to do so because of the fundamental difference between defendants to proceedings respecting criminal charges and those to respecting peace bonds. (I use "may" deliberately to avoid commenting on the constitutional implications of preventive arrest on lesser grounds than traditionally required by our law). Parliament made a choice not to rely on the provisions of Part XVI to compel appearances respecting peace bond Informations. Permitting a judge to issue a warrant of arrest

under section 810.2(2) would be, in my view, inconsistent with Parliament's scheme respecting peace bonds. The Crown's argument fails to recognize this inconsistency. If the Crown's position were to prevail, the special provisions for compelling appearances in the peace bond provisions would be rendered pointless, thereby offending the presumptions against tautology and of consistent expression, and would override an inconsistency of the kind envisioned in section 795 of the *Code.*

[51] Mr. Penunsi also argues that section 515 does not apply to defendants appearing on proceedings under section 810.2 because the language in section 515 of the *Code* does not encompass such defendants.

[52] Section 515 reads:

> Subject to this section, where an accused who is charged with an offence other than an offence listed in section 469 is taken before a justice, the justice shall, unless a plea of guilty by the accused is accepted, order, in respect of that offence, that the accused be released on his giving an undertaking without conditions, unless the prosecutor, having been given a reasonable opportunity to do so, shows cause, in respect of that offence, why the detention of the accused in custody is justified or why an order under any other provision of this section should be made and where the justice makes an order under any other provision of this section, the order shall refer only to the particular offence for which the accused was taken before the justice.
>
> (Emphasis added.)

[53] The modifications to section 515 that are required to give effect to the Crown's argument are:

(1) that the word "accused" must be substituted with the word "defendant" and interpreted to mean both defendants to criminal charges and defendants to section 810.2 peace bond Informations;

(2) that the phrase "charged with an offence" must be substituted with "laid with a section 810.2 peace bond Information"; and

(3) the phrase "in respect of [the] offence [charged]" must be substituted with the words "in respect of a section 810.2 peace bond Information".

It is only if these substitutions are made that section 515 can apply to section 810.2 proceedings, and it is only if section 515 so applies that a judge can be required to order a show cause hearing upon the Crown's request.

[54] Substitution of the word "accused" with the word "defendant" in section 515(1) is an accepted modification (by virtue of section 795) to section 515 for the purposes of proceedings respecting summary conviction charges. This substitution could lead one to conclude that any defendant, including a defendant to a section 810.2 Information, could be contemplated by section 515. However, in my view there is a fundamental difference between a defendant to a summary conviction charge and a defendant to a peace bond Information – the first has been charged with having committed a criminal offence and the second has not.

[55] Other modifications required in order for section 515 to have application to section 810.2 are that the defendant in issue be one who is "charged with an offence" and that his or her appearance before the court must be "in respect of the offence charged". The language in section 515(1) is clear and unequivocal. A defendant to a section 810.2 peace bond Information has not been charged with an offence nor is he or she appearing in court in relation to an offence charged. Such a defendant is not in legal jeopardy and has not been alleged to have done anything wrong. To say that defendants to section 810.2 Informations are effectively appearing in relation to charged offences is simply not so. Such an interpretation broadens the application of section 515 to people who are not only fundamentally different than those who are alleged to have committed criminal offences. They are not just innocent until proven guilty – they are not even alleged to be guilty.

[56] The language in section 507 would also require modification to give effect to the Crown's argument:

> (1) Subject to subsection 523(1.1), a justice who receives an information laid under section 504 by a peace officer, a public officer, the Attorney General or the Attorney General's agent, other than an information laid before the justice under section 505, shall, except if an accused has already been arrested with or without a warrant,
>
> (a) hear and consider, ex parte,
>
> (i) the allegations of the informant, and
>
> (ii) the evidence of witnesses, where he considers it desirable or necessary to do so; and
>
> (b) where he considers that a case for so doing is made out, issue, in accordance with this section, either a summons or a warrant for the arrest of the accused to compel the accused to attend before him or some other justice for the same territorial division to answer to a charge of an offence.

> …
>
> (4) Where a justice considers that a case is made out for compelling an accused to attend before him to answer to a charge of an offence, he shall issue a summons to the accused unless the allegations of the informant or the evidence of any witness or witnesses taken in accordance with subsection (3) discloses reasonable grounds to believe that it is necessary in the public interest to issue a warrant for the arrest of the accused.
>
> …
>
> (Emphasis added.)

As with section 515, the word "accused" in section 507 can be substituted with the word "defendant" in several places. But again, a defendant to a peace bond proceeding is of an entirely different character than a defendant to a criminal charge and, a defendant to a section 810.2 Information is not appearing "to answer to a charge of an offence". There is no language in section 810.2 that is suggestive of a criminal charge. The language in sections 515 and 507 is clearly directed to persons charged with criminal offences. Substituting the words "to answer to a charge of an offence" with "laid with a peace bond Information" in order to be able to arrest those facing a section 810.2 Information would expand the power of arrest to an extent heretofore unacceptable in our law.

[57] Parliament has to be presumed to mean what it says and that it expresses itself correctly (*Spillers Ltd. and Cardiff (Borough) Assessment Committee*, [1931] 2 K.B. 21 at 43). The Crown's proposed modifications to Parliament's language are in my view, substantial and go well beyond mere changes in detail, as Hinds J. stated in *R. v. Forrest*, (1983), 8 C.C.C. (3d) 444 (B.C.S.C.), a trial court decision which decided that a defendant to a peace bond proceeding could not be subjected to a show cause hearing:

> [17] Here, the Crown is arguing that the provisions of s. 457 can be applied through the use of the words "*mutatis mutandis"* to convert a person not charged with anything — merely a person against whom proceedings have been initiated under s. 745 — into the position of "an accused who is charged with an offence". That is a change in substance and not "a change in points of detail". In my view, the interpretation of the words "*mutatis mutandis"* cannot be extended to embrace a change in substance of the type contemplated in these proceedings.

The effect of the modifications proposed by the Crown is to treat people whom others fear the same as those who have been criminally charged. To do so in my view is simply wrong.

[58] There are other reasons which indicate that Parliament did not intend to permit a defendant to a section 810.2 peace bond Information to be arrested in order to be brought to court at first instance. A judge who concludes after a section 810.2 merits hearing that the informant's case is made out has only one available remedy – that of ordering the defendant to enter into a recognizance to keep the peace, with or without conditions. The judge has no ability to detain the defendant unless the defendant refuses to enter into the proposed recognizance after being ordered to do so. Interpreting section 810.2(2) to permit a defendant to be arrested and held in custody prior to a merits determination makes the process of getting to the merits hearing worse than the worst possible sanction after a merits hearing. In other words, the defendant's liberty is jeopardized by the process but not by the worst possible result. There is something both illogical and absurd about a process which permits more severe restrictions on a defendant's liberty before a hearing than would be possible after a hearing. This point was made by Kelly J. at paragraph 33 of *MacAusland v. Pyke* (1995), 139 N.S.R. (2d) 142, 397 A.P.R. 142 (S.C.):

> … A scheme in which one is subject to a more severe penalty while awaiting determination than when the determination is actually made creates, in my opinion, logical and legal inconsistency.

[59] I agree with Justice Kelly in this respect. Subjecting a defendant to a section 810.2 Information to arrest and detention and a show cause hearing with the potential for further detention or restrictions on his or her liberty does not reconcile the provisions, objectives, and scheme of the peace-bond provisions of the *Code* "with a result that is perceived to be fair and just in the particular circumstances" *(Archean* at paragraph 29). Arresting a defendant to a section 810.2 proceeding and subjecting him or her to a show cause hearing effectively circumvents a merits hearing and enables the informant's objective, or more, to be met forthwith – by arresting the defendant, detaining him or her, and then either further detaining him or her or imposing release conditions on the basis of a bail hearing. This queue jumping is an affront to notions of fair play and decency.

The Power of Arrest

[60] The issue in this case requires consideration of the power of arrest and the fundamental role it plays in our criminal law. The power of arrest is mighty, and although necessary to the proper functioning of our justice system, must be used cautiously and in a manner consistent with our constitutional values.

[61] The law is well established that in order to arrest a person or obtain a warrant for arresting a person, an informant must swear that he or she believes, on reasonable grounds, that the person has committed a criminal offence. In *R. v. Storrey*, [1990] 1 S.C.R. 241, Cory J. explains the importance of the requirement for reasonable grounds to the power of arrest in a democracy:

> Section 450(1) makes it clear that the police were required to have reasonable and probable grounds to believe that the appellant had committed the offence of aggravated assault before they could arrest him. Without such an important protection, even the most democratic society could all too easily fall prey to the abuses and excesses of a police state. In order to safeguard the liberty of citizens, the *Criminal Code* requires the police, when attempting to obtain a warrant for an arrest, to demonstrate to a judicial officer that they have reasonable and probable grounds to believe that the person to be arrested has committed the offence. In the case of an arrest made without a warrant, it is even more important for the police to demonstrate that they have those same reasonable and probable grounds upon which they base the arrest.
>
> The importance of this requirement to citizens of a democracy is self-evident. Yet society also needs protection from crime. This need requires that there be a reasonable balance achieved between the individual's right to liberty and the need for society to be protected from crime. Thus the police need not establish more than reasonable and probable grounds for an arrest. The vital importance of the requirement that the police have reasonable and probable grounds for making an arrest and the need to limit its scope was well expressed in *Dumbell v. Roberts*, [1944] 1 All E.R. 326 (C.A.), wherein Scott L.J. stated at p. 329:
>
> > The power possessed by constables to arrest without warrant, whether at common law for suspicion of felony, or under statutes for suspicion of various misdemeanours, provided always they have reasonable grounds for their suspicion, is a valuable protection to the community; but the power may easily be abused and become a danger to the community instead of a protection. The protection of the public is safeguarded by the requirement, alike of the common law and, so far as I know, of all statutes, that the constable shall before arresting satisfy himself that there do in fact exist reasonable grounds for suspicion of guilt. That requirement is very

> limited. The police are not called on before acting to have anything like a *prima facie* case for conviction; but the duty of making such inquiry as the circumstances of the case ought to indicate to a sensible man is, without difficulty, presently practicable, does rest on them; for to shut your eyes to the obvious is not to act reasonably.
>
> (Page 249.)

[62] Similarly, in *R. v. Pearson*, [1992] 3 S.C.R. 665, Lamer C.J.C. explained why sworn belief on reasonable grounds for arrest is fundamental to the presumption of innocence, an age-old principle of justice and a *Charter* value:

> Examples are legion of how the various stages of the criminal process have accommodated themselves to the fundamental principle that the assumed innocence of an accused or a suspect is the starting point for any proposed interference with that person's life, liberty or security of the person. In general, one who proposes to lay an information must believe, on reasonable grounds, that an offence has been committed: see, e.g., *Criminal Code* , s. 504 . The justice receiving the information must consider, before issuing process, that a case for doing so has been made out: see, e.g., *Criminal Code* , s. 507(1) . Much the same may be said with respect to the power to arrest. In general, a peace officer must have reasonable grounds to effect the arrest. There must be reasonable and probable grounds to demand a breath sample under s. 254(3) of the *Code*, and reasonable grounds must be shown before a search warrant may be issued: s. 487(1). Each of these cases may be seen as an example of the broad but flexible scope of the presumption of innocence as a principle of fundamental justice under s. 7 of the *Charter* . The principle does not necessarily require anything in the nature of proof beyond reasonable doubt, because the particular step in the process does not involve a determination of guilt. Precisely what is required depends upon the basic tenets of our legal system as exemplified by specific *Charter* rights, basic principles of penal policy as viewed in the light of "an analysis of the nature, sources, *rationale* and essential role of that principle within the judicial process and in our legal system, as it evolves": *Re B.C. Motor Vehicle Act*, *supra*, at p. 513.
>
> (Page 685)

[63] Chief Justice Lamer wrote in dissent in *Pearson*, although his comments quoted above were not disagreed with by the majority. In any event, they were adopted by the Court in *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489 at para. 34. Chief Justice Lamer also touched on this principle in the context of pre-trial detention in *R. v. Morales*, [1992] 3 S.C.R. 711, a bail case, at page 736:

> … The appellant concedes, quite properly in my opinion, that danger or likelihood that an individual will commit a criminal offence does not in itself provide just cause for detention. In general, our society does not countenance preventive detention of individuals simply because they have a proclivity to commit crime. …

[64] An important exception to the law enunciated in *Storrey, Pearson, Demers,* and *Morales*, foreshadowed by Lamer C.J.'s words "in general" which prefaced his statements of the principle in both *Demers* and *Morales*, is that persons *who are about to commit indictable offences* can be lawfully arrested. Section 495(1)(a) of the *Code* reads:

> A peace officer may arrest without warrant
>
> (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence; …

[65] The words of section 495(1)(a) limit the "preventive" power of arrest to indictable offences, although the power arguably extends to summary conviction offences.

[66] The Ontario Court of Appeal considered the preventive power of arrest under section 495(1)(a) in *Brown v. Regional Municipality of Durham Police Services Board* (1998), 43 O.R. (3d) 223, 167 D.L.R. (4th) 672 (C.A.), leave to appeal to SCC granted but appeal discontinued, [2000] 2 S.C.R. vi (note), in the context of the detention of members of a motorcycle club whom the police believed posed a real and present danger to the community. In the course of deciding that the detentions were unlawful, Doherty J.A. explained the common law power to arrest or detain in order to prevent an apprehended breach of the peace:

> [74] … The apprehended breach must be imminent and the risk that the breach will occur must be substantial. The mere possibility of some unspecified breach at some unknown point in time will not suffice. These features of the power to arrest or detain to avoid a breach of the peace place that power on the same footing as the statutory power to arrest in anticipation of the commission of an indictable offence. … To properly invoke either power, the police officer must have reasonable grounds for believing that the anticipated conduct, be it a breach of the peace or the commission of an indictable offence, will likely occur if the person is not detained.
>
> [75] Neither the power to arrest in anticipation of the commission of an indictable offence nor the power to arrest for an apprehended breach of the peace is meant as a mechanism whereby the police can control and monitor on an ongoing basis the

> comings and goings of those they regard as dangerous and prone to criminal activity.
>
> . . .
>
> [78] … The common law ancillary power doctrine has never equated the scope of the police duties with the breadth of the police powers to interfere with individual liberty in the performance of those duties …. Any interference with individual liberty must be justified as necessary …. *When taking proactive measures to maintain the public peace, the requisite necessity arises only when there is a real risk of imminent harm. Before that point is reached, proactive policing must be limited to steps which do not interfere with individual freedoms.*
>
> [79] The balance struck between common law police powers and individual liberties puts a premium on individual freedom and makes crime prevention and peacekeeping more difficult for the police. In some situations, the requirement that there must be a real risk of imminent harm before the police can interfere with individual rights will leave the police powerless to prevent crime. The efficacy of laws controlling the relationship between the police and the individual is not, however, measured only from the perspective of crime control and public safety. We want to be safe, but we need to be free.
>
> (Emphasis added.)

[67] I agree with Justice Doherty's reasoning in *Brown* that a preventive arrest, be it pursuant to section 495(1)(a) or the common law, requires *an informant's belief on reasonable grounds* that there is a *substantial risk* that a *specified offence* will occur *imminently*. Such a restrictive interpretation is in keeping with our constitutional values.

[68] Section 507 of the *Code* sets out when a justice (or judge) can issue an arrest warrant. The judge must be satisfied that a case for doing so has been made out *after* having been presented with an Information swearing that a criminal offence has been committed. This means, as a first step, that the law respecting the grounds required for arrest as set out in *Storrey*, *Morales*, and *Pearson* must be followed. Accordingly, any difference between the grounds required for laying a section 810.2 Information and the grounds required for obtaining a warrant to arrest a person who is alleged to have committed a criminal offence must be considered.

[69] The reasonable grounds required to arrest a person who is alleged to have committed an offence are twofold: (1) the informant must have the subjective belief that an offence was committed and (2) the informant's grounds for that belief must meet objective evaluation. According to *Brown*,

reasonable grounds to arrest a person who is about to commit an offence require both subjective belief in a substantial risk of an imminent specific offence being committed and that those grounds pass objective evaluation. By contrast, section 810.2 requires "a fear based on reasonable grounds that a person will commit a serious personal injury offence". These words require a judge to evaluate whether an informant's fear that a serious personal injury offence of an unspecified nature and in respect of unspecified persons will be committed at some unknown point in time or place is based on reasonable grounds. The reasonable grounds required to lay a section 810.2 Information are of a lesser quality than those that *Storrey* stipulates are required to execute an arrest. Fear that something will happen, even if based on reasonable grounds, is lower than belief that something has happened or will imminently happen. The kind of details that are required to lay an Information alleging the commission of a criminal offence – respecting time, place, victims, and what happened, are not required in order to lay a section 810.2 Information. These details are the very factors that enhance the reasonableness of reasonable grounds and enable objective evaluation of whether charges should be laid and warrants of arrest ought to be issued. In the absence of such details, fear can still be reasonable. But such fear, though genuine and not unreasonable, leaves the power of arrest susceptible to abuse which in turn can jeopardize freedom. Interpreting section 810.2(2) to include the power of arrest would make it easier to arrest a person for not committing an offence than it would be to arrest a person for committing an offence. Arresting persons on the lower standard of fear is not in accordance with the jurisprudence respecting grounds for arrest and would not, in my view, provide the necessary "important protection" from "the abuses and excesses of a police state" (*Storrey*, at page 249).

[70] In deciding the Crown's *certiorari* application, the Justice acknowledged jurisprudential conflict respecting whether section 515 applies to section 810.2 peace bond proceedings. He relied on cases from three Canadian appellate courts as "the weight of authority in Canada" to support his decision. This "weight of authority" has its basis in *R. v. Allen*, (1985), 18 C.C.C. (3d) 155 (Ont. C.A.), which decided that a judge had the power to issue a warrant of arrest to cause a defendant to a peace bond proceeding to appear "notwithstanding that the section does not create an offence" (paragraph 13). The *Allen* court relied on the principle of *mutatis mutandis* to give effect to the Crown's argument. In so ruling, the Court did not itemize or analyze the modifications required to do so or address the difference between proceedings and defendants thereto respecting peace

bond Informations and those respecting criminal offences. Neither did the Court consider the law respecting the power of arrest.

[71] Some years later in *Budreo*, the Ontario Court of Appeal was asked to reconsider its decision in *Allen* in the context of a section 810.1 peace bond proceeding. The Court obliged, but came to the same result as in *Allen*, saying at paragraph 62:

> The appellant asked us to reconsider Allen on its own terms or in the light of the *Charter*. In my view, Allen was correctly decided. Applying provisions relating to a charge against an accused (ss. 507(4) and 515) to a proceeding commenced by the laying of an information (s. 810.1) is a modification contemplated by s. 795 of the *Code*. I am supported in this conclusion by the decision of the Saskatchewan Court of Appeal in *R. v. Wakelin* (1992), 71 C.C.C. (3d) 115, 97 Sask. R. 275 (C.A.), which reached a similar result.

[72] The *Budreo* court concluded that sections 515 and 507(4) applied to a defendant in a section 810.1 peace bond proceeding, saying that any modifications required to make the application work were contemplated by section 795 of the *Code.* The *Budreo* court did not itemize or analyse the modifications to the wording in sections 515 and 507 required to enable the application of section 515 to section 810.1. Neither did it consider the difference between defendants in peace bond proceedings and those who are criminally charged, and the *Code* provisions in relation to compelling their respective appearances, or consider the law respecting the power of arrest. Notably, in 2002, subsequent to both *Allen* and *Budreo*, section 507.1 of the *Code* was enacted. Section 507.1 specifically excludes the power of arrest from applying to sections 810 and 810.1 proceedings. Accordingly *Allen* and *Budreo,* on their specific facts, are no longer good law.

[73] The *Budreo* court reasoned that the existence of judicial discretion (as to whether to issue a warrant of arrest for a peace bond defendant) was "an important constitutional safeguard and procedural protection" (paragraph 64). The Crown relies on that reasoning in this case, saying there is no cause for concern in empowering judges to issue arrest warrants because judges can be trusted to exercise their discretion to do so only in deserving circumstances, and if they betray that trust by issuing arrest warrants in inappropriate circumstances, they can be corrected by higher courts.

[74] I am not persuaded by this argument. Such a view effectively endorses judges circumventing established law in favour of the "trust me" approach. In this regard, I share the view expressed by Lamer C.J. at page 729 of *Morales* that "[a] standardless sweep does not become acceptable

simply because it results from the whims of justices and justices of the peace rather than the whims of law enforcement officials".

[75] Another of the cases in "the weight of authority" is *R. v. Wakelin* (1992), 97 Sask. R. 275 (C.A.), which considered the applicability of section 515 bail provisions to section 810 peace bond proceedings. The *Wakelin* Court concluded that section 515 of the *Code* did apply to peace bond proceedings, relying on *Allen* as authority for the proposition that a judge could issue an arrest warrant to cause a party to a section 810 peace bond Information to appear. The Court then reasoned that "it would be anomalous if the judicial interim release provisions did not apply" (paragraph 16) (presumably because there would be no other way to release an arrested party). Although the *Wakelin* Court's conclusion logically followed from its acceptance of the *Allen* ratio, it, too, did not itemize or analyze the modifications to *Code* provisions necessary to enable its conclusion, consider the scheme of the *Code* respecting the difference between peace bond proceedings and proceedings respecting criminal charges and the defendants thereto, or the jurisprudence respecting the power of arrest. I note that *Wakelin* would also no longer appear to be good law on its specific facts given the enactment of section 507.1.

[76] In *R. v. Cachine*, 2001 BCCA 295, the British Columbia Court of Appeal concluded that section 515 applied to a peace bond proceeding under section 810.2 of the *Code*. In doing so, it rejected the reasoning in *Forrest* and followed the Ontario Court of Appeal's decision in *Budreo*, saying that section 795 of the *Code* provided an economical way for Parliament to give effect to its intent to permit defendants to peace bond Informations to be arrested. While *Cachine* dealt with a section 810.2 proceeding, it too, did not itemize or analyze the modifications to the *Code* provisions required to enable its decision. Neither did it consider the scheme of the *Code* regarding the difference between proceedings and defendants respecting peace bonds and criminal charges, or consider the law respecting the power of arrest.

[77] I do not agree with the decisions in *Allen*, *Boudreo*, *Wakelin*, or *Cachine*. Rather, I favour the reasoning in the *MacAusland* and *Forrest* cases, which to my mind produces a fair and just result in keeping with the principles of statutory interpretation, in harmony with the scheme of the peace bond provisions in the *Code,* and in accordance with the law respecting the power of arrest.

CONCLUSION

[78] In summary, the provisions of Part XVI (compelling appearances) are inconsistent with the peace bond provisions in Part XXVII of the *Code*. As well, the modifications to the language of sections 515 and 507 of the *Code* required to enable a justice to subject a defendant to a section 810.2 peace bond proceedings to a show cause hearing are substantial and well beyond the substitutions of detail envisioned by the language in section 810 and 795 – they are of such a nature and character as to effectively alter the law respecting the power of arrest.

[79] In the result, a judge cannot compel the appearance of a defendant to a section 810.2 Information by issuing a warrant of arrest. If an informant has reasonable and probable grounds to believe there is a substantial risk that an imminent and specific serious personal injury offence will be committed, a charge under section 495 can be laid and the alleged offender arrested if indicated. Fears based on more general concerns about a person's history of violence as a predictor of future conduct can be addressed by laying a section 810.2 peace bond Information, summonsing the defendant to appear, hearing the merits of the Informant's fear, and determining whether the defendant ought to be required to enter into a recognizance.

[80] Finally, I would observe that there was a simpler way to address public safety concerns about Mr. Penunsi committing "a serious personal injury offence" upon his release. That simpler way was to have him summoned to appear at an earlier date so that a merits hearing could take place prior to his release from prison.

[81] Given my conclusion, it is not necessary to consider Mr. Penunsi's *Charter* argument that a person's section 7 rights would be infringed by being arrested in the absence of having committed an offence.

DISPOSITION

[82] In the result, the Judge did not err in refusing the Crown's request to subject Mr. Penunsi to a show cause hearing. Mr. Penunsi was not under arrest respecting the section 810.2 peace bond Information when he appeared in court, and the Judge recognized that, although the point is not necessary to decide. What is important is that section 810.2(2) does not authorize a judge to compel the appearance of a defendant to a section 810.2 Information by issuing a warrant of arrest. I would therefore allow the appeal and restore the ruling of the Judge.

_____

L. R. Hoegg J.A.

_____

J.D. Green C.J.N.L.

_____

C.W. White J.A.