SUPREME COURT OF CANADA

CITATION: R. *v.* Penunsi, 2019 SCC 39

APPEAL HEARD: February 21, 2019
JUDGMENT RENDERED: July 5, 2019
DOCKET: 38004

BETWEEN:

Her Majesty The Queen
Appellant

and

Albert Penunsi
Respondent

- and -

Director of Public Prosecutions, Attorney General of Ontario, Yukon Legal Services Society, Canadian Civil Liberties Association, Canadian Broadcasting Corporation and Canadian Association for Progress in Justice
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

REASONS FOR JUDGMENT: (paras. 1 to 86)
Rowe J. (Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown and Martin JJ. concurring)

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Her Majesty The Queen *Appellant*

v.

Albert Penunsi *Respondent*

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Attorney General of Ontario,
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Canadian Broadcasting Corporation and
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Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL OF NEWFOUNDLAND AND LABRADOR

Criminal law — Sureties to keep the peace — Application of arrest and judicial interim release provisions — Information laid against defendant under peace bond provisions of Criminal Code on basis of reasonable grounds to fear he would commit serious personal injury offence — Crown's request to show cause why defendant ought to be detained or required to abide by certain conditions pending hearing on Information denied by provincial court judge — Whether judge can compel appearance of defendant to Information — Whether power of arrest and judicial interim release provisions of Criminal Code apply to peace bond proceedings — Criminal Code, R.S.C. 1985, c. C-46, s. 810.2.

P was nearing the end of a prison sentence when a peace bond Information under s. 810.2 of the *Criminal Code* was laid against him by an RCMP officer. The officer swore that there were reasonable grounds to fear P would commit a serious personal injury offence upon his release. Days before the end of his prison sentence, P was brought to court to respond to the Information, at which time a date was set for the hearing to determine whether the fear sworn to in the Information was reasonably held. However, the hearing was scheduled to take place after P's release from prison. Wishing to avoid P's unconditional release in the interim period, the Crown sought to show cause why P ought to be detained or required to abide by certain conditions pending the hearing. In denying the Crown's request, the provincial court judge held that he did not have jurisdiction to subject P to a show cause hearing,

concluding that the judicial interim release ("JIR") provisions of the *Criminal Code* do not apply to peace bond proceedings.

The Crown sought judicial review of the provincial court judge's decision. Prior to the application being heard, P voluntarily entered a recognizance with conditions at his peace bond merits hearing. Though the issue was moot, the Supreme Court of Newfoundland and Labrador granted declaratory relief accepting that a judge can compel a defendant's initial appearance by issuing a warrant of arrest and thus, that the JIR provisions must apply to provide a procedure by which the defendant could subsequently be released. The Newfoundland and Labrador Court of Appeal allowed P's appeal and restored the provincial court judge's ruling.

Held: The appeal should be allowed and the order of the Court of Appeal quashed.

The arrest and JIR provisions of the *Criminal Code* apply, with necessary modifications, to peace bond proceedings under s. 810.2 of the *Criminal Code* and to all other peace bond proceedings. The appearance of a defendant to a peace bond Information may be compelled by a summons or a warrant of arrest. A judge or justice of the peace also has jurisdiction to subject a person to a show cause hearing when he or she has been arrested in relation to a peace bond Information and brought before the court.

Section 810.2(2) states that a provincial court judge who receives information under s. 810.2(1) "may cause the parties to appear before a provincial court judge". However, there is no internal mechanism provided by Parliament within s. 810.2 by which a judge could compel the appearance of either party. Rather, the procedures for compelling attendance are found in Part XVI of the *Criminal Code* ("Compelling Appearance of Accused Before a Justice and Interim Release"). Instead of reproducing those procedures in the peace bond provisions, Parliament has chosen to apply the relevant Part XVI provisions to the peace bond scheme via a series of incorporating provisions. First, each peace bond provision (except for s. 810.02) expressly incorporates s. 810(5). Then, s. 810(5) incorporates all provisions of Part XXVII ("Summary Convictions"), including s. 795, into peace bond proceedings. Section 795, in turn, incorporates provisions of Part XVI into Part XXVII. Therefore, ss. 810.2(8), 810(5), and 795 operate together to incorporate the provisions of Part XVI, which houses the summons, arrest, and JIR provisions, into Part XXVII, which houses the peace bond provisions.

However, s. 795 does not import Part XVI wholesale into Part XXVII, but rather, its wording limits its application: the provisions of Part XVI apply "in so far as they are not inconsistent with" Part XXVII, and "with any necessary modifications". Accordingly, whether Part XVI applies to peace bond proceedings depends on the proper interpretation of the statutory language in s. 795. When that language is properly interpreted, it is clear that Parliament intended the arrest and JIR provisions under Part XVI to apply to peace bond proceedings. The provisions of Part

XVI, with respect to compelling appearance, are not inconsistent with the peace bond provisions. To the contrary, they are necessary for the proper functioning of the scheme. Parliament would not have sought to create a scheme where a judge may hold a hearing to determine whether to order a defendant to enter into a recognizance to keep the peace, but make no provision whereby a judge can ensure the defendant attends the hearing. The application of the JIR provisions flows from the power of arrest under s. 507 of the *Criminal Code*. Where a defendant is arrested and detained, it follows that the judicial interim release scheme applies in order to release the defendant from custody. When applied with regard to the context and purpose of the peace bond scheme, the arrest and JIR provisions are a consistent and appropriate interim measure and necessary to the function and integrity of the peace bond proceedings. Furthermore, the arrest and JIR provisions apply to peace bond proceedings with simple modifications that do not amount to substantive change in the law. Accordingly, Parliament intended the arrest and JIR provisions under Part XVI to apply to peace bond proceedings.

The proper application of the arrest and JIR provisions in the context of peace bond proceedings must be guided by the policy objectives of timely and effective justice, and minimal impairment of liberty. To begin, when exercising the discretion whether to hold a hearing, the justice must consider whether the fear sworn to in the Information is reasonably held. Initiating a s. 810.2 peace bond proceeding upon a person's release from prison risks a further deprivation of liberty after the completion of a sentence already determined to be proportionate. Without further

evidence that the feared conduct will occur, a fear based solely on the offence for which a defendant is serving a sentence will not be sufficient. Where the justice exercises his or her discretion to cause the parties to appear, he or she will proceed to Part XVI of the *Criminal Code* which creates a ladder of increasingly coercive measures to compel appearance of a defendant before a court. At the low end of the ladder is a summons or an appearance notice issued by a peace officer which is the default process for compelling attendance. Where a defendant appears before a justice pursuant to a summons and the hearing is adjourned, the justice has no jurisdiction to impose interim conditions pending the merits hearing. If new information comes to light after the issuance of a summons, including at the initial hearing, which information raises concerns regarding the risk the defendant poses to the public or the likelihood of his or her attendance at the proceeding, an arrest warrant may be sought at that time.

Higher up the ladder is arrest, and release by an officer in charge on an undertaking or recognizance. Where an Information is laid before a justice and he or she finds that there are "reasonable grounds to believe that it is necessary in the public interest", he or she may issue a warrant for the defendant's arrest. This phrase must be interpreted in light of the context (where the subject is not suspected of having committed a criminal offence) and the purpose (to bring the subject forward to a hearing) of the provision operating within the peace bond scheme. Accordingly, it will only be necessary in the public interest to issue an arrest warrant where a case has been made out that the defendant will not otherwise attend court or that the

defendant poses an imminent risk to the public. While placing a person under arrest inherently infringes his or her liberty, the infringement should be minimized to the extent possible.

Higher still up the ladder is detention and judicial interim release. In the rare case where a peace bond defendant is arrested and held over for bail, the JIR provisions under s. 515 provide the mechanism to release the defendant from custody. These provisions must be applied with due regard to ensuring the attendance of the accused at the peace bond hearing, and the ultimate goal of the peace bond scheme: to place the defendant under recognizance where an informant has a reasonably held fear that the defendant will commit certain harms. It would be inconsistent with the peace bond provisions to impose conditions aimed at protecting against a risk to the public that surpass the conditions that could be placed on a defendant at the conclusion of a hearing on the merits of the peace bond application. The default is release on the giving of an undertaking without conditions, unless the prosecutor (or the informant) can show cause why an order for more stringent release conditions should be made. For a condition to be reasonable, it must have a nexus with either ensuring the defendant's attendance in court, or with the feared conduct sworn to in the Information. Under most circumstances, the final rung of the ladder would be a recognizance without sureties with reasonable conditions in the circumstances. The circumstances where detention is justified in the peace bond context must also mirror the possible outcomes provided for in the peace bond provisions. A judge has authority to order detention following a peace bond hearing only where the defendant

fails or refuses to enter into a recognizance to keep the peace and be of good behaviour. Accordingly, the rare case where detention may be justified will likely only arise where a defendant refuses to sign a recognizance and therefore refuses to be bound by conditions related to ensuring attendance at the peace bond hearing, and/or to addressing in the interim the fear sworn to in the Information.

Cases Cited

Overruled: *MacAusland v. Pyke* (1995), 139 N.S.R. (2d) 142; **approved:** *R. v. Budreo* (1996), 27 O.R. (3d) 347, aff'd *R. v. Budreo* (2000), 46 O.R. (3d) 481, leave to appeal dismissed, [2001] 1 S.C.R. vii; *R. v. Cachine*, 2001 BCCA 295, 154 C.C.C. (3d) 376; *R. v. Allen* (1985), 18 C.C.C. (3d) 155; *R. v. Wakelin* (1991), 71 C.C.C. (3d) 115; *R. v. Nowazek*, 2018 YKCA 12, 366 C.C.C. (3d) 389; **referred to:** *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; *International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange*, [1967] S.C.R. 628; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46; *R. v. Myers*, 2019 SCC 18; *R. v. Oland*, 2017 SCC 17, [2017] 1. S.C.R. 250; *R. v. Smith*, 2004 SCC 14, [2004] 1 S.C.R. 385; *Goodyear Tire & Rubber Co. of Canada v. The Queen*, [1956] S.C.R. 303; *R. v. S. (S.)*, [1990] 2 S.C.R. 254; *Mackenzie v. Martin*, [1954] S.C.R. 361; *R. v. Parks*, [1992] 2 S.C.R. 871; *R. v. Woking Justices, Ex p. Gossage*, [1973] 2 All ER 621; *R. v. Forrest* (1983), 8 C.C.C. (3d) 444; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R.

27; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *Bessette v. British Columbia* (*Attorney General*), 2019 SCC 31; *2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919; *R. v. Gill*, [1991] B.C.J. No. 3255; *R. v. Schafer*, 2018 YKTC 12; *R. v. Antic*, 2017 SCC 27, [2017] 1 S.C.R. 509; *R. v. Goikhberg*, 2014 QCCS 3891; *R. v. Hebert* (1984), 54 N.B.R. (2d) 251; *R. v. Hall*, 2002 SCC 64, [2002] 3 S.C.R. 309; *R. v. Hall* (1996), 138 Nfld. & P.E.I.R. 80; *R. v. Walsh*, 2015 ABCA 385; *Smith v. Jones*, [1999] 1 S.C.R. 455; *R. v. Morales*, [1992] 3 S.C.R. 711.

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Criminal Code, R.S.C. 1985, c. C-46, ss. 83.29(4), 83.3, Part XVI, 493, Form 9, 499, 503, 504, 507, 507.1, 515, Part XVIII, 715.37(4), Part XXVII, 788, 795, 810, 810.01, 810.011, 810.02, 810.1, 810.2, 811.

Criminal Code, S.C. 1953-54, c. 51, s. 717.

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APPEAL from a judgment of the Newfoundland and Labrador Court of Appeal (Green, White and Hoegg JJ.A.), 2018 NCLA 4, 357 C.C.C. (3d) 539, [2018] N.J. No. 13 (QL), 2018 CarswellNfld 12 (WL Can.), setting aside a decision of Goodridge J., 2015 NLTD(G) 141, 373 Nfld. & P.E.I.R. 170, [2015] N.J. No. 337 (QL), 2015 CarswellNfld 385 (WL Can.). Appeal allowed.

Lisa M. Stead, for the appellant.

Jessica Tellez, for the respondent.

David W. Schermbrucker and *Elaine Reid*, for the intervener the Director of Public Prosecutions.

Written submissions only by *Gregory J. Tweney* and *Stacey D. Young*, for the intervener the Attorney General of Ontario.

Vincent Larochelle and *Greg Johannson*, for the intervener the Yukon Legal Services Society.

Scott Bergman, for the intervener the Canadian Civil Liberties Association.

Sean A. Moreman and *Farid Muttalib*, for the intervener the Canadian Broadcasting Corporation.

Ryan D.W. Dalziel and *Joseph J. Saulnier*, for the intervener the Canadian Association for Progress in Justice.

The judgment of the Court was delivered by

ROWE J. —

I. Background

[1] This appeal raises the question of whether the judicial interim release ("JIR") provisions — and by necessary implication, the power of arrest — under Part XVI of the *Criminal Code*, R.S.C. 1985, c. C-46, apply to provisions under the heading "Sureties to Keep the Peace" in Part XXVII of the *Criminal Code* ("peace bond provisions"). The JIR provisions (commonly referred to as the bail provisions) require a judge to release an accused person pending trial without conditions unless the Crown can demonstrate why some more restrictive measure is necessary (for example, an order to abide by interim conditions, or pre-trial custody). A peace bond is an order from a judge to keep the peace, be of good behaviour and abide by certain conditions. A peace bond may be ordered where the judge is satisfied on the evidence that an informant has reasonable grounds to fear that the defendant will cause harm to another person. Peace bonds are not "offences" under the *Criminal Code*. For the reasons that follow, I conclude that the arrest and JIR provisions apply, with necessary modifications, to peace bond proceedings. The peace bond provision at issue in this appeal is s. 810.2. However, except where otherwise specified, the following applies to all peace bond provisions.

[2] Mr. Penunsi was nearing the end of a prison sentence when a peace bond Information under s. 810.2 of the *Criminal Code* was laid against him by a Royal Canadian Mounted Police ("RCMP") officer. In the Information, the officer swore that there were reasonable grounds to fear Mr. Penunsi would commit a serious personal injury offence upon his release. The sentence Mr. Penunsi was serving at the time was for breach of a prior s. 810.2 peace bond. A judge issued a warrant for Mr.

Penunsi's arrest. However, the warrant was never executed, as Mr. Penunsi was already in custody.

II. Judicial History

[3] Days before the end of his prison sentence, Mr. Penunsi was escorted by the RCMP to court to respond to the Information, at which time a date was set for the hearing to determine whether the fear sworn to in the Information was reasonably held. However, the hearing was scheduled to take place after Mr. Penunsi's release from prison. Wishing to avoid Mr. Penunsi's unconditional release in the interim period, the Crown sought to show cause why Mr. Penunsi ought to be detained or required to abide by certain conditions pending the hearing. In denying the Crown's request, the provincial court judge held that he did not have jurisdiction to subject Mr. Penunsi to a show cause hearing, concluding that the JIR provisions do not apply to peace bond proceedings. He added that even if he did have jurisdiction, he would decline to exercise it.

[4] The Crown sought judicial review of the provincial court judge's decision, requesting *certiorari* and a declaration that the JIR provisions are applicable to proceedings under s. 810.2, and that the judge was under a statutory duty to conduct a show cause hearing at the request of the Crown. Prior to the *certiorari* application being heard, Mr. Penunsi voluntarily entered a recognizance with conditions at his peace bond merits hearing.

[5] Though the issue was moot, the Supreme Court of Newfoundland and Labrador granted declaratory relief (2015 NLTD(G) 141, 373 Nfld. & P.E.I.R. 170). The court accepted that a judge can compel a defendant's initial appearance respecting a s. 810.2 Information by issuing a warrant of arrest. Consequently, the JIR provisions must apply to provide a procedure by which the defendant could subsequently be released. Mr. Penunsi appealed.

[6] The Newfoundland and Labrador Court of Appeal restored the provincial court judge's ruling. The court found that the provisions in Part XVI of the *Criminal Code* ("Compelling Appearance of Accused Before a Justice and Interim Release") were inconsistent with the peace bond scheme and thus did not apply to it. The court held that it would be inconsistent to detain an individual in respect of a proceeding in which incarceration was not available as a sanction. It held that the modifications to the statutory language required to enable a judge to subject a defendant named in a peace bond Information to a show cause hearing would be "of such a nature and character as to effectively alter the law respecting the power of arrest" (2018 NLCA 4, 357 C.C.C. (3d) 539, at para. 78).

III. Parties' Submissions

[7] Both parties urge upon this Court to decide the issue despite the fact that it is moot.

[8] The appellant Crown submits that the Newfoundland and Labrador Court of Appeal erred in finding that Part XVI of the *Criminal Code* does not apply to peace bond proceedings. In its view, s. 810.2(2) states that a judge may "cause the parties to appear" to answer to a sworn peace bond Information, and thus authorizes a judge to use the procedures set out in Part XVI to bring the necessary people to court for the hearing, either pursuant to a summons or an arrest warrant. No major modifications are required to the statutory language in order to apply the relevant provisions under Part XVI to the peace bond provisions. The Crown points to a number of appellate decisions that support its position. It asks this Court to follow the weight of judicial authority and answer the question of whether the arrest and JIR provisions apply to peace bond proceedings in the affirmative.

[9] The respondent, Mr. Penunsi, relies on a textual analysis of the statutory language. He argues that the arrest and JIR provisions of the *Criminal Code* permit the exercise of those powers only against an "accused" as that term is defined in s. 493 (in Part XVI). The definition of "accused" in s. 493 includes (a) a person to whom a peace officer has issued an appearance notice (in lieu of arrest); and (b) a person arrested for a criminal offence. In his submission, "accused" cannot include a defendant to a peace bond proceeding, because a defendant to a peace bond proceeding is not charged with committing a criminal offence. In the respondent's view, the modifications necessary for the JIR provisions to operate within the peace bond scheme extend beyond *mutatis mutandis.* The respondent emphasizes the holding in *MacAusland v. Pyke* (1995), 139 N.S.R. (2d) 142 (S.C.), that applying the

JIR provisions to peace bond proceedings would potentially subject a defendant to a greater infringement of liberty in the interim than would be possible following a hearing of the peace bond application on the merits (para. 31). This outcome, as put by the Court of Appeal and echoed by the respondent, would be "illogical and absurd" (para. 58, cited in R.F., at para. 77).

IV. Analysis

A. *Mootness*

[10] "The doctrine of mootness reflects the principle that courts will only hear cases that will have the effect of resolving a live controversy which will or may actually affect the rights of the parties to the litigation except when the courts decide, in the exercise of their discretion, that it is nevertheless in the interest of justice that the appeal be heard" (*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 17). The expenditure of judicial resources on a moot point is warranted in cases that raise important issues but are evasive of review (see, e.g., *Doucet-Boudreau*, at para. 22; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at p. 360; *International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange*, [1967] S.C.R. 628; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46).

[11] This Court has recently held in *R. v. Myers*, 2019 SCC 18, and *R. v. Oland*, 2017 SCC 17, [2017] 1 S.C.R. 250, that issues of judicial interim release can be evasive of review due to their temporary nature. Both the appellant and the respondent urge this Court to reconcile the divide in the jurisprudence on the issue central to this appeal despite the fact that the determination will have no immediate impact on Mr. Penunsi. I agree with the parties that this is an occasion where the significance of the issue and the inconsistency in the appellate jurisprudence merits the expenditure of resources to decide the moot issue (*R. v. Smith*, 2004 SCC 14, [2004] 1 S.C.R. 385, at para. 50; *Borowski*).

B. *Peace Bonds and the Criminal Power*

[12] The peace bond is an instrument of preventive justice. The prevention of crime is a well-recognized purpose of the criminal law. As Locke J. explained in *Goodyear Tire & Rubber Co. of Canada v. The Queen*, [1956] S.C.R. 303: "The power to legislate in relation to criminal law is not restricted, in my opinion, to defining offences and providing penalties for their commission. The power of Parliament extends to legislation designed for the prevention of crime as well as to punishing crime" (p. 308; see also *R. v. S. (S.)*, [1990] 2 S.C.R. 254, at p. 282).

[13] In *Mackenzie v. Martin*, [1954] S.C.R. 361, Kerwin J. (as he then was) wrote that a peace bond delivers preventive justice by "obliging those persons, whom there is probable grounds to suspect of future misbehaviour, to stipulate with and to give full assurance to the public, that such offence as is apprehended shall not

happen; by finding pledges or securities for keeping the peace, or for their good behaviour" (p. 368, citing W. Blackstone, *Commentaries on the Laws of England* (16th ed. 1825), cited in *R. v. Parks*, [1992] 2 S.C.R. 871, at p. 911, per Sopinka J.).

[14] *R. v. Budreo* (1996), 27 O.R. (3d) 347 (Ont. Ct. Gen. Div.) ("*Budreo S.C.*"), dealt with a constitutional challenge to the peace bond under s. 810.1 of the *Criminal Code.* Then J. referred to the preventative nature of the peace bond:

> The court in considering what constitutes fundamental justice in a liberal society must refer to the history of a particular power and the policy rationale behind it. Preventive justice is the exercise of judicial power not in order to sanction past conduct but to prevent future misbehaviour and harm. The exercise of this power is justified by the risk of harm or dangerousness posed by certain individuals . . . . [pp. 368-69]

This was echoed by Laskin J.A. in his decision affirming the reasons of Then J. (*R. v. Budreo* (2000), 46 O.R. (3d) 481 (C.A.) ("*Budreo C.A.*"), leave to appeal dismissed, [2001] 1 S.C.R. vii:

> The criminal justice system has two broad objectives: punish wrongdoers and prevent future harm. A law aimed at the prevention of crime is just as valid an exercise of the federal criminal law power under s. 91(27) of the *Constitution Act, 1867*, as a law aimed at punishing crime. [Footnote omitted; para. 27]

[15] The modern peace bond can be traced back as early as the 1300's, to the common law practice of "binding over". "Binding over" described a judicial authority to make preventive orders to maintain social order despite no specific crime having

been charged, aimed at preventing a wide range of undesirable activity. The earliest reference to the practice was in the *Justices of the Peace Act 1361* (Eng.), 34 Edw. 3, c.1, where the power was granted to justices to "take of people who came before them sufficient mainprise of their good behaviour towards the king and his people" (Law Commission No. 222, *Binding Over: Report on Reference under Section 3 (1)(e) of the Law Commissions Act 1965* (1994), cited in D. Orr, "Section 810 Peace Bond Applications in Newfoundland" (2002), 46 *Crim. L.Q.* 391, at p. 391).

[16] In 1892, existing English law was codified in the *Criminal Code*, including the common law peace bond. Section 959(2) of the *Criminal Code, 1892*, S.C. 1892, c. 29, provided:

> 2. Upon complaint by or on behalf of any person that on account of threats made by some other person or on any other account, he, the complainant, is afraid that such other person will do him, his wife or child some personal injury, or will burn or set fire to his property, the justice before whom such complaint is made, may, if he is satisfied that the complainant has reasonable grounds for his fears, require such other person to enter into his own recognizances, or to give security, to keep the peace, and to be of good behaviour, for a term not exceeding twelve months.

[17] The 1892 peace bond provision bears strong similarity to the modern day peace bond provisions, but like the common law peace bond, there was no requirement to hold a hearing. Where a justice was satisfied that the "complainant" had a reasonably founded fear, the justice could require the "other person" to enter

into a recognizance to keep the peace and to be of good behaviour for a period not exceeding 12 months.

[18] Regarding the procedural requirements of common law peace bonds, Chief Justice Lamer, writing in dissent in *Parks*, cited a decision of the English Court of Appeal which noted:

> That is not to say that it would not be wise, and indeed courteous in these cases for justices to give such a warning; there certainly would be absolutely no harm in a case like the present if the justices, returning to court, had announced they were going to acquit, but had immediately said "We are however contemplating a binding-over; what have you got to say?" I think it would be at least courteous and perhaps wise that that should be done, but I am unable to elevate the principle to the height at which it can be said that a failure to give such a warning is a breach of the rules of natural justice. [Emphasis in original; pp. 893-94, quoting *R. v. Woking Justices, Ex p. Gossage*, [1973] 2 All ER 621, at p. 623 (Eng. C.A.).]

[19] In the 1954 amendments to the *Criminal Code*, S.C. 1953-54, c. 51, the phrases "cause the parties to appear", "evidenced adduced", and reference to the court "before which the parties appear" were introduced into s. 717 (a predecessor of s. 810). These amendments resulted in a more procedurally robust peace bond scheme; one where a hearing was required so that the defendant could have the opportunity to respond to the alleged fear and contest the peace bond. As will be discussed below, I respectfully cannot accept the conclusion of the Court of Appeal that the enactment of provisions which include the phrase "cause the parties to appear" (e.g. ss. 810(2) and 810.2(2)) are "special provisions to compel appearance", or that their enactment created a unique "scheme for dealing with peace bond Informations" (para. 50) to

compel the attendance of a defendant to a hearing. Rather, the introduction of the wording most likely reflected the requirement that, before ordering a defendant to enter a recognizance, a judge must hold a hearing to determine whether the informant's fear is reasonably founded.

[20] In addition to the general peace bond, based on fear of personal injury or damage to property (s. 810), Parliament has since the early 1990's added a number of specialized peace bonds respecting: fear of a criminal organization offence, including intimidation of a justice system participant or a journalist (s. 810.01); fear of a terrorism offence (s. 810.011 and s. 83.3);[1] fear of an offence related to forced marriage or child marriage (s. 810.02); fear of a sexual offence committed against a minor (s. 810.1); and fear of serious personal injury (s. 810.2).

[21] Each of the peace bonds shares the following common features.

[22] First, an Information may be laid by any person (the informant) where he or she has reasonable grounds to fear that another person (the defendant) will cause certain types of injury or damage to property, or commit certain types of offences. As I will discuss below, in certain instances, the consent of the Attorney General is required to lay the Information (e.g., s. 810.2(1)).

[1] Section 83.3 provides for a specialized peace bond designed to reduce the risk of terrorist activity. Unlike the peace bond provisions discussed in these reasons, s. 83.3 is contained in a different Part of the *Criminal Code* and includes internal powers of arrest, preventative detention, and judicial interim release that are exclusive to this section. Given the unique nature of this provision, it will not be considered in these reasons.

[23] Second, a judge (or justice of the peace in the case of a s. 810 peace bond) who receives an Information may "cause the parties to appear" and conduct a hearing on the merits of the application (e.g., s. 810.2(2)).[2] If satisfied by the evidence adduced at the hearing that the informant has reasonable grounds for his or her fear, the judge may order the defendant to enter a recognizance to keep the peace and be of good behaviour for a period not exceeding 12 months (e.g., s. 810.2(3)),[3] and place additional conditions on the defendant as prescribed by statute (e.g., s. 810.2(4.1)).

[24] Third, where a defendant fails or refuses to enter into a required recognizance, the judge may commit him or her to a term of imprisonment not exceeding 12 months (e.g., s. 810.2(4)).

[25] Finally, s. 811 provides that a person who breaches a peace bond faces up to four years' imprisonment where the charge proceeds by way of indictment and up to 18 months' imprisonment where the charge proceeds by way of summary conviction.

C. *Statutory Scheme*

[26] The officer who swore the Information against Mr. Penunsi did so under s. 810.2, which reads:

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[2] Each of the peace bond provisions provide for judicial discretion as to whether or not to hold a hearing, with the exception of one: s. 810(2) provides that a justice who receives an Information laid under s. 810(1) "shall cause the parties to appear".

[3] Under certain peace bond provisions, the period of recognizance may be extended to two years where the defendant has previously been convicted of an offence referred to in the relevant provision (e.g., s. 810.2(3.1)).

Where fear of serious personal injury offence

810.2 (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.

Appearances

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

Adjudication

(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.

Duration extended

(3.1) However, if the provincial court judge is also satisfied that the defendant was convicted previously of an offence referred to in subsection (1), the judge may order that the defendant enter into the recognizance for a period that does not exceed two years.

Refusal to enter into recognizance

(4) The provincial court judge may commit the defendant to prison for a term not exceeding twelve months if the defendant fails or refuses to enter into the recognizance.

Conditions in recognizance

(4.1) The provincial court judge may add any reasonable conditions to the recognizance that the judge considers desirable to secure the good conduct of the defendant, including conditions that require the defendant

(a) to participate in a treatment program;

(b) to wear an electronic monitoring device, if the Attorney General makes the request;

(c) to remain within a specified geographic area unless written permission to leave that area is obtained from the provincial court judge;

(d) to return to and remain at his or her place of residence at specified times;

(e) to abstain from the consumption of drugs except in accordance with a medical prescription, of alcohol or of any other intoxicating substance;

(f) to provide, for the purpose of analysis, a sample of a bodily substance prescribed by regulation on the demand of a peace officer, a probation officer or someone designated under paragraph 810.3(2)(a) to make a demand, at the place and time and on the day specified by the person making the demand, if that person has reasonable grounds to believe that the defendant has breached a condition of the recognizance that requires them to abstain from the consumption of drugs, alcohol or any other intoxicating substance; or

(g) to provide, for the purpose of analysis, a sample of a bodily substance prescribed by regulation at regular intervals that are specified, in a notice in Form 51 served on the defendant, by a probation officer or a person designated under paragraph 810.3(2)(b) to specify them, if a condition of the recognizance requires the defendant to abstain from the consumption of drugs, alcohol or any other intoxicating substance.

Conditions — firearms

(5) The provincial court judge shall consider whether it is desirable, in the interests of the defendant's safety or that of any other person, to prohibit the defendant from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or all of those things. If the judge decides that it is desirable to do so, the judge shall add that condition to the recognizance and specify the period during which the condition applies.

Surrender, etc.

(5.1) If the provincial court judge adds a condition described in subsection (5) to a recognizance, the judge shall specify in the recognizance how the things referred to in that subsection that are in the defendant's possession should be surrendered, disposed of, detained,

stored or dealt with and how the authorizations, licences and registration certificates that are held by the defendant should be surrendered.

Reasons

(5.2) If the provincial court judge does not add a condition described in subsection (5) to a recognizance, the judge shall include in the record a statement of the reasons for not adding the condition.

Condition — reporting

(6) The provincial court judge shall consider whether it is desirable to require the defendant to report to the correctional authority of a province or to an appropriate police authority. If the judge decides that it is desirable to do so, the judge shall add that condition to the recognizance.

Variance of conditions

(7) A provincial court judge may, on application of the informant, of the Attorney General or of the defendant, vary the conditions fixed in the recognizance.

Other provisions to apply

(8) Subsections 810(4) and (5) apply, with such modifications as the circumstances require, to recognizances made under this section.

While subs. (2) states that a provincial court judge "may cause the parties to appear", there is no internal mechanism provided by Parliament by which a judge could compel appearance of either party. The procedures for compelling attendance are found in Part XVI of the *Criminal Code*.

[27] Instead of reproducing the procedures of Part XVI in the peace bond provisions, Parliament has chosen to apply the relevant provisions regarding compelling attendance to the peace bond scheme via a series of incorporating provisions. The drafting technique of incorporation by reference is "an economical

one for Parliament to employ" (*R. v. Cachine*, 2001 BCCA 295, 154 C.C.C. (3d) 376, at para. 28).

[28] Parliament has chosen a rather circuitous route to incorporate the necessary procedures to cause the parties to appear. Each peace bond provision expressly incorporates s. 810(5), with the exception of one.[4] For example, s. 810.2(8) reads:

> **Other provisions to apply**
>
> **(8)** Subsections 810(4) and (5) apply, with such modifications as the circumstances require, to recognizances made under this section.

Section 810(5) provides:

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

Section 810(5) incorporates all provisions of Part XXVII, including s. 795, into peace bond proceedings. Section 795 incorporates provisions of Part XVI ("Compelling Appearance of Accused Before a Justice and Interim Release") into Part XXVII ("Summary Convictions"):

> **795.** The provisions of Parts XVI and XVIII with respect to compelling the appearance of an accused before a justice … in so far as they are not

[4] Section 810.02 (Fear of forced marriage or marriage under the age of 16 years), does not include a specific reference to s. 810(5). I make no determination as to whether Part XVI applies to this peace bond by operation of the other incorporating provisions.

> inconsistent with this Part, apply, with any necessary modifications, to proceedings under this Part.

[29] Together, ss. 810.2(8), 810(5), and 795 incorporate "[t]he provisions of Par[t] XVI . . . with respect to compelling appearance of an accused before a justice . . . in so far as they are not inconsistent with this Part . . . with any necessary modifications, to proceedings under this Part". The relevant provisions of Part XVI ("Compelling Appearance of Accused Before a Justice and Interim Release") will be discussed below.

[30] Whether the arrest and JIR provisions apply to peace bond proceedings turns on the proper interpretation of the incorporating language of s. 795: "in so far as they are not inconsistent with this Part" and "with any necessary modifications", and the similar language "with such modifications as the circumstances require" in s. 810(5). Whether the modifications required for Part XVI to operate within the peace bond scheme are the type of modifications contemplated by Parliament has been the subject of judicial debate.

D. *Two Lines of Jurisprudence*

[31] There are two lines of authority falling on either side of the issue. One line of authority is based on two decisions from the Ontario Court of Appeal (*R. v. Allen*, (1985), 18 C.C.C. (3d) 155; *Budreo C.A.*). The *Allen-Budreo* line holds that the arrest and JIR provisions contained in Part XVI apply to peace bond proceedings. In

Allen, the court considered the incorporating provision (what is now s. 795) and held that the arrest provision (what is now s. 507) was applicable *mutatis mutandis* to peace bond proceedings. In *R. v. Wakelin* (1991), 71 C.C.C. (3d) 115, the Saskatchewan Court of Appeal applied the reasoning in *Allen* to conclude that if the power of arrest applies, "it would be anomalous if the judicial interim release provisions did not apply" to peace bond proceedings (para. 16). This line culminated in the *Budreo C.A.* case, which upheld the constitutionality of the peace bond provided for by s. 810.1. The *Allen-Budreo* line was recently applied by the Yukon Territory Court of Appeal in *R. v. Nowazek*, 2018 YKCA 12, 366 C.C.C. (3d) 389. I rely on Fitch J.A.'s summary in *Nowazek* of the Ontario Court of Appeal's reasons in *Budreo C.A.*:

> In *Budreo*, . . . [the] defendant was a diagnosed paedophile who had just been released from prison after serving sentences for sexual offences involving children. He refused to consent to the imposition of a recognizance under s. 810.1. The defendant attended court voluntarily on police instructions. On the same day, a police officer swore an information under s. 810.1 that she had reasonable grounds to fear the appellant would commit sexual offences against children. The judge determined to issue process and concluded that the defendant's attendance in court to answer to the application should be compelled by an arrest warrant [notwithstanding that he was already there voluntarily]. The defendant was arrested outside the courtroom pursuant to a warrant issued under s. 507(4) of the *Code*. With the defendant now in custody, he was taken before the judge for a show cause hearing to determine whether he should be released on bail pending resolution of the s. 810.1 application. The defendant eventually agreed to the release conditions sought by the Crown and the s. 810.1 hearing was adjourned to a date one week later. He then applied for a declaration that ss. 810.1 and 507(4) violated the *Charter*.
>
> The Court . . . concluded that s. 795 contemplates the modification of ss. 507 and 515 to apply to proceedings commenced by the laying of an

information under s. 810.1, even though a defendant to a s. 810.1 information is not "an accused charged with an offence": paras. 59-62.

The Court emphasized that s. 507(4) requires a justice to issue a summons whenever possible. The judge may issue an arrest warrant only where necessary in the public interest, which, in the s. 810.1 context, means where the defendant will not otherwise attend court or poses an imminent risk to the safety of children: para. 66. The Court also noted that, if an arrest warrant is issued and the defendant is brought before a justice, s. 515 demands the release of the defendant without conditions unless the Crown can show cause for a more restrictive order. The justice must exercise his or her discretion under s. 515 "judicially and bearing in mind the limited conditions that can be imposed following a successful s. 810.1 application": para. 67.

The Court found that the availability of pre-hearing detention in s. 515 did not render s. 810.1 overbroad, notwithstanding that detention is more severe than any sanction available to the court at the conclusion of a successful s. 810.1 application (unless the defendant refuses to enter into the recognizance):

> … Pre-trial arrest or even pre-hearing detention may be necessary to secure the defendant's attendance at the hearing or to prevent harm to children pending a hearing because of a defendant's unwillingness to comply with reasonable terms of release. In short, as I have already said, pre-trial arrest and detention may be needed in some cases to ensure the integrity and viability of the s. 810.1 proceedings themselves.

The Court emphasized that pre-hearing detention will only be justified in unusual circumstances in s. 810.1 proceedings. It also pointed to s. 515(10), which circumscribes judicial discretion to order pre-hearing detention by setting out the circumstances in which detention is justified.

The British Columbia Court of Appeal followed the *Allen-Budreo* line in *Cachine*, and held that interim conditions may be imposed on a peace bond defendant who is arrested and brought before the court.

[32] The second line of jurisprudence follows the decisions in *R. v. Forrest* (1983), 8 C.C.C. (3d) 444 (B.C.S.C.), and *MacAusland*. The *Forrest-MacAusland* line holds that the JIR provisions do not apply to peace bond defendants, and was preferred by the Court of Appeal in the instant case. In *Forrest*, the court concluded that the words "*mutatis mutandis*" in the incorporating provision (language which has since been amended to read "with such modification as the circumstances require") could not be relied upon to convert a peace bond defendant into an accused charged with an offence. The court found that this was a "change in substance" and not a "change in points of detail" (p. 448). However, *Forrest* was subsequently overruled by the British Columbia Court of Appeal and is no longer binding in that province (*Cachine*, at paras. 23-24).

[33] Save for the decision of the Newfoundland and Labrador Court of Appeal in the instant case, *MacAusland* appears to be the only decision of a superior or appeal court that is still "good law" holding that the JIR provisions cannot be applied to a peace bond defendant. In *MacAusland*, Kelly J. concluded that as s. 810 creates no offence, the alterations necessary to apply the JIR provisions to s. 810 were not merely technical; rather they "involve a change in the nature of s. 810 or s. 515" (paras. 27-28). Kelly J. also identified a danger of "potential for abuse by informants with improper motives" (para. 30) where a defendant may be put on conditions before reasonable grounds for any fear or apprehension is proven. Finally, Kelly J. concluded:

> 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. [para. 33]

This passage was cited with approval by the Court of Appeal in the instant case (para. 58).

[34] For reasons I will explain, I agree with the Courts of Appeal in *Allen*, *Wakelin*, *Budreo C.A.*, *Cachine*, and *Nowazek* insofar as they found that the arrest and JIR provisions apply to peace bond proceedings. That said, any interim measure should not surpass the severity of outcomes following a final determination, except where necessary to preserve the integrity of the proceedings.

E. *Part XVI Applies to Peace Bond Proceedings*

[35] As mentioned above, ss. 810.2(8), 810(5), and 795 operate together to incorporate the provisions of Part XVI (which houses, *inter alia*, the summons, arrest, and JIR provisions) into Part XXVII ("Summary Convictions") which houses, *inter alia*, the peace bond provisions. The incorporating provision (s. 795) does not import Part XVI wholesale, but rather limits its application:

> **795.** The provisions of Parts XVI ["Compelling Appearance of Accused Before a Justice and Interim Release"] and XVIII ["Procedure on Preliminary Inquiry"] with respect to compelling the appearance of an accused before a justice, and the provisions of Parts XVIII.1, XX and XX.1, <u>in so far as they are not inconsistent with this Part, apply, with any necessary modifications, to proceedings under this Part.</u>

[36] Accordingly, whether Part XVI applies to peace bond proceedings depends on the proper interpretation of the statutory language in the incorporating provision, s. 795. The interpretation must be guided by the modern rule of statutory interpretation, that "the words of an Act must 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" (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, citing E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26).

[37] Provision for the peace bond at issue in this appeal was passed by Parliament in an omnibus Bill (Bill C-55, *An Act to amend the Criminal Code (high risk offenders), the Corrections and Conditional Release Act, the Criminal Records Act, the Prisons and Reformatories Act and the Department of the Solicitor General Act*, 2nd Sess., 35th Parl., 1996-1997) aimed at protecting society from individuals who are considered "high risk" to reoffend. In the same Bill, changes were made to parole eligibility for dangerous offenders, and to provide for increased supervision of long-term offenders. Several of the other peace bond provisions are aimed at protecting vulnerable groups including children at risk of sexual offences (s. 810.1), and children at risk of forced marriage or removal from the country (s. 810.02). The general peace bond (s. 810) is an important tool used to protect women leaving abusive relationships (see, e.g., P. M. Neumann, "Peace Bonds: Preventive Justice? Or Preventing Justice?" (1994), 3 *Dal. J. Leg. Stud.* 171; S. Gauthier, "L'engagement

de ne pas troubler l'ordre public dans les causes de violence conjugale ayant fait l'objet d'un abandon des poursuites judiciaires criminelles (art. 810 C.CR.)" (2011), 23 *C.J.W.L.* 548, at pp. 548-78; L. M. Tutty and J. Koshan, "Calgary's Specialized Domestic Violence Court: An Evaluation of a Unique Model" (2013), 50 *Alta. L. Rev.* 731; C. L. Chewter, "Violence Against Women and Children: Some Legal Issues" (2003), 20 *Can. J. Fam. L.* 99).

[38] Then J. in *Budreo S.C.* stated the policy rationale behind peace bonds:

> . . . where the reasonably certain commission of an offence can be prevented, it may be in the interest of the likely offender, his potential victim and of society to prevent the offence. This is particularly true when the preventive measures employed are less restrictive than the punishment that might flow from a conviction. [p. 372]

[39] It is against this backdrop of pressing policy objectives — the protection of vulnerable persons and the prevention of violent crime — that I undertake the interpretative exercise.

(1) <u>"With Respect to Compelling the Appearance of an Accused Before a Justice"</u>

[40] Part XVI of the *Criminal Code* is entitled "Compelling Appearance of Accused Before a Justice and Interim Release". In *Forrest*, the British Columbia Supreme Court reasoned that the JIR provisions now under s. 515 were excluded from the scope of now s. 795 because although the latter section refers to the

provisions of Parts XVI and XVIII with respect to compelling the appearance of an accused before a justice, it does not refer to the provisions of Part XVI with respect to *judicial interim release*. The respondent relies on the interpretation of s. 795 in *Forrest* to support his argument that Parliament did not intend for the JIR provisions to apply to peace bond proceedings.

[41] The words "in respect of" were considered by Dickson J. (as he then was) to be "words of the widest possible scope" (*Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 39). The phrase "with respect to" in s. 795 is similarly broad and can be read to include the JIR provisions under s. 515, even though those provisions do not specifically authorize "compelling the appearance of an accused before a justice". While compelling appearance and judicial interim release are conceptually distinct, they are procedurally inextricable. It would be unworkable if a defendant named in a peace bond Information could be arrested, but could not be released. Applying well-established principles of statutory interpretation, courts favour an interpretation of the statute that avoids absurd results. Arrest and judicial interim release go hand in hand as components that form an overall scheme under Part XVI. Accordingly, the JIR provisions under s. 515 are captured by s. 795 as provisions "with respect to" compelling the appearance of the defendant.

(2) <u>"In so Far as They Are Not Inconsistent With This Part"</u>

There Is No Mechanism to Compel Attendance in Part XXVII

[42] The Court of Appeal concluded that Part XVI was inconsistent with peace bond proceedings because by including the language "cause the parties to appear" in s. 810.2(2), Parliament had created a unique scheme for compelling the attendance of a defendant:

> 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. [para. 50]

With respect, I do not agree that the provisions cited create a "scheme for dealing with peace bond Informations". Nowhere in the peace bond provisions nor in any provision under Part XXVII does the statute provide a mechanism by which to "cause the parties to appear". In concluding that Part XVI does not apply to peace bond proceedings, the Court of Appeal failed to explain how a provincial court judge can cause the defendant to appear.

[43] The Court of Appeal wrote that "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" (para. 49). The Court of Appeal did not identify an alternative provision in Part XXVII of the *Criminal Code* that would enable a judge to issue a summons, or explain how a judge might otherwise summons the parties in law. As put by Fitch J.A. in *Nowazek*, the peace bond provisions are "silent on the mechanics through which that appearance is to be achieved" (para. 84).

[44] It was argued before this Court that s. 788, which is within Part XXVII, provides a process by which a judge may issue a summons. Section 788 states:

> # Information
>
> **Commencement of proceedings**
>
> **788 (1)** Proceedings under this Part shall be commenced by laying an information in Form 2.
>
> **One justice may act before the trial**
>
> **(2)** Notwithstanding any other law that requires an information to be laid before or to be tried by two or more justices, one justice may
>
> **(a)** receive the information;
>
> **(b)** issue a summons or warrant with respect to the information; and
>
> **(c)** do all other things preliminary to the trial.

[45] With respect, I fail to see how this provision provides support for the argument that Part XVI does not apply to peace bond proceedings. Section 788(1) prescribes the Form to be used in laying an Information under Part XXVII. In my view, s. 788(2) and the subsequent paragraphs do not empower a judge to issue a summons or a warrant with respect to a peace bond proceeding. Rather, s. 788(2) simply clarifies that where two or more justices are otherwise required by law to receive an Information, issue a summons or a warrant, or "do all other things preliminary to the trial", *one justice* may act with respect to proceedings under this Part.

[46] If s. 788(2) created a stand-alone power to issue a summons or a warrant, then it would be redundant in light of s. 795 which specifically incorporates into Part XXVII the provisions of Part XVI with respect to compelling appearance. Not only does s. 788 fail to provide a mechanism to cause the parties to appear, it provides further evidence that the power to summons and to issue a warrant for arrest, both of which appear under s. 507 in Part XVI, are intended to apply to Part XXVII.

[47] Even if I were to accept that the arrest and JIR provisions do not apply to peace bond proceedings, a judge would still need to resort to Part XVI in order to issue a summons (pursuant to s. 507(4)). Nowhere in Part XXVII is the power granted to a judge to issue process to cause a defendant to appear.

[48] The provisions of Part XVI, with respect to compelling appearance, are not inconsistent with the peace bond provisions. To the contrary, they are necessary

for the proper functioning of the scheme. Parliament would not have sought to create a scheme where a judge may hold a hearing to determine whether to order a defendant to enter into a recognizance to keep the peace, but make no provision whereby a judge can ensure the defendant attends the hearing. This would be an absurd outcome. The application of the JIR provisions flows from the power of arrest under s. 507. Where a defendant is arrested and detained, it follows that the judicial interim release scheme applies in order to release the defendant from custody. When applied with regard to the context and purpose of the peace bond scheme, the arrest and JIR provisions are a consistent and appropriate interim measure and necessary to the function and integrity of peace bond proceedings (*Budreo C.A.*, at para. 46).

(3) "With any Necessary Modifications"

[49] Prior to 1985, what are now ss. 795 and 810(5) both included the phrase "*mutatis mutandis*". Following the 1985 statute revision and consolidation, the language was changed to "with such modifications as the circumstances require" in the English version of both provisions (in the French version, the language was changed to "*compte tenu des adaptations de circonstance*" and later to "*avec les adaptations nécessaires*" in s. 795 and "*compte tenu des adaptations de circonstance*" in s. 810(5)). As explained by Professor Sullivan, there is a strong presumption against any change in the law following a revision, "because the purpose of a revision is to restate the law, not change it" (*Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 741, citing *Parrill v. Genge* (1997), 148 Nfld. & P.E.I.R. 91 (C.A.), at

paras. 40-42). In 2011, the phrase "with such modifications as the circumstances require" in s. 795 was amended to read "with any necessary modifications" (there were no changes to the French version). In recent years, Parliament has preferred the more concise phrase, which bears the same meaning (for example, the same amendment was made to the English version of s. 83.3(14) in 2013; see also *Criminal Code*, ss. 83.29(4) and 715.37(4)). Accordingly, the traditional interpretation of *mutatis mutandis* should inform the interpretation of "with any necessary modifications".

[50] The definition of *mutatis mutandis* was recently articulated by this Court in *Bessette v. British Columbia* (*Attorney General*), 2019 SCC 31, meaning:

> . . . "[w]ith the necessary changes in points of detail, meaning that matters or things are generally the same, but to be altered when necessary, as to names, offices, and the like" (*Black's Law Dictionary* (6th ed. 1990), at p. 1019; see also the British Columbia *Interpretation Act*, s. 44 ("mutatis mutandis") and *Samograd v. Collison* (1995), 17 B.C.L.R. (3d) 51 (C.A.)). "[W]ith the necessary changes and so far as applicable" therefore cannot be stretched to mean "to the extent that another source of law does not contradict the *Criminal Code*. [Emphasis in original; para. 69.]

[51] The Court of Appeal held that the modifications to the statutory language required to apply the JIR provisions to peace bond proceedings extend beyond what is intended by *mutatis mutandis*, and would result in a substantive change that "would expand the power of arrest to an extent heretofore unacceptable in our law" (para. 56), citing Hinds J. in *Forrest*:

> Here, the Crown is arguing that the provisions of s. 457 [now s. 515] 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 [now s. 810 to 810.2] — 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. [para. 57 citing *Forrest*, at para. 17.]

[52] Respectfully, I disagree. The necessary modifications do not put a peace bond defendant in the place of an accused person. Rather, they adapt the procedures for compelling attendance to a preventive justice context. While this will be discussed in greater depth below, I pause to stress that the powers of arrest and judicial interim release are a means of last resort, and will only be available where it is demonstrated on reasonable grounds that it is necessary in the public interest to issue a warrant. The default process is the issuance of a summons (s. 507(4)).

[53] In my view, the necessary modifications when applying Part XVI to peace bond proceedings would simply substitute the appropriate variation of "defendant named in a peace bond Information" in place of any variation of "accused charged with an offence", in accordance with the grammar of the provision. In doing so, the definition of "accused" in s. 493 need not be altered. I agree with the Court of Appeal that "a defendant to a peace bond proceeding is of an entirely different character than a defendant to a criminal charge" (para. 56). Instead of modifying the definition of an accused person, one need only modify the language in the relevant provisions to the extent necessary to bring the text into accord with the context and

purpose of the peace bond scheme. These and other small substitutions are required for the arrest and JIR provisions to operate harmoniously with the peace bond scheme. For example, the provision under which a peace bond Information is sworn must stand in for an Information sworn under s. 504 (the initiating process for a criminal proceeding) to trigger the summons and arrest powers in s. 507 in a peace bond proceeding.

[54] To illustrate, I have indicated in brackets other necessary modifications to the text of s. 507 and s. 515.

> **Justice to hear informant and witnesses — public prosecution**
>
> **507(1)** Subject to subsection 523(1.1), a justice who receives an information laid under [the applicable peace bond provision] 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 [a defendant named in a peace bond Information] 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 [defendant named in a peace bond Information] to compel the [defendant] to attend before him or some other justice for the same territorial division to answer to [the Information].
>
> . . .
>
> **Summons to be issued except in certain cases**

> **(4)** Where a justice considers that a case is made out for compelling [a defendant] to attend before him to answer to [the Information], he shall issue a summons to the [defendant] 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 [defendant].
>
> . . .
>
> **Order of release**
>
> **515(1)** Subject to this section, where a [defendant] who is [named in a peace bond Information] is taken before a justice, the justice shall . . . order, in respect of that [Information], that the [defendant] be released on his giving an undertaking without conditions, unless the prosecutor [or informant], having been given a reasonable opportunity to do so, shows cause, in respect of [a peace bond Information], why the detention of the [defendant] 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 [Information] for which the [defendant] was taken before the justice.

[55] The Ontario Court of Appeal in *Budreo C.A.* similarly found that applying provisions relating to a charge against an accused (ss. 507 and 515) to a proceeding commenced by the laying of an Information (in that case, s. 810.1) is a "modification contemplated by s. 795 of the *Code*" (para. 62). See also *Cachine*, at paras. 23-24; *Wakelin*, at pp. 121-22.

[56] I agree with the Courts of Appeal in *Wakelin*, *Budreo C.A.* and *Cachine* that the required modifications are points in detail that are contemplated by s. 795 of the *Criminal Code*, and do not amount to substantive change in the law. The

necessary modifications provide a procedure to give effect to the phrase "cause the parties to appear" in s. 810.2(2).

[57] The Court of Appeal in the instant case also looked to s. 507.1(9) to support its conclusion that Part XVI was not intended to apply to peace bond proceedings. Section 507.1 sets out additional procedures to be followed before a summons or a warrant is issued where the Information is laid by a member of the public (i.e, a private prosecution). Section 507.1(9) provides that these procedures "do not apply in respect of an information laid under section 810 or 810.1". Section 507.1(9), read in context, simply expresses an intention that the more onerous screening mechanism provided for in s. 507.1 does not apply to ss. 810 or 810.1 where an Information is sworn by a member of the public. I endorse the view of Fitch J.A. in *Nowazek*: the exclusion of certain peace bond provisions from the additional procedures of s. 507.1 has no bearing on the application of the arrest and JIR provisions to the peace bond scheme as a whole. He wrote:

> The enactment of s. 507.1(9) does nothing, in my view, to detract from the authoritativeness of *Allen*, *Wakelin*, and *Budreo*. It appears that s. 507.1(9) simply exempts proceedings under ss. 810 and 810.1 from the additional safeguards for private prosecutions in s. 507.1, even where the s. 810 or 810.1 information is laid by a member of the public. Trotter J. (as he then was) reached the same result in *R. v. Konjarski*, 2015 ONSC 3999 (Ont. S.C.J.), at para. 6:
>
> > Proceedings under s. 810 are different from the more elaborate procedure under s. 507.1 … Section 507.1 provides for a pre-enquete hearing before process may issue … However, this procedure does not apply to proceedings under s. 810 (see s. 507.1(9)).

> In my view, the enactment of s. 507.1(9) did not change the law in relation to compelling a defendant's appearance in proceedings under s. 810.1. [para. 83]

Without deciding the issue, the exclusion of ss. 810 and 810.1 from the procedures of s. 507.1 suggests that privately sworn Informations under these provisions proceed pursuant to s. 507. At any rate, Parliament has contemplated and specifically excluded the application of certain procedures under Part XVI to two specific peace bonds. This exclusion implies that Parliament intended Part XVI to otherwise apply to peace bond proceedings. Had Parliament intended that Part XVI have no application to the peace bond scheme, s. 507.1(9) would be unnecessary.

[58] When the Honourable Allan Rock, Minister of Justice and Attorney General, introduced the Bill containing the peace bond provision in the instant case to the Standing Committee on Justice and Legal Affairs, he expressly referenced the Ontario Superior Court decision of Then J. in *Budreo S.C.*, which held that the JIR provisions apply to peace bond proceedings:

> After section 810.1 was enacted, it was invoked in the case of a man named Wray Boudreo [*sic*]. . . .
>
> Judgment in that case was rendered in January of this year and we took into account that judgment in preparing the provisions of section 810.2 as they appear in Bill C-55. . . .
>
> House of Commons, Standing Committee on Justice and Legal Affairs, *Evidence*, No. 88, 2nd Sess., 35th Parl., December 3, 1996, at p. 88:4 (Hon. Allan Rock)

[59] Parliament is presumed to have knowledge of the prevailing case law (*2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, at para. 238). In this case, the express reference and endorsement by the Attorney General of Then J.'s lengthy and detailed judgement in *Budreo S.C.* is evidence which, in my view, reinforces the view that Parliament intended the arrest and JIR provisions under Part XVI to apply to peace bond proceedings.

F. *The Proper Application of Part XVI to Peace Bond Proceedings*

[60] Having found that, via the incorporating provisions of ss. 810(5) and 795, the arrest and JIR provisions in Part XVI apply to peace bond proceedings, I turn now to the proper interpretation of these provisions in the context of peace bond proceedings. This interpretation is informed by the context and purpose of peace bonds, and the competing interests of protecting public safety and safeguarding the liberty of the defendant, who is not accused of any criminal offence.

[61] As discussed above, the peace bond is an instrument of preventive justice, based on the reasonable fear of the informant, rather than the guilt of the defendant. I agree with the respondent that though it is a valid expression of the criminal law power, the peace bond resembles to a certain extent a civil injunction (R.F., at para. 8). As noted by de Villiers Prov. Ct. J. in *R. v. Gill*, [1991] B.C.J. No. 3255 (QL):

> It is true that the effect of a recognizance is to restrict the liberty of the defendant somewhat, but, as in the case of a civil injunction that restrains

> a defendant from committing a tort, that may also be a crime, the recognizance is not in its essence a restriction of lawful activity. [p. 6]

Like a civil injunction, there is often a sense of urgency to have the matter heard and, where the fear is reasonably founded, to impose conditions on the defendant by recognizance to protect the public. Where a merits hearing is postponed because the defendant requests an adjournment for counsel or there is some unavoidable delay, the very fear sworn to in the peace bond Information may go unaddressed in the interim. Adjournments can undermine the very purpose of the application (see Neumann, at p. 184). Ultimately, a balance must be struck between the right to liberty of a defendant to a peace bond Information, and the public protection concerns which animate these proceedings. Thus, the application of the arrest and JIR provisions must be guided by the policy objectives of timely and effective justice, and minimal impairment of liberty.

(1) A Justice May Cause the Parties to Appear

[62] The initiating process of a peace bond application is the swearing of an Information before a provincial court judge (or justice of the peace in the case of a s. 810 peace bond) by an informant who has reasonable fear that certain offences will be committed (see, e.g., s. 810.2(1)). Three of the peace bond provisions require the consent of the Attorney General (or his or her delegate) to lay an Information. Where the Attorney General considers the complaint to be unmeritorious, he or she may withhold their discretion and the process ends there. Where the Attorney General

consents (or where consent is not required), the justice who receives the Information may cause the parties to appear.

[63] When exercising the discretion whether to hold a hearing, the justice must consider whether the fear sworn to in the Information is reasonably held. It was raised before this Court that the peace bond under s. 810.2 is a "tool . . . often used when an offender is nearing their warrant expiry", or shortly after an individual has completed a custodial sentence, as was the case with Mr. Penunsi himself (I.F., Attorney General of Ontario, at para. 13; see also *R. v. Schafer*, 2018 YKTC 12, at paras. 38-39). Initiating a s. 810.2 peace bond proceeding upon a person's release from prison risks a further deprivation of liberty after the completion of a sentence already determined to be proportionate. Without further evidence that the feared conduct will occur (for example, the existence of threats or other violent conduct while in custody) a fear based solely on the offence for which a defendant is serving a sentence will not be sufficient. A s. 810.2 peace bond ordered on that basis alone would be improper. It would serve as a *de facto* probation order, not as a prospective tool of preventative justice.

[64] Where the justice exercises his or her discretion to cause the parties to appear, he or she will proceed to Part XVI of the *Criminal Code*. Part XVI "creates a ladder of increasingly coercive measures" to compel appearance of a defendant before a court (*Nowazek*, at para. 58). At the low end of the ladder is a summons or an appearance notice issued by a peace officer (Form 9 of the *Criminal Code*). Higher up

the ladder is arrest, and release by an officer in charge on an undertaking or recognizance (s. 499). Higher still is detention and judicial interim release, which as I will explain, must be guided by this Court's ruling in *R. v. Antic*, 2017 SCC 27, [2017] 1 S.C.R. 509 (s. 515). What follows is practical guidance on how and when these various procedures should apply with respect to a defendant named in a peace bond Information.

(a) *Summons*

[65] The default process for compelling attendance is the issuance of a summons. Section 507(4) states (with the necessary modifications) that a justice *shall* issue a summons unless he or she is satisfied, on the allegations or the evidence of the informant, that there are reasonable grounds to believe that it is necessary in the public interest to issue a warrant for the arrest of the defendant. If an arrest warrant is issued and executed, s. 503 states that the person shall be "taken before a justice to be dealt with according to law". As discussed below, once the person is "taken before a justice", s. 515 applies (*Nowazek,* at para. 61).

[66] Where a defendant appears before a justice pursuant to a summons and the hearing is adjourned, the justice has no jurisdiction to impose interim conditions pending the merits hearing. I agree with Fitch J.A.'s interpretation that

> [a] summoned defendant is neither in custody nor "taken before a justice". By contrast, the defendants in *Allen, Wakelin, Budreo,* and *Cachine* were arrested and, once taken before a justice, s. 515

> governed their release pending the hearing of the Crown's application for a recognizance.
>
> (*Nowazek*, at para. 88; see also *R. v. Goikhberg*, 2014 QCCS 3891, at para. 85 (CanLII); *R. v. Hebert* (1984), 54 N.B.R. (2d) 251 (C.A.).)

[67] If new information comes to light after the issuance of a summons, including at the initial hearing, which information raises concerns regarding the risk the defendant poses to the public or the likelihood of his or her attendance at the proceeding, an arrest warrant may be sought at that time. Once the defendant is arrested, the court will have jurisdiction to apply the JIR provisions (see, e.g., *Budreo C.A.*). However, there must be a material change to justify the need for arrest; the mere fact of an adjournment of the proceedings will not be sufficient to issue a warrant. The test for an issuance of a warrant under s. 507(4), and interpreted in light of the unique context of the peace bond defendant, must still be met.

(b) *Warrant for Arrest*

[68] Given the unique circumstances of the peace bond defendant as a person accused of no crime, it is the responsibility of every justice system participant to guard against the deprivation of the defendant's liberty unless absolutely necessary. In the words of Iacobucci J., writing in dissent:

> At the heart of a free and democratic society is the liberty of its subjects. Liberty lost is never regained and can never be fully compensated for; therefore, where the potential exists for the loss of freedom for even a day, we, as a free and democratic society, must place the highest

> emphasis on ensuring that our system of justice minimizes the chances of an unwarranted denial of liberty.
>
> (*R. v. Hall*, 2002 SCC 64, [2002] 3 S.C.R. 309, at para. 47)

[69] Where an Information is laid before a justice and he or she finds that there are "reasonable grounds to believe that it is necessary in the public interest", he or she may issue a warrant for the defendant's arrest. This phrase must be interpreted in light of the context (where the subject is not suspected of having committed a criminal offence) and the purpose (to bring the subject forward to a hearing) of the provision operating within the peace bond scheme. I agree with the Courts of Appeal in *Budreo C.A.* and *Nowazek* that instances when it will be

> . . . "necessary in the public interest" to issue an arrest warrant will be limited to cases in which proceeding in this fashion is necessary to preserve the integrity of the [peace bond] proceeding. <u>This will only be so when a case has been made out by the informant that the defendant will not otherwise attend court or that the defendant poses an imminent risk</u> . . . .
>
> (*Nowazek*, at para. 82 (emphasis added), citing *Budreo C.A.*, at para. 66. See also *Cachine*, at para. 26.)

[70] When determining whether a defendant might fail to abide by a summons, the usual factors considered under the primary ground of pre-trial detention are useful guidance. If the defendant does not have roots in the community, or if he or she has a history of failing to attend court as established on his or her criminal record, these will be strong factors militating in favour of issuing an arrest warrant (see, e.g.,

R. v. Hall (1996), 138 Nfld. & P.E.I.R. 80 (C.A.); *R. v. Walsh*, 2015 ABCA 385, at para. 6 (CanLII)).

[71] Where there is no indication that the defendant will fail to attend court pursuant to a summons, the justice must be satisfied that there is an imminent risk of the harm contemplated by the relevant peace bond provision before issuing an arrest warrant. For example, where an Information is sworn under s. 810.2(1), there must be an imminent risk of serious personal injury before an arrest warrant may be issued. In order to be satisfied that the defendant poses an imminent risk, the informant or prosecutor must be able to establish with sufficient specificity the particulars of the risk posed by the defendant. Imminent risk is not a generalized risk based on the defendant's record. An imminent risk is an urgent or immediate risk. While not every peace bond provision requires the informant to name the victim of the feared violence, it is difficult to conceive of a situation where imminent risk can be established without reference to an identifiable person or group at risk of being harmed for the purposes of issuing an arrest warrant (see *Smith v. Jones*, [1999] 1 S.C.R. 455, at para. 84, regarding what constitutes imminent risk in the context of the public safety exception to solicitor-client privilege).

[72] Where either of these elements are established on a balance of probabilities, a judge may issue a warrant for the arrest of the defendant.

Release by Peace Officer

[73] While placing a person under arrest inherently infringes his or her liberty, the infringement should be minimized to the extent possible. Under s. 507(6), the issuing justice may endorse an arrest warrant to authorize a peace officer to release the defendant on conditions or an undertaking (s. 507(6) and s. 499). An "Officer in Charge" recognizance pursuant to s. 499 is a mechanism that can be used to further the purpose of the peace bond (by placing the defendant on interim conditions pending the merits hearing), while at the same time minimizing the infringement of liberty on the defendant.

[74] The conditions placed on the defendant by the peace officer should be guided by the same principles described below for judicial interim release. Where a defendant is dissatisfied with the conditions of an undertaking by a peace officer, he or she may then apply to a justice under s. 515(1) to replace his or her undertaking (s. 499(3)).

(c) *Judicial Interim Release*

[75] In the rare case where a peace bond defendant is arrested and held over for bail, the JIR provisions under s. 515 provide the mechanism to release the defendant from custody. The JIR provisions must be applied with due regard to ensuring the attendance of the accused at the peace bond hearing, and the ultimate goal of the peace bond scheme: to place the defendant under recognizance where an informant has a reasonably held fear that the defendant will commit certain harms.

[76] I accept the point made by the court below that "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" (para. 58, citing *MacAusland*, at para. 33). Recalling that the provisions of Part XVI apply "in so far as they are not inconsistent" with the peace bond scheme, there is a necessary limit on the applicability of interim conditions under s. 515. It would be inconsistent with the peace bond provisions to impose conditions aimed at protecting against a risk to the public that surpass the conditions that could be placed on a defendant at the conclusion of a hearing on the merits of the peace bond application.

[77] The guidance given by this Court in *Antic* must also apply to the peace bond context, with regard to the "ladder" principle codified in s. 515(3). The default is release on the giving of an undertaking without conditions, unless the prosecutor (or the informant, where the Attorney General has not taken carriage of the matter) can "show cause" why an order for more stringent release conditions should be made (*Antic*, at para. 29).

[78] For a condition to be reasonable, it must have a nexus with either ensuring the defendant's attendance in court, or with the feared conduct sworn to in the Information. Where the Crown or informant has established that conditions are necessary to ensure attendance in court, the imposition of conditions should be guided by the principles set out in *Antic*, with regard to the "primary ground" for detention in s. 515(10)(a).

[79] Any interim conditions placed on a defendant relating to the fear sworn to in the Information should not exceed the conditions provided for by the peace bond provision under which the Information was sworn and, in most cases, should be less severe. Under s. 515, the JIR conditions must be "no more onerous than necessary" (*Antic*, at para. 44), whereas under a s. 810 recognizance, a judge may include "any reasonable conditions . . . desirable to secure the good conduct of the defendant" (s. 810 (3.02); see also I.F., Canadian Association for Progress in Justice, at para. 36). As put by Laskin J.A. in *Budreo C.A.*, the justice should exercise his or her discretion "judicially and bearing in mind the limited conditions that can be imposed following a successful s. 810.1 application" (para. 67). Under most circumstances, the final rung of the ladder would be a recognizance without sureties under s. 515(2)(b), with reasonable conditions in the circumstances.

[80] Practically speaking, the interim conditions regarding public safety placed on a peace bond defendant will likely form the basis for the recognizance following a meritorious peace bond application. These conditions will address, *inter alia*, concerns regarding the safety of the person whose protection is the objective of the peace bond. Judges should be mindful that a breach of interim conditions will result in a peace bond defendant — not accused of any crime — becoming subject to a criminal charge. It bears repeating that any public safety conditions should have a nexus with the specific fear sworn to in the Information. I underline this with respect to the imposition of conditions prohibiting the consumption of drugs and alcohol. Where the condition is not demonstrably connected to the alleged fear, it may merely

set the defendant up for breach, especially where the defendant is known to have a substance use disorder (I.F., Yukon Legal Services Society; see also Public Prosecution Service, *Public Prosecution Service of Canada Deskbook*, Part III, c.19, "Bail Conditions to Address Opioid Overdoses" (updated 1 April 2019) (online) (regarding bail conditions in the context of federally-prosecuted drug offences)). Any condition should not be so onerous as effectively to constitute a detention order by setting the defendant up to fail (*Antic*, at para. 56, see also Canadian Civil Liberties Association and Education Trust, *Set up to Fail: Bail and the Revolving Door of Pre-trial Detention* by A. Deshman and N. Myers (2014) (online), at pp. 1-2 and 4).

Where Pre-hearing Custody May Be Justified

[81] As Chief Justice Lamer wrote in the context of pre-trial detention, "[i]n general, our society does not countenance preventive detention of individuals simply because they have a proclivity to commit crime" (*R. v. Morales*, [1992] 3 S.C.R. 711, at p. 736). As cited (though ultimately not endorsed) by Then J. in *Budreo S.C.*:

> Predictive detention is thus thought to be unjustifiable in a liberal society because it evinces a lack of respect for the offender as a moral agent. It amounts to punishing her for what she is, which is largely a matter over which she has no control, rather than for her voluntary actions, for which a liberal society attributes her with moral responsibility.
>
> (p. 368, citing N. Lacey in "Dangerousness and Criminal Justice: The Justification of Preventative Detention" [1983], *Current Legal Problems* 31, at p. 34.)

[82] I agree with Laskin J.A.'s observation in *Budreo C.A.*:

> . . . it will be a rare case where it would enhance confidence in the administration of justice to detain a defendant who is not alleged to have committed any crime and who can only be required to enter into a recognizance at the conclusion of the proceedings. [para. 68]

[83] The circumstances where detention is justified in the peace bond context must also mirror the possible outcomes provided for in the peace bond provisions. A judge has authority to order detention following a peace bond hearing only where the defendant fails or refuses to enter into a recognizance to keep the peace and be of good behaviour (e.g., s. 810.2(4)). Accordingly, the "rare case" where detention may be justified will likely only arise where a defendant refuses to sign a recognizance under s. 515 and therefore refuses to be bound by conditions related to ensuring attendance at the peace bond hearing, and/or to addressing in the interim the fear sworn to in the Information. Echoing the holding in *Antic*, in the context of an accused charged with a criminal offence, this Court recently noted that "we must not lose sight of the fact that pre-trial detention is a measure of last resort" (*Myers*, at para. 67). For a peace bond defendant, the absence of an alleged offence reinforces this point.

G. *Application*

[84] In Mr. Penunsi's case, an Information under s. 810.2(1) was laid against him by a police officer, while Mr. Penunsi was nearing the end of a prison term. The officer swore to a fear that Mr. Penunsi would commit a serious personal injury offence upon his release from custody. While the validity of the arrest warrant was

not contested, I do not see how a federal inmate could represent an imminent risk to the safety of another person such that arresting him or her would be the appropriate response, nor how the inmate could be seen as at risk of not attending a peace bond proceeding while he or she remains in custody.

[85] It is not clear how Mr. Penunsi came before the court while he was still in custody, or what notice he was given regarding the appearance. What is clear is that a warrant was issued for Mr. Penunsi's arrest, but never executed. Absent the procedural protections including notice and rights to counsel that are required of police officers in the execution of an arrest, a person cannot be said to be "taken before a justice" within the meaning of ss. 503 and 515. Accordingly, the provincial court judge did not err in finding that he lacked jurisdiction to subject Mr. Penunsi to a bail hearing — not because the JIR regime does not apply to peace bond proceedings, but because Mr. Penunsi had never been arrested in relation to this matter. Judicial interim release did not apply in his case.

V. Disposition

[86] Accordingly, I would allow the appeal. The order of the Court of Appeal is quashed. The appearance of a defendant to a peace bond Information may be compelled by a summons or a warrant of arrest. A judge or justice of the peace has jurisdiction to subject a person to a show cause hearing when he or she has been arrested in relation to a peace bond Information and brought before the court. No further order is required as the issue as it pertains to Mr. Penunsi is moot.

Appeal allowed.

Solicitor for the appellant: Special Prosecutions Office, St. John's.

Solicitor for the respondent: NL Legal Aid Commission, Happy Valley-Goose Bay.

Solicitor for the intervener the Director of Public Prosecutions: Public Prosecution Service of Canada, Halifax.

Solicitors for the intervener the Yukon Legal Services Society: Tutshi Law Centre, Whitehorse.

Solicitors for the intervener the Canadian Civil Liberties Association: Cooper, Sandler, Shime & Bergman, Toronto.

Solicitor for the intervener the Canadian Broadcasting Corporation: Canadian Broadcasting Corporation, Toronto.

Solicitors for the intervener the Canadian Association for Progress in Justice: Norton Rose Fulbright Canada, Vancouver.