

Table of Contents

Dedication iii
Foreword v
Preface vii
Acknowledgments ix
Table of Contents xiii
Table of Charts lxiii
Introduction lxvii
Glossary of Abbreviations lxix
User Guide lxxi

CHAPTER 1: ARREST AND RELEASE

1.1 INTRODUCTION **1**

1.2 ARREST **2**

1.2.1 Arrest With Warrant **2**

1.2.2 Arrest Without Warrant **2**

 (A) Flowchart: Arrest by Civilian Without Warrant 2

 (B) Flowchart: Arrest by Peace Officer Without Warrant 3

 (C) List Chart: Straight Summary Conviction Matters 4

 (D) List Chart: Straight Indictable Matters 5

 (E) Anyone Can Arrest Without Warrant 9

 (I) Authority — Finds Committing Offence — 494(1)(a) + 494(3) + 34(1) IA 9

 (a) Definition of “Finds Committing” 9

 (b) Summary Conviction Offence — Must Find Committing to Arrest 10

 (II) Authority — RPG Committed Offence & Escaping — 494(1)(b) + 494(3) + 34(1) IA 10

 (F) Breach of Release (524 Arrest) — 494(1) + 495(1) + 495.1 10

 (G) Peace Officer Arrest Without Warrant 10

 (I) Authority — Finds Committing Offence — 495(1)(b) 10

 (II) Authority — RPG Committed Offence — 495(1)(a) 11

 (a) RPG Assessment Based on Subjective Belief Objectively Defensible 11

 (i) Objective Component 11

 (ii) Subjective Component 12

 (b) RPG Assessment Cannot Be Based on Unlawfully Obtained Evidence 13

 (c) RPG Assessment to Include All Information Available (Except Unreliable Information) 13

 (III) Authority — Warrant Outstanding — 495(1)(c) 13

 (IV) Non-Compliance with Arrest Provisions — Deemed Lawful Arrest — 495(2) and (3) 14

1.2.3 Duty Upon Arrest **14**

 (A) Advise of Reason for Arrest & Produce Warrant — 29 14

 (B) Police Must Make Notes 14

1.2.4 Investigation Can Continue After Arrest **15**

1.2.5 Out-of-Jurisdiction Arrest **16**

 (A) Flowchart: Out-of-Jurisdiction Arrest 16

 (B) Arrest with SCJ or Endorsed Warrant — 514, 528, and 703 16

 (C) Arrest Without Warrant or With Unendorsed Warrant 17

 (D) Release — If Not Defendant — 503(3)(a) 17

 (E) Release — If on Consent — 503(3.1) 17

 (F) Remand — Up to 6 Days — 503(3)(b)(i) 18

1.3 COMPELLING ATTENDANCE **18**

1.3.1 Flowchart: Informations and Process **18**

1.3.2 Issuing Process **18**

(A) Considerations	18
(I) Aboriginal / Vulnerable People — 493.2	18
(II) Restraint — 493.1	19
(B) Hearing Before Justice	19
(I) Appearances	19
(a) Jurist to Appear in Person — 502.1(5)	19
(b) Participant to Appear in Person — 502.1(4)	19
(c) Witness — 502.1(2 + 3)	19
(II) Evidence	19
(a) Based on Evidence, Must be	19
(b) Weighing Evidence, Cannot	20
(III) Exercise Judiciously	20
(IV) Hearing <i>in camera</i>	20
(V) Multiple Attempts Can be Made to Issue Process	21
(VI) Where is Hearing — In Location of Offence.	21
(C) Private Prosecutions	21
(I) Attorney General Permitted to	21
(a) Attend — 507.1(4)	21
(b) Stay Charges — At Any Time	22
(c) Withdraw Charges — After Process Issued.	22
(II) PJO or Designated Justice to	23
(a) Conduct Hearing <i>in camera</i> — 507.1(1)	23
(b) Hear from Informant AND Witness — 507.1(3)(a).	23
(c) Issue Summons or Warrant — 507.1(2).	24
(III) Process Not Issued	24
(a) Information Deemed Never Laid — 6-Month Limit — 507.1(5) and (6)	24
(b) New Evidence Required for Another Hearing — 507.1(7)	24
(c) Process Need Not be Issued When Information Laid.	24
1.3.3 Summons	25
(A) Authority to Issue	25
(I) Continuation of Trial or Re-Trial — 507(8)	25
(II) Defendant Not Attending Court “Bench Summons” — 512(1)	25
(III) Direct Indictment — Same Release Applies — 523(1.2)	25
(IV) Even if Arrest Without Warrant Possible — 507(2)	25
(V) Holidays — Can be Issued — 20	25
(VI) New Information	25
(a) New Charge — 507(1)(b) and (4)	25
(b) Same Charge (Replacement Information) — Same Release Applies — 523(1.1)	26
(VIII) Private Prosecution — 507.1(2 + 3)	26
(a) Court May Issue Summons — 507.1(2).	26
(IX) Recommencement of Proceedings — 578(1) and (2).	26
(B) Contents of Summons — 507(5) and 509(1 + 4).	26
(C) Conditions in Summons — Attend Court and for ID — 509(1)(c) and 509(5)	26
(D) Custody — Summoned Person Not in Custody	26
(E) Default Process — Unless Warrant Necessary — 507(4).	27
(F) Definition — 2	27
(G) Duration of Summons — Until First Appearance	27
(H) <i>Identification of Criminals Act</i> — Summons for — 485.2	27
(I) Preliminary Inquiry, Validity After — 546	27
(J) Service.	28
(I) Corporate Service — 703.2	28
(II) Electronic Service — Permitted — 708.1	28
(III) Holidays — Can be Served — 20	28
(IV) Peace Officer to Serve — 509(2) + 703.1	28
1.3.4 Warrant.	28
(A) Bench Warrant — 597 and 800	28
(I) Discretionary Bench Warrant — 597(5).	28

TABLE OF CONTENTS

(II) Endorsement of Warrant for Release — 507(6 + 7)	29
(III) In Custody Defendant	29
(B) Cancellation	29
(C) Contents — 507(5) + 511(1)	30
(D) Duration — 511(2 + 4).	30
(E) Execution.	30
(I) Deemed Execution — Upon Voluntary Appearance — 511(4)	30
(II) Responsibilities in Executing Warrant — 29 + 708.1	30
(III) Where Can Warrant be Executed	30
(a) Anywhere in Province — Issued by Provincial Court Judge — 703(2)	30
(b) Anywhere in Canada — Issued by Superior Court Judge — 703(1).	30
(c) Corporation, Service on — 703.2.	31
(d) Dwelling House.	31
(i) Authority — 529(1) + 529.1	31
(ii) Conditions in Warrant — 529.2.	31
(iii) No Knock Entry — 529(2) and 529.4(1 + 2).	31
(e) Extraterritorially	31
(i) If Warrant Endorsed Locally — 528	31
(ii) If Peace Officer in Pursuit — 514(1)(b).	31
(F) Material Witness Warrant — Anywhere in Canada — 705(1).	31
(G) Public Interest in Issuing	31
(H) Warrant in the First	32
(I) Breach of Release — 512.3.	32
(II) Failing to Attend — 512(2) + 512.1 + 512.2	32
(III) New Charges — 512(1)	33
(IV) Recommencement After Appeal or Stay — 507(8) or 578(1)	33
1.4 INFORMATIONS / INDICTMENTS — ISSUING.	33
1.4.1 Flowchart: Informations and Process	33
1.4.2 Authority to Lay Information — 504 or 505	34
1.4.3 Defects — Facial	34
(A) Illegible Signature	34
(B) Missing Date — 601(4.1)	34
(C) Wrong Date	35
1.4.4 Direct Indictment.	36
(A) Authority — 577.	36
(B) Provincial Court Judge Election, Attorney General Can Still Directly Indict	36
(C) Reasons for Direct Indictment Not Required	37
(D) Recommendation Package to Attorney General, Non-Disclosable	37
1.4.5 Hearing to Issue Information.	38
(A) Appearances.	38
(I) Jurist to Appear in Person — 502.1(5).	38
(II) Participant to Appear in Person — 502.1(4).	38
(III) Witness — 502.1(2 + 3).	38
(B) Justice Must Hear Evidence of Informant and May Confirm or Cancel Release — 508	38
(C) Test — Need <i>Prima Facie</i> Evidence	39
(D) Where Hearing to Take Place.	40
1.4.6 Multiple Informations.	40
1.4.7 Replacement Information	40
1.4.8 Time in Which to Lay Information.	41
(A) As Soon as Practicable — Authority — 505	41
(B) Attesting Cures Defects	41
(C) Breach of ASAPr Means Information Valid, but No FTA Charge	41
(D) Breach of ASAPr Means Information Nullity.	42
1.4.9 Unidentified Person — Information Against.	43

1.5 JUDICIAL REFERRAL HEARING	44
1.5.1 Flowchart: Judicial Referral Hearing	44
1.5.2 Authority for JRH Hearing — 523.1(1) and (2)	45
1.5.3 Dismiss and Not Lay New Information — 523.1(4 + 5)	45
1.5.4 Powers of Jurist — 523.1(3)	45
1.6 RELEASE AFTER ARREST	46
1.6.1 Flowchart: Release.	46
1.6.2 Appearance Notice.	47
(A) Authority to Issue Appearance Notice.	47
(I) After Arrest WITH Warrant — If Warrant Endorsed — 499.	47
(II) After Arrest WITHOUT Warrant — 498(1 + 2)	47
(III) Except If Public Interest or FTA Concerns — 498(1.1)	47
(IV) For Judicial Referral Hearing — 496.	47
(V) New Information or Direct Indictment — 523(1.1 + 1.2)	47
(VI) Without Arrest.	48
(B) Contents of Appearance Notice — 500.	48
(C) Considerations — 493.1 and 493.2	48
(D) Defect — Does Not Affect Validity of Information	48
(E) Duration of Appearance Notice	49
(F) Refusal to Sign Appearance Notice — 500(4).	50
1.6.3 Bail	50
(A) 24 hour rule	50
(B) Except If — Ongoing Investigations.	50
1.6.4 Confirmation of Release	51
(A) Confirmation Required Before Appearance Date	51
(B) Confirmation Not Needed if Defendant Attorns.	51
(C) Appearing is Attorning	52
1.6.5 Unconditional Release — No Longer “About to Commit Indictable Offence” — 503(4).	52
1.6.6 Undertaking	53
(A) Authority to Issue Undertaking	53
(I) After Arrest WITH Warrant — If Warrant Endorsed — 499.	53
(II) After Arrest WITHOUT Warrant — 498(1 + 2)	53
(III) Except If Public Interest or FTA Concerns — 498(1.1)	53
(IV) New Information or Direct Indictment — 523(1.1 + 1.2)	53
(B) Conditions in an Undertaking — 501(3)	53
(C) Considerations — 493.1 and 493.2	54
(D) Contents of Undertaking — 501	54
(E) Duration	54
(I) Starts as Soon as Entered	54
(II) Valid Until Trial Completes	55
(F) Refusal to Sign — 501(6)	55

CHAPTER 2: BAIL

2.1 INTRODUCTION	57
2.1.1 Flowchart: Bail Process — Upon Arrest	58
2.1.2 Flowchart: Bail Process — Not Upon Arrest	59
2.2 ADJOURNMENT.	59
2.2.1 Maximum 3 Days Without Consent	59
(A) Authority — 516(1)	59
(B) Delays Not Appropriate.	59
(C) Hearing Must Recommence on 3rd Day	60

TABLE OF CONTENTS

2.2.2 Non-Communication Order — 516 (2 + 3) **60**

2.3 DETENTION **60**

2.3.1 After 469 Offence — Auto Detention — 515(11) **60**

2.3.2 After Crown Onus Show Cause **60**

(A) Authority — 515(5) 60

(B) No Contact While Detained — 515(12) 60

(C) Written Reasons if Detained Based on Record — 515(9.1) 60

2.3.3 After New Direct Indictment — Same Detention Applies — 523(1.2) **60**

2.3.4 After New Information — Same Detention Applies — 523(1.1) **61**

2.3.5 After Reverse Onus Show Cause **61**

(A) Authority — 515(6) 61

(B) Reasons if Detained After Reverse Onus — 515(6.1) 61

2.3.6 Grounds for Detention **61**

(A) Primary Ground 61

(I) Authority — 515(10)(a) 61

(II) Factors to Consider 61

(III) Flight Risk — If Untrustworthy Defendant 61

(B) Secondary Ground 62

(I) Authority — 515(10)(b) 62

(II) Necessary — Detention Must be Necessary for Public Safety 62

(III) Protection or Safety of Public 62

(IV) Substantial Likelihood of Re-Offence or Interference 63

(a) Conditions of Bail Can Nullify Risk of Re-Offence 63

(b) Definition of Substantial Likelihood — Means Significant Probability 63

(c) Interference with Administration of Justice — Means Significant Probability 64

(d) Past Behaviour IS Best Predictor of Future Behaviour 64

(e) Re-Offending While on Bail 65

(f) Substantial Likelihood Must Endanger Protection or Safety of Public 65

(g) Willingness to Comply 65

(C) Tertiary Ground 66

(I) Authority — 515(10)(c) 66

(II) Four Factors in Tertiary Ground 66

(a) Apparent Strength of Prosecution’s Case 66

(b) Gravity of Offence 66

(c) Circumstances of Offence, Including whether Firearm Used 66

(d) Is Defendant Liable for Potentially Lengthy Term of Imprisonment? 66

(III) GPS Monitoring — Irrelevant to Tertiary Ground 68

(IV) Factors to be Analyzed Together — Maximum Force by All = Detention 68

(V) Not Limited to Exceptional Circumstances or Types of Crimes 68

(VI) Plan of Bail 69

(VII) Serious / Violent Crime with Overwhelming Evidence = Detention 69

(VIII) Who is the Public? 70

2.3.7 No Contact Order While Detained — 515(12) **70**

2.4 DURATION OF BAIL **70**

2.4.1 Offence is 469 Offence — Ends Upon Conviction — 523(1)(a) **70**

2.4.2 Offence is Non-469 Offence — Ends Upon Sentence — 523(1)(b) **70**

2.5 HEARING **71**

2.5.1 List Chart: Considerations at Show Cause Hearing **71**

2.5.2 Appearances **72**

(A) Defendant 72

(I) Appears in Person — 502.1(1) 72

(II) Appears Remotely — 515(2.2) 73

(B) Jurist to Appear in Person — 502.1(5) 73

(C) Participant to Appear in Person — 502.1(4)	73
(D) Witness — 502.1(2 + 3)	73
2.5.3 Burden of Proof — “On Balance”	73
2.5.4 Evidence	74
(A) Agreed to by Counsel	74
(I) Authority — 518(1)(d)	74
(II) Challenge Weight of Evidence	74
(B) Confession	74
(C) Crown’s Case	75
(I) Circumstances of Offence, Convictions, Outstanding Charges — 518(1)(c)	75
(II) Crown Cannot be Compelled to Produce Specific Witness	75
(III) Taken at its Highest	75
(IV) Wiretap — 518(1)(d.1)	76
(D) Defendant Shall Not be Examined, Except by Counsel — 518(1)(b)	76
(E) Trustworthy and Credible — 518(1)(e)	76
(I) Crown Read-In Facts	76
(II) Evidence Instead of Crown Read-In Statement	77
(III) Hearsay	77
2.5.5 Factors at Hearing	78
(A) Aboriginal or Vulnerable Defendants — 493.2 + 515(13.1)	78
(B) Any Relevant Factors, Including CR and IPV — 515(3)	79
(C) Co-Accused	79
(D) Mental Health	79
(E) People of Colour	80
(F) Restraint — 493.1	80
(G) Victim’s Safety and Security — 515(13)	80
2.5.6 Obligations	80
(A) Crown	80
(I) Inquire into Sureties	80
(II) Protection of Rights of Defendant	81
(III) Restraint	81
(B) Defence	82
(I) Agree to Conditions, Seek Bail Variation Later	82
(II) Restraint	82
(C) Judiciary	82
(I) Appropriate Release or Detention Order	82
(II) Restraint	82
2.5.7 Onus	83
(A) Crown Onus — 515(1 + 2)	83
(B) Reverse Onus	83
(I) Authority	83
(a) 469 Offences Authority — 522(2)	83
(b) Conditional Sentence Breach Authority — 742.6(2)	83
(c) General Authority — 515(6)	83
(i) Hybrid Offence is Always an Indictable Offence	83
(ii) Hybrid Offence is an Indictable Offence Until Crown Elects	84
(iii) Not Ordinarily Resident	84
(1) No Legal Status	84
(2) Refugee Claimant	85
(iv) Reasons Required if No Detention Order — 515(6.1)	85
(II) Defendant Must Show Cause	85
(III) Release if Not Detained — 515(7)	85
2.5.8 Process	86
(A) Bifurcated Hearings	86
(B) Defence Counsel — Defendant’s Entitlement to	86
(I) Defendant’s Entitlement to Counsel	86

TABLE OF CONTENTS

(II) Students Not Permitted 87

(C) Crown Counsel — Only Lawyers Can Prosecute Bail Hearings 87

 (I) Lawyers Only Can Conduct Bail Hearings 87

 (II) Students Not Permitted 87

(D) Record of Proceedings — 515(9) 87

(E) Submissions 87

 (I) Crown Submissions 87

 (II) Joint Submissions 88

 (a) Court Can Reject, Not Routinely 88

 (b) Ladder Principle, Bail Conditions, Less Strictly Enforced 88

 (c) Joint Submissions Must Follow Bail Criteria. 88

2.5.9 Publication Ban. 89

 (A) Authority — 517(1) 89

 (B) Publication Ban Prohibits Publication of Even Reasons for Order 89

 (C) Victim’s Identity 89

2.5.9A Strike Bail Hearing 89

2.5.10 Sureties 90

 (A) Attendance for Bail Hearing — Sureties do NOT Need to be in Court. 90

 (B) Cross-Examining Sureties 90

 (I) Leave to Cross-Examine. 90

 (a) Leave Required 90

 (b) Leave Not Required 91

 (II) What Defendant Said to Surety 92

 (a) Can Cross-Examine Surety 92

 (b) Cannot Cross-Examine Surety 92

 (C) Naming Surety — 515(2.1) + 515.1 93

 (D) Obligations of Surety 93

 (E) Suitability of Surety 94

 (I) Crown Required to Consider — CAA 11(i) 94

 (II) Factors to Consider 94

 (III) Location of Surety 95

 (IV) Not Ideal Sureties 95

 (V) Surety Can be Suitable, Even if Unaware of Criminal Conduct 95

 (VI) Surety Can be Surety for Defendant Twice. 96

 (VII) Surety Cannot be Surety for Two Separate People. 96

 (VIII) Surety Unsuitable if Defendant Ungovernable 97

2.5.11 Timing of Hearing 97

 (A) After Arrest — Within 24 Hours. 97

 (I) Authority — 503(1) 97

 (II) Police to Assist Defendant 98

 (III) 24-Hour Rule. 98

 (B) During Show Cause if Defendant Pleads Guilty — 518(2) 98

 (C) New Charging Document — “Replacement” Information / Indictment — 523(1 + 1.1 + 1.2) 99

 (D) Preliminary Inquiry — At End of 99

 (I) Authority — 523(2)(b) + 537(1)(c) 99

 (II) Is *de novo* Hearing, Which Incorporates Evidence Heard at Preliminary Inquiry 99

 (III) Requires Material Change — Not *de novo* Hearing. 100

 (a) Committal for Trial NOT Alone a Material Change in Circumstances. 100

 (E) Trial Judge. 100

 (I) Authority — 523(2)(a) 100

 (II) Material Change Required — Not *de novo* Hearing 100

 (III) Onus on Balance of Probabilities 101

 (IV) Trial Judge ALONE Can Deal with Bail Once Trial Commences. 101

2.6 OUT-OF-JURISDICTION ARREST 102

2.7 RELEASE. 102

2.7.1 Conditional Release	102
(A) Authority — 515(4)(g) and (h) and 515(4.2(b)) and (4.3)	102
(B) Conditions of Release	102
(I) Addiction Conditions — Caution Advised	102
(II) Boundary Conditions	103
(a) Not Attend Within — Generally — 515(4)(e)	103
(b) Not Attend Within — Terrorism, Criminal Harassment, Intimidation, IPV, Security of Information — 515(4.2 + 4.3)	103
(c) Remain Within — 515(4)(b)	103
(III) Delegated Rules Conditions — Can Be Problematic	103
(IV) GPS Monitoring Conditions	104
(a) Breaches, Does Not Prevent	104
(b) Evidence-Gathering Tool, Not Crime-Prevention Tool	104
(c) House Arrest, Does Not Assist If Exceptions	105
(d) Material Change in Circumstances — Can Be, Cannot Be	105
(e) Primary Grounds, Can Assist With	106
(f) Strong Surety Plan, Only Useful With	106
(V) <i>Identification of Criminals Act</i> , Condition to Attend for — 515.01 + <i>ICA</i> 2(1)(c)	106
(VI) Keep the Peace and Be of Good Behaviour Conditions	107
(VII) Mental Health Conditions — Must Be Necessary to Address Specific Risk	107
(VIII) No Contact Conditions — 515(4)(d) + 515(4.2 + 4.3)	107
(IX) Passport — Deposit Conditions — 515(4)(f)	108
(X) Rehabilitative Conditions — Must Be Necessary to Address Specific Risk	108
(XI) Requirements to Impose Conditions	108
(a) <i>Charter</i> Breaches — Conditions Should Not Create	108
(b) Least Onerous — Conditions Must Be	109
(c) Necessary — Conditions Must Be	109
(d) Reasonable — Conditions Must Be	110
(e) Statutory Risks — Conditions Must Be Linked	110
(f) Tailored to Defendant — Conditions Must Be	111
(g) Unintended Consequences — Avoiding	111
(XII) Weapons Prohibition Conditions	111
(a) Authority — 515(4.1)	111
(b) Exemption — 113	112
(c) Forfeiture Not Required — 115(1.1)	112
(d) Surrender of Weapons	112
(C) Forms of Release	112
(I) Cash Deposit	112
(a) Authority — 515(2)(d) and (e)	112
(b) Exceptional Form of Release	112
(c) Promise to Pay Favoured Over Deposit — 515(2.02)	113
(II) Own Bail — 515(2)(a + b)	113
(III) Surety Bail	113
(a) Authority — 515(2)(c)	113
(b) Least Onerous Form of Release — 515(2.03)	113
(c) Non-Compliance with Conditions — Surety May be Required	114
2.7.2 Ladder Principle	114
(A) Flowchart: Release Ladder	114
(B) Cash Bail — Most Onerous Rung	115
(C) Definition — 515(2.01)	115
(D) In Reverse Onus — Ladder Principle Does NOT Apply	116
2.7.3 Quantum of Bail	116
2.7.4 Reverse Onus Bail	116
(A) Authority — 515(7)	116
(B) “Set Not Met” Bail — Not Permitted in Reverse Onus Situation	116
2.7.5 Unconditional Release	117

TABLE OF CONTENTS

2.8 REVOCATION AND BREACH 117

2.8.1 Breach Allegation — 524 Hearing 117

(A) Arrest Not Necessary 117

(B) Authority — 524 119

(C) Onus 119

(I) Crown to Prove 524 Breach First 119

(II) Defendant to Then Show Cause for Release 119

(D) Proceeding on Copy of Information 120

(E) Revoking Prior Release Mandatory 120

(F) Superior Court Release 121

(G) Timing — When Defendant Before Court 121

(H) Two-Stage Hearing — Breach Found, Release Can Then be Fashioned 122

2.8.2 De minimus. 122

2.8.3 Estreatment of Bail — Authority to Note in Default — 770 123

2.8.4 Mens rea Required for Breach. 123

2.8.5 Surety Relief / Surrender 125

(A) Rendering Defendant to Court 125

(I) Authority — 767 125

(II) Cancels Old Bail 125

(B) Surety Warrant — 766 126

2.9 RIGHT TO BAIL. 127

2.9.1 Authority — Charter 11(e) 127

2.9.2 Just Cause to Deny Bail 127

2.9.3 Post-Conviction: 469 Offence. 128

2.9.4 Post-Conviction: Non-469 Offence 128

2.10 VARIATIONS 129

2.10.1 Consent Variations. 129

(A) After Bail Hearing 129

(I) Authority for New Order — 523(2)(c) 129

(a) Permits New Order — Not Variation 130

(II) Authority for Variation — 519.1 130

(B) After Police Release — 502(1) 130

2.10.2 Contested Variations 130

(A) After Bail Hearing 130

(I) Adjourn Hearing: On Consent, or Maximum 3 days — 520(4) or 521(4) 130

(II) Authority for Hearing — 520(1 + 2) or 521(1 + 2) 130

(III) Court or Judge is Superior Court — 493 130

(IV) Defendant to be Present — 520(3) or 521(3) 130

(V) Evidence at Hearing — 520(7)(a) to (c) 131

(VI) Order Dismissing Application or Making new Bail Order — 520(7)(d + e) or 521(8)(d + e) 131

(VII) Warrant to Arrest Defendant — 520(5) or 521(5 + 6) 131

(VIII) 30-Day Waiting Period — 520(8) or 521(9) 131

(B) After Police Release — Authority — 502(2) 131

2.10.3 Surety Substitution. 131

(A) Authority — 767.1 131

(I) Named Surety — Cannot Substitute 131

(II) Unnamed Surety — Can Substitute 132

(B) Notice to Crown — Generally Required 132

2.10.4 Victim Wants Contact — Not Determinative 133

2.11 VICTIM RIGHTS — RIGHT TO COPY OF BAIL — 515(14) 134

CHAPTER 3: SET DATE

3.1 INTRODUCTION	135
3.2 FLOWCHART: SET DATE PROCESS	136
3.3 ADJOURNMENT	137
3.3.1 Flowchart: Valid Appearance for Adjournment	137
3.3.2 Bail Adjournments	138
3.3.3 Factors to Consider for All Adjournments	138
(A) Delay of Trial	138
(B) Diligence of Defendant	138
(C) Disclosure — Late	139
(I) Adjournment is Remedy	139
(II) Do Not Adjourn, Move Matter Forward	140
(D) Discretionary Order	140
(E) Lack of Counsel	141
(I) Counsel Essential if Offence Serious and Complex	141
(II) Counsel Essential for Full Answer and Defence	141
3.3.4 Holidays / Non-Juridical Days, Accidentally Adjourned to	142
3.3.5 Preliminary Inquiry Adjournments	142
3.3.6 Trial Adjournments	142
3.4 APPEARANCE NOTICE	142
3.5 APPEARANCES	143
3.5.1 List Chart: Who Can Appear	143
3.5.2 List Chart: Permitted List — Matters on Which Non-Counsel Can Appear	144
3.5.3 Agents	148
(A) Agents Cannot Appear in Trial / Appeal	148
(I) Not for <i>Criminal Code</i> Matters, Unless Authorized	148
(II) Not in Provincial Offences Matters	149
(B) Only Licencee Can Practise Law in Ontario — <i>LSA</i> 26.1(1)	149
(I) Except, Non-Licencee May Practice if Permitted by By-Laws — <i>LSA</i> 26.1(5)	149
3.5.4 Attorning	149
3.5.5 Designation of Counsel	150
(A) Authority — 650.01(1)	150
(B) Court Can Issue Summons or Warrant — 650.01(4)	150
(C) Effect of Designation — 650.01(3)	150
(D) Paralegals	150
(E) Students-at-Law	151
(F) Unnamed Counsel Not Counsel per Designation	151
3.5.6 Indictable Offences — Only Lawyers Can Appear	152
3.5.7 Lawyers — Crown Fails to Attend Court	152
(A) Crown No-Show — Lack of Prosecution	152
(B) Court Cannot So Dismiss After Guilty Plea	153
(C) Court Cannot Dismiss if Crown is Late, Without Further Inquiry	153
3.5.8 Paralegals	153
(A) Authority	153
(B) Cannot Appear in Criminal Matters, Unless Authorized	154
(C) Scope of Authority — Law Society of Ontario — By-Law 4, Clause 6(1) and (2)	154
3.5.9 Remote Appearances	154
3.5.10 Students-at-Law	154
(A) Authority	154
(B) Scope of Authority	154

TABLE OF CONTENTS

- (C) Scope of Authority — Law Society of Ontario Guidelines 155
 - (I) Law Students / Summer Students 155
 - (II) Articling Students 155
- 3.5.11 Summary Conviction Matters 155**
 - (A) Crown and Defence Must Appear — 800(1) 155
 - (B) Defendant May Appear by Agent or Counsel — 800(2) 155
 - (I) Limit on Agents — 802.1 155
 - (II) Court Can Disqualify “Agent” 155
- 3.6 COUNSEL OF CHOICE 156**
 - 3.6.1 Defendant’s Choice — Cannot Force Counsel on Defendant 156**
 - 3.6.2 Dismiss Counsel — Defendant May 156**
 - 3.6.3 Removal of Counsel by Court 156**
 - 3.6.4 Self-Representation 157**
 - (A) Defendant 157
 - (I) Effective Representation by Agent, Not Entitled to 157
 - (II) Fair Trial, Entitled to 158
 - (III) Unfair Trial, Cannot Complain if Self-Represented 158
 - (B) Court Obligations 158
 - (I) Assistance, Must Only be Reasonable 158
 - (II) *Charter* Applications, Court Must Assist With 159
 - (III) Defence, Presentation of, Court Must Aid. 159
 - (IV) Unfair Trial, Court Must Prevent 159
 - 3.6.5 State Funding (*Rowbotham*) 160**
 - (A) Authority 160
 - (B) Discharge *Rowbotham* Counsel — Defendant May 160
 - (C) Factors: Legal Aid Refusal, No Means to Hire Counsel, “Fair Trial” with Counsel 161
 - (I) Legal Aid Refusal — Defendant Must Act Reasonably and in Good Faith 161
 - (II) No Means to Hire Counsel. 161
 - (a) Financial Imprudence 161
 - (b) Selling Assets 162
 - (III) Fair Trial 162
 - (a) Definition of Fair Trial 162
 - (b) Fair Trial Factors: Seriousness, Likelihood of Jail, Complexity and Length of Trial 162
 - (c) Seriousness and Complexity 163
 - (D) Preliminary Inquiry — Not Generally Available 163
 - 3.6.6 Withdraw Services — When Counsel May 164**
- 3.7 DISCLOSURE 165**
 - 3.7.1 Flowchart: Disclosure Process 165**
 - 3.7.2 Defence Obligations and Rights 166**
 - (A) Change of Solicitor — Counsel Must Pass Disclosure to New Counsel 166
 - (B) Pursue Third Party Records Applications. 166
 - (C) Review Disclosure and Identify Missing Items 166
 - (I) Assertion Defendant Has All Disclosure — Crown and Court Can Rely Upon 167
 - (D) Right to Disclosure 167
 - 3.7.3 Format 168**
 - (A) Crown Decides When and How Disclosure Made 168
 - (B) Defence Access. 168
 - (I) Counsel Presumed to Have Computer Skills of Average Person. 168
 - (II) Defendant in Custody 169
 - (III) Electronic Disclosure Acceptable, Unless Self-Represented Defendant Can’t Access. 169
 - (a) Hard Copies, Court Can Require 170
 - (IV) Format Must be Reasonably Accessible. 171
 - (C) Legibility of Disclosure (Notes) 171
 - (D) Restricting Access 171

(I) Misuse of Disclosure, Access Restriction OK	171
(II) Sensitive Documents, Access Restriction OK	172
3.7.4 State Obligations	173
(A) Crown Obligations	173
(I) Disclose Evidence	173
(a) Fruits of the Investigation — All Relevant Material	173
(b) Only Material in Possession and Control of the Crown	173
(II) Gather Evidence from Police	174
(III) Notify Defendant of Withheld Disclosure	174
(IV) Preserve Evidence	175
(B) Not State Obligations	175
(I) No Duty to Create Evidence	175
(II) No Duty to Investigate	176
(C) Police Obligations	176
(I) Police Must Make Notes	176
(II) Police Must Preserve Evidence	177
(III) Police Must Provide Evidence to the Crown	177
3.7.5 Third Party Records	178
(A) Definition: Records in Hands of Strangers	178
(B) Disclosure Regime	178
(I) Stage 1: Defendant to Show Information “Likely Relevant”	178
(a) Onus on Defendant	179
(b) Onus Not Onerous Burden	179
(II) Stage 2: Defendant to Show Salutary Benefits Outweigh Deleterious Effects of Disclosure	180
(a) Factors to Consider	180
(i) Discriminatory Beliefs or Biases	180
(ii) Nature And Extent of Reasonable Expectation of Privacy in Record	180
(iii) Prejudice to Complainant’s Dignity, Privacy or Security Upon Production	180
(iv) Probative Value of Record	180
(v) Record Necessary to Make Full Answer and Defence	180
(III) Procedure	181
(C) Police Files	181
(I) Officer Discipline	181
(II) Other Investigations	182
(D) Sexual Offences	182
(I) Definition of “Record” — 278.1	182
(a) Enumerated Records	182
(b) Non-Enumerated Records	183
(II) Evidence Required — Must Be Case-specific	183
(III) Factors to Consider — 278.5(2)	184
(IV) Records in CROWN Possession — Crown to Notify — 278.2(3)	184
(a) Consent Disclosure	184
(b) Crown Must Notify Defence of Record — 278.2(3)	184
(V) Records in DEFENCE Possession	184
(a) Evidence Inadmissible, Unless Judge Authorizes — 278.92	184
(b) Hearing — Stage 1	185
(i) Proper Application — 278.93(1) + (2)	185
(ii) Timing of Application — 278.93(4)	185
(c) Hearing — Stage 2 — Records Relevant and Probative	185
(i) Complainant — Submissions and Counsel — 278.94(2) + (3)	185
(ii) Decision — 278.92(2)	185
(iii) Factors — 278.92(3)	185
(VI) Records in 3 rd PARTY Possession	186
(a) Hearing — Stage 1 — Records Likely Relevant	186
(i) Application — 278.3	186
(ii) Hearing <i>in camera</i> — 278.4(1)	186

TABLE OF CONTENTS

- (iii) Record Holder — Appearance By — 278.4(2) 186
- (iv) Record Holder — Right to Counsel — 278.4(2.1). 186
- (v) Order Production for Review — 278.5(1). 186
- (vi) Order Production for Review — Refused — 278.8 186
- (vii) Service — 278.3(6). 186
- (viii) Timing of Application and Subpoena — 278.3(5) 186
- (b) Hearing — Stage 2 — Decision to Order Disclosure 187
 - (i) Conditions on Disclosure — 278.7(3) 187
 - (ii) Copy to Crown — 278.7(4) 187
 - (iii) Factors to Consider 187
 - (iv) Limit on Use in Other Proceedings — 278.7(5) 187
 - (v) Hearing — 278.6(1) + (2) 187
 - (vi) Order Disclosure — Necessary in Interests of Justice — 278.7(1). 187
 - (vii) Order Disclosure — Refused — 278.7(6) + 278.8 187
 - (viii) Prohibition on Publication — 278.9(1) 187
- (c) Subpoena to Obtain Third Party Records, Not Permitted 188
- 3.7.6 Timing of Disclosure 188**
 - (A) Before Election or Plea 188
 - (B) Before Any Steps Affecting Full Answer and Defence 188
 - (C) Cannot Not Set Dates Because of Late Disclosure 189
 - (D) Upon Request by Defendant. 189
- 3.8 FITNESS 191**
 - 3.8.1 Flowchart: Fitness Concerns 191**
 - 3.8.2 Flowchart: Fitness Hearing 192**
 - 3.8.3 Flowchart: Treatment / Disposition Hearing. 193**
 - 3.8.4 Authority — “Unfit to Stand Trial” — 2. 194**
 - 3.8.5 Test — Understand and Make Decisions 194**
 - 3.8.6 Timing — Only Before Sentencing 194**
- 3.9 JURISDICTION. 195**
 - 3.9.1 Jurisdiction Over the Person 195**
 - (A) Attendance Gives Jurisdiction (If More Than Mere Presence). 195
 - (I) Challenging Process — Prohibition in SCJ 195
 - (II) Conditional Appearance, Not Permitted. 196
 - (B) Failure to Appear — Issue Bench Warrant. 196
 - (I) Authority — 597(1). 196
 - (II) Deemed Execution — 597(5) 196
 - (III) Discretionary Bench Warrant — 597(4). 197
 - (IV) Release After Arrest — 597(3) 197
 - (V) Execution — Anywhere in Canada — 597(2) 197
 - (C) Jurisdiction Lost 197
 - (I) Regain by Attorning 197
 - (II) Regain by Process in 3 Months — 485(2). 197
 - (III) After 3 months, Dismissed for Want of Prosecution — 485(3) 197
 - (D) Jurisdiction Not Lost — 485(1.1) 197
 - 3.9.2 Hybrid Charges Indictable, Until Election — IA 34(1). 198**
 - 3.9.3 Jurisdiction Over Offence 198**
 - (A) Failure of Court to Act — Jurisdiction Not Lost — 485(1) 198
 - (B) Lack of Information Before Court — Jurisdiction Not Lost 199
- 3.10 LANGUAGE 199**
 - 3.10.1 English or French 199**
 - (A) Application — English or French 199

(B) Notice at First Appearance	199
3.10.2 Other Languages	200
(A) Application — Best Language	200
(B) Notice at First Appearance	200
(C) Translator	201
3.11 PRE-TRIALS — NEGOTIATIONS ARE PRIVILEGED	201
3.12 PROCEDURE — CROWN CALLS LIST	202
3.13 STAYS	202
3.13.1 Attorney General May Stay — 579(1)	202
3.13.2 Effect of Stay — Release / Bail Ends.	203
3.13.3 Process to Enter Stay	203
(A) Stay Directed to Court Clerk	203
(B) Upon Direction by Crown for Stay — Matter Ends	203
3.13.4 Recommencement After Stay — Within 1 Year — 579(2).	204
3.13.5 Review of Stay by Court — Only if Abuse of Process	204
3.14 SUMMONS	204
3.15 UNDERTAKING	204
3.16 WARRANT	204
3.17 WITHDRAWALS.	205
3.17.1 Effect — Cancels Defendant's Release.	205
3.17.2 How to Effect Withdrawal.	205
3.17.3 When to Effect Withdrawal.	206
(A) After Plea — With Leave of Court	206
(B) Before Plea — Attorney General's Right Unfettered	206
3.17.4 Who Can Withdraw Charges — Attorney General Has Sole Authority.	206

CHAPTER 4: ELECTIONS

4.1 INTRODUCTION	209
4.2 FLOWCHART: ELECTION PROCESS	210
4.3 CROWN ELECTIONS	211
4.3.1 Attorney General Requires Jury Trial.	211
(A) Authority — 568.	211
(B) No Re-Election Exists.	211
(C) Reviewable by Courts.	211
4.3.2 Attorney General Consents to Judge Alone — 469 Offence	212
(A) Assistant Crown Attorney Can Consent for Attorney General.	212
(B) The Superior Court Can Override the Crown's Refusal to Permit a Re-election in a 469 Offence.	212
4.3.3 Crown's Right to Elect.	213
(A) Authority.	213
(B) Not Informant's Right.	213
(C) Reviewable by Court Only if Flagrant Abuse.	214
4.3.4 Failure to Elect	214
(A) Deemed / Implied Election.	214
(B) Indictable Until Crown Elects.	214
4.3.5 Timing of Election	215
(A) Any Time or Place.	215

TABLE OF CONTENTS

- (B) Before Plea, Should be Done 215
- (C) Early, Often When Not All Facts Known 215
- (D) First Opportunity — Not Required 216
- (E) Past Limitation Period. 216
 - (I) Elect by Indictment, Crown May 216
 - (II) Elect By Summary Conviction, if on Consent. 217
 - (a) Consent Should be Given Expressly 217
- 4.4 ELECTIONS BY LAW 218**
 - 4.4.1 Defendant Does Not Elect — 565(1) 218**
 - 4.4.2 Direct Indictment — 565(2). 218**
 - 4.4.3 Defendants, Multiple / Different Elections 218**
 - (A) Authority — 567. 218
 - (B) Defendants Do Not Have to Elect at Same Time. 218
 - (C) Election Cannot “Revert” to Previous Election 219
 - (D) Judge May Decline Election — “Deeming” Jury Election 219
 - 4.4.4 Re-Election by Operation of Law 220**
 - (A) Provincial Court 220
 - (I) Flowchart: Re-Election by Operation of Law at PCJ 220
 - (II) Absolute Jurisdiction Offence >\$5000: Election Required — 555(2) 220
 - (III) Endorsement of Election. 221
 - (IV) Provincial Court Judge Decides NOT to Adjudicate: Election Required — 555(1) and (1.1). 221
 - (V) Preliminary Inquiry Entitlement — 555(1.2) 221
 - (B) Superior Court 222
 - (I) Flowchart: Re-Election by Operation of Law at SCJ 222
 - (II) Defendant Absconds, Effect on Elections 222
 - (a) Bench Warrant — 597(1). 222
 - (b) Deemed Judge-Alone Trial — 598(1) 222
 - (III) Proof of Absconding 222
 - (a) Must be Intentional. 222
 - (b) Onus on Defendant to Show Legitimate Excuse 223
 - (IV) Non-Jury Trial, After Election — 558. 223
- 4.5 DEFENCE ELECTIONS. 223**
 - 4.5.1 Default is Judge and Jury for Indictable Offence — 471 223**
 - 4.5.2 Election Must be Unequivocal 223**
 - 4.5.3 Election Must be to All Charges. 224**
 - 4.5.4 Election, if Jail >14 Years — Preliminary Inquiry Possible — 536(2 + 4.1). 224**
 - 4.5.5 Election, if Jail <14 Years — Preliminary Inquiry Not Possible — 536(2.1 + 4.12). 224**
 - 4.5.6 Election to Provincial Court Judge — 536(3) and 554(1) 225**
 - 4.5.7 Failure to Put Defendant to Election: Loss of Jurisdiction 225**
 - 4.5.8 Waiver of Election Must be Unequivocal. 225**
 - 4.5.9 Written Election 226**
 - (A) Authority — 536.2. 226
 - (B) By Designated Counsel. 227
 - (I) Counsel Can Waive the Election 227
 - (II) Requires Separate Document Signed by Defendant 227
- 4.6 RE-ELECTIONS 227**
 - 4.6.1 Crown Re-Election — At Any Time 227**
 - 4.6.2 Defence Re-Elections 229**
 - (A) By Right in Provincial Court 229
 - (I) Flowchart: Re-Elections in the PCJ. 229
 - (II) Authority to Re-Elect — 561(2) 229
 - (B) By Right in Superior Court 230

(I) Flowchart: Re-Elections in the SCJ	230
(II) Authority to Re-Elect — 561(1)	230
(C) Change in Crown's Case	231
(I) Authority to Re-Elect.	231
(II) Burden on Defence to Show Substantial Change	231
(D) Change in Evidentiary Landscape	231
(I) Authority to Re-Elect.	231
(II) Change in Evidence Required, Not Change in Defence Strategy	232
(III) Late Disclosure MAY or MAY NOT be Change in Evidence	233
(E) Direct Indictment	233
(I) Defendant May Re-Elect on Direct Indictment to Judge Alone	233
(II) Defendant May NOT Re-Elect on Direct Indictment to Judge Alone	233
(F) Refusal by Crown to Permit Re-Election	234
(I) Court Can Review Crown's Refusal	234
(II) Onus on Defendant to Show Refusal is Abuse of Process	235
(III) Reasons Not Required	235
(IV) Reasons Given, Court May Act	236
4.6.3 No Re-Election Permitted	236
(A) After Jury Selection	236
(B) Judge-Shopping Not Permitted	237

CHAPTER 5: PRELIMINARY INQUIRY

5.1 INTRODUCTION	239
5.2 FLOWCHART: PRELIMINARY INQUIRY	240
5.3 ABSCONDING DEFENDANT IN COURSE OF PRELIMINARY INQUIRY	241
5.3.1 Counsel is Permitted to Act — 544(4 + 5)	241
5.3.2 Court is Permitted to Continue or Adjourn — 544(1 + 2)	241
5.3.3 Defendant Waives Right to be Present, and Cannot Re-open Case — 544(1 + 3)	241
5.3.4 “In Course of Preliminary Inquiry” = After Election.	241
5.4 ADJOURNMENT.	241
5.5 BAIL	241
5.6 COMMITTAL FOR TRIAL	242
5.6.1 Absolute Jurisdiction Offence, Committal CAN be for.	242
5.6.2 Authority	242
(A) Committal or Discharge — 548(1).	242
(B) Consent Committal.	242
(I) Authority — 549(1).	242
(II) Consent to Trial on Additional Charges	242
(C) Fix Date for Trial or Appearance — 548(2.1).	243
(D) Only Justice Can Commit — Not SCJ	243
(E) Same Transaction — Series of Acts Over Time	243
(F) Same Transaction — Different Victim	244
5.6.3 Evidence	244
(A) Circumstantial Evidence — Inferences to be Drawn Must be Most Favourable to Crown	244
(B) Circumstantial Evidence vs. Direct Evidence — Commit or Limited Weighing	245
(C) Crown Evidence — Need Only Show <i>prima facie</i> Case	246
(D) Defence Evidence — Limited Weighing	246
(E) Test for Committal.	246
5.7 EVIDENCE.	247

TABLE OF CONTENTS

5.7.1 Authority to Take Evidence — 540(1) 247

5.7.2 Confessions 247

 (A) Authority — 542 247

 (B) Voluntariness, Must be Proven by Crown 247

5.7.3 Documentary Case 248

 (A) Authority if Credible or Trustworthy — 540(7) 248

 (B) Cross-Examination 248

 (I) Authority to Permit — 540(9) 248

 (II) Cross-Examination is Norm 248

 (III) Cross-Examination — Defence Entitled to Request 249

 (IV) Cross-Examination — Only if Relevant 249

 (C) Notice Required — 540(8) 249

 (D) Paper Case Possible 250

5.7.4 Discovery Aspect to Inquiry 250

 (A) Discovery Part of Inquiry Function 250

 (B) Groundwork Permitted for *Charter*, *Garofoli*, or Third-party Records 251

 (I) *Charter* Remedies 251

 (II) *Garofoli* Application 251

 (III) Third Party Records 252

 (C) Limits on Discovery Function 252

5.7.5 Witnesses 253

 (A) Crown Witnesses 253

 (I) Cross-Examination, Defendant Entitled to, Generally 253

 (II) Cross-Examination, Defendant Permitted PERSONALLY, Even if has Counsel 253

 (III) Force Crown to Call Witness, Court Cannot 254

 (IV) Prevent Crown from Calling Witness, Court Cannot 254

 (B) Defence Witnesses 255

 (I) Adjournment for Defence to Call evidence, if Necessary Court to Permit 255

 (II) Court Must Hear from Defence Witnesses if Called — 541(1) and (5) 255

 (C) Refusal to Testify 256

 (I) Adjourn and Commit to Jail for Up to 8 Days — 545(1) 256

 (II) Again Refuses, Adjourn and Commit to Jail for Another 8 Days — 545(2) 256

 (III) Committal for Trial, Despite Witness Refusal — 545(3) 256

 (IV) Contempt Not Possible 256

 (V) Contempt Possible, Only if 545 Not Used 257

 (VI) Obstruct Justice (s.139(2)) Possible, if 545 Not Used 257

5.8 JURISDICTION 258

5.8.1 Jurisdiction / Venue 258

 (A) Any PCJ Has Jurisdiction — 536(5) 258

 (B) PCJ (Ontario) Has Jurisdiction Through Entire Province 258

 (C) Traverse to Correct Jurisdiction — 543(1) 258

5.8.2 Judge Unable to Continue — 547.1 259

5.9 POWERS OF JUDGE 259

5.9.1 Adjourn — 537(1)(a + d + e) 259

5.9.2 Binding Witnesses Over to Trial by Recognizance — 550 259

5.9.3 Change Venue — 537(1)(a) + 537(2) 259

5.9.4 Charter Breach 259

 (A) Cannot Determine Constitutionality of Legislation 259

 (B) Cannot Grant *Charter* Remedies — Not “Court of Competent Jurisdiction” 260

5.9.5 Comment About Case Does Not Equate to Bias 261

5.9.6 Counsel 261

 (A) Disqualify Counsel, Court Can 261

 (B) Submissions, Restrictions on 261

(I) Court Can Refuse Crown Submissions — 537(1)(f)	261
(II) Court Cannot Refuse Crown Submissions	262
5.9.7 Disclosure.	262
(A) Court Cannot Order Disclosure	262
(I) Primary Crown Disclosure	262
(II) Third Party Records	263
(B) Subpoena to Obtain Disclosure, Not Permitted	263
5.9.8 Exclusion of Public	264
(A) Authority — 537(1)(h)	264
(B) Can Exclude All, but Not Some, of Public	264
(C) Requires Hearing About Exclusion	265
5.9.9 Exclusion of Witnesses	265
(A) Counsel, Order Cannot Preclude from Talking with Witnesses	265
(B) De Rigueur, Unless Reasons Not to	265
(C) Mandatory, if Credibility in Issue	266
5.9.10 Excuse Defendant — 537(1)(j.1)	266
5.9.11 Generally — Regulate Inquiry	266
(A) Authority — 537(1)(i)	266
(B) Court Attire — Court Can Regulate	266
(C) Full Answer and Defence, Court Cannot Ensure	267
(D) Jurist Must be in Court	267
(E) Physically Restrain Defendant, Court Can	268
5.9.12 Limit Questioning	268
(A) Authority — 537(1.1).	268
(B) Cross-Examination Cannot be Arbitrarily Limited	268
(C) Cross-Examination Not Unlimited Right	268
(D) Questions Limited to Charges of 14+ Jail	269
5.9.13 Limit Scope — 537(1.01).	269
5.9.14 Publication Ban	269
(A) Authority — 539(1)	269
(B) Constitutionally Valid	269
(C) Expires at End of Trial	270
(D) Notice to Self-Represented Defendant — 539(2).	270
5.9.15 Receive Evidence — 537(1)(g)	270
5.9.16 Remand — 537(1)(b) and (c)	271
5.9.17 Remote Appearance	271
(A) Authority — On Consent — No Evidence Taken — 537(1)(j)	271
(B) Authority — On Consent — Evidence Taken — 715.231	271
5.10 PREFER INDICTMENT AFTER PRELIMINARY INQUIRY.	271
5.10.1 Crown Prosecutor	271
(A) Can Prefer Indictment.	271
(I) Add Counts NOT Included in Information	271
(II) Authority to Prefer Indictment	272
(a) As Ordered to Stand Trial — 574(1)(a)	272
(b) As Found on Facts — 574(1)(b)	272
(III) Discharged Counts, Cannot Include.	272
(B) Consent to Include Other Charges — 574(2)	273
(C) No Preliminary Inquiry Conducted — 574(1.1).	273
5.10.2 Private Prosecutor — Requires Court Consent — 574(3)	273
5.11 REQUEST PRELIMINARY HEARING.	273
5.11.1 Authority to Request Inquiry — 536(4)	273
5.11.2 Available if	273

TABLE OF CONTENTS

(A) Penalty >14 Years 273
 (I) At Time Offence Committed 273
 (II) Based on Jeopardy of Charge, Not Final Sentence 274
 (III) Only on Counts with Penalty >14 Years 275
 (B) Requested Before September 19, 2019 275
 (C) Statement of Issues Filed by Requesting Party — 536.3 276
 (D) 2+ Defendants — Required if 1 Requests — 536(4.2) 276
5.11.3 Court Must Inquire — If Requested — 535 276
5.11.4 Endorsement of Preliminary Inquiry Request — 536(4.1 + 4.11) 276
5.11.5 Focus Hearing — 536.4(1) 276
5.11.6 Limit Scope of Inquiry — 536.5 + 549(1.1) 276
5.11.7 List Chart: Preliminary Inquiry Offences. 277
5.11.8 No Preliminary Inquiry Request — Fix Trial Date — 536(4.3) 280
5.12 WITHDRAW CHARGES 280

CHAPTER 6: TRIAL

6.1 INTRODUCTION 283
6.2 ADJOURNMENT. 283
6.2.1 Reason for Adjournment 283
 (A) Amend Information / Indictment — 601(5) 283
 (B) Lack of Counsel Mid-Trial. 283
 (I) Grant Adjournment if in Interests of Justice 283
 (II) Grant Adjournment if Not Defendant’s Fault 284
 (C) Trial Rulings / Decisions — 645(4) 284
6.2.2 Factors. 284
 (A) Discretionary Order 284
 (B) General Factors 285
 (I) Criminal Record of Defendant 285
 (II) Complexity of Trial 285
 (III) Consequences 285
 (IV) Gravity of Offence 285
 (V) Legal Aid Status 285
 (VI) Prior Adjournments. 285
 (VII) Public Interest. 285
 (C) Trial Fairness Factors 286
 (I) Adjournment Would Delay Trial Inordinately 286
 (II) Defendant Able to Conduct Trial Without Counsel 286
 (III) Defendant Acted Honestly and Diligently 286
 (IV) Delay Would Affect Trial Fairness for Crown 286
6.2.3 Who Can Effect Adjournment 288
 (A) Clerk — 474(2) and 482.1(1)(b) and 482(2) and 669.1(2) 288
 (B) Judge — 571 and 606(3) and 669.1(2) and 803(1) 288
 (C) Justice — 606(3) and 669.1(2) and 803(1). 288
6.3 ARRAIGNMENT AND PLEAS 289
6.3.1 Flowchart: Arraignment and Pleas 289
6.3.2 Crown Consent to Plea to Other Charge 290
 (A) Authority — 606(4) 290
 (B) Crown Consent Required — Conditions May Be Attached. 290
 (C) Court Refusal to Accept 290
 (D) Original Charge Dismissed 291
6.3.3 Nolo contendere 291

(A) Alternative Method	291
(B) Plea Inquiry Required	292
(C) Not Available Plea	292
6.3.4 Ordinary Plea — 606(1) + 607(4)	292
6.3.5 Plea Comprehension.	292
(A) Authority — 606(1.1).	292
(B) Informed	293
(I) Aware of Nature of Allegations, Effect and Consequences of Plea	293
(II) Collateral Consequences	294
(C) Mandatory Inquiry	294
(D) Unequivocal	295
(E) Voluntary	295
(I) Conscious, Volitional Choice	295
(II) Counsel, Experienced — Presumption of Voluntary Plea	295
(III) Duress or Coercion, None Means Voluntary	296
(IV) Indigeneity	296
(V) Mental Health Concerns	297
6.3.6 Special Pleas.	298
(A) Authority — 607(1).	298
(B) Evidence of Prior Acquittal or Conviction	298
(C) Hung Jury — Mistrial — Stay	298
(D) Test: Final Determination on Merits	299
(E) Withdrawn	299
6.3.7 Withdrawal of Plea	300
(A) Authority	300
(B) Burden: on Balance	300
(C) Discretionary Order	300
(I) At Discretion of Trial Judge	300
(II) Not as of Right	301
(D) Grounds for Withdrawal of Guilty Plea	301
(I) Awareness of Effects of Guilty Plea, Lack of	301
(II) Collateral Consequences, Lack of Awareness of	302
(III) Indigeneity	302
(IV) Inducements / Coercion	302
(V) Intent to Plead Guilty / Admit Facts, Lack of	303
(VI) Legal Advice, Wrong	303
(VII) Language Issues	304
(VIII) Prejudice to Defendant, Required	304
(IX) Valid Defence, Not Required.	304
(E) Motive to Enter Guilty Plea: Irrelevant	305
(F) Non-Disclosure of Evidence	305
(G) Onus on Defendant	305
(H) Presumption of Validity of Guilty Plea	306
(I) Procedure to Withdraw Guilty Plea	306
(I) Rely on Record Before Court, or Defendant to Swear Affidavit	306
(II) Unaware of Collateral Consequences — Defendant Required to Swear Affidavit	307
(J) Timing of Withdrawal Application: Before Sentence	307
6.4 COURT ORDERS	308
6.4.1 Introduction	308
6.4.2 List Chart: Orders.	308
6.4.3 Adjournment Order.	313
6.4.4 Amendment Order.	313
(A) Authority to Amend	313
(I) Amendment Section Applies to Indictments or Informations — 2 + 601(1)	313
(II) At Any Stage — 601(2) + (3) + (11)	314

TABLE OF CONTENTS

- (B) Procedure to Amend. 314
 - (I) Amend Based on Evidence on Face of Information / Indictment — 601(7) 314
 - (II) Quash, Only if Cannot Amend 315
- (C) Test to Amend 315
 - (I) Court Shall Consider: Evidence, Circumstances, Prejudice — 601(4) 315
 - (II) Essential Element of Offence Missing: Not Fatal. 315
 - (III) Prejudice as Factor 316
 - (a) Conducted Defence Differently or Unaware of Offence Alleged 316
 - (b) Defendant Did Not Have Opportunity to Meet All Issues 316
 - (c) Lost Defence or Alibi — Not Prejudice. 317
 - (IV) Prejudice Shown: Adjourn or Quash 317
 - (V) Prejudice NOT Shown: Amend. 318
 - (VI) Time / Date of Charge. 319
 - (a) Court Shall NOT Consider: Time, Location — 601(4.1) 319
 - (b) Essential — If Required for Charge or Defence. 319
 - (c) Limitation Period, Amendment Does Not Have to be Made Within 320
 - (d) Not Essential — For Young Victims. 320
- 6.4.5 Appointment of Counsel Order 321**
 - (A) *Amicus* 321
 - (I) Authority 321
 - (II) Discharge *amicus*, Defendant Cannot 322
 - (III) Test to Appoint *amicus* 322
 - (a) Defendant Abusive 322
 - (b) Defendant Incompetent 322
 - (c) Defendant Refuses to Participate 322
 - (d) Trial Progresses, and Fairly 322
 - (IV) Trial Strategy, *amicus* Does Not Dictate. 323
 - (B) Cross-Examination of Victim / Witness — 486.3 323
 - (I) Adverse Inference — None to be Drawn — 486.3(5) 323
 - (II) Application. 323
 - (a) Choice of Counsel 323
 - (b) Evidentiary Foundation Required 323
 - (c) Onus 324
 - (d) Remuneration 325
 - (e) Timing — 486.3(4.1) 325
 - (III) Mandatory Order — 486.3(1) + (2). 325
 - (IV) Permissive Order 325
 - (a) Authority — 486.3(3) 325
 - (b) General Factors 326
 - (i) Circumstances of the Case 326
 - (ii) Nature of the Criminal Acts 326
 - (iii) Nature of the Defendant-Witness Relationship 326
 - (iv) Questioning by the Defendant 326
 - (c) Statutory Factors — 486.3(4) 327
 - (i) Age of the Witness 327
 - (ii) Nature of the Offence 327
 - (iii) Protection From Intimidation or Retaliation 327
 - (iv) Society’s Interest In Encouraging Participation 327
 - (v) Witness’ Mental Or Physical Disabilities 327
 - (d) Wide Latitude Afforded to Court to Make Order 327
- (C) Funding Private Counsel: *Rowbotham*. 327
 - (I) Authority 327
 - (a) Court Can Order Stay of Proceedings, Until Funding Provided 327
 - (b) Legal Aid’s Decision Should be Respected. 328
 - (II) Requirements of Funding Order 329
 - (a) Counsel Essential to Fair Trial. 329

(i) Fair Trial Factors — Length and Complexity of Proceedings	329
(ii) Fair Trial Factors — Likelihood of Jail	329
(iii) Fair Trial Factors — Seriousness of Charges	329
(b) Defendant Lacks Funds	329
(c) Refused Legal Aid	329
6.4.6 Attendance of Prisoner	329
(A) Court Can Order Defendant Brought From Prison to Testify in Court — 527(1) + (2) + (9)	329
(B) Court Can Order Defendant Brought From Prison to Police Custody — 527(7) + (8) + (9).	330
6.4.7 Change of Venue Order	330
(A) Authority — Administratively by the RSJ or CJ	330
(B) Authority — On Application — 599(1)	331
(C) Costs — Court May Order Payment of Expenses — 599(3)	331
(D) Initial Venue	331
(I) Crown Choice of Venue, If Some Connection to Location	331
(II) Ordinary Venue — Trial Occurs Where Alleged Crime Occurs	332
(E) Onus	332
(I) Initial Venue IS Ordinary Venue — Onus on Moving Party	332
(II) Initial Venue NOT Ordinary Venue — Onus on Crown	333
(F) Test for Change of Venue	333
(I) Appears Expedient to Ends of Justice	333
(II) Reasonable Probability of Partiality	334
6.4.8 DO / LTO Assessment Order.	334
(A) Application for Assessment — 752.1(1)	334
(B) Choice of Assessor.	335
(C) Notice Requirement — 752.01	335
(D) Offences — 752	336
(E) Report to Court — 752.1(2) + (3)	336
6.4.9 Exclusion of People from Court Order	336
(A) Authority — 486(1) + (1.1) + (4)	336
(B) Burden of Proof, With Moving Party	336
(C) Evidence, Required	337
(D) Mental Health Disposition Hearing — 672.5(6) + (10).	337
(E) Preliminary Inquiry	338
(F) Presumption of Open Court	338
(G) Reasons Required, if Certain Offences — 486(3)	339
(H) Test and Factors	339
(I) Core Biographical Information, Protection of.	339
(II) Other Options and Limitations of Order, Consideration of.	340
(III) Press and Public's Interest in Free Speech, Judge to Consider	340
(IV) Statutory Factors — 486(2).	341
(I) Sexual Offence, Prior Sexual Acts / Records Application — 278.94(1)	341
(J) Witness Exclusion	341
6.4.10 Exhibits: Release or Seal Order	342
(A) Release Exhibit	342
(I) Authority — 605(1).	342
(II) Post Trial / Appeal, No Right to Exhibits	343
(B) Seal Exhibit	343
(I) Authority — 486(1).	343
(II) Test to Seal Exhibit	344
6.4.11 Mental Health Disorders	345
6.4.12 Non-Communication Order	345
(A) Bail Hearing.	345
(B) Preliminary Inquiry	345
(C) Sentencing	345
6.4.13 Non-Disclosure Order	346

TABLE OF CONTENTS

- (A) NCR Disposition Information 346
 - (I) Default: Disclose Disposition Information Unless Would Harm — 672.51(1) + (2) + (3) + (7) + (11) 346
 - (II) Release Information Despite Risk of Harm — 672.51(4). 346
 - (III) Withhold Information to Others — 672.51(5) 346
- (B) Witness’ Identity — 486.31 346
- 6.4.14 Publication Ban Order 347**
 - (A) Evidence at Hearing 347
 - (I) Bail Hearing 347
 - (a) Generally 347
 - (b) Victim’s Identity 347
 - (II) Preliminary Hearing 347
 - (III) Records Hearing (Release Documents to Court) — 278.9. 348
 - (IV) Records Hearing (Disclosure to Defendant) / Prior Sexual Acts Application — 278.95 348
 - (V) Trial 348
 - (B) Identity of Justice System Participant 350
 - (I) Authority — 486.5(2) + (4) + (5) + (6) + (8) 350
 - (II) Factors — 486.5(7) 350
 - (III) INQUIRY Before Order Made — 486.5(5.1). 350
 - (IV) NOTIFICATION After Order Made — 486.5(8.1) + (8.2) 351
 - (V) Permitted Disclosure — 486.5(3) + (3.1). 351
 - (VI) Publication Ban on Application — 486.5(9) 351
 - (VII) Variation or Revocation 351
 - (a) Application 351
 - (b) Authority if Variation / Revocation Will Affect Rights of Others — 486.51(3) + (4) + (6) 351
 - (c) Authority if Variation/Revocation Will Not Affect Rights of Others — 486.51(2) + (4) 351
 - (C) Identity of Victim / Witness 351
 - (I) Enumerated Offences. 351
 - (a) Authority — Generally: Permissive Order — 486.4(1) 351
 - (b) Authority — Victim of Child Pornography: Mandatory Order — 486.4(3). 352
 - (c) Authority — Witness <18 Years: Mandatory Order — 486.4(2) 352
 - (d) Notification — 486.4(2) + (3.1) + (3.2). 352
 - (e) Permissible Disclosure — 486.4(4) + (5) 352
 - (II) Non-Enumerated Offences — Generally 352
 - (a) Authority: Permissive Order — 486.5(1) 352
 - (b) INQUIRY Before Order Made — 486.5(5.1) 352
 - (c) NOTIFICATION After Order Made — 486.5(8.1) + (8.2) 352
 - (d) Permitted Disclosure — 486.5(3) + (3.1) 353
 - (e) Publication Ban on Application — 486.5(9) 353
 - (f) Variation or Revocation 353
 - (i) Application 353
 - (ii) Authority if Variation / Revocation Will Affect Rights of Others — 486.51(3) + (4) + (6) 353
 - (iii) Authority if Variation/Revocation Will Not Affect Rights of Others — 486.51(2) + (4). 353
 - (III) Non-Enumerated Offences — Victim <18 Years 353
 - (a) Authority — 486.4(2.1) + (2.2) 353
 - (b) Notification — 486.4(2) + (3.1) + (3.2). 353
 - (c) Permissible Disclosure — 486.4(4) + (5) 354
 - (d) Variation or Revocation 354
 - (i) Application 354
 - (ii) Authority if Variation/Revocation Will Affect Rights of Others — 486.51(3) + (4) + (6) 354
 - (iii) Authority if Variation/Revocation Will Not Affect Rights of Others — 486.51(2) + (4). 354
 - (D) Of Search Warrant — 487.3. 354
 - (E) Open Court Principle 354
 - (F) Variation / Revocation of Order. 355
- 6.4.15 Quash 356**
- 6.4.16 Remote Appearance Order 356**
 - (A) Defendant 356

(I) Generally	356
(a) Attendance in Person is Default — 650(1) + 715.21	356
(b) Exception for Audioconference or Videoconference	356
(i) Authority — 715.24 + 715.241	356
(ii) Factors to Consider — 715.23 + 715.242 + 715.243	357
(II) Pleas	357
(a) Attendance in Person is Default — 650(1) + 715.21	357
(b) Exception for Audioconference or Videoconference	357
(III) Preliminary Inquiry	358
(IV) Sentencing	358
(V) Trial	358
(a) Attendance in Person is Default — 650(1) + 715.21	358
(b) Exceptions	359
(i) Appearance by Designated Counsel — 650(1.1)	359
(ii) Defendant Misconducts or is Unfit — 650(2)(a) + (c)	359
(iii) Permission of the Court — 650(2)(b) + 715.232 + 715.233	359
(B) Generally — 715.21 + 715.221 + 715.222	360
(C) Judge — 715.21 + 715.26	360
(D) Participants — 715.21 + 715.25	361
(E) Witnesses	361
6.4.17 Severance Order	361
(A) Authority — 591	361
(B) Discretionary Order of Severance	361
(C) Test for Severance: in “Interests of Justice”	362
(I) Antagonistic Defence	362
(II) Complexity of Evidence	362
(III) Cross-Count Evidence	362
(IV) Desire to Testify	362
(V) Inconsistent Verdicts	362
(VI) Length of Trial	362
(VII) Multiplicity of Proceedings	362
(VIII) Prejudice Potential	362
(D) Presumption Against Severance	362
6.4.18 Support Person Order	363
6.4.19 Stay Order	363
6.4.20 Trial Management	363
6.4.21 Unsealing ITO Order — 487.3(4)	364
6.5 JURISDICTION	365
6.5.1 Provincial Court Judge	365
(A) Absolute Jurisdiction	365
(I) Authority — 553	365
(II) Remand to Provincial Court Judge — 536(1)	365
(III) Value of Subject Matter	365
(B) Joint Trial	366
(I) Indictable and Summary Conviction	366
(II) Provincial Offences and Summary Conviction Matters	366
6.5.2 Superior Court	367
(A) Jurisdiction Over Indictable Offences — 468 + 470	367
(B) Jurisdiction Over Summary Conviction Offences	367
6.6 NOTICE TIME PERIODS	368
6.6.1 List Chart: Notice Time Periods	368
6.6.2 Constitutional Challenges	370
(A) Alberta — 7 Days’ Notice	370

TABLE OF CONTENTS

(B) Manitoba — 30 Days’ Notice 370

(C) New Brunswick — 30 Days’ Notice 370

(D) Newfoundland — 15 Days’ Notice 370

(E) Nova Scotia — 7 Days’ Notice 370

(F) Nunavut — 60 Days’ Notice 370

(G) Ontario — 15 Days’ Notice 370

(H) Saskatchewan — 14 Days’ Notice 371

6.6.3 Convictions. 371

(A) Higher Penalty — Notice for Notice for — 727(1) 371

(B) Proof of Past Conviction — Notice for 372

(I) Generally — 667(1) + (3) + (4) + (5) 372

(II) Summary Conviction Matters — 667(1) + (2) + (2.1). 372

6.6.4 Counterfeit Money: Reasonable — 461(2) + (3) 372

6.6.5 Dangerous Offender: 7 Days — 754(1)(b) 373

6.6.6 Documents, Notice for 373

(A) Bank Records: None — CEA 29(1) + (3) 373

(B) Business Records: 7 Days — CEA 30(1) + (2) + (3) + (4) + (7). 373

(C) Government Records: 7 days — CEA 24 + 26 (1) + (2) + (3) + 28 (1) + (2). 373

(D) Judicial Records 373

(I) Certified Copies: 7 days — CEA 23(1) + 28(1) + (2) 373

(II) Originals or Exemplifications: None 374

(E) Public Records / Documents 375

(I) Certified Copies: 7 days — CEA 25 + 28(1) + (2) 375

(II) Originals or Exemplifications 375

6.6.7 Driving Prohibition — Proof and Presumption: 10 Days – 320.32(6) + (7) 376

6.6.8 Errors in Notice, Defence Must Prove Harm 376

6.6.9 Exhibits from Preliminary Inquiry: 3 Days — 605(1) 377

6.6.10 Experts. 377

(A) Notice: 30 Days — 657.3(3) 377

(B) Remedies — 657.3(4) + (5) 377

(I) Notice Not Given — 657.3(4) 377

6.6.11 Fail to Attend / Comply: Reasonable — 145(9) + (10) + (11). 377

6.6.12 Impaired / 80%+: Reasonable — 320.32(1) + (2). 377

6.6.13 Ownership: Reasonable — 657.1 378

6.6.14 Preliminary Inquiry: Reasonable — 540(7) + (8) + (9) 378

6.6.15 Remote Testimony — Outside Canada: 10 Days — 714.2(1) + (2) 378

6.6.16 Stay, Recommence: 1 year — 579 378

6.6.17 Terrorist — Sentence: Before Plea — 83.27(1) + (2) 378

6.6.18 Weapons Prohibition: per the Court — 111(2) + 117.011(2) 378

6.7 TRIAL MANAGEMENT. 378

6.7.1 Language Rights— 530(3). 378

6.7.2 Re-Open Case. 379

6.7.3 Resolution Discussions 380

6.7.4 Summary Dismissal of Application 380

6.8 WITNESS — COMPELLING ATTENDANCE. 382

6.8.1 Competent and Compellable 382

(A) Accused — CEA 4(1). 382

(B) Co-Accused 383

(C) Counsel. 383

(D) Judge 384

(E) Legislators 384

(F) Prejudice to Witness	384
(G) Suspects, Uncharged.	385
(H) Spouse — CEA 4(2) + (3).	385
6.8.2 Subpoena	385
(A) Effect of Subpoena	385
(I) Attend and Give Evidence (<i>ad testificandum</i>) — 698(1) + 700	385
(II) Attend and Bring Documents (<i>duces tecum</i>) — 698(1) + 700.	386
(III) Not Substitute for Disclosure Request	386
(B) Issuing a Subpoena	387
(I) Form of Inquiry — 698(1) + 699(2)	387
(II) Material at Inquiry	388
(III) Test to Issue — 698(1)	388
(IV) Who Can Issue	389
(a) To Compel to Attend Provincial Court WITHIN Province: PJC or JP — 699(2)(a)	389
(b) To Compel to Attend Provincial Court OUTSIDE Province: PCJ or SCJ — 699(2)(b) + (3)	389
(c) To Compel to Attend Superior Court: SCJ or Clerk — 699(1) + (4).	390
(d) To Compel to Attend Remotely: — 700.1(1)	390
(V) Who Can Request: Agents, Counsel, Crown, Defendant	390
(C) Service of Subpoena.	391
(I) Effectiveness — Where Does Subpoena Have Effect.	391
(a) Issued by Judge or Court — Effective Throughout Canada — 702(1).	391
(b) Issued by Justice of Peace — Effective Within Province — 702(2)	391
(II) Method of Service	392
(a) Out-of-Province Service — 701(2)	392
(b) Within the Province — 509(2) and 701(1) and 701.1	392
(D) Sexual Offences — Subpoena Specific to Records for — 699(5.1) + (7)	392
6.8.3 Quash Subpoena	392
(A) Alternative to Quash, Excuse Witness	392
(B) Authority to Quash	393
(I) Forum to Hear Application to Quash.	393
(II) Onus on Party Seeking to Support the Subpoena.	393
(III) Test — Likely to Have Material Evidence	394
(C) Opposing Counsel — Necessity and Relevance Required if Subpoena for.	394
6.9 WITNESS — COMPELLING EVIDENCE	396
6.9.1 Flowchart: Witness Evidence.	396
6.9.2 Absent Witness	396
(A) Adjournment — 645(2) + 571 + 803(1)	396
(B) Material Witness Warrant	397
(I) Authority to Issue Warrant	397
(a) Factors to Consider.	397
(b) Witness Already Bound by Recognizance — 704(1) + 705(2)	398
(c) Witness Has Been Subpoenaed — 705(1)	398
(d) Witness Not Subpoenaed, but Evading Service — 698(2) + (3).	398
(II) Expert — Compelling by Warrant	398
(III) Execution of Warrant — Anywhere in Canada — 705(3).	399
(IV) Release / Detain — After Arrest on Warrant — 706 + 707	399
6.9.3 Commission Evidence.	399
(A) Witness Absent from Canada	399
(I) Authority — 709(1)(b) + 712 + 713 + 713.1.	399
(II) Test and Factors to Take Commission Evidence	399
(B) Witness Ill / Other Reason — 709(1)(a) + 710 + 711 + 713	400
6.9.4 Contempt	400
(A) Authority to Punish for Contempt	400
(I) For Refusing to Attend — 9 + 708.	400
(II) For Refusing to Testify — 9 + 708.	401

TABLE OF CONTENTS

- (III) Restraint Required 401
- (B) Sentence for Contempt — Factors 402
 - (I) General Deterrence 402
 - (II) Rehabilitation 402
- (C) Test to Convict for Contempt — *Mens rea* and *actus reus* Factors 402
- 6.9.5 Cross-Examine Defendant 403**
 - (A) Criminal Record 403
 - (I) By Co-accused. 403
 - (II) Charges on Record — What Can be Included 404
 - (III) Facts Underlying — Cannot Cross-Examine on — Unless Character Put in Issue 405
 - (B) Statements to Person in Authority 406
 - (I) Lack of Police Caution. 406
 - (II) Voluntariness of Statement. 407
- 6.9.6 Cross-Examine Own Witness — CEA 9(2). 408**
 - (A) Authority — Permit Cross-examination on Statement Inconsistent With Testimony — CEA 9(2) 408
 - (B) Procedure re: 9(2) Application 409
 - (I) Absence of Jury 409
 - (II) *Milgaard* Procedure 409
 - (a) 9(2) Application. 409
 - (b) Jury Retires. 409
 - (c) Judge Decides if Inconsistency 409
 - (d) Prove Statement. 409
 - (e) Judge Decides if Cross-Examination Permitted 409
 - (C) Test to Permit Cross-Examination of Own Witness 410
 - (I) Adversity, Not Required. 410
 - (II) Ends of Justice 410
 - (III) Factors Court to Consider. 411
 - (a) Statement Has Contradictions With Evidence 411
 - (b) Statement Has Information Prejudicial to Defendant 411
 - (c) Statement Was Obtained Fairly 411
 - (d) Will Cross-Examination Change Testimony 411
 - (e) Will Procedure Create Distracting Side-Issues 411
 - (IV) Lack of Recall IS Inconsistency 411
 - (V) Reason Witness Departed from Out-of-Court Statement, Permitted 412
 - (VI) Refusing Cross-Examination, Rare 412
 - (VII) Reliability of Statement, Not Essential 412
- 6.9.7 Hearsay Evidence 413**
 - (A) Flowchart: Hearsay 413
 - (B) Admission by Defendant 414
 - (I) By Actions 414
 - (II) By Silence 414
 - (III) By Words 415
 - (a) By Utterance Outside Court 415
 - (b) By Utterance Inside Court 416
 - (IV) Self-Identification 416
 - (V) State of Mind / Present Intention. 417
 - (C) Admission by Others 418
 - (I) Admission of Adopted Prior Statement 418
 - (II) Admission Against Penal Interest. 418
 - (III) State of Mind / Present Intention 419
 - (D) Business Records / Declarator’s Duty 419
 - (E) Co-Conspirators. 420
 - (F) Court Documents — Exemplifications. 422
 - (G) Documents in Possession (of Defendant). 422
 - (I) Example — Text Messages 422
 - (II) Test 423
 - (H) Demeanour 423

(I) Narrative	424
(J) Past Recollection Recorded	425
(K) Principled Approach vs. Existing Exception	426
(L) Principled Approach	426
(I) Necessity	426
(a) Cannot Compel Testimony	426
(b) Recanting Witness	427
(c) Refusing to be Sworn	428
(d) Refusing to Testify	428
(e) Trauma — Testifying Would Traumatize	428
(f) Unknown Declarant	429
(II) Prejudice vs. Probative Value	430
(III) Procedural Reliability	430
(a) Authority	430
(b) Cross-Examination, Lack of — Because of Poor Memory	430
(c) Oath, Videotaped, and Cross-Examination	431
(d) Oath — Lack of	431
(IV) Procedural vs. Substantive Reliability	432
(V) Proof on Balance	432
(VI) Substantive Reliability	433
(a) Authority	433
(b) Corroborative Evidence	434
(c) Factors to Consider for Substantive Reliability	435
(VII) Threshold Reliability	436
(VIII) Voluntariness	436
(M) Public Documents	437
(N) <i>Res gestae</i>	438
(I) Acts with Statement (Traditional <i>res gestae</i>)	438
(II) Contemporaneity of Statement	438
(III) Dying Declaration	439
(IV) Spontaneous Utterance	439
6.9.8 Hostile Witness	440
(A) Cross-Examination at Large — Permitted	440
(B) Definition	441
(C) Not Part of 9(1) Application	441
6.9.9 Impeach Witness — CEA 9(1)	442
(A) Authority — CEA 9(1)	442
(B) Adverse Witnesses	442
(I) Definition	442
(II) Found on Factors Other Than Just Inconsistent Statement	442
6.9.10 Previously Taken Evidence	443
(A) Civilians — 715	443
(B) Police Officers — 715.01	443
(C) Test	443
(I) Cross-Examination, Lack of Full Opportunity	444
(II) Discretion to Exclude	444
(III) Exclusion of Evidence, Rare	445
6.9.11 Recorded Statement of Witness	445
(A) Authority	445
(I) Witness <18 Years — 715.1	445
(II) Witness with Disability — 715.2	445
(B) Procedure to Admit This Evidence	445
(C) Test and Factors to Consider	446
(I) Adopt Statement — Witness Made Statement, Was Telling Truth, Statement True	446
(II) Cross-Examination, Effect of Inability	446
(III) Evidence Admissible — Only for “Acts Complained of”	447

TABLE OF CONTENTS

- (IV) Factors to Consider to Exclude Video Statement 447
- (V) Prejudicial vs. Probative Balancing 448
- (VI) Reasonable Time Requirement. 448
- 6.9.12 Re-Examination 449**
- 6.9.13 Refresh Memory 449**
 - (A) Procedure 449
 - (I) Any Document Can be Used 449
 - (II) Document Must be Disclosed 450
 - (III) Memory Does Not Have to be Exhausted. 451
 - (IV) Memory Should be Exhausted 451
 - (V) Process Flexible 452
 - (B) Refresh vs. Discredit / Cross-Examination 452
 - (C) Test for Refreshing Memory. 452
 - (I) Witness — Knows Facts, Document Will Refresh Memory, Sees Document, Memory Refreshed 452
 - (II) Witness Uncooperative / Partial Recall 453
- 6.9.14 Remote Testimony 453**
 - (A) Generally — 714.41 + 714.7 + 714.8. 453
 - (B) Inside Canada 453
 - (I) Authority to Permit Remote Testimony — 714.1 453
 - (II) Factors to Consider 454
 - (a) Better Than in Person 454
 - (b) Efficient. 454
 - (c) Greater Value of Testimony and Importance of Credibility — Less Likely Can be Remote 455
 - (d) Health and Safety. 455
 - (e) Presumption is In-Person Testimony 456
 - (f) Remote Testimony Similar to 486.2 456
 - (g) Specific Factors to Consider 457
 - (i) Ability of Court to Impose its Authority Extraterritorially. 457
 - (ii) Ability to Cross-Examine Effectively 457
 - (iii) Nature of Evidence 457
 - (iv) Integrity of Remote Location 457
 - (v) Impact of Travel on Witness. 457
 - (vi) Ability to Cross-Examine Witness. 458
 - (vii) Cost to Have Witness Attend Court 458
 - (viii) Effect on Witness to Attend Court. 458
 - (ix) Integrity of Witness’ Location 458
 - (x) Nature of Evidence (Controversial or Not) 458
 - (xi) Reliability of Technology 458
 - (xii) Use of Exhibits 458
 - (h) Statutory Factors, Not Exhaustive — 714.1 459
 - (i) Threats of Violence Against Witness 459
 - (j) Victim Testifying Remotely. 459
 - (i) Generally Rare 459
 - (ii) Poor Health Favours Remote Testimony 460
 - (III) Procedure 460
 - (a) Evidence — Counsel Submissions Sufficient 460
 - (b) Timing of Application — Best Before Trial, but Not Necessary 461
 - (C) Outside Canada 461
 - (I) Audio Testimony — 714.1 + 714.3. 461
 - (II) Oath or Affirmation — 714.5 461
 - (III) Video Testimony 461
 - (a) Authority — 714.2 461
 - (b) Test for Use — 714.1 + 714.3 462

- 6.10 TESTIMONIAL AIDS. 463**
- 6.10.1 Screen / CCTV 463**

(A) Generally	463
(I) Crown Decides WHICH Testimonial Aid to Use	463
(II) Evidence Must be Presented in Court	463
(B) Witness < 18 Years or Disability: Mandatory Order — 486.2(1) + (2.1) + (5) + (6)	464
(C) Witness Generally: Permissive Order	464
(I) Authority — 486.2(2) + (2.1) + (3) + (4) + (5) + (6)	464
(II) Procedure	464
(a) Evidence Not REQUIRED (but Desired) for Application	464
(b) Motion (Written) Best Practice	465
(c) Opinion Evidence Can Suffice	465
6.10.2 Support Person	465
(A) Witness <18 Years or Disability: Mandatory Order — 486.1(1) + (4) + (5) + (6)	465
(B) Witness Generally: Permissive Order	465
(I) Authority — 486.1(2) + (2.1) + (3) + (4) + (5) + (6)	465
(II) Evidence Not REQUIRED (but Desired) for Application	466

CHAPTER 7: SENTENCING

7.1 INTRODUCTION	467
7.2 OVERVIEW	468
7.2.1 Flowchart: Process Overview	468
(A) Allocution	469
(B) Notation of Sentence — 719(3.3)	469
(C) Pre-Sentence Report	469
(D) Prior Convictions	469
(E) Reasons for Sentence — 726.2	469
(F) Submissions — 723(1)	469
(G) Timing of Sentence — 719(1) and 720	469
(H) Victim	469
(I) Impact Statement	469
(II) Notification of Sentence — 726.3	469
7.2.2 Flowchart: Sentencing Options	470
7.3 CUSTODY	471
7.3.1 Conditional Sentence	471
(A) Charts	471
(I) Flowchart: Conditional Sentence Eligibility	471
(II) List Chart: Offences NOT Eligible for Conditional Sentence	472
(III) Flowchart: Process to Impose Conditional Sentence	474
(IV) List Chart: Conditions in Conditional Sentence	475
(B) Breach	476
(I) Flowchart: Process of Breach of Conditional Sentence	476
(II) Arrest	476
(a) Authority — 742.6(1)(b)	476
(b) Compelling Appearance — 742.6(1)(a) + (d)	476
(c) Police Release — 742.6(1)(e)	476
(d) Warrant for Arrest — 742.6(1)(f)	476
(III) Bail	477
(a) Reverse Onus — 742.6(2)	477
(b) Venue	477
(IV) Hearing	477
(a) Adjourn — 742.6(3.3)	477
(b) Commencement Within 30 days — 742.6(3)	477
(c) Evidence — Report, Notice, Cross-examination — 742.6(4) + (5) + (6)	478
(d) Judge	478

TABLE OF CONTENTS

- (e) Venue — Local and Out of Province — 742.6(3.1) + (3.2) 479
- (V) Hearing Outcome: Breach Found. 479
 - (a) Change the Optional Conditions — 742.6(9)(b) 479
 - (b) Credit Time Served — Exceptional Circumstances — 742.6(16) + (17) 479
 - (c) No Action — 742.6(9)(a) 479
 - (d) No Earned Remission While Awaiting Hearing — 742.6(13) 479
 - (e) Suspend the CSO: Serve Part in Custody — 742.6(9)(c) 479
 - (f) Terminate the CSO: Serve Rest in Custody — 742.6(9)(d) 480
- (VI) Hearing Outcome: No Breach Found — 742.6(15) 480
- (VII) Suspension of CSO Pending Hearing 480
 - (a) Authority Generally + Effect on Conditions — 742.6(10) + (11) 480
 - (b) Authority if New Sentence — 742.7(1) 481
 - (c) Except if Delay in Arrest — 742.6(14) 481
 - (d) Except if Detained Only on CSO Breach — 742.6(12) 481
- (C) Eligibility. 482
 - (I) Authority to Impose Conditional Sentence — 742.1 482
 - (II) Not Endanger Safety of Community. 482
 - (III) Not Penitentiary Sentence 483
 - (IV) Not Probationary Sentence 484
 - (V) Onus 485
 - (VI) Principles of Sentencing to be Considered 485
 - (a) Punitive Measures Warranted — Conditional Sentence Not Appropriate 485
 - (b) Restorative Measures Warranted — Conditional Sentence May be Appropriate 486
 - (VII) Specific Issues — Conditional Sentence Inappropriate 487
 - (a) Child Sex Assault. 487
 - (b) Deterrence or Denunciation Appropriate 487
 - (c) Prior Breaches 487
- (D) Factors 488
 - (I) Aboriginal Offenders — 718.2(e) 488
 - (II) All Other Sanctions, Before Custody — 718.2(d) 488
 - (III) First Offender — All Other Sanctions, Apart from Custody 488
 - (IV) First Sentence of Imprisonment — As Short as Possible 488
- (E) Principle of Separation — 718(c). 489
- (F) Implementation 489
 - (I) Blended Sentence 489
 - (a) Different Charges, Permitted if Total Sentence <2 Years 489
 - (b) Different Charges, Can be Combined With Intermittent. 489
 - (c) Same Charge, Blended Conditional Sentence Not Permitted 490
 - (II) Conditions 490
 - (a) Mandatory Conditions — 742.3(1) 490
 - (b) Optional Conditions — 742.3(2) 490
 - (i) Bodily Substances Testing — 742.3(2 + 5 + 6 + 7 + 8 + 9 + 10) 490
 - (ii) Conditions Must be Punitive. 490
 - (iii) Other Reasonable Conditions 491
 - (1) Cannot Require Defendant to Return to Court 491
 - (2) Cannot Require Something of Any Other Person, Other Than Offender 492
 - (III) Court Obligations — 742.3(3) 492
 - (IV) Duration of Conditional Sentence. 493
 - (V) Pre-Sentence Custody 493
- (G) Transfer of Order — 742.5 494
- (H) Variation — 742.4. 494
 - (I) Variation Requested by Supervisor — 742.4 494
- (I) Weapons Prohibition — 742.2. 494
- 7.3.2 Intermittent Custody Sentence 495**
 - (A) Flowchart: Process to Impose Intermittent Sentence 495
 - (B) Imposition 495
 - (I) Authority — 732(1). 495

(II) Adjourn to Impose Multiple Intermittents, Cannot	496
(III) Chaining Intermittent With Another, Not Permitted — CCRA 139(1)	496
(IV) Collapse of Conditional Sentence, Effect on Intermittent — 732(3) + 742.6(9) + 742.7(2)	497
(V) Pre-Sentence Custody	497
(VI) Subsequent Jail Sentence, Intermittent Collapses, Unless — 732(3)	498
(VII) Variation — 732(2)	498
7.3.3 Maximums	498
(A) Indictable — Punishment, if Unspecified: 5 Years — 743	498
(B) Summary Conviction — Punishment: 2 Years Less 1 Day Jail / \$5000 — 787(1)	498
7.3.4 Prison or Penitentiary Sentence	498
(A) Introduction	498
(B) Flowchart: Imposition of Prison or Penitentiary Sentence	499
(C) Placement of Prisoner — Court Cannot Direct — MCSA 17	499
(D) Penitentiary	500
(I) Authority for Imposition of Penitentiary Sentence	500
(a) Already in Penitentiary — 743.1(2)	500
(i) Mandatory Release/Parole — Inmate Still “Serving Sentence”.	500
(b) Already in Prison / Jail — 743.1(4)	501
(c) Already on LTSO, and Sentenced to New — 743(3.1)	501
(d) Sentenced for Escaping — 149	501
(e) Sentenced to: Life or 2+ Years — 743.1 (1)(a) + (b)	501
(f) Sentenced to: 2+ Sentences Total 2+ Years — 743.1(5)	501
(i) Earned Remission — Reduces Sentence for Calculation Purposes.	501
(II) Non-Communication Order — 743.21(1)	502
(III) Report by Court to Correctional Service — 743.2	502
(E) Prison	502
(I) Authority for Imposition of Prison Sentence — Default, if Not Penitentiary — 743.1(3)	502
(II) Non-Communication Order — 743.21(1)	502
7.4 DISCHARGES.	503
7.4.1 Charts	503
(A) Flowchart: Eligibility	503
(B) List Chart: Discharge Eligible Offences.	504
7.4.2 Authority — 730(1)	512
(A) Not Limited to Trivial or Technical Breaches.	512
(B) Not Possible for Violence Resulting in Injury.	512
(C) Possible for Any Offence Without Minimum or Life / 14 Years’ Sentence	513
7.4.3 Bail Continues Until Sentence Passed — 730(2)	513
7.4.4 Reference to Discharge — 730(3)	513
7.4.5 Revoke Discharge — 730(4)	514
7.4.6 Test.	515
(A) Best Interest of Accused	515
(I) Defendant of Good Character	515
(II) Deterrence or Incarceration Not Required	515
(III) Immigration Factors	516
(IV) Prior Convictions	516
(a) Must Have None	516
(b) Significant Adverse Repercussions	516
(V) Prior Discharge	517
(a) Not a Prohibition on Another Discharge	517
(b) Only a Factor to Consider	517
(B) Not Contrary to Public Interest	518
(I) Deterrence Required	518
(II) Deterrence Important, but Does Not Preclude Judicious Use of Discharge.	518
7.5 DNA.	519

TABLE OF CONTENTS

7.5.1 Introduction 519

7.5.2 Charts 519

 (A) List Chart: In Order of *Criminal Code* Section 519

 (B) List Chart: In Order of Designation 529

7.5.3 Correcting Orders — 487.053(2) + 487.0911 538

7.5.4 Primary Compulsory 538

 (A) Authority to Take Sample — 487.051(1 + 4) 538

 (B) Offences — 487.04 539

 (C) References in Parentheses, Not Relevant 539

7.5.5 Primary Presumptive 539

 (A) Authority to Take Sample — 487.051(2 + 4) 539

 (B) Offences — 487.04 539

 (C) Onus on Defendant 539

 (D) References in Parentheses, Not Relevant 540

 (E) Test — Grossly Disproportionate 540

7.5.6 Secondary Offences 541

 (A) Authority to Take Sample — 487.051(3) 541

 (B) NCR Defendant — Order Can be Made at Court’s Discretion 541

 (C) Offences — 487.04 542

 (D) Onus: Technically None, but Crown Has Evidentiary Burden 542

 (E) Referenes in Parentheses, Not Relevant 542

 (F) Test 543

 (I) Factors — Circumstances of Offence, Criminal Record, Nature of Offence 543

 (a) Circumstances of Commission 544

 (i) Low Risk of Reoffending Can be Factor 544

 (ii) Risk of Reoffending, Not Required 544

 (iii) RPG to Believe Another Particular Offence Committed, Not Required 545

 (b) Criminal Record 545

 (i) Court Can Look at Entire Record 545

 (ii) Lack of Criminal Record 545

 (iii) Criminal Record Indicates DNA Could be Useful Investigative Tool 546

 (iv) Criminal Record for Violent / Sexual Offences Can Show Defendant Dangerous 546

 (c) Nature of Offence 546

 (i) DNA at Crime Scene, Not Relevant 546

 (ii) DNA Sample May Now Help for Cold Cases 547

 (iii) Offence Not One Typical of Listed Offence 547

 (iv) Trivial Nature of Offence 547

 (II) Impact on Offender 548

 (a) Conditions on Taking Sample, Can be Imposed 548

 (b) Prior Sample Taken — No Further Sample to be Taken — 487.071(2) 548

 (c) Reduced Expectation of Privacy 548

7.5.7 Youths 549

7.6 EVIDENCE AT SENTENCING 549

7.6.1 Any Evidence Presented — 723(2) 549

7.6.2 Court May 549

 (A) Compel Witness — 723(4) 549

 (B) Require More Evidence — 723(3) 549

7.6.3 Disputed Facts 549

 (A) Crown Burden of Proof (Aggravating Facts and Criminal Record) 549

 (B) Defence Burden of Proof — 724(3)(b) + (d) 550

 (C) Evidence at Hearing 550

 (I) Court May Require Evidence to be Adduced — 724(3)(a) 550

 (II) Cross-Examination Permitted — 724(3)(c) 551

(III) Counsel's Submissions Not Evidence	551
(IV) Hearsay Permitted — 723(5)	552
(V) Hearsay Not Permitted, Unless Credible and Trustworthy	553
7.6.4 Facts on Consent — 724(1)	553
7.6.5 Information Disclosed at Trial — 724(1)	553
7.6.6 Impact Statements	553
(A) Community Impact Statements	553
(I) Authority — 722.2(1)	553
(II) Disclosure — 722.2(5)	554
(III) Form of Statement — 722.2(2)	554
(IV) Presentation of Statement — 722.2(3) + 722.2(4)	554
(B) Victim Impact Statements	555
(I) Authority — 722(1)	555
(II) Contents of VIS — Not Permitted	555
(a) Criticism of Offender	555
(b) Inflammatory Language	556
(c) Recommendations to Penalty	556
(d) Restating Facts	556
(III) Court Obligations re: VIS	557
(a) Adjourn for VIS — 722(3)	557
(b) Consider VIS, Only the Relevant Portions — 722(1 + 8)	557
(IV) Cross-Examination on VIS	557
(V) Disclosure — 722.1	558
(VI) Inquire of Prosecutor About VIS — 722(2)	558
(VII) Form of VIS — 722(4)	558
(VIII) Presentation of Statement — 722(5) + 722(6) + 722(7)	559
(IX) Purpose of VIS	559
(a) Enhances Identity of Victim Before Court	559
(b) Improves Society's Perception of Administration of Justice	559
(c) Recognizes Impact of Crime on Victim	559
(d) Promotes Acknowledgment of Wrongdoing	559
(e) Provides for Reparation for Harm Done to Victim	559
(X) Requirements of VIS	560
(a) Authored by Victim	560
(b) Describes Harm or Loss	560
(c) Filed with Court	560
(d) In Correct Form	560
(e) In Writing	560
(XI) Who Can Author VIS — Victim and Those Affected	560
7.6.7 Pre-Sentence Report	561
(A) Authority — 721(1)	561
(B) First Offender, Especially if Custody, Required	561
(C) Purpose of PSR	561
(D) Requirements	562
(I) Accurate, Balanced, and Independent Report	562
(II) Contested Facts — Must be Proven by Crown	562
(III) Disclosure — 721(5)	563
(IV) Information Requested by Court — 721(4)	563
(V) Psychological Assessment	563
(a) Can Order	563
(b) Cannot Compel Offender to Participate	563
(VI) Statutory Information — 721(3)	563
7.6.8 Social Context / IRCA Reports	564
(A) Authority	564
(B) Connection Required Between Racism and the Events	564
(C) Expert Evidence Required	565

TABLE OF CONTENTS

(D) Indigenous 566

(E) Report Must be Neutral 566

(F) Valuable in Sentencing 567

7.7 FACTORS ON SENTENCING. 568

7.7.1 Flowchart: Sentencing Factors 568

7.7.2 Aboriginal 569

(A) Different Methodology — Not Necessarily Different RESULT 569

(B) Factor, but Not Determinative 569

(C) Serious and Violent Offences 569

(D) Specific Requirements When Sentencing Aboriginal Offender 570

7.7.3 Addiction 571

7.7.4 Age 571

(A) Old Age 571

(I) Alone, Old Age Not Sufficient Reason to Discount an Appropriate Sentence 571

(II) Factor to Consider 572

(III) Imprisonment — Would it be “Pointless” or “Unreasonable Burden” 572

(IV) Medical Conditions 572

(a) Can be a Factor 572

(b) Purview of Parole Board 573

(V) Natural Life Span, Not to Exceed 573

(B) Youthful Offender 574

(I) First Offender — Youthfulness a Factor 574

(II) First Penitentiary Sentence — Denunciation and General Deterrence Not Focus 574

(III) Primary Objective Specific Deterrence and Rehabilitation 574

7.7.5 Allocation — 726. 575

7.7.6 Bail — On Bail at Time 575

(A) Aggravating Factors 575

(I) Committing Offence While on Bail 575

(II) Flight from Jurisdiction — Rehabilitation on the Lam Not Mitigating 575

(B) Consecutive Sentences 576

(C) Mitigating Factors: “Downes” Credit 576

(I) House Arrest and Stringent Bail Conditions “Downes Credit” 576

(II) Reasonable Conditions Do Not Warrant Sentence Reduction 577

(III) Sentence Reduction Only if Defendant Sought Bail Variation 577

7.7.7 Breach of Trust. 578

(A) Position of Trust 578

(I) Factors 578

(a) Consider All Aspects of Relationship to Determine if “Position of Trust” 578

(b) Safety, Confidence and Reliability 579

(II) Statutorily Aggravating — 718.2(a)(iii) 579

(III) Teacher Normally in Position of Trust 579

(B) Sentences 580

(I) Requires Stiffer Sentence 580

(II) Requires Imprisonment, if in Relation to Employer 581

7.7.8 Child Pornography for Profit — 163.1(4.3) 581

7.7.9 Conditional Sentence, Committing Offence While on — Aggravating Factor — 718.2(a)(vi). 581

7.7.10 Consecutive Sentences. 581

(A) Different Legal Interests (Even if in Same Transaction) 581

(B) Firearms Prohibition Breaches — Must be Consecutive 582

(C) New Offence, While on Bail, Should be Consecutive 582

(D) New Offence, While Fleeing, Should be Consecutive 583

(E) Procedure for Consecutive Sentences 583

(I) Existing Sentence and New Offence 583

(II) Two New Offences 584

(F) Statutory Considerations	584
(I) Assaulting Law Enforcement Officer — 270.03	584
(II) Criminal Organization — 467.14	584
(III) Criminal Organization — Explosives — 82.1	584
(IV) Fleeing from Peace Officer — 718.3(4)(b)(iii)	584
(V) Kill / Injury Law Enforcement or Service Animal — 445.01	584
(VI) Multiple Events — 718.3(4)(b)(i)	585
(VII) Serving Sentence Currently — 718.3(4)(a)	585
(VIII) Sex Offence Against Child — 718.3(7)	585
(IX) Terrorism — 83.26	585
(X) Use Firearm or Imitation — 85(4)	585
7.7.11 Criminal Organization — Aggravating Factor — 718.2(a)(iv)	585
7.7.12 Criminal Record	585
(A) Coke Rule: Increased Penalty on Second Offence Only if Convicted of First Offence	585
(B) Conditional Discharge, Use of	586
(I) Person Remains First-Time Offender	586
(II) Prior Discharge Cannot be Referred to — <i>CRA</i> 6.1(1)	586
(C) Criminal Record and Past Convictions, Aggravating	587
(D) Currently in Prison, Not Worthy of Sentence Reduction	587
(E) Lack of Criminal Record, Not Mitigating	588
(F) Proof of and Notice — 727	588
7.7.13 Denunciation and Deterrence	588
(A) Child Victim — 718.01	588
(B) Deterrence — Definition	588
(C) General Deterrence.	589
(I) Prevalence of Crime in Locale	589
(a) Factor — Prevalence Can be Factor in Sentencing	589
(b) Requires Evidence and Notice	589
(II) Requires Focus on Offence, Not Offender	590
(III) Sending Message to Discourage Others Should Not Make Defendant Suffer	590
(D) Justice System Participant Victim — 718.02	590
(E) Law-Abiding People — Denunciation Effective	590
(F) Law Enforcement Animal Victim — 718.03	591
(G) Law Enforcement Victim — 718.02	591
(H) Planning and Premeditation, Require Denunciation	591
(I) Principle of Denunciation — 718(a)	591
(J) Principle of Deterrence — 718(b)	591
(K) Publicity, Can be Deterrence	592
(L) Requires Focus on Offence, Not Offender	592
(M) Retribution vs. Denunciation	593
(N) Ruin and Humiliation and Loss of Professional Status, Affect Deterrence and Denunciation	593
(O) Specific Deterrence — For Past Criminal Behaviour	594
(P) Symbolic Statement of Society's Values	594
(Q) Vulnerable Victim — 718.04	595
7.7.14 Driving Offences — Aggravating Factors — 320.22	595
7.7.15 Employment	595
(A) Good Work History, Indicates Prior Good Character — Mitigating Factor	595
(B) Law Enforcement Capacity	595
(I) Could Act as Aggravating Factor	595
(II) Denunciation Has Heightened Significance	596
(C) Loss of Professional Status and Ruin and Humiliation	596
(I) Affect Deterrence and Denunciation	596
(II) Not Justify Lighter Sentence.	597
7.7.16 Family Separation	597
7.7.17 Gap Principle	597
(A) Bodily Harm / Death — Gap Not Relevant	597

TABLE OF CONTENTS

(B) Definition 598

7.7.18 General Penalty 598

(A) Indictable — 743. 598

(B) Summary Conviction — 787(1) 598

7.7.19 Guilty Plea 598

(A) Mitigating Factor. 598

(B) Not Mitigation, if Guilty Plea “Inevitable”. 599

(C) Without Insight. 599

7.7.20 Health 599

(A) COVID While in Custody 599

(I) Collateral Consequence, Not Mitigation 599

(II) Requires Evidence of Specific Impact on This Defendant 600

(B) Mental Illness 600

(I) Failure of Legal System to Address Defendant’s Mental Illness Can Affect Sentence 600

(II) Mitigating, Even if Did Not Cause Offence 600

(III) Mitigating, if Contributed to Offence. 601

(IV) Mitigating, if Sentence Would Disproportionately Affect This Offender. 602

(V) Substance Abuse Not Mitigating Factor 603

(C) Terminal Health — Compassion for, Can be Factor. 603

7.7.21 Health Care, Impeding Access to — 718.2(a)(vii). 604

7.7.22 Immigration 605

(A) Flowchart: Immigration Consequences 605

(B) Appeals. 606

(I) Board — Appeal (IAD) 606

(II) Federal Court — Judicial Review 606

(III) Federal Court of Appeal — Appeal. 606

(IV) No Appeal if Jail — 6 Months or More. 606

(V) Subsequent Conviction after Removal Order Stay — Stay Removed 606

(C) Consequence — Citizenship Delay 606

(I) Conviction — Delays Citizenship 606

(II) Parole, Prison, Probation Periods Delay Citizenship 606

(D) Consequence — Inadmissibility 607

(I) Authority 607

(a) Actual Jail is 6 Months or More 607

(b) Hybrid Offence 607

(c) Potential Jail is 10 Years or More 607

(d) Two (Or More) Summary Conviction Offences (At Different Times) 607

(II) Hybrid Offences — Deemed Indictable. 607

(III) Discharge — Does Not Trigger Inadmissibility 607

(IV) Conditional Sentence — Not a “Term of Imprisonment” 607

(V) Pre-Sentence Custody — Is Part of “Term of Imprisonment”. 608

(VI) Removal Order 608

(VII) Term of Imprisonment — Calculated Per Charge, Not Globally 608

(E) Consequences — Inadmissibility — Other Countries 609

(F) Consequence — Ineligible to Claim Refugee Status 609

(G) Consequence — Sponsorship 610

(I) Certain Convictions Preclude. 610

(II) Custodial Status Precludes 610

(III) Removal Order Precludes 610

(H) Inapplicability of Section 36 of *IRPA* 610

(I) Acquittal. 610

(II) *Contraventions Act*. 610

(III) Pardon / Records Suspension. 610

(IV) Youths. 610

(I) Sentencing 610

(I) Immigration Consequences — Relevant to Sentence 610

(II) Sentencing Procedure — Immigration Consequences	611
7.7.23 Inmate Safety — Not Factor: Responsibility of Prison Authorities	611
7.7.24 Institutional Misconducts.	612
7.7.25 Joint Submission	612
(A) Judge Should Follow, Unless Not in Public Interest.	612
(B) Judge Refuses Joint Submission, What Should Happen.	612
(C) Mandatory Order, Judge Should Inquire, and Must Impose	614
(D) Not Fully Joint Submission, Not Joint Submission	614
(E) Permissive Order or Clause Omitted, Court Presumes Deliberately Omitted.	615
7.7.26 Jump Principle	615
(A) Definition	615
(B) If Rehabilitation Main Goal, Then Jump Not Appropriate	616
(C) Long Criminal Record, Jump Not Applicable.	616
(D) Prior Lenient Sentence or Dangerous Defendant, Jump Not Applicable	617
(E) Violence, Jump Not Applicable.	617
7.7.27 Maximums	618
(A) Contempt of Court, Maximum Does Not Apply	618
(B) Pre-Sentence Custody, Part of Punishment Calculation	618
(C) Rarely Imposed.	619
(D) Stark Horror — Not Concept Used	619
(E) Worst Offender, Worst Offence — Not Concept Used	619
7.7.28 Mistake of Law	619
(A) Can be Mitigating Factor.	619
(B) Onus — On Defendant	620
7.7.29 Number of Offences, Duration and Intensity, Factors to Consider	620
7.7.30 Other Crimes	621
(A) Acknowledged Charges, Without Guilty Plea — 725(1)(b.1) + (1.1) + (2)	621
(B) Acknowledged Facts of, Without Guilty Plea — 725(1)(c) + (2).	621
(C) Found Guilty of — 725(1)(a)	622
(D) Pleads Guilty to — 725(1)(b) + (1.1)	622
7.7.31 Parity.	622
(A) Similar Offender and Similar Offence, Should Get Similar Sentence — 718.2(b)	622
(B) Sentencing Ranges, Cannot Fetter Judge’s Discretion	622
7.7.32 Parole, Offence While on — Aggravating Factor — 718.2(a)(vi)	623
7.7.33 Personate Peace Officer to Commit Offence — 130.1	623
7.7.34 Pre-Sentence Custody	623
(A) Court May Credit Pre-Sentence Custody — Maximum 1:1 — 719(3) + (3.2)	623
(B) Court May Credit Pre-Sentence Custody — Maximum 1.5:1, If Circumstances Justify — 719(3.1) + (3.2).	623
(C) Court May Mitigate Sentence, If Harsh Pre-sentence Conditions Justify — “Duncan” and <i>Charter</i>	625
(I) General Authority: “Duncan Credit”	625
(II) If Breach of <i>Charter</i> 24(1).	625
(D) Double-Dipping, Not Permitted.	626
(E) Must Result from Detention Order.	626
7.7.35 Proportionality	627
(A) Consecutive Sentences and Totality Principle.	627
(B) Consecutive Sentence vs. Concurrent	627
(C) Gravity of Offence and Responsibility of Offender	628
(D) Harm to Victim and Community, Gravity of Offence.	628
(E) Regional Characteristics.	628
(F) Principle of Proportionality — 718.1	629
7.7.36 Recidivism Risk: Greater Risk, Greater Need for Custody	629
7.7.37 Rehabilitation — 718(d)	630
7.7.38 Remorse	630

TABLE OF CONTENTS

- (A) Failure to Express Remorse 630
 - (I) After Finding of Guilt 630
 - (a) Not Aggravating Factor 630
 - (b) Can be Aggravating Factor 631
 - (II) After Guilty PLEA, IS Aggravating 631
- (B) Guilty Plea Mitigating Factor 632
- (C) Lack of Insight, Factor 632
- (D) Voluntary Reparations, High Degree of Remorse 633
- 7.7.39 Reparations — 718(e) 633**
- 7.7.40 Responsibility — 718(f) 633**
- 7.7.41 Restraint 634**
 - (A) Custody 634
 - (I) All Sanctions Before Custody, if Custody Shortest Term Possible 634
 - (II) Limit Use, Especially for Aboriginal Offenders 634
 - (B) Rehabilitation Must be Considered 635
 - (C) Youthful Defendant Without Criminal Record 635
- 7.7.42 Retribution: Accepted Principle of Sentencing 635**
- 7.7.43 Separation 636**
 - (A) Dangerous With No Alternative Sanctions, Custody Required 636
 - (B) Reformation Not Possible, Custody Required 636
- 7.7.44 State Misconduct 637**
 - (A) *Charter* Breach: Misconduct a Factor, and Can Reduce Sentence Below Minimum 637
 - (B) No *Charter* Breach: Misconduct a Factor, but Cannot Reduce Sentence Below Minimum 637
- 7.7.45 Terrorism — Aggravating Factor — 718.2(a)(v) 638**
- 7.7.46 Totality 638**
 - (A) No Upper Limit — 718.2(c) 638
 - (B) Spree — Petty Offenders, Series of Property Crimes Close in Time and Circumstance 639
- 7.7.47 Victim 639**
 - (A) Aboriginal — 718.04 + 718.201 639
 - (B) Female — 718.04 + 718.201 639
 - (C) Health Care Provider — 718.2(a)(iii.2) 640
 - (D) Hate for Victim — 718.2(a)(i) 640
 - (E) Impact on Victim 718.2(a)(iii.1) + 722(9) 640
 - (F) Intimate Partner 640
 - (I) Aggravating Factor — 718.2(a)(ii) + 718.201 640
 - (II) Increased Penalties — 718.3(8) 641
 - (G) Justice System Participant — 718.02 641
 - (H) Law Enforcement — 718.02 641
 - (I) Law Enforcement Animal Victim — 718.03 641
 - (J) Vulnerable — 718.04 641
 - (K) Youthful — Under 18 Years 641
 - (I) Denunciation and Deterrence Primary — 718.01 641
 - (II) Involved in Commission of Crime or Victim — 718.2(a)(ii.1) + (ii.2) 641
- 7.7.48 Vigilante Justice — Collateral Consequence Factor 642**
- 7.7.49 Voluntary Surrender — Mitigating Factor 642**
- 7.8 FINES 644**
 - 7.8.1 Flowchart: Imposition of Fine 644**
 - 7.8.2 Default 645**
 - (A) Conditional Sentence, Not Available for Default 645
 - (B) Definition of Default — 734(3) 645
 - (C) Imprisonment for Default 645
 - (I) Authority — 718.3(5) + 734(4) 645
 - (II) Effect of Imprisonment = No Licence Suspension or Civil Remedies — 734.7(4) 645

(III) Length of Imprisonment — 718.3(3) + 734(5) + 743 + 787(2)	645
(IV) Payment to Reduce Jail Time — 734.8	645
(V) Requires Refusal to Pay	646
7.8.3 Enforcement of Fine.	646
(A) Civil Enforcement — 734.6	646
(B) Suspend Licence / Permit — 734.5	647
7.8.4 Imposition of Fine	647
(A) Amount of Fine — Must Be Reasonable.	647
(B) Amount of Fine — Must Deter	647
(C) Authority to Impose Fine — 734(1)	648
(D) Ability to Pay	648
(I) Affirmative Finding Defendant Can Pay Required — 734(2)	648
(II) Alternative to Ability to Pay Can be Fine Option Program	649
(III) Burden of Proof — Crown Has Practical Burden, on Balance	649
(IV) Inference — Illegally Obtained Funds (No Proof of Dissipation), Defendant Has Ability to Pay	650
(E) Concurrent Fines — Cannot be	650
(F) Maximum Fine — Summary Conviction: \$5000 — 787(1)	651
(G) Process of Making Fine Order — 734.1 + 734.2(1)	651
(H) Restitution Priority — 740	651
(I) Time to Pay	651
(I) Extension of Time to Pay — Court Can Grant at Any Time	651
(II) Extension of Time to Pay — Defendant Can Seek Multiple Extensions	652
(III) Extension of Time to Pay — Procedure Must be Relatively Simple	652
(IV) Reasonable Time to Pay — Court Must Grant	652
7.8.5 Organizations — 735	653
7.8.6 Satisfaction of Fine	653
(A) Money found on Defendant — 734(6)	653
(B) Payment — 734.4	653
(C) Remission — 748.1	653
(D) Work — Fine Option Program — 736	653
7.8.7 Variation of Order — 734.3	654
7.9 FORFEITURE.	655
7.9.1 Flowchart: Forfeiture — Offence-related Property	655
7.9.2 Flowchart: Forfeiture — Proceeds of Crime.	656
7.9.3 Flowchart: Forfeiture — Property Obtained by Crime	657
7.9.4 Flowchart: Forfeiture — Property Obtained with No Prosecution	658
7.9.5 Flowchart: Forfeiture — Property Used — Offences Against Persons	659
7.9.6 Flowchart: Forfeiture — Property Used — Offences Against Property.	660
7.9.7 Offence-related Property.	660
(A) Authority	660
(I) Offence-related Property from ANY Crime — 490.1(2) and 16(2) <i>CDSA</i>	660
(II) Offence-related property from THIS Crime — 490.1(1) and 16(1) <i>CDSA</i>	661
(B) Defendant Died / Absconded	661
(I) Authority — 490.2(1 + 2) and 17(2) <i>CDSA</i>	661
(a) Exception for Disproportionality — 490.41(3 + 4) and 19.1(3 + 4) <i>CDSA</i>	661
(II) Definition — Absconded — 490.2(3) and 17(3) <i>CDSA</i>	661
(III) Definition — Absconded — Corporation	661
(IV) Notice, Application and Lawful Owner — 490.2(1 + 3), 490.41(1 + 2) and 19 and 19.1 <i>CDSA</i>	662
(V) Notice to Resident of Dwelling-house and Consideration — 490.41 and 19.1 <i>CDSA</i>	662
(C) Definition Of Offence Related Property — 2	662
(D) Lawful Owner — Return Property — 490.4(3) and 19(3) <i>CDSA</i>	663
(E) Relief From Forfeiture.	663
(I) Authority — 490.5(4) and 20(4) <i>CDSA</i>	663
(II) Onus is on Balance of Probabilities	663

TABLE OF CONTENTS

(III) Test Applicant Must Meet. 664

(F) Notice — 490.4(1 + 2) and 19(1 + 2) CDSA and 19.1(1 + 2) CDSA. 664

7.9.8 Proceeds of Crime 664

(A) Authority. 664

(I) Property Proceeds of ANY Crime — 462.37(2). 664

(II) Property Proceeds THIS Crime — 462.37(1). 665

(III) Property Proceeds of Criminal Organization & Drugs & Human Trafficking — 462.37 (2.01 to 2.07) and 462.41(1 + 2). 665

(B) Definition 665

(C) Defendant Died / Absconded 666

(I) Authority — 462.38(1 + 2). 666

(II) Definition — Absconded — 462.38(3). 666

(III) Definition — Absconded — Corporation 666

(IV) Notice, Application and Lawful Owner — 462.41 666

(D) Fine in Lieu 666

(I) Ability to Pay — Not a Factor. 666

(II) Amount of Fine — Value of Property, Not Profits. 667

(III) Apportionment Between Co-accused 667

(IV) Authority — 462.37(3) 668

(V) Discretionary 668

(VI) Time to Pay Must Be Reasonable. 669

(a) Extension of Time to Pay. 669

(VII) Default Requires Jail 670

(a) Authority — 462.37(4) 670

(b) Length of Jail — Required to be Noted. 670

(c) Mandatory Jail if WILFUL Non-payment. 670

(VIII) Test. 671

(E) Mandatory Order 671

(F) Notice, Application and Lawful Owner — 462.41 672

(G) Purpose of Forfeiture 672

7.9.9 Property Obtained by Crime 672

(A) Authority — 491.1. 672

(B) Specific Offences. 672

(I) Fraud (Minerals) — 394(6). 672

(II) POBC (Minerals) — 394.1(4). 672

(III) Trademark (Unlawful Use) — 412(2) 673

7.9.10 Property Obtained Without Prosecution 673

(A) Anything (No Longer Needed) — 490(1 + 9) 673

(B) Counterfeit Money — 462 673

(C) Sex / Obscene Material & Therapy 673

(I) Computer Files Seized — 164.1(1 + 2 + 5) 673

(II) Physical Items Seized — 164(1 + 2 + 4). 673

(D) Weapons 673

(I) Weapons Seized — 117.05(1 + 2+ 4) 673

(II) Weapons Prohibited — 115(1 + 1.1) 673

7.9.11 Property Used for Specific Offences 674

(A) Child Luring & Child Porn & Child Sex (Arrange) & Intimate Image — 164.2(1) 674

(B) Explosives — 492(2) 674

(C) Incite Hate or Advocate Genocide — 319(4) 674

(D) Weapons Offences — 491 674

7.9.12 Property Used for Offences Against Property 674

(A) Auto-theft (Device for) — 333.2(4) 674

(B) Computer Device (Mischief or Unauthorized) — 342.2(2). 674

(C) Credit Card (Forgery) — 342.01(2) 674

(D) Games of Chance — 206(5). 675

(E) Telecommunications (Unlawful Use) — 327(2). 675

(F) Wiretap (Unlawful Use) — 192(1)	675
7.9.13 Restitution Has Priority Over Forfeiture — 462.49(2) + 740	675
7.10 PROBATION	676
7.10.1 Charts	676
(A) Flowchart: Imposition of Probation	676
(B) List Chart: Probation Conditions	677
(I) Ordered by Condition	677
(II) Ordered by Section	679
7.10.2 Authority for Probation, After	681
(A) Custody — 731(1)(b)	681
(B) Discharge — 731(2)	681
(C) Fine — 731(1)(b)	681
(D) Suspended Sentence — 731(1)(a)	681
7.10.3 Commencement of Probation Order — 732.2(1)	682
7.10.4 Conditions of Order	682
(A) Mandatory Conditions — 732.1(2)	682
(B) Optional Conditions for Person	682
(I) Authority — 732.1(3)	682
(II) Bodily Substances Testing — 732.1(3)(c.1) + (c.2) + 732.1(7-10) + 732.11	682
(III) Care and Support of Defendants — 732.1(3)(e)	682
(IV) Community Service — 732.1(3)(f)	682
(V) Contact Restrictions — 732.1(3)(a.1)	682
(VI) Counselling Conditions — 732.1(3)(h)	683
(VII) Donation to Charity, Not Permitted	683
(VIII) Evidence-Gathering Conditions	684
(a) Admission of Guilt, Cannot Require	684
(b) Consent, Required from Defendant	684
(c) Consent, Cannot be Coerced	685
(IX) Geographic Restrictions Conditions	686
(a) Banishment — 732.1(3)(a.1)	686
(i) Larger Geographic Area, More Difficult to Justify	686
(ii) Restorative, But Also Retributive	686
(b) Remain Within the Court's Jurisdiction — 732.1(3)(b)	687
(c) Reside at Specified Address — 732.1(3)(h)	687
(X) Rehabilitative, Conditions Should be	687
(a) Ancillary Punishment as Part of Rehabilitation Acceptable	687
(b) Should be Primarily Rehabilitative, Not Punitive	688
(XI) Reasonable Conditions — 732.1(3)(h)	688
(a) Must be Reasonable Terms	688
(b) Nexus Between Offender and Protection of Community and Reintegration into Society	689
(c) Power Very Broad, but Not Unlimited	689
(XII) Report — 732.1(3)(a)	690
(XIII) Treatment Conditions — 732.1(3)(g)	690
(a) Require Defendant's Consent	690
(b) No Consent, Can Require Rigorous Monitoring	690
(XIV) Weapons Restriction Condition	691
(a) Authority — 732.1(3)(d)	691
(b) Exception for Hunting or Trapping for Sustenance or Employment — 113	691
(c) Inquire Before Making Probation Order — 731.1(1) + (2)	691
(C) Optional Conditions for Organization — 732.1(3.1) + (3.2)	691
7.10.5 Duration of Probation — 732.1(4) + 732.2(2)(b)	692
7.10.6 Procedure	692
(A) Obligations of Court — 732.1(5)	692
(B) Probation Officer's Role	692
7.10.7 Revoke Probation Order	692

TABLE OF CONTENTS

(A) After Discharge — 730(4) + 732.2(5) 692

(B) After Suspended Sentence — 732.2(5) 692

7.10.8 Variation of Probation Order — 732.2(3) + (4) 693

7.11 PROHIBITIONS 693

7.11.1 Animal Prohibitions 693

7.11.2 Conveyance Prohibitions 694

(A) Flowchart: Conveyance Prohibitions — Simple 694

(B) Flowchart: Conveyance Prohibitions — Bodily Harm 695

(C) Flowchart: Conveyance Prohibitions — Death 696

(D) Authority — Federal Prohibition 696

(I) Mandatory Prohibition 696

(II) Permissive Prohibition 696

(E) Authority — Provincial Suspension 697

(I) Alberta 697

(II) British Columbia 697

(III) Manitoba 697

(IV) Newfoundland & Labrador 697

(a) Authority — General 697

(i) 1st Conviction — 1 Year 697

(ii) 2nd Conviction — 3 Years 697

(iii) 3rd Conviction — 5 Years 697

(iv) 4th Conviction — Life 698

(b) Authority — Impaired / 80%+ or Refuse Cause Bodily Harm 698

(c) Authority — Impaired / 80%+ or Refuse Cause Death 698

(V) Nova Scotia 698

(a) Authority — Impaired / 80%+, Refuse, Operate Prohibited 698

(b) Authority — Dangerous Operation or Fail to Stop 698

(c) Authority — Criminal Negligence, Manslaughter or Cause Bodily Harm / Death 698

(d) Authority — Theft of Motor Vehicle 698

(e) Authority — Use Motor Vehicle in Crime 698

(VI) Prince Edward Island 699

(VII) Ontario 699

(VIII) Quebec 699

(IX) Saskatchewan 699

(F) Commencement of Prohibition 699

(G) Duration — Reduced by Bail Conditions 699

(H) Termination of Order Early — 109 CCRA 701

7.11.3 Internet Prohibitions — 162.2(1 + 2) 701

7.11.4 Weapons Prohibitions 701

(A) Introduction 701

(B) Flowchart: Weapons Prohibition for Criminally Charged 702

(C) Flowchart: Weapons Prohibition if Not Criminally Charged — Emergency Order 703

(D) Flowchart: Weapons Prohibition if Not Criminally Charged — Order With Notice 704

(E) Criminally Charged Person 705

(I) Mandatory Prohibition Order 705

(a) Absolute Discharge 705

(b) Authority to Impose — 109(1) 705

(c) Duration 705

(i) First Offence: 10 Years to Life — Authority — 109(2) 705

(ii) Subsequent Offences: Life 705

(1) Authority — 109(3) 705

(2) Crown Must Prove Prior Conviction 706

(3) Crown Must Provide Notice of Prior Conviction 706

(4) Lack of Notice — Court Can Still Impose Longer Prohibition 706

(d) Sexual Assault on Minor, No Violence or Threats Qualifies 707

(e) What Items Are Prohibited	707
(II) Discretionary Order	708
(a) Authority to Impose — 110(1)	708
(b) Court Must Exercise Discretion, and Give Reasons	708
(c) Factors to Consider	708
(i) Breach of Recognizance	708
(ii) Construed Broadly, Especially in Domestic Violence Situations	709
(iii) Safety Concern Required.	709
(iv) Violence Against Person	710
(1) Sexual Assault on Minor, No Violence or Threats Qualifies	710
(2) Implied Threat, No Violence or Threats Qualifies	710
(d) Duration: Up to 10 Years.	710
(i) Authority — 110(2).	710
(ii) Longer Duration — 110(2.1)	711
(iii) No Order Made — Reasons Required — 110(3)	711
(e) What Items Are Prohibited	711
(F) Exception — Sustenance / Employment	711
(I) Competent Authority to Authorize — 113(1 + 5).	711
(II) Factors to Consider	711
(a) Criminal Record, Circumstances of Offence, Safety of Person — 113(2).	711
(b) Part-Time, Social or Cultural Hunters	712
(III) Timing of When Exception Can be Made.	712
(a) After Sentencing	712
(b) At Sentencing — 113(4)	713
(c) At Prohibition / Disposition, Bail or Peace Bond Hearing — 113(4).	713
(G) Forfeiture of Prohibited Weapons	713
(I) Automatic Forfeiture, Unless Excepted — 115(1).	713
(II) Forfeiture Does Not Apply at Bail Stage — 115(1.1).	713
(III) Return to Lawful Owner — 117.	713
(H) Not Criminally Charged Person.	714
(I) Prohibit Other Person (Cohabitant / Associate) — Order With Notice	714
(a) Application to Prohibit — 117.011(1 + 3)	714
(b) Hearing — 117.011(2 + 4).	714
(c) Order & Terms — 117.011(5 + 6)	714
(d) Revocation of Order by PCJ — 117.012	714
(II) Prohibit Other Person (Cohabitant / Associate) — Emergency Prohibition Order	714
(a) Authority — Emergency Hearing — 110.1(1 + 3)	714
(b) Hearing — <i>ex parte</i> — 110.1(2)	714
(c) Full Hearing — 110.4(1 + 2 + 3).	714
(d) Applicant Protection Order — 110.3(1 + 2) and 110.2(1)	714
(III) Prohibit This Person — Order With Notice.	715
(a) Authority — 111(1 + 3).	715
(b) Hearing — 111(2 + 4).	715
(c) Order & Duration — 111(5)	715
(d) Reasons Required If No Order — 111(6).	715
(e) Revocation of Order by PCJ — 112	715
(IV) Prohibit This Person — Emergency Prohibition Order.	715
(a) Application to Prohibit — 117.0101(1 + 3)	715
(b) Hearing — <i>ex parte</i> — 117.0101(2).	715
(c) Full Hearing — 117.0104(1 + 2 + 3)	716
(d) Applicant Protection Order — 117.0102(1) and 117.0103(1)	715
(e) Return of Weapon	716
(i) Early — 117.0101(11)	716
(ii) Upon Expiry / Revocation of Order — 117.0101(12)	716
(f) Surrender of Weapons — 117.0101(9 + 10)	716
(I) Revocation of Licences, Authorizations and Registrations.	716
(I) Authority — 116(1).	716

TABLE OF CONTENTS

(a) Except — Bail, Revoked Only for Bail Duration — 116(2) 716

(J) Surrender Of Weapons — 114. 716

7.12 RESTITUTION 717

7.12.1 Flowchart: Restitution Process 717

7.12.2 Authority — 737.1(1), 738 and 739 718

7.12.3 Factors. 718

(A) Ability to Pay — 739.1. 718

(I) Ability to Pay a Factor. 718

(II) Assets Owned by Defendant. 718

(III) Bald Assertion of Lack of Ability, No Weight. 718

(IV) Breach of Trust, Ability Not Predominant Factor 719

(V) Future Ability to Pay 719

(B) Bankruptcy. 720

(C) Civil Proceedings. 720

(I) Does Not Bar Restitution, Factor to Consider 720

(II) Restitution Not Substitute for Civil Action. 720

(D) Co-Accused 721

(I) Amount for Each Accused 721

(II) Apportion So No Unfairness. 722

(III) Order Can Exceed Total Loss, if Structured to Avoid Overcompensation 722

(E) Complex Commercial Transactions — 737.1(4) 723

(F) Double Recovery 723

(G) Generally. 724

(H) Just or Fair Sentence 725

(I) Can Make Sentence Unjust 725

(II) Not Mechanical Afterthought 725

(I) Restraint and Caution 726

7.12.4 Incidental Losses 727

(A) Not Permitted. 727

(B) Permitted. 727

7.12.5 Insurance Company, Payment Can be Made to. 727

7.12.6 Procedure. 728

(A) Court Must Ask Prosecutor if Has Asked Victim, and Adjourn To Do So — 737.1(2 + 3). 728

(B) Reasons for No Restitution Order — 737.1(5) 728

(C) Request for Restitution — 737.1(4) 728

7.13 SEX OFFENDER REGISTRATION 728

7.13.1 Introduction 728

7.13.2 Charts 729

(A) List Chart: *SOIRA* Eligible Offences 729

(I) Ordered by Section Number 729

(II) Ordered by Designation. 731

(B) Flowchart: Reporting Requirement. 734

(C) Flowchart: Reporting Length 735

7.13.3 Christopher’s Law. 735

(A) Authority — *CL* 1(1) + 3(1) + Ont Reg. 69/01 — 1.1 735

(B) Disclosure — Generally Prohibited — *CL* 6(1) + 10 736

(C) Duration of Reporting. 736

(I) Maximum Custody ≤ 10 Years: 10 years — *CL* 7(1)(a) 736

(II) Maximum Custody >10 Years: Life — *CL* 7(1)(b) 736

(III) Prior Offence: Life — *CL* 7(1)(c). 736

(D) Obligations 736

(I) Ministry / Police Obligations — *CL* 3(3) + (5) + (6) and 4 + 5 + 6(3) 736

(II) Offender Obligations — *CL* 3(2) + 6(3) + 7(2) + (3) and Ont Reg. 69/01 1(1) + (3) + (4) + 1.2 + 3(1). 736

(E) Offences— *CL* 11(1) + (2). 736

(F) Termination of Obligations — <i>CL</i> 1(1) + 7(4) + 9 + 9.1	737
7.13.4 SOIRA	737
(A) Authority — Primary Offence	737
(I) Mandatory — Indictable Primary Offence on Youth, if Prison > 2 Years — 490.011(1) + 490.012(1)	737
(II) Mandatory — Prior Conviction for Sex Offence — 490.011(1) + 490.012(2).	737
(III) Mandatory (Except) — Other Primary Offences — 490.011(1) + 490.012(3) + (4)	737
(B) Authority — Secondary Offence — 490.011(1) + 490.012(5).	738
(C) Correcting Order	738
(I) Court CAN Correct Order.	738
(II) Court CANNOT Correct Order	739
(D) Designated Offences — 490.011	740
(E) Disclosure — 490.03	740
(F) Duration of Reporting	740
(I) Court Has No Discretion to Reduce Length of Reporting Period	740
(II) End of Reporting Requirement	740
(a) Maximum Custody is	740
(i) 2 or 5 Years: 10 Years — 490.013(2)(a)	740
(ii) 10 or 14 Years: 20 Years — 490.013(2)(b)	740
(iii) Life: Life — 490.013(2)(c)	740
(b) Prior Conviction or SOIRA Obligation — 490.013(5) + (6)	741
(c) Summary Conviction: 10 Years — 490.013(2)(a).	741
(d) Two Offences at Once — 490.013(3) + (4)	741
(III) Start of Reporting Requirement — Day Order Made — 490.013(1)	741
(G) Exemption Order (Orders Made Between April 15, 2011 and October 26, 2023) — 490.04	741
(H) Failure to Make Order — 490.0132	741
(I) Obligations — 490.018	742
(J) Reasons for Decision — 490.0131	742
(K) Termination	742
(I) Application — 490.015(4) + (6).	742
(II) Multiple Offences — 490.015(2).	742
(III) Pardon / Record Suspension / NCR Discharge — 490.015(3)	743
(IV) Re-Apply — 5-Year Wait — 490.015(5)	743
(V) Single Offence — 490.015(1).	743
(VI) Test — 490.016.	743
(L) Variation of Order (For Prior “2 Offences at Once” Registrations) — 490.05.	743
7.14 SUSPENDING SENTENCE	743
7.14.1 Imposition.	743
(A) Authority — 731(1)(a)	743
(B) Factors	743
(I) Criminal Record (Many Previous Convictions)	743
(II) Custody Not Required.	744
(III) Deterrence.	744
(a) Deterrence Not Needed, Suspended Sentence Well-Suited but Not Confined to Those Cases	744
(b) “Sword of Damocles” Has Deterrent Effect	744
(IV) Prior Probation.	745
(V) Seriousness of Offence	745
(VI) Sophisticated Criminal.	745
(C) Warning of Exact Sentence Upon Breach — Court Should Not	745
7.14.2 Revocation	746
(A) Authority — 732.2(5)(d)	746
(B) Original Judge to Hear	746
(C) Process	747
(I) Notice Requirement.	747
(a) Hearing Date.	747
(b) In Writing	747
(c) Nature of Proceedings	747

TABLE OF CONTENTS

- (d) New Information, Not Required 747
- (e) Order Sought 747
- (II) Timing 747
 - (a) New Sentence Can be Imposed AFTER Probation Ended, Revocation Must be Within Time 747
 - (b) Revocation Must be Before Expiry of Probation 747
- (D) Re-sentence 748
 - (I) Appropriate for Original Offence 748
 - (II) Consecutive Sentence, Cannot be 748
 - (III) Forfeits Right to Leniency 749
 - (IV) Sentence Starts When Imposed 749
- 7.15 VICTIM SURCHARGE. 749**
 - 7.15.1 Amount of Surcharge 749**
 - (A) General Surcharge Amount — 737(2) 749
 - (B) Increased Surcharge Amount — 737(3). 749
 - (C) Reduced Surcharge Amount — 737(2.1) + (2.2) + (2.3) 750
 - 7.15.2 Authority for Court to Impose — 737(1) 750**
 - 7.15.3 Obligations of Court — 737(6) 751**
 - 7.15.4 Time to Pay 751**
 - (A) Authority — 737(4) 751
 - (B) Court Must Grant Reasonable Time to Pay 751
 - (C) Extension of Time to Pay 751
 - (I) Court Can Grant 751
 - (II) Defendant Can Seek Multiple Extensions 752
 - (III) Granted at Any Time 752
 - (IV) Procedure Must be Relatively Simple 753

APPENDIX A: FORMS

- FORMS 755**
 - Designation of Counsel — Provincial Court 756
 - Designation of Counsel — Superior Court 757
 - Election 758
 - Re-Election 759
 - Weapons Prohibition Order — Mandatory 760
 - Weapons Prohibition Order — Discretionary 761
 - Form 5.03 — Order Authorizing the Taking of Bodily Substances for Forensic DNA Analysis 762
 - Form 5.04 — Order Authorizing the Taking of Bodily Substances for Forensic DNA Analysis 763
 - Form 6 — Summons to a Person Charged with an Offence 764
 - Form 6.3 — Summons to Appear for Purposes of Section 490.0132 765
 - Form 6.4 — Warrant for Arrest 766
 - Form 7 — Warrant for Arrest 767
 - Form 8 — Warrant for Committal 768
 - Form 9 — Appearance Notice 769
 - Form 10 — Undertaking 770
 - Form 11 — Release Order 772
 - Form 11.1 — Order to Appear for the Purposes of the *Identification of Criminals Act* 774
 - Form 12 — Surety Declaration 775
 - Form 15 — Warrant to Convey Accused Before Justice of Another Territorial Division 777
 - Form 16 — Subpoena to a Witness 778
 - Form 16.1 — Subpoena to a Witness in the Case of Proceedings in Respect of an Offence Referred to in Subsection 278.2(1) of the *Criminal Code* 779
 - Form 17 — Warrant for Witness 780
 - Form 18 — Warrant to Arrest an Absconding Witness 781
 - Form 19 — Warrant Remanding Prisoner 782
 - Form 20 — Warrant of Committal of Witness 783

BALGOPAL'S GUIDE TO CRIMINAL PRACTICE

Form 21 — Warrant of Committal on Conviction. 784
Form 22 — Warrant of Committal on an Order for the Payment of Money 785
Form 23 — Warrant of Committal for Failure to Furnish Recognizance to Keep the Peace 786
Form 24 — Warrant of Committal of Witness for Failure to Enter into Recognizance. 787
Form 25 — Warrant of Committal for Contempt 788
Form 28 — Endorsement of Warrant. 789
Form 29 — Endorsement of Warrant. 790
Form 30 — Order for Accused to be Brought Before Justice Prior to Expiration of Period of Remand 791
Form 31 — Deposition of a Witness 792
Form 32 — Recognizance. 793
Form 33 — Certificate of Default to be Endorsed. 795
Form 34.1 — Statement on Restitution 796
Form 34.2 — Victim Impact Statement 797
Form 34.3 — Community Impact Statement 799
Form 38 — Conviction for Contempt 801
Form 39 — Order Discharging Person from Custody 802
Form 43 — Jailer's Receipt to Peace Officer for Prisoner. 803
Form 44 — Certificate (Criminal Record) of Fingerprint Examiner. 804
Form 45 — Certificate (Evidence) of Fingerprint Examiner 805
Form 46 — Probation Order 806
Form 47 — Order to Disclose Income Tax Information 807
Form 48 — Assessment Order of the Court 808
Form 48.2 — Victim Impact Statement — Not Criminally Responsible. 809
Form 49 — Warrant of Committal 811
Form 51 — Notice of Obligation to Provide Samples of Bodily Substance. 812
Form 52 — Order to Comply with Sex Offender Information Registration Act 813
Form 53 — Notice of Obligation to Comply with *Sex Offender Information Registration Act* 814
Form 54 — Obligation to Comply with *Sex Offender Information Registration Act* 815

APPENDIX B: LEGISLATION

LEGISLATION. 817
AppB.1 Federal Legislation. 817
AppB.1.1 Citizenship Act, R.S.C. 1985, c. C-29 817
AppB.1.2 Corrections and Conditional Release Act, S.C. 1992, c.20. 817
AppB.1.3 Criminal Records Act, R.S.C., 1985, c. C-47 817
AppB.1.4 Identification of Criminals Act, R.S.C., 1985, c. I-1. 817
AppB.1.5 Immigration and Refugee Protection Act, S.C. 2001, C-27 818
 (A) Immigration and Refugee Protection Regulations, SOR/2002-227 819
AppB.1.6 Interpretation Act, R.S.C., 1985 c. I-21. 820
AppB.2 Provincial Legislation. 820
AppB.2.1 Alberta 820
 (A) Court of Justice Act, R.S.A. 2000, c. C-30.5. 820
 (B) Traffic Safety Act, R.S.A. 2000, c.T-6 821
AppB.2.2 British Columbia 821
 (A) Motor Vehicle Act, R.S.B.C. 1996, c. 318. 821
AppB.2.3 Manitoba 821
 (A) The Constitutional Questions Act, C.C.S.M. c. C180. 821
 (B) Highway Traffic Act, C.C.S.M., c. H60 822
AppB.2.4 New Brunswick. 824
 (A) Rules of Provincial Court Practice — Practice Notes 824
AppB.2.5 Newfoundland and Labrador 824
 (A) Highway Traffic Act, R.S.N.L. 1990, c. H-3 825
 (B) Judicature Act, R.S.N. 1990, c. J-4. 825
 (C) Rules of the Provincial Court of Newfoundland and Labrador in Criminal Proceedings,
 Can. Reg. SI/2004-134. 825

TABLE OF CONTENTS

AppB.2.6 Nova Scotia 825
 (A) Motor Vehicle Act, R.S.N.S. 1989, c. 293. 825
 (B) Nova Scotia Provincial Court Rules 827
 AppB.2.7 Nunavut 827
 (A) Nunavut Court of Justice Practice Directive #39 827
 AppB.2.8 Ontario 827
 (A) Christopher’s Law (Sex Offender Registry), 2000, S.O. 2000, c. 1 827
 (I) Christopher’s Law — Regulation, O. Reg. 69/01 837
 (B) Courts of Justice Act, R.S.O. 1990, c. 43 839
 (C) Criminal Rules of the Ontario Court of Justice, Can. Reg. SI/2012-30 839
 (D) Crown Attorneys Act, R.S.O. 1990, c. C.49. 840
 (E) Highway Traffic Act, R.S.O. 1990, c. H-8. 840
 (F) Law Society Act, R.S.O. 1990, c. L.8. 841
 (I) Law Society Of Ontario — Bylaw #4 841
 (II) Law Society of Ontario Guidelines 842
 (a) Law Students / Summer Students 842
 (b) Articling Students. 843
 (III) Ontario — Order in Council — #1115/2009 845
 (IV) Samples of Bodily Substances Regulation — SOR/2014-304 845
 (G) Ministry of Correctional Services Act, R.S.O. 1990, c. M-22. 846
 AppB.2.9 Prince Edward Island 846
 (A) Highway Traffic Act, R.S.P.E.I. 1988, c. H-5. 846
 AppB.2.10 Quebec 847
 (A) Highway Safety Code, CQLR, c. C-24.2. 847
 AppB.2.11 Saskatchewan 847
 (A) The Traffic Safety Act, S.S. 2004, c. T-18.1 847
 (I) The Driver Licence Suspension Regulations, 2006, c. T-18.1, Reg 2. 848
 (B) Provincial Court of Saskatchewan, Practice Directive VIII (March 21, 2018) 848
INDEX. 849

