Law Reform Commission of Canada

Commission de réforme du droit du Canada

REPORT

criminal procedure part 1

miscellaneous amendments

9

REPORT

ON

CRIMINAL PROCEDURE - PART I

MISCELLANEOUS AMENDMENTS

130 Albert Street
Ottawa, Ontario
K1A 0L6

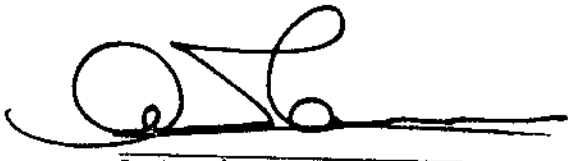
February 23, 1978

The Honourable S. Ron Basford, P.C., Q.C., M.P.
Minister of Justice and
Attorney General of Canada
House of Commons
Room 511-S
Ottawa, Ontario
K1A 0A6

Dear Mr. Minister:

In accordance with the provisions of Section 16 of the Law Reform Commission Act, we have the honour to submit herewith our report with our recommendations on the study undertaken by the Commission on Criminal Procedure: Part I - Miscellaneous Amendments.

Yours respectfully,



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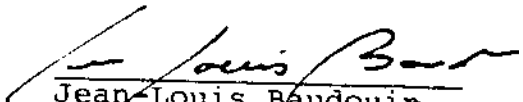

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* Commissioner La Forest being on leave of absence did not participate in the formulation of this Report.

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INTRODUCTION

The subject of this Report is the reform of certain criminal law procedures leading to trial, and incidentally with the law itself.

The Commission's recommendations are expressed in the form of draft statutory provisions for precision and for orientation in relation to present practice. The draft provisions which are presented have not been drafted by professional legislative drafters, but they are formulated to inform judges, lawyers and others of the specifics of the recommendations and they could serve as instructions to legislative drafting professionals.

This Part I Report on Criminal Procedure expresses reform recommendations which the Commission thinks could be implemented without delay. This Commission will be submitting many more recommendations than those of Part I, in the subject area of Criminal Procedure. The Commission will be reporting to Parliament on matters comprehended by the tentative recommendations expressed in our published Working Papers on Discovery, The Criminal Process and Mental Disorder and Control of the Process. The Commission has been studying, publishing and consulting on this subject of Criminal Procedures since before the publication of the first of several Study Papers on procedure and evidence in the summer of 1972.

Following this Part I Report on Miscellaneous Criminal Procedures, the Commission will shortly be publishing recommendations on Discovery as Part II of Criminal Procedure. Changes in the Commission's composition, and the lack of a full statutory complement of Commissioners during the past two years, have delayed presentation of the reform recommendations which the Commission's intensive work in the area of criminal procedure would normally have generated before now.

The Commission's studies and observations, including the experience and observation of individual Commissioners, have borne upon us the recognition that the

criminal justice system of Canada is creaking ominously. Specifically it creaks in terms of:

-- Backlogs of cases generating delay, waste of time and money, and mounting frustration on the part of the operators of the system, as well as the public whom they serve as best they can;

-- Thousands of witnesses across Canada who are summoned to criminal court only to wait to be told to return another day, or to testify to matters which are not in dispute;

-- Jurors who must attend at trials unduly protracted by voir dire and other proceedings from which the jury is excluded;

-- Re-elections of mode of trial permitted at times when the consequent re-adjustment of the process produces dislocation and delay for the public as well as the operators of the system.

Cognizant of these deficiencies, the Commission has conducted research on them, and has solicited the comment of interested persons and groups, both lay and professional. In response to our Working Paper on Discovery and subsequent co-operative efforts by the Commission and others, several pilot projects on pre-trial discovery have been conducted in various parts of the country. In June, 1976, the Commission presented a Preliminary Study on Pre-Trial Procedures to the meeting of Attorneys-General in Vancouver. In March, 1977, the Commission sponsored a conference in Ottawa on Preparing for Trial. That Conference was attended by judges, Crown counsel, defence counsel, police, representatives of agencies involved in the administration of criminal justice, and concerned members of the lay public.

Few, if any, have denied that the system needs corrective maintenance work. Most by far assert that it does indeed creak. On that assertion there is general consensus on the part of those whom we have consulted. There are, however, widely differing prescriptions for remedying the deficiencies. Faced with our statutory mandate and responsibilities, the Commission cannot stand by wringing its hands and hoping for the best. To wait for general consensus may be to wait forever. Indeed, as it was suggested by some at the conference on Preparing

for Trial, if those who are knowledgeable and involved in this system cannot formulate practical reform remedies for it, sooner or later aroused public demand may well impose changes born of frustration. The Commission therefore proposes rational correctives, precisely to avoid the possibility suggested.

In our adversary criminal law system, in which the burden of proof remains to be borne by the prosecution, we have concluded after much consultation that reforms effected by voluntary agreement cannot long endure. Unless the procedure itself be authoritatively re-cast, why should the contending adversaries not exploit every benefit it actually offers? At the end of the day, there is no answer to that question. We therefore conclude that the reform must, at last, be not merely corrective, but also authoritative. It must be statutory or it will be ignored ultimately, if not out of hand.

The clinching argument for these proposed reforms arises from the facts presented at, inter alia, the conference on Preparing for Trial in March, 1977. Those facts are the quantified success of more or less voluntary experiments carried out as pilot projects in Montreal, Edmonton and Ottawa. As recorded at page 114 of the conference report, the discovery project in Montreal avoided the appearance of 35,000 witnesses in 1976, witnesses who would have been otherwise summoned needlessly. As recorded at page 213 of the same report, the Disclosure Court in Edmonton during a six week period in early 1977, demonstrated that over 50% of the witnesses who would have been required for preliminary inquiries did not have to be called, and there were instances of charges being withdrawn, stays of proceedings and defence counsel agreeing to abridged preliminary inquiries. As recorded at page 231 of that conference report, the Pro-Forma Court system in Ottawa, between June 29th and November 30th, 1976, obviated the necessity of subpoenaing 2,141 witnesses. Of some 1,547 cases dealt with in the Pro-Forma Court, slightly over one-third of them were finally disposed of in that court by guilty plea, or by a plea of guilty to lesser charges or by withdrawal by the Crown. In 87% of all those cases the attendance of one or more witnesses was waived by defence counsel.

These facts, as reported at that conference on Preparing for Trial, make compelling arguments for reform. The Law Reform Commission of Canada asserts that it is high time reforms which will produce such savings of

time, expense and public convenience should be authoritatively emplaced in Canada's criminal procedure. The reforms which the Commission is now proposing here in Part I, and will be proposing in Part II, are calculated to maintain the essence of the traditional legal safeguards of the liberty of a dignified, free people, while enhancing the criminal justice system's credibility in the minds of that same dignified, free people.

SPECIFIC REPORT PROPOSALS

A - Pre-Trial Hearings

The proposals, which are expressed in statute-like form under this title, are designed to permit the "clearing-away" of as many procedural matters as we think can be "cleared away" through corrective maintenance work on the system, without as yet constructing a whole new design. Included in the list are such matters as special pleas, *res judicata* and issue estoppel, severance of trial, venue, joinder of counts, alternative charges, amending of defective indictments, particulars, fitness to stand trial, issues of admissibility of evidence, statutory *vires*, and the jurisdiction of the trial court. There ought to be a procedural niche in which any and all of these important matters can be resolved before the trial, if trial there be. The limited pre-trial hearing expressed in statute-like language under this title is that proposed niche.

The proposal is designed to be at once authoritative and flexible. It would be authoritative upon being enacted as new provisions of the Criminal Code of Canada. Its flexibility to accommodate disparate circumstances in the various provinces resides in its being given life and shape by the rules of court. The rules made pursuant to Section 438 of the Code are formulated fundamentally by the provincial judiciary. Subject to the over-riding power of the Governor-General in Council to secure uniformity (if uniformity be considered proper in the circumstances), Section 438 accords full local autonomy to make the rules contemplated in the proposal. Rules of court so made would manifestly be "not inconsistent with this Act", to quote Section 438(1), because they would be made in conformity with this new Code provision specifically calculated to accommodate local conditions. The option "to exercise any or all of the jurisdiction conferred" by Parliament, to quote the proposal, would carry local autonomy pretty far in the implementation of federal legislation. That, we think, is exactly how this proposal should be given life and form across Canada.

B - Evidence by Solemn Declaration

Ordinarily proof of ownership, or of an owner's lack of consent to the moving of a chattel, or the entering of any premises or other place is not a matter in dispute, no matter how essential such proof may be. How often, for example, are witnesses summoned to describe the make, model and colour of their cars, to read off a provincial Motor Vehicle registration card a long unmemorizable manufacturer's serial number, to answer a few desultory questions -- or not to be asked any questions -- and then to go away, wondering why it takes the loss of a day's, or a half-day's, wages to recite or read facts which are not disputed? It is clear that this kind of scenario is staged all too often, all throughout Canada.

The proposals for admitting this certain kind of evidence by solemn declaration are designed simply to give the system a chance to eliminate many if not most of these silly charades. If defence counsel knows he or she is not really going to cross-examine that sort of witness, why should the witness have to be present in the flesh? To this question, too, there is no reasonable answer.

The Commission thinks that it is no answer to the question to note that the proposal would require the prosecution to engage in the extra paper-work of preparing solemn declarations. Prosecutors are virtually always public servants remunerated from public moneys to serve the public. Requiring members of the public to attend court unnecessarily in the tens, probably even hundreds, of thousands each year in Canada is obviously no public service! So long as cross-examination of such witnesses is not sought by defence counsel, it is an appallingly mindless waste to cause a legion of witnesses to lose their individual wages, only to be inadequately compensated collectively at substantial cost to the state. A prosecutor who is alert may, under the proposal, avoid serving written notice of intention to make proof by solemn declaration, by giving notice early and orally in court. It is foreseeable, if the proposal be enacted, that Attorneys-General and judges alike would (and we surely hope, will) demand explanations for the unnecessary attendance of witnesses whose evidence could have been given through solemn declarations.

The same observations expressed above can be made with regard to the parade of witnesses called for no

other purpose than to demonstrate the sequence and continuity of possession of a proposed exhibit or other article. Having squinted at and testified about the presence of their initials or some other identifying mark on the article, they are only rarely cross-examined. Therefore they should only rarely be called in person so to testify.

These proposals are designed frankly to exploit the fact that criminal cases almost invariably involve the participation of licensed, professional counsel. While nothing should fetter the professional judgment of counsel in any particular case, nevertheless counsel who are seen persistently to do public disservice by permitting or requiring witnesses to attend court unnecessarily may well be called to account for it by their Law Society. This ramification of the proposal is, of course, a local matter of concern and that, we think, is appropriately where it belongs. The participation of professionals in this regard, like so many others, makes it possible to streamline the system, and to retain fair procedures.

C - Elections and Re-elections

The subject of elections of mode of trial -- and re-elections -- generates much noteworthy discussion about the delays and dislocations of the criminal justice system. The Commission maintains that those accuseds who are presently entitled to opt for trial by jury ought not to be deprived of that right. The operation of the law on elections and re-elections, however, reveals demonstrable flaws which are curable.

With the exception of a few of the most serious and the least serious offences, whenever charged in an information with an indictable offence, the accused has the right to elect one of three modes of trial: magistrate, judge alone, or judge and jury. The Criminal Code, in Part XVI, also permits re-election under certain circumstances. Not surprisingly, the Code provisions permitting re-election are complex.

It is frequently suggested by critics of the system that the right of re-election is sometimes exerted as a deliberate delaying tactic; and even where that is not the motive, the re-election may -- and often does -- cause administrative difficulties and delay.

In order to diminish some of those difficulties and delay, the Commission proposes that re-election of mode of trial be available as of right only within seven days after committal for the trial whose mode was originally elected by the accused. Once that initial election has been made and the seven days have passed, re-election should be possible only if the accused can show valid cause and, in addition, if the Crown and the court of original election both agree. The requirement that the leave of the court be obtained is expressed in our proposal to ensure judicial control over the case and over the court's own docket. The consent of the Crown is required, as in certain instances under the present law, to avoid administrative dislocation.

It is one thing for an accused to choose trial by jury, it is another thing to be accorded trial by jury when no election is made. The Commission recommends that, in the latter situation, the accused should be deemed to have elected a trial by magistrate. Again, where the election is not for trial by magistrate but without specifying which of the other two modes, it should be deemed to be an election for trial by a judge alone.

While the Commission would not wish to deprive accused persons of the right to have second thoughts about the chosen mode of trial, yet we assert that one week is sufficient to mull it over after committal for that trial. Within that seven day period, whether the accused can actually be brought before the court for re-election or not, (a matter over which the accused may have no control) notice of intention to re-elect, filed with the Court Clerk, will suffice to articulate the absolute right to re-elect mode of trial. After the week has elapsed the absolute right will also have elapsed, to be replaced by a permission granted only by leave of a judge and upon consent of the Attorney-General or Crown counsel. Thus would the Commission wed a new efficiency to traditional fairness for the accused.

Minimization of the accused's mobility in relation to re-election of mode of trial, but without scrapping the essential rights now accorded the accused, will permit better utilization of court time. Our proposal is expressed in specific statute-like detail.

D - Discharge of the Accused

Apart from a few minor exceptions, there is no limitation period governing the commencement of prosecutions for indictable offences. Once a charge is laid, there is no rule specifying how soon the case must be brought to trial. The law ought reasonably to express some formal recognition of the vice of delay. The Commission proposes that where an accused has not been brought to trial within one year (or within 180 days in proceedings under Part XXIV) of his or her first court appearance on a charge, the accused should be entitled to apply to a judge of the trial court for a discharge. Unless the period has been lawfully extended in the manner provided, then the accused would simply be discharged. It should not be a matter of discretion. It should be simply a matter of the passage of time.

The only discretion in effecting a discharge after the time has truly elapsed should be conferred on the judge where the accused does not move to invoke the right to be discharged. In such probably rare cases, discharge should be virtually automatic, but in the judge's discretion in the event that the accused be ignorant of the right, or even just sullenly irked at the system after such a delay. Again, it may be that, despite the great delay, an accused would nevertheless wish to be tried, confidently expecting to be fully acquitted and not merely discharged. In such probably equally rare cases discharge should not be automatic, but also in the judge's discretion, if for example, it appears that the accused does not appreciate that an unexpected conviction in such circumstances would not be obviated by the running-out of the time periods.

In terms of Canadian criminal law this proposal may appear to some to be radical, but that appearance is as nothing when compared with the plight of an accused who cannot get on to trial within six months or a year after the first court appearance. Because of the possibility of extending the time periods, discharges in cases of delay may be rare, but the power to discharge would not only be a judicial weapon against injustice, but also a spur to uproot the causes of delay in the criminal justice system.

Finally, it may seem to some a great maladministration of justice to discharge an accused who stands

charged with a serious crime, just because the trial has not commenced prior to an arbitrary date. However, a discharge is not an acquittal. Even though the Crown has not succeeded in bringing the accused to trial within one year (or 180 days, as the case may be) the Crown may still proceed on the charge, if the Attorney-General personally consents to the re-instituting of the proceedings. It might be assumed that an Attorney-General would demand to be personally informed of the circumstances of the delay, when requested to give personal consent. By the same token, if there were several discharges for which the Attorney-General were not asked personally to signify consent, the Minister would surely demand to be personally informed of the circumstances of such an incidence of discharges. This, the Commission thinks, would be a proper means of appropriately engaging the executive functions of responsible government in the administrative reform of criminal procedure. This, the Commission asserts would be entirely in the public interest.

CONCLUSION

The Commission recommends that legislation in conformity with the proposed draft be enacted by Parliament, without delay, as the first step toward a general reform and overhaul of criminal procedures. It requires streamlined efficacy to escape the slough of delay in which the system is bogging down. The present system operates at full blast and yet it creaks ominously because it is tied to anachronisms which weigh it heavily and dissipate its thrust. The correctives which the Commission proposes ought to be applied now, and before any major re-design or entirely new vehicle is tried, as may be proposed in forthcoming Reports on Criminal Procedure.

PROPOSED AMENDMENTS TO THE CRIMINAL CODE

- Draft Statutory Provisions -

A - Pre-Trial Hearing

Section 1.

(1) Notwithstanding any other provision in this Act, a court with which there is filed, in relation to an accused, an indictment or a formal charge, as the case may be, or any judge of that court if the rules of Court so permit, may exercise jurisdiction to determine the following matters in the same manner as a judge presiding at the trial of the accused, and said matters shall be deemed to have been determined at trial and shall have the same effect:

(a) taking a special plea authorized by this Part, determining the validity of any such special plea, and making any other order or ruling provided for in sections 534 to 538;

(b) any issue or defence based on the principle of res judicata or issue estoppel other than those mentioned in paragraph (a);

(c) severance of the trial of two or more accused jointly charged in the same indictment;

(d) any matter provided for in section 516, 519, 520, 527, 529;

(e) the issue of whether the accused is then, on account of insanity, unfit to stand his trial with or without a jury as determined by section 543 and, where the accused is to stand trial before a court composed of a judge and jury, by that judge without a jury;

(f) the admissibility of evidence, including the holding of a voir dire to determine the admissibility of a confession;

(g) the validity of any statute or regulation of Canada, provided that the challenge to the

validity of any statute or regulation is made in accordance with the notice and other requirements of the laws in force in the province or territory in which the challenge is made;

(h) jurisdiction of the trial court; and

(i) any other matter that may, in the interests of improving, expediting and simplifying the trial, be determined conveniently before the trial, and that is authorized by rules of court to be so determined.

(2) The jurisdiction conferred by subsection (1) shall be exercised in the manner prescribed by rules of court, or, in the absence of such rules, in the manner that the court or judge may direct.

(3) The rules of court may authorize judges or specified classes of judges acting under Part XV to exercise any or all of the jurisdiction conferred by subsection (1) at any time after an indictment or a formal charge has been filed with the trial court.

B - Evidence by Solemn Declaration

Section 1.

Where an accused is charged with an offence in relation to property, a place or a dwelling-house, under sections 283, 295, 298, 301.1(1)(a), (b) and (c), 306, 307, 387, 388, 389, 390, or, with an attempt, counselling or conspiracy thereof, of an offence under section 312 in relation to property under the aforementioned sections, proof by the prosecutor of

(1) ownership or of a special interest in that property and of its value other than proof of ownership or of a special interest vested in the accused,

(2) the absence of consent, by the owner or person having a special interest, to, as the case may be, the alleged

(a) taking, conversion, moving of or causing to be moved of property under sections 283 and 295,

(b) whatever is alleged having been done and described in section 298(1)(a) and (b),

(c) taking, possession or using, under section 301.1(1)(a) and (c),

(d) accused's entering or being present in a place, under section 306, or a dwelling-house under section 307,

may at trial, pre-trial, or at a preliminary inquiry, be made by producing the solemn declaration of the owner or person having a special interest.

Section 2.

(1) If it is intended to make proof by solemn declaration, as provided in section 1, the prosecutor shall,

(a) upon the earliest occasion at which the date for the preliminary inquiry, or for the pre-trial, or for the trial is set by the

judge, and in any event, not later than during the following day,

(b) either orally in court, in the presence of the accused or counsel for the accused, and for the record, or

(c) by notice in writing to counsel for the accused or if the accused be without counsel of record, then to the accused personally,

communicate in clear specific language the intention to make proof of any of the matters described in section 1 by producing the solemn declaration of the owner by name, or of any person, by name, having a special interest;

(2) The accused may, as of right, require the presence of the witness at the proceedings for the purpose of cross-examination but only if he has given notice of same in writing to the Crown;

(3) Notice, under subsection (2) shall be given

(a) in the case of a preliminary inquiry at least 24 hours before the first date set for the inquiry,

(b) in the case of a trial, at least six clear days before the first date set for trial and, if a pre-trial hearing has been held, at the hearing,

(c) in the case of evidence adduced at a pre-trial hearing, at least 48 hours before the hearing.

Section 3.

A justice, magistrate, judge or pre-trial judge, at any time after the limitation periods of section 2, subsection (3) have expired and where during the proceedings, at the request of the accused, upon cause being shown and after having offered the prosecutor an opportunity to be heard, may order a witness to attend the proceedings for the purpose of cross-examination and, in determining whether to grant such a request, he may

inquire into the nature of the questions to be put to the witness.

Section 4.

Where a person has, under the authority of this Act, seized and then given possession of anything to another person or other persons, proof of the sequence and continuity of possession of that thing

(a) by those other persons or that other person,

(b) including its having been committed to the post by the sender and having been received by the addressee,

may be made in accordance with sections 1, 2 and 3 to identify it as the very thing seized, except

(c) by the person who effected the seizure, and

(d) by the person in actual last possession of it at the time the thing is tendered in evidence.

C - Elections and Re-elections

Section 464.

Repeal subsection (4) and replace it by the following:

(4) Where an accused does not elect, he shall be deemed to have elected for a trial by a magistrate, and subsection (3) shall apply.

(5) Where an accused has elected for a trial by a court composed of a judge and a jury or by a judge sitting alone, or has elected not to be tried by a magistrate, without further specifying, the justice shall hold a preliminary inquiry into the charge and if the accused is committed for trial, or, where the accused is a corporation, is ordered to stand trial, the justice shall

(a) endorse on the information a statement showing the nature of the election, and

(b) state in the warrant of committal, if any, that the accused

(i) elected to be tried by a judge without a jury; or

(ii) elected to be tried by a court composed of a judge and jury; or

(iii) did not specify as between a judge without a jury or a court composed of a judge and a jury.

Section 466.

Section 466 should be amended to read "486.(1), (2) and (3)."

Section 484.

Subsections (3) and (4) are repealed and replaced by:

(3) Where an accused does not elect, he shall be deemed to have elected for trial by a magistrate, and subsection (5) shall apply.

(4) Where an accused has elected for a trial by a court composed of a judge and a jury or by a judge sitting alone, or has elected not to be tried by a magistrate without further specifying, the magistrate shall

(a) endorse on the information a statement showing the nature of the election, and

(b) state in the warrant of committal, if any, that the accused

(i) elected to be tried by a judge without a jury; or

(ii) elected to be tried by a court composed of a judge and jury; or

(iii) did not specify as between a judge without a jury or a court composed of a judge and a jury.

(5) Where an accused elects to be tried, or is deemed to have elected to be tried, by a magistrate, the magistrate shall

(a) endorse on the information a record of the election, and

(b) call upon the accused to plead to the charge, and if the accused does not plead guilty the magistrate shall proceed with the trial or fix a time for the trial.

Section 485.

Repeal subsection (3) and replace by the following:

(3) Where an accused is put to his election pursuant to subsection (2), the following provisions apply, namely,

(a) if the accused elects to be tried by a magistrate, the magistrate shall endorse on the information a record of the election and continue with the trial;

(b) if the accused does not elect he shall be deemed to have elected for a trial by magistrate and sub-paragraph (a) shall apply;

(c) if the accused has elected for a trial by a court composed of a judge and a jury, or a court composed of a judge without a jury, or if he has elected not to be tried by a magistrate without further specifying, the magistrate shall continue the proceeding as a preliminary inquiry under Part XV, and, if he commits the accused for trial, he shall comply with section 484(4)(a) and (b).

Section 486.

Repeal section 486 and replace by the following:

(1) An accused that is a corporation shall appear by its counsel or agent.

(2) Where an accused corporation does not appear pursuant to a summons and service of the summons upon the corporation is proved, the magistrate shall, if the charge is for an offence other than those that are within the exclusive jurisdiction of a court composed of a judge and jury, proceed with the trial of the charge in the absence of the accused corporation.

(3) Where an accused corporation appears but does not make any election under section 484(2), it shall be deemed to have elected for a trial by a magistrate without a jury.

Section 490.

Repeal subsection (5) and replace by the following:

(5) Where an accused has elected, under section 464 or 484, to be tried by a judge without a jury, or is deemed to have done so under section 495, he may re-elect to be tried by a judge and jury

(a) within seven days of his committal to trial by filing with the Clerk of the Court to

which he was committed in writing a notice of re-election,

(b) later than seven days after his committal to trial by leave of the judge of the court to which he was committed for trial, and with the consent of the Attorney General or of counsel acting on his behalf.

Section 492.

Amend subsection (1) by deleting "or is deemed to have elected", repeal subsection (5) and replace by the following:

(5) Where an accused who desires to re-elect to be tried by a judge without a jury or by a magistrate without a jury does not notify the sheriff in accordance with subsection (1) within seven days after his committal for trial, no election may be made under this section without leave of a judge of the court to which he was committed and the written consent of the Attorney General or of counsel acting on his behalf.

Section 494.

Repeal section 494 and replace by the following:

494. Where an accused, being charged with an offence that, under this Part, may be tried by a judge without a jury, is committed for trial or, in the case of a corporation, is ordered to stand trial within seven days before the opening of the sittings or session of the court composed of a judge and jury by which the accused is to be tried, the accused is not entitled to elect, under section 492, to be tried under this Part by a judge without a jury, or by a magistrate without a jury, unless a judge of the court to which he was committed or ordered to stand trial gives leave, and unless the Attorney General or counsel acting on his behalf consents in writing.

Section 495.

Repeal section 495 and replace by the following:

495. Where an accused is committed for trial or ordered to stand trial for an offence that, under this Part, may be tried by a judge without a jury, he shall, for the purposes of the provisions of this Part relating to election and re-election, be deemed to have elected to be tried by a court composed of a judge without a jury if

(a) he did not specify his election in section 464(5) or 484(4),

(b) he was committed for trial or ordered to stand trial by a magistrate who, pursuant to section 485, continued the proceedings before him as a preliminary inquiry, or

(c) having elected under section 464 or 484 for a trial by jury, he absconded during the course of his preliminary inquiry and did not reappear before the justice or magistrate prior to his committal, or, if the accused is a corporation, fails to appear before being ordered to stand trial.

D - Discharge of the Accused

Section 1.

(a) Where in proceedings under this Act there has expired since the first court appearance of an accused one year or, in proceedings under Part XXIV, 180 days without the trial being commenced, an accused may move for a discharge before a judge of the court before which the trial is to be held or, if such court is not yet determined, before any judge of a court of criminal jurisdiction or superior court of criminal jurisdiction.

(b) Where a new trial is ordered pursuant to an appeal or to a declaration of mistrial the time periods of paragraph (a) shall commence to run on the day of the mistrial or of the judgment of the Court of Appeal.

Section 2.

A judge before whom a motion is presented under section 1 shall, upon proof of the facts, discharge the accused forthwith unless proof is made that the time periods of section 1 have been extended by a judge of a superior court of criminal jurisdiction or of the court of appeal and that those extended time periods have not yet expired.

Section 3.

Notice of presentation of a motion under section 1 shall, if made prior to the trial, be served upon the prosecutor and the Attorney General or counsel acting on his behalf and the clerk of the court before whom the procedures are pending.

Section 4.

A clerk upon being served a motion shall cause all records of the proceedings pending to be filed with the judge or the clerk of the court before whom the motion has been made presentable.

Section 5.

A Justice, Magistrate or Judge presiding at a trial shall at the outset ascertain whether the

time periods of section 1 or those extended pursuant to a petition under section 6 have expired and, if such be the case, and if no motion for discharge is presented by the accused, he may nevertheless discharge the accused.

Section 6.

(1) The Attorney General or counsel acting on his behalf may, at any time after the first court appearance of an accused, and before the expiration of the time periods set out in section 1 petition a judge of a superior court of criminal jurisdiction or of the appeal court for an extension of the time periods prescribed in section 1.

(2) A petition under subsection (1) shall be served upon counsel for the defence or, if the accused is unrepresented by counsel, upon the accused personally by leaving a copy of the petition at the residence the accused had at the time of his first court appearance or at any other subsequent residence the accused has in writing notified the clerk of the court of a change of residence or in any other way authorized by the rules of court, or if the accused then be in custody within the jurisdiction, upon the accused in custody.

(3) A judge in determining whether to extend the time periods or not shall consider all of the circumstances, and shall, in so doing, give weight particularly to the responsibility, if any, of either of the parties.

Section 7.

If at any time after the first court appearance the accused absconds, any period of time expired shall be of no effect in computing the time periods prescribed in section 1 and said time periods shall recommence to run on the day of first court appearances following the absconding.

Section 8.

If at any time after the first court appearance and the commencement of the trial the Attorney General directs a stay under section 508, the

computation of the time under section 1 shall be suspended pending the stay but shall resume if and when the stay is withdrawn.

Section 9.

No proceedings for the same offence against an accused who has been discharged pursuant to sections 2 and 5 or to section 508(2) shall be instituted without the consent in writing of, and personally signed by, the Attorney General, first having been obtained and filed in court.

Section 10.

Any decision by a Justice, Judge or Magistrate, to adjourn a proceeding to a date that is after, or within seven days before, the date at which the period of section 1 is to have expired may be summarily appealed to a judge of a superior court of criminal jurisdiction or of the court of appeal.