



**SUPREME COURT OF CANADA**

**CITATION:** R. v. Carignan, 2025  
SCC 43

**APPEAL HEARD:** May 21, 2025  
**JUDGMENT RENDERED:** December  
12, 2025  
**DOCKET:** 41186

**BETWEEN:**

**His Majesty The King**  
Appellant

and

**David Carignan**  
Respondent

- and -

**Attorney General of Ontario,  
Attorney General of Alberta and  
Canadian Civil Liberties Association**  
Intervenors

**OFFICIAL ENGLISH TRANSLATION**

**CORAM:** Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal,  
O'Bonsawin and Moreau JJ.

**REASONS FOR  
JUDGMENT:** Côté J. (Wagner C.J. and Karakatsanis, Rowe, Martin, Kasirer,  
Jamal, O'Bonsawin and Moreau JJ. concurring)  
(paras. 1 to 147)

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**His Majesty The King**

*Appellant*

v.

**David Carignan**

*Respondent*

and

**Attorney General of Ontario,  
Attorney General of Alberta and  
Canadian Civil Liberties Association**

*Interveners*

**Indexed as: R. v. Carignan**

**2025 SCC 43**

File No.: 41186.

2025: May 21; 2025: December 12.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O’Bonsawin and Moreau JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

*Criminal law — Arrest — Arrest without warrant by peace officer —  
Accused challenging his arrest without warrant on ground that it was unlawful because*

*it was contrary to s. 495(2) of Criminal Code and thus infringed his constitutional right not to be arbitrarily detained — Trial judge refusing to hold voir dire on lawfulness of arrest — Whether arrest that is contrary to s. 495(2) of Criminal Code is unlawful arrest — Whether effect of s. 495(3) of Criminal Code is to deprive accused of opportunity to allege infringement of right not to be arbitrarily detained in criminal proceeding relating to accused's own criminal liability — Criminal Code, R.S.C. 1985, c. C-46, s. 495(2), (3).*

The accused was arrested without warrant 11 days after committing, according to the allegations in the indictment, sexual assault. At the police station, he was subjected to an interrogation that was recorded on video, during which he made an incriminating statement. Before his trial began, the accused filed a motion asking the court to exclude the incriminating statement on the ground that his arrest without warrant was unlawful and therefore arbitrary within the meaning of s. 9 of the *Canadian Charter of Rights and Freedoms*. According to him, the arrest without warrant was contrary to s. 495(2) of the *Criminal Code* because the police did not believe on reasonable grounds that the arrest was necessary to satisfy the public interest and because there was no risk that he would fail to attend for his appearance.

The trial judge refused to hold a *voir dire* to determine the lawfulness of the arrest under s. 495(2). He found that an arrest without warrant that is contrary to s. 495(2) is nonetheless lawful through the application of s. 495(3) as long as the peace officer acts in compliance with s. 495(1)(a). Since the peace officers had believed on

reasonable grounds that an offence had been committed within the meaning of s. 495(1)(a), the judge was of the view that the accused's motion had no chance of success. The incriminating statement was not excluded, and the accused was convicted. On appeal by the accused, the Court of Appeal found that the interpretation of s. 495(2) and (3) adopted by the trial judge was incorrect. In its opinion, there were valid grounds for the request for a *voir dire*, since s. 495(3) provides an opportunity to challenge the lawfulness of an arrest without warrant and since there was no apparent basis on which to conclude that s. 495(2) justified the accused's arrest. The Court of Appeal ordered a new trial.

*Held:* The appeal should be dismissed.

In a criminal proceeding, a judge can grant a motion under s. 9 of the *Charter* alleging the unlawfulness and arbitrariness of an arrest without warrant that does not meet the requirements of s. 495(2). Properly interpreted, s. 495(2) can have the effect of making an arrest unlawful under s. 9 of the *Charter*, and s. 495(3) does not preclude an accused from alleging such an infringement of s. 9 of the *Charter* and seeking a remedy under s. 24 of the *Charter* in the accused's own trial. In this case, the refusal to hold a *voir dire* on the question of the lawfulness of the accused's arrest is a reviewable error that warrants a new trial. The case does not involve any of the scenarios in which s. 495(3) applies, and the criminal or civil liability of the peace officer who arrested the accused without warrant is not in issue. The presumption of

lawfulness created by s. 495(3) does not apply, and the trial court had to hold a *voir dire* to determine the lawfulness of the arrest.

It is necessary to use the modern approach to statutory interpretation to determine the proper interpretation to be given to s. 495(2) and (3). The statutory interpretation exercise is focused on the intent of the legislature at the time of enactment, and courts are bound to give effect to that intent. The text of a provision is the anchor of the interpretative exercise, and this approach requires that the meaning of the provisions be ascertained in light of their text, their context and their purpose.

First of all, s. 495(1) of the *Criminal Code* states the grounds required for an arrest without warrant and remains the foundation of this discretion. It provides that a peace officer “may arrest without warrant . . . a person” if the officer believes on reasonable grounds that an indictable offence has been or is about to be committed, if the officer finds the person committing a criminal offence or if the officer has reasonable grounds to believe that there is a warrant for the person’s arrest or committal. The use of the expression “may arrest without warrant” indicates that s. 495(1) is permissive, but the power so conferred is not absolute. This power was the subject of a major reform aimed at limiting the use of arrest and avoiding unnecessary pre-trial arrest and detention, in which Parliament enacted the provisions that are now s. 495(2) and s. 495(3). In enacting these two provisions, Parliament sought to reduce unnecessary arrests without warrant and to protect a peace officer who made an arrest without warrant if, in good faith, the officer made a mistake in judgment. Parliament’s

intention was to balance various considerations, including individual freedoms, public safety and the public interest in ensuring that peace officers can do their work effectively.

Section 495(2) qualifies the general rule set out in s. 495(1): it imposes binding norms that limit the discretion of peace officers, which at one time was very broad, to make an arrest without warrant when certain cumulative conditions are met. The scope of s. 495(2) is limited, since it applies only to hybrid offences, offences punishable on summary conviction and the indictable offences mentioned in s. 553 of the *Criminal Code* (s. 495(2)(a) to (c)). In addition, the limitation in s. 495(2) applies only when two requirements are met: first, the peace officer must believe on reasonable grounds that the public interest may be satisfied without making an arrest without warrant (s. 495(2)(d)); and second, the peace officer must have no reasonable grounds to believe that, if he or she does not arrest the person without warrant, the person will fail to attend court (s. 495(2)(e)).

The text, context and purpose of s. 495(2) of the *Criminal Code* lead to the conclusion that the limitations imposed on the power of arrest without warrant are mandatory in nature: when the conditions set out in para. (d), para. (e) and any of paras. (a) to (c) are met, an arrest without warrant is strictly prohibited. Section 495(2) states that a peace officer “shall not” arrest a person without warrant where the requirements mentioned are met. According to the rule of interpretation codified in s. 11 of the *Interpretation Act*, the word “shall” in the expression “shall not” should be

construed as expressing an obligation. Peace officers therefore have an obligation to assess whether an arrest without warrant is justified in the public interest and whether there is a risk that the accused will not appear. Peace officers contravene s. 495(2) where they fail to assess these criteria before acting or where they — wrongly — make an arrest without warrant when the conditions do not permit them to do so. An arrest contrary to s. 495(2) is an unlawful arrest, which suffices to characterize it as arbitrary within the meaning of s. 9 of the *Charter*.

Section 495(3) provides provide peace officers and any person responsible for them with some protection against proceedings in which they face criminal or civil liability for an arrest contrary to s. 495(2). Section 495(3) creates a presumption of lawfulness with respect to the conduct of a peace officer who has made an arrest without warrant that does not meet the requirements of s. 495(2), as long as the officer acted in compliance with s. 495(1). Section 495(3)(a) prevents, for example, a peace officer from being held criminally liable for an offence under the *Criminal Code* for having breached the requirements of s. 495(2). However, s. 495(3)(b) allows a person who has been arrested to rebut this presumption in a proceeding not brought under the *Criminal Code* or any other Act of Parliament. Section 495(3)(b) therefore allows such a person to bring a civil suit against the peace officer, or the officer's employer, but the person arrested without warrant bears the burden of proving that the peace officer believed on reasonable grounds that the public interest could be satisfied without arresting the person and that there was no risk of the person failing to attend court.

The presumption of lawfulness created by s. 495(3) does not apply when the criminal or civil liability of the officer or of any person responsible for the officer is not in issue. Under s. 495(3)(a) and (b), the proceedings must be directly aimed at the conduct of the peace officer who made the arrest without warrant contrary to the requirements of s. 495(2). An interpretation whereby an arrest contrary to s. 495(2) would still be considered lawful in the criminal trial of the person who was arrested would diminish the deterrent effect of s. 495(2), one of the objectives of which is to reduce arrests without warrant.

There cannot be ascribed to Parliament, in enacting the provision that is now s. 495(3), an intention of insulating an arrest contrary to s. 495(2). The wording of the provisions on the power of arrest without warrant came into force nearly a decade before the enactment of the *Charter*. Parliament could not have imagined at the time that, years later, accused persons would be able, in their own criminal trial, to challenge infringements of their constitutional rights by asserting the unlawfulness of their arrest. The *Charter* had not yet been enacted, and the Court had not recognized that an unlawful arrest could amount to an arbitrary arrest. Nor could Parliament have anticipated that accused persons would be able to seek remedies under the *Charter*. The wording of s. 495(3) must be interpreted in light of this reality.

### **Cases Cited**

**Overruled:** *R. v. Adams* (1972), 21 C.R.N.S. 257; *R. v. McKibbin* (1973), 12 C.C.C. (2d) 66; *R. v. Fuhr*, [1975] 4 W.W.R. 403; *R. v. Cayer* (1988), 28 O.A.C.

105; *R. v. Jowett Work*, 2019 BCCA 236, 379 C.C.C. (3d) 187; *R. v. Veen*, 2022 ABCA 350, 51 Alta. L.R. (7th) 417; **referred to:** *R. v. Wray*, [1971] S.C.R. 272; *R. v. Veen*, 2020 ABQB 99, 10 Alta. L.R. (7th) 192; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Basque*, 2023 SCC 18; *R. v. Wolfe*, 2024 SCC 34; *Telus Communications Inc. v. Federation of Canadian Municipalities*, 2025 SCC 15; *Perka v. The Queen*, [1984] 2 S.C.R. 232; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *United States of America v. Dynar*, [1997] 2 S.C.R. 462; *Piekut v. Canada (National Revenue)*, 2025 SCC 13; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Directrice de la protection de la jeunesse du CISSS A*, 2024 SCC 43; *Bessette v. British Columbia (Attorney General)*, 2019 SCC 31, [2019] 2 S.C.R. 535; *R. v. Johnson*, 2003 SCC 46, [2003] 2 S.C.R. 357; *Baron v. Canada*, [1993] 1 S.C.R. 416; *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504; *Tremblay v. Ottawa (Police Services Board)*, 2018 ONCA 497, 48 C.C.L.T. (4th) 1; *Smith & Rhuland Ltd. v. The Queen*, [1953] 2 S.C.R. 95; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; *R. v. Morales*, [1992] 3 S.C.R. 711; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Tim*, 2022 SCC 12, [2022] 1 S.C.R. 234; *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692; *Hudson v. Brantford Police Services Board (2001)*, 158 C.C.C. (3d) 390; *Collins v. Brantford Police Services Board (2001)*, 158 C.C.C. (3d) 405; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *La Presse inc. v. Quebec*, 2023 SCC 22; *R. v. Alex*, 2017 SCC 37, [2017] 1 S.C.R. 967; *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84; *Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281; *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783; *Reference re Impact Assessment Act*,

2023 SCC 23; *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754; *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248; *R. v. Gladue*, [1999] 1 S.C.R. 688; *R. v. Munson*, 2003 SKCA 28, 172 C.C.C. (3d) 515; *R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402; *R. v. Kuldip*, [1990] 3 S.C.R. 618; *R. v. Prince* (1981), 61 C.C.C. (2d) 73; *R. v. McIntosh*, [1995] 1 S.C.R. 686; *Kosoian v. Société de transport de Montréal*, 2019 SCC 59, [2019] 4 S.C.R. 335; *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743.

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*Canadian Charter of Rights and Freedoms*, ss. 7, 9, 24.

*Controlled Drugs and Substances Act*, S.C. 1996, c. 19.

*Criminal Code*, R.S.C. 1970, c. C-34, ss. 25, 118(2), 247(2), 279(2), 449, 450.

*Criminal Code*, R.S.C. 1985, c. C-46, ss. 25, 129(a), 271(a), 279(2), 495, 553.

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APPEAL from a judgment of the Quebec Court of Appeal (Schrager, Healy and Bachand JJ.A), [2024 QCCA 86](#), [2024] AZ-51999406, [2024] J.Q. n° 314 (Lexis), 2024 CarswellQue 344 (WL), setting aside the conviction of the accused for sexual assault and ordering a new trial. Appeal dismissed.

*Patrick Cardinal and Daphné Godin-Garito*, for the appellant.

*Ronald Prigent and Alexandra Boulanger*, for the respondent.

*Jeremy Streeter and Charmaine Wong*, for the intervener Attorney General of Ontario.

*Andrew Barg*, for the intervener Attorney General of Alberta.

*Matthew Gourlay and Tara Boghosian*, for the intervener Canadian Civil Liberties Association.

English version of the judgment of the Court delivered by

CÔTÉ J. —

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I.	<u>Overview</u>	

[1] This appeal concerns the interpretation of s. 495(2) and s. 495(3) of the *Criminal Code*, R.S.C. 1985, c. C-46 (“Cr. C.”), which govern the power of peace officers under s. 495(1) *Cr. C.* to make arrests without warrant. The question is whether, in a criminal proceeding, a judge can grant a motion under s. 9 of the

*Canadian Charter of Rights and Freedoms* alleging the unlawfulness and arbitrariness of an arrest without warrant that does not meet the requirements of s. 495(2) *Cr. C.*

[2] It must be acknowledged that s. 495(2) and s. 495(3) *Cr. C.* are not drafted in the clearest manner. The proof of this is that courts across the country disagree on the interpretation to be given to them. To decide this appeal, I rely on the modern approach to statutory interpretation, which requires that the meaning of these provisions be ascertained in light of their text, their context and their purpose.

[3] First, I interpret s. 495(2) *Cr. C.* to determine whether it imposes binding limitations on the power of a peace officer who arrests a person without warrant, such that an arrest that is not in compliance with this provision becomes unlawful. My analysis leads to the conclusion that this provision is binding and mandatory. In other words, an arrest that is contrary to s. 495(2) *Cr. C.* is unlawful under the *Criminal Code*. This provision is not merely a guideline, a practice guide or a suggestion from Parliament. On the contrary, it obliges a peace officer not to arrest a person without warrant when all of the requirements set out in s. 495(2) *Cr. C.* are met.

[4] Second, I interpret s. 495(3) *Cr. C.* to determine whether its effect is to deprive an accused of the opportunity to allege an infringement of s. 9 of the *Charter* and to obtain a remedy under s. 24 in a criminal proceeding relating to the accused's own criminal liability. My analysis leads me to conclude that this provision applies in very specific cases, namely where a proceeding specifically concerns the liability of the peace officer who made an arrest contrary to s. 495(2) *Cr. C.* and of any person

responsible for that peace officer. On the one hand, s. 495(3)(a) *Cr. C.* applies where the proceeding is brought under the *Criminal Code* or any other Act of Parliament and concerns the criminal liability of the peace officer or of persons responsible for that officer. On the other, s. 495(3)(b) *Cr. C.* applies where the proceeding is brought under a statute that is not the *Criminal Code* or another Act of Parliament. This includes a civil proceeding that concerns the civil liability of the peace officer who made the arrest contrary to s. 495(2) *Cr. C.* or of persons responsible for that officer.

[5] In sum, the common feature of s. 495(3)(a) and (b) *Cr. C.* is that the proceeding must necessarily relate to the criminal or civil conduct of a peace officer where there has been a contravention of s. 495(2) *Cr. C.* This therefore means, for the purposes of this appeal, that s. 495(3) *Cr. C.* is not applicable, since this appeal concerns a criminal proceeding relating to the criminal liability of the person arrested without warrant. Section 495(3)(a) *Cr. C.* thus does *not* nullify from the outset the chances of success of a person arrested without warrant who would like to challenge the lawfulness of his or her arrest through a *voir dire* based on s. 9 of the *Charter*.

[6] Section 495(2) *Cr. C.* is mandatory in nature and allows an accused to raise, under s. 9 of the *Charter* in the context of a *voir dire*, the unlawfulness and arbitrariness of an arrest that does not comply with this provision. Moreover, s. 495(3) *Cr. C.*, properly interpreted, cannot serve in this case to immunize an arrest contrary to s. 495(2) *Cr. C.*, since the proceeding does not relate to the criminal liability of a peace officer or of persons responsible for that officer.

[7] The trial judge was required in this case to hold a *voir dire* to determine the lawfulness of the respondent's arrest without warrant. The respondent's motion was not manifestly frivolous, contrary to what was decided. The failure to hold a *voir dire* is a reviewable error of law that warrants a new trial.

[8] I would therefore dismiss the appeal and uphold the order for a new trial made by the Quebec Court of Appeal.

## II. Background

### A. *Facts*

[9] On or about March 8, 2018, the respondent, David Carignan, allegedly committed acts of a sexual nature that, according to the allegations in the indictment, satisfy the constituent elements of the offence of sexual assault under s. 271(a) *Cr. C.*

[10] Eleven days later, on March 20, 2018, he was arrested without warrant inside his educational institution for the acts alleged against him.

[11] Following his arrest, peace officers took the respondent to the police station, where he was subjected to an interrogation that was recorded on video. During that interrogation, the respondent made an incriminating statement.

### B. *Judicial History*

(1) Court of Québec (Judge Roy)

[12] In November 2018, before his trial began, the respondent filed a motion for exclusion of evidence and for a stay of proceedings based on ss. 7, 9 and 24 of the *Charter*. The respondent asked the court to exclude the incriminating statement recorded on video on the ground that his arrest on March 20, 2018, was unlawful and therefore arbitrary within the meaning of s. 9 of the *Charter*. According to him, the arrest without warrant was contrary to s. 495(2) *Cr. C.* because the police did not believe on reasonable grounds that the arrest was necessary to satisfy the public interest and because there was no risk that he would fail to attend court for his appearance.

[13] When the trial began, the trial judge dismissed the respondent's motion for exclusion of evidence, thereby refusing to hold a *voir dire* to determine the lawfulness of the arrest under s. 495(2) *Cr. C.* The judge based his reasoning on an interpretation whereby an arrest without warrant that is contrary to s. 495(2) *Cr. C.* is nonetheless lawful through the application of s. 495(3) *Cr. C.* as long as the peace officer acts in compliance with s. 495(1)(a) *Cr. C.* Since the peace officers had believed on reasonable grounds that an indictable offence had been committed within the meaning of s. 495(1)(a) *Cr. C.*, the judge was of the view that the respondent's motion had no chance of success. The incriminating statement was therefore part of the evidence adduced by the Crown at the trial that followed.

[14] At the conclusion of the trial, the judge convicted the respondent, relying notably on his incriminating statement. The respondent was sentenced to imprisonment for a term of 15 months, and a 2-year probation order was also issued against him.

(2) Quebec Court of Appeal, 2024 QCCA 86 (Schrager, Healy and Bachand J.J.A.)

[15] The respondent appealed his conviction on two grounds. First, he argued that the trial judge had erred in law by refusing to hold a *voir dire* on the question of the lawfulness of his arrest. Second, he alleged that the trial judge had erred in analyzing the *mens rea* for the offence of sexual assault.

[16] The court, per Healy J.A., found that the interpretation of s. 495(2) and (3) *Cr. C.* adopted by the trial judge was incorrect.

[17] The court stated that s. 495(2) *Cr. C.* “excuses an exercise of the power of arrest without warrant that does not comply with the conditions stated in section 495(1)” (para. 17). Section 495(3) *Cr. C.* “explicitly reserves to a person arrested without warrant the opportunity to challenge the lawfulness of the arrest upon allegation and proof” (para. 18). Refusal to hold a *voir dire* on this question deprives the person arrested of the benefit of s. 495(3) *Cr. C.*, which “expressly acknowledge[s]” the possibility of holding a *voir dire* on the lawfulness of an arrest without warrant (para. 19).

[18] In this case, the court held that there were valid grounds for the respondent's request for a *voir dire*, as there was no apparent basis on which to conclude that s. 495(2) *Cr. C.* justified such an arrest. By refusing to conduct a *voir dire*, the trial judge had thus deprived the respondent of the opportunity to allege and establish the unlawfulness of his arrest without warrant, an opportunity that he had on a proper interpretation of s. 495(3) *Cr. C.*

[19] Finding that the appeal should be allowed and a new trial ordered on the basis of the first ground of appeal, the court did not consider the respondent's second ground of appeal concerning an alleged error as regards the *mens rea* required for the offence of sexual assault. Since that question is not before our Court, there is no need for us to address it.

### III. Issues

[20] This appeal is one involving statutory interpretation. We are not dealing with a constitutional challenge to s. 495 *Cr. C.*, nor do we have to rule on the merits of the motion filed by the respondent. Rather, the Court is called upon to determine whether it was appropriate for the trial judge to summarily deny the respondent's request that a *voir dire* be held to decide the lawfulness of his arrest without warrant.

[21] An interpretive exercise is required with respect to s. 495(2) and (3) *Cr. C.*, because if s. 495(2) *Cr. C.* were interpreted as having no effect on the lawfulness of an arrest, it would then become unnecessary to consider whether s. 495(3) *Cr. C.* prevents

the unlawfulness of that arrest from being raised in a criminal proceeding. A proper interpretation of these two provisions, starting with s. 495(2) *Cr. C.*, is therefore essential to determine the outcome of the appeal.

[22] Two questions can helpfully guide the interpretive analysis in this case.

[23] First, it must be determined whether s. 495(2) *Cr. C.*, properly interpreted, can have the effect of making an arrest unlawful under s. 9 of the *Charter*. Second, if this is the case — which is what I conclude — it must be asked whether s. 495(3) *Cr. C.*, properly interpreted, precludes an accused from alleging such an infringement of s. 9 of the *Charter* and seeking a remedy under s. 24 of the *Charter* in the accused's own trial.

#### IV. Analysis

##### A. *Powers of Arrest Provided for in Section 495 Cr. C.*

[24] To properly identify the legal framework applicable to this appeal, and for ease of reference, I will reproduce in full s. 495 *Cr. C.*, which establishes one of the powers of arrest without warrant held by peace officers and delineates the contours of this power:

**495 (1)** A peace officer may arrest without warrant

(a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;

(b) a person whom he finds committing a criminal offence; or

(c) a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII in relation thereto, is in force within the territorial jurisdiction in which the person is found.

(2) A peace officer shall not arrest a person without warrant for

(a) an indictable offence mentioned in section 553,

(b) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction, or

(c) an offence punishable on summary conviction,

in any case where

(d) he believes on reasonable grounds that the public interest, having regard to all the circumstances including the need to

(i) establish the identity of the person,

(ii) secure or preserve evidence of or relating to the offence, or

(iii) prevent the continuation or repetition of the offence or the commission of another offence,

may be satisfied without so arresting the person, and

(e) he has no reasonable grounds to believe that, if he does not so arrest the person, the person will fail to attend court in order to be dealt with according to law.

(3) Notwithstanding subsection (2), a peace officer acting under subsection (1) is deemed to be acting lawfully and in the execution of his duty for the purposes of

(a) any proceedings under this or any other Act of Parliament; and

(b) any other proceedings, unless in any such proceedings it is alleged and established by the person making the allegation that the peace officer did not comply with the requirements of subsection (2).

[25] It appears from the foregoing that s. 495(1)(a) *Cr. C.* gives a peace officer a power of arrest without warrant in three situations: where (1) a person has committed an indictable offence, (2) a person is about to commit an indictable offence, or (3) the peace officer believes on reasonable grounds that a person has committed an indictable offence. But the power so conferred is not absolute.

[26] This is because s. 495 *Cr. C.* also includes subss. (2) and (3). These provisions were described by both parties as limiting, circumscribing or restricting a peace officer's discretion to make an arrest without warrant. The nature and scope of these provisions are precisely what I clarify in these reasons.

#### B. *History of Arrest Without Warrant in Canada*

[27] The power of peace officers to make arrests without warrant, which at one time involved very broad discretion, was the subject of a major reform in which the first iterations of the provisions that are now s. 495(2) and s. 495(3) *Cr. C.* were enacted. At the outset of the analysis, it is important to review the circumstances that led to their enactment, focusing more specifically on the report of the Canadian Committee on Corrections ("Committee") entitled *Report of the Canadian Committee on Corrections — Toward Unity: Criminal Justice and Corrections* (1969) ("*Ouimet Report*") and the parliamentary debates that preceded their enactment.

##### (1) *Ouimet Report*

[28] Until 1972, the *Criminal Code* did not regulate the exercise of the power of peace officers to make arrests without warrant on the basis that an indictable offence had been or was about to be committed or that a criminal offence was being committed. The *Criminal Code* simply stated the grounds required for an arrest to be legally justified, which can now be found in s. 495(1)(a) and (b) (see *Crankshaw's Criminal Code of Canada, R.S.C. 1985* (rev. ed. (loose-leaf)), at § 495:HIST). At the time, the power of arrest without warrant was set out in the following terms in s. 449 of the *Criminal Code, R.S.C. 1970, c. C-34* (“*Cr. C. (1970)*”):

**449.** A peace officer may arrest without warrant

(a) a person who has committed an indictable offence or who, on reasonable and probable grounds, he believes has committed or is about to commit an indictable offence or is about to commit suicide,

(b) a person whom he finds committing a criminal offence, or

(c) a person for whose arrest he has reasonable and probable grounds to believe that a warrant is in force within the territorial jurisdiction in which that person is found.

However, no limitation was set out at the time in the *Criminal Code* to narrow the scope of the former s. 449 *Cr. C. (1970)*, as is the case with the current s. 495(2) *Cr. C.*, titled “Limitation” (“*Restriction*”).

[29] In the 1960s, the federal government established the Committee, chaired by Justice Roger Ouimet, to study Canada’s correctional system and recommend desirable legislative changes. In 1969, the *Ouimet Report* was released. The Committee concluded from its survey of the powers of peace officers in Canada that these powers

maintained “a reasonable balance . . . between the requirements of the general security and the protection of the fundamental rights of the individual” (p. 49). The Committee nevertheless noted that the power of peace officers to make arrests without warrant was “broad” (p. 91). The Committee was of the view that arrests without warrant were too frequent and were often not justified in the public interest, because in many cases other methods would have sufficed to secure the accused’s attendance at trial (pp. 42 and 92).

[30] The Committee accordingly recommended that the *Criminal Code* be amended to incorporate public interest criteria that would govern decisions about whether to make an arrest without warrant:

The Committee therefore recommends that section 435 of the Criminal Code be amended to require not only reasonable grounds to believe that the person arrested has committed or is about to commit an indictable offence but also reasonable grounds to believe that immediate arrest is necessary in the public interest and to provide that a police officer may arrest a person whom he finds committing an offence punishable on summary conviction if he has reasonable grounds for believing that immediate arrest is necessary in the public interest. [Emphasis deleted; p. 92]

(2) Enactment of the *Bail Reform Act*

[31] On the strength of those recommendations, the then Minister of Justice, John N. Turner, introduced Bill C-218, which would become the *Bail Reform Act*, S.C. 1970-71-72, c. 37 (reproduced in R.S.C. 1970, c. 2 (2nd Supp.)), once it received royal assent. The purpose of that statute was to implement two legislative reforms. The first

was designed to limit the use of arrest by replacing it with other methods, such as a summons or an appearance notice. The second was aimed at remedying the injustice associated with cash bail, which had the effect of penalizing people who had limited financial resources and who were therefore obliged to find a surety. It is the first of these reforms that is of interest to us here, because it forms the backdrop against which the provisions equivalent to the current s. 495(2) and (3) *Cr. C.* were introduced.

[32] In the House of Commons, Minister Turner explained the reasons that had led the government to propose such a reform of the powers of arrest conferred on peace officers. He stressed the importance of maintaining public confidence in peace officers (*House of Commons Debates*, vol. 3, 3rd Sess., 28th Parl., February 5, 1971, at p. 3114 (Hon. J. Turner)). Although the Minister emphasized the central role of arrest in the criminal process, he acknowledged that unnecessary arrests could undermine such confidence and that the law had to provide peace officers with clear guidelines for judging whether an arrest was necessary (p. 3114). The Minister therefore said that there was a need to reform the legislation governing arrests without warrant by peace officers.

[33] One of the bill's stated objectives was to "avoid unnecessary pre-trial arrest and detention" (*House of Commons Debates*, February 5, 1971, at p. 3116 (Hon. J. Turner)). According to Minister Turner, the law then in force did not give peace officers the "flexibility or the . . . guidelines" they needed to judge whether an arrest without warrant should be made (p. 3114). In order to avoid unnecessary arrests

without warrant, he believed that a peace officer “should be obliged not to arrest without a warrant where he has reasonable and probable cause to believe that the public interest may be secured by proceeding other than by arrest” (with an exception being made, of course, for cases like murder or serious offences against public order) (*ibid.*).

[34] Discussing more specifically how the former s. 450(2) *Cr. C. (1970)* (now s. 495(2) *Cr. C.*) would limit the power of arrest, the Minister stated the following:

. . . I assume that the criminal law in this country and every provision of it will be enforced with the best honest human judgment that it can be enforced by the police and the magistrates of this country. What this Bill does is alter the unfettered discretion of the police to arrest . . . to a discretion that he must exercise not to arrest in a number of offences where he has reasonable and probable grounds to believe that the public interest can be satisfied by not arresting. [Emphasis added.]

(*Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, No. 11, 3rd Sess., 28th Parl., March 4, 1971, at p. 14; see also pp. 10-13)

[35] That being the case, Parliament was aware of the heavy impact that those additional limitations might have on the work of peace officers. It recognized “that decisions by the police may have to be made under difficult conditions”, in other words, that peace officers might be called upon to make quick decisions in the heat of the action (*House of Commons Debates*, February 5, 1971, at p. 3116; see also p. 3117). It therefore sought to limit the consequences of such unnecessary arrests *for peace officers themselves*, notably by lessening the possibility of their conduct being the subject of criminal or penal proceedings relating more specifically to their personal

liability, but also to that of any person responsible for those peace officers, such as their employer.

[36] Minister Turner explained in this regard that if a police officer made a mistake by arresting someone without warrant even though this was not permitted under the new limitations, “then that is a mistake in judgment for which the policeman will not be penalized by criminal liability. He cannot be charged criminally for false arrest” (*Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, No. 8, 3rd Sess., 28th Parl., February 23, 1971, at p. 7; see also pp. 8-9). For a person arrested in violation of the then new limitations set out in the former s. 450(2) *Cr. C. (1970)* (now s. 495(2) *Cr. C.*), the only possible remedy was an award of damages in a civil suit relating more specifically to the conduct of the peace officer who made the arrest without warrant.

[37] To the question of what would happen if a peace officer made an arrest contrary to s. 495(2) *Cr. C.*, Minister Turner replied as follows:

If he arrests and it later turns out that, in judgment, he did not need to arrest because the public interest would have been served just as well or better by not arresting, then that is a mistake in judgment for which the policeman will not be penalized by criminal liability. He cannot be charged criminally for false arrest.

. . . That means that the person who wants to sue civilly for having been brought in to the desk and booked must establish that the policeman did have reasonable and probable grounds to believe that the public interest could be satisfied without so arresting him. Instead of the policeman having to show that he had reasonable and probable grounds for arresting, the person brought in had to show that there were reasonable and probable

grounds for not arresting. In a doubtful case that gives the benefit of doubt to the policeman who has to make this snap judgment.

...

So there are two separate situations here. If there were no grounds to arrest at all then the burden of proof is on the policeman. If there were grounds to arrest but under this new Bill he did not have to arrest, then the burden of proof is on the person to show that he need not have been brought in, although there was justification for arresting him. There are two separate situations there.

In other words, there are two factors that policemen have to decide. First of all is there grounds for arresting at all? Secondly, if there are grounds for arresting, are there grounds for bringing him in? On the first the burden of proof is on the policeman in civil cases, on the second the burden of proof is on the person who was brought in. [Emphasis added.]

*(Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs, February 23, 1971, at pp. 7-9)*

[38] Similar remarks were made again by Minister Turner before the Committee, though in different terms (*Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, March 4, 1971, at p. 14):

Subsection (3) . . . says that notwithstanding the failure of a police officer to exercise his discretion properly in accordance with the Bill — you know, we are dealing with human judgments here — if the police officer makes the wrong judgment, he is going to be protected under paragraph (a) from a criminal suit, as he is now, but he is not protected under paragraph (b) from a civil suit. All that paragraph (b) says is that he is open to a civil suit if he makes a mistake in judgment but the burden of proof is on the person who feels that he has been wronged by the exercise of that judgment.

So the ultimate sanction is a civil suit and . . . I believe that the police of this country, if they accept this Bill as I believe they will be, and I am trying to listen to their objections both at the brotherhood level, and the association level, and the chiefs of police level — I think . . . they will try to live within its sphere. [Emphasis added.]

[39] The *Bail Reform Act* came into force on January 3, 1972. There have been no substantive amendments to the former s. 450(2) and (3) *Cr. C. (1970)* since the initial enactment thereof.

C. *Jurisprudence on the Interpretation of Section 495(2) and (3) Cr. C.*

[40] Appellate courts across the country have adopted an interpretation of s. 495(2) and (3) *Cr. C.* that is more in line with the approach put forward by the Crown in this case. This is, in the words of Healy J.A., the “dominant view” (C.A. reasons, at para. 12, fn. 12). I propose to outline it by looking first at decisions rendered before the *Charter* was enacted in 1982, then at those rendered after its enactment.

(1) Pre-Charter Decisions

[41] Shortly after the passage of the *Bail Reform Act*, the current s. 495(3) *Cr. C.* was considered by several appellate courts in this country. In all of those cases, one of the charges involved was that of unlawfully resisting arrest (now s. 129(a) *Cr. C.*; formerly s. 118(2)).

[42] In *R. v. Adams* (1972), 21 C.R.N.S. 257, the Saskatchewan Court of Appeal held that s. 495(3) “must be construed as denying the right to raise a defence, based on the non-compliance with subs. (2), in any proceedings under the Code or under any other Act of Parliament” (p. 260). The court added that, in its opinion, “because of subs. (3) no reliance can be placed on subs. (2) to establish that the peace officer, for

non-compliance with the requirements of that subsection, was not acting lawfully and in the execution of his duty” (*ibid.*).

[43] That reasoning was followed by the courts of appeal of British Columbia and Alberta, respectively, in *R. v. McKibbon* (1973), 12 C.C.C. (2d) 66 (B.C.C.A.), at p. 70, and *R. v. Fuhr*, [1975] 4 W.W.R. 403 (Alta. C.A.), at p. 406.

[44] In *McKibbon*, the respondent was charged with assaulting a peace officer with intent to resist lawful arrest, although no charge was laid against him for the underlying offence of impaired driving. The British Columbia Court of Appeal followed *Adams* and concluded as follows:

[Subsection (3)], which specifically applies notwithstanding s-s. (2), makes it clear that a peace officer who acts under s-s. (1)(a) is deemed to be acting lawfully for the purposes, *inter alia*, of any proceedings under the *Criminal Code*. In my view, that means that as he is arresting without warrant with the grounds and belief set out in s-s. (1)(a), he is still acting lawfully and his arrest is lawful. [p. 70]

[45] In *Fuhr*, the Alberta Court of Appeal also followed *Adams* in the context of a charge of unlawfully resisting a peace officer engaged in the execution of his duty:

I am of the view that the limitations set out in subs. (2) of the powers granted a peace officer under subs. (1) do not afford a defence to the present charge, in view of the deeming words found in subs. (3). Subsection (3) provides that if a peace officer is acting under subs. (1), he is deemed to be acting lawfully and in the execution of his duty for the purposes of any proceedings under the Code. [p. 406]

[46] It goes without saying that the question of whether a motion under s. 9 of the *Charter* could be brought to challenge the validity of an arrest contrary to s. 495(2) *Cr. C.* was not addressed in those cases, as the *Charter* had not yet been enacted. Prior to its enactment, the recourses available to an accused who had been unlawfully arrested were very limited and amounted mainly to the possibility of raising a defence against a charge of obstruction or resisting arrest. Not only did peace officers have broad discretion at the time to make arrests without warrant, but courts could exercise their discretion to exclude evidence only in rare circumstances, where a very high threshold was met (*R. v. Wray*, [1971] S.C.R. 272, at p. 293; see also S. Coughlan, “Threading Together Abuse of Process and Exclusion of Evidence: How it Became Possible to Rebuke Mr. Big” (2015), 71 *S.C.L.R.* (2d) 415, at pp. 429-30). Among other things, courts did not have the power — which they do today under s. 24 of the *Charter*— to exclude evidence on the ground that its admission would bring the administration of justice into disrepute (*Wray*, at p. 287, per Martland J.).

[47] The decisions rendered by certain appellate courts in this country on the interpretation of s. 495(3) *Cr. C.* following the enactment of the *Charter* in 1982 merit particular attention. Indeed, the analysis in those decisions is based on the law applicable since the coming into force of the *Charter*, just like the analysis that this Court must undertake in the instant case.

(2) Post-Charter Decisions

[48] Since the advent of the *Charter*, most of the decisions interpreting s. 495(3) *Cr. C.* and its interaction with s. 9 of the *Charter* have found that every criminal proceeding — regardless of the identity of the accused — is a “proceedin[g] under [the *Criminal Code*] or any other Act of Parliament” contemplated by s. 495(3)(a) *Cr. C.*

[49] In *R. v. Cayer* (1988), 28 O.A.C. 105, a decision rendered by the Ontario Court of Appeal in 1988, the issue was whether the effect of s. 495(3)(a) *Cr. C.* was that an arrest authorized by s. 495(1) *Cr. C.* became unlawful where the requirements of s. 495(2) *Cr. C.* were breached. The Ontario Court of Appeal, relying on the reasons given in *Adams* and *McKibbon*, adopted the following interpretation of s. 450(2) and (3) *Cr. C.* (1970) (now s. 495(2) and (3) *Cr. C.*) (at para. 33):

. . . notwithstanding subs. (2), a peace officer exercising his power under s. 450(1) is deemed to be acting lawfully and in the execution of his duty for the purposes of any proceedings under the *Criminal Code* or any other Act of Parliament. Thus, a peace officer exercising his power of arrest without warrant under s. 450(1) is deemed by s. 450(3) to be acting lawfully for the purpose of any proceedings under the *Code* or any other Act of Parliament, even though, in arresting a person without warrant he has breached the duty imposed on him by s. 450(2) not to arrest the accused in the circumstances therein specified . . .

[50] Further on, the Ontario Court of Appeal added that “[t]he fact that the arrest may contravene s. 450(2) [now s. 495(2)] of the *Code* does not ipso facto make it arbitrary under s. 9 of the *Charter*. If the arrest does contravene s. 450(2) of the *Code*, it is, of course, lawful under s. 450(3)” (*Cayer*, at para. 46). The court ultimately concluded that there had been no contravention of s. 495(2) because it was not

“unreasonable in the public interest to arrest the accused to prevent the continuation or repetition of the offence” (para. 47).

[51] Nearly 30 years later, in *R. v. Jowett Work*, 2019 BCCA 236, 379 C.C.C. (3d) 187, the British Columbia Court of Appeal also had to interpret s. 495(3) *Cr. C.* In that case, the accused had been arrested without warrant for theft and, in a search incident to the arrest, the police had discovered drugs. During the *voir dire* to determine the lawfulness of the arrest, the trial judge found that the officers had breached the requirements of s. 495(2) *Cr. C.*, thereby making the arrest unlawful.

[52] The British Columbia Court of Appeal allowed the Crown’s appeal and admitted the evidence from the search incident to the arrest. The court noted that s. 495(3)(a) *Cr. C.* expressly applies “for the purpose of ‘any proceedings’ under the *Criminal Code*” (*Jowett Work*, at para. 38). In the court’s view, the effect of the provision is to make the peace officer’s conduct “lawfu[l] and the arrest . . . lawful as long as the Crown establishes that the officer had reasonable and probable grounds to arrest under s. 495(1)(a) or (b)” (para. 32). Thus, in its opinion, there was no need to consider s. 495(2) *Cr. C.*, as any non-compliance with that provision would not, in a criminal proceeding, render an otherwise lawful arrest unlawful, in light of the presumption of lawfulness in s. 495(3)(a) *Cr. C.* (para. 30).

[53] In *R. v. Veen*, 2022 ABCA 350, 51 Alta. L.R. (7th) 417, the Alberta Court of Appeal in turn addressed the interpretation of s. 495(3) *Cr. C.* In that case, the accused had been arrested and then detained at the police station after being found by

the police in the driver's seat of his truck with an empty beer can nearby. In a *voir dire* based on s. 9 of the *Charter* held during his trial, the accused challenged the lawfulness of his arrest, believing it to be contrary to s. 495(2) *Cr. C.* The Alberta Court of Queen's Bench (sitting on appeal from the decision of the Alberta Provincial Court) granted the accused's request for a *voir dire* and excluded the evidence obtained following the arrest. In its opinion, "[s]ubsection (3) should not be interpreted as overriding the duty not to arrest[, because it] is relevant in instances where a police officer is facing criminal liability" (*R. v. Veen*, 2020 ABQB 99, 10 Alta. L.R. (7th) 192, at para. 74).

[54] For its part, the Alberta Court of Appeal was of the view that the appeal should be allowed and the evidence obtained following the accused's arrest admitted. It found that while the police officer may have made a mistake in judgment by arresting the accused without warrant, that mistake did not negate the lawfulness of the arrest under s. 495(3)(a) *Cr. C.* As a result, the accused could not raise non-compliance with s. 495(2) *Cr. C.* as a defence. However, the Court of Appeal specified that this type of mistake could be the subject of a civil suit or internal disciplinary measures against the police officer concerned under s. 495(3)(b) *Cr. C.* In support of that conclusion, the Court of Appeal relied in part on pre-*Charter* case law as well as on the wording of s. 495(3)(a) *Cr. C.* itself and the parliamentary debates.

#### D. *Principles of Statutory Interpretation*

[55] There is now only one approach to statutory interpretation in Canada, namely the approach requiring that the words of a provision be interpreted "in their

entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; see also *R. v. Basque*, 2023 SCC 18, at para. 63; *R. v. Wolfe*, 2024 SCC 34). I will therefore use this approach to first determine the proper interpretation to be given to s. 495(2) *Cr. C.*, and I will then do the same for s. 495(3) *Cr. C.*

[56] In this case, the wording of the provisions to be interpreted concerning the power of arrest without warrant came into force nearly a decade before the enactment of the *Charter*, which introduced new safeguards in relation to arrest. In this context, it is important to remember that the statutory interpretation exercise is focused “on the intent of the legislature at the time of enactment and courts are bound to give effect to that intent” (*Telus Communications Inc. v. Federation of Canadian Municipalities*, 2025 SCC 15, at para. 32 (emphasis added); see also paras. 33-36; *Perka v. The Queen*, [1984] 2 S.C.R. 232, at pp. 264-66; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 335; *United States of America v. Dynar*, [1997] 2 S.C.R. 462, at para. 45; P.-A. Côté and M. Devinat, *Interprétation des lois* (5th ed. 2021), at para. 24; R. Sullivan, *The Construction of Statutes* (7th ed. 2022), at § 6.01[1]).

[57] Having briefly outlined these principles, I turn now to the interpretation of s. 495(2) *Cr. C.*

E. *Interpretation of Section 495(2) Cr. C.: Can Non-compliance With Section 495(2) Cr. C. Have the Effect of Making an Arrest Without Warrant Unlawful and Thus Arbitrary Within the Meaning of Section 9 of the Charter?*

(1) Text of Section 495(2) Cr. C.

[58] As I indicated at the outset, the modern approach to statutory interpretation makes the text the “anchor of the interpretative exercise”, because the text specifies the means chosen by Parliament to achieve its purposes and attain its goals (*Piekut v. Canada (National Revenue)*, 2025 SCC 13, at para. 45, quoting *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Directrice de la protection de la jeunesse du CISSS A*, 2024 SCC 43, at para. 24).

[59] In general terms, s. 495(2) *Cr. C.* provides that a peace officer shall not arrest a person without warrant in certain circumstances, but only for a restricted number of offences. The scope of s. 495(2) *Cr. C.* is therefore limited — the provision applies only to hybrid offences and offences punishable on summary conviction, as well as to the indictable offences mentioned in s. 553 *Cr. C.* The offences referred to in s. 553 *Cr. C.* are indictable offences within the exclusive jurisdiction of a provincial court judge (e.g., theft (other than theft of cattle), betting, breach of a recognizance or failure to comply with a probation order). By operation of s. 34 of the *Interpretation Act*, R.S.C. 1985, c. I-21, s. 495(2)(b) and s. 495(2)(c) *Cr. C.* also apply to offences created by legislation other than the *Criminal Code*, including the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, or other Acts of Parliament.

[60] Section 495(2) prevents a peace officer from making an arrest without warrant where two requirements are met. First, the peace officer must believe on reasonable grounds that the public interest may be satisfied without making an arrest without warrant (s. 495(2)(d)). Second, the peace officer must have no reasonable grounds to believe that, if he or she does not arrest the person without warrant, the person will fail to attend court (s. 495(2)(e)).

[61] I note, as the parties do, that s. 495(2) *Cr. C.* applies only when the two requirements set out in s. 495(2)(d) and (e) *Cr. C.* are met. The use of the word “and” at the end of the English version of s. 495(2)(d) *Cr. C.*, and of the expressions “*d’une part*” and “*d’autre part*” in the French version of s. 495(2)(d) and (e), clearly supports such a cumulative reading. A peace officer cannot make an arrest without warrant if the requirements of s. 495(2) *Cr. C.* are met. However, if one of the requirements is not met, the officer can arrest a person without warrant. To conclude otherwise would in fact have the absurd consequence of preventing a peace officer from making an arrest without warrant, thereby running the risk, for example, of allowing evidence to be destroyed right before his or her eyes, even if the officer does not consider the person to be a flight risk. Parliament cannot have intended such a result.

[62] It follows that, in a scenario where one of the conditions in s. 495(2) *Cr. C.* was not met, a peace officer could make an arrest without warrant under s. 495(1) *Cr. C.* Thus, the peace officer would be authorized to make such an arrest if he or she believed on reasonable grounds that it was necessary to do so, either to satisfy the public

interest or to ensure the person's appearance in court. Conversely, the peace officer could not make such an arrest if it was not necessary to do so in order to satisfy the public interest or to ensure the person's attendance in court.

[63] I turn my attention now to the heart of the appellant's argument with respect to s. 495(2) *Cr. C.* Does the text of this provision suggest that peace officers have a mandatory obligation to verify that the two requirements set out in s. 495(2)(d) and (e) *Cr. C.* are not met before making an arrest without warrant, or does it only constitute non-binding guidelines whose purpose is simply to delineate the exercise of their discretion?

[64] There are very strong textual indications within s. 495(2) *Cr. C.* that this provision is of a mandatory nature. The English text of s. 495(2) *Cr. C.* states that a peace officer "shall not" arrest a person without warrant where the two requirements mentioned are met. In my view, an *obligation* not to make an arrest can be inferred from the use of the words "shall not arrest" ("*ne peut arrêter*" in the French version).

[65] This Court wrote in *Bessette v. British Columbia (Attorney General)*, 2019 SCC 31, [2019] 2 S.C.R. 535, at para. 25, that the rule of interpretation codified in s. 11 of the *Interpretation Act* provides that "'[s]hall' is mandatory language" ("*[l]e présent de l'indicatif indique l'obligation*"). In this case, the use of the expression "shall not" ("*ne peut*") reflects Parliament's intention to achieve its objectives (to which I will return) by imposing on peace officers a strict prohibition against arresting a person without warrant where certain cumulative conditions are met. As with many other

provisions of the *Criminal Code*, the word “shall” (and, in French, the use of the present indicative) in s. 495(2) *Cr. C.* should be construed as expressing an obligation; the word “shall” should be understood to mean “must” (see, e.g., *R. v. Johnson*, 2003 SCC 46, [2003] 2 S.C.R. 357, at para. 16; see also *Baron v. Canada*, [1993] 1 S.C.R. 416, at pp. 422-23). It thus differs from the word “may” (“*pouvoir*”), which generally “connotes a measure of discretion” (*Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504, at para. 54).

[66] In short, the text of the provision suggests that, in practice, peace officers have an obligation, before making any arrest without warrant, to assess whether the public interest can be satisfied and the person’s attendance in court ensured in some other way. This would therefore mean that peace officers should refrain from making such an arrest where they believe on reasonable grounds that these two conditions are met.

(2) Context

[67] The context of s. 495(2) *Cr. C.* also supports this interpretation. For a clear understanding of the scope of this provision, it is important to look first at the relationship between s. 495(1) and s. 495(2) *Cr. C.* and then at the relationship between s. 495(2) and s. 495(3) *Cr. C.*

(a) *Relationship Between Section 495(1) and Section 495(2) Cr. C.*

[68] In legislative drafting, it is common practice to begin by formulating a general rule and then to clarify or narrow the rule by means of more specific provisions. In such cases, the general rule and the specific rules must be read together: the specific rules qualify the general rule stated first and reveal its true scope in a particular situation (Côté and Devinat, at paras. 1074 et seq.).

[69] This is precisely the logic underlying the relationship between s. 495(1) and s. 495(2) *Cr. C.* Section 495(2) *Cr. C.* does not create a freestanding power of arrest without warrant. This power has its normative source exclusively in s. 495(1) *Cr. C.* As many have already pointed out, s. 495(1) *Cr. C.* remains the foundation and cornerstone of the power of arrest without warrant (*Jowett Work*, at para. 34; *Veen* (C.A.), at para. 34; J. A. Scollin, *The Bail Reform Act: An Analysis of Amendments to the Criminal Code Related to Bail and Arrest* (1972), at p. 4). Section 495(2) *Cr. C.* must therefore be understood as a provision that serves to limit the scope of the general power of arrest provided for in s. 495(1) *Cr. C.* when certain requirements are met.

[70] It is thus incorrect to say that s. 495(2) *Cr. C.* permits the exercise of such a power regardless of the conditions set out in s. 495(1) *Cr. C.* Section 495(2) *Cr. C.* cannot come into play unless a peace officer first believes on reasonable grounds that an indictable offence has been or is about to be committed, the officer finds a person committing a criminal offence or the officer has reasonable grounds to believe that there is a warrant for the person's arrest or committal, in accordance with s. 495(1) *Cr. C.* (*Tremblay v. Ottawa (Police Services Board)*, 2018 ONCA 497, 48 C.C.L.T.

(4th) 1, at para. 91). It logically follows that the determination of whether s. 495(2) *Cr. C.* applies must always begin with the question of the application of s. 495(1) *Cr. C.*: if the latter does not apply or is not complied with, consideration of s. 495(2) *Cr. C.* becomes moot.

[71] In summary, s. 495(1) *Cr. C.* differs from s. 495(2) in that it provides that a peace officer “may arrest without warrant . . . a person” (“*peut arrêter sans mandat . . . une personne*”), whereas s. 495(2) *Cr. C.* instead says “shall not arrest a person without warrant” (“*ne peut arrêter une personne sans mandat*”). Section 495(1) *Cr. C.* is therefore permissive, because it makes a grant of powers, rights, authorizations or permissions (*Interpretation Act*, s. 11, the French version of which refers to “[l]’octroi de pouvoirs, de droits, d’autorisations ou de facultés”) and thus connotes the existence of “an area of discretion” (*Smith & Rhuland Ltd. v. The Queen*, [1953] 2 S.C.R. 95, at p. 97). The contrast between “may” (“*peut*”) and “shall not” (“*ne peut*”) in s. 495 *Cr. C.* reinforces the idea that Parliament’s intention was to confer a certain degree of discretion on peace officers in s. 495(1) *Cr. C.* but to impose an obligation or duty on them in s. 495(2) *Cr. C.* (see, e.g., *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at para. 108, per La Forest J., dissenting, but not on this point).

[72] I also observe that the marginal note to s. 495(2) *Cr. C.* is titled “Limitation” (“*Restriction*”). While this marginal note is not part of the content of the provision (*Interpretation Act*, s. 14), it does serve as an additional indication that

s. 495(2) *Cr. C.* should be interpreted as imposing binding limitations on the powers set out in s. 495(1) *Cr. C.*

(b) *Relationship Between Section 495(2) and Section 495(3) Cr. C.*

[73] Continuing with my analysis of the context of the provision, I will look at the relationship between s. 495(2) *Cr. C.* and s. 495(3) *Cr. C.* I note that the very existence of s. 495(3) *Cr. C.* is a contextual element of no small importance in confirming the binding and mandatory nature of s. 495(2) *Cr. C.* Indeed, if s. 495(2) *Cr. C.* had no normative import, there would have been no need to create a form of presumption of lawfulness “[n]otwithstanding subsection (2)” (“[n]onobstant le paragraphe (2)”) in s. 495(3) *Cr. C.* Section 495(3) *Cr. C.* therefore also suggests that s. 495(2) *Cr. C.* imposes a real obligation, since subs. (3) contains protective mechanisms in the event of non-compliance with subs. (2).

(c) *Conclusion on the Context of Section 495(2) Cr. C.*

[74] In summary, an analysis of the context of s. 495(1), (2) and (3) *Cr. C.* reveals a coherent legislative structure in which each provision plays a complementary role. Section 495(1) *Cr. C.* creates a power of arrest without warrant, while s. 495(2) *Cr. C.* strictly regulates the exercise of this power by imposing binding limitations. The existence of s. 495(3) *Cr. C.* confirms the normative character of s. 495(2) *Cr. C.* by setting out protective mechanisms in the event of non-compliance.

(3) Purpose of Section 495(2) Cr. C.

[75] Interpreting s. 495(2) *Cr. C.* as limiting a peace officer's power of arrest is also consistent with the purpose of this provision.

[76] Indeed, as I mentioned above, s. 495(2) *Cr. C.* was enacted as part of a bill aimed at reducing “unnecessary pre-trial arrest and detention” by limiting “discretionary injustice” (*House of Commons Debates*, February 5, 1971, at p. 3116; see also pp. 3114 and 3118). To achieve this objective, Parliament wanted “new duties . . . placed on the police to direct their minds to what the public interest requires”, but also wanted peace officers to be given the “flexibility or the . . . guidelines that would help [them] in judging whether or not an arrest should be made” (pp. 3114 and 3116-17 (Hon. J. Turner)).

[77] The appellant interprets this passage from the parliamentary debates as indicating that Parliament's objective was to increase the *discretion* of peace officers to make arrests without warrant (A.F., at para. 44). I respectfully disagree.

[78] Even though Parliament, as part of its legislative reform, equipped peace officers with new tools to avoid resorting to arrest — such as the possibility of issuing an appearance notice — its intention and the legislative objective were not to leave their discretion intact, but rather to limit it. In keeping with the stated objective of reducing unnecessary arrests without warrant, Minister Turner explained that the legislation was meant to “alter the unfettered discretion of the police to arrest” that had

existed until then under the *Criminal Code*, so as to limit it to “a discretion that he must exercise not to arrest in a number of offences where he has reasonable and probable grounds to believe that the public interest can be satisfied by not arresting” (*Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, March 4, 1971, at p. 14). Thus, Minister Turner emphasized that the bill “convert[ed] the discretion into a duty not to arrest” when certain requirements were met (p. 9 (emphasis added)).

[79] In my opinion, Parliament intended that a peace officer’s exercise of the power of arrest without warrant be strictly regulated through the mandatory requirements of s. 495(2) *Cr. C.* in order to promote the public interest and ensure the person’s appearance in court. The purpose of s. 495(2) *Cr. C.* is therefore clear: it is to limit the discretion of police officers by identifying the situations in which an arrest without warrant is not required in order to reduce what are considered to be unnecessary arrests. Interpreting s. 495(2) *Cr. C.* as simply setting out guidelines would therefore be contrary to what Parliament intended, since it would not effectively assist in reducing unnecessary arrests without warrant.

(4) Constitutionality of the Public Interest Criterion

[80] The appellant argues that finding s. 495(2) *Cr. C.* to be mandatory would raise constitutional issues because of the overly vague nature of the public interest criterion (A.F., at paras. 53, 82 and 84). The appellant relies in particular on *R. v. Morales*, [1992] 3 S.C.R. 711, in which this Court held that “the criterion of ‘public

interest’ as a basis for pre-trial detention under s. 515(10)(b) violate[d] s. 11(e) of the *Charter* because it authorize[d] detention in terms which [were] vague and imprecise” (p. 726).

[81] Here, the Court does not have squarely before it a constitutional challenge to s. 495(2)(d) *Cr. C.* based on s. 7 of the *Charter* and the constitutional doctrine of vagueness, as it did in *Morales*. Nor does the Court have before it a constitutional challenge to the “public interest” criterion in s. 495(2)(d) *Cr. C.* under s. 9 of the *Charter*. In my view, this is sufficient to reject the appellant’s arguments in this regard.

(5) Conclusion on the Interpretation of Section 495(2) *Cr. C.*

[82] I therefore find that an analysis of the text, context and purpose of s. 495(2) *Cr. C.* leads to the conclusion that the limitations imposed on the power of arrest without warrant are mandatory in nature. This provision requires peace officers, in order to properly exercise their discretion to arrest a person without warrant, to assess whether the arrest is justified in the public interest and whether there is a risk that the accused will not appear. When the conditions set out in para. (d), para. (e) and any of paras. (a) to (c) of s. 495(2) *Cr. C.* are met, an arrest without warrant is prohibited. Thus, peace officers contravene s. 495(2) *Cr. C.* where they fail to assess these criteria before acting or where they — wrongly — make an arrest without warrant when the conditions (if they are met) do not permit them to do so.

[83] It follows from the above that an arrest contrary to s. 495(2) *Cr. C.* is unlawful because it is contrary to this law, which suffices to characterize said arrest as arbitrary within the meaning of s. 9 of the *Charter*. Indeed, since the enactment of the *Charter* in 1982, this Court has had occasion to state that an unlawful arrest or detention, including one not authorized by law, is necessarily an arbitrary arrest or detention and infringes s. 9 of the *Charter* (*R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 54; *R. v. Tim*, 2022 SCC 12, [2022] 1 S.C.R. 234, at paras. 21-22; *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692, at para. 124).

[84] Since I am of the view that an arrest contrary to the law established by s. 495(2) *Cr. C.* results in this arrest made in violation of binding norms being unlawful, this is sufficient to characterize such an arrest as arbitrary within the meaning of s. 9 of the *Charter*. The question that now remains is whether the effect of s. 495(3) *Cr. C.* is to shield such an arrest from being found unlawful and thus arbitrary under s. 9 of the *Charter*, such that it would be manifestly frivolous to conduct a *voir dire* to determine, in a criminal proceeding (such as the trial of the respondent in this case), the lawfulness of a police arrest — as the trial judge held.

F. *Interpretation of Section 495(3) Cr. C.: Does Section 495(3) Cr. C. Apply Where a Criminal Proceeding Is Not Against the Peace Officer Who Made the Arrest?*

[85] The main source of disagreement between the parties with respect to s. 495(3) *Cr. C.* lies in para. (a) of this provision. This paragraph sets out the presumption that, notwithstanding s. 495(2) *Cr. C.*, a peace officer who complies with

s. 495(1) is “acting lawfully and in the execution of his duty” for the purposes of various proceedings, subject to certain conditions.

[86] It is not in dispute that this paragraph serves, among other things, to provide a peace officer who has made an arrest without warrant with protection in a criminal proceeding where that officer is personally facing a criminal charge for failure to comply with s. 495(2) *Cr. C.*, despite the fact that the officer complied with s. 495(1) *Cr. C.* As Minister Turner explained, the bill was drafted in such a way that a peace officer could not be prevented from acting “for fear of a criminal suit in the exercise of his discretion” (*Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, March 4, 1971, at p. 11). It is also not in dispute that s. 495(3)(b) *Cr. C.* nevertheless allows a person who has been arrested and believes the arrest to be contrary to s. 495(2) *Cr. C.* to bring a civil suit against the peace officer, or the officer’s employer, in order to establish that the officer did not comply with the requirements of s. 495(2) *Cr. C.* and thus to obtain damages as a remedy (see, e.g., *Hudson v. Brantford Police Services Board* (2001), 158 C.C.C. (3d) 390 (Ont. C.A.); *Collins v. Brantford Police Services Board* (2001), 158 C.C.C. (3d) 405 (Ont. C.A.)).

[87] However, the appellant proposes a broader interpretation of this provision. He argues that s. 495(3)(a) *Cr. C.* is not confined to criminal proceedings in which a person — particularly the peace officer who made the arrest without warrant, but also, for example, the officer’s employer — is facing criminal liability for non-compliance with s. 495(2) *Cr. C.* According to the appellant, s. 495(3)(a) applies more broadly to

all criminal proceedings, including the trial of the respondent in this case. In other words, an arrest made in compliance with s. 495(1) *Cr. C.* would be presumed to be lawful for the purposes of “any proceedings” under the *Criminal Code* or any other Act of Parliament, regardless of the proceeding and the statute under which it is brought, and regardless of the identity of the accused and the basis for the charges laid against him or her. Other than in the decision under appeal before us, this interpretation is the one that has generally been adopted thus far by appellate courts in the other provinces (see for example: *Veen*, *Jowett Work* and *Cayer*).

[88] The effect of such an interpretation is as follows: an arrest contrary to s. 495(2) *Cr. C.* will necessarily be lawful because of s. 495(3) *Cr. C.* and will not make an arrest arbitrary within the meaning of s. 9 of the *Charter*. Consequently, a motion under s. 9 of the *Charter* — alleging non-compliance with s. 495(2) *Cr. C.* — will inevitably have to be dismissed, as it will be doomed to failure from the start.

[89] In my view, when read in light of the context and purpose of the provision, its text weighs in favour of a narrow interpretation of s. 495(3)(a) *Cr. C.* that is confined to preventing a peace officer or any person to whom the officer reports from being held liable in a proceeding under the *Criminal Code* or any other Act of Parliament for non-compliance with s. 495(2) *Cr. C.* This therefore means that one of the effects of s. 495(3)(a) *Cr. C.* is that a peace officer cannot be held criminally liable, in a criminal proceeding against the officer, for having contravened s. 495(2) *Cr. C.* when arresting a person without warrant. Despite its broad and general language, s. 495(3) *Cr. C.*

applies in a very narrow and specific context, namely where the liability of a peace officer or a person responsible for that officer is in issue on the ground that the peace officer allegedly breached the requirements of s. 495(2) *Cr. C.*, even though the officer complied with those of s. 495(1) *Cr. C.*

[90] Section 495(3) *Cr. C.* therefore does not apply in the criminal trial of the person arrested without warrant. Nor does it apply where a *Charter* motion is brought in the course of such a criminal trial. It follows that accused persons can assert in their own criminal trial that their arrest without warrant, which they believe to be contrary to s. 495(2) *Cr. C.*, constitutes an infringement of the *Charter*.

[91] To support this reasoning, I consider the text, context and purpose of the provision. This leads me to conclude that the interpretive approach adopted by certain appellate courts — including that of the Court of Appeal in some respects in this case — is, and I say this with great respect, incorrect.

(1) The Text of Section 495(3) *Cr. C.* Supports Two Interpretations

[92] I begin my analysis by focusing on the text of s. 495(3) *Cr. C.* Generally speaking, the language of s. 495(3) *Cr. C.* can be described as establishing a presumption of lawfulness. Indeed, this provision states that, notwithstanding s. 495(2) *Cr. C.*, a peace officer acting under s. 495(1) “is deemed to be acting lawfully and in the execution of his duty” in two situations:

- (1) for the purposes of any proceedings under the *Criminal Code* or any other Act of Parliament (s. 495(3)(a) *Cr. C.*); and
- (2) for the purposes of any other proceedings, *unless* the person alleging a contravention of s. 495(2) *Cr. C.* establishes that the peace officer did not comply with the requirements of s. 495(2) *Cr. C.* (s. 495(3)(b) *Cr. C.*).

[93] The text of s. 495(3)(b) *Cr. C.* is clear. The parties all agree that this provision does not prevent a person who alleges an arrest contrary to s. 495(2) *Cr. C.* from bringing a civil suit against the arresting peace officer or a person responsible for that officer for non-compliance with s. 495(2) *Cr. C.*

[94] This provision gives the peace officer or a person responsible for that officer the benefit of a rebuttable presumption to the effect that the officer acted lawfully and in the execution of his or her duty, that is, in compliance with the requirements of s. 495 *Cr. C.* This presumption can be displaced. The person arrested must be able to show that the requirements of s. 495(2) *Cr. C.* directing the peace officer not to make an arrest without warrant were met, in other words, that the peace officer believed on reasonable grounds that the public interest could be satisfied without so arresting the person and that there was no risk of the person failing to appear in court.

[95] It is possible that s. 495(3)(b) *Cr. C.* also covers police conduct proceedings under provincial or federal legislation enacted to that end. However, there is no need to decide this question for the purposes of this appeal.

[96] With regard to s. 495(3)(a) *Cr. C.*, the appellant and all of the intervening attorneys general propose a reading of the text that is related to the arrest, emphasizing the grammatical and ordinary meaning of the phrase “any proceedings under [the *Criminal Code*] or any other Act of Parliament” (see *Veen* (C.A.), at para. 50). They take the view, as the Alberta Court of Appeal found in *Veen*, that if Parliament had intended that s. 495(3)(a) *Cr. C.* essentially be confined to preventing peace officers — or their employers — from being convicted of an offence in a criminal proceeding on the basis of non-compliance with s. 495(2) *Cr. C.*, then Parliament could easily have said so (see also I.F., Attorney General of Ontario, at paras. 10-22; I.F., Attorney General of Alberta, at paras. 17-20; *Veen* (C.A.), at para. 50). However, they argue, Parliament did not express itself in such a narrow fashion. It is therefore clear, in their opinion, that s. 495(3)(a) *Cr. C.* would apply even in the criminal trial of the person arrested without warrant, like the trial of the respondent in this case, because it would be — in a broad sense — a proceeding under the *Criminal Code* or any other Act of Parliament.

[97] In my view, the grammatical and ordinary meaning of s. 495(3)(a) *Cr. C.* also supports another interpretation, one that is more consistent with the provision’s purpose and context that I consider below.

[98] I draw attention to the wording chosen by Parliament: “. . . a peace officer acting under [s. 495(1)] is deemed to be acting lawfully and in the execution of his duty” (“. . . *un agent de la paix agissant aux termes du [par. 495(1)] est censé agir légalement et dans l’exercice de ses fonctions*”) (s. 495(3) *Cr. C.*). In light of this wording, I note that the text also supports the interpretation that s. 495(3)(a) and s. 495(3)(b) in fact require that the proceedings be directly aimed at the conduct of the peace officer who made the arrest contrary to the requirements of s. 495(2) *Cr. C.*, which is to say that the court will look at the peace officer’s own actions to determine the liability of that officer, the officer’s employer or any other person who may have proceedings brought against him or her and be held liable *for the peace officer’s conduct*.

[99] From this perspective, the presumption of lawfulness set out in s. 495(3) *Cr. C.* would apply only to the peace officer’s actions for the purposes of determining the liability of the officer or of a person responsible for the officer. The lawfulness of the peace officer’s *conduct* (in the context of a civil liability suit or criminal prosecution) would be a very different question than the lawfulness of the *arrest* under the *Criminal Code* and the *Charter*.

[100] A plain reading of the words used in s. 495(3)(a) *Cr. C.* therefore reveals an ambiguity as regards the scope of this provision, in that they can reasonably support two interpretations. However, I am of the view that it is not a “real” ambiguity in the sense discussed in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2

S.C.R. 559, at paras. 29-30, since the true meaning of s. 495(3)(a) *Cr. C.* can be ascertained from the context and the purpose underlying it (*La Presse inc. v. Quebec*, 2023 SCC 22, at paras. 23-24). The statutory interpretation exercise would in any event be incomplete without looking to the context and purpose of this provision (*Wolfe*, at para. 32; *R. v. Alex*, 2017 SCC 37, [2017] 1 S.C.R. 967, at para. 31). Here, the context and purpose of s. 495(3)(a) *Cr. C.* indicate that the presumption of lawfulness in s. 495(3) *Cr. C.* applies solely to the conduct of the peace officer who makes the arrest that is considered to be contrary to s. 495(2) *Cr. C.* In other words, they confirm that a narrow reading of the provision must be adopted.

(2) Purpose of Section 495(3) *Cr. C.*

[101] I continue my analysis by focusing on the purpose of the provision. It is well settled that a court engaged in statutory interpretation is not required to follow any strict order in examining the text, context and purpose (*Piekut*, at para. 43; *Bell ExpressVu*, at para. 31; *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84, at para. 28). Here, this means that there is no obstacle to considering the purpose next in the analysis, and I will look at the context later. In my view, consideration of the purpose of s. 495(3) *Cr. C.* is of significant assistance in resolving the ambiguity regarding the scope of the provision, and it helpfully informs the analysis.

[102] As I noted above, following the release of the *Ouimet Report*, Parliament enacted the *Bail Reform Act*, one of the objectives of which was to reduce unnecessary

pre-trial arrest without warrant and detention. This objective is reflected particularly in s. 495(2) *Cr. C.*, whose purpose is — I repeat — to impose binding norms that limit the discretion of peace officers to make an arrest without warrant when certain conditions are met.

[103] The purpose of s. 495(3) *Cr. C.*, for its part, is complementary to that of s. 495(2) *Cr. C.* Section 495(3) *Cr. C.* provides some protection to peace officers in situations where, in good faith, they have made a mistake in judgment by arresting a person contrary to s. 495(2) *Cr. C.* For example, s. 495(3)(a) *Cr. C.* prevents a peace officer from being held criminally liable for an offence under the *Criminal Code* for having breached the requirements of s. 495(2) *Cr. C.*, whereas — again by way of example — s. 495(3)(b) *Cr. C.* limits the possibility of a peace officer being held liable for such a contravention in a civil suit. This possibility is limited by the wording of s. 495(3)(b), which confirms that the onus is on the person alleging that his or her arrest was contrary to s. 495(2) *Cr. C.* to prove this fact.

[104] While they must be considered with caution, the parliamentary debates surrounding the enactment of s. 495(3) *Cr. C.* that I reproduced at the outset are of particular importance in this case (*Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281, at para. 46; *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783, at para. 17). The same is true of the parliamentary debates that I will reproduce below (*Reference re Impact Assessment Act*, 2023 SCC 23, at para. 62; *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754, at para. 64; *Application under*

*s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248, at para. 37; *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 45).

[105] Indeed, in the absence of an especially instructive legislative history (the provisions in question having hardly been amended since their enactment), the parliamentary debates provide relevant and reliable information concerning the purpose of the former s. 450(3) *Cr. C.* (1970) (now s. 495(3) *Cr. C.*) and the intention of Parliament. In addition, they offer helpful guidance for the interpretation of s. 495(2) and s. 495(3) *Cr. C.* because they reveal how these two provisions interact. I will therefore reproduce the key passages from these debates below to assist in analyzing the purpose of s. 495(3) *Cr. C.*

[106] I note that, before the Standing Committee on Justice and Legal Affairs, certain members raised concerns about s. 495(2) *Cr. C.* Given that peace officers, in the execution of their duty, are required to exercise their judgment — which is subject to human error — and to make decisions in real time, some members of the Committee feared that peace officers would not be adequately protected if they made a mistake in judgment, even if it was a mistake made in good faith.

[107] Minister Turner responded to those concerns by stating that it was not the intention of the legislation to jeopardize the community by discouraging proper and efficient law enforcement by the police (*House of Commons Debates*, February 5, 1971, at pp. 3116-17). Quite the opposite. He later added that s. 495(3) *Cr. C.* was specifically intended to give peace officers some protection against such mistakes in judgment. In

this regard, the Minister clearly stated that if a peace officer made an arrest when it was not necessary, this would be a mistake in judgment that, under s. 495(3)(a) *Cr. C.*, could not ground a guilty verdict in a criminal proceeding (*Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, February 23, 1971, at pp. 7-9):

The second concern of the police was that because the ordinary policeman was going to be required to make this judgment rather than have the judgment made by a desk sergeant or, eventually, a justice of the peace, then there ought to be some protection for the policeman from criminal or civil liability if, in good faith, he makes the wrong judgment.

It is clear, first of all, that there was nothing in the first version of the bill and nothing in this version of the bill to impose criminal liability on a policeman who happened to make the wrong judgment. If he arrests and it later turns out that, in judgment, he did not need to arrest because the public interest would have been served just as well or better by not arresting, then that is a mistake in judgment for which the policeman will not be penalized by criminal liability. He cannot be charged criminally for false arrest. [Emphasis added.]

[108] The Minister reconfirmed this interpretation to be given to the phrase “any proceeding under this or any other Act of Parliament” in answer to a question from a member of the Committee (*Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, February 23, 1971, at p. 9):

**Mr. Marceau:** Yes. In the first version, in clause 436, subparagraph 3, there is express mention of the fact that the . . . peace officer [h]as no criminal liability. This is not mentioned in the new version of the Bill.

**Mr. Turner (Ottawa-Carleton):** Yes, if you read page 7 of the new version of the Bill[, subsection (3), paragraph (a)].

a) any proceeding under this or any other Act of Parliament and . . .

any other Act of Parliament, this includes the Criminal Code.

**Mr. Marceau:** You interpret that as being a protection against any criminal proceedings.

**Mr. Turner (Ottawa-Carleton):** That is correct.

[109] An analysis of the general scheme of the *Criminal Code* reinforces the interpretation that Parliament intended s. 450(3)(a) *Cr. C. (1970)* (now s. 495(3)(a)) to act as a shield in criminal proceedings relating to a peace officer's actions in making an arrest. The interaction of this provision with ss. 25 and 247(2) *Cr. C. (1970)*, corresponding to the current ss. 25 and 279(2) *Cr. C.*, is enlightening.

[110] At the time s. 450(3) was enacted, s. 247(2) provided that everyone who, “without lawful authority” (“*sans autorisation légitime*”), confined, imprisoned or forcibly seized another person was guilty of an indictable offence and liable to imprisonment for a term of five years. By specifying in s. 450(3)(a) that a peace officer acting under s. 450(1) “is deemed to be acting lawfully and in the execution of his duty” (“*est censé agir légalement et dans l'exercice de ses fonctions*”) for the purposes of any proceedings under the *Criminal Code*, Parliament ensured that the peace officer's actions, even if not in compliance with the requirements of s. 450(2), would not be considered to be a forcible seizure of a person “without lawful authority” (“*sans autorisation légitime*”) within the meaning of s. 247(2).

[111] Similarly, like the current s. 25 *Cr. C.*, apart from a few differences in form, s. 25 *Cr. C.* as it read at the time provided that “[e]very one who is required or

authorized by law to do anything in the administration or enforcement of the law . . . as a peace officer or public officer . . . is, if he acts on reasonable . . . grounds, justified . . . in using as much force as is necessary for that purpose.” Again, the enactment of s. 450(3) ensured that a peace officer’s use of force remains “authorized by law” despite non-compliance with s. 495(2).

[112] In short, it is clear that Parliament’s intention in enacting s. 495(3)(a) *Cr. C.* was to protect, first and foremost, the peace officer who made an arrest without warrant contrary to s. 495(2) *Cr. C.*, as well as any person responsible for that officer. This protection was directed in particular at proceedings in which they could be found criminally liable for non-compliance with s. 495(2) *Cr. C.* Read as a whole, the debates therefore do not support the argument that the presumption of lawfulness in s. 495(3) *Cr. C.* applied to *the arrest* itself, despite what the Crown suggests in this case.

[113] The parliamentary debates surrounding s. 495(3)(b) *Cr. C.* also confirm that s. 495(3) *Cr. C.* is concerned primarily with the liability of a peace officer and of any person responsible for that officer for failure to comply with the requirements of s. 495(2) *Cr. C.* Minister Turner confirmed that while s. 495(3)(b) *Cr. C.* leaves open the possibility of a civil suit against the peace officer who made the arrest contrary to s. 495(2) *Cr. C.* or a person responsible for that officer, s. 495(3)(b) nonetheless provides some protection against the civil liability that might arise from the conduct of peace officers. Indeed, this provision was drafted so as to impose on the person arrested without warrant the burden of proving that the peace officer believed on reasonable

grounds that the public interest could be satisfied without arresting the person *and* that there was no risk of the person failing to attend court. As Minister Turner explained, “an arrested person . . . must demonstrate that the police did not carry out their new duties properly if he is to recover damages against them in civil proceedings” (*House of Commons Debates*, February 5, 1971, at p. 3117). The following comments by Minister Turner provide a good understanding of the operation of s. 495(3) as a whole:

Subsection (3) . . . says that notwithstanding the failure of a police officer to exercise his discretion properly in accordance with the Bill — you know, we are dealing with human judgments here — if the police officer makes the wrong judgment, he is going to be protected under paragraph (a) from a criminal suit, as he is now, but he is not protected under paragraph (b) from a civil suit. All that paragraph (b) says is that he is open to a civil suit if he makes a mistake in judgment but the burden of proof is on the person who feels that he has been wronged by the exercise of that judgment.

So the ultimate sanction is a civil suit and . . . I believe that the police of this country, if they accept this Bill as I believe they will be, and I am trying to listen to their objections both at the brotherhood level, and the association level, and the chiefs of police level — I think . . . they will try to live within its sphere. [Emphasis added.]

(*Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, March 4, 1971, at p. 14)

[114] In this regard, the Alberta Court of Appeal was correct in stating that the Minister did not indicate that “the statutory duty imposed by subsection (2) was . . . nullified” because of s. 495(3) and that he did in fact say that one of the consequences of non-compliance with s. 495(2) was a civil suit (*Veen*, at para. 50). However, when he explained the mechanism of s. 495(3)(b) *Cr. C.*, the Minister referred at all times to the lawfulness of the peace officer’s conduct, in a context where the civil or criminal

liability of the officer or of persons responsible for the officer was sought for actions related to the arrest, and not to the lawfulness of the arrest itself.

[115] I pause to clarify that there is no basis for saying that the purpose of s. 495(3) *Cr. C.* is to “discourage persons resisting arrest where they believe they will not be convicted of the offence for which they are being arrested”, as the Saskatchewan Court of Appeal stated in *R. v. Munson*, 2003 SKCA 28, 172 C.C.C. (3d) 515, at para. 58. That court relied in part on *Adams, McKibbon* and *Fuhr*, which I discuss at the very beginning of these reasons, in support of its conclusion (see also *Jowett Work*, at paras. 33-34). With respect, such a purpose is not apparent at any point from the parliamentary debates we have considered or from any contextual element relevant to establishing the purpose of the provision. It follows from the foregoing that the purpose underlying the enactment of s. 495(3) *Cr. C.* is not *physical* protection (i.e., when the person being arrested resists arrest by force), but rather *legal* protection (i.e., in the context of a lawsuit or prosecution).

[116] In this context, it can be inferred from s. 495(3)(a) and s. 495(3)(b) *Cr. C.*, read as a whole, that they share the same purpose, namely to provide peace officers and any person responsible for them with some protection against proceedings in which they face criminal or civil liability for an arrest contrary to s. 495(2).

(3) Context

[117] Other contextual elements also support this interpretation. First, I look at the broader context by discussing the legislative landscape at the time s. 495(3) *Cr. C.* was enacted, and thus before the advent of the *Charter*. Second, I consider its immediate context, and specifically the relationship between s. 495(2) and s. 495(3) *Cr. C.*

(a) *Pre-Charter Context Surrounding the Enactment of Section 495(3) Cr. C.*

[118] The legislative landscape in which Parliament enacted s. 495(3) *Cr. C.* is an important contextual element. I note that this provision was enacted several years before the *Charter* came into force. It is therefore necessary to place s. 495(3) *Cr. C.* in the context of the time in order to interpret it properly. Ultimately, as we will see, the interpretation to be given to this provision was not disturbed by the advent of the *Charter*.

[119] When Parliament enacted s. 450(2) and (3) *Cr. C. (1970)* (now s. 495(2) and (3) *Cr. C.*) through the *Bail Reform Act*, the possibilities for accused persons to challenge the lawfulness of their arrest and obtain redress in their own criminal and penal proceedings were very limited. This was due in part to *Wray*.

[120] In June 1970, shortly before the *Bail Reform Act* came into force, this Court affirmed in *Wray* that a court did not have the discretion to exclude admissible evidence simply because its admission would bring the administration of justice into disrepute, for example because the evidence had allegedly been obtained following an unlawful

arrest (p. 287). A court did of course have the power to exclude evidence obtained following an unlawful arrest, but, as Martland J. explained, the threshold was very high: “It is only the allowance of evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the court is trifling, which can be said to operate unfairly” (p. 293). The state of the law as set out in *Wray* seems to have remain unchanged until the advent of the *Charter* in 1982 (Coughlan, at pp. 429-30).

[121] Thus, at the time the first iteration of s. 450(3) *Cr. C. (1970)* (now s. 495(3) *Cr. C.*) was enacted, Parliament could not have imagined that, years later, accused persons would be able, in their own criminal trial, to challenge infringements of their constitutional rights — such as the right not to be arbitrarily detained — by asserting the unlawfulness of their arrest and seeking the exclusion of the evidence obtained in violation of those rights. The *Charter* had not yet been enacted and, even more to the point, this Court had obviously not recognized that an *unlawful* arrest could amount to an *arbitrary* arrest. Nor could Parliament have anticipated that, where a *Charter* infringement was established, accused persons would be able to seek other “appropriate and just” remedies under s. 24(1) of the *Charter* in their criminal trial, such as a sentence reduction or a stay of proceedings. It is accordingly very difficult, if not impossible, to ascribe to Parliament any intention, in enacting the former s. 450(3) *Cr. C. (1970)*, of insulating an arrest contrary to s. 495(2) *Cr. C.* from scrutiny based on the unlawfulness of the arrest at the time it enacted the provisions in question. I

therefore agree with the respondent that the wording of the former s. 450(3) *Cr. C.* (1970) (now s. 495(3) *Cr. C.*) must be interpreted in light of this reality.

[122] Very recently, in *Telus*, I endorsed the theoretical framework outlined by my colleague Moreau J. regarding the manner in which legislation should be interpreted in response to changing circumstances (para. 155). It is understood that the modern approach allows courts “[to] appl[y] statutes to new or evolving circumstances” (para. 33; see also *Interpretation Act*, s. 10). It is also possible for Parliament to use “broad or open-textured language to cover circumstances that are neither in existence nor in [its] contemplation” (*Telus*, at para. 33, citing *R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402, at para. 61, *Perka*, at p. 265, and *Côté and Devinat*, at para. 285), as might be the case with the words “any proceedings” (“*toutes procédures*”) used in s. 495(3) *Cr. C.*

[123] However, determining whether a provision is capable of applying to new circumstances is an interpretive question, and it must be answered by reading the text of the statute in its context and in a manner consistent with the legislature’s purpose (*Telus*, at para 36). Thus, even where the text of the provision is drafted in general terms suggesting that it could apply to new circumstances, courts must avoid giving it a meaning that would overreach the provision’s purpose. Otherwise, courts risk exceeding their institutional role by intruding into questions that can be better addressed by legislatures (Sullivan, at § 6.01[3]).

[124] Moreover, a provision that uses broad and general language can be read more narrowly so that its interpretation does not overreach its purpose. *R. v. Kuldip*, [1990] 3 S.C.R. 618, provides an example of this. In that case, this Court was called upon to interpret the words of s. 5(2) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5. Relying on wording that was broader and more general, the accused proposed an interpretation of the provision that would overreach its purpose (see Sullivan, at § 9.04[4]: “. . . the guarantee sought by the accused (protection against impeachment of credibility) was not rationally related to the purpose of the provision (protection against self-incrimination)” (emphasis added)). This Court rejected the accused’s arguments, thereby declining to adopt an interpretation of the provision that, while consistent with the grammatical and ordinary meaning of the words, “would extend beyond the purpose” of the provision (*Kuldip*, at p. 639). Rather, the Court found that “the protection offered by s. 5(2) . . . must be interpreted in consideration of the express purpose” — without going beyond it (p. 639).

[125] In light of the foregoing, I find it difficult to draw any definitive conclusions from the broad and general wording of s. 495(3)(a) *Cr. C.*, especially since the consequences of such drafting were hard to foresee at the time the predecessors to s. 495(3)(a) and (b) were enacted. The mere fact that the text is framed in general terms is not a basis for concluding that Parliament necessarily intended to include [TRANSLATION] “all criminal proceedings” (“*toutes les procédures criminelles*”) imaginable within the scope of s. 495(3)(a) (*A.F.*, at para. 71). The same could also be

said of the interpretation to be given to the expression “any other proceedings” in s. 495(3)(b) *Cr. C.*

[126] I therefore propose, following the example of *Kuldip*, to adopt an interpretation of s. 495(3)(a) *Cr. C.* that is consistent with but does not overreach the purpose of this provision, in other words, that applies only to proceedings under the *Criminal Code* or any other Act of Parliament in which a peace officer or any person responsible for that officer is actually facing liability for a breach of the requirements of s. 495(2) *Cr. C.*

(b) *The Purpose of Section 495(2) Cr. C. Is Consistent With an Interpretation of Section 495(3) Cr. C. Limited to the Liability of the Peace Officer and of Any Person Responsible for That Officer*

[127] The final contextual element that I propose to examine in support of my analysis is the relationship between s. 495(2) and s. 495(3) *Cr. C.* Given that s. 495(3) *Cr. C.* refers directly to s. 495(2) *Cr. C.*, it is necessary to consider it.

[128] As I have already said, the structure of s. 495 *Cr. C.* confirms that s. 495(2) must be interpreted as a binding limitation, which narrows the scope of the discretion conferred by s. 495(1). In my view, this same structure also confirms that s. 495(3) *Cr. C.* must be viewed as providing some protection to peace officers, their employer or any other person who might be held liable for a peace officer’s failure to comply with s. 495(2) *Cr. C.*

[129] Section 495(3) *Cr. C.* is under the heading “Consequences of arrest without warrant” (“*Conséquences de l’arrestation sans mandat*”). While this marginal note is not part of the content of the provision (*Interpretation Act*, s. 14), it may suggest that s. 495(3) specifically concerns the “Consequences” (“*Conséquences*”) to be suffered *by a peace officer* who has contravened s. 495 (2) *Cr. C.* and by the officer’s principal, among others.

[130] Focusing on the words “a peace officer . . . deemed to be acting lawfully and in the execution of his duty for the purposes of” (“*l’agent de la paix . . . censé agir légalement et dans l’exercice de ses fonctions aux fins*”) makes it clear that s. 495(3) *Cr. C.* has the effect of creating a presumption to the effect that, in a proceeding relating to the conduct of a peace officer who breached the requirements of s. 495(2) *Cr. C.*, the peace officer is presumed to have acted lawfully as long as he or she acted in compliance with s. 495(1) *Cr. C.*, regardless of his or her failure to comply with the requirements of s. 495(2) *Cr. C.* On the other hand, s. 495 *Cr. C.* does not create any presumption with respect to the lawfulness of the arrest without warrant itself. The lawfulness of the arrest can always be challenged, even in a criminal proceeding like the trial of the respondent in this case.

[131] Such an interpretation is in keeping with the binding nature of s. 495(2) *Cr. C.* Indeed, to interpret s. 495(3) *Cr. C.* as having the effect of shielding *arrests* contrary to s. 495(2) *Cr. C.* from any finding of unlawfulness would undercut the binding nature of this provision. It would also run directly counter to Parliament’s

objective in enacting the *Bail Reform Act*, that is, to reduce unnecessary arrests without warrant. In other words, the more broadly s. 495(3)(a) *Cr. C.* is interpreted, the more the normative import of s. 495(2) *Cr. C.* is eroded, thereby jeopardizing the achievement of the objective sought by Parliament. It is therefore essential to avoid adopting such an interpretation and to opt instead for a proper balancing consistent with the text, context and purpose of s. 495(3)(a) *Cr. C.*

[132] In the same spirit, I cannot agree with the way in which several appellate courts have interpreted the interaction between s. 495(2) and s. 495(3) to establish the scope of s. 495(3)(a) *Cr. C.* (see, among others, *Veen* (C.A.), at para. 57). For example, the British Columbia Court of Appeal wrote the following in *Jowett Work* about the relationship between s. 495(2) and s. 495(3) *Cr. C.*:

. . . s. 495(3)(a) was intended to ensure that the requirements of s. 495(1) remained the focus of the power to arrest without warrant, whereas s. 495(3)(b) was intended to permit the public interest considerations to be challenged in proceedings in the civil or provincial regulatory context.

Therefore, it is my view that an arrest that is lawful under s. 495(1) cannot be rendered unlawful in a criminal proceeding due only to a peace officer's failure to properly consider the public interest in an arrest as set out in s. 495(2), and the trial judge erred in concluding that the arrest of the respondent was unlawful because the requirements of s. 495(2) had not been satisfied. [paras. 38-39]

[133] With respect, I believe that such an interpretation fails to consider the binding nature of s. 495(2) *Cr. C.* It also takes away a large part of the provision's practical utility in reducing unnecessary arrests, which was Parliament's objective when enacting it. On this point, I wholly agree with the sentiment expressed by

Kopstein Prov. Ct. J. in *R. v. Prince* (1981), 61 C.C.C. (2d) 73 (Man.), when he stated the following:

. . . it would seem a strange phenomenon for Parliament to have taken the initiative to enact s. 450(2) which restricts the power of arrest without a warrant for those offences referred to in s. 450(2), and then immediately thereafter by s-s. (3) to nullify any legal or practical effect which might arise out of the operation of s-s (2). [p. 80]

[134] It is true, as noted by the attorneys general of Ontario and Alberta, that the combined operation of s. 495(2) and s. 495(3)(b) *Cr. C.* (civil action in damages) also serves to change peace officers' conduct to some extent by encouraging them to comply with the requirements of s. 495(2) *Cr. C.*, on pain of being sued civilly (s. 495(3)(b) *Cr. C.*) for non-compliance with s. 495(2) *Cr. C.* The experience of provinces like Ontario and Alberta shows that complainants have been able to allege the unlawfulness of an arrest in a civil proceeding and to claim damages as a remedy. The Attorney General of Ontario cites, for example, *Collins*, in which the complainant alleged that his arrest was unlawful because it was contrary to s. 495(2) *Cr. C.* and that his right guaranteed by s. 9 of the *Charter* had been infringed. This is in line with Minister Turner's statement that "the ultimate sanction is a civil suit" (*Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, March 4, 1971, at p. 14; see also pp. 10-11). In this sense, I concede that it would be going too far to say that the interpretation suggested by the Crown would completely deprive s. 495(2) *Cr. C.* of any useful effect.

[135] That being the case, it must be recognized that an interpretation whereby an arrest contrary to s. 495(2) *Cr. C.* would still be considered lawful in criminal and penal proceedings, such as the trial of the respondent in this case, would greatly diminish the deterrent effect of this imperative, such that Parliament's objective would be not only largely exceeded but also, and above all, compromised. This interpretation must therefore be rejected.

(4) Conclusion on the Interpretation of Section 495(3) *Cr. C.*

[136] In conclusion, s. 495(3) *Cr. C.* is intended to govern the liability of peace officers for failure to comply with the requirements of s. 495(2) *Cr. C.* Since peace officers are called upon to exercise their judgment quickly to make an arrest without warrant in circumstances that are often unpredictable, it was necessary for Parliament to establish some protection in relation to the then new limitation on their discretion introduced by s. 495(2) *Cr. C.*

[137] From this perspective, s. 495(3)(a) *Cr. C.* provides peace officers or any person responsible for them with greater protection when proceedings are brought against them under the *Criminal Code* or any other Act of Parliament by creating a presumption that peace officers are deemed to have acted lawfully and in the execution of their duty. As for s. 495(3)(b) *Cr. C.*, it sets out the parameters for a civil suit that may be brought by a person who believes that his or her arrest was contrary to s. 495(2) *Cr. C.* For the purposes of such a lawsuit, the peace officer is presumed to have acted lawfully and in the execution of his or her duty unless the person arrested without

warrant successfully demonstrates that the arrest was contrary to the requirements established by s. 495(2) *Cr. C.* Section 495(3)(b) therefore ensures that, in a civil suit against the peace officer or any person responsible for that officer for a contravention of s. 495(2), the plaintiff bears the burden of proof.

[138] I would add that such an interpretation is consistent with the *Criminal Code*'s special nature, which requires that it be read having regard "to liberty interests" (*R. v. McIntosh*, [1995] 1 S.C.R. 686, at para. 39). Along the same lines, I noted in *Kosoian v. Société de transport de Montréal*, 2019 SCC 59, [2019] 4 S.C.R. 335, that "[i]n a free and democratic society, police officers may interfere with the exercise of individual freedoms only to the extent provided for by law" (para. 6). Of course, this taking into account of individual freedoms must not compromise other fundamental criminal law considerations, which must be carefully balanced with these freedoms — including public safety and the public interest in ensuring that peace officers can do their work effectively and expeditiously (see *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para. 20).

[139] That being the case, as we have seen, Parliament's intention in enacting s. 450(2) and (3) *Cr. C. (1970)* (now s. 495(2) and (3) *Cr. C.*) was precisely to balance these various considerations. I therefore propose to give full effect to the balancing done by our elected representatives. In this context, preference should be given to the interpretation that best reflects this desired balance, without overstepping it.

G. *Application to the Facts*

[140] In light of the above interpretation, I would dismiss the appeal and uphold the order that the respondent be given a new trial. However, my reasons for reaching this result differ from those of the Quebec Court of Appeal. With great respect, let me make myself clear.

[141] Section 495(3) *Cr. C.* creates a presumption of lawfulness applicable to the conduct of a peace officer who has made an arrest without warrant that does not meet the requirements of s. 495(2) *Cr. C.* Section 495(3)(b) provides, however, for the possibility of rebutting this presumption in a proceeding not brought under the *Criminal Code* or any other Act of Parliament, where the person alleging the unlawfulness of the peace officer's conduct establishes that the officer did not comply with the requirements of s. 495(2) *Cr. C.* The Court of Appeal's error was in finding that the possibility of rebutting the presumption of lawfulness applied in a proceeding under the *Criminal Code* or another Act of Parliament contemplated by s. 495(3)(a), which distorted its entire interpretation.

[142] Thus, by stating that in this case s. 495(3) *Cr. C.* guaranteed the respondent "the opportunity to challenge the lawfulness of the arrest upon allegation and proof" (C.A. reasons, at para. 18), the Court of Appeal erred, because in the context of determining the criminal liability of the respondent in this case — and not that of the peace officer — there was no presumption of lawfulness that applied.

[143] On this point, I agree with the analysis of the Alberta Court of Appeal in *Veen* to the effect that "sections 495(3)(a) and (b) were intended to operate differently

and in different contexts, with subsection (a) applying to criminal matters and (b) applying to civil matters” (para. 59). It follows that the phrase “unless in any such proceedings it is alleged and established by the person making the allegation that the peace officer did not comply with the requirements of subsection (2)” in s. 495(3)(b) *Cr. C.*, as the very structure of subs. (3) clearly indicates, applies only to para. (b), and its application cannot be extended to the entire subsection. There is no justification for reading into para. (a), as the Court of Appeal did, a phrase that is expressly confined to para. (b).

[144] In summary, since the criminal proceeding brought against the respondent — specifically a charge for sexual assault — does not fall within either of the paragraphs of s. 495(3), the Quebec Court of Appeal could not base its analysis on this provision. That being said, I am of the view that this error by the Court of Appeal is not determinative. In this case, it is rather the trial judge’s refusal to hold the *voir dire* requested by the respondent that constitutes a reviewable error.

[145] Section 495(2) *Cr. C.* is mandatory and binding. Failure to comply with it may make an arrest without warrant unlawful, even if the arrest meets the requirements of s. 495(1) *Cr. C.* An arrest that is unlawful may, by that very fact, be characterized as arbitrary within the meaning of s. 9 of the *Charter* and thus provide a basis for constitutional remedies under s. 24 of the *Charter*.

[146] This case does not involve any of the scenarios in which s. 495(3) applies, because the criminal or civil liability of the peace officer who arrested the respondent

without warrant or of any person responsible for that officer is not in issue. The presumption of lawfulness created by s. 495(3) *Cr. C.* with respect to the conduct of the peace officer who made the arrest therefore does not apply, and the trial court had to hold a *voir dire* to determine the lawfulness of that arrest. The refusal to conduct that hearing is a reviewable error that warrants a new trial.

V. Conclusion

[147] For these reasons, I would dismiss the appeal and uphold the order for a new trial made by the Court of Appeal.

*Appeal dismissed.*

*Solicitor for the appellant: Director of Criminal and Penal Prosecutions,  
Montréal.*

*Solicitors for the respondent: Battista Turcot Israel, Montréal; Les avocats  
Poupart, Touma, Montréal.*

*Solicitor for the intervener Attorney General of Ontario: Crown Law  
Office — Criminal, Toronto.*

*Solicitor for the intervener Attorney General of Alberta: Alberta Crown  
Prosecution Service — Appeals and Specialized Prosecutions Office, Calgary.*

*Solicitors for the intervener Canadian Civil Liberties Association: Henein  
Hutchison Robitaille, Toronto.*