

LAW 520

CRIMINAL PROCEDURE

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1) Introduction: Theories of the Criminal Process

A) HERBERT PACKER'S 2 MODELS OF CRIMINAL JUSTICE:

1. Crime Control Model: The main concern of crime control is efficiency, and acts as a conveyor belt operated by the police and Crown in order to secure guilty pleas.
2. Due Process Model: the process is an obstacle course operated by the defence, who are attempting to throw up road blocks with the final goal of having the charges withdrawn.

The Crime Control Model:

- Emphasis on factual guilt
- Broad powers to the police
- Real evidence should be admitted no matter how it is obtained
- Pre-trial detention persuades guilty plea
- Limit appeals
- Trials are to be avoided as an expensive and unnecessary drain on the system

The Due Process Model:

- Emphasis on legal guilt
- Restraints on police power
- Release people before trial because they are presumed to be innocent
- Trials are the logical culmination of the justice process

B) IMPACT OF THE CHARTER ON CRIMINAL PROCEDURE:

Prior to the introduction of the *Charter* in 1982, courts used the principle of legality as a fundamental principle of justice to question the lawful authority of the action. This created 2 main drawbacks:

1. It allowed the government to infringe upon citizen's liberty through clear legislative intention;
2. Illegally obtained evidence was always admissible.

The introduction of the *Charter* changed the legal landscape from a crime control model to a due process model.

Hunter v. Southam saw the *Charter* as always being a limit on state power, never a source of state power.

2) Detention

Everyone has the right not to be arbitrarily detained or imprisoned

S. 9 of the *Charter of Rights and Freedoms*

Absent explicit or implied statutory or case law authority, a police officer cannot act. They may ask questions in furtherance of their investigations, but there is no requirement on a citizen to respond to these questions.

A) STATUTORY DETENTION POWERS:

- *R. v. Dedman (1985 SCC)*
 - Random check-stop. Case is examined in depth later.
 - “Absent explicit or implied statutory authority, the police must be able to find authority for their actions at common law. Otherwise they are acting unlawfully.”
 - Chief Justice Dickson
 - “Although a police officer is entitled to question any person in order to obtain information with respect to a suspected offence, he has no lawful power to compel the person questioned to answer. Moreover, a police officer has no right to detain a person for questioning or for further investigation.” Para. 13.

- *Koechlin v. Waugh and Hamilton (1957 ONCA)*
 - Civil lawsuit over wrongful arrest, defendants are police officers.
 - Police are cruising around when they ask Koechlin to identify himself. Recent break-ins were done by somebody wearing similar footwear. Koechlin refuses to identify himself to the police, and resists his arrest.
 - Argues Court finds that there were no reasonable and probable grounds for his detention.

- *R. v. Therens (1985 SCC)*
 - Deals with the application of s. 10(b) (right to retain and instruct counsel) to drivers who are arrested and charged with impaired driving.
 - Police officer demanded breath sample, which was complied with. Was he detained at that time?
 - Court – yes, as to refuse would have resulted in a criminal charge. Any criminal liability for failure to comply with a demand or direction of a police officer must be sufficient to make compliance involuntary.
 - Recognize that there is such a thing as psychological restraint with legal compulsion.
 - A person is detained where they submit or acquiesce in the deprivation of liberty and reasonably believe that the choice to do otherwise does not exist.

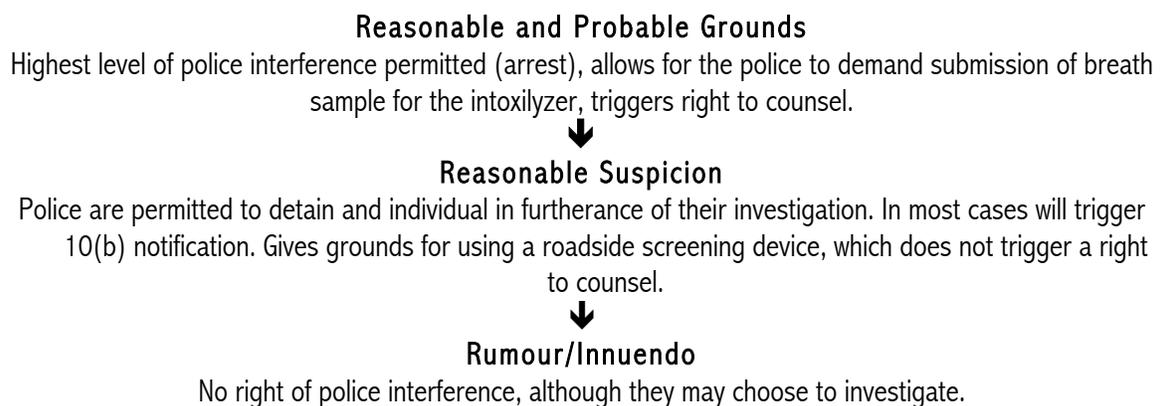
- *R. v. Thomsen (1988 SCC)*
 - Addresses whether the right to counsel extends to roadside breath demands.
 - When a police officer has **reasonable suspicion** of intoxication, they can administer a roadside screening device (rsd). While this device does not give them an accurate reading of levels of intoxication (this involves testing by a drug recognition expert back at the station), it does elevate the police's ability to interfere with one's rights by giving them **reasonable and probable grounds** for making an arrest.
 - Case took place in a roadblock scenario, where the drivers were selected at random, without any indication of impairment (no reasonable suspicion for even pulling people over).
 - The court recognizes that both the roadblock and the demand for a breath sample into a roadside screening device constitute detention, but policy considerations allow for s.1 to become engaged and allow it.
 - WHAT ABOUT THE NEED TO GIVE 10(b) RIGHTS??

KNOW FOR THE EXAM

The courts recognize in *Therens* and *Thomsen* that there are 3 distinct types of detention:

- 1) **Physical Detention or Restraint**
 - Where a police officer restrains or detains someone with or without legal compulsion
- 2) **Psychological Restraint with Legal Compulsion**
 - Where people will be punished for failing to comply with a police directive.
 - Ex. Legally compelled to stay and blow otherwise you will get a ticket.
- 3) **Psychological Restraint without Legal Compulsion**
 - Where one thinks they are legally compelled to stay, or that they are detained, but legally are not.
 - Frequently litigated.
 - Ex. *R. v. Grant*

The hierarchy of grounds for police interference has 3 levels:



- *R. v. Grant (2009 SCC)*
 - Black man is walking in an area with 4 schools with reported problems, 3 police are on patrol when Grant walks by, stares at them in an unusually intense manner and is fidgeting.
 - Police ask him “What is going on”, ask for identification, which is provided. He adjusts his jacket, at which point the police officer tells him to keep his hands in front of him.
 - Other officers join in and move to obstruct Grants path.
 - Police then ask if he has ever been arrested and if he has anything on him that he should not have.
 - Case turns on when detention occurred, with Grant arguing his right to be free from arbitrary detention (s.9), and right to speak to a lawyer (s.10(b)).
 - When determining whether or not the reasonable person in the individuals circumstances would conclude that they have been deprived by the state of their liberty, the court will consider the following factors:
 - a) The circumstances giving rise to the encounter as they would reasonably be perceived by the individual: whether the police were providing general services or specifically singling out the individual for a focused investigation;
 - b) The nature of the police conduct, including the language used, use of physical contact, the place where the interaction occurred, duration, presence of others;
 - c) The particular characteristics of the individual including race, minority status, age, and level of sophistication.
 - Grant was detained prior to his arrest and had a right to be made aware of his *Charter* protections.
 - The officers admitted that they had no legal grounds to have a reasonable suspicion to detain Grant, therefore the detention was arbitrary.

Grant makes it possible for general inquiries by the police to become detention at some point. Would have to look to the objective reasonable person test in *Grant* to determine when this occurs in any given case.

- *R. v. Suberu (2009 SCC)*
 - Police officer responds to a call regarding the use of a stolen credit card. Not knowing anything about the suspects at the time he enters the store, Suberu brushes past him saying ‘it was him, not me, so I guess I can go’.
 - Officer follows Suberu to his van, engages him in a brief exchange, and then receives further information indicating that Suberu was involved in the fraud. He then believes he has the requisite reasonable and probable grounds to make the arrest, warning Suberu of his *Charter* rights as he does so.
 - Applying the reasonable person standard of *Grant*, the question is whether Suberu was psychologically detained without legal compulsion to do so and was therefore entitled to a *Charter* caution.

- Would a reasonable person have felt compelled to stay? SCC says no. The officer was trying to sort out the situation and reasonably believed Suberu was somehow involved.
- There was no move to obstruct, the conversation was brief, and there was no detention found.
- Suberu did not testify, therefore the personal characteristics aspect of the test could not be applied in this case.

B) COMMON LAW DETENTION POWERS

- *R. v. Dedman (1985 SCC)*
 - Offence predates the *Charter*
 - Dedman was pulled over randomly in accordance with a check-stop type program.
 - Question is whether or not the stop was unlawful as having been made without the requisite statutory or common law authority, and if it was, if this should result in a dismissal of the charge.
 - The test for the common law existence of police powers came from *R. v. Waterfield* (English Case). Also known as the ancillary powers doctrine, it requires considering whether:
 - a) The conduct falls within the general scope of any duty imposed by statute or recognized at common law, and;
 - b) Whether such conduct, while within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty. To pass the interference with liberty must be necessary for carrying out the police duty and it must be reasonable considering the circumstances of the liberty being involved with and the public purpose served by doing so. (It must be reasonably necessary.)
 - Therefore there is a limit to the powers granted to police in statute and common law
 - It would be wrong to execute the duties of preventing crime and bringing offenders to justice where it would involve undue interference with a private citizen.
 - The court recognizes that the random vehicle stop is a *prima facie* interference with the licensed liberty of driving on a public roadway, but apply the *Waterfield* test to determine that the police have a general duty to prevent crime and protect life by controlling traffic (part A) of the test).
 - Part B) of the test is passed because:
 - a) The liberty is already restricted: driving is a licensed liberty that is subject to regulation and control in the interest of safety;
 - b) The stop is of only slight inconvenience, due to its short duration and highly publicized nature, in contrast with the seriousness of the problem it is trying to combat (drunk driving).
 - Therefore there is common law authority for conducting random stops for the purpose of screening for impaired drivers.

The ancillary powers doctrine (or *Waterfield Test*) was never designed as a way for the judiciary to license new and unprecedented police powers. Its application has been limited to *R. v. Mann*, *R. v. Suberu*, and *R. v. Clayton*.

- *R. v. Mann (2004 SCC)*
 - Police officers responding to a break and enter call come upon Mann, who matches the description offered. Mann complies with their requests for identification and a search for weapons, whereupon the police feel a soft bag in his sweater and find marijuana. He is arrested and charged.
 - The power to detain cannot be exercised on the basis of a hunch, or become a *de facto* arrest.
 - SCC finds that the circumstances of Mann, applied to the *Waterfield Test*, find that there is a power of search incidental to investigative detention at common law:
 - a) The ability to detain suspects for the purposes of questioning falls within the duty of police to protect life and property;
 - b) The duty to protect life will, where there are reasonable grounds to suspect that there is a risk to their own safety or the safety of others, give rise to the power to conduct a pat-down search
 - In this case, the reasonable grounds came from the fact that Mann met the description of the offender, who they suspected could be carrying tools incidental to the break in which could pose a danger to them.
 - There was no reason for the police officer to extend his search to include anything but weapons, and therefore he was not justified in reaching into Mann's pocket and pulling out the soft bag of marijuana.
 - Mann thus sets out a new test for detention, lower than both RPG and Reasonable Suspicion.
 - The new test requires only *reasonable grounds to suspect*, or an *articulable cause to suspect* in order to detain for investigative purposes.

- *R. v. Suberu (2009 SCC)*
 - Issue: Do the police have to convey 10(b) rights immediately upon investigative detention?
 - From the moment an individual is detained, their 10(b) rights are engaged.
 - These rights include notification "without delay", which is only influenced by concerns for officer or public safety, or to reasonable limitations that are prescribed by law or justified under s.1 of the *Charter*. Absent these concerns, "without delay" is taken to mean "immediately".

- *R. v. Clayton (2007 SCC)*
 - Police use of a roadblock for non-traffic related offence.
 - Officers respond to a call of firearms present in a strip club parking lot in possession of black males in 4 identified vehicles.

- Upon arriving at the scene, the officers stop a vehicle not matching the callers description, but with 2 black men in it.
 - Police become concerned for their safety when the driver protests to getting out of the car. Clayton acts strangely, when officer puts his hand on him he bolts. He is caught with a handgun on him.
 - Application of the Ancillary Powers Doctrine:
 - The initial traffic stop was a justifiable use of police powers associated with the police duty to investigate offences;
 - The initial detention is seen as reasonably necessary to respond to the seriousness of the offence and the threat to police and public safety;
 - The search was justified by safety concerns and incidental to their lawful investigative detentions.
-
- *R. v. Hufsky (1988 SCC)*
 - Random roadblock scenario, no indicia of impairment.
 - Hufsky argues that his s. 9 rights were impaired.
 - The court finds that there was detention,
 - That the detention was arbitrary (because it was done completely randomly without the existence of any guiding principles, at the complete discretion of the police officer.
 - “discretion is arbitrary if there are no criteria, express or implied, which govern its exercise”. - Para. 13.
 - The infringement upon individuals s. 9 rights is justifiable because of the gravity of drunk driving and is therefore saved by s.1 (after *Oakes* analysis).
-
- *R. v. Ladouceur (1990 SCC)*
 - 5-4 Court decides to extend the power extended to police in *Hufsky* to roving vehicle stops.
 - The majority sees the s. 9 breach as being saved by s. 1 in *Oakes* analysis.
 - The minority sees it as “a total negation of the freedom from arbitrary detention guaranteed by s. 9 of the *Charter*”. – Justice Sopinka
 - Police are then able to stop any vehicle at any time without any reason.
-
- *R. v. Thomsen (1988 SCC)*
 - Is there a right to counsel at the roadside testing stage of a breath demand?
 - No, the right is incompatible with the effective use of the device, and limit on this right is a reasonable one demonstrably justified in a free and democratic society (drinking and driving being a very serious societal concern) and therefore saved by s. 1 of the *Charter*.

- *R. v. Mellenthin (1992 SCC)*
 - Indication that this will be on the exam ★
 - When conducting a random roadside check-stop can the police interrogate a driver about matters not related to the vehicle, its operation, and search the driver and vehicle?
 - At a check-stop Mellenthin is pulled over, police ask what is in the sandwich bag inside a brown paper bag inside a gym bag in the passenger seat. Sees glass, asks to see it, sees vials of hash oil.
 - Check-stops are a permitted infringement upon s. 9 rights in response to reducing toll of impaired driving, and do not extend beyond those aims.
 - Without any reason to suspect that there were drugs in the bag, the police officer had no right to conduct an unfounded inquisition or unreasonable search.

3) Search and Seizure

Everyone has the right to be secure against unreasonable search or seizure

S. 8 of the *Charter of Rights and Freedoms*

S. 8 guarantees everyone a right to privacy. If an individual does not have a reasonable expectation of privacy, there is no need to search and seize in accordance with s. 8.

A) HISTORY

- *Semayne's Case (Eng. 1604)*
 - "A person's home is their fortress and castle."

- *Entick v. Carrington (Eng. 1765)*
 - Entick has his home broken into on orders from the Secretary of State, he then sues for unlawful trespass.
 - At the time the only way to enter a home to search is looking for stolen goods.
 - Early case showing history of very strict interpretation of property rights.

- *R. v. Colet (1981 SCC)*
 - City of Prince George wants to clean up Colet's property, demolishing the small shack he lives in in the process.
 - Police get a warrant to seize (but not search for!) firearms Colet may have on his property.
 - Colet resists the searching of his property by the officers, and is charged with 2 counts of attempted murder et al.

- The court strictly interprets property rights as being inviolable where there is not express authority stating otherwise. Regardless of the state of his home, it is still his home and 'castle'.

B) POST CHARTER

- *Hunter v. Southam (1984 SCC)*
 - *Combines Investigation Act* permits officers to enter into any premises that the director believes *may* contain evidence.
 - Issue concerns the constitutional validity of the *Combines Investigation Act*.
 - The *Act* is a clear violation of s. 8, and introduces a new requirement for search warrants: an unbiased 3rd party must grant them.
 - The system of granting warrants must be conducted through a system of prior authorization, not subsequent validation (*post facto* analysis).
 - Dickson J: "Reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the pace of the search, constitutes the minimum standard, consistent with s. 8 of the Charter, for authorizing search and seizure."
 - Probability of finding something is insufficient
 - Need to show *reasonable and probable grounds* to the judicial officer

In order to engage s.8, there must determine if there was an intrusion that can be characterized as a "search or seizure". This is done through determining whether the state action intruded upon the citizen's "reasonable expectation of privacy". If no, then no search and seizure and thus no s.8 violation, as the constitutional guarantee is not engaged.

- *R. v. Dyment (1988 SCC)*
 - A physician took a blood sample from the defendant, then gave it to police. This constituted a 'seizure'.
 - This seizure violated his reasonable expectation of privacy.
 - Not all non-consensual takings will be considered seizure, and the line is generally drawn where an individual ceases to have a privacy interest in the subject matter that was seized.
- *R. v. Duarte (1990 SCC)*
 - Great written decision preserving the rights of citizens to be free from the arbitrary (no judicial review) use of police powers to record conversations.
 - Police had set up an apartment to use as a base for nabbing drug traffickers. They used a provision in the criminal code [178.11(2)(a)] to use *participant surveillance* – electronically recorded surveillance through the consent of one of the parties (an informer or police officer). Warrants were not required for this type of surveillance.
 - To allow this practice to continue would "annihilate expectations of privacy".

- *R. v. Wong (1990 SCC)*
 - Another great decision written by La Forest who also wrote *Duarte*.
 - Accused was running casinos in hotel rooms, where he would invite members of the public in.
 - Police put a electronic recording device in one of the rooms without a search warrant.
 - ONCA found that since he was inviting members of the public in, Wong was not entitled to a reasonable expectation of privacy.
 - Just because there were members of the public in the hotel room does not give the state unfettered discretion to record the going on's. Need to broaden the question of what rights we are protecting and avoid *post facto* analysis when doing so.
 - Hotels are our homes away from home, and we are entitled to privacy there as well.

- *R. v. Wise (1992 SCC)*
 - Police used electronic tracking of a vehicle without a warrant.
 - Crown argued that travelling on public streets does not give you a reasonable expectation to privacy.
 - Court found a difference between the threat to privacy caused by "courting the ordinary observations of other members of society and the threat to privacy posed by allowing the state to electronically monitor our every movement."
 - Unwarranted electronic tracking violates a reasonable expectation of privacy and invokes requirements of s. 8.

As a result of *Duarte*, *Wong & Wise*, the Criminal Code was amended.

- *R. v. Muhollock (ABPC)*
 - Not in casebook.
 - Car rolled, Muhollock is injured. Asks attending fireman to retrieve his backpack, who sees that there are drugs in it. Reports this to the police officer.
 - Officer gets into the back of the ambulance, sees two bags of marijuana and a jar of mushrooms.
 - Officer then asks if the backpack is his, Muhollock answers yes, the bag is then seized.
 - At trial, it is argued that s.8 and s.10 were breached.
 - Fails on s.8 – the items were in plain view, therefore there was no reasonable expectation of privacy that would engage s.8.
 - Crown argues *Suberu* to the s.10 argument, Court finds that Muhollock was reasonable in thinking that he was detained and should have been warned about his s.10(b) rights.

- *R. v. Evans (1996 SCC)*

- Police receive an anonymous tip that Evans is growing marijuana. They conduct a preliminary search of the property, check his criminal record and electricity bill, turning up nothing.
 - The police then go and knock on his door to see if they can smell pot coming out, which they do.
 - Issue is whether smelling for pot at the door constitutes a search.
 - The common law recognizes an implied license for all members of the public, including police, to knock at the door of a residence, but only for the purposes of facilitating convenient communication.
 - Knocking for purposes other than to facilitate communication results in the individual becoming an intruder.
 - Where the police approach a residence with the intention of gathering evidence against the occupant, they have exceeded their authority to knock that is implied by invitation.
-
- *R. v. Edwards (1996 SCC)*
 - Edwards was a drug dealer who hid drugs at his gf's apartment. Arrested for driving without a license, the police went to his gf's and told her a bunch of lies and half truths to gain unwarranted entry into her apartment, including telling her that neither she nor her bf would be charged.
 - Issue was whether or not Edwards had a reasonable expectation of privacy in his gf's apartment, and could therefore argue s. 8.
 - Introduces the Totality of the Circumstances Test, which may include assessment of:
 - a) Presence at the time of the search;
 - b) Possession or control of the property or place searched;
 - c) Ownership of the property or place;
 - d) Historical use of the property or item;
 - e) The ability to regulate access, including the right to include or exclude others from the place;
 - f) The existence of a subjective expectation of privacy;
 - g) The objective reasonableness of that expectation.
 - Court finds that although he had a key, he was nothing more than a privileged guest, therefore has no privacy interest in her apartment.
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- *R. v. Belvanis (1997 SCC)*
 - Three women are travelling in a car driven by the owner's girlfriend.
 - Issue: Does a passenger in a vehicle have a reasonable expectation of privacy?
 - Again, need to look at the totality of the circumstances laid out in *Edwards*.
 - In this case no, but where parties are driving long distance, sharing driving duties and expenses, each would likely have an equal expectation to privacy.
 - Also, husband and wife would have reasonable expectations of privacy in each others vehicles.

- *R. v. Plant (1993 SCC)*
 - Does accessing a citizens electricity consumption records violate a reasonable expectation of privacy?
 - S. 8 is designed to “protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state.
 - Electrical bills don’t meet this standard, as they do not reveal intimate details about ones lifestyle or private decisions.

Plant was decided before the government introduced legislation requiring that companies don’t release information without first obtaining consent. Exceptions to this include: a) complying with a warrant or subpoena, or b) where the information relates, on reasonable and probable grounds, to a breach of law.

- *R. v. Tessling (2004 SCC)*
 - Is using heat-sensing technology to look at a house for signs of abnormal heat loss a violation of a reasonable expectation of privacy?
 - Applies the “Totality of the Circumstances Test” from *Edwards*.
 - External patterns of heat distribution on the external surfaces of a house is not information for which there exists a reasonable expectation of privacy.

- *R. v. Patrick (2009 SCC)*
 - Not likely on the exam
 - Patrick puts his garbage out near his property line, police posing as garbage collectors take it, find drug making paraphernalia, and get a search warrant with this evidence.
 - Deals with the issue of abandonment, applies Totality of the Circumstances Test from *Edwards*.
 - Finds that there are direct interests of individuals in the contents of their garbage, very personal information. Bags are opaque for a reason, and a subjective expectation of privacy in the bag, which is objectively reasonable.
 - Garbage at a dump may be considered abandoned, but garbage on a porch is not.

In addition to showing that a governmental intrusion invaded a reasonable expectation of privacy, it must also be shown that this invasion was itself unreasonable. **To be reasonable, a search and seizure must:**

- i. Be authorized by law;
- ii. The law itself must be reasonable (constitutional);
- iii. The search and seizure must be carried out in a reasonable manner.
 - *R. v. Collins (SCC 1987)*

Section 8 challenges can be brought on any of these three fronts.

Three default minimum requirements for reasonableness under s. 8 came from *Hunter v. Southam*:

- i. The law should require searches be authorized by warrant, except where it is unreasonable to obtain one;
- ii. Standard for searching is reasonable and probable grounds, established by oath, that a crime has been committed;
- iii. The law should require that someone capable of acting judicially (Judge or J.P.) should be the one to determine if the grounds are sufficient for granting the warrant.

These standards are floating, and can be ratcheted up (in cases of solicitor-client privilege) or more frequently down (ie immigration, visiting prisoners).

Court also established in *Hunter* that warrantless searches are presumptively unreasonable.

- *R. v. M(R.M.) (1998 SCC)*
 - School principal investigates info that a 13 y/o student has pot on him. He pulls the student into his office for a meeting, a police officer is in attendance.
 - Principal then conducts a search, asking the student to turn out his pockets, lift pant legs, etc., and finds some pot.
 - It was found that the student had a reasonable expectation of privacy, yet it can be diminished in some instances, influencing what the analysis of s. 8 should be.
 - It is not reasonable for a student to expect to be free from all searches while at school.
 - Providing a safe environment requires teachers to react quickly and effectively to potentially dangerous situations.
 - From *Hunter*, all warrantless searches are *prima facie* unreasonable, while recognizing that in some situations it may not be reasonable to insist on prior authorization.
 - It would not be feasible to require a warrant or any other prior authorization in searches of students by school authorities, therefore when a school official conducts a search and/or seizure of a student, a warrant is not required.
 - Summary of approach to searches by teachers:
 - a) A warrant is not essential in order to conduct a search
 - b) The school authority must have reasonable grounds to believe there has been a breach of school regulations, and that a search will reveal that breach.
 - c) School authorities are in the best position to assess the information given to them, and courts should recognize the preferred position of school authorities to determine if reasonable grounds existed for the search.
 - d) Examples of reasonable grounds: information from one credible student, a teacher's own observations.
 - Finally, the search must be conducted in a reasonable manner considering the student's age and sex, and should be minimally intrusive.

C) STATUTORY SEARCH AND SEIZURE POWERS

- *Re Laporte and The Queen (1972 Que. QB)*
 - Can you search an individual for bullets inside their body with a warrant?
 - Pre-Charter, trying to see if the body is a place, building or receptacle.
 - Need to preserve human dignity outweighs the need to gather evidence.
 - Where would the line be drawn if you allow searches via surgery?

- *R. v. Hunter (1987 ONCA)*
 - Refers to an outdated system of Crown protection of informant's identity.
 - Now the Crown can make an application to seal the information given for a search warrant. After the charge the defendant would receive a heavily redacted information in which all the identifying information has been removed.

- *R. v. Debot (1989)*
 - Establishes rules for attacking search warrants – when weighing evidence gathered by the police to justify a warrantless search, three concerns must be addressed:
 - a) Was the information predicting the commission of an offence compelling?
 - b) Where that information was based on a tip originating from a source outside the police, was that source credible?
 - c) Was the information corroborated by police prior to making the decision to search?
 - The totality of the circumstances must meet the standard of reasonableness.
 - Weaknesses in one area may be compensated to some extent by strengths in others.
 - Reputation alone will **never** provide grounds for a search.

D) COMMON LAW SEARCH AND SEIZURE POWERS

i) Search Incident to Arrest

- *R. v. Caslake (1998 SCC)*
 - RCMP policy to search any car that is impounded without warrant or consent, for policy of taking inventory.

- There is a right to search, without warrant, when that search is incidental to the arrest. This power comes from the fact that there is already reasonable and probable grounds for the arrest, therefore there are grounds to conduct the search, as long as the following three conditions are met:
 - a) There is no duty for a search upon arrest. If the objectives of imposing the law can be met without a search, the police may choose not to conduct one.
 - b) The search must be for a valid objective, such as looking for weapons that may threaten the safety of the public or police, may facilitate escape or act as evidence against the accused. It may not be used as a tool to intimidate, ridicule, or pressure the accused into making admissions.
 - c) It must not be conducted in an abusive fashion, and the use of psychological or physical restraint must be proportional to the objectives sought and the other circumstances of the situation.
 - Cars are legitimate objects to be searched incident to an arrest.
 - Courts should be reluctant to set a time limit on the amount of time that can pass between the time of search and time of arrest.
 - The authority of the search does not arise as a result of the reduced privacy expectations of the arrested individual, it arises out of the need to have law enforcement gain control of the situation or information which outweighs the individuals' privacy interests.
 - **The search is only justifiable if the purpose of the search is related to the purpose of the arrest.**
 - ie No searching the trunk of a vehicle for a speeding ticket.
 - Three main purposes of search incident to arrest:
 - a) Ensuring the safety of the police and public;
 - b) Protection of evidence from destruction at the hands of the arrestee;
 - c) The discovery of evidence which can be used at the arrestee's trial.
 - This type of search does not require a standard of reasonable and probable grounds: the only requirement is that there be a reasonable basis for doing what the police officer did.
 - The police are entitled to search an arrested person for a weapon if under the circumstances it seems *reasonable* to check whether the person is armed.
 - In this case, the purpose of the search was to take inventory. Therefore the search was not for a purpose related to the reason for the arrest, and was a breach of s. 8.
-
- *R. v. Stillman (1997 SCC)*
 - Search incident to arrest does not extend to bodily samples or impressions.
 - *R. v. Golden (2001 SCC)*
 - Police watch Golden selling rocks on all the hard blocks (Subway restaurant), and make an arrest.
 - He was strip searched in the restaurant, bent over the table. Search was not visible from outside the restaurant. He shits himself before giving up the coke wedged between his ass-cheeks.

Criminal Procedure

- Strip searches are *prima facie* unreasonable.
- Sets out rules for a lawful strip search incident to arrest at common law:
 - a) The arrest itself must be lawful;
 - b) The search must be incident to arrest.
- The common law allows for search for weapons, but a pat-down search is enough.
- Police have to meet the higher threshold of reasonable and probable grounds to conduct a strip search.
- They must also be conducted in a manner that is consistent with s. 8, and that will include a thorough assessment of the way in which the search is done with an eye on preserving the dignity of the person being searched.
- In this case, it was not done in such a reasonable manner, as the station was 2 minutes away, there was no urgency to conduct it in the Subway, and the evidence was not going to be lost by going to the station.
- There are different rules that apply to strip searches in a custodial setting.

ii) Emergency Search Power

- *R. v. Godoy (1999 SCC)*
 - Recognized the common law power of the police to force entry into a private residence where they have reasonable grounds to believe that an occupant is in distress and entry is necessary to protect life and prevent serious injury.
 - This case involved a 911 hang-up, which gives the police the grounds necessary to enter.
 - This power is limited only to the protection of life and safety. Once they have entered the home, no right to conduct an extensive search.
 - However, other illegal items in plain view are then fair game (ie bong on the table).

iii) Dog Sniff Searches

- *R. v. Kang-Brown (2009 SCC)*
 - Police see suspicious looking Kang-Brown at the Calgary bus depot, approach him (but no detention), and ask him questions.
 - He gets jumpy, police bring over sniffer dog, indicates presence of drugs, arrest made.
- *R. v. A.M.*
 - Police conducted a sweep of a school after getting invitation to do so by principle. Students and parents had been made aware of this policy.

In both these cases it was found that there was a reasonable expectation of privacy and the searches were found to be unconstitutional.

The common law power to conduct a sniff search is based upon a reasonable suspicion.

E) CONSENT SEARCHES AND SEIZURES (WAIVING S.8 PROTECTION)

- *R. v. Mellenthin (1992 SCC)*
 - The Crown needs to give evidence that the person detained has made an informed decision to consent to the search based upon an awareness of their rights to refuse to respond to the questions or to consent to the search.

- *R. v. Borden (1994 SCC)*
 - The police had 2 ongoing sexual assault investigations.
 - Borden agreed, through a signed consent form, to provide a blood sample for one of their investigations. They did not tell him it would be used in another case.
 - Police needed to tell him that it would be used in another case.
 - In order for the waiver of a right to be free from unreasonable search to be effective, the person purporting to consent must be possessed of the requisite informational foundation for a true relinquishment of the right. They must have sufficient information available in order to make the preference of consenting or not consenting meaningful.

- *R. v. Arp (1998 SCC)*
 - The obligation imposed on the police to disclose information only extends to the disclosure of anticipated purposes known to the police at the time the consent was given.
 - Therefore the consent given to one case to take blood samples was valid for another case 30 months later, because he was not a suspect for the case that had yet to open.
 - Therefore there was no deception, and he should have known that they would have his DNA on record.

- *R. v. Wills (1992 ONCA)*
 - An essential condition for valid consent is that the person giving it has the authority to do so.
 - Wills was driving when he was in an accident which killed his 2 passengers. After blowing into a RSD, which was not properly calibrated and gave the officer's present the impression that he was not impaired, he blew .128 in the intoxilyzer and was charged with impaired driving causing death.
 - To be valid, the consent must align with the following 6 factors, established by the Crown on a balance of probabilities:
 - a) there was a consent, express or implied;
 - b) the giver of the consent had the authority to give the consent in question;

- c) the consent was voluntary in the sense that that word is used in Goldman, supra, and was not the product of police oppression, coercion or other external conduct which negated the freedom to choose whether or not to allow the police to pursue the course of conduct requested;
 - d) the giver of the consent was aware of the nature of the police conduct to which he or she was being asked to consent;
 - e) the giver of the consent was aware of his or her right to refuse to permit the police to engage in the conduct requested; and,
 - f) the giver of the consent was aware of the potential consequences of giving the consent.
- In this case Wills got off because the 6th factor was not met: he did not know that the RSD was not calibrated properly, and did not know that the officer was still undecided as to whether or not he was going to press charges.

F) PLAIN VIEW SEIZURES

- *R. v. Buhay (2003 SCC)*
 - At the Winnipeg bus depot, the police witness 2 people putting a bag in a locker, and notice the slight smell of marijuana.
 - After they leave, they go to the locker and smell marijuana through the vents.
 - Believing that they did not have the requisite grounds to get a warrant, the police get the security guards to open the locker.
 - There is found to be a reasonable expectation of privacy in bus depot lockers: there is a fee, you get a key, and there is no mention that searches will be conducted anywhere. Similar to a hotel.
 - The crown contends the *Plain View Doctrine* applies because the security guards put it in the plain view of the police.
 - This fails because the doctrine requires that the police have prior justification for the intrusion into the place where the seizure occurred in the first place.
 - The police did not have prior authorization to enter the locker without a warrant.

4) Arrest

The big cases that you need to know for this area are *Storrey* and *Feeney*. Arrests are a very severe, important use of state power. Arrest occurs when a person is seized or touched with the intention to detain, or words are spoken indicating the intention to arrest. Arrest is a very intrusive, and can be effected with the use of lethal force if necessary (CCC).

A) STATUTORY POWERS

S. 494 CCC – Citizen’s Arrest: Everyone can arrest someone seen committing an indictable offence without a warrant. It also allows anyone who has reasonable grounds to believe that an individual has committed a criminal offence and is escaping from those with lawful authority to arrest to then make an arrest. People are also allowed to effect an arrest when they find someone committing (or apparently committing) an offence against their property.

S. 495(1)(a) CCC – Police Arrest: Police can arrest on reasonable and probable grounds when they believe that an individual has committed, or is about to commit, an indictable offence. S. 495(1)(b) provides that a police officer can arrest individuals who are committing, or apparently committing, a summary conviction offence. If they do not witness it, they must procure a warrant before making the arrest.

S. 495(2) is a limitation on s. 495(1). In response to the sense that police were exercising an unfettered ability to arrest too frequently, this section was introduced and says that police should not arrest without a warrant in: a) s. 553 Offences: indictable offences that go to Provincial Court; b) Hybrid Offences, and; c) Summary Conviction Offences. They are still able to arrest when it is in the public interest to do so. I understand this to mean that they will make the arrest, but then release the person on a summons, recognizance, or appearance notice shortly thereafter rather than forcing them to apply for bail.

S. 31(1) CCC – Breach of the peace – Police can arrest on this basis, but there is no corresponding offence for ‘breaching the peace’ – therefore it is unclear how much the police use it, follow it up with charges or how long they detain people for under this power.

- *R. v. Storrey (1990 SCC)*
 - Americans are driving back to the US in Canada when they are attacked. They pick 5 lookalikes, and name a rare car that the attackers were driving.
 - While searching for the car, the police pull up a photo of an owner who looks very similar to one of the lookalikes. This person has also got a record for crimes of violence. Officer concludes that he has reasonable and probable grounds, and makes the arrest.
 - Storrey is then identified by the witnesses.
 - Issue: did the officer have the necessary reasonable and probable grounds to make the arrest?
 - a) The officer must subjectively have the reasonable and probable grounds
AND
 - b) The court must objectively recognize whether there was reasonable and probable grounds.
 - In this case there was plenty of evidence to get both subjective and objective RPG.

B) CONSTITUTIONAL IMPLICATIONS

- *R. v. Feeney (1997 SCC)*
 - An 85 year old man was murdered, and distinctive cigarettes were left at the scene.
 - Feeney was spotted walking away from an accident involving the deceased's car.
 - The police go to his trailer, where there is no answer to their knock. They go in, find him sleeping, and wake him up.
 - They tell him to get out of bed (detention). Moving him to better light, they see blood and make the arrest.
 - Excuses are given to the blood, but the police also notice the cigarettes in the trailer.
 - Feeney expresses his desire to speak to a lawyer, but the interview continues.
 - Issue goes only to whether the arrest was made lawfully. In order to be lawful, an arrest made following forced entry into a private home must comply with s. 495(1)(a) and:
 - a) The officer must have reasonable grounds to believe that the person is in the home;
 - b) A proper announcement must be made;
 - c) The officer must believe that reasonable grounds for the arrest exist;
 - d) Objectively, reasonable and probable grounds for the *de* arrest exist.
 - In this case, the officer did not subjectively believe that he had reasonable grounds to make the arrest before entering the trailer and finding more evidence.
 - Nor was the objective test met by the court.
 - EVEN IF THESE CONDITIONS HAD BEEN MET, IN THE *CHARTER* ERA IT WOULD NOT HAVE BEEN ENOUGH
 - Because of s. 8, individual rights outweigh societies interests in allowing unwarranted arrests inside private residence's.
 - Exceptions do exist, with the only example given being that of hot pursuit.
 - An arrest warrant is insufficient to trespass into a residence, it is now necessary for the police to get what is known as a Feeney Warrant.
 - In order to get a Feeney Warrant, the police must show two things:
 - a) That there are reasonable grounds for the arrest;
 - b) That there are reasonable grounds to believe that the person is at the address named.

5) Questioning

Because the police do not have any legal powers to question people, they are forced to rely on a) persuasion or b) trickery to convince people to talk to them. Because police may abuse their physical and psychological advantage, the law regulates these efforts.

This regulation has three key components. First, the common law confessions rule requires the Crown to prove that the defendants inculpatory statements were made voluntarily. S. 7 of the *Charter* limits the ability of the police to use covert operatives to obtain statements from the suspect, as well as prohibiting the state from using legally-compelled statements in some cases. S. 10 obliges the police to tell people the reasons for their detention, their rights to speak to a lawyer, and give them a reasonable opportunity to do so before questioning them.

No good can ever come from answering police questions. Exculpatory statements are not admissible, whereas inculpatory statements are.

A) THE COMMON LAW CONFESSIONS RULE

This common law rule prohibits the admission of statements made by suspects to the police, or other “persons in authority”, unless the Crown can show, beyond a reasonable doubt, that the statements were voluntary.

The confession rule only applies to statements made to persons known by the suspect to be in a position of authority over the investigation or prosecution.

Involuntariness may arise from one or more of the following (*R. v. Oickle 2000 SCC*):

1. Threats or promises:

- a. An explicit offer by the police to provide lenient treatment in return for a confession is a very strong inducement, and will result in an exclusion in almost all circumstances.
 - i. “Charge will be of manslaughter if you confess to murder” – Not admissible.
- b. An offer of psychiatric assistance in exchange for a confession will require a contextual approach of addressing the entirety of the circumstances, and may not result in omitting the confession (*R. v. Ewert (1991 SCC)*).
 - i. “We can get you the help you need if you confess” – requires looking at circumstances.
- c. The threat or promise does not need to be aimed at the accused in order to have a coercive effect, and will again require looking at the entirety of the circumstances. The key will be in determining whether the relationship is sufficiently close that “the immunity of one is of such vital concern to the other that he would untruthfully confess to preserve it”.
 - i. “I won’t charge your daughter if you confess” – not admissible.
- d. Saying “it would be better if you confess” have excluded confessions. Saying “it would be better if you told the truth” does not automatically result in an exclusion, only a comprehensive look at the circumstances.
- e. Confessions that result from spiritual exhortations or appeals to the conscience or morality are admissible, because the officer is not offering anything.
 - i. “You will feel better if you confess” is admissible.

2. Oppressive interrogation conditions:

- a. Best example of oppressive interrogation techniques comes from *R. v. Hoilett* – left naked in a cold cell for 2 hours, woken up at 3am for interviewing, fell asleep 5 times in interview, requested warmer clothes and tissue many times, which were refused.
- b. Under inhumane conditions, it is unsurprising to find suspects confessing to escape those conditions. Factors would include the deprivation of food, clothing, water, sleep, medical attention, access to counsel and excessively aggressive, intimidating questioning.

- c. Using non-existent evidence will elicit a comprehensive look at the circumstances in a *voir dire*.
3. **Diminished capacity:**
 - a. The operating mind requires that the suspect knows what they are saying and that they are saying it to police officers who can use it to their detriment – *R. v. Whittle*
4. **Police Trickery:**
 - a. Unlike the first three headings, this requires a distinct inquiry.
 - b. Police are allowed to use tricks and other forms of deceit, but are prohibited from conduct that would **shock the community** – *R. v. Rothman*
 - i. Examples are police pretending to be a lawyer or chaplain, or injecting truth serum under the guise of giving medical care.

****Bottom Line – A confession will not be admissible if it is made under circumstances which raise a reasonable doubt as to voluntariness.**

- *R. v. Hodgson (1998 SCC)*
 - Defines “person in authority”.
 - Hodgson is accused of sexually assaulting a girl he babysat. Upon being accused of this by the family, he told them that he was sorry. The police were called and he was arrested.
 - Generally, persons in authority are those who are formally engaged in the arrest, detention, examination, or prosecution of the accused.
 - In order for a person to be recognized as a person in authority, there must be a subjective belief that the person can effect the prosecution and an objective realization that they *are* a person of authority.
 - In a case by case basis, this could include a parent, doctor, teacher or employer. The mere fact that they wield some personal authority is not enough to establish them as a person of authority.
- *R. v. Spencer (2007 SCC)*
 - In *Oickle*, the court suggested that the critical factor in evaluating an alleged inducement is whether it can be characterized as *quid pro quo*.
 - In this case, the accused was told that he could not have a visit with his girlfriend until he confessed.
 - The court found that this was a *quid pro quo* inducement, but that in the context of other factors, was not sufficient enough to render his statement inadmissible.
 - Spencer was savvy and had experience dealing with the police.

B) “MR. BIG” SCHEMES

Criminal Procedure

The confession rule only applies to statements made by the accused to persons known by the suspect to be in a position of authority over the investigation or prosecution.

The community shock standard has been applied to statements made to undercover agents.

Mr. Big schemes are elaborate police investigations that are designed to trick suspects into giving confessions to undercover agents who are posing as criminals. Canada and Australia are the only countries in the world that allow the use of these techniques.

The police create a gang, befriend the suspect, give them lots of money for menial jobs, and tell them that they have a mole in the police that can manipulate evidence to protect the suspect. They frequently tell the suspect that their arrest is imminent, and that they might be able to find someone with a terminal illness to take the fall. But before they can offer assistance, they need to hear all about their criminal past.

The reliability of the confessions taken from these schemes is tainted because there is an obvious inducement. They may want a job, to get rid of evidence, or to protect themselves from harm at the hands of Mr. Big. They are therefore more useful when they reveal unique evidence that only the murderer would know or can be used as a piece of corroborative evidence.

Confessions of any sort are not easily explained away, particularly to juries.

The police are also operating the scheme with a dangerous amount of tunnel-vision: they are working towards getting a confession with a strong theory about who committed the crime, and yet they actually do not know for sure.

C) EVIDENTIARY ISSUES

Some courts find that where recording equipment is available but not used and police deliberately interrogate, the failure to record will place a heavy burden on the Crown to prove voluntariness beyond a reasonable doubt (*R. v. Moore-McFarlane 2001 ONCA*).

Other courts find that the failure to record is simply one factor of many to be considered in determining voluntariness (*R. v. Ducharme 2004 MBCA*).

At common law, statements made following an involuntary confession may also be considered involuntary, and are therefore inadmissible. The “derived confessions rule” applies if either the tainting features which disqualified the first confession continued to be present or if the fact that the first statement was made was a substantial factor contributing to the making of the second statement. It is unclear whether the second confession needs to be made to a person in authority.

Historically, where an involuntary confession leads to the discovery of physical evidence, courts have admitted both the evidence and the portion of the confession that led to the finding of that evidence. It is not clear whether this is still part of the common law (*R. v. Sweeney 2000*). The *Charter* does allow for the disqualification of both the statement and evidence in some circumstances through s. 7 and 24(2).

D) SECTION 10 OF THE *CHARTER*

s.10 – Everyone has the right on arrest or detention:

- (a) to be informed promptly of the reasons therefor;
- (b) to retain and instruct counsel without delay and to be informed of that right; and
- (c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

If violated, s. 24(2) permits the exclusion at trial of statements and other evidence obtained through a violation of these rights.

These rights are triggered by an arrest or detention.

In Canada, it is not required that the police inform people whether they are legally obliged to cooperate. Instead, the police are allowed to approach people and ask them questions without informing them of their legal status. People often assume that they must comply with police requests. Because of this, the courts recognize that s.10 protection should sometimes extend to suspects who are not legally detained in the usual sense of the concept.

- *R. v. Moran (1987 ONCA)*
 - Not the famous *Moran* case.
 - Issue of defining detainment.
 - Husband comes home, finds his deceased wife. The accused was having an affair with the deceased.
 - The police ask the suspect if they can speak with him, either at his house or at the station. He agrees to meet them at the station. Asked if he can do a polygraph, he agrees.
 - a) NOTE: polygraph statements are not admissible at trial. Never suggest someone agrees to it.
 - The accused gave a number of statements to the police over a couple of weeks.
 - At trial, the accused says that it was his impression that he went to the station to talk to them because he thought they would come and get him if he did not go.
 - He also said that had he been advised of his right to retain a lawyer he would have remained silent and done so.
 - Issue was whether he was detained within s.10(b) when he was interviewed by the police.
 - Court finds 7 factors that are relevant, but not exhaustive, in determining whether a person who was questioned by police was detained at the time of questioning:
 - a) The precise language of the officer in requesting the meeting. Whether or not they suggested the interview be conducted at the station or their home;
 - b) Whether the person was escorted to the police station or came by themselves;
 - c) Whether the person left at the conclusion of the interview or was arrested;

- d) The stage of the investigation, and whether the questioning was part of a general investigation or whether the person was already a suspect;
- e) Whether the police had reasonable and probable grounds to believe that the suspect had committed the crime;
- f) The nature of the questions, and whether they were of a general nature or pointed to the accused guilt.
- g) The subjective belief of the accused that they are detained. Relevant but not decisive, will take into consideration intelligence, age, and lack of sophistication.

i) S.10(a)

Everyone has the right on arrest or detention:

(a) to be informed promptly of the reasons therefor;

It requires that police must tell suspects, “in clear and simple language”, about every offence that they are under investigation for, and if the nature of the investigation changes such that the suspect’s jeopardy changes significantly, police must inform the suspect of that fact.

S.10(b) cannot be adequately exercised if 10(a) is not done so first.

- *R. v. Evans (1991 SCC)*
 - s.10(a) reasons for detention do not have to be technically precise.
 - Detainment went from being on the basis of marijuana to murder.
 - Repeating the formalities of s.10(a) are not necessary, but giving the suspect an opportunity to get a lawyer is important.

- *R. v. Borden (1994 SCC)*
 - Case is already referred to – police seized blood for a double purpose.
 - Once the police had detained for the second purpose, they had a duty to let the accused know about that purpose.

ii) S.10(b)

Everyone has the right on arrest or detention:

(b) to retain and instruct counsel without delay and to be informed of that right;

The purpose of s.10(b) is to provide detainees with an opportunity to be informed of their rights and obligations under the law, and to obtain advice on how to exercise those rights and obligations. This is all

done with an eye on ensuring that those persons arrested or detained are treated fairly in the criminal process.

This does not prohibit police from pressuring people into giving self-incriminating statements, but attempts to strike a balance between a suspect's interest in avoiding making self-incriminating statements and the states need to obtain confession evidence to deter, prosecute, and punish crime.

- *R. v. Brydges (1990 SCC)*
 - The accused was arrested in Manitoba for a murder that took place in AB, where he was a resident. He was interviewed by an EPO in Brandon.
 - The accused was read his 10(b) rights, and expressed an interest in speaking with a lawyer but was concerned that he could not afford to do so. The EPO was unsure about the availability of Legal Aid in MB.
 - The failure of the police to inform him about the existence of legal aid or duty counsel constituted a violation of his s.10(b) rights and resulted in an exclusion of evidence, and a subsequent acquittal.
 - **Police now have an obligation to make accused persons aware of Legal Aid services.**

★ The following cases are important and examinable.

- *R. v. Bartle (1994 SCC)*
 - Sets out the next step after *Brydges* – police now have a duty to make the accused aware of the ability to contact legal aid or duty counsel for immediate, preliminary legal advice, and to provide the accused with the 1-800 number.
 - Accused was picked up for drunk driving, and was read the standard caution which now, because of *Brydges*, included notifying him of the free legal advice available through Legal Aid.
 - Arrested on a Friday night, the accused reasonably thought that the next time he could contact a lawyer would be Monday morning. The police did not correct this assumption.
 - a) At the roadside, he was not told of the existence of a toll free number through which he could receive free, preliminary and immediate legal advice. Although he was told at the station, he made incriminating statements between getting pulled over and arriving at the station. He should have been told at the roadside, even though there were no phones.
 - b) The reference to Legal Aid was confusing because it implied that it required an application once charged, and would take some time. The caution failed to communicate that it was available in the pre-charge stage.
 - While it is possible to waive right to exercise s.10(b) rights, valid waivers are rare.

- a) The waiver must be established by the Crown, and the standard is high: must show the intention to waive the right was clear, unequivocal, and done with a full understanding of their rights.

- *R. v. Baig (1987 SCC)*
 - Absent evidence to the contrary, once the police have communicated the required information to the suspect, they can then safely assume that they understand it.

- *R. v. Manninen (1987 SCC)*
 - Accused is picked up for a robbery 2 days after the offence. Upon arrest and being read his rights, he asserts that he is not saying anything until he speaks to his lawyer.
 - Upon making a clear assertion of his s.10(b) rights, there are at least two duties imposed upon the police:
 - a) They must provide the detainee with a reasonable opportunity to exercise their right to retain and instruct counsel without delay.
 - b) They must cease questioning or otherwise attempting to elicit evidence from the detainee until he has had a reasonable opportunity to retain and instruct counsel.

- *R. v. Ross (1989 SCC)*
 - Unable to reach his lawyer, the respondent said that he did not want to speak to another lawyer.
 - The mere fact that he did not want to call another lawyer cannot be seen as a waiver of his right to retain counsel.
 - Accused or detained persons have the right to choose counsel and it is only if the lawyer cannot be available within a reasonable time that the detainee should be expected to exercise right to counsel by calling another lawyer.
 - While they were waiting, the accused parties were told to participate in a line-up.
 - The police have a duty to cease questioning or otherwise attempting to elicit evidence from a detainee until they have had a reasonable opportunity to exercise their 10(b) right to counsel.
 - They did not have a real opportunity in this case to do so, and there was not any urgency or compelling reason which justified proceeding with a line-up at that time.
 - Reasons will exist to do so, as is the case with driving while impaired charges, where it is required to gather a breath sample within two hours of the arrest.

- *R. v. Smith (1989 SCC)*
 - Smith was arrested, and told about his right to counsel. He didn't express a wish to exercise that right until 2 hours had passed at the station, at 9pm. He refused to call

until the morning, even upon the police suggesting that someone may be in the office.

- The duties imposed on the police in *Manninen* are suspended when the arrested or detained person is not reasonably diligent in the exercise of their rights, as the court finds was the case here.

- *R. v. Burlingham (1995 SCC)*
 - Over the course of four days, the accused is interrogated vigorously and manipulatively. The police make disparaging remarks about the trustworthiness of his lawyer, and hold out an offer that did not exist and that they did not share with defence counsel.
 - The accused then made incriminating statements, and took the police to the area on the frozen Kootenay river where he disposed of the murder weapon.
 - S.10(b) protects an accused from having his lawyer belittled with the express goal or effect of undermining their confidence in counsel.
 - The improper conduct with regards to the plea bargain constituted an infringement of s.10(b), as the officers pressured the accused into accepting a deal without speaking to his lawyer.
 - The breach by the police was sufficient enough to warrant an exclusion of the statement to the police, the statement made to his girlfriend, and the gun that they found as a result.

Despite *Burlingham*, courts have allowed extensive post-arrest questioning, even when detainees ask to speak to their lawyers or tell police that they do not want to speak. In *R. v. Singh*, the courts upheld the confession obtained after the accused said that he wanted to speak to his lawyer *again* eighteen times. S.10(b) was not considered in that case, however, and is differentiated in that he already spoke to his lawyer.

Different rules also apply to the questioning of young offenders, and is governed by the *Youth Criminal Justice Act*.

E) SECTION 7 OF THE *CHARTER*

Right to “life, liberty, and security of the person”. Interpreted for the purposes of questioning as a right to silence, which is a part of the overarching principle against self-incrimination.

- *R. v. Hebert (1990 SCC)*
 - After consulting counsel and advising the police that he did not wish to make a statement to them, was tricked into making a statement to an undercover officer in the cell he was then put in.

- Sets out 4 principles:
 - a) Nothing in the confessions rule prohibit the accused from being questioned in the absence of counsel after the accused has retained counsel.
 - Police persuasion, short of denying the suspect the right to choose or depriving them of an operating mind, does not breach the right to silence.
 - b) The rights only apply after detention. Undercover operations prior to arrest do not raise the same considerations.
 - c) The right to silence, based upon the accused persons right to choose freely whether to speak to police or remain silent, does not affect voluntary statements made to cell mates.
 - The violation of the detainee's rights only occurs when the crown acts to subvert their right to choose not to make a statement.
 - d) There is a distinction between the use of undercover agents to observe the suspect and actively elicit information in violation of a suspect's right to remain silent.
 - If a suspect speaks to a cellmate without eliciting behaviour, it is by their own choice and they have accepted the risk that this person may speak to the police.
 - Even where detainee's rights have been violated, the evidence may still be admitted. Only where the court is satisfied that its reception would likely bring the administration of justice into disrepute can it be rejected according to s.24(2) of the *Charter*.
 - Going from a passive listener to actively soliciting information will violate s. 7.
- *R. v. Broyles (1991 SCC)*
 - The police arranged to have a friend visit the accused in jail, wearing a wire. The recording established that the accused knew the time of the deceased's death, and was admitted at trial.
 - The friend encouraged the accused to ignore his lawyer's advice to remain silent and elicited the information. All of the evidence was excluded on the basis that the friend became a state agent.
 - TEST: Would the exchange between the informer and the accused have occurred, in the form and manner in which it did take place, *but for* the intervention of the state or its agents?

6) Intake Procedures

Once arrested, a person who is not released must be taken in front of a justice "without unreasonable delay" – s. 503(1)(a) of the *Criminal Code*.

Delays that are allowed include:

- Securing or preserving evidence,
- Fingerprinting and photographing,
- Conducting a line-up,
- Interrogation.

There is a 24 hour limit to the amount of time the police can take to conduct those actions, however (s.503(1)(a)). If the accused is not released or taken in front of a justice in that period, the detention becomes unlawful and means that s. 9 of the *Charter* is violated and the accused can then seek a remedy under s. 24(2).

Between the arrest and the first court appearance, the charge will formally be laid through the swearing of 'information' before a justice. The party swearing the document will have to have 'personal knowledge' or 'believe on reasonable grounds' that the person arrested committed the offence specified.

s.10(c) of the *Charter* guarantees the right to go in front of a judge or justice – *habeas corpus*

- *R. v. Pilcher (1981 MB Prov. Ct.)*
 - Gives a good definition of the reasonable and probable grounds necessary for laying an information:
 - “an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.

Justice's don't have discretion to refuse an information for an arrested individual. In giving pre-arrest warrants or summons they *do* have discretion (*R. v. Jeffrey 1976 Ont. Prov. Ct.*).

7) Bail

S.11(e) of the *Charter*:

Any person charged with an offence has a right:

e) not to be denied reasonable bail without just cause

Other than the decision at trial, the bail hearing will provide the most important judgment in the criminal process. Underwent a monumental change in 1970 with the *Bail Reform Act*. Prior to this reform police were holding approximately 95% of those that could be released. The new approach emphasizes release over detainment.

The practice today is somewhat divorced from the legislative intent. Approximately 25% of those arrested are denied bail.

Not all offences favour release. S.469 offences have to go before a superior court judge to make a bail application, and the presumption of release does not apply. Attempted murder is the exception to this rule.

Nor does the presumption of release apply to those already on bail for an indictable offence, crimes relating to organized crime, trafficking, charged with failing to comply with the terms of an earlier release order or where the person is not a resident of Canada. In those cases there is a reverse onus on the accused to show why they should be released on bail.

- *R. v. Pearson* (1992 SCC)
 - Upholds the constitutionality of the reverse onus bail provisions.
 - There are 2 distinct rights in s.11(e) of the *Charter*:
 - a) The right to obtain bail;
 - b) The right to have that bail set on reasonable terms.
 - A reverse onus bail condition is a denial of bail for s.11(e), and must be with 'just cause' in order to be constitutionally justified.
 - In this case, s. 515(6)(d) was found to be a denial of bail that was justified with just cause because (a) bail was denied only in a narrow set of circumstances, and (b) the denial of bail is necessary for a proper functioning bail system and is not done for any extraneous reason.

S.515(10) of the *Criminal Code* sets out the grounds for ordering an accused's detention. An accused can be detained for one or more of the listed grounds. **** KNOW FOR EXAM ****

1. Primary Ground: s.515(10)(a) – allows for detention where it is “necessary to ensure his or her attendance in court in order to be dealt with according to law.”
 - a. Considerations include whether the accused has roots in the community: a job, family, residence and friends all weigh in favour of release.
 - b. Past record while on bail also considered. Most recent record is applicable.
2. Secondary Ground: s. 515(10)(b) – allows for detention where it is “necessary for the protection or safety of the public, including and victim or witness to the offence, having regard to all the circumstances including any substantial likelihood that the accused will, if released, commit a criminal offence or interfere with the administration of justice”.
 - a. Look to the accused's record and assess whether there is a substantial likelihood that they will commit another criminal offence or interfere with the administration of justice.
 - b. Even if no previous record, if the accused is charged with a serious personal injury offence and the evidence seems overwhelming, can easily be rationalized as being in the interests of public safety.
3. Tertiary Ground: s.515(10)(c) – Allows for detention where it is necessary to maintain confidence in the administration of justice.
 - a. *R. v. Hall* (2002 SCC) says that detention can be granted under this section only when it is necessary to maintain confidence, not only advisable. The minority in that case says that tertiary grounds allow for irrational fears to influence bail, and should therefore be scrapped.

Evidentiary rules at bail hearings are relaxed by s.518 of the *Criminal Code*. It authorizes the presiding justice to “receive and base his decision on evidence considered credible or trustworthy by him in the circumstances of each case”. This generally involves the prosecutor reading a “Show Cause Report” that contains a summary of the allegations. There are inherent issues with these reports, in that they tend to gloss over many of the shortcomings of the Crown’s case.

As such, bail hearings are rather ineffective at determining the strength of a case, and instead focus on flight and public safety concerns.

8) Charge Screening

Charge screening is the process of reviewing the efforts of the investigative authorities and deciding whether to proceed with the prosecution. This decision is generally made by a prosecutor, either provincial or federal, and should occur shortly after the charges are laid. In practice it can take weeks or even months for this review. It is a constitutional principle that the Attorney General, or anyone from his office, must act independently of political considerations.

According to official policy, the charges may only go forward if:

- i. The evidence meets a threshold of conviction: there must be a “reasonable likelihood of conviction”, and;
- ii. It is in the public interest to proceed.

The discretion exercised by the screening prosecutor includes assessing the type of offence, the penalty sought, the personal circumstances of the accused (such as health issues, whether the harm was remedied, remorse shown and rehabilitative steps taken), the time and cost of the trial, and the compliance of witnesses.

There is no official charge screening process in Alberta. This can result in a formal review taking place shortly before the trial. In British Columbia is typically done prior to the information being laid.

9) Disclosure, Lost Evidence, & 3rd Party Records

A) DISCLOSURE

Pre-*Stinchcombe*, the Crown had a duty to bring forward evidence of every material fact known to them, whether favourable to the accused or otherwise. This obligation came out of the prosecutor’s non-partisan role within the justice system, which was best characterized by the SCC in 1955 in *R. v. Boucher*:

“Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty that which in civil life there can be none charged with greater personal responsibility. It is to be

efficiently performed with an ingrained sense of dignity, the seriousness and the justness of judicial proceedings.”- Rand J.

This obligation could be fulfilled by the prosecution by either calling the evidence at trial or making the defence aware of it. In practice, the application was slippery. It was the prosecutions subjective perception of what was material, and were left with a lot of discretion in this regard.

- *R. v. Stinchcombe (1991 SCC)*
 - Crown called a witness at a preliminary enquiry who gave evidence favourable to the defence, they then refused to call them at trial because they were incredible.
 - Created the duty on the Crown to disclose all relevant information. The documents they gathered were no longer seen as being Crown property for the purposes of a conviction, but public property to be used to ensure that justice is done.
 - Certain information can be withheld, such as the names of informants, witnesses addresses.
 - The duty to disclose extends to the police, who then have a duty to provide all relevant information to the Crown, and the Crown has a concomitant obligation to request and receive this information from the police.
 - There is no corollary obligation on the defence to assist the prosecution; they are entitled to adopt a purely adversarial role towards the prosecution.
 - a) The only exceptions to this rule are giving basic information about constitutional challenges, expert witnesses, or the defence of alibi.

B) LOST OR DESTROYED EVIDENCE

- *R. v. La (1997 SCC)*
 - When the Crown loses evidence that would otherwise have to be disclosed, they must present a satisfactory explanation as to why it was lost.
 - If the explanation is reasonable, the responsibility to disclose has been satisfied.
 - If it is not reasonable, it could constitute a breach of the right to a fair trial, resulting in s. 7 *Charter* relief.
 - There is a responsibility on the police and crown to safeguard evidence, this duty arises out of the Crown's duty to disclose.
 - In determining the reasonableness of the explanation, the court analyses the circumstances surrounding the loss.
 - a) Perceived relevance at the time of investigation. As relevance increases, so does the degree of care for its preservation that is expected.
 - b) Will the conduct arising from a failure to disclose constitute an abuse of process?
 - Eg. deliberate destruction, gross negligence.
 - Even where a satisfactory explanation is given, if the loss sufficiently impairs the accused's right to give a full answer and defence, it could result in a stay.
 - Generally, stays are only granted in the rarest of circumstances.

C) THIRD PARTY RECORDS

The natural extension of *Stinchcombe* was to allow the defence to access potentially relevant information in the hands of third parties, for example the therapeutic records of a complainant in a sexual assault case. This is not analogous, however, as in the first case it is a weighing of state interests and accused's interests, whereas third party records introduces the complainants constitutional right to privacy and security of the person as well.

- *R. v. O'Connor (1995 SCC)*
 - **Know this case
 - Sets out the common law rules for access to confidential third party records that is favourable to the defence, which in turn creates a backlash in the public opinion.
 - The defence could get an order based on the 'likely relevance' of the record, the judge would read it first, weigh the probative and prejudicial value of the records and make a decision.

In direct response to *O'Connor*, and adopting the view that opening such records to the defendant would deter complainants of sexual offences from reporting them, Parliament erected 'rape shield' legislation in response. (s.278/279 CCC)

It is now very difficult to access third party records in sexual offences. *O'Connor* is still the law, just not with regards to sexual offences.

While applications are complicated, time consuming and potentially dangerous, it is a mistake not to pursue third party records, as they can be very relevant and exculpatory.

- *R. v. Mills (1999 SCC)*
 - Challenges the constitutionality of the 'rape shield' legislation, which is found to be constitutional.
 - Addressed the balancing of the rights of the complainant with those of the defendant, which can best be recognized as a collision of rights.

- *R. v. McNeil (2009 SCC)*
 - Provides a good summary of the *O'Connor* application process.
 - a) Accused issues a *subpoena duces tecum* under s. 698(1) and s. 700 of the *Code*, compelling the record holder to appear in court with all of the relevant documentation.
 - b) The accused files an affidavit stating why the records are likely to be relevant.
 - c) *O'Connor* application is then brought before the trial judge.
 - d) If the record holder successfully presents an argument of privilege, the application ends there.
 - e) The judge then determines whether production of the document should be compelled by applying the 2 part test from *O'Connor*:
 - Judge determines if the documents are likely relevant, and has the document produced to the court if it is.

- The judge then inspects the documents and determines whether, and to what extent, production should be ordered.

10) Elections, Preliminary Inquiries, & Preferring the Indictment

A) ELECTIONS

For many indictable offences the accused has the option to elect how they will be tried.

S. 553 offences are indictable offences where the accused must be tried in Provincial Court:

- Theft,
- Obtaining money or property by false pretenses,
- Unlawful possession of property or proceeds of crime punishable by indictment,
- Defrauding the public,
- Mischief under s.430(4)
- Counseling or conspiracy to commit any of the above crimes,
- Keeping a gaming or betting house,
- Betting,
- Placing bets,
- Lotteries,
- Cheating at play,
- Keeping a bawdy-house,
- Fraud in relation to fares,
- Breach of recognizance,
- Failure to comply with a probation order.

S. 469 offences are indictable offences where the accused must be tried in a Superior Court:

- Treason,
- Alarming Her Majesty,
- Intimidating Parliament or a legislature,
- Inciting a mutiny,
- Seditious offences,
- Piracy,
- Piratical acts,
- Murder
- Accessory to treason or murder,
- Corrupting justice (bribery),
- Crimes against humanity,

Criminal Procedure

- Attempting any of the above crimes,
- Conspiring to commit any of the above crimes.

Our focus is on the election – the choice of what type of trial (jury, judge alone) and where (Provincial Ct. or QB). Sympathies and complex legal issues will determine what election you take.

If an accused 'stands mute' and refuses to make an election, the judge will order a jury trial in QB. (No jury trials in Prov. Ct.)

If a trial in a superior court is elected, an accused or the crown are entitled to a preliminary inquiry should they request it.

S. 561 sets out the rights of reelection, but is a very complicated section of the *Code*. Electing to proceed in the Provincial Court is the most flexible option, as it allows you to re-elect up to 15 days prior to trial without the consent of the Crown.

B) PRELIMINARY INQUIRIES

In the pre-*Stinchcombe* era, the crown would choose to proceed summarily to avoid giving an accused the right to a jury and a preliminary enquiry. A valuable tool to the defence, as they can get an idea about the case being made against them.

The primary role of the preliminary inquiry is to ascertain whether or not there is a sufficient amount of evidence to warrant putting the accused on trial. This is not about the discovery of guilt, and therefore there is no application of the beyond a reasonable doubt standard.

The secondary role of the inquiry developed into an opportunity for the accused to discover and appreciate the case to be made against them at trial.

You can ask for a publication ban on preliminary inquiries, as you don't want potential jurors to hear about any of the evidence that comes out. If requested by the accused, it is mandatory.

Once the evidence has been taken by the judge, they can order the accused to stand trial for this, or any other offence. If the evidence does not pass the requisite test, they can also discharge the accused. The judge cannot assess credibility at a preliminary inquiry.

The test for a preliminary inquiry is the same for a directed verdict or non-suit motion, and is also the standard applied in extradition hearings:

Whether or not there is any evidence, upon which a reasonable jury properly instructed could return a verdict of guilty

- *R. v. Arcuri (2001 SCC)*
 - Facts resembled a mob movie, man found in the back of a distinctive Cadillac.

- Addressed the issue as to the appropriate standard to be applied to cases involving circumstantial evidence. To what extent can a preliminary inquiry justice weigh the evidence? (Being that they are not allowed to assess credibility)
- In this case the accused brought evidence at the preliminary inquiry. This is allowed but obviously very rare.
- When assessing circumstantial evidence, the judge is allowed a very limited weighing of the evidence. They cannot assess guilt, draw factual inferences or assess credibility.
- In assessing circumstantial evidence the judge must weigh all the evidence, including the defence evidence. This is not done in other cases.
- Judge must ask whether the evidence, if believed, could reasonably support an inference of guilt.

There are very limited grounds for appealing the decision of a judge at a preliminary inquiry. No statutory right of appeal, but the accused or the Crown may seek a writ of *certiorari*. This does not offer relief of legal errors, but permits review only where it is alleged that the tribunal has exceeded its statutory authority or has acted in a way that breaches the principles of natural justice.

A denial of natural justice requires a denial of procedural fairness. Eg. if a justice arbitrarily denies the accused the right to question a witness or refuses to hear submissions from counsel.

Certiorari - Writ that brings the judicial claim forward to a superior court.

Prohibition - Writ that stops the inquiry from proceeding further until an application for *certiorari* or *mandamus* is granted.

Mandamus - Writ used to compel the justice in a certain way.

Relief is also offered where there is no evidence supporting the charges. Some evidence is enough, but having no evidence will not suffice.

Because the judge can add more charges if they feel that the accused has been under-charged, it is worthwhile to forego the preliminary inquiry if the accused has been under-charged.

A judge presiding over a preliminary inquiry does not have the jurisdiction to grant *Charter* relief.

C) PREFERRING THE INDICTMENT

An Indictment is the Information of a case in QB. It is not sworn, but is prepared by a prosecutor and filed with the court on the accused's first appearance.

If certain preconditions are met, the prosecutor can prefer the indictment and go straight to trial, a process that requires the personal written consent of the Attorney General.

11) Charter Remedies

s.24 of the *Charter*:

(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such a remedy as the court considers appropriate and just in the circumstances.

(2) Where, in the proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

A) STANDING AND FORUM

s. 24 of the *Charter* only allows for the exclusion of evidence that is obtained in violation of the defendant's rights, not the rights of others. In *Edwards*, the court held that illegally obtained evidence that violated his girlfriends rights could not be excluded at his trial.

In limited circumstances third parties may be granted standing to apply for a remedy. Eg. media seeking to challenge a publication ban.

Courts of 'competent jurisdiction' mean superior courts and trial courts. When the matter is before an inferior court, the superior court should decline to exercise its discretion to award *Charter* remedies and intervene only when a trial court:

- Has not yet been assigned;
- Lacks the power to order the remedy sought;
- Is implicated in the alleged violation.

Provincial courts and courts presiding over regulatory offences can exercise s.24 remedies, but only so long as those remedies do not fall outside the ambit of the criminal law powers set out in the constitution.

Preliminary inquiry justices do not constitute courts of competent jurisdiction, although they may exclude evidence obtained in violation of the common law confessions rule.

B) SECTION 24(1) REMEDIES

Applicants for a particular remedy must have a) standing and b) apply to a court that has jurisdiction. Remedies vary for applications under 24(1) and 24(2). Applicants seeking the exclusion of evidence obtained in violation of the *Charter* follow 24(2), and all other remedies flow from 24(1). The most common remedies under 24(1) are costs, mitigation of sentence, return of the item seized, publication bans, sealing orders, disclosure orders, constitutional exemptions.

Stays can be ordered, which effectively halts the proceeding and does not allow it to be revived by the crown. The stay is rare, but are always ordered for violations of the right to be tried within a reasonable amount of time under s. 11(b). Rarely awarded for other *Charter* violations.

The ordering of a stay can be appealed to the superior court, right exists in statute.

- *R. v. Jewitt (1985 SCC)*
 - Affirmed that there is a right of ordering a stay in order to prevent the abuse of process.
 - 'There is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings', yet must only be exercised in the 'clearest of cases'.

- *R. v. Keyowski (1988 SCC)*
 - Accused stands trial for criminal negligence causing death for the third time after the first two juries hang.
 - The judge accepts the application for a stay because it would constitute an abuse of process in violation of s.7.
 - It is not necessary to show prosecutorial misconduct in order to grant a stay.
 - The court overturned the application of the stay as it was a serious charge and was not one of those 'clearest of cases' that warranted such a remedy.

- *R. v. O'Connor (1995 SCC)*
 - Case was already addressed with regards to access to third party records.
 - Issue also addressed is when non-disclosure by the Crown justifies an order to be stayed.
 - A stay of proceedings will only be appropriate when two criteria are fulfilled:
 - a) The prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial or its outcome, and;
 - b) No other remedy is reasonably capable of removing that prejudice.
 - Judges have available to them an ability to award a wide variety of relief - 24(1) is a scalpel, not an axe.

- *R. v. Regan (2002 SCC)*
 - The premier of Nova Scotia is charged with sexual assault.
 - The accused alleges various police and Crown conduct that give rise to an application for a stay: one of the investigating officers made a statement to the media against police policy, charges were laid against the advice of the Director of Public Prosecutions, an assistant Crown attorney interviewed a police witness, Crown apparently 'judge shopped'.

- This did not rise to the level of abuse of process which is egregious, vexatious, oppressive or which would offend the community's sense of decency and fair play.
- There is a very high threshold required for obtaining a stay.

B) SECTION 24(2) REMEDIES

As a threshold matter, the applicant must show that the evidence was obtained in a manner that offends the *Charter*. Then they must show that the admission of the evidence would bring the administration of justice into disrepute.

- *R. v. Strachan (1988 SCC)*
 - Only the second case ever heard by the SCC on the exclusionary rules of s. 24(2).
 - There need not be a causal link between the *Charter* violation and the evidence gathered; rather the two step process requires:
 - a) That a *Charter* violation occurred in the course of obtaining evidence, and;
 - b) A determination of whether the admission of the evidence would bring the administration of justice into disrepute.
 - This requires looking at the entire chain of events in the gathering of the evidence, a temporal link will be important but not determinative.
- *R. v. Goldhart (1996 SCC)*
 - Leading case on remoteness issue.
 - Police got a search warrant for Goldhart's residence after conducting an illegal perimeter search and smelling marijuana. They arrest him and his accomplice, Mayer.
 - Goldhart succeeds in having the marijuana excluded at trial, but his accomplice undergoes a religious transformation and gives evidence against him on which he is convicted.
 - Having regard to the entire chain of events, the court determines that the causation link is too remote, as is the temporal link.
 - Link between breach and evidence is too remote, and does not pass the 2 stage requirements.
- *R. v. Wittwer (2008 SCC)*
 - The accused gave three statements to the police. The first two were given in ways that infringed his rights, so the police went back to him for a third statement. They did not tell the accused that his first two inculpatory statements were of questionable admissibility.
 - The issue is whether the third statement was tainted by the earlier *Charter* breaches.
 - The statement can only be tainted by the earlier admissions if the breach and the statement can be said to be part of the same transaction or course of conduct.
 - The temporal and causal connection can be addressed in this analysis.

- While the temporal connection is tenuous (5 months between 2nd and 3rd interviews), the causal connection is strong (for 4 hours he did not say anything, until the interrogating officer said that he knew the content of the first 2 statements, at which point he adopted those statements).
- Subsequent confessions are seen as involuntary when a) the tainting features disqualifying the earlier statements continue to be present or b) the fact that the first statement was made was a substantial factor contributing to the making of the second statement.

ASSESSING DISREPUTE

- *R. v. Grant (2009 SCC)*
 - Made a new test for the exclusion of evidence, based not upon the punishment of police principle, but on the broad impact of the administration of justice.
 - The first branch of the test, determining whether or not a *Charter* breach occurred in the process of gathering evidence, remains the same.
 - In determining whether the admission of evidence would bring the administration of justice into disrepute, there are now 3 avenues of inquiry:
 - a) The seriousness of the *Charter* infringing state conduct (where an admission may send the message that the justice system condones serious state conduct);
 - b) The impact of the breach on the *Charter*-protected interests of the accused (an admission may send the message that an individual's rights count for little);
 - c) Society's interest in the adjudication of the case on its merits.

1) The Seriousness of the *Charter* Infringing State Conduct

The seriousness of the breach involves assessing the blameworthiness of the conduct. The more severe or deliberate the state conduct that led to the *Charter* violation, the greater the need for the courts to disassociate themselves from that conduct by excluding evidence.

This focuses mostly on the state of mind of the police officer, but extends to include systematic or institutional failures in *Charter* compliance. The conduct will also be more serious where it is part of a larger pattern of *Charter* violations committed during the investigation.

There are three clear considerations that will colour the seriousness of the breach:

1. Blameworthiness of the conduct
 - Good faith/bad faith of the police,
 - Misleading or false evidence from the police concerning *Charter* compliance,
 - Erroneous or incomplete legal advice from the Crown,
 - Pattern of violations.
2. Degree of departure from charter standards
 - Substantial or merely technical breach of *Charter* rights,

- Racial profiling,
 - Abusive police conduct,
 - Exploiting the vulnerability of the accused (mentally challenged/intoxicated)
3. Extenuating circumstances
- Need to prevent the disappearance of evidence
 - Emergency where public or police safety is at stake

Essentially look to see whether or not the behaviour was of the type that the court should distance itself or risk losing credibility in the eyes of the public

2) Gauging the Impact of the *Charter* Violation on the Protected Interests of the Accused

This focuses on the seriousness of the impact of the breach on the *Charter*-protected interests of the accused. A relatively non-intrusive breach must be weighed against the absence of *any* reasonable basis for justification.

The way the impact is assessed varies with the kind of evidence sought to be admitted:

a. Statements

- Generally speaking, the degree of intrusion that occurs when statements are unconstitutionally obtained is high because the statements by the accused engage the principle of self-incrimination, which is one of the cornerstones of our criminal law system.
- Unconstitutionally obtained statements are presumptively inadmissible.

b. Bodily Samples

- The degree of intrusion depends upon the extent to which privacy, bodily integrity and human dignity are compromised given the nature of the samples and the manner in which they are secured.
- There is no presumption of exclusion, but it should not be routinely admitted, either.

c. Non-bodily Physical Evidence

- The degree of intrusion is primarily influenced by the nature of the search or seizure that produces the evidence, and how compromising that search is of the privacy interests of the accused.

d. Derivative Evidence

- Eg. gun in the river, body in sewer.
- Because derivative evidence comes from unconstitutionally obtained statements, the degree of intrusion will likely be

significant unless it can be confidently be concluded that there is a likelihood that the evidence would have been discovered even if there had been no *Charter* violation.

3) Judging Societies Interests in an Adjudication on the Merits

Two central factors exist in examining the impact of exclusion on the truth-seeking function: a) the reliability of the evidence, and b) the importance of the evidence to the prosecutions case.

Exclusion of relevant and reliable evidence may undermine the truth-seeking function of the justice system and render the trial unfair from the public perspective, thus bringing the administration of justice into disrepute in that way.

The importance of the evidence to the prosecutions case is also considered, as the exclusion of the evidence may impact more negatively on the administration of justice where the remedy effectively guts the prosecution.

The seriousness of the offence is largely immaterial, as s.24(2) rights are meant to be engaged across the board, not only for the least serious offences.

Finally, the courts are to consider the administration of justice in the long term, and not the immediate impact on how people view the justice system.

- Finally, the courts must weigh all three of the considerations to determine whether or not the evidence should be excluded.
- While some factors may favour inclusion and others exclusion, there is no mathematical equation that can be relied upon to determine what the correct decision is. It is not a question of whether the majority of the relevant factors favour inclusion or exclusion.

- *R. v. Harrison (2009 SCC)*
 - Decision was released at the same time as *Grant*, applied the test made in that case.
 - Police found 33kg of cocaine as the result of an unconstitutional search of a vehicle.
 - a) Seriousness of the *Charter* breach:
 - There was virtually no reasonable grounds for the initial traffic stop.
 - The violations were not deliberate, but reckless and showed an insufficient regard for *Charter* rights.
 - The evidence given by the police officer was misleading
 - Overall, weighs in favour of exclusion.
 - b) Impact on the *Charter* protected interests of the accused:
 - While there is not a huge expectation of privacy while driving, it is impacted by the absence of *any* reasonable basis for justifying the search;
 - In this case there was no justification for the search, so the impact was significant, but not egregious.
 - Overall, weighs in favour of exclusion.
 - c) Societies interest in adjudication on the merits:
 - The evidence was highly reliable.
 - Overall, weighs in favour of inclusion.
 - Court finds that the breaches were significant and would bring the administration of justice into disrepute should it be admitted.

12) Time Limitations

Section 11(b) of the *Charter*:

11. *Any person charged with an offence has the right*

(b) to be tried within a reasonable amount of time

There are not a lot of true time limitations in Canadian criminal law. S. 786 of the *Criminal Code* says that no summary proceedings shall be instituted more than six months after the time when the subject matter arose, unless the prosecutor and defendant so agree. This means that for true summary conviction offences (of which there are few) the information must be laid within 6 months of the offence date, or date it came to the police's attention. For hybrid offences, the crown could just proceed by indictment and avoid the time bar.

Many quasi-criminal offences have statutory expirations.

- *R. v. Askov (1990 SCC)*
 - In reality, this case did not get much application outside of Ontario.
 - It recognized that s.11(b) exists to protect both individual and community interests.
 - Looks at 4 factors in determining whether or not the delay in bringing the accused to trial is unreasonable:
 - a) The length of the delay;
 - b) The explanation for the delay;
 - c) Waiver;
 - d) The prejudice to the accused;
 - The case came up with a benchmark of 6-8 months to get the accused to trial.
 - This resulted in 50,000 stays in Ontario the following year!

- *R. v. Morin (1992 SCC)*
 - Put the brakes on *Askov*.
 - The accused asked for the 1st available trial date, which was 14 months later. They brought a 11(b) argument at that time.
 - Adopted the same factors to be considered in analyzing how long is too long:
 - a) The length of the delay;
 - b) Waiver of time periods;
 - c) Reasons for the delay, including
 - Inherent time requirements of the case,
 - Actions of the accused,
 - Actions of the Crown,
 - Limits on institutional resources,
 - Other reasons for the delay; and
 - d) Prejudice to the accused.
 - Introduces judicial resources as a consideration in the application of 11(b) rights.
 - Institutional delays can add 8-10 months to the delay of getting to trial in Provincial Court. It starts to run when both parties are ready but the system cannot accommodate them.

It is very difficult to get an 11(b) remedy. They can be sought at any time during the trial, on numerous occasions or after the trial, when it is easier to show prejudice to the accused (conviction).

- *R. v. L(W.K.) (1991 SCC)*
 - Issue of whether the accused can rely solely on the date on the indictment to argue 11(b).
 - The pre-charge delay does not engage ones rights.
 - Tension exists between accountability and the inherent difficulties in running a case on an issue that took place 30 years ago.

13) Territorial Limitations

A) TERRITORIAL JURISDICTION

There is a well established presumption that a person charged with an offence should be tried in the locale in which the alleged crime took place. The starting point of this is s.6(2) of the *Code*, which says that no person shall be convicted or discharged for an offence committed outside of Canada. Many exceptions exist, including:

- Offences on aircraft,
- Hostage taking,
- Offences involving nuclear materials,
- Financing terrorist activities,
- Terrorism offences outside Canada, where the perpetrator or victim is a Canadian,
- Sexual offences involving children, but only where the AG consents.

Furthermore, s.478(1) of the *Code* states that a court in a province shall not try an offence committed entirely in another province. There are many exceptions:

- Where the offence is committed on a bridge between two jurisdictions,
- Where the offence occurs within 500m of either jurisdiction,
- Where an offence is committed on a vehicle or vessel and passed through many provinces,
- Where an offence occurred on a plane, the originating province, the terminating province or any other province over which the plane passed.

S. 478(3) of the *Code* allows for an individual to plead guilty to a crime that occurred in another province. The Crown in the originating province must agree to the move, and the facts must be accepted as charged. Any change, attempt to plead down, or setting for trial will be denied and result in the charges moving back to the originating province. The jurisdiction of the second province is contingent on the accused pleading guilty.

- *R. v. Bigelow (1982 ONCA)*
 - Issue is whether the Ontario courts have jurisdiction to charge a father with depriving a mother from her lawful custody of her child after he had taken that child from Ontario to Alberta.
 - S. 476 provides that either court will have jurisdiction when the offence was started in one province but completed in another.

B) CHANGE OF VENUE

Section 470 of the *Code* gives the courts within a province expansive jurisdiction to try offences that were committed anywhere in that province. This discretion is very rarely used by the authorities, but exists in theory.

There is a very strong presumption that the trial should occur in the locale where it is alleged to have occurred. The accused can make an application under s. 599 of the *Code* to have the trial moved to another part of the province, but these applications very rarely succeed. These applications must show that such a move would “appears expedient to the ends of justice”.

- *R. v. Suzack (2001 ONCA)*
 - Accused is charged in the high profile murder of a police officer.
 - 12,000 people sign a petition calling for the return of the death penalty in response.
 - Facts were seemingly very prejudicial to the accused, yet the trial judge refuses to grant an application for moving the trial, citing the facts that the jurors will hear in the Crown’s opening as being equally prejudicial as any of the information heard in the media; also cites other safeguards protecting the trial process.

14) Plea Bargaining

Plea bargains can be accurately described as:

A proceeding whereby competent and informed counsel openly discuss the evidence in a criminal prosecution with a view to achieving a disposition which will result in the reasonable advancement of the administration of justice.

With cases like *Homolka* (12 years for the murders of 3 young girls in exchange for testimony against her husband) *Reyat* (5 years for testimony in Air India bombing), and *Olson* (secured \$100,000 for his family for each body he lead the police to) in Canadian judicial history, the use of plea bargains is arguably the most contentious issue plaguing the legal system. The public sees it as a method of allowing criminals to get less than they deserve, and gives them the impression that there is room for manipulation within the justice system itself, undermining its integrity. Nevertheless, it is a vital tool that preserves judicial resources and is utilized every day in every courthouse across the country.

In Ed’s view, a guilty plea is a gift to the Crown, so he expects something in return for his client.

The format of pleas is essentially limitless, but some of the most common formats are:

- Negotiating a reduction of charges to a lesser and included offence
- Getting the charges withdrawn
- The type of sentence
- Re-election down to summary
- Withdrawal against a co-accused
- Negotiating the time of the sentencing
- Negotiating the facts put before the judge
- Negotiating which judge will hear the sentencing
- A promise not to appeal the sentence

Being that approximately 70% of charges end in guilty pleas, the skill of a lawyer in exercising their skills in plea bargaining cannot be overstated. They need to be able to present evidence to the Crown showing them some of the deficiencies in their case, as well as knowing what the appropriate sentencing ranges are.

Before pleading guilty, you need to know how the result will impact your client. It may involve weapons prohibitions, DNA bank, sex offender registry listings, or impact on immigration status.

One of the most difficult issues to respond to as a lawyer is a Crown's offer for a reduced, relatively short sentence but if that is not accepted they will seek a heavy sentence (ie 3 years to plead, 9 years recommended at trial).

If there is a dispute as to the facts, you can have a trial to determine those facts. Eg. Someone can admit to the initial punch, but not to the additional kicks.

Plea bargains can help to alleviate the emotional turmoil and embarrassment of a public trial for both the accused, the victim, and the witnesses. Despite this, many times the victims or their families do not understand the process. It is justified in the system because a criminal charge is seen as a breach to society, not to the victim. The Crown represents the government, who is a representation of societies interests, not the victim's direct interest. Civil court is obviously different in this regard. Since the 1990's victims have been given more of a voice in the criminal law arena, but they are still not a party to the proceedings. It falls to the judge to clearly explain this to the victim or their family.

Bob is involved with the victim/offender mediation program, where he has witnessed some remarkable connections made between victims and offenders. The best example was that of a father who became very close with the young man who was driving while drunk with his friend, the man's son, in the vehicle when he got into an accident which resulted in the sons death. Obviously the facts need to favour reconciliation and cannot be expected in a large portion of events.

When a plea of guilty is entered by the accused, the Judge has discretion as to whether or not they accept that plea.

- *Adgey v. R. (1975 SCC)*
 - The accused was represented by duty counsel and entered guilty pleas to a number of charges. The Crown then read the facts of the case and the accused gave his version of the events, which raised a defence to some of the charges.
 - Issue is whether the Judge erred by permitting the guilty pleas to stand.
 - The judge has an obligation to seek assurance that any plea of guilty is based on an appreciation of the nature of the charges and of the consequences of such a plea. This obligation is elevated with unrepresented accused.
 - Failure to make due inquiry is a ground for appeal.
 - It is an error of law for a Judge to enter a plea of guilty where the accused indicate at the time of the plea that they want to challenge the charge, or where it appears that the facts do not support a plea of guilty.
- *R. v. Rubenstein (1987 ONCA)*
 - Appeal against the entering of a guilty plea.
 - The represented accused entered a guilty plea and an agreed statement of facts that demonstrated their guilt. Crown and defence then entered a joint submission as to sentence.

- When it became clear that the joint submissions were not going to be accepted, the accused attempted to withdraw his plea of guilty, which was refused.
- A guilty plea cannot be withdrawn just because the Judge doesn't go along with a joint submission.

The *Criminal Code* was amended to reflect the decision in *Rubenstein* with the addition of s.606. That section mandates that:

(1.1) A court may accept a plea of guilty only if it is satisfied that the accused

(a) is making the plea voluntarily; and

(b) understands

(i) that the plea is an admission of the essential elements of the offence,

(ii) the nature and consequences of the plea, and

(iii) that the court is not bound by any agreement made between the accused and the prosecutor.

(1.2) The failure of the court to make a full inquiry into whether or not the conditions were met does not affect the validity of the plea.

15) Trial

Up to now, we have dealt with all of the issues that may come up at trial.

Basic framework of the trial process:

1. Arraignment (or plea in Provincial Court)
 - Charges are read to the accused, and they plead guilty or not guilty.
2. Jury Selection
3. Application to Exclude Witnesses
 - Brought by either Crown or defence.
4. Opening Statement of the Prosecutor
 - In Provincial Court, rarely made.
 - In long cases, particularly before a jury, defence can get leave to make an opening statement before the Crown opens their case.
5. Crown Presents Case
 - Examination-in-chief, cross-examination, re-examination on issues not initially addressed.
6. Application for Directed Verdict
 - Same test is used as in preliminary inquiries: Whether a reasonable jury, properly instructed, *could* convict the accused.
7. Defence Opening Statement

- Only if calling evidence
- 8. Closing Statements
 - If the accused does not call any evidence, the Crown goes first.
 - If the accused does call evidence, they go first.
 - Where there are co-accused, the one listed first on the information goes first.
 - Where one calls evidence but the other does not, the Crown goes last.
 - The doctrine of Recency versus Primacy: some lawyers find it advantageous to go first, others prefer going last. Many defence lawyers will forego giving any evidence simply to preserve what they see as the advantage of addressing the jury last.
- 9. Judge's Instructions to the Jury
 - Jury must be sequestered until it reaches its verdict.
- 10. Judgment
- 11. Sentencing

A) RIGHT TO COUNSEL AT TRIAL

The right to 'retain and instruct' counsel is constitutionally entrenched in s. 10(b) of the *Charter*, but the onus of hiring a lawyer rests on the accused. There is no express right in the *Charter* to obtain state funded legal representation. The drafting committee considered it, but it was not included in the final draft.

Legal Aid programs are offered provincially. For those charged with serious crimes and who do not qualify for Legal Aid, s.7 (right to make full answer and defence) and s.11(d) (right to a fair trial) can combine to create a legal obligation on the state to provide representation.

- *R. v. Rowbotham (1988 SCC)*
 - Accused was denied funding by legal aid.
 - While s. 7 and 11(d) do not create a constitutional right to funded counsel per se, in cases where counsel is essential to a fair trial, an indigent accused has a constitutional right to funded counsel.
 - This would only happen in serious and complex offences.
 - Where the accused is being charged jointly with co-accused, and the trial is scheduled to take place over an inordinately long period of time, the courts should work towards notifying counsel when the accused's lawyer should be present.

As the state of legal aid in Alberta continues to erode, lawyers are preparing to make *Rowbotham* applications on behalf of indigent accused.

B) JURY SELECTION

Juries start with 12 people, but can finish with as few as 10. Any less and a mistrial will be declared (s. 644(2) CCC).

Crown and defence have 2 tools available to them in selecting juries:

1. Peremptory challenges do not require counsel to give any reason in dismissing the potential juror from the pool. S. 633 of the *Code* gives an accused charged with treason or murder 20 challenges, 12 for charges where imprisonment longer than five years is possible, and 4 for any other charges.
 - The Crown can challenge 4 times, but can 'stand aside' 48 jurors. This makes the jurors unavailable for selection until it is determined that a full jury cannot be made without those asked to stand aside.
 2. Challenges for Cause require counsel to show that the juror is biased and incapable of giving impartial judgment. They do this through asking each juror questions that are pre-approved by the judge in an effort to detect bias. There is no limit to how many challenges for cause counsel can make, but they are rare and occur only in high profile cases.
 - Section 638(1)(b) governs challenges for cause. Most frequently challenges are made showing that "a juror is not indifferent between the Queen and the accused".
 - Jurors are presumed to be impartial, and before the Crown or accused can challenge and question them, they must raise concerns which displace that presumption.
 - The court must grant an application to make a challenge for cause.
 - There must be a *realistic potential* for the existence of partiality, on a ground sufficiently articulated in the application, before the challenger will be allowed to proceed.
 - Once granted, challenges for cause are argued in front of the last two jurors sworn in a 'trial for the truth'. The decision of the jurors is final and is not appealable.
 - The jurors must determine 1) whether a particular juror is prejudiced in a way that could affect their impartiality, and 2) whether the juror is capable of setting aside that prejudice.
- *R. v. Sherratt (1991 SCC)*
 - Accused was charged with murdering a pimp, a crime that gathered a significant amount of media coverage in the area.
 - Except in extreme cases, mere dissemination by the media of the facts of the case is not normally sufficient to ground a challenge for cause.
 - Media misrepresentation, speculation to the accused's guilt or innocence, dredging up discreditable incidents from the accused's past will be grounds for a challenge for cause.
 - There is a line between drawing an impartial jury and a favourable one, and challenges for cause are not to be used for the latter purpose.
 - TEST: There must be a realistic potential for the existence of partiality, on a ground sufficiently articulated in the application, before the challenger will be allowed to proceed.
 - *R. v. Crosby (1979 ONHCl)*

- The accused was a black man, his witnesses were mostly black, and the Crown's witnesses mostly white.
 - Defence attempted to challenge for cause and ask each juror questions relating to their prejudice against black people.
 - The judge refused to allow the challenges based on the idea that to permit challenges of this type admit to a weakness in our nation that he did not want to acknowledge.
- *R. v. Parks (1993 ONCA)*
 - The accused black man was convicted of the murder of a white man.
 - The court did research of their own to determine that racism is real and is a grounds for granting challenges for cause.
 - *R. v. Williams (1998 SCC)*
 - Aboriginal is accused of robbery, says it was another aboriginal that did it.
 - Issue was whether the accused had the right to question (challenge for cause) potential jurors to determine whether they possess prejudice against aboriginals which may impair their impartiality.
 - Evidence of widespread racial prejudice may lead to the finding that there is a realistic potential for partiality.

Sometimes challenges for cause are made not to determine if there was any external cause for bias, such as exposure to media or racist stereotypes in the community, but on the basis of the charge itself. These 'offence based challenges' were most frequently used in sexual assault cases.

- *R. v. Find (2001 SCC)*
 - Defence wanted to question (challenge for cause) the jury on their ability to fairly judge a trial involving the sexual abuse of an 8 year-old child.
 - Issue is whether the nature of the charges gives rise to the right to challenge jurors for cause on the ground of partiality.
 - Establishing a realistic potential for juror partiality requires satisfying the court on 2 matters:
 - a) That a widespread bias exists in the community, and
 - b) That some jurors may be incapable of setting aside this bias, despite trial safeguards (judicial cleansing) to render an impartial decision.
 - The case for widespread bias arising from the nature of charges of sexual assault on children is tenuous.
 - Crimes by their nature evoke strong reactions in people, and this does not constitute a grounds for challenge for cause.