

LAW 520
CRIM PRO

PENNEY

I. CONSTITUTIONAL JURISDICTION OVER CRIMINAL PROCEDURE

A) THEORIES

1. PACKER'S MODEL → CRIME CONTROL

- Trust in discretion of police and prosecutors
 - A high speed “**assembly-line conveyor belt**” operated by police/prosecutors
 - Goal is efficiency, concerned w/ the truth not accused rights, ends in guilty plea
 - Broad police powers → “writs of assistance” to search and e w/o warrant
 - Reluctance to exclude corroborating evidence even if unfairly obtained
 - Court favored social interest in repression of crime, before the Charter
- ****Want to ensure police don't abuse powers, but to be done outside of criminal process (civil lawsuits) don't want to reward criminals b/c police screw up****
- 1960 Canadian Bill of Rights (CBR): *Miranda decision* accused rights in minimal fashion
- No exclusionary rule
- Factual guilt is only concern, don't allow offenders to contact lawyer before interrogation
- Minimize trials
- Risk of wrongful convictions an “unreal dream”
- Criminal Justice Process in the USA until 1950s
- Not necessarily a harsh or punitive model

2. DUE PROCESS

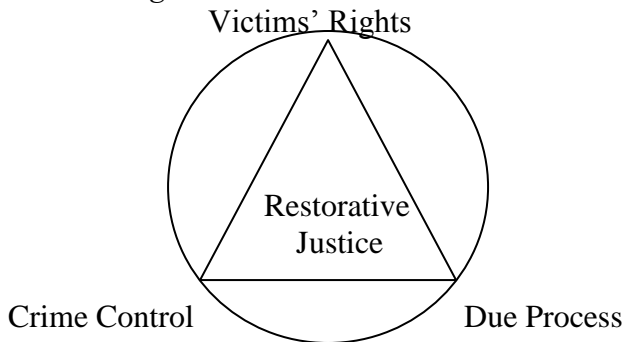
- Skepticism
 - Fairness is key, means matter more than ends
 - Robust exclusionary rule, legal guilt is only concern
 - Trials, not guilty pleas preferred
 - Risk of wrongful convictions real
 - Fair procedures only antidote
 - An “**obstacle course**” defence lawyers argue before judges about client's rights
 - Fairness to accused (in court and pre-trial process) and “quality control” – Charter
 - Procedural rights given to accused- ensure lawful conduct of police
 - In 1980s, rights subject to “reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government”
- ****If violation of accused rights, remedies whatever is just in circumstances*
- ****Exclusionary rules in evidence (might not be reliable, want to deter abusive police conduct)*
- Consensual Crimes → Hard with crimes that don't have direct victims – drugs, prostitution, gambling
 - Debate whether these crimes should be criminalized
 - Police have to be more present in order to combat consensual crimes
 - Have to use electronic surveillance, search and seizures, interrogation

3. VICTIMS' RIGHTS – POST PACKER

A non-punitive model of Victims' Rights: A Circle Model

In Canada:

- S. 276 post *Seaboyer*, S. 33.1 post-*Daviault*, Ss. 278 to 278.91 post *O'Connor*
- *Victims' Rights Bills*



- Making sure victim is treated fairly by the whole system
- Focus on the impact of crime on victims or *vulnerable groups*
- Toward crime prevention and restorative justice once crime has occurred
- Neighborhood watch, community policing
- October draft: presumption of innocence, right to be tried in reasonable time, right to retain and instruct counsel, right against self-incrimination
- Different variants: more conservative (punitive measures i.e. retribution), restorative justice (community minded perspective- bring victims/offender together),

4. RESTORATIVE JUSTICE

- Does not necessarily focus on individual rights or the state
- Involves the community and reintegrating offenders back into the community
- Focuses on the interests of victims if done properly – restitution, justice, etc...
- Also focuses on the needs of the offender (underlying problems: mental illness, drug addiction, unemployment)
- Try to change the vicious cycle that criminals get on

Due Process is Empirically Irrelevant

Empirical evidence suggests that even if we look at the due process model and offenders' rights, lawyers encourage guilty plea to ensure the most efficient and lenient disposition.

- This push is still then towards the assembly line metaphor of the crime control model
- Due process is empirically irrelevant
- Law was 'enabling' and 'explicitly for crime control' because it gave police and detectives great discretion and was formulated for their 'pragmatic use and benefit'
- This idealized and publicly consumed version of the law supports crime control by creating the illusion that accused are treated fairly and have every opportunity to exercise their rights in the due-process obstacle course.
- In reality, however, the passive and dependent accused is processed along the assembly line of crime control.
- Ericson claims the *Charter* (due process) justifies and legitimates the broad discretionary power of police and courts (crime control)

Punitive Model of Victim's Rights: A Roller-Coaster model

- This model combines the crime-control assembly line and the due-process obstacle course to create a roller coaster.
- It is in a state of constant crisis as it responds to the inadequacies of crime control to protect and serve victims, as revealed by victimization studies and accounts of crime victims being re-victimized by the adversarial process.
- It is also in crisis because of the perceived need to defend the criminal sanction from due process challenges.
- Focuses on victims' rights vs. accused's rights and factual guilt
- Perpetuates dichotomy of innocent victim and guilty offenders
- Rejects restorative justice

The Charter's Impact on Canadian Criminal Procedure

- Safeguard against police investigative powers
- Ensures fair treatment for individuals once detained or charged with a crime

James Stribopoulos: "In Search of Dialogue: The Supreme Court, Police Powers and the Charter (2005) 31 Queen's L.J. 1 (Citations Omitted)

- Charter resulted in a large number of police illegalities being revealed
- October Draft to clarify and limit the scope of legal rights
- Needed a remedies (exclusion of unconstitutionally obtained evidence) provision to make the *Charter* effective
- Established procedures by law such as arbitrary search and seizures and detention
- *Hunter v. Southam* → Charter (s.8 and 9) impose limits on, are not sources of, police power

B) DIVISION OF POWERS

Jurisdiction Over Criminal Procedure and Criminal Prosecutions

- Expressed under the *Constitution Act* of 1867
- Federal Powers:
 - ⇒ 91(27) The Criminal Law,
 - ⇒ (28) The Establishment, Maintenance, and Management of Penitentiaries.
- Provincial Powers:
 - ⇒ 92(6) Laws in the Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province;
 - ⇒ (13) Property and Civil Rights in
 - ⇒ (14) the Administration of Justice in the Province, including the Constitution, maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.
- *R. v. Hauser*, [1979] 1 S.C.R. 984 a constitutional challenge was mounted against the authority of federal officials to prosecute charges under what was then the *Narcotics Control Act* (a federal enactment) → falls under residual power of POGG

In short, the Federal Government has constitutional authority to prosecute federal offences, while the provinces have the constitutional authority to prosecute provincial offences. And, if the two levels of government agree, that authority can be delegated from one to the other, as is the case with the *Criminal Code*.

FEDERAL: 91(27) → Criminal Law power, procedure in criminal matters = Parliament

PROVINCIAL:

92(15) → The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

- As long as the area is within their constitutional power
- May enact procedures relating to offences

92 (14) → the Administration of Justice in the Province, including the Constitution, maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

- All *Code* offences tried in provincially administered courts (including superior s. 96 courts)
- Superior Courts: s. 96
 - Superior trial court: Court of Queen's Bench (little to do with criminal law)
 - Superior appellate court: Court of Appeal of Alberta
 - Federally appointed judges serving in provincially administered courts
 - Have more to do with the creation of the law
- *Code* permits indictable offences to be tried in Provincial Courts (provincially-appointed judges) → Vast majority of criminal trials in Provincial Courts

SHARED JURISDICTION

Policing:

PROVINCES

- Enforce provincial and federal laws
- Municipal and provincial police (RCMP in AB) are under provincial jurisdiction
- Most *Code* and YCJA offences, as well as some drug offences

FEDERAL PARLIAMENT

- RCMP contracted to provinces and municipalities
- Federal policing activities (RCMP and other agencies) much like the FBI
 - Non-*Code* federal offences
 - Some *Code* offences, e.g. crimes against federal government, large-scale crimes, terrorism...
- Responsible to the Federal Attorney General as well as the attorney general

Prosecutions: Code, s. 2 (definition of "Attorney General")

- **Provinces** – *Code* Offences
- **Feds:**

- *Code* offences in NWT, Yukon and Nunavut
- Offences under other federal statutes, including conspiracy, attempts and counseling (technically *Code* offences); e.g. CDSA, ITA, Customs Act
- Attempting, counseling, conspiracy is in the *Code*, even offence may be in CDSA
- Substantive offence and party liability
- **Either** – Terrorism offences, securities fraud
- Parliament has delegated the power to prosecute federal offences (*Code*) to provincial prosecutors
- Both Parliament and the provinces have the authority to create regulatory legislation

Sentencing and Corrections:

PUNISHMENTS:

- Federal authority under 91(27) and other heads of power
- Provincial authority under 92(15)

PRISONS:

- 92(28) – the establishment, maintenance, and management of penitentiaries
- 92(6) – establishment, maintenance, and management of public and reformatory prisons in and for the province.
- Code s. 743.1(1): 2 years or more served in federal penitentiary; less than 2 years in provincial prison.

PAROLE:

- Generally federal government, regardless of site of incarceration
- Provinces may establish own boards for provincial prisoners (ON, PQ and BC)

PROBATION:

- Administered by provinces
- Can be used as a substitute for a sentence of incarceration (suspended sentence which means if you breach your probation orders you go back to jail)
- Can be added to a jail sentence
- Conditional sentence is equivalent to a period of incarceration “served in the community” instead of physically in jail. Probation is a non-custodial sentence.

II. CLASSIFICATION OF OFFENCES

A) OVERVIEW

Summary Conviction Offences: (least serious)

- Maximum between 6 – 18 months
- Limitation period – six months (s.786)
- Accused, called defendant, need not appear (s. 800)
- Tried in provincial court, PCJ → Not acquitted but dismissed

Hybrid (Dual Procedure) Offences: (Most offences in Canada)

- Crown has unfettered discretion to choose how to prosecute
- E.g. Sexual assault – either summary conviction offence or indictable offence
- Considered indictable until the Crown elects

Indictable Offences: (most serious)

- Penalty: Life (murder), 14 yrs. (aggravated assault), 10 yrs. (assault causing bodily harm), 5 yrs. (dangerous driving), 2 yrs. (cheating at play) – **default max is 5 years (s. 743)**
- Few limitation periods; Accused usually must be present
- Three Types:
 - S. **553**, *absolute jurisdiction* of Provincial Court
 - S. **469** *exclusive jurisdiction* indictable offences (murder, treason, alarming Queen) within jurisdiction of superior court (CQB), must be tried with judge and jury, unless accused and Crown agree to proceed without jury as per s. 473
 - Electable offences: NOT in s. 553 OR 469 – Accused has choice to be tried by...
 - Provincial Court Judge
 - Superior CJ
 - Superior CJ and jury as per s. **536**

B) COURTS

Justice of the Peace (JPs)

- Issue basic search warrants
- Compel appearance
- Bail hearing after arrest for most offences (rare)
- Hear summary conviction trial (rare)
- Adjourn summary and indictable
- Put accused to election as to mode of trial
- Hear preliminary inquiry (rare)

Provincial Court Judges (power of JPs +)

- More intrusive search warrants
- Arraignment (first appearance)
- Preliminary inquiries
- Trial court for summary conviction offences (s. 785)
- Trial court for two types of indictable offences:
 - Absolute jurisdiction (553) and
 - Where accused has elected trial by Provincial Court Judge

Superior Court Judges (power of PCJs +)

- Most intrusive search warrants
- Bail for s. 469 offences (s. 522)
- Review bail decisions of lower courts (ss. 522, 525)
- Trial of two types of indictable offences
 - 469 offences
 - Where accused has elected trial in superior court
- Issue prerogative writs
- Hear applications for forfeiture of recognizances
- Appeals from summary conviction trials

C) WHICH COURT FOR WHICH OFFENCES?

Summary conviction offences

- Always in Provincial Court, although both JPs and SCJs have power (s.785)

Indictable Offences

- Absolute jurisdiction offences (s.553) – some in provincial court
- Presumptive jury trial offences (s. 469) – superior court, unless both sides agree
- Accused election (ss.554 and 536(2)) – PCJ alone, SCJ alone, or SCJ with jury

Hybrid offences

- Crown elects summary conviction or indictment
- Deemed indictable until election

D) APPEALS

Summary Conviction Appeals

- Initial appeal to Superior Court
- Then to Court of Appeal by leave on law
- Then to SCC by leave on law or jurisdiction

Indictable Appeals

- Accused to Court of Appeal as of right on questions of law; by leave on fact and sentence
- Crown as of right on law (cannot appeal finding of fact); by leave on sentence
- Then to SCC on law only; by leave unless dissent at Court of Appeal

Note: Where you go on appeal does NOT depend on where your trial was held. It depends on the type of offence committed.

III. STOPPING POWERS

CL tools Police have to interfere in individuals' liberty when investigating a crime

A) PRINCIPLE OF LEGALITY (*Dedman, Koechlin v. Waugh and Hamilton*)

- Have no more power than ordinary citizens unless given power by Parliament
- Duties and freedoms of police
 - Explicit powers recognized by the courts, that are given to Police to empower them while investigating criminal offences
 - If something the Police do is NOT one of these powers, subject to legal insight
 - Freedoms of police – if an ordinary citizen can do it, so can they
 - E.g. Police can walk up to someone to the street and ask him or her to answer a few questions. Citizen is free to choose whether to cooperate.
 - Duties of police – written policy of police force, norms and values of police.
 - Find people who commit crimes, evidence that will help prove these crimes, do things to prevent crime from occurring in the first place.
 - Power has to come from statute or common law
- Duties and freedoms of citizens - No duty to cooperate with Police

- Common Law or statute
- Arrest v. Detention

Pre-Charter:

- *Koechlin v. Waugh* – detained two kids, wasn't even a reason to stop the kids. Police acting in good faith is not justification for interfering with individual liberty.
- Post-Charter: critical distinction

Koechlin v. Waugh and Hamilton (1957), 118 CCC 24 (Ont CA)

LAILAW J.A.

- Infant II asked officer for ID and badge number, didn't give it, refused to show his
- Police claimed to have stopped the II's because of "their dress" (rubber soled shoes and a windbreaker) and a recent number of break-ins
- No reasonable or probable grounds for believing that the infant II had committed or was about to commit an indictable offence
- Infant II entitled in law to resist the efforts of the police officers

Ratio: Police can question any person to obtain information with respect to an offence, but he has no power to compel the person questioned to answer, must allow him to proceed.

- Charter has the possibility of excluding evidence, give power to defence lawyers
 - Charter Section 9 – the right not to be arbitrarily detain
 - Charter Section 10 – certain procedural rights triggered by arrest or detention
-

B) INVESTIGATIVE DETENTION

The "ancillary powers" doctrine - **The Waterfield test**

- Duty = power
- Limitations = "reasonably necessary"

Two-part test:

- 1) Did such conduct fall within *general scope* of any duty imposed by statute or at CL?
- 2) Whether such conduct, albeit within the general scope of such a duty, involved and *unjustifiable use of powers* associated with the duty?

R. v. Dedman [1985] 2 SCR 2

Facts: Accused was stopped, voluntarily complied, asked for ID, had alcohol on his breath (reasonable suspicion), officer demanded a breath sample, accused blew four times into device which didn't work, issued and appearance notice

Issue: Do the police have the CL authority to make random traffic stops without suspicion?

Analysis: LE DAIN J. majority

- Whether the random stop was unlawful (without statutory or CL authority)?
- Random vehicle stop program referred to as RIDE – reduce impaired driving
- **Can find the power at common law:**

Applied **Waterfield** – random vehicle stop *prima facie* unlawful interference with liberty

- 1) Random stop within general scope of duties, acting in good faith
- 2) "Reasonably necessary" interference with liberty because of the seriousness of the problem of impaired driving – **public purpose served**

Balance an individual's interest (amount of intrusiveness) v. State's interest (social crime, big problem, minimal force) → is what the police did reasonably necessary?

- Adverse psychological effects produced for innocent driver minimized by the well-publicized nature of the RIDE program
- *Hoffman* – traffic census does not fall under this scope
- Assault or obstructing a police officer in the execution of his duty
- *Wiretap Reference – Waterfield* provides no support for police conduct, where the conduct is unlawful at common law

Ratio: Police can randomly stop people for purposes of roadside programs

Decision: Detention was arbitrary, but saved by s. 1.

DICKSON C.J.C - dissenting

- Police, in carrying out their general duties, have limited powers and are only entitled to interfere with the liberty or property of the citizen to the extent authorized by law
 - An administrative scheme to validate random discretionary intrusions upon individual liberty, are arbitrary - No legislation expressly conferred such a power
 - **Problem with the ancillary powers doctrine? Not legislated**
A laudable social purpose is not enough to clothe the exercise with legality.
-

C) R. V. SIMPSON

1) No general detention power

2) Justification (nature and importance of duty v. nature and extent of interference)

- Belief of involvement in criminal activity
- Different than *Dedman* because it was not a random stop

3) Standard of suspicion – articulable cause/reasonable suspicion – grounds to detain

- *Subjectively* by the officer
- Justified *objectively* – constellation of objectively discernible facts
- Reasonable suspicion < reasonable and probable grounds

4) Other Limits

- Can simply stop and ask a few questions
- Conduct a brief pat-down search for weapons (*Mann*)

R. v. Simpson (1993), 12 OR (3d) 182 (Ont CA)

Facts: Police observed accused emerge from a “crack house”, got into car

- Pulled over car, noticed and touched bulge in accused’s pocket, accused asked to reveal it
- Accused was convicted at trial for possession of narcotics for the purpose of trafficking

Analysis: DOHERTY J.A:

- **Detention:** did not fall within s. 216(1) of the *Highway Traffic Act* Ontario.
 - From *Ladouceur* forward: They can stop you, but purpose of stop and scope of investigation has to be held to driving offences (speeding, licensing, parts of car)
- **Investigative detention** power only justified if “**articulable cause**” → articulable facts which taken with rational interferences reasonably warrant intrusion (*Terry v. Ohio (1868)*) – Good faith or hunches of police not good enough, need objective criteria
- **Application** – no articulable cause → information of “crack house” from unknown source
 - Need to **balance** society’s interest in the detection/punishment of crime with society’s interest in maintaining the freedom of its individual members
- *Danguay* – highly intrusive detention premised only on a suspicion short of reasonable and probable grounds for an arrest that was held to be arbitrary – DOES NOT APPLY

- Applied *Waterfield*:
 - 1) **Acting within the course of duty? Pursuing an investigation**
 - Interfered with appellant's liberty in hope that he would acquire grounds to arrest
 - 2) **No Articulate Cause** → Need objectively discernible facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation (*Storrey*)

Decision: Search: Section 8 of the Charter – unreasonable search and seizure

- No lawful authority to detain therefore no lawful authority to search, evidence excluded

Ratio: Specific power to detain short of arrest

D) WHAT IS DETENTION?

- **Physical Restraint** – pull car in front of yours, handcuffs, put you in back of squad car
- **Psychological restraint** – two types
 - Legal liability – if you face a punitive sanction for failing to comply
 - Reasonable belief that compliance is mandatory

R. v. Therens [1985] 1 SCR 613

- Accused lost control of vehicle and collided with tree
- Officer demanded breath sample, accused complied, over legal limit
- Accused never informed of his right under s.10(b) of Charter of his right to instruct and retain counsel

LeDAIN J.: dissent

- Word “detention” in section 10 of the charter
 - Deprivation of liberty by physical or psychological constraint, which a person may reasonably require the assistance of counsel but might be prevented or impeded from retaining and instructing counsel without delay but for the constitutional guarantee.
 - Agent of the state assumes control over the movement of a person by a demand or direction which may have significant legal consequences and which prevents or impedes access to counsel
 - Criminal liability for refusal to comply constitutes effective compulsion
 - applies to a varying duration, not confined to those of such duration as to make the effective use of habeas corpus possible.
 - May not have been physically constrained, but enough to comply with demand of police~~~ question of voluntary
 - s.10(b) violated and held that evidence of the breathalyzer certificate should be excluded
-

E) THE INVESTIGATIVE DETENTION POWER

1. Justification for detention (*Mann*)

- Need reasonable suspicion → Would a reasonable person have had suspicion based on these facts? In *Simpson* this was not met

2. Search incident to detention (*Mann*)

- Extends to searches ONLY to weapons that may compromise the safety of officer
- Considerably less intrusive than arrest – pat down search
- Search in *Mann* exceeded the search incident to arrest

3. Right to counsel (*Suberu*) – DOHERTY analysis

- BEFORE BRIEF INTERLUDE –
 - Have to be told he can incriminate himself
 - Allows the police officer some time to size up the situation to decide whether anything beyond brief investigative detention of the individual may be warranted
- AFTER BRIEF INTERLUDE –
 - If officer has made up his mind that it will be more than brief (i.e. find something that would justify a further detention), 10(b) right must be given
 - Before he answers incriminating questions
- “WITHOUT DELAY” –
 - Protects the rights and liberty of the suspect, minimize intrusiveness of encounters and not prolonging the contact with the officer
 - Just a brief detention with a limited purpose, a little too much to ask police to tell individuals about their right to counsel
- USA Different than the *Miranda Warning* – which is said immediately after arrest
 - If the accused starts blabbing on the way back to the police station – all admissible statements because you have not started to question them
 - Right is only triggered when the police intend to question

4. Different standard of justification:

- *Reasonable Suspicion* – lower standard, therefore lower power of search (pat-down)
- *Reasonable and Probable Grounds* - higher standard, therefore allow intrusive forms of search (bodily integrity).
- s. 10(a) – police have to tell you why they are detaining you – IMMEDIATELY
- s. 10(b) – right to counsel – WINDOW in *Suberu*

R. v. Mann (2004)

Facts:

- Officers were responding to a break and enter call stopped a by-standard who did not match description of offender – **reasonable suspicion**
- Allowed to briefly detain and question (*Dedman, Simpson*)
- Gave him a pat-down search, found marijuana and baggies inside kangaroo pocket
- Appellant arrested for possession for purposes of trafficking s.5(2)

Analysis: IACOBUCCI J.

Court has to balance individual liberty rights and reasonable expectation of privacy with a societal interest in effective policing.

- **Waterfield Test:**
 - Reasonable grounds to detain appellant → proximity to crime, description
 - Reasonable grounds for protective pat-down search → possession of weapons/tools
 - **Problematic:** To go beyond pat-down to investigate the soft object in the pocket →
⇒ The search was carried out in an unreasonable manner
- **Investigative detentions** – conduct is *prima facie* an unlawful interference with liberty
 - Must be advised of the reasons for detention
 - Need articulable cause / reasonable grounds to detain – objectively discernible factors
- Was the detention justified in the totality of the circumstances? “Reasonably necessary”?
Seizure of marijuana was unlawful, evidence excluded under s. 24(2)

R. v. Suberu (2007) 218 CCC (3d) 27, 45 CR (6th) 47 (Ont. CA)

Facts:

- Police officer briefly detained appellant for investigative purposes and questioned him without advising him of his right to counsel
- Involved a stolen credit card scam to buy \$100 gift certificates.
- Officer questioned the appellant while in his van, noticed many goods → formed RPG and arrested the appellant

Issue: when was the appellant to be informed of his right to counsel?

- 30 minutes is too long, 5 hours is way too long (*R. v. Monney*) – saved by Custom's Act, b/c drug swallower

Decision: Was granted leave to appeal to the SCC

R. v. Grant (2004)

Facts:

- Grant, a young black man, was stopped around noon by two plain clothes officers driving an unmarked car. They were on patrol in an area of four schools well known for student assaults, robberies and drug offences occurring during the lunch hour.
- They initially stopped Grant to determine whether he was a student at one of the schools and whether or not he was going to one of the schools.
- An additional officer in uniform was also in the vicinity and at the advice of the other two officers, stopped Grant by standing in his path and asking him “what was going on” and requesting his name and address. Grant produced a provincial health card but continued to behave nervously.
- The other two officers pulled up and stood behind the uniformed officer after informing Grant that they were also members of the Police Service. They believed that Grant was acting suspiciously – continually adjusting his clothing and looking around nervously – and joined the encounter to ensure everything was okay.
- During the conversation Grant admitted to having a small bag of marijuana as well as a firearm on his person.
- The trial judge held that there was no detention prior to arrest, and even if he were detained, he waived his rights by cooperating with the officers. He also found that the officers' questions did not amount to a search under s. 8. The firearm was admitted.

Issue: The definition of detention under the Charter

Decision: The detention was a violation of s. 9 because the officers lacked the requisite grounds to detain him (*Mann*) and because there was a detention, the officers were required under s. 10(b) to inform him of his right to counsel and failed to do so.

- The Court upholds the definition of detention (for Charter purposes) from *R. v. Therens* (1985-SCC) which set out three forms of detention: (1) physical restraint, (2) psychological restraint: (a) legal obligation to comply with a demand, (b) reasonable person would believe they have to comply by virtue of the state conduct.
- Was the Appellant Detained Prior to Incriminating Himself? Yes
- The Court held that there was a detention. A reasonable person would have concluded, due to the police conduct, that he had no choice whether or not to comply with the questioning.

IV. STOPPING POWERS – involving motor vehicles

- We have relaxed protections of the *Charter* for those who happen to be traveling in a car.
 - Driving is very regulated – state govern our driving rules
 - Very public nature of the activity – lesser reasonable expectation of privacy

A) CHECK POINT STOP – LESS INTRUSIVE THAN RANDOM ROVING STOPS

R. v. Hufsky [1988] 1 SCR 621

Facts: Random stop, detected alcohol odor on breath, appellant refused to give breathalyzer sample, charged with refusing to provide a sample of breath, informed of 10(b) rights

- S. 9 → detention to the absolute discretion of the officer (no selection criteria) → arbitrary
- S. 8 → Search and Seizure of demanding license and insurance found not to be an intrusion on a reasonable expectation of privacy – lawful condition of right to drive

Ratio: Upheld stopping power under s.8 (search and seizure of demanding licence and insurance) & 9 (detention of the appellant) of *Charter*, **reasonable limit under s.1**

- Fixed point programs of random spot checks are justified under certain provincial Highway Traffic Acts, to detect/discourage drunk drivers (Legislative objective)

OAKES TEST: s.1 Inquiry:

Limit is reasonable and demonstrably justified in a free and democratic society

- First, the legislative objective, which the limitation is designed to promote, must be of “pressing and substantial concern” to warrant overriding a constitutional right.
- Second, means chosen to achieve the objective must be **proportional** to ends. 3 criteria:
 - Rational connection with the legislation and its objectives
 - Infringement to the minimum extent possible
 - Balance between importance of infringement and benefit conferred by legislation

Applied:

- Seriousness of impaired driving, attempt to deter → pressing and substantial
- Random stop authority to be justified by increasing the perceived risk of detection of such offences (impaired driving, driving with a suspended licence, driving without insurance)
- Nature and degree of the intrusion of a random stop is **proportionate** to the purpose of serving public interest of safety

B) RANDOM ROVING STOPS

R. v. Ladouceur [1990] 1 SCR 1257

- Randomly stopped and found to be driving with a suspended license due to parking tickets
- Random stops (not organized as in *Hufsky*), are justifiable under s. 1 → to maintain road safety (pressing and substantial concern) as long as police officer is acting lawfully within scope of a statute
 - ⇒ Drivers without licenses are presumably the less safe drivers
 - ⇒ Unlicensed drivers demonstrate a contempt for the law and an irresponsible attitude
- Proportionate: minimally intrusive checking documents, does not outweigh legislative objective (limited powers, **have to act within scope**)

C) LIMITATIONS (*Mellenthin*)- from Ladouceur forward

THEY CAN STOP YOU, BUT PURPOSE OF STOP AND SCOPE OF INVESTIGATION HAS TO BE HELD TO DRIVING OFFENCES (SPEEDING, LICENSING, PARTS OF CAR)

- Can ask you for ID, observe you for signs of intoxication, can look at stuff in plain view
- Cannot open trunk, look for stuff not in plain view (under seats, root around)

R.v. Mellenthin [1992] 3 SCR 615

Facts: Stopped for driving, peered into car saw gym bag asked to open it and it contained narcotics (cannabis residue), subject to an unreasonable search, evidence excluded

- Questions regarding the gym bag, asked without the slightest suspicion of impairment, beyond the scope of the random stop program → no RPG's to search
 - ⇒ If they see something **in plain view** that is illegal can seize it but not if its only suggestive, *has to be in plain view* or get "genuine" consent.
 - ⇒ Only a visual inspection has to be necessarily incidental to a check stop, and at the earliest opportunity
- Can stop you at random without any basis of suspicion – arbitrary detention saved by s. 1 (*Dedman, Hufsky and Ledoucer*)
- **This scope of "open season" gives rise to discrimination – exceeds scope of power to stop and check for driving related offences**
- Evidence was excluded under s. 24(2) - Beach was serious, bad faith of police officer

R. v. Thomsen [1988] 1 SCR 640

Facts: If demand made by police for appellant to accompany him to his car to provide a sample of breath for a roadside-screening resulted in a detention of the appellant within s.10? YES

Reasons: LeDAIN J.: gives four essential reasons

- "Detention" directed to physical/psychological restraint of liberty other than arrest
- Criminal liability or a reasonable belief that one does not have a choice in compliance
- Therefore demand to follow to car was a *prima facie* detention
 - Was denied right to obtain and instruct counsel but was justified under s.1
 - The breath sample is to be provided as quickly as it effectively can be, therefore the right to retain and instruct counsel is incompatible with effective use
 - Pressing and substantial concern – road side screen to increase detection of impaired driving and increase perceived risk of detention
 - Also, the opportunity will be given at the more serious breathalyzer stage

R. v. Clayton 2007 SCC 32

Facts: Weapons reported at nightclub – four out of ten black guys had handguns with descriptions given of cars carrying weapons. Car eventually stopped does not come close to matching description. Both occupants arbitrarily detained, Clayton took off, was caught with a loaded prohibited handgun in his pocket

Background: The ancillary powers doctrine could not be used to justify this sort of indiscriminate stop that took place – Court of Appeal excluded evidence

Decision: SCC overturned saying the **detention was reasonably necessary** to respond to the seriousness of the offence and threat to the police/public's safety, temporal/geographic location

- Justifiable use of police powers associated with the police duty to investigate the offences
 - Ancillary powers doctrine designed to shield police, not to become a sword in their arsenal
-

D) THE PROBLEM OF PROFILING

1. Nature of the problem

- Due to broad discretionary powers given to police and subtle systemic racism (not conscious)
- Targeting by police according to gender, age, race, ethnicity...etc
- “Boxer wants Halifax Police on the Ropes” p. 102, “Police Target Black Drivers” p. 103 → 34% of all drivers charged with out-of-sight violations were black (only 8.1% of population)

2. Biased discrimination → racism in the conventional sense

- There are certain groups who are more likely to engage in a certain type of crime, so then police stop them more, perpetuating the cycle of rates of offences (e.g. Black drivers more likely to be in possession of drugs than white drivers).
- If same number of black and white drug dealers, black drug dealers the police would charge 50 black dealers for every 10 white dealers → perpetuating that drug dealing is centered in the black community thus justifying the profiling.

3. Statistical discrimination → some sub-groups are statistically more associated with certain types of crimes over others.

- Statistics show that 90% of crime committed by young men ages 16 – 45
- Limited information, have to make a decision on the spot, follow stereotypes
- Study done where participants are shown images, give words, then results are interpreted → biases revealed, studies done on people with specific skin colors

3. Problems with statistical discrimination

- E.G) Highway stops for drugs – dealers in this place tend to be aboriginal so we will stop them more frequently
- If you focus on that group, you stop more of them, perpetuate the statistic – in a disproportionate way they end up in jail – because they are being PROFILED
- Was effect does this have on family, attitudes towards the group, educational and employment opportunities?

4. Two avenues for remedy:

- Focus on nature of stopping/search power, procedural requirements for justifying intrusion
 - Demonstrate individualized suspicion, the less opportunity is for racial profiling
 - Increase standard to RPG, have to have something solid – chance the person you pull over will be found guilty

V. SEARCH AND/OR SEIZURE POWERS

A) HISTORY:

1. Common Law

- **Strong protection in CL for residents, home, and private property**
- **Semayne’s Case** [77 ER 194,5 Co. Rep. 91 a] 1604
 - ⇒ “That the house of everyone is to him as his castle and fortress, as well for his defence against injury and violence as for his repose...”
- **Entick v. Carrington** (1765) 19 St. Tr. 1029

- ⇒ Secretary of state allowed police to search a house for documents
- ⇒ Empowering agents of the executive to conduct search of a residents
- ⇒ People involved in the search committed a trespass → private lawsuit
- ⇒ Every invasion of private property, even if minute, is a trespass – right to enjoy property
- ⇒ Principle of legality – Crown is governed by law, no inherent powers to restrict the freedom of citizens, has to come from statute or CL – here there is no power
- **Mere evidence v. contraband**
 - ⇒ Court says even if there had been such power, **could not authorize a search for evidence**, only basis for a warrant is contraband (stolen goods)
- **Substance and procedure**
 - ⇒ Concern about a substantive rule and a procedure (rules regulating conduct of police)
 - ⇒ Use of a procedural rule in order to protect political or religious dissidence
- **Modern policing and search powers**
 - ⇒ Took place in an era where we didn't have modern police forces
 - ⇒ Officials of a government department did this, not police

2. Pre- Charter

- **Writs of assistance** – means by which police could search anywhere if given permission in advance, lower standard than a warrant – no level of individualized suspicion let alone RPG
 - ⇒ Gave individual police officers broad discretion to search and seize without getting authorization from an independent authority or showing RPG's.
 - ⇒ No exclusionary remedy for breaches of restraints on police (i.e. s. 24(2) *Charter*)
- **Colet and the Principle of Legality**

R. v Colet [1981] 1SCR 2

Facts: Ordered to clean up his property by the City of Prince Rupert, did not

- RCMP obtained warrant under s. 105(1) of the *Code* – reasonable grounds for believing it is not desirable for the appellant to possess firearms/weapons
- RCMP approached home of appellant, threw gasoline at the RCMP – charged with attempted murder and intention to cause bodily harm in defence of his property – claims intrusion

Issue: did the power to seize include the power to search? NO

- S. 26(2) of Interpretation Act – all powers that are necessary to enable officer to carry out act
- If Parliament wanted to include the power to search to s. 105(1) of the *Code*, they would have

Decision: APPEAL ALLOWED

3. Fourth Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly...

4. Charter, Section 8

- **1980 Draft**: *Everyone has the right not to be subjected to search or seizure except on grounds and in accordance with procedures established by law.*
 - ⇒ Complicated part was the **except** – no explicit guarantee of unreasonableness
 - ⇒ Procedure that does not substantively guarantee there will be no unreasonable

searches/seizures – merely procedural protection

- **Final Draft:** *Charter* Section 8: “Everyone has the right to be secure against unreasonable search or seizure” → **Reasonableness is the new standard**
-

B) FOUNDATIONAL PRINCIPLES

1. Overview

- 1. State Action?
 - ⇒ No State Action – quit
 - ⇒ State Action – go to 2
- 2. Search or seizure?
 - ⇒ No REP – quit
 - ⇒ REP – go to 3 have a search or seizure
- 3. Unreasonable – is the search/seizure reasonable?
 - ⇒ Authorized by law
 - ⇒ Law itself reasonable
 - ⇒ Carried out in a reasonable fashion

2. Hunter v. Southam Inc

- **Olmstead, Katz, and the 4th Amendment:**
 - *Katz* was an illegal gambling business, using a phone booth to make calls
 - Police needed to get evidence, so they place a bug on the outside of the telephone booth
 - Prior to *Katz*, the US Supreme Court said that unless you physically trespass, no violation
 - Which meant you could listen to people’s conversations all you wanted
 - In *Katz*, the **4th Amendment was interpreted to protect people not property/places**
- **The Warrant Presumption**
 - 1) Prior authorization** (where feasible)
 - 2) Neutral and impartial arbiter** → judicial discretion, not police power
 - 3) Reasonable and probable grounds** → point at which credible based probability replaces suspicion
 - ⇒ Discretion not to issue → even if all these conditions are fulfilled, may be circumstances where the privacy interest is so strong that conditions may have to be imposed to ensure the search is reasonable – solicitor client privilege

Hunter v. Southam Inc [1984] 2 SCR 145, SCC

- Combines Investigation Branch to investigate Southam for violating competitions regulations
- Allowed agents to enter premises of the Edmonton Journal and look for evidence of anything: notes, papers, records, and financial documents...
- Search authorized by the director, Hunter.

Issue: Whether s. 10(3) and (1) of the *Combines Investigations Act* are inconsistent with s. 8 of the *Charter* by reason of authorizing unreasonable searches and seizures and are therefore of no force and effect.

Analysis: DICKSON J.

- Procedure for conducting a search under provisions of *Combines Investigations Act*

- **Authorization** = licence to roam at large on the premises of Southam Inc. “and elsewhere in Canada”
 - S. 8 does not confer any powers of search and seizure on governments
 - Broad and general right to be secure from unreasonable search and seizure
 - Entitlement to a *reasonable expectation of privacy*
 - Balancing of government interests and that of the individual resisting governmental intrusion
 - Reveals principles of: protecting personal privacy, deterrence, prior authorization
- Decision: ss. 10(1) and 10(3) of the *Combines Investigation Act* – appropriate standard should be read into these provisions – therefore of no force and effect → Search illegal.

Criteria: Requirements of s. 8

A) A SYSTEM OF NEUTRAL PRIOR AUTHORIZATION TO BALANCE STATE VS. INDIVIDUAL

- ⇒ A valid warrant where feasible
- ⇒ Onus on the state to demonstrate superiority of its interest to that of the individual
- ⇒ Warrantless search is prima facie UNREASONABLE
- ⇒ Neutral and impartial – Director is not neutral/impartial

B) RPG’S TO BELIEVE AN OFFENCE HAS BEEN COMMITTED

C) RPG’S THAT SOMETHING, WHICH WILL AFFORD EVIDENCE, IS TO BE RECOVERED

D) ONLY DOCUMENTS TO BE SEIZED ARE THOSE STRICTLY RELEVANT TO THE OFFENCE

3. Types of Challenges (Collins)

1. Search not authorized by law (*Collins*)

- Authorized by statute or common law

2. The law itself is unreasonable (*Hunting*)

- Law is reasonable – challenge a law on its face
- *Hunter* – statute authorizing the search was not reasonable because it allowed for searches/seizures to take place without prior authorization or reasonable and probable grounds.

3. Despite the authorized search, it was carried out in an unreasonable manner (*Collins*)

- Carried out reasonably
- *Collins* – search was executed unreasonably, grabbed her by the throat
- Hearsay argument was admissible in establishing RPG’s to get the search warrant
- The hearsay rule doesn’t apply to obtaining search warrants – only in evidence
- The trial judge said that it was inadmissible, but that was an error in law

R. v. Collins (1987)

Facts: Observed Collins couple at a motel, arrested Richard Collins, searched and found him in possession of heroin. Observed Ruby Collins, used “considerable” force on her, and obtained a green balloon that contained heroin.

Issue: Was Ruby’s searched authorized by s. 10(1) of *Narcotic Control Act*

- Appellant bears burden of persuading court that her Charter rights were infringed
- Crown has burden of showing that the search was, on a balance of probabilities, a reasonable one
 - Reasonable under s.10(1) of *Narcotic Control Act*
 - Was narcotic in the place? Was the manner of search reasonable?

Decision: Trial judge said unnecessary violence, therefore unreasonable

Order a new trial, have to decide if evidence under s.24(2) should be excluded

- Evidence obtained was *real* evidence therefore would not affect trial fairness
- Cost of excluding evidence would be *high*: someone guilty of serious offence would walk
- *Collins Test*: police conduct was flagrant and serious violation of rights

EVIDENCE MUST BE EXCLUDED

C) REASONABLE EXPECTATIONS OF PRIVACY

1. General Principles (Duarte)

- **Need three things for a section 8 violation:**
 - State action – take place in Canada, agent of government
 - Search or seizure – only if there is REP (*Dyment*)
 - Has to be unreasonable
- ***Ex ante v. ex post (Wong)***
 - Has to be an *ex ante* (before the fact) perspective, NOT after the fact *ex post*
 - Have to presume innocence, which is why it has to be prior knowledge
 - Or else there would be no incentive for police officers to comply
- **Subjective v. objective**
 - Subjective REP is not determinative
- **Descriptive v. Normative**
 - Descriptive = given the state of society and the law does this person have a REP?
 - Normative = *should* the person have a REP
 - Our chosen approach is normative – ascribing meaning to the touchstone of s. 8
 - Cost v. benefit question
- **Standing (Edwards) – does s. 8 apply to the applicant?**
 - NO, he did not have REP, only his girlfriend did
 - *Charter* – only applies to people whose OWN rights have been violated
 - Girlfriend could have claimed a violation of s.8 had she been charged

2. Applying the REP Test

- **TOTALITY OF THE CIRCUMSTANCES (EDWARDS)**
 - Presence at time of search, possession/control of property/place searched
 - Ownership of property/place, historical use of property/place, ability to regulate access
 - Existence of a subjective expectation of privacy, objective reasonableness of expectation
- **BIOGRAPHICAL CORE (PLANT)**
 - Information that is fairly intimate and forms part of biographical core, want control over
 - Religious affiliation, sexual orientation, sexual practices, financial information
- **ABANDONMENT, WAIVER, PLAIN VIEW, AND VOLUNTARY EXPOSURE (EVANS, TESSLING)**
 - Can be lost in some fashion – if waived, abandoned, plain view or voluntarily exposed
 - Something that applicant has done or allowed it to happen – garbage has been abandoned
 - May be abandoned for some purposes, but not for others

3. Types of Cases- REP

- **Personal searches** (*Dyment*)
 - As long as the state has extracted it, say blood, can take it off the streets – ok
 - Police asks doctor to get blood from the patient – not allowed
- **Private, personal property** (*Edwards, A.M.*)
 - Control over access
- **Private, real property** (*Evans, Tessling*)
 - What about getting information from your home with technology?
 - *Evans* – knocking on a door is implied invitation for good faith general inquiries
 - *Tessling* – FLIR imaging to create a visual representation of heat, trying to gain grounds for a search warrant, not enough information to violate the biographical core
 - All depends on the sensitive of the information being uncovered
- **Vehicles** (*Belnavis*)
 - Passenger of a vehicle, unlikely to have REP, unless relationship to the driver or something in the car
 - Say you pull over a car full of people for a licence/registration check, search for drugs, find drugs, unlawful search – choice is you get none of them, or you get three of four of them – evidence will probably be excluded for the driver, but not the passengers.
- **Public Spaces** (*Wise*)
 - When the police install tracking device on your vehicle and follow you around, they violate your limited REP – unless tracking warrant is obtained s. 492.1 in *Code*.
- **Third party records** (*Plante*)
 - Biographical core test. Police got a warrant to get electricity consumption records – for a grow op, used 5 times as much as another person in a similar sized home
 - No REP held in the records because no sensitive, stigmatizing information
 - Now legislation that obligates all entities engaged in commercial activities not to disclose “personal information” without first obtaining his or her consent (*Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5*).
 - Exceptions: Where subpoena or warrant (s. 7(3)(c)), or info relation to national security, the defence of Canada or the conduct on international affairs (s. 7(3)(d)).
- **Electronic Surveillance** (*Duarte*)
 - Police were allowed to intercept, when one of the two parties consents
 - Send an undercover agent in “wired” - This was held in USA, not a violation of REP
 - Invades a REP – different between having a conversation with a confidante and they run to the police AND to expect that the state can intercept and record our conversations directly. This is an intrusion of a higher order.

R. v. Duarte(1990)

- Accused charged with trafficking of narcotics, trial judge held that video tape violated s.8 and should be excluded, Court of Appeal allowed appeal, said s.8 not violated b/c accused took risk that conversations with an informer might be revealed by informer’s testimony
- Accused appealed to Supreme Court

Analysis: LaFOREST J.:

- Electronic surveillance of individuals to others is judicially supervised under s.184(1) and left to police discretion under s.178.11(2)(a) exceptions to s.184(1)

Ratio: Charter does not protect us from a “friend” who turns out to be an informer, but **does** protect us from electronic interception, which is considered search and seizure → by standard of

reasonableness in *Hunter v. Southam Inc.*

- Have to strike a fair balance between the right of the state to intrude on the private lives of its citizens and the right of those citizens to be left alone → fishing expeditions, unfettered police discretion
- s. 24(2) Considers good faith of police, who were relying on a legislative provision that had not yet been challenged, the Court admitted the evidence

Decision: APPEAL DISMISSED, new trial ordered

R. v. Wong (1990)

- Accused charged with keeping a common gaming house, Crown sought to introduce a video tape of gambling conducted a Toronto hotel room

Analysis: LaFOREST J.:

- A person attending a function to which general public has an open invitation has no reasonable grounds to privacy
- Has to be justified before the fact, not after the fact
- Deter intrusions before they occur
- Do people who occupy a hotel room have a reasonable expectation of privacy? Yes.
- Although s.8 was violated, video tapes still allowed b/c police were acting in good faith

Decision: APPEAL DISMISSED

⇒ At the time of *Wong*, C.Code did not authorize use of video cameras, now s.487.01 provides general warrants for any investigative technique that might violate s.8 of charter

R. v. Wise (1992 SCC)

- Police affixed a tracking device to a suspect's car to track it electronically
- Car could have ordinarily been observed by any member of the public
- Intrusion of reasonable expectation of privacy for the state to electronically monitor our every movement

R. v. Dyment (1988 SCC)

- Took a vial accused's blood from hospital staff – violated s. 8 subject to a duty of confidentiality on the part of medical personnel
- Intrusion of privacy in three forms:
 - i) Privacy in one's person
 - ii) Privacy of a territorial or spatial nature
 - iii) Privacy of an informational nature
- Seizures are subject to the same reasonableness regardless of if there was a search or not

Evans v. the Queen (1996 SCC)

- Accused charged with possession of marijuana for the purpose of trafficking
- Police got a tip, visual inspection of home disclosed nothing, knocked on the door with the intention of smelling an odor of marijuana to obtain a search warrant
- **Was the police conduct a search? YES, an invasion of REP**
 - Implied licence to knock extends to all members of the public including police
 - "Waiver" of privacy rights is only for the purpose of communicating with the occupant of the dwelling – Police actions went beyond this, intention to whiff or secure evidence
- Was search reasonable?

- Without prior authorization therefore prima facie unreasonable (*Hunter*)
- In order to rebut presumption of unreasonableness must show:
 - Search authorized by law → need a search warrant – NOT MET
 - Law itself was reasonable → CL “knock on” principles not enough
 - Manner carried out was reasonable → a mere “sniff”
- *The Warrant*
 - Invalid because the sole information used to get it was in violation of the *Charter*
 - The unconfirmed “Crime Stoppers” tip would not have been enough

Decision: Evidence not excluded relying heavily on the good faith of the officers involved

R. v. Edwards [1996] 1 SCR 128

- Edwards’ GF’s car was impounded and searched, police seized a cell phone and pager and received calls from people ordering small amounts of cocaine
- Search of a third party’s premises – Edwards’ girlfriend where cocaine was revealed
- Reasonable expectation of privacy?
 - Only way in which the appellant asserted his right to privacy in Ms. Evan’s apartment was his interest in the drugs → he denied that the drugs were his, confirmed by GF
- Cannot claim for relief under s. 24(2) unless HIS *Charter* rights have been infringed
- S. 8 protects people not places
 - **Establish reasonable expectation of privacy in the totality of circumstances:**
 - Presence at time of search
 - Possession/control of property/place searched
 - Ownership of property/place
 - Historical use of property/place
 - Ability to regulate access
 - Existence of a subjective expectation of privacy
 - Objective reasonableness of the expectation
 - Was the search conducted reasonably?
- No reasonable expectation of privacy established, he was just a visitor, did not contribute to rent, did not regulate access

Decision: SCC held that accused did not have a reasonable expectation of privacy in girlfriend’s apartment, did not contribute to rent, did not regulate access, only frequently slept over.

R. v. Belnavis (1997), 118 CCC (3d) 405 (SCC)

⇒ Three women traveling in a car owned by one’s boyfriend, pulled over

⇒ Does a passenger have a reasonable expectation of privacy?

- Connection tenuous (passenger in a friend of a friend’s car)
- Did not have control over vehicle, could not regulate access, had no history of use
- No subjective expectation of privacy
- Could only demonstrate a reasonable expectation of privacy in the garbage bags, but did not – no markings to indicate hers, didn’t point to a specific one,

Ratio: Passenger had no REP with respect to the search of bags and the trunk of a car

R. v. Plante (1993) 84 CCC (3d) 203 (SCC)

- Anonymous Crime Stoppers tip that there was a marijuana grow op in someone's house
- Police wanted to access the electricity consumption records for the house – high usage is indicative of possibly hydroponic grow lights, four times average consumption and two times that compared to other grow ops discovered – obtained a search warrant

REP in computer records?

- Nature of information
 - o Electricity records do not elicit intimate details of an individual's life (private decisions, personal lifestyle)
- Nature of confidential relationship
 - o Contractual relationship not one of confidentiality
- Place where records obtained
 - o Policy of the commission to allow police to access records
 - o Not intrusive to obtain them, police allowed a special password
- Seriousness of offence investigated
 - o Marijuana grow ops are not as serious as hard drugs, but still serious
- Have to be balance societal interests and individual dignity, integrity, and autonomy

Decision: No REP in computer records because it does not outweigh the state interest in enforcing laws relating to narcotics offences.

R. v. Tessling (2004)

BINNIE J.:

- FLIR image, along with evidence caused the police to get reasonable and probable grounds to infer existence of a “grow op” and to search the home

Issue: Was there a reasonable expectation of privacy? NO

- ⇒ No REP to external patterns of heat distribution on external surfaces of a house
- ⇒ Does not reveal any private (biological core) information of the respondent or their lifestyle
- ⇒ No warrant needed because image alone is not enough to tell you marijuana is being grown
 - o Combined with a tip, electricity usage, enough to obtain warrant
- ⇒ Did not abandon, taken from home, lack of intrusiveness
- ⇒ Should not be available for state without prior judicial authorization (*Dinh* 2003 AB CA)
- ⇒ FLIR image cannot identify the source of the heat or the nature of the activity that created it – must be alert to the fact that modern methods of electronic surveillance have the potential, if uncontrolled, to annihilate privacy – Heat emanations on their own are “meaningless”

4) Drugs and Dogs:

- **In what circumstances can police use drug sniffing dogs without a warrant?**
 - o Is the use of a dog for finding drugs and explosives
 - o When things are concealed, within structures, receptacles, buildings → attract REP
 - o Analogous to the FLIR imaging (technology) used in *Tessling*
 - o Make inferences on what exists inside the structure – heat v. smell
- **Is this a search?**
 - o Is there a subjective expectation of privacy?
 - o Is the subjective expectation of privacy reasonable?
- **What information does the dog reveal?**

- Dog only detects one thing – either drugs or explosives
- Focuses on the contents of your belongings – something personal
- **What are the practical consequences to allowing the police to have unrestricted access to this information? Like unrestricted eavesdropping**
 - People might be scared of using certain things: like cell phones and wire-tapping, instant messaging and encryption
 - People should be free to discuss what they want to discuss
 - This is not good for society, takes away freedoms
- **Targeted search that only detects contraband – not legally entitled to have in the first place**
- Normative/Descriptive → what do you think the SCC will do when it come to dog sniffs
- Separate out the issue of detention and potential intimidation from the discrete question of the dog sniff search itself – compare it to a sniff search of the home or car
 - Intrusion – stopped at random
 - As long as we isolate the receptacle, we are protecting bodily integrity
 - Are we protecting a right to have contraband?
 - No reasonable expectation of privacy to contraband

R. v. A.M. (2006 Ont. CA)

⇒ Drug sniffing dogs went into a school, sniffed out a backpack and reacted positively to it
 ⇒ Inside there was marijuana, mushrooms and drug paraphernalia, located A.M.'s ID and charged him → Violates s. 8

(Alberta Court of Appeal) → Use of dogs to sniff luggage that was waiting to be loaded onto a Greyhound bus, did not violate a REP

When approaching a question:

1. Was there a REP? **When considering REP... use and relevance of two tests:**
 - Totality of the circumstances test (*Edwards*)
 - Biographical Core Test (*Plante*)
2. Did the police unreasonably invade this privacy?

5) Diminished Expectations of Privacy

Exceptions to the *Hunter v. Southam* requirements:

0%	RS	RPG	ARREST	Conviction 100%
	Diminished REP	Lesser REP	Even Lesser REP	No REP

i) **No REP** (*Tessling*) don't necessarily have to comply with *Hunter v. Southam* standards → use technique without restriction, s. 8 does NOT apply, cannot be violated

ii) **Diminished REP** →

CRIMINAL SEARCHES

- **Reasonable suspicion searches** –
 - *Wise* – rural area lots of roads, difficult to follow him in such a way that he wouldn't catch them following him. – Strength of signal sort of like hot/cold
 - Able to demonstrate that he was vandalizing
 - Violated his REP, violated s. 8, exclude evidence under s. 24(2)

- Crown decided to concede that the installation of the device invaded a REP and violated s. 8 because without a warrant and without RPG's
- SCC said there is a minimal expectation of privacy on public roads → regulated activity that is subject to heavy oversight by the police and public

→ This type of search justified by reasonable suspicion, because REP is diminished

→ Enacted legislation that allowed police to apply a tracking warrant, and all they have to demonstrate is that an offence has been committed and tracking will uncover evidence proving this, on grounds of **reasonable suspicion**.

- **Incidental searches** – incident to detention authorized by *Code*
 - In order to justify a detention only need reasonable suspicion.
 - If you lawfully detain/arrest someone, right to search does not require a warrant or independent RPG/RS
 - Pat down search flows virtually from the detention
 - **Grounds for search flow from the arrest/detention**
- Once you are arrested/detained, you have a diminished REP

NON-CRIMINAL SEARCHES

- **Regulatory searches** → Environment, consumer protection, highway traffic safety
 - Gives state far greater scope to conduct searches and seizures without enacting s. 8
 - In order to maintain the integrity of these regulatory schemes, the state needs to be given additional powers to ensure these rules have been followed.
 - Eg. Inspection of factories, income tax → Don't need a warrant, RPG's, RS
 - *Hunter and Southam* standards are relaxed/ignored

When it's not a criminal investigation, then the standards that apply are lower than H and S. Corporations are not as protected because of the industry it is in.

- **Schools and prisons** → School aged kids have an extremely diminished REP, even if the police are present when the search is happening
 - As long as school administrators are seeking to apply school disciplinary rules, don't have to comply with *Hunter and Southam*

Teachers should have a broad scope to enforce rules, however if they want to hand over the evidence to police, shouldn't the *Charter* be triggered

- **Border control** → Diminished REP

D) STATUTORY SEARCH AND SEIZURE POWERS

1. Examples under the *Criminal Code*

s. 487.04 & 487.05 DNA warrants (*Borden*)

s. 487.092 Body Impression Warrants (*Stillman*)

s. 492.2 Dial Number Recorder Warrants (*Fegan*)

ss. 117.02 Weapons in place other than Dwelling-house

s. 117.04 Preventative weapons searches

ss. 199(1)(2) Gaming and Bawdy House Searches

ss. 254(2) – (4) Breath or Blood Demands with respect to alcohol related driving offences

s. 339(3) Stolen Timber

s. 447(2) Seizure of Cocks found in a Cockpit

s. 462 Seizure of Counterfeit money

ss. 487.04 & 487.09 DNA warrant scheme and a national DNA databank

- Some comply with the minimum requirements of s. 8, others are constitutionally suspect because they authorized the police to search without any need to first obtain a warrant
- Police have powers to search without a warrant if by reason of **exigent circumstances** it would be impracticable to obtain one (*Controlled Drugs and Substances Act*, s. 11(7), *Grant*)
- s. 256 a warrant to draw blood from an individual incapable of consenting where RPG to believe that a person has, within 4 hrs, committed the offence of impaired driving and was involved in an accident resulting in the death of another person or in bodily harm to himself/herself or any other person.

2. s. 487 of the Criminal Code

- Good for any federal offence, bound by limitations
- **Incorporates the minimum standards mandated by s. 8 of the Charter – judicial officer can only issue a warrant if satisfied that there are reasonable grounds, established upon oath, that an offence has been committed and that relevant evidence will be found in the “building, receptacle or place” to be searched**
- Bodily searches? (*Laporte v. Langanier*)

Re Laporte and The Queen (1972), 8 C.C.C. (2d) 343, Quebec Court of Queen’s Bench

- *Writ of certiorari* for the purpose of quashing and setting aside a search warrant
- Police felt they had RPG’s to search body of Lapotto for bullets fired from police revolvers during a hold-up that happened a long time ago → wanted to prove this crime
- Would need minor surgery to extract it, need patient consent, not given

Issue: can police get a warrant to search the interior of a living human body?

Analysis:

- **Body is not a “receptacle “or “building”**
- **Principle of legality to limit police power without the Charter:** *Any conflict between them must be resolved in a manner most compatible with individual human dignity – cutting into a body would demolish this – intrusive search*

Decision: warrant quashed and set aside as illegal, any further proceedings are prohibited

- If the Crown cannot prove its case against Laporte without doing physical violence to his person then it is better that the case not be proved

3. Reasonable and Probable Grounds

- **Provenance and evidentiary value – (*Gillis*)**
 - RPG’s related to where the piece of evidence is located
 - Evidentiary
 - What is the relationship between the documents and the offence?
 - Need to be specific – date, which assets, which accounts?
 - Have to provide some level of precision in identifying what they are looking for and how these items relate to the offence that has been alleged.
- **Basis for belief (*Debot*)**
 - Sources of information – Indicators of reliability (some reason to believe)

- Reputation of suspect – has to relate to the present offence alleged,

4. Warrant

A. PARTICULARITY

- Has to be on the application for the warrant (information) on the face of the warrant itself.
- Ensures the scope of the warrant is limited to the actual grounds of the warrant (items to be found, location, relation to offence).

B. CONDITIONS AND TIMING: SUBSTANTIVE ELEMENTS

- *Who can seize?* Person listed on the warrant
- *What can they seize?* (s. 489) anything related to the particular offence, anything you see when you are lawfully carrying out the search warrant, even if not in the warrant or related to the offence but related to another offence.
- *When can they seize it?* (s. 487(3), 488) during the day as a rule, nighttime is the exception

C. MANNER OF SEARCH

- Announcement and production (s. 29 of *Code*) – must have search warrant present and produce it on request
- Reasonable force (s. 25) – if necessary in the circumstances
- “Freezing”? – if you don’t have time to get a warrant, cannot hold evidence
- Some exceptions- conduct a warrantless search in exigent circumstance – where it is impracticable to obtain a warrant and have to act quickly so that evidence is not destroyed.
- Either you get a warrant or conduct a warrantless search – there’s no freezing of the premises
You can now make an application to get warrants over the telephone or a fax machine. Special judges take these calls and issue warrants where it is justified.

D. REVIEW OF AUTHORIZATION

- Access to information (*MacIntyre, 487.3, Toronto Star*)
 - Presumption is public access (including media) after search has been executed
 - Crown has to demonstrate that there would be serious threat to an investigation to justify non-disclosure of the information
- Standard of review
 - Reviewing Judge asks if they would have decided if RPG’s existed
 - Deference given to the issuing judge
 - Reasonable basis for issuing the warrant
- Section 8 of the Charter

Were there reasonable grounds to obtain warrant? If yes, and meets RPG’s

 - If no RPG’s, one of the substantive elements are not met
 - If you conduct a non-constitutional parameter search, violate s. 8
 - Issuing unlawful warrant v. obtaining some evidence → relation to the s. 8 violation
 - Say a legal requirement isn’t met (daytime requirement) – clear relationship between obtaining the evidence and this requirement, wouldn’t have obtained the evidence without the warrant, violated the warrant by searching at night, therefore warrant void.

- Sever the tainted information, could that judge have reasonably issued a warrant? If yes the evidence is good
- Return of items (489.1 – 490) – look at provisions
 - If Crown establishes that information is necessary for prosecution, can keep it.
 - If items are not contraband, and prosecution won't use it, can get it back
- Confidential informants –
 - *Hunter* – confidential informer
 - *Leipert* – anonymous confidential informer
 - Crown asserts informer privilege – if the information to obtain a warrant is based on information from a confidential informant, Defence will almost NEVER get this information – No editing, no balancing
 - Crown is prohibited from disclosing any information that could conceivably reveal the source of the information, unless informant consents
 - As long as you can maintain confidentiality, are obligated to disclose any information that they have to the Defence

Type 1: “Informant” → person who swears an Information To obtain a search warrant (*Criminal Code* form 1) – usually a police officer

Type 2: “an Information” → person who swears out a criminal charge (*Criminal Code* form 2) – usually a police officer

Type 3: “Witnesses” → those who supply information to police without any expectation that their identity will be kept private, good citizens, willing to testify

Type 4: “Confidential Informants” → provides information in secret and expects his or her identity to remain private.

E. PRACTICAL REALITIES OF SEARCH WARRANTS

- Are most warrants validly issued? Are issuing authorities truly independent?
- Regional variations
- Have things gotten better since the *Charter*
- The only practical part of the search warrant process is that it exists. → it's a check on arbitrariness and discretion
- May only be a rubber stamp, but it's a lot more than that

5. Case Law

Re Gillis and the Queen (1982), 1 CCC (3d) 345 (Que. SC)

- Gillis committed fraud for \$25,000 promissory note
- RPG: the statement made by victim, an examination of documents and a police investigation

Nature of a Search Warrant: *AT of NS v. MacIntyre*

- “An order issued by a Justice under statutory powers, authorizing a named person to enter a specified place to search for and seize specified property which will afford evidence of the actual or intended commission of a crime”. P. 195
- Effectiveness of any search made pursuant to the issuance of a search warrant will depend

much upon timing, upon the degree of confidentiality, which attends the issuance of the warrant and upon the element of surprise, which attends the search.

- S. 443 has been introduced which is a policy choice to put public interest in the detection, investigation and prosecution of crimes above individual interest

Issuance of a search Warrant

- “Judicial act – decides if there are reasonable grounds to believe that the objects described in the information are located in the place indicated by the informant and whether these objects will provide evidence of the commission of the offence set out in the information” p. 196
- TWO STEPS:
 - Existence of and presence of certain objects in a given place
 - Probative value
- Need to strictly construe the statute → *Re Bell Telephone Co. of Canada* “Purpose of the search warrant is to secure things that will in themselves be relevant to a case to be proved, not to secure an opportunity of making observations in respect of the use of things and thereby obtain evidence” (p. 197)

Statement of Reasonable Grounds

- Sometimes inferred from informant, sometimes set out in the information
- *Re Lubell and The Queen* – where the connection between the items sought and the offence is one that might be gathered easily by inference from the very nature of the offence and the material sought, the informant is not obliged to underline the obvious.
- Justice cannot rely solely on the good faith of the informant or on the good sense that the person who will execute the warrant may exhibit.
- **Applied:** Grounds insufficient – justice exceeded jurisdiction in authorizing warrant

Description of the Objects

- Sufficient precision with respect to category and relation to the offence
- Need to indicate in the information which documents, nature and specific identity
- Relation between fraud committed by applicant and the documents sought
- Search cannot be a fishing expedition – cannot seize whatever they want during search
- Need some indication which ties the thing or document to the offence for which the warrant was issued
- **Applied:** nature of the documents sought is set out, nothing to identify them or tie them with the offence for which they afford evidence.

Decision: Warrant quashed

- Judge exceeded his jurisdiction in not adequately detailing the objects sought in warrant
- Must return seized things in light of ss. 8 and 24 of the *Charter*

Regina v. Hunter (1987), 59 OR (2d) 364 (Ont. CA)

Issue: Should the accused have access to the information upon which a search warrant was based if that information disclosed the identity of the informer?

Analysis:

- American authority favor protecting the identity of the informer
- *MacIntyre* – anyone “directly interested” in the search warrant could inspect the information used to obtain the warrant after the warrant had been executed
- *Realty Renovations* – in order to exercise the right to question the validity of a warrant, must be able to inspect the search warrant and the information for the RPG’s.
- Oppressive tool of the state therefore the accused should know the basis upon which the

warrant was issued

Disposition: Appeal allowed, new trial ordered

- Trial judge reviews information, edits, gives back to Crown
- Crown determines if edited version would identify the informer
- If YES, Crown decides if necessary to preserve the anonymous privilege – informer may give consent to reveal identity or become so notoriously well known to the community that identity no longer is an issue.
- If PROCEED not from consent – trial judge considers evidence obtained in s. 24(2)

R. v. Leipert, [1997] 1 SCR 281 – Crime Stoppers

- If anonymous tip, accused is *not* entitled to any information that *could* potentially reveal the identity of a confidential and anonymous informant – **unless proving informant’s innocence**
- Person filled out a tip sheet, Defence made an application that this tip sheet should be disclosed
- **Rationale for informant privilege is that we should encourage individuals with knowledge of criminal activity to supply that information to the police – need to preserve the confidentiality of the informer**
- Potential for abuse is limitless
- SCC has fashioned special rules for assessing whether a confidential informant’s tip is reliable enough to supply the reasonable and probable grounds necessary to search or arrest

Debot v. the Queen (1989), 52 CCC (3d) 193 (SCC)

Facts:

- Informant advised Gutteridge of a drug transaction between Carpenter and List – place, drug, quantity, supplier, time of day, basis of assertion
- Set up surveillance on Carpenter’s residence (known user and trafficker), followed a car to a pub, saw exchange of money and “something else”
- Saw a Bronco pull up, people got out went into the house, came back out, got into Bronco
- Bronco pulled over (owned by appellant), driver and female passenger searched at station after receiving right to counsel

Analysis: WILSON J.

- Warrantless search authorized by s. 37 of the Food and Drugs act if the officer had “reasonable belief” that the appellant was in possession of a controlled drug and whether the search was carried out in an unreasonable manner

Totality of Circumstances test to meet the standard of **reasonableness**:

- Tip from informant – sufficiently specific to warrant police attention
- Reputation – must be related to search, cannot be based on hearsay (was)
- Informant was credible – with Carpenter before, previous tips given
- Surveillance – Police observed what they thought to be a drug transaction (highly speculative, low probative value)
- Sequence of events must conform sufficiently to the anticipated pattern to remove the possibility of innocent coincidence

Decision: Police surveillance warranted enough corroborative evidence to warrant the belief that a drug transaction had occurred and had RPG’s to search the appellant under s.37 of FDA.

R. v. Lewis (1997), 122 CCC (3d) 481 (Ont. CA)

- Tipster: accused flying from Toronto to Edmonton, particular day/time, specific airline, accompanied by a two-year-old boy and an Appleton rum bottle of crystallized cocaine.
- Police searched without RPG's, had articulable cause to detain
- Doherty JA: anonymous informant, untested, cannot stand alone provide RPG's for an arrest or search

Law Reform Commission of Canada,

Working Paper 30: Police Powers – Search and Seizure in Criminal Law Enforcement (1983)

- Gap between the legal rules for issuing and obtaining search warrants and the daily realities of practice – 59% invalid, 39% valid
- Probative requirements – Most problems in the Narcotic Control Act and Food and Drugs Act, which required “reasonable grounds to believe” (judiciality) failed in 32%
- Substantive requirements (protections of the warrant, items to be seized, premises to be searched, offences alleged) – 49% failed
- Problem resides in adherence to procedures, not factual basis for warrant
- Adherence to warrant requirements varied due to local practices – lack of enforcement of legal rules
- Sometimes search warrants are treated by justices as a “formality”
- This was all before the enactment of the *Charter*
- Study complete in 1999 – took 100 warrants issued in downtown Toronto, 61% should not have been issued, 40% for failing to disclose necessary RPG's – ill trained JP's
- Inadequacy of training those responsible for issuing warrants

6. Other Warrant Provisions

- **Firearms**
- **Drugs** (CDSA)
- **Blood Samples** (256)
- **Tele-warrants** (487.1)
- **General investigative (including video)** (487.01)
 - Says that if you want to conduct a certain type of search and there is:
 - No other provision in the Criminal Code that authorizes that search
 - No interference with bodily integrity
 - And you have RPG's, you can do whatever you want (*Wong*)
 - Additional requirements on electronic or video intercepts section VI of the *Code*
- **Tracking Devices** (492.1)
 - Issued on the basis of **reasonable suspicion**
 - Can they be used to authorize the use of a GPS or cell phone based tracking device
 - *Wise* dealt with primitive devices – hot or cold
- **Telephone number recorders** (492.2)
 - Call display for numbers coming in and dialed out of a telephone
 - Reasonable suspicion
- **DNA samples** (487.04 – 487.09)
 - After *Stillman*
- **Bodily impressions** (487.091)

- Have to inform person of what you are doing, right to counsel, reasonable force
- **Proceeds of crime (462.32)**

7. Electronic Surveillance

- **Coverage (s. 183) →**
 - Private communication
 - Not encrypted, no REP
- **Consent intercepts (184.2(3))**
- **Conditions**
 - SCJ only, limited list of offences, signed by AG or SG, 60 days
 - **Investigative necessity** – have to demonstrate that you have already tried to obtain information using less intrusive means, or impossible to even try to do so.
 - *Criminal Organization and Terrorism Offences (185(1.1))* – investigative necessity no longer operative or required
 - Not a requirement under s. 8 for these offences – is a policy choice
 - Investigative necessity is demonstrated given the breadth and scope of the offences already, where impossibility is inherent in the offences
- **National Security Agency Powers:**
 - *CSIS Act* → legislation that allows CSIS to conduct searches and do investigations, very broad powers, but still has to be authorized by a neutral and partial arbiter.
 - *CSE Act* → intercepts foreign communications that where the target originates OUTSIDE of Canada
 - Only need approval of the Minister of Defence – neutral and partial arbiter?

8. Warrantless Statutory Search Powers

- **Breath and Blood sample demands (254)**
 - First, can observe looking for evidence of impairment
 - If they have **reasonable suspicion** that you are impaired, they can demand a sample of your breath with a roadside screening device (not admissible in court)
 - If the indicator tells the officer you are likely over the limit, this gives the officer **RPG's** to demand a Breathalyzer test. RPG's can also come from behavior patterns (driving, accident).
 - Three driving offences in Canada:
 - 1) Driving over the legal limit (0.08)
 - 2) Impaired driving – don't need a breathalyzer
 - Crown has to offer evidence (consumed alcohol, not able to perform sobriety tests, engaged in impaired behaviors).
 - 3) Failing, without reasonable excuse, to comply with providing a sample – punishment is the same as the first two offences
 - Realistically requiring a warrant is not practicable
- **Exigent Circumstances (487.11, 11(7) CDSA) – urgency or necessity**
 - Exception to a number of different search powers that would require warrants
 - If you fulfill all the requirements for obtaining a warrant, yet its not practical to obtain one in the circumstances, you can go ahead and search

- Already have RPG's that an offence has been committed, and evidence can be found in a building, receptacle or place → to comply with requirements in s. 47
- Exigent circumstances
 - Evidence could be destroyed – house burning down
 - Dangerousness situations
- Has to consider the availability of the tele-warrant procedure
- Seems to negate that a *Charter* violation doesn't even exist

If you didn't have exigent circumstances in the first place (s. 8 violation), why should it become relevant all of a sudden in s. 24(2) analysis.

E) COMMON LAW SEARCH AND SEIZURE POWERS

1. Search Incident to Arrest

A. GENERAL REQUIREMENTS (*Caslake*)

- **Prior authorization** (warrant) not required
- **Lawful arrest** (including R & P grounds)
 - Both subjective – police has to subjectively believe he/she has RPG
 - And objective – correct assessment from a reasonable person
- **Purposes**
 - Prevent injury – potentially weapons
 - Remove means of escape
 - Preserve evidence – if you have to obtain warrant, get rid of evidence
 - Discover evidence - SCC has supported this
- **No independent R & P grounds**
- **Once arrested, lowered REP**
 - Once arrested on the basis of RPG's that you committed an offence, your privacy and liberty are compromised at this point
 - Once you are arrested, already have experienced indignities, so might as well let the police go ahead and look for evidence, judge would grant a warrant anyways

B. BASIS FOR SEARCH (*Caslake*)

- **Separate RPG's for search not required**
- **Purpose of search must relate to scope of arrest** – prevent fishing expeditions
 - If traffic stop for parking offences, cannot search car or backpack
- **Subjective and objective “reasonable basis” for search**
 - Police must have one of the purposes for a valid search incident to arrest in mind when the search is conducted – *reasonable basis*
 - Has to be subjectively in the mind of the police officer, and an objective reason for the search

C. TIMING

- **Before arrest** (*Debot*)
 - Safety concerns – someone is armed or believed to be armed

- Can search before arrest, a “protective sweep”
- Drugs or evidence before it is destroyed (*Collins*)
- **After arrest** (*Caslake*)
 - How long? No firm deadline
 - *Caslake* – Search occurred 6 hours after the arrest, this was reasonable considering the short-staffed police.
 - Court warns that the longer you wait, harder to establish truly incident to arrest

D. BODILY SEARCHES

- **“Pat-down” searches:** Police always authorized to conduct a pat-down search
- **Strip Searches:** Looking at intimate areas of the body – genitals
 - Pre-Golden → policies that said anyone arrested and brought to the police stations, even if only for temporary detainment, were strip searched.
 - *Golden* → need separate RPG’s to conduct the strip search, have to demonstrate that it is necessary, not purely at the whim of the police, truly necessary in the circumstances
 - Two reasons to justify a strip search:
 1. To ensure safety of officers and general public (including accused)
 2. To preserve evidence that might otherwise be lost
 - Unless exigent circumstances, must be done at the police station – not high probability they will be able to destroy evidence while in back of police car.
- **Bodily cavity searches**
 - Not allowed - No authority anywhere in Canadian jurisprudence
 - Mouth is not considered to be a bodily cavity – hence the chokehold
 - Unless voluntary informed consent of the subject
 - Customs agent – stuffers and swallows → wait until it passes
 - *Monney* (SCC) – suspected swallower pursuant to the *Canada Customs Act*, had to wait until they defecated – considered equivalent to a strip search.
- **Bodily samples & impressions**
 - *Stillman* – Cannot take any sample of the body pursuant to a search incident to arrest power

E. NON-BODILY SEARCHES

- **Premises:** Control, immediate vicinity
- **Vehicles:** Immediate vicinity, inventory searches **not permitted** incident to arrest (*Caslake*)
- Anything beyond this, well advised for a police officer to obtain a warrant

2. Search Incident to Arrest Case Law:

Rex v. Brezack [1949] OR 888 – 892

Facts:

- Appellant unlawfully assaulted RCMP Macauley – who was observing a premises
- RCMP acting on information expecting to find capsules containing the narcotic concealed in the appellant’s mouth → arrested appellant
- Constable Macauley used choke hold on appellant, tried to retrieve drugs and was bit several times – no drug found in his mouth or on his person, took him to his car found drugs

Analysis:

- Constable engaged in the lawful execution of his duty as a peace officer making an arrest, and believing the information he had, was entitled even to search in appellant's mouth for evidence of the offence of which he believed appellant to be guilty
- Although the information was wrong as to where the drug would be found, it was his duty in making the arrest to make reasonable efforts to obtain possession of any narcotic that he believed to be illegally in the appellant's possession (as evidence, and to prevent disposing)
- S. 19(1) of Opium and Narcotic Drug Act says... reasonable cause... if necessary, by force, may search any person

Decision: Search was incident to arrest

R. v. Caslake [1998] 1 SCR 51

Facts:

- Officer saw a vehicle pulled over on the side of a highway, driver in the tall grass
- Officer went to the area and found a yellow garbage bag containing 9 lbs. of marijuana
- Arrested the appellant for possession of narcotics
- Car was towed to a garage, six hours later and searched the vehicle (Warrantless)
- Found cocaine and money, Constable Boyle claimed search was conducted pursuant to an RCMP policy to take inventory of impounded vehicles,
- Convicted of possession of marijuana for the purposes of trafficking, and possession of cocaine – appealed on a s. 8 breach

Background: Trial – search beyond inventory search, still valid search incident to arrest

- Delay due to short staffing – search was reasonable

Analysis: Lamer J.

- Prima facie unreasonable – no warrant → *Collins TEST*

Common law power of search incident to arrest – no independent RPG's

- Since legality of the search is derived from the legality of arrest, if arrest is later found invalid, search will be also
 - Cloutier limits: p. 227/228
 - 1) The power does not impose a duty. – have discretion
 - 2) The search must be for a valid objective in pursuit of the ends of criminal justice.
 - 3) The search must not be conducted in an abusive fashion.
 - If met and law reasonable, search reasonable

- **Scope of Search incident to arrest:** Allows state to pursue legitimate interests while protecting individuals' right to privacy. Power to search extends to automobiles.
- **Was the search incidental to arrest?** Constable's purpose was to do an RCMP inventory – this falls outside of scope, delay not truly incidental to arrest, not authorized by CL rule

Decision: Inventory search falls outside of scope, therefore NOT authorized by CL – **INVALID**

- Evidence not excluded: trial still fair, breach not serious, exclusion would have more detrimental impact than admission

Dissent: Bastarache J.

- No onus on Crown to establish subjective and objective believe – RPG's justified by arrest
- Whether officer turns mind to that is irrelevant unless evidence of bad faith
- Arrest was legal, impounding/inventory of vehicle was legal therefore reasonable search

R. v. Nicolosi (1998)

- Inventory search after arrested for traffic warrants, found loaded revolver
- Highway Traffic Act granted an implied license to conduct an inventory search – reasonable

R. v. Golden (2001 SCC)

Facts: Observation post to observe potential drug transactions – trafficking in cocaine

- Saw the appellant engage in two transactions, was “taken down”, did “pat down” search, no weapons, did a strip search inside the restaurant, subject to three strip searches

Preconditions of a Lawful Strip Search Incident to Arrest at Common Law:

- Strip searches are humiliating and degrading for detainees regardless of the manner in which they are carried out and they therefore can't be routine (only in a prison setting)
- INCIDENT TO A LAWFUL ARREST for the purpose of discovering weapons in the detainee's possession or evidence related to the reason for the arrest
 - Arrest for drug trafficking – purpose of search to discover illegal drugs secreted
- NEED ADDITIONAL RPG's. That a strip search is necessary for safety or obtain evidence
 - *Cloutier* RPG's only cover a frisk search, need higher degree of justification to support the higher degree of interference with individual freedom and dignity
- MINIMALLY INTRUSIVE FASHION: **reasonable manner**
 - Even if concealed in a bodily cavity b/c you maintain supervision
 - Manner has to ensure health and safety, same gender, minimal officers present, minimum force, private area, as quick as possible, visual inspection, if physical touching required give detainee option of doing it, authorization of senior officer
 - Have to take person back to police station
 - At scene of arrest? Only justified IFF: exigent circumstances
 - 1) Reasonable belief that suspect might have concealed weapons
 - 2) Hidden evidence of a temporal nature

Evidence found is perfectly admissible as long as it is obtained legitimately: onus on Crown

- Applied: Strip search not carried out in a reasonable manner, no exigent circumstances existed (police station close by), no senior officer permission, unsanitary conditions, appellant not given option to remove himself, could have physically harmed him
- Would have had authority for the strip search due to the possibility of concealment
 - Arrest for observed drug transactions
 - Constable Ryan's experience
 - Crack found under table

Decision: Acquitted

3. Search Incident to Investigative Detention

A) EMERGENCY SEARCH POWER (*Goody*)

- Someone dialed 911, hung up, police went to residence, turned away at door, forced way in
- 911 “cry for help – gave police required grounds to enter
- CL power for police to enter private premises where they have reasonable grounds to believe that an occupant is in distress and entry is necessary to protect life and prevent serious injury
- Limited to locating 911 caller, not searching premises or intruding on private property

B) CONSENT SEARCH AND SEIZURE WAIVING THE PROTECTION OF S. 8

- Passive acceptance insufficient (*Dedman*)
- Requires full appreciation of consequences (*Borden, Mellenthin*) – what uses they might make of the seizure

D) PLAIN VIEW SEIZURES, BEYOND THE PROTECTION OF S. 8

- **Prior justification for intrusion**
 - Must be in a lawful position
 - If they are executing a search warrant for child pornography and happened to see a severed corpse in your living room, *in plain view*, entitled to seize
- **Cannot use it as an excuse to be in a certain place**
- **Is it truly in plain view?**
 - *Mellenthin* – it was NOT in plain view, search based on a hunch, not a true consent search because detainee and felt like he had no choice to comply.

E) S. 489 OF CODE & S. 11(8) OF CDSA

Neither authorizes the police to search, they allow a police officer who is executing a warrant or otherwise lawfully present in a place to seize anything the officer believes on reasonable grounds has been obtained by or used in the commission of an offence or that will afford evidence in respect of an offence.

- Say they inadvertently stumble upon contraband
- Do not in themselves authorize police to search
- Evidentiary value of evidence would have to be immediately apparent

4. Case Law: Search Incident to Investigative Detention

Regina v. Mellenthin (1992 SCC)

- Check Stop – officer flashed light inside, asked appellant what was inside the gym bag, pulled out drug evidence, was arrested, gave incriminating statement at RCMP station
- Stop and scope of investigation has to be held to driving offences (speeding, licensing, parts of car) – evidence must be *in plain view*
- Officer argued consent of the appellant
- Appellant felt compelled to respond, therefore consent cannot be given during an already arbitrary detention

Decision: Evidence excluded

Regina v. Borden (1994 SCC)

Facts:

- Elderly woman sexually assaulted in home, police had ample evidence
- Appellant arrested for a separate offence – simple assault at a motel, said he did not wish to talk to a lawyer, told of his charge and made an exculpatory statement in writing
- *Charter* rights were repeated, called a lawyer, was instructed not to tell police anything
- Respondent consented to hair and blood samples, signed a written consent said “investigations” so police could use sample to investigate elderly woman’s sexual assault

Analysis: **Section 8**

- Violated, police had no statutory authority to take samples, REP in bodily samples

- Consent for motel offence was valid consent
- Consent to waive a section 8 right: Voluntariness, awareness of consequences of waiver
- To consent, must possess the requisite informational foundation for a true relinquishment of the right – Respondent was cooperative with police in the face of the advice of his lawyer not to say anything to the police other than his name – did not turn his mind to October offence
- Police have to make aware that it is a blanket offence – or at least for another offence that is different than the one being detained for

Note: S. 10 right would not have been waived either, because police did not tell the accused he was also being detained for another offence

Decision: consent for October offence was invalid, samples excluded.

R. v. Buhay (2003)

Facts: Search of a locker at a bus depot, seizure of marijuana, done by private security guard

- **Appellant had REP** with respect to locker 135 – control and possession of key, ability to exclude others, contract with locker company (rental fee, no random search).

Were the security guards acting as state agents during the initial search of locker 135?

- **NO** – guards investigated on their own initiative, independent from police
- *Broyles* test p. 256 – would the exchange between the accused and the informer have taken place, in the form and manner in which it did take place, **but for** the intervention of the state or its agents?
- *R. v. M. (M.R.)* – agreement or police instruction to create an agency relationship

Was the search of locker 135 by the Police contrary to sec.8 of the Charter?

- **Yes** because there was no transfer of control from the Security guards to police, there was a continuance of expectation of privacy when bag was placed back in locker.
- Person's REP should not be forfeited because a private individual invades that privacy

It was a warrant-less search, item does not fall in "plain view" doctrine

- Not authorized by law
- No exigent circumstances, no immediate danger of destruction of evidence
- The fact that there may not have been sufficient grounds to obtain a search warrant does not justify a Warrantless search

Lawful position – prior authorization for the intrusion into the place

- Could lawfully enter the bus station
- Could not lawfully enter the locker

Decision: evidence excluded, acquittal

VI. ARREST POWERS

A) DEFINING ARREST:

- Critical event in the balance of power that exists between an individual and the state
- Coercive measures police make recourse to in fulfilling their law enforcement and
- **Physically:** Seizure or touching of body by a peace officer (*Whitfield*)
 - **Consists of the actual seizure or touching of a person's body with a view to his detention**
- **Psychologically:** Words of arrest and submission (*Whitfield*)

- Or the pronouncing of “words of arrest” if the person sought to be arrested submits to the process and goes with the arresting officer.
- **De facto arrest** = Grounds for arrest + told detained for investigative detention (*Latimer*)
- Police officers are licensed to use as much force as they consider necessary to effect an arrest (s. 25 of the *Code*)
- Placed in handcuffs, given an incidental search (which can vary in intrusiveness), fingerprints and photographs are also taken

B) STATUTORY POWERS

1. Citizen’s Arrest – all of us possess this, police included

Two different circumstances:

- a. **s. 494(1)(a)** everyone, police included, to arrest without warrant (with reasonable grounds) a person whom they find committing, or (*Biron*) apparently committing, an indictable offence. OR
 - Part I → When you SEE someone committing an indictable offence
 - From the perspective of the observer at the time, don’t have to be correct
 - Part II → Viewing from an *ex-anti* perspective – knowledge held at the time
 - Can’t be based on second hand information
- b. **S. 494(1)(b)** – “criminal offence” and escaping from, and being freshly pursued by, those with lawful authority to arrest, then a Warrantless arrest is also permitted.
 - Does not include provincial offences
 - Chaser → have to have lawful authority to arrest
- Better off to leave it to police, most of these provisions work as a benefit to security guards

Incidental Powers:

- **S. 25** Use of Force by anyone who has lawful authority to do something under the Code
- Search incident to arrest (*Lerke*)
- Delivery – responsibility of the citizen to deliver the perpetrator ASAP

Situations:

- Cabbie allowed arresting a passenger who doesn’t pay? No, summary conviction offence.
- Can police arrest a fleeing passenger? No, because although criminal offence, doesn’t meet part II has knowledge that not allowed to arrest.

2. Special Arrest Powers Relating to Property

- **S. 494(2)** power to arrest for owners or custodians of property, can arrest without warrant a person whom he finds committing a criminal offence on or in relation to that property
 - Can taxi driver take advantage of this provision?

3. Police Power to Arrest for Breach of Peace

- **S. 31(1)** arrest any person found committing a breach of the peace or whom, on reasonable grounds, the officer believes is about to join in or renew a breach of the peace.
- No CL offence for breaching the peace

4. Arrest without warrant

- **S. 495(1)** – police officer may arrest without warrant a person whom, “on reasonable grounds, he believes has committed or is about to commit an indictable offence”. Includes preparatory steps towards committing a crime
 - At the time the officer made the offence:
 1. Did he/she subjectively believe he/she had RPGs?
 2. Was this belief objectively reasonable based on the circumstances?
- **S. 495(1)(a)** A person *Who has committed* an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence
 - Can be based on hearsay
- **S. 495(1)(b)** – criminal offence (indictable offence or summary conviction offence)
 - Summary conviction offence – if a police officer does not witness the offence, he/she must procure a warrant before carrying out an arrest
- **S. 495(1)(c)** – authorizes a police officer to arrest if she or he has “reasonable grounds to believe that a warrant of arrest or committal” is outstanding within the “territorial jurisdiction in which the person is found”.
 - Do not need the actual warrant present, as long as it is registered on CPIC
- E.g.: Could the police have arrested the fare by fraud according to s. 495? NO would need a warrant, because the police didn’t find him committing the offence.

5. What is an “offence”?

Powers that attach to private citizens and peace officers that allow them to make an arrest, this means an apparent offence.

Biron - Peace officer made an arrest involving an alleged assault in a bar

- Person was acquitted (self-defence), sued police for false imprisonment.
- Even if offence fails, the question is whether the peace officer had reason to believe an offence had been committed **at the time**. Not entitled to resist, police have authority to use force as long as it **reasonably appeared** at the time you were committing an offence.

Why do we afford police this discretion?

- Situations are not always clear cut
- Need to not give people the discretion the right to resist arrest
- If the arrest is unlawful (no RPG’s, summary conviction offence and not seeing it) you are entitled to resist it.
- Principle of legality – police have no inherent power or authority, all of their authority stems from law (statutory and common law).

C) REASONABLE AND PROBABLE GROUNDS

- Subjective belief
- Objectively reasonable

***R. v. Storrey* [1990] 1 SCR 241 – “Safeguards”**

CORY J.: Need RPG’s that the appellant had committed the offence before they could arrest him

- **Subjectively** on the testimony of Larkin
- **Objectively** upon the cumulative effect of the following items:

- The possession and ownership by Storrey of a 1973 blue T-Bird, unusual care, type used in infraction
- Appellant stopped on several occasions driving that car
- Past record of violence
- Two of the victims picked out a picture of Cameron as someone who looked like their assailant
- The remarkable resemblance of Storrey to Cameron
- Victims picked Storrey out of a lineup

RD Standard that police have to abide by:** warrant-less arrest

- Police need subjective reasonable and probable grounds to believe that the person to be arrested has committed the offence
- These reasonable and probable grounds have to be justified by an objective point of view

These grounds existed immediately prior to the event

- Do NOT need to establish a prima facie case for conviction before making the arrest
- Police can continue their investigation subsequent to an arrest, as long as reasonable and probable grounds for the arrest exist in the first place

D) POST-ARREST PROCEDURES

- **Investigation can continue after arrest** (*Storrey, Duguay*)
 - *Storrey* – held for 18 hrs to gather info for lineup, necessary to investigation, and after the arrest
 - *Duguay* – de-facto arrest, police even admitted – no RPG’s for arrest
 - Argued by the defence in *Storrey* that it was like *Duguay* – not legitimate
 - In *Storrey* there were RPG’s for the arrest, not in *Duguay*
 - Cannot arrest for purposes of continuing investigation unless RPG’s
- **Fingerprinting** (*Identification of Criminals Act*)
- **Photographing**
- **Measurements**
- **Legal obligation to ensure that the validity of the detention, Justice of Peace has to be contacted to ensure validity of continuing detention and set up a bail hearing.**

E) UNLAWFUL ARREST AND ARBITRARY DETENTION

- ***Duguay* Approach → Ont. CA**
 - Unless a search is conducted, or arbitrary detention, there is not much you can do as a defence lawyer to seek relief to exclude evidence.
 - Court says you can almost have RPG’s to detain someone, not arbitrary
 - Have to look at the totality of the circumstances to determine if detention is arbitrary in the circumstances
- ***Iron* Approach → Sask. CA**
 - Principle of legality, SCC says unlawful searches violate s. 8 of the *Charter*
 - Unlawful detention = arbitrary detention
 - If you cannot justify interfering with a person’s freedom, arbitrary
- **Is an unlawful arrest an inherently arbitrary detention? DEPENDS**

- *Storrey* (Cory J.) arrest will violate s. 9 of the *Charter* if it is undertaken “because a police officer was biased towards a person”
- Have to follow court in *Duguay*

Regina v. Duguay, Murphy, and Sevigny (1985 Ont. CA)

- Respondents unlawfully arrested, breached s. 9 of the *Charter*, Crown now appeals
- Detectives Reaume and Chevalier (experienced officers) investigating a break and enter
- The neighbor said three individuals were coming to the Grummett residence (did not implicate the three individuals) – were in the neighbor’s yard the night before drinking beer
- Police officers had **subjective belief** of RPG’s, **objective justification did not exist**
- Purpose of the arrest was to further the investigation by obtaining inculpatory statements and fingerprints from the accused → arrest declared unlawful
- Unlawful arrest could be considered a lawful detention if a reasonable person honestly, though mistakenly, believed that RPG’s for the arrest exists and there may be some basis for that belief.

Decision: detention found to be arbitrary → “hunch” did not have reasonable basis, trial judge did not believe honest belief with such lengthy service experience

F) ARREST WITH A WARRANT

- Generally executed by police (**513**)
- Execution of Warrants
 - Issued by Provincial Court – anywhere within territorial division and anywhere in Canada where fresh pursuit or for failure to appear
 - Issued by superior courts – anywhere in Canada
 - Endorsement for execution in another jurisdiction by justice in that jurisdiction
- Secure individual’s attendance in court: appearance notice (s. 496), promise to appear (ss. 497(1)(b), 498(1)(b), 499(1)(a), 503(2)), a summons, or a recognizance entered into before the officer in charge (ss. 498(1)(c), 498(1)(d)).

G) S. 495(2) – LIMITS TO ARRESTS WITHOUT A WARRANT

- Once a police officer decides that he or she has the required grounds to carry out an arrest, s. 495(2) directs the officer not to arrest for less serious indictable offences, hybrid offences and summary conviction offences, if there are reasonable grounds to believe an arrest is unnecessary in the “public interest” (establish identity, secure or preserve evidence, prevent commission or continuance of offence, ensure attendance in court).
 - Has to be of public interest
 - Should find another way to ensure they show up for court
 - **Problem**: lies in (3) notwithstanding (2) you may ignore it
- Potential for honest mistakes and abuse of police arrest power
- Police may arrest a suspect because they “flunk the attitude test”, or due to racial bias
- Arrest warrants only usually obtained where the police have decided to arrest a suspect but his/her whereabouts are unknown – can register it on CPIC (Canadian Police Information Computer)
- Police need a warrant before entering into a private-dwelling to effect an arrest

H) OTHER METHODS OF COMPELLING APPEARANCE

- Appearance notice
- Promise to appear
- Summons
- Recognizance

D) RESIDUAL ARRESTS

1. Common Law (*Eccles v. Borque, Landry*)

- RPG's to believe that present
- Proper announcement
 - We are the police, we want entry
 - Only if entry is refused are you entitled to use force
 - Exceptions: hot pursuit, exigent circumstances (stop evidence from being destroyed, safety concern)

2. Charter (*Feeney*)

- **Warrant** – *Landry* → (revised CL rule) court held that a warrant was required to enter a home, increased privacy in the home, need to justify increase in violation of such privacy
- **Hot pursuit** – exception to the warrant requirement, subset of exigent circumstances
- **Additional exigent circumstances?**

3. Residential Arrest Warrants

- Authorization on arrest warrant (**529**)
- Stand-alone warrant (**529.1**)
- Reasonable and probable grounds
 - To believe person in the house
 - “Immediately before” entering – RPGs right before you execute warrant
- Authorizing justice can add conditions for the execution of the warrant (**529.2**)
- Omitting announcement (**529.4(2)-(3)**)
- Can obtain a warrant over the telephone, narrows exigent circumstances (**529.5**)
- Exigent circumstances (**529.3**)

4. R. v. Feeney [1997] 2 SCR 13

Facts: Police investigation of the beating death of Frank Boyle in BC

- Stolen and crashed a truck close to Boyle's residence where Boyle's truck was later found
- Found witness statement that let the police to believe Feeney was the perpetrator
- Went to his trailer and knocked, yelled “police” no answer, entered the trailer, arrested appellant, gave 10(b) rights, asked him questions lawyer absent, Feeney trying to obtain one
- Took breathalyzer sample, questioned him some more regardless of him stating he should have a lawyer - Police obtained search warrant and seized cigarettes, money and shoes

Analysis: *Eccles + Landry + Storrey* + s. 495 =

Warrantless arrest following a forced entry into a private premises is legal if:

- The officer has RPG's to believe that the person sought is within the premises**
- Proper announcement is made** - Knocking/doorbell, identifying themselves, give notice of purpose by stating lawful reason for entry

(c) **The officer believes (subjectively) reasonable grounds for the arrest exists**

(d) **Objectively speaking, reasonable and probable grounds for the arrest exist**

Applied: Russell told police where appellant was, no announcement made, suspicions at best, no exigent circumstances existed.

Decision: There was no warrant, because there was not RPG's for a warrant

- A simple watch of the trailer in which the police were told the appellant was sleeping, not a Warrantless entry, would have sufficiently addressed any safety concerns
- *Ex post facto justification* of searches by their result → *Hunter* standards designed to prevent

Dissent: claims that exigent circumstances did exist (destruction of evidence, not practical to obtain a warrant given remote community, violent crime occurred) as well as both subjective and objective RPG's.

VII. INTERROGATION

- Most important investigative tool that police have – no power conferred by statute
- Police are not prohibited from interrogating unless the law says that they can't
- We as citizens (witnesses, potential criminals) have the freedom whether to answer
- More like a negotiation – police are free to make inquiries (subject to limitations)
- Under coercive circumstances (physical or psychological), what a person might say under such circumstances may be rather disconnected from the truth
- Also a strong moral objection to obtaining evidence through the use of such techniques
- Basic due process rights for those who are under investigation, have been detained or are charged with a crime → right against self-incrimination

A) CONFESSIONS RULE

- Rule of evidence – excludes certain kinds of statements from trier of fact at a criminal trial
- When you are questioning someone and you don't follow the rules, can't include it if you don't do it properly
- Most convincing and compelling evidence that can be brought forward at a criminal trial

1. Overview:

When an accused makes a statement to a person in authority that the Crown wishes to adduce at trial, Crown has to prove the statement was voluntary beyond reasonable doubt.

- **Burden and standard of proof – on the Crown**
 - Standard is beyond reasonable doubt
 - Both legal and evidentiary burden
 - Opposite of *Charter* application
 - Does not matter whether it is exculpatory or inculpatory, if the Crown seeks to admit it, they feel it will help their case.
- **Person in authority**
- **Rationale**: Reliability, public policy – humans exposed to highly coercive circumstances
- **Voluntary BRD** – proxy is threshold reliability (include the objective circumstances as well as the accused's internal state of mind) – is there fear that the statement may not be reliable?
 - Operating mind, Threats and promises, Oppression, trickery

2. Voluntariness – ULTIMATE QUESTION: is it voluntary?

TEST: Given this accused, is there a possibility that this tactic might lead to a false confession

Operating Mind

- **Low threshold** – Crown has to prove BRD that the suspect had a limited degree of cognitive capacity to understand, in a linguistic sense, what he/she was saying and what was being said to him/her. Some degree of appreciation for the consequences of speaking
- *Clarkson* – highly intoxicated woman, confessed to the police that she stabbed her husband, accompanied by her aunt who told her not to say anything. SCC threw out confession on the basis that she did not have an ‘operating mind’
- *Whittle* – **Don’t have to have a full** operating mind – *don’ have to make a calculated, rational best self-interest decision.*
- Low threshold of understanding – if don’t speak the language, need an interpreter
- If you are dealing with a young person, a mental illness, or someone so intoxicated that they don’t know what is going on, will have problems proving ‘operating mind’

Threats and Promises: (*Oickle*)

- **Violence, actual or threatened** is forbidden
- “Veiled” threats – not allowed
- **Moral / spiritual inducements** are acceptable – police have no actual control over this
- **Reduced charge or sentence** – can’t do this
- **Downplaying moral culpability** – allowed
- **Psychiatric assistance, therapy or counseling** – Can say these resources are available, but cannot tie an offer of assistance to the confession.
- **Inducements aimed at third parties** – NO threaten loved ones with negative consequences
 - In *Oickle* said they were going to have to question his girlfriend
 - This was deemed ok by the SCC did not induce a confession
- **No quid pro quo** – if you confess, we will give you this – not allowed
 - *Spencer* (2007 SCC) decision: SCC said that even if you can demonstrate a *quid pro quo*, it has to be a **significant** offer – would lead an innocent person to confess also. Accused interrogated, asked to see his GF and police said that he could if he ends the interrogation successfully.
 - Something of substance that would substantially induce

Oppression

- **Deprivation of necessities** – food, water, bathroom breaks not allowed
- **No caution** – no authority in the SCC that police **have** to tell the accused of a right to silence
- **Denial of access to counsel** – permissible, don’t have to let you see your lawyer
- **Unlawful detention**
- **Lengthy questioning** – permissible
- **Strip clothing**

- **Use of non-existent evidence** – fabricating evidence (fingerprints, DNA) is looked at skeptically – concern is that even innocent people when confronted with seemingly infallible evidence of his/her guilt, will confess – NOT permissible

3. Trickery

- Can consider this within the oppression analysis
- **“Community shock” test (Rothman)**- CL exclusionary rule
 - If the police use a reprehensible trick that we cannot abide by it as a civilized society, we will exclude the confession
 - Even if there is no chance of a false confession
 - Use of a priest to induce a confession – inadmissible
- **Use of fabricated evidence** – look at oppression
- **Use of inadmissible evidence** – permissible as long as its not too far
 - *Oickle* – subjected to a polygraph test
 - Results of polygraph tests are inadmissible because they are unreliable
 - Police use this as a tactic – take the polygraph to rule you out
 - Say you failed, and have to ask more questions – why did you fail
 - If police says that they will use the polygraph in court to make them guilty -
- **Timing of polygraph**
 - *Oickle* – can use polygraph results to induce a confession SCC says admissible even if immediately after failed polygraph
- **Exaggerating strength of evidence**
 - Including the use of polygraph results
- **Abuse of Trust**
 - This is allowed – police use good cop routine – much more effective
 - May come a point where you so incomprehensibly break down a suspect, that the court will say this is too much.
 - Police are given a great deal of leeway

Oickle (2000 SCC)

- Responsible for a bunch of fires, interviews lasted over six hours
- *Physical conditions*: small room, interrogator was right in his face, right in the corner
- You have a right to silence, but you can still be interrogated for hours
- You can assert your right to remain silent, may just put you back into your cell
- Demeanor of questioners: not huge and mean, but claustrophobic effect of being closed off, psychologizing attitude of the police – soft sell (good cop), not the hard sell (bad cop).
- Offered food to him, gave him a drink, opportunity to go to the washroom
- Told him repeatedly that he could talk to a lawyer – made him aware of it
- “It would be better for you if you confessed” – this general statement by police was OK

B) SECTION 10 OF THE CHARTER

Everyone has the right on arrest or detention...

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

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

Triggered by Arrest, detention, police questioning as a suspect

1. CONFESSIONS RULE DIFFERENT THAN S. 10 OF THE CHARTER

- Burden on accused to show on a balance of probabilities, a violation of constitutional rights
- Evidence obtained in violation is excluded under s. 24(2) on if it would bring the administration of justice into disrepute
- Evidence always excluded under the confessions rule.

2. MIRANDA CASE

- Courts became dissatisfied with the confessions rule
- Kept getting cases where they would have a voir dire, and police would say one thing, accused would say the opposite – no physical evidence, courts will believe the police 99%
- Courts had suspicion on police getting away with a few lies
- Searching for some solution to solve the ‘swearing’ contest between police and the accused
- Solution? Crown has to **prove the statement was videotaped** – unless it wasn’t feasible to videotape it (person starts confessing in the field)
 - SCC has stopped short of requiring statement to be videotape (option did not exist in 1966). Police prefer to use it to show voluntariness.
- Another Solution? In order to supplement the voluntary confessions rule, we will tell people they have the right to counsel – *Miranda Warning*

3. DETENTION REVISITED

- General principles revisited – when is a person detained
 - Physical restraint
 - Psychological restraint: Legal liability, reasonable belief compliance mandatory
- Problematic: Says person have a reasonable belief to comply, even though they actually don’t have to comply – are free to leave
- This is an error in law: if detained, but through *Charter* are free to leave – not detained
- Arises in interrogation – people have a freedom to refuse
- What is the difference between an individual free to stand up and walk away and the detained suspect who is compelled to remain during an interrogation?
 - Reality is that people don’t always feel free to refuse to comply

4. POLICE QUESTIONING

- **Nature of the interrogation** – substance of the questioning process
 - Questioning: Open-ended in field questioning
 - Interrogation: Pointed questions designed to elicit self-incriminating statements (perpetrator, done at police station)
- **When does someone become a suspect?**
 - Without individualized suspicion could be interviewing friends or family members, and all of a sudden be detaining a suspect
- **Where do you draw the line?**
 - Investigative detention (*Suberu*)
- **Other police questioning: when does s. 10 warning have to be given?**
 - Suspect v. witness (*Mickey*)
 - Likely perpetrator (*Hawkins, Elshaw*, per LHD)
 1. Focuses on the conditions of the interrogation
 2. If the purpose is to elicit self-incriminating statements - suspect

- Totality of the circumstances (*Moran*)

R. v. Mickey (1987 BC CA) → **SUSPECT VS. MERE WITNESS** (Courts moved away from this)

Facts: Appellant is appealing his conviction for second-degree murder

- Wore “hush puppies” that night, attended the crime scene the day after
- Constable Lincoln released information of tattoo on the arm of the victim was released
- Appellant told others of the tattoo as well as that the victim was raped with a hockey stick, her faced was messed up and that she was naked, the crime was not done by her boyfriend, and that the killer was still in the Alberni area. Also some misinformation.

Issue: Crown’s case rested entirely on circumstantial evidence

- Appellant had opportunity to commit the crime
- He had made false statements in an attempt to exonerate himself
- He had knowledge of details of the victim and of the murder which only would have been know to the assailant or to the police
- Appellant said he saw the attack, agreed to make a witness statement at the police station.
- On the way to the police station asked if the girl had tattoos on the back of her hands
- Not under detention at first, but was no longer treated as a witness after the tattoo comment
 - Turned over to experienced interrogators, no longer free to leave – **now detained**
 - Wasn’t given s. 10 rights
 - When tape was turned on, statements were no longer voluntary

Decision: appeal allowed, violation of s. 10 rights, new trial ordered

R. v. Elshaw [1991] 3 SCR 24 → **POINT AT WHICH THEY BECOME A LIKELY PERPETRATOR**

- Two counts of attempted sexual assault and two counts of simple assault
- Witness saw the appellant crouched in bushes with two boys saying “it’ll be our little secret”
- Officer detained appellant, appellant told the officer he had a problem – not given s. 10 rights

Decision: Statements were ruled inadmissible, appeal allowed new trial ordered.

Dissent: L’Heureux-Dube K.

- Detention: Deprivation of liberty by physical or psychological constraint
 - Police officer assuming control over the movement of a person by a demand or direction which might have significant legal consequences and which prevents or impedes access to counsel
- Not detained → Appellant only spend 5 or 6 minutes in the van
- S. 10(b) rights should not be triggered until later in the process, when the police have an opportunity to assess the situation which confronts them
- Even if detained arbitrarily, admitting the statements would not bring the administration of justice into disrepute s. 24(2).

R. v. Moran (1987 Ont. CA) **TOTALITY OF THE CIRCUMSTANCES** - most dominant approach

Facts: Deceased died from severance of the trachea. Appellant and deceased had a secret sexual relationship, were previously business partners.

Issue: Did the judge err in admitting the appellant’s statements to the police?

Analysis: Police invited the appellant to talk as they were investigating death of Betty Hart, appellant agreed to help

Was the appellant detained?

- Police officer is entitled to question any person to obtain information with respect to a suspected offence, no power to compel the person questioned to answer
- No power to detain must allow him/her to proceed unless RPG's for an arrest
- Application:
 - First interview:*
 - o Police conducting general investigation, appellant elected to go to station
 - o Police asked general questions that were asked to all friends of the deceased
 - Second interview:*
 - o No choice of place, assumed appellant's choice would be station again
 - o Appellant was a suspect at the time of the interview
 - o Questions were more pressing, but not accusatory
 - o Suicide was not ruled out at this time
 - o Appellant replied he felt a lot better after the interviews
- NOT DETAINED

Was it relevant whether the appellant's statements made to the police were made in an off-the-record basis?

- Phelan denied the appellant stated this
- Statement made to authority, even if accused wanted it confidential, does not render it involuntary – unless the police tricks them into testifying by saying it is confidential

Decision: Appeal dismissed

Moran Factors

- 1. CHOICE OF LOCATION – at the station or something less formal**
 - 2. ESCORT – drop by, or accompanied**
 - 3. LEFT OR ARRESTED AT THE END OF THE INTERVIEW**
 - 4. STAGE OF INVESTIGATION – general investigation or likely perpetrator**
 - 5. REASONABLE AND PROBABLE GROUNDS**
 - 6. NATURE OF THE QUESTIONS – general information or confrontation**
 - 7. SUBJECTIVE BELIEF**
- This is problematic for police officers to be able to apply at the heat of the moment.
 - These rules do NOT guide in a concrete fashion the judgment call of the police officer
 - When do they have to comply with s. 10 when do they not?
 - Courts trying to decide: What conditions of questions provide a need for s. 10?
 - When is s. 10 most critical? When is it unnecessary, potentially a hindrance to an investigation?

5. SECTION 10(A) – RIGHT TO BE INFORMED OF REASONS

- **Extent of jeopardy** – general sense of what you've been detained for
- **What offence(s) you are being investigated for?**
- **If nature of investigation changes** – they have to tell you

R. v. Black – can only exercise 10(b) right in a meaningful way if he knows extent of his jeopardy
Regina v. Borden (1994 SCC)

- Non-disclosure of police for their dual purpose in seizing the respondent's blood infringes s. 10(a) and (b) rights
- Accused had the right to be informed that he was being detained for both the motel sexual assault AND the October sexual assault on the elderly woman

6. SECTION 10(B) – RIGHT TO COUNSEL

Purposes: give the right itself - Equal playing field, make sure everyone aware of legal rights

- Make sure they know they have a right to remain silent, don't have to cooperate with police
- **Prevent people from making self-incriminating statements**
 - Penney feels that s. 10(b) does a lousy job of this – lawyers tell suspects to remain silent, some people don't listen
- Provides authority for the police to conduct potentially abusive and coercive interrogations
- **Serve as a reminder that there are limits:** no obligation to cooperate
- **Without delay requirement depends on the context of the investigative detention** – *Suberu*
 - *Feeney* – short delay between waking appellant and moving him to door without 10(b) right was found to be a violation
 - *Strachan* – Delay justifiable where police facing a potentially dangerous situation

(a) Informational duties (*Brydges, Bartle*)→

1. Immediate warning, except where emergency (high-risk takedowns)

2. About right to counsel, and *exactly how to access* any system in place to provide them with legal aid / duty counsel (if it exists in your area)

- Inability to afford lawyer as an impediment to the exercise of the right to retain and instruct counsel
 - If **no** 24-hour duty counsel in place, then the police have to “hold off”
 - If 24-hour system **is** in place, and accused refuses, then the court will conclude that the accused was not duly diligent in exercising his/her right

3. Re-Warning: if the jeopardy of the detainee changes

4. Waiver: (*Brydges*) waiving the informational component

- The police attempt to comply with 10(b) and the suspect interrupts them repeatedly telling them that they've heard it before
- Almost impossible to establish this – have to prove the suspect really did know the full content of the right (just read the caution card)
- Only situation this may arise is in the re-warning --> informational component waived, easy to prove in these circumstances

R. v. Brydges (1990 SCC) “**duty counsel**” Ontario 1-800 number created & added to police cards

- Arrested for second degree murder, read right to retain and instruct counsel
- Accused asked if they had any Legal Aid because he couldn't afford anything
- 10(b) was infringed as police should have given him access to Legal Aid
- *Manninen* – how to access rights

- Detective asked if there was a reason to talk to a lawyer, accused replied not right now, and gave prejudicial statements, then contacted legal aid, was told not to say anything; too late.
- *Brydges Duty Counsel* - Encouraged provinces to ensure fed. Govn't funded legal services

Decision: Evidence of admission excluded - ACQUITTED

Ratio: Duty on police to inform him of the existence of duty counsel & how to access such

R. v. Parks (1988 Ont. HC)

- Accused admitted to killing two people, Advised of his right to retain and instruct counsel, and right to remain silent.
- Police interviewed him, he told police no lawyer because he couldn't afford to pay him.
- Second interview continued – police did not inform accused of Ontario Legal Aid Plan

R. v. Bartle (1994 SCC) – **provide 1-800 number**

- Charged for having care/control of a motor vehicle while blood alcohol level in excess of .08
- Informed of free legal aid numerous times, provided breath samples, admitted to drinking

Ratio: Not given 1-800 number, inadequately explained immediate access to such services prior to being charged, legal aid available in Ontario

- Cannot waive a right without full knowledge of the rights
- State has to take reasonable steps to ensure the detainee has full knowledge
- No urgent situation was at hand

Decision: Court held that 10(b) was violated and excluded the breathalyzer sample under s.24(2)

Dissent: L'Heureux-Dube

- Provinces not constitutionally required to establish Legal Aid / Duty Counsel, therefore no constitutional obligation on police to provide such information

(b)Implementational duties (Manninen, Prosper)→

1. Understanding and invocation (*Baig, Clarkson, Whittle*)

2. About access to counsel: if suspect refuses counsel, police can interrogate if they are capable, but must grant access at anytime without delay

- If accused requests a lawyer, police must facilitate such contact without delay
- Burden on accused to show that it was apparent in the circumstances that there was no understanding – same as operating mind (limited cognitive capacity to communicate and understand the basic consequences of waiving a right).
- Unless you say YES, police don't have to comply with any other Implementational duties

3. Reasonable opportunity / due diligence needs to be given to exercise the right to counsel (*Manninen, Ross, Smith*)

- POLICE give reasonable opportunity: If you do talk to a lawyer, you are fair game again
- ACCUSED: has to exercise due diligence in taking this opportunity
 - If you don't talk to a lawyer – won't be available or try unsuccessfully
 - If you don't, you are fair game to continue investigation
- *Smith* – opportunity to call at 9pm, didn't bother trying
- *Ross* – opportunity to call at 2am, tried
- This just shows that there is still no definitive test

4. Must refrain from questioning or attempting to elicit evidence from the detainee until the detainee has had that reasonable opportunity – “holding off” period (*Manninen*)

5. Post-invocation restrictions (*Burlingham*)

- Can't denigrate the integrity of the lawyer
- Cannot engage in plea bargaining without defence counsel
- Cannot persistently question someone when they re-iterate their refusal to speak to the police in the absence of their lawyer

6. Young Offenders (YCJA, s. 146) - More protective rules

R. v. Prosper (1994 SCC) “*how to access legal advice*”

Facts: Accused arrested for drunk driving, advised of his right to counsel, made 15 unsuccessful legal aid calls, still provided a breath sample over the legal limit

Analysis: LAMER C.J.C.:

- Crown- 10(b) does NOT impose a positive *constitutional* obligation on governments to implement a “*Brydges* duty counsel” in the province (only PEI and NS don't)

Ratio: When a detainee has indicated a desire to exercise his/her right to counsel, **the police must “hold off” from eliciting incriminatory evidence from the detainee until he/she has had reasonable opportunity to reach counsel**

- Even if this means the police losing the benefit of the presumption; **evidence excluded**

R. v. Baig (1987 SCC)

- Charged with murder, acquitted due to exclusion of evidence, violation of s. 10(b) rights
- Absent proof that the accused did not understand right to retain counsel, rights waived
- Accused did not put forth evidence to suggest he was denied opportunity to ask for counsel

Decision: Appeal Dismissed

R. v. Manninen (1987 SCC)

- Robber at a store, two days later police officers responded to a tip, found suspect, handcuffed him and read him rights from the card
- **Did not provide reasonable opportunity to exercise rights** – there was a phone in the room, but they did not volunteer the use of the telephone to the respondent
- Suspect requested his lawyer, police ignored request and did not cease questioning (no urgency to continue questioning) → Tricked Manninen into admitting robbery

R. v. Ross (1989 SCC)

- Accused arrested for break & enter and theft
- Could not get a hold of the counsel of their choice, was not asked if he wanted to call another
- Affording a reasonable opportunity:
- “**Reasonable Diligence**”: Detained have a right to retain the counsel of their choice, and only if lawyer chosen is not available within a reasonable time that the detainee should be expected to exercise the right by calling another lawyer.
- Refraining from taking further steps: once accused asserts right to counsel
- Line Up: accused participated in a line-up – not given reasonable opportunity no urgency or compelling reason to proceed so precipitously

- No obligation to participate, therefore counsel has an important role in advising a client about participating voluntarily in a line-up
- Right not waived by lack of refusal to participate

Decision: Line-up evidence excluded, appeal dismissed, new trial ordered

R. v. Smith (1989 SCC)

Analysis: LAMER J.

- Arrested from home for robbery, informed of right to retain and instruct counsel, expressed wish to exercise right two hours later.
- **Reasonable opportunity** given: wanted to speak to specific lawyer, 9pm at night home phone number unavailable, said he would call him at the office in the morning
- **Reasonable diligence** not met – Did not attempt to call lawyer, didn't leave a message
 - Police were justified to continue their questioning
- Continuously asserted his intention not to talk about the robbery until his lawyer was present
 - Cannot request police to suspend questioning if due diligence not met
 - Hinder police efficiency
- Statement not obtained in a matter that infringed or denied a *Charter* right

Decision: Appeal dismissed

L'HEUREUX-DUBE

- The *Charter* does not prohibit admissions of guilt – if free and voluntary
- Confessions are among the most useful types of evidence – relieves guilty conscience

R. v. Burlingham (1995 SCC)

Facts: Appellant accused of murder, already convicted of murder in a similar manner

- Never consulted with the appellant's counsel regarding the "deal" nor did they give the appellant the opportunity to speak to his counsel

Issue: The content of an accused's right to counsel during the plea bargaining process

- Police must refrain from attempting to elicit incriminatory evidence once accused has asserted right to counsel
- Cannot belittle an accused's lawyer to undermine confidential relationship
- Opportunity to call any random lawyer in such circumstances does not discharge responsibility under s. 10(b)
- Police convinced accused not to consult with lawyers
- *Evans* → police have duty to advise a suspect of the right to counsel where there is a fundamental and discrete change in the purpose of an investigation which involves a different more serious offence

Decision: Right to counsel violated, no urgency to permit breach, evidence obtained is excluded, new trial ordered.

(c) Waiver of s. 10 rights

R. v. Clarkson (1986 SCC)

- Highly intoxicated woman, confessed to the police that she stabbed her husband, accompanied by her aunt who told her not to say anything.
- Given customary police warning and informed of her right to retain and instruct counsel

- Aunt tried several times to interrupt interrogation until lawyer present for the accused
- Issue: Was the accused **aware of the consequences**?
- SCC threw out confession on the basis that she did not have an ‘operating mind’
 - Did not pass awareness of the consequences test for valid and effective waiver
 - Should have waited until she was sufficiently sober

R. v. Whittle (1994 SCC)

- Imposed a test for understanding 10(b): **Awareness of what you are saying and an awareness of consequences, but only in terms of understanding the language**
- Limited cognitive capacity that is required for fitness to stand trial:
 - Communicate with counsel,
 - Understand function of counsel
 - Dispense counsel even if not in accused’s best interest

Young Persons – ages 12 to 18

- s. 146 of *Youth Criminal Justice Act*
- Need enhanced protection when they are being questioned by police

C) SECTION 7 OF THE CHARTER - Right to Silence

Hypothetical:

- Arrested with RPG’s (no s. 9 issue)
- Given reason for arrest (10(a)) and right to counsel, exercised this (10(b))
- Brought back into interrogation room:
 - Told he has no obligation to speak, not influenced by authority
 - Interrogators start with a series of crafted questions
 - Suspect does not relent – “I refuse to answer questions on advice of counsel”
 - This is protecting his right to silence

1. Undercover Investigations (*Hebert, Broyles*)

- **After detention** – police have already complied with s. 10(b)
 - Voluntary confession rule does not apply
 - Nothing to stop the police from questioning the accused in absence of counsel, once they’ve exercised their right

- **State agent** (the “but for” test) – *Broyles*

Would the conversation/confession have occurred BUT FOR the involvement of the police?

- **Active elicitation**
 - Interrogation v. conversation → can engage them in conversation, cannot go
 - Relationship between accused and agent of the State (right to silence engaged)
 - *Hebert* – if conversational and not asking leading questions, this is ok

R. v. Hebert (1990 SCC)

Facts: Undercover cop disguised as a cell mate, Hebert gave inculpatory statements

- *Rothman* → undercover investigations could shock the conscience of the community\
- Jailhouse informant testimony on accused is even less reliable
- Police persuasion allowed, after detention, once given and exercised right to counsel
- Right to silence means suspect’s right to choose freely to remain silent
- Distinction between observing and interrogating – actively eliciting, right to silence

- Even if a violation, can include evidence under 24(2)
- **Waiver** – “AWARENESS OF CONSEQUENCES” test - Deliberate deception prevented appellant from being aware of the consequences of his actions

Decision: Court found you cannot do this to someone who is already in custody, violates s. 7 right to silence – statements excluded

Commentary: Penney

- Hebert rule encourages false convictions –top reason for wrongful confessions
- **Rationale**: Fundamentally people have a right not to be tricked into making an incriminating statement in this fashion
- What about the possibility that suspects are ignoring their rights to counsel?

R. v. Broyles (1991 SCC)

- Appellant convicted of 2nd degree murder
- Police arranged for a friend to meet the appellant while in custody – wired the friend, encouraged the accused to ignore legal advice and elicit inculpatory statements
- Is informer a state agent?
- **Would the exchange between the informer and the accused have taken place, in the form and manner in which it did take place, BUT FOR the intervention of the state and its agents?**

VIII. INTAKE AND RELEASE

FORMAL REQUIREMENTS FOR SETTING UP A PROSECUTION.

INTAKE

A) REVIEW OF DETENTION

- First appearance (**503(1)(a)**) have to bring them in front of a justice “without reasonable delay”, 24 hour time limit imposed
- Violation of *Charter* s. 9 → if no first appearance, or failure to comply with this
- Unless there is a good logical explanation (e.g. good faith of officer)
- What is the remedy? Would want to get a stay of proceedings as a defence lawyer.
- *Charter* s. 10(c) → right to have validity of detention reviewed by habeas corpus

B) LAYING THE INFORMATION

- Compelling the accused of the appearance before the court into a formal charging document
- Sets out essential ingredients of the charge: time, place and nature of offence(s) alleged
- Document that everyone who is charged with a criminal offence starts out with
- Indictable offences transform into indictments
- Lays out the specific offences they are charged with

In what cases justice may receive information

504. Any one who, on reasonable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a justice, and the justice shall receive the information, where it is alleged...

Elements: (s. 504)

1. Someone will swear on oath – knowledge/RPG's to believe accused has committed offence
 2. Resident, committed offence, obtained property, or possession in territorial jurisdiction (504)
 3. “Justice shall receive the information” → Discretion to receive? (504, 795, Jeffrey, Pilcher)
 - Given the wording of Code provision, the justice is performing a ministerial function in receiving the information. **Justice has no discretion** not to receive it as long as the formal requirements are fulfilled.
 - Basic reality is that justices rubber stamp the information and don't substantively scrutinize the Crown's case
- If they arrest you and don't release you, will lay an information and will have to bring you before a justice within the 24 hour period under s. 503
 - At no point is a judge ever required to look at the charges against you and decide if the police actually have a case against you
 - Issue of whether you are released or not pending your trial will be figured out right away
 - Issue of whether the police had RPG's won't be addressed until the trial --> Penney finds this
 - Applies to indictable offences as well as hybrid and summary conviction offences

R. v. Pilcher and Broadberry (1981 Man. Prov. Ct.)

- Informant did not have RPG's to believe the aggregations → latent defect in the information, requesting it to be quashed
- Informant Lobson did not know details surrounding the case, swore the information – was instructed to do so - Crown aware that the information could be quashed, laid another one
- RPG's – an honest belief, state of circumstances that 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.

Ratio: Informant's knowledge can simply come from reading an arrest report or synopsis prepared by the arresting officer

Whitmore (1987 Ont. CA) – complete absence of knowledge on the part of the informant does not affect the validity of the information

R. v. Jeffrey (1976 Ont. Prov. Ct.)

- Informant provided name of Δ, relevant section of *Liquor Licence Act* and date, swore on bible, Justice of Peace endorsed them
- JP does nothing more than receive the information – Cannot reject a complain which is in writing and complies with the conditions set out in that section

Reeves v. the Queen (1964 – JP Should decide whether a sufficient case is made out for the issue of a warrant, or summons sufficient)

C) COMPELLING ATTENDANCE

- **Discretion to issue/cancel process** (*Jeffrey*) → 507, 508
 - Justice (pre-trial inquiry judge) looks at case and decides if there is a **prima facie case to meet** – some evidence that is capable of being believed on each of the elements of the offence.
 - If standard not met, a summons/warrant will be refused – or process will be cancelled and individual notified not to attend court
 - Questionable effectiveness at weeding out unjustified charges

- JP's need better legal training as a way of making procedures a more effective check on police charging powers
- **Summons or arrest warrant**
 - Summons – Issued by court saying you have to face these charges, gives date
 - Or by an arrest warrant – default is summons, arrest only if truly necessary
- **Endorsing the warrant (507(6), 499)**

Justice to hear informant and witnesses — public prosecutions

507. (1) Subject to subsection 523(1.1), a justice who receives an information laid under section 504 by a peace officer, a public officer, the Attorney General or the Attorney General's agent, other than an information laid before the justice under section 505, shall, except if an accused has already been arrested with or without a warrant,

- (a) hear and consider, *ex parte*,
 - (i) the allegations of the informant, and
 - (ii) the evidence of witnesses, where he considers it desirable or necessary to do so; and
- (b) where he considers that a case for so doing is made out, issue, in accordance with this section, either a summons or a warrant for the arrest of the accused to compel the accused to attend before him or some other justice for the same territorial division to answer to a charge of an offence.

Process compulsory

(2) No justice shall refuse to issue a summons or warrant by reason only that the alleged offence is one for which a person may be arrested without warrant.

Procedure when witnesses attend

- (3) A justice who hears the evidence of a witness pursuant to subsection (1) shall
 - (a) take the evidence on oath; and
 - (b) cause the evidence to be taken in accordance with section 540 in so far as that section is capable of being applied.

Summons to be issued except in certain cases

(4) Where a justice considers that a case is made out for compelling an accused to attend before him to answer to a charge of an offence, he shall issue a summons to the accused unless the allegations of the informant or the evidence of any witness or witnesses taken in accordance with subsection (3) discloses reasonable grounds to believe that it is necessary in the public interest to issue a warrant for the arrest of the accused.

No process in blank

(5) A justice shall not sign a summons or warrant in blank.

Endorsement of warrant by justice

(6) A justice who issues a warrant under this section or section 508 or 512 may, unless the offence is one mentioned in section 522, authorize the release of the accused pursuant to section 499 by making an endorsement on the warrant in Form 29.

Promise to appear or recognizance deemed to have been confirmed

(7) Where, pursuant to subsection (6), a justice authorizes the release of an accused pursuant to section 499, a promise to appear given by the accused or a recognizance entered into by the accused pursuant to that section shall be deemed, for the purposes of subsection 145(5), to have been confirmed by a justice under section 508.

Issue of summons or warrant

(8) Where, on an appeal from or review of any decision or matter of jurisdiction, a new trial or hearing or a continuance or renewal of a trial or hearing is ordered, a justice may issue either a summons or a warrant for the arrest of the accused in order to compel the accused to attend at the new or continued or renewed trial or hearing.

Three Streams – how do we get someone, suspected of committing an offence, before the court?

1. Arrest and keep the person in custody → this is where 503 is relevant, bring person in front of justice, go to bail
2. Promise to appear January 5th, 2008 – police then has to go to court and lay an information before that date, as long as the technical requirements are fulfilled Justice has to receive it, to confirm the promise to appear, justice has to determine if the crown has a prima facie case.

3. Police go directly to the court; lay the information – received without discretion. Then the question is: do we compel the appearance? Need to make a prima facie case? Then do we do this by summons or by arrest? Arrest then release, goes back to promise to appear

BAIL –

- AKA Pre-trial Release or Judicial Interim Release
- Most important because people want to get the hell out of prison
 - Remand facilities are overcrowded, lockdowns and personal searches are frequent
 - Remand – limits ability to mount defence, can wreck employment opportunities
 - More likely to plead guilty, to be found guilty after trial, and to receive heavier sentences if convicted
- Secures attendance in court to answer the charge
- *Statute of Westminster (1275)* – stipulated which crimes were bailable and which ones were not. Sheriff’s power over bail was gradually transferred to justices of the peace through a series of statutes.
- Police used to arrest people instead of doing paperwork of summoning
- *Bail Reform Act* – now provides clear legislation for pre-trial release over pre-trial detention
 - Once an individual held by police is brought before the court within the required 24 hrs, the presiding justice should order his or her release unless the *Crown shows cause* why pre-trial detention is justified (**s. 515(2)**)
 - Surety remains a part of the bail process (**s. 139(1)(a), (b) of Code**)
- Releases must be ordered on the least onerous terms unless cause is shown for a more restrictive form of release
- 1 in 4 people charged with a criminal offence are also denied bail.
- Bail hearing might be delayed for up to a week, without accused’s consent, due to heavy caseloads
- **Presumption in favor of release** – except if charged with one of the most serious indictable offences (s. 469 – murder treason...), OR in special circumstances set out in **s. 515(6)**

A) GROUNDS

PRIMARY GROUND: Accused will not appear in court (515(10)(a))

Relevant evidence →

1. Past criminal record (out on bail before and haven’t shown up in court)
2. Lack of roots in the community – job, residence, family and friends
3. Anything that demonstrates noncompliance with authorities
4. Part of criminal enterprise
5. Wealth/access to international travel – ask for cash bond, take passport

SECONDARY GROUND (Morales): Protection of public (515(10)(b)) –

- Establishes narrow set of circumstances (“public interest” STRUCK DOWN)
- Relevant evidence
 1. Criminal record
 2. Nature of the crime – drug crimes, serious personal injury

TERTIARY GROUND (Morales, Hall): Any other “just cause” (515(10)(c))

- Assuming: cannot justify detention on primary or secondary ground.
- Is there any other reason that they should be detained?
 1. Serious crime
 2. Crown's case appears to be very strong
 3. Maintain confidence in the justice system
 4. To appease the public

Commentary:

Regardless of the nature of the offence, when you are attempting to justify the detention or the release of the offender, have to rely on one of these three grounds

- Legislation to fill gap with a provision similar to the provision struck down in *Morales*
- To maintain confidence in the justice system (*Hall*):
 - *Hall* – heinous crime that was unexplained, people afraid, evidence strong
 - Not vague or overbroad – narrowed to the reasonable community perception of the necessity of denying bail – objective lens of factors:
 1. Strength of Crown's case – lots of forensic evidence
 2. Potential for lengthy imprisonment – life sentence
 3. Seriousness of the offence – grievous offence
 4. Circumstances surrounding commission – community perception
- *Hall* decision scrutinized in light of s. 11(e) of *Charter* (right to reasonable bail)

Decision: Parliament **struck down any other reference of “just cause”** → too broad, too much power to the trial judge's discretion – Remainder of provision upheld. How can we justify locking someone up who will appear at trial, and does not put public at risk, this as reasonable?

Rationale:

- **Avoidance of vigilantism** – public taking matter into own hands, protection of defendant
 - People react viscerally when it comes to heinous crimes
 - Principle of legality → if you aren't found guilty, you are innocent
 - Cannot sanction extra-legal measures just because not found guilty
 - Greater risk of vigilante soon after the instant
 - Q. Is it too idealistic to expect people to accept presumption of innocence, and tolerate someone walking around the streets who has been accused of a murder
- **Maintain confidence in the system** - Have to live with this fact that people who are accused of a crime, but who are factually innocent will suffer because of this provision

Commentary:

- Parliament has pretty much overruled the SCC in a diplomatic way addressing the superficial concerns that you have (explicit guidance)
- Recurring pattern where SCC has kind of said, if we say no once, we'll reconsider

B) CONDITIONS OF RELEASE

1. Burden of Proof on Prosecutor (s. 515(1) and (3))

- Start at the least restrictive disposition which is a release on an **undertaking** to
- Up to the prosecution to “show cause” why the accused should not be released on an undertaking

UNDERTAKING

- Without conditions (515(1))
- With conditions (515(2)(a))

RECOGNIZANCES (515(2))

- Without sureties or deposit (b)
 - Person other than the accused, who will vouch for that person, if they don't they will be responsible – obligation to make a payment of money
- Without deposit but with sureties (c)
- With consent of prosecutor, with deposit but without sureties (d)
- If not ordinarily resident in province or 200km of place of custody, with or without sureties and with deposit (e)

CONDITIONS (515(4) – (4.2))

- Reporting
- Stay in territorial jurisdiction
- Non-communication
- Firearms
- Other “reasonable” conditions

2. Reverse Burden of Proof – denied bail, up to defence to discharge

WHICH OFFENCES? 515(6)

- Offences while at large, charged with another indictable offence (a)(i)
- Criminal organization offence (a)(ii)
- Terrorism and national security offences (a)(iii)
- Not ordinarily resident in Canada (b)
- Failure to show up or comply with conditions (c)
- Serious (types and amounts) drug trafficking offences (d) - *Pearson*
- Section 469 offences (application made in superior court (522)) – murder, treason...

3. Constitutionality

CHARTER s. 11(e) – right to reasonable bail

MORALES (515(6)(a)(i) – committing an offence while at large

- Court felt that reversing the onus requiring you to prove you'll show up at trial next time without committing any other offences, this is fair

PEARSON (515(6)(d) – narrow set of circumstances denied bail

- Drug trafficking is a lucrative business based on profit – form of organized crime
- Drug crimes are responsible for 70 – 80% of jail terms

JUSTIFICATION FOR REVERSE ONUS:

- Danger that the accused will abscond rather than appear at trial

- If released on bail, incentive to keep being a drug trafficker, should be more reluctant to let them go – “just cause” for large-scale dealers
 - Scope of narcotic control is broad – hard and soft drugs, trafficking can range from transport to manufacture, sell, give, administer, send, deliver, distribute
 - Taking one drug dealer off the street doesn’t necessarily stop drug dealing
- Reality is that vast majority of prosecutions involve small time crooks, or addicts that do not pose a significant risk of absconding / continuing to offend
- WHO will have no difficulty **justifying their release** and obtaining bail – just show they have not part of criminal organization (help them flee country).
- Does not violate s. 11 (e)
- Does not violate s. 9 – process with fixed standards

SECTION 469 OFFENCES? LIKE MURDER, TREASON...

- Justification for reverse onus: criminals likely to re-offend

FIREARMS OFFENCES

- Trend is to increase the number of offences subject to the reverse onus

4. Evidence

- Oral representation
- Testimonial evidence
- Practice? Not easy to assess strength of Crown’s case
- Non-compellability of accused

5. Review of Bail

- Review of PCJ by SCJ (520, 521)
 - Look at info, record, any changed circumstances
 - Some deference given to initial decision
- Subsequent review (520)(9))
- Review of SCJ by CA (680)
- Subsequent review
- Release pending appeal (679)
 - If you can demonstrate a genuine issue on appeal
 - Not likely to flee jurisdiction or commit crime while on release

6. Case Law

R. v. Pearson (1992 SCC)

Arrested with five counts of trafficking narcotics, tried to get bail granted through s. 11(e)- *not to be denied reasonable bail without just cause*)

- Argument failed as there was “just cause” due to his offence
- **RD*Two factors vital to a determination that there is “just cause” under s. 11(e)**
 - Denial of bail must occur only in a *narrow set of circumstances*
 - Denial of bail must be necessary to *promote the proper functioning of the bail system* and must not be undertaken for any purpose extraneous to the bail system

R. v. Morales LAMER C.J.C.:

- ⇒ Charged with trafficking, possession, importing, conspiracy, and participated in a major network to import cocaine into Canada
- ⇒ Was convicted of assault with a weapon, an indictable offence
- ⇒ Denied bail: appealed by challenging constitutionality of secondary grounds of detention
 - Secondary grounds is to “protect public” and for “public interest”
 - “Public interest” too vague and overbroad therefore violates s.11(e) of Charter that gives accused right to bail → STRUCK DOWN
 - Meets tertiary “JUST CAUSE” Test in *Pearson*:
 - “Narrow circumstances” → pose a likelihood of committing an offence
 - “Functioning of bail system” → protect public safety, prevent crimes

Five years later, new version of s.515(10)(c) which gives justification to deny bail to protect the confidence in the administration of justice (strength of Crown’s case, seriousness of offence, probability of lengthy sentence).

R. v. Hall

Facts: Charged with first degree murder of his wife, slashed her 37 times tried to cut her head off

Issue: was denied bail and argued that s.515(10)(c) was unconstitutional

- Just cause was too general/vague, no clear parliamentary objective being defined
- Gives unfettered discretion to judges to deny bail under any reason under the sun

RATIO Struck down the just cause, but SCC upheld the rest of the provision: *Where the detention is necessary in order to maintain confidence in the administration of justice, having regard to all the circumstances including:*

- *The apparent strength of the prosecution’s case*
- *The gravity of the nature of the offence*
- *The circumstances surrounding its commission*
- *The potential for a lengthy term of imprisonment*
- To protect the defender from the outside, placating irrational fear of the public

Denied BAIL: in order to maintain confidence in the administration of justice

C) CHARGE SCREENING – P. 419

- Ultimately up to the Crown to continue prosecution of any or all of those charges
- If charges are screened – more efficient system
- NB, Quebec, BC – every charge to be approved by prosecutor before information laid
- Most other jurisdictions prosecutors only look at charge after information laid
- Prosecutors are more discriminating than police in laying charges – more reluctant to lay charges, more selective in what charges to lay
 - Police check on charging decisions – adequacy of evidence
- Have to show gross incompetence and negligence on the charge to get out of it

1. Practical impediments:

- Timing: some provinces it is done before information laid, others have post-charge
- Logistics: if bail hearing, need immediate charge-screening
- Busier jurisdictions – fragmentation ‘balkanization’ of work done, rare for a single Crown prosecutor to be responsible for a file from the beginning of a file to the end, nobody wants to make that call

- Evidence might not all be in, police not done investigation...
- Really only on the eve of the trial that the person who is actually responsible for the trial, interviews the witness and such... and decides it doesn't pass
- All this time, the accused has all the psychological stress and stigma this causes
- As a result, an erroneous arrest decision by police poses a very real risk of controlling an individual's custodial status long into the criminal process
- Some deficient cases still squeak through: heavy reliance on police report, avoid burden of justifying a withdrawal of charge, allow preliminary inquiry to decide
- Which lead to many charges going through that are eventually stayed or withdrawn
 - Some diverted to alternative measures program
 - Other cases fall apart – witnesses fail to attend
 - No reasonable prospect of conviction
- Quebec has highest conviction rate (73.6%) because prosecutors have to approve charges before laid

2. How does the ultimate decision get made? TWO STANDARDS

1. Reasonable prospect of conviction TEST

- Objective → evidence where reasonable jury, properly instructed, could convict
- Higher than *prima facie*, lower than probability of conviction

2. Public Interest

- Even if the crown decides there is a reasonable prospect of conviction, still have to decide if it is in the public's interest to proceed
- Is it worth proceeding given the seriousness of the crime, and the circumstances of the alleged offender?

IX. DISCLOSURE, LOST EVIDENCE AND 3RD PARTY RECORDS

Part I → DISCLOSURE by Crown

- Crown role is not to win or lose, but to perform with an ingrained sense of the dignity, seriousness and justness of judicial proceedings
- Duty to bring forward evidence of every material fact known to the prosecution whether favorable to the accused or otherwise
- Ideally, they are “ministers of justice”- To prosecute those accused, and to ensure power of state used in pursuit of impartial justice
- **Boucher v. the Queen**: The duty of the Crown: is to lie before the jury what the Crown considers to credible evidence relevant to what is alleged to be a crime.
- Donal Marshall Jr. Prosecution:
 - Prevent witness tampering, fabrication of evidence/alibis, eliminate element of surprise
 - State controls access to vital information for accused's right to make full answer and defence (principle of fundamental justice under s. 7 of *Charter*)
 - For a fair trial, accused must receive from Crown all information that might be reasonably considered useful.

- The Crown should have a positive and continuing duty; it immaterial whether or not the defence fails to request it.

A) NON-CHARTER DISCLOSURE

1. PRELIMINARY INQUIRY

- Defence find them useful to see how the evidence will play out in the trial
- Vast majority of cases go on without this

2. PARTICULARS (S. 587)

- Doesn't entitle defence to disclosure of evidence
- Requires Crown to flesh out its theory of the case – little insight for defence

3. INSPECTIONS AND TESTING (SS. 603 & 605)

- Of own indictment by the accused
- As well as evidence

4. PRE-TRIAL CONFERENCES (S. 625.1)

- Try to narrow the issues before trial to get agreed statements of fact
- Supplements disclosure, no substituted for *Stinchcombe*

B) CHARTER DISCLOSURE (STINCHCOMBE)

- Prior to *Stinchcombe*, very little obligation on Crown to disclose their case – trial by surprise
- In *Marshall*, the prosecutor's failure to make full disclosure and defence counsel's failure to press the case as hard as possible played important roles in the wrongful conviction.
- To prevent further wrongful conviction due to non-disclosure → primary concern of SCC in:

R. v. Stinchcombe, (1991), 68 C.C.C. (3d) 1

Ratio: The Crown has an obligation to disclose all materials, which are not clearly irrelevant and/or not privileged.

History: Trial/Court of Appeal refused saying there was no obligation on the Crown to disclose.

Facts: Crown witness (former secretary) gave evidence at the preliminary inquiry favorable to the accused was subsequently interviewed by agents for the crown. Crown counsel decided to not call the witness and would not produce the statements obtained in the interview.

Issues: What is the Crown's obligation to disclose?

Decision & Reasons: Appeal allowed; new trial at which statements should be produced.

1) The SCC refers to Justice Rand's comments in *Boucher v. The Queen* regarding the unique responsibilities of Crown counsel.

- Statements obtained are the property of the public in the interest of justice being done
- Imposing this obligation on the Crown will not result in delays
- Pay special attention to s.7 of *Charter* → right to make full answer and defence.

2) The Crown must disclose all information whether it be inculpatory or exculpatory.

3) In the present case the Crown should have disclosed. Appeal allowed, new trial ordered with statements produced to the defence.

1) PROCEDURE

- **Disclosure triggered** by defence request – *What happens if unrepresented?* Obligation on the trial judge to tell the defendant they have right to disclosure. Tell them to seek counsel ASAP.
- **Timing** of disclosure – very early on, before accused makes plea or elects mode of trial
- **Continuous** obligation – if new info comes to attention of Crown, has to be disclosed

2) SCOPE – what do you have to disclose?

- **Not clearly irrelevant** – all evidence that is...
- **Not privileged** – Informer privilege, solicitor-client or litigation privilege
 - Public interest privilege
 - Have to tell defence they have privileged information
 - Want to give defence an opportunity to attest if its privileged
- **Inculcating, exculpatory, and tactical** – all relevant (issue at trial, competency of witness)
 - Tends to show accused is guilty/innocent
 - Something useful for defence in terms of developing its tactical case
 - Tactical advantage must be sacrificed in the interests of fairness

3) MATERIAL

- **Statements** – made to police and prosecutors
- **Notes** – usually made by police
- **“Will says”** – Crown thinking of calling someone at trial, know what they will say
- **Witnesses and others** – identity (names, addresses, occupations) of all people under investigation, anyone who may be called as a witness

4) CROWN CONTROL

- Same obligations we put on the Crown, we put on the police
- Agency of the state may be in an investigation relating to the accused – not criminal –
 - Regulatory investigation whereby notes, materials, statements are created – should be within Crown’s control and should be produced
 - E.g. Tax investigations, Investigation by Child Welfare

5) REVIEW

- If defence not satisfied about disclosure, make an application to the court about evidence you may not have, or even know you don’t have - ASAP
- Court decides if meets criteria: not clearly irrelevant, not privileged
- Through submissions, inspection of statements and other documents, and viva voce evidence (in a voir dire).
- Duty to disclose – applies to indictable offences, may or may apply less to summary conviction offences

C) LOST OR DESTROYED EVIDENCE (LA)

R. v. La (1997 SCC)

- Child welfare case – investigation of a run-away, they found her (teenage prostitute)
- Interview – 45 mins tape recorded – done for purposes of seeking secure treatment
 - Very stressful time for the Constable – being investigated for shooting at a car

- Not directly interested in obtaining evidence against pimps
 - Police eventually find pimps, want to build a case
 - Defence wants information, Crown says sorry
 - This tape was lost, Crown still disclosed a transcript of the interview
- Issue: if Crown has breached disclosure obligations through innocent inadvertently losing evidence that would otherwise be disclosed? Defence wanted a stay of proceedings
- Decision: Constable did **not** breach duty to preserve, loss did not amount to abuse of process
- Interviewee said told a “few lies” during interview – goes to lack of credibility
 - Full answer and defence NOT impaired – alternative source of information available
- APPEAL DISMISSED

1. DUTY TO PRESERVE

- Crown has a reasonable duty to preserve
- Cannot just destroy – still had a transcript of interview
- As relevance of evidence increases, so does the degree of care for its preservation
- If destroy for purposes of evading disclosure – abuse of process

2. DUTY TO EXPLAIN LOSS

- Deliberate attempt to evade? If YES, we have a problem
- “Unacceptable Negligence” – can have a violation of the right to disclosure
 - *La* → Was NOT unacceptable negligence, when evidence was created it was not seen to be part of a criminal investigation.
- Perceived importance of evidence at time
- If explanation is satisfactory – discharges Crown’s constitutional obligation
- If explanation not satisfactory – breach of s. 7 of the *Charter*

3. EXTRAORDINARY CASES / FULL ANSWER & DEFENCE

- Police act in good faith, not unacceptable negligence → no evidence of misconduct
- If defence can argue that evidence is so critical to full answer and defence
- Difficult argument to make: must point to something substantial that is missing yet necessary to defend your client → entitled to remedy for violation of disclosure

4. THIRD-PARTY DESTRUCTION (CAROSELLA 1997 SCC)

- Sexual assault center interviewed complainant before complainant went to police
- Notes had been shredded pursuant to the center’s policy of shredding files with police involvement **before** being served in relation to criminal proceedings

Issue: Did the trial judge have the right to stay the proceedings? STAY given, 5:4 decision

- Reason: emphasized prejudice to accused’s ability to make full answer and defence
- **Center’s conduct resulted in an abuse of process**

D) REMEDIES

- Violation of disclosure = violation of s. 7 of the *Charter*
- Right to full answer and defence is a **principle of fundamental justice**

1. Order to Disclose - won’t help you if evidence is destroyed

2. Adjournment - Usually given

3. Costs - If Crown unusually negligent

4. Recalling of Witnesses –

- Of the Crown, so that the cross-examination can be supplemented with new information the defence now has

5. Mistrial / new trial

- Failure of disclosure that cannot be remedied by the above
- Very significant failure of disclosure
- Litigated on appeal – new trial – failure of disclosure resulted in an inability of defence to conduct itself in full answer and defence (reasonable possibility that outcome would be different)

6. Stay of Proceedings

- Extreme cases, no other way to remedy what has been done
- Crown's conduct so egregious that NONE of these sanctions would demonstrate our revulsion of the Crown's conduct
- “Grand slam” of remedies

Part II → DISCLOSURE by Defence

1. GENERAL RULE – Do not require defence to disclose their case

2. EXCEPTIONS:

I.... ALIBI–

- Where the defence proctors an alibi, but fails to disclose prior to trial, trier of fact may be instructed to weight the alibi evidence in light of failure of defence to disclose alibi in timely manner. Trier of fact can “*draw an adverse interest*”.
- Crown needs an opportunity to check out legitimacy of alibi
- Defence has to show why the court should not draw an adverse inference
- Instead of this, grant an adjournment to give time for the Crown to investigate – reopen their case and present rebuttal witnesses

II.... CONSTITUTIONAL APPLICATIONS –

- Timely notice of any constitutional applications you may be bringing at trial
- E.g. Exclusion of evidence, stay of proceedings – Any legislation under *Charter* or division of powers

III.... EXPERT OPINION EVIDENCE (s. 657.3)

- Prior to trial (opening of defence case) of intention to adduce expert evidence
- Crown has to disclose any report that exist
- Defence only has to disclose they are putting an expert on stand and their qualifications – give Crown a defence to prepare a cross-examination – do not have to give summary

Part III → PERSONAL (beyond 3rd party) RECORDS

- New statutory regime applies both to records by 3rd party AND the Crown

A) O'CONNOR

- Decided by SCC in post *Charter* era – Bill C-46
- Bishop alleged to have abused children,

- Defence attempted to compel a whole bunch of records from the children
- Therapist records, psychiatric records – could be very important to defence, high privacy interest to the complainant – “intensely private aspects”

Issue: Under **what circumstances** is an accused entitled to obtain production of sexual assault counseling records in the possession of third parties?

- Problem is that there are cases where records can be used in an abusive fashion – harass complainants to not even come forward in the first place
- Information also that reveals contradictions / lies crucial to demonstrating innocence
- Framework for dealing with requests

1. MAJORITY

Third Party v. Crown Records:

- O’Connor process applies **ONLY** when records are in hands of 3rd party
- If in hands of Crown, *Stinchcombe* applies – must disclose unless privileged is proven
 - Waiver must be “fully informed” in order to defeat claim of privilege
 - Onus on Crown to prove irrelevance to defence on a Stinchcombe application

Two Step Process:

- **STAGE ONE:** Production to court – subpoena third party, then at trial...
 - **NO BALANCING, NOT ONEROUS – ON THE ACCUSED, BRING AN APPLICATION SUPPORTED BY APPROPRIATE AFFIDAVIT EVIDENCE SHOWING THAT THE RECORDS ARE **LIKELY TO BE RELEVANT** EITHER TO AN ISSUE IN THE TRIAL OR TO THE COMPETENCE TO TESTIFY OF THE SUBJECT OF THE RECORDS.**
 - Defence in a **CATCH 22** → doesn’t know what’s in records, cannot maybe demonstrate evidence is likely relevant
 - Presumption against ordering production of private records
 - No presumption of materiality – records not created by state
 - Therapeutic records only relevant in rare cases – emotional/psychological responses to certain events, **NOT** a fact-finding exercise
 - To see if judge can look at it
- **STAGE TWO:** Production to defence: **BALANCING SALUTARY AND DELETERIOUS EFFECTS**
 - Do not consider encouraging reporting or trial integrity
 - Only consider potential for information to be misused if evidence is tendered.
 - Consider privacy interest – maintaining confidentiality in records
 - Whether and to what extent they should be proved

2. MINORITY

Third party v. Crown records → doesn’t comment on this

Two Step Process:

- **FIRST STAGE: Production to court**
 - “Likely relevance” → logically probative to an issue at trial
 - Presumption is against the defence, have to point to something solid
 - Low **onerous** burden on accused to set out specific grounds for production
 - Is right to make full answer and defence implication by info in records?
 - May be material if created close to date of alleged offence

- Information regarding unfolding of events
 - Therapy that influenced memory of events
 - Information that may point to complainant's 'credibility'
 - Have to **balance** interests in deciding production (highly private records)
 - **SECOND STAGE: Disclosure to defence**
 - Salutary effects must outweigh deleterious effects of such production
 - Balancing full answer and defence vs. privacy interest
 1. Extent record necessary to make full answer and defence
 2. Probative value
 3. Nature of reasonable expectation of privacy – privacy interest
 4. Production based on bias
 5. Potential prejudice to complainant's dignity
 6. If production would frustrate society's interest in reporting sexual offences and/or seeking treatment by the victim (publication ban, spectators barred?)
 7. Effect on integrity of trial process if produced or not produced
 - Then decide whether and to what extent they should be produced to the accused – ONLY TO THE EXTENT NECESSARY TO ACHIEVE THAT OBJECTIVE
- Application:** third party records in this case are not relevant → fishing expedition
- Defence can always apply for a search warrant to get the records

NOTE: In *O'Connor*, SCC dealing with the common law and s. 7 of *Charter*, a blank slate – developed procedures to deal with these disclosure applications – court making it up as they went

B) MILLS – NEW LEGISLATION

- s. 278.1 – 278.91 Codifies the minority approach from *O'Connor* – upheld as constitutional
 - *Charter* is designed to set the minimum standards compatible with the constitution
 - In most criminal procedure constitutionality challenges: rights of individual vs. state interest
 - Here, collision of individual rights:
- ACCUSED'S RIGHTS OF FULL ANSWER AND DEFENCE VS. COMPLAINANT'S RIGHT TO PRIVACY**
- Must be defined in light of each other, and both must be defined in light of equality provisions of s. 15 – in certain situations one will trump the other

1. SCOPE

- **Record** = “reasonable expectation of privacy” but not those created by police or Crown
 - Within a conversation with a therapist, or counselor (privileged source)
 - If you are talking to a cop, *Stinchcombe* applies
- **Sexual offences** → only applies to sexual offences, (*O'Connor* to non-sexual offences)
- **Third party AND Crown records** (unless express waiver), **but not defence records**
 - Regime still applies even if it has been turned over to the Crown
 - Does not matter if third party record, if it is personal, this regime applies
 - Goes directly against MAJORITY in *O'Connor* – 3rd party *Stinchcombe*
- **Notice of Crown records** - Have to give the defence notice, don't have to reveal contents

2. PROCEDURE

- **Make an application for production (278.3)**

- Record and holder
- Grounds: what justifies release information
- Give notice to parties affected: *In Camera* hearing with notice
- **Subpoena duces tecum** – compels a person to produce a document of information to court
- **Disclosure application to the defence** – if court will disclose – may be with conditions

3. PRODUCTION AND DISCLOSURE DECISION

- **Relevant and necessary** – for full answer and defence
- **Salutary and deleterious effects** – of either production or disclosure, balance the two
- **Factors:** to get disclosure
 - Full answer and defence
 - Probative value
 - Expectation of privacy
 - Discriminatory belief or bias
 - Dignity, privacy, or security of person
 - Reporting and treatment
 - Integrity of trial process
- **Bare assertions:** cannot give one of these to attempt to get disclosure of a personal record, in and of itself is not good enough.
 - Record exists
 - Relates to treatment
 - Relates to incident
 - Prior inconsistent statement
 - Credibility
 - Reliability
 - Abuse by others
 - Sexual activity or reputation
 - Recent complaint
 - Timing of record

Catch-22 → defence lawyers face this list, need something beyond it, to show evidentiary foundation for requesting such personal information, but don't know what the information is.

- Trial judges cannot be too onerous in demanding a comprehensive reason
- Something beyond speculation – the document *might* show prior inconsistent statements
- Need to place evidence in real evidentiary context – unique about case, that there must be something fruitful in personal information that could be used
- Need a concrete foundation for your defence – court will disclose it
- SECOND STAGE – is the important one in getting disclosure from the courts

X. ELECTIONS, PRELIM. INQUIRIES & PREFERRING INDICTMENT

A) ELECTIONS

Indictable offences

- Absolute jurisdiction offences (553) – provincial court, provincial court judge
- Exclusive jurisdiction offences (469) – murder – superior court, after preliminary inquiry in provincial court (must be requested in writing s. 536(4)).
- All other offences (536(2)) – accused gets election:

- Trial by provincial court judge
- Trial by superior court judge
- Trial by superior court judge and jury
- If no election is made, accused stands mute, presumption to elect trial by superior court judge and jury.

B) PRELIMINARY INQUIRY (Part XVII of Criminal Code)

- Have fallen due to summary convictions with hybrid offences now
- This has kept many trials in a provincial court

1. PURPOSE:

To ensure that frivolous cases do NOT proceed to trial, disclosure of evidence

- First time the judge looks at the case to see if probable cause
- Ascertain whether or not there is sufficient evidence to warrant the accused being placed upon his trial – Crown has to reveal case ahead of time
- *R. v. Skogman* – gives the accused a chance to appreciate the strength of the case to be made against him at trial where the requisite evidence is found to be present.

2. PROCEDURE:

- Request: Have to make a request for one (536)
- Evidence: Crown presents evidence (540), Defence Evidence (541)
- Publication Ban: if defence requests one (539)
- Review: if we don't like decision: p. 484/485
 - No appeal, both sides can subject the decision to judicial review
 - Seek a writ of *certiorari* to quash decision – review only where it is alleged that tribunal has acted in excess or jurisdiction or acted in breach of the principles of natural justice (procedural fairness – e.g. not allowing witnesses).
 - *Certiorari* brings claim forward
 - *Prohibition* stops inquiry proceedings
 - *Mandamus* to compel the justice to act a certain way.
 - Find a jurisdictional error – cannot be just errors of sufficiency of evidence
- Which offences? (535) – Offence charged, and any other indictable offences supported by evidence in the preliminary inquiry (part of same transaction).
- Committal or discharge: (548(1), *Arcuri*)
 - Provincial court judges run preliminary inquiries – protective function
 - Assess sufficiency of Crown's evidence without weighing its reliability

3. R. v. ARCURI (2001 SCC)

Facts: Accused charged with 1st degree murder – two witnesses who were arguably exculpatory

Issue: sufficient evidence to warrant committing the accused to trial?

- Crown evidence – linking accused to crime
 - Clothes and shoes were same size, pack of gum, laces double knotted
 - Bundle of clothes left in a ditch, witness identified someone other than accused
 - Whereabouts of deceased, talking to accused “like old friends” – went for coffee
 - Accused gave DNA/fingerprints – DNA matched shirt, blood matched Mora's

- **Standard: whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty.** (Same as a motion for a directed verdict).
- Traditional CL rule: does not use the word “reasonable”
- Nature of judge’s task changes: Test is the same whether evidence is direct or circumstantial
 - DIRECT EVIDENCE → does not require inference, relates directly to an issue at trial
 - ▲ Assume evidence is true
 - ▲ If Crown presents evidence for each element of offence – TRIAL
 - CIRCUMSTANTIAL EVIDENCE → assuming it is true
 - ▲ Assuming that the evidence is true, is it capable of supporting the inference that the Crown asks the jury at trial (issue at trial)?
 - ▲ Could the evidence, if believed, reasonably support an inference of guilt?
 - ▲ NOT weighing as in final drawing of inferences from the facts (jury’s job)
 - DEFENCE EVIDENCE → depends if Crown provides:
 - ▲ **Direct evidence** for each element of the offence, the case must proceed to trial, regardless of the existence of defence evidence.
 - ▲ **Circumstantial evidence**, judge must engage in a limited weighing of the whole of the evidence (including defence evidence) to determine whether a reasonable jury properly instructed could return a verdict of guilty.

Note: Since *Stinchcombe* – discovery not the same, expensive/time consuming, low threshold means benefits are minimum, unnecessarily traumatic for victims

- Conservative government wants to do away with preliminary inquiries
- To eliminate costs – still potential for miscarriages of justice

C) PREFERRING THE INDICTMENT

- Charging document is an Information (Form 2 of *Code*)
- IF committed to stand trial, prosecutor will take information and prepare an indictment
 - Sets out offences charge – who, when, where, what of allegations
 - Signed by Attorney General, filed with Court
- **Generally** (566, 574(1))
 - Ordered to stand trial
 - Any other charge founded on facts – can add aggravated to assault
 - Except where discharged – cannot add any other charge
- **Direct Indictment** (577)
 - If no preliminary inquiry, or don’t like results, don’t bother with judicial review
 - Have survived constitutional challenge – does not offend s. 7
 - Accused can make representations to AG before direct indictment is preferred

Note: Situations when dealing with a complex, lengthy, notorious case → no prelim. (*Bernardo*)

XI. CONSTITUTIONAL REMEDIES

- Inconsistent with Constitution (s. 52 *Constitution Act, 1982*)
 - “No force or effect” – legislation is invalid if *ultra vires*
- Inconsistent with the *Charter* – Appropriate and just remedy
 - Stay of proceedings under s. 24(1)
 - Exclusion under s. 24(2)

A) S. 24(1) - p. 494

1. TEXT

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 remedy, as the court considers appropriate and just in the circumstances.

2. COURT OF COMPETENT JURISDICTION

- **Trail Court** – has power, can be passed cases from superior court in exigent circumstances
- **Superior Court** – court does have power, but don't exercise it – go to trial
 - Inherent jurisdiction comes from *Constitution* itself “**s. 96 Courts**”
- **Preliminary inquiry** – **not** a court of competent jurisdiction, no constitutional status
 - Improperly obtained evidence cannot be excluded under s. 24(2)
 - So any relevant evidence presented by the Crown is admissible
 - Confessions rule relies at a prelim – police obtains statements if voluntary go in at a preliminary even if not given s. 10 warning
- **Provincial Offences** – regulatory offences – are courts of competent jurisdiction
- **Parole Board** – NOT a court of competent jurisdiction

3. REMEDIES

- **Procedural orders:**
 - Adjournments, recalling witnesses
 - Crown fails to disclose in timely fashion, grant defence adjournment to read material, can recall witnesses to cross-examine on new info
- **Costs:** (*Pawlowski*)
 - Say Defence needs money for the costs of adjournment, Crown didn't disclose in timely fashion, apply for award of costs.
- **Mitigation of Sentence:** – which would otherwise be appropriate
- **Return of Items constitutionally seized:** assuming they are not contraband
- **Constitutional Exemption for individual whose rights are uniquely/adversely affected:**
 - Court will declare that a statutory provision does NOT violate the *Charter* as applied generally, however as applied to this individual, grant an exception
 - *Latimer* → 10-year minimum for parole for 2nd degree murder, mercy killing, applied for a constitutional exception under s. 12 of *Charter* – didn't win.
 - Mandatory minimums – chief area to apply for constitutional exceptions
- **Stay of Proceedings:** Tantamount to acquittal, no judicial consequences
- **Exclusion of Evidence:**
 - Cannot exclude evidence that was “**obtained in a manner**” (s. 24(2))
 - **Admission of the evidence itself would compromise the fairness of a criminal trial**– constitutes violation of the *Charter* – apply under s. 24(1), CL.
 - Police had been given evidence by a third party who wasn't a state agent – therefore not *obtained in a manner*.
 - Extra-territorial – evidence collected outside Canada, evidence obtained in a fundamentally egregious way outside of the country – can use s. 24(1)

4. ABUSE OF PROCESS

- **History and context** (*Jewitt* 1985 SCC)

- CL doctrine has been subsumed in s. 7 of *Charter*
- Controls prosecution behavior which operates prejudicially to accused persons
- Where agents of the state engage in reprehensible conduct, there should be some remedy for this abuse
- TEST (Young 1984 Ont.CA) → *A stay should be granted 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”, or where the proceedings are “oppressive or vexatious”.*
- Burden at CL: Power can only be exercised in the “clearest of cases”
- Burden for *Charter*: Bof P, remedy under s. 24(1) what is just and appropriate

Stay of Proceedings IFF: criteria

1) Irreparable prejudice (*Keyowski, O’Connor*) –

1. The prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and

Keyowski (1988 SCC) – criminal negligence causing death
Issue: do a series of trials constitute an abuse of process?
 - Must show prosecutorial misconduct, improper motivation or oppressive proceedings
Decision: NO abuse of process, have to stand trial the third time
 - Courts reluctant to enter a stay of proceedings – serious crime, not lengthy time for proceedings, not disadvantaged by custody.

O’Connor (1995 SCC)
Issue: Did non-disclosure of Crown amount to abuse of process? NO
 - *Charter* is more flexible in selecting an appropriate remedy
 - No utility in maintaining two distinct approaches

2) Clearest of Cases (*Regan*)

2. No other remedy is reasonably capable of removing the prejudice.
 - **Full answer and defence:** Not able to conduct adequate defence (physical evidence lost, witnesses dead) – no other way of remedying situation, OR
 - **Integrity of justice system:** Conduct of Crown (all state agents) so irreprehensible there has to be some meaningful response

- Competing interests
- Interests served by the granting of a stay VS. interest society has final decision on the merits
- Convince court that so egregious as to enter a stay of proceedings – very fact dependent

- **The “Ultimate” Remedy** – stay of proceedings

5. TYPES OF CASES:

- **Non-disclosure** (*O’Connor*)
- **Multiple Trials** (*Keyowski*)
- **Pre-charge delay** (violation of s. 11(b)) – Clock starts running when you are charged
- **Other Crown misconduct** (*Regan*)

R. v. Regan
Facts: Accused charged with sexual offences relating to women employees
 • Police involved media before charges laid

- Crown assisted in investigating complainants/witnesses – defence argued that there is a firm line between the police and the Crown; judge shopping?

Background: Court of Appeal always thinks what the Crown did is terrible

Decision: Majority did not think its cumulative effect warranted a stay of proceedings

- Right to a fair trial not invoked – unfair as in contrary to interest of justice
- Proceedings have to be oppressive and vexatious
- Violate fundamental principles of justice underlying the community’s sense of fair play and decency
- Sometimes the Crown participates in investigation – unless you can show conflict of interest or bias, no problems

B) S. 24(2)

1. TEXT

Where, in 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**.

2. HISTORY AND THEORY

i.... The American Experience:

- Nothing says what happens if rights infringed or denied
- Could sue police, demand disciplinary actions, lay criminal charges
- Fourth amendment: **Due Process Clause** – exclude evidence if it had been obtained through conduct that shocked the conscience, offended a sense of justice or was at odds with the decencies of civilized conduct.
- Judicially created **exclusionary rule**: says where a right is violated in obtaining evidence we want to admit, evidence is excluded.
- *Mack v. Ohio* – exclusionary rule applies to actions of state officials
- Criticism: extreme response at one end

ii.... The UK Experience:

- **Traditional CL rule**: as long as evidence is relevant, how it is obtained is utterly irrelevant
- There are other remedies: sue police, discipline them, charge them with criminal offences
- If prejudicial effect (mislead trier of fact in questions of guilt or innocence) extremely high AND value is low can exclude it
- Criticism: other end of spectrum of exclusionary rule
- *Wray*: brutal torture of a murder suspect, SC said evidence admitted

iii.... The Canadian Experience:

- Most conservative approach until *Canadian Charter of Rights and Freedoms* - 1982
 - Limit investigatory powers of police
 - Ensure fairness to the criminal defendant in the trial process
 - Needed provisions dealing with how the rights and freedoms guaranteed were to be enforced – or else *Charter* ineffectual (hollow promises).
- S. 24(2) – used to focused on the appropriateness of excluding evidence as a constitutional remedy, not focus is on the criteria to be applied in deciding exclusion.

iv.... Rationales for Exclusion – shape how we go about attempting to exclude

- To NOT bring the administration into disrepute
- Akin to the **shock the consciousness of the community**
- Protect the integrity of the court – evidence tainting the judiciary
- To deter police misconduct from happening again –
 - Suing ineffective (vulnerable members of society poor, most affected)
 - RCMP breaking in, search without a warrant
- Balancing individual rights v. state interest
- Give the courts a tool to remedy the violation in a meaningful fashion

Criticisms of Exclusionary Rule – Stribopoulos – p. 508

- Criminal goes free, because police screws up
 - Official compliance with 4th amendment makes it harder to catch criminals
- Serves to restrict police – it's the sanction, not the rule that does this
- Serves to benefit the guilty – protects everyone against unreasonable search and seizures
- Motions for exclusion are costly, shift emphasis from guilt/innocent of accused
 - Need to ensure Constitutional guarantees are not meaningless
 - Courts assume the role of final arbiters of individual rights
- Confers disproportionate benefit on accused
 - Exceptions to exclusionary rule have been created to ensure Δ returned to the original position BUT FOR the constitutional violation
 - Exception: evidence that would have been found anyways
- Lots of nations have a variation of the exclusionary rule

3. PRELIMINARY MATTERS (COLLINS)

i.... Burden and standard of proof

- On the accused to prove *Charter* violation – and that the admission of evidence would bring the administration of justice into disrepute – on a BofP

ii.... Discretion and deference

- The legislation is so open-ended, it is discretionary in practice
- SCC instructed itself and other appeal courts that they are supposed to give deference to the trial court's decision as to whether or not to exclude evidence
- If you apply principles correctly, your decision won't be interfered with
- Trial court decisions get overturned fairly routinely, not hard to convince the Court of Appeal that the trial court made an error of law

iii.... Disrepute and the rationale(s) for exclusion

- Judicial integrity – not penalizing the police for misconduct (deterrence rationale)
- Look at the effect of admitting the evidence on the integrity of the system
- Insofar as it relates to police in the field interacting with criminal suspects
- Deterrence not that important → however SCC hopes that excluding evidence will have effect of preventing future constitutional violations
- If we really wanted s. 24(2) to be all about deterrence – police can go and violate rights, in situations where they know people won't be charged.

iv.... “Could” v. “Would”

- Would = could... difference in the two official languages
- Would includes could, but could doesn't include would (Could is a lower threshold)

4. STANDING

In order to obtain a remedy under s. 24(2) you have to be able to show that YOU as the applicant (criminal defendant) experienced an invasion of YOUR constitutional rights. NOT the rights of somebody else.

- Cannot argue the *Charter* rights of a 3rd party have been violated to get evidence excluded.
- Have to establish the rights of **your** client have been violated

5. OBTAINED IN A MANNER

- 10(b) violation, confession
- Invalid warrant, finding of real evidence
- Relationship between violation and acquisition of evidence
- Have to draw a connection between the two things: **Two ways**

1) **Temporal connection** → weaker the connection, harder to establish obtained in a manner that violated the *Charter* – searches and the right to counsel

2) **Causal connection** → BUT FOR the violation, evidence would not have been discovered - “derivative” evidence say from a confession

R. v. Goldhart

- S. 8 violation – search of the home found revealed a friend
- Much later in time, his friend undergoes religious conversion and decides he would cooperate with the police – will testify against the accused, *viva voce* evidence
- Defence wants to have testimony of the friend excluded, argues:

Causal connection → BUT FOR the violation of s. 8 (illegal search), you wouldn't have had the testimony of the friend → obtained in a manner

Temporal connection → testimony occurs a while after the violation.

Decision: NOT excluded

- Causal connection is too remote (weak) – between breach and evidence (testimony)
- Temporal link between illegal search and testimony is WEAK – intervening event of decision to undergo religious conversion, voluntary decision to cooperate with police and testify

Ratio: Comes down to characterization:

- Cannot equate discovery of person with *viva voce* evidence given at another time
- Testimony is the product of a person's mind, can only be obtained when person discloses it – independent, not the same as an inanimate object

R. v. Strachan –

- Search revealed evidence: drugs and paraphernalia
- Received a warrant based on confidential sources
- Executed warrant, gave accused his 10(b) rights but said he couldn't exercise them until situation was under control → no violation

Issues: Was search invalid? Should the evidence be excluded?

Analysis:

- SCC does NOT insist on causal connection, temporal connection is sufficient but not determinative
- Causal connection is too narrow. Said that focus on the entire chain of events between the evidence and the violation – don't want to be too picky – want all evidence
- Look at the single transaction, temporal violation occurred – meets first branch “obtained”
 - If we require a BUT FOR test to exclude evidence, we won't exclude it.
 - If we insist on a causal connection, this limits the ability to exclude evidence
 - Police could then deliberately violate s. 10(b) and discover **real** evidence without consequence.
 - What if we could still get a warrant based on an unconstitutional parameter search – because there will still be RPG's to get the warrant? No consequence for the violation
 - The section 8 violation and finding of the drugs part of single transaction
 - If it is a bad constitutional violation, evidence will be excluded
 - If it is a minor violation, evidence will go in
 - All regardless of the strength of the connection
 - **Presence and Strength** – and then make best argument that you can
- Decision: Violation was characterized as an isolated error in judgment, goes to seriousness of the breach, would NOT bring the administration of justice into disrepute – Evidence Admitted
- In a situation where safety is a concern, you can get situation under control before reading right to counsel. Situation was under control, but right to counsel still not given

Problem: 10(b) violation reveals murder weapon. Later he admits to GF he is guilty.

- Confession to Murder Weapon:
 - Temporal/Causal connection – between murder weapon and 10(b) and violation
 - Obtained in a manner
- GF testimony:
 - Causal connection – does he confess to GF because he disclosed murder weapon? Could argue that the GF independently decided to testify
 - Argue that he would never have confessed to GF if he would have been given the right to counsel, obtained in a manner
 - Temporal connection – confesses after he gives up murder weapon
 - Characterize the content of the GF's testimony as not causally connected
 - If he told her self-incriminating statements on other occasions, hard to argue causal connection

6. DISREPUTE

Collins: If established that – burden of BofP on applicant

- Disrepute – on the proceedings, fair hearing, prejudice, long-term effects of exclusion
- Would it cause more disrepute to include or exclude?
- **Reasonable person test:** *would the admission of the evidence bring the administration of justice into disrepute in the eyes of the reasonable man, dispassionate and fully apprised of the circumstances of the case?*
- Judge still must be impartial to such community views, keep in mind long term community values, not just present sensationalism.
- Factors: see page 520

i.... TRIAL FAIRNESS

COLLINS

- Real evidence existed regardless of violation, so only consider conscriptive evidence
- Self-incriminating evidence obtained following a denial of the right to counsel should generally be excluded.

Applied: real evidence, prejudicial to accused, trial would not be unfair. Cost of excluding would be high (serious offence, evade conviction). Cost would be higher admitting it (court needs to separate itself from conduct of police – flagrant, serious violation, based on suspicion).

Ratio: Confusion left between: Real Evidence vs. Conscriptive Evidence

STILLMAN APPROACH (p. 525)

Facts: brutal murder of teenage girl, semen found, accused had no alibi, accused at police station forced to give samples.

- Need to look at the nature of the evidence itself that may be self-incriminating
- Certain types of evidence will have impact on fairness of the trial – not being compelled to incriminate yourself in very particular ways
- Right to bodily integrity and the sanctity of the body – s. 7 of *Charter*
- **Rationale**:
 - Interference can only be undertaken in accordance with principles of fundamental justice
 - Unless a minimal intrusion – fingerprints – accepted by Canadian society
 - Need to prevent Police brutality – abusing force, control over these actions

HAS TO BE conscriptive and non-discoverable to affect trial fairness:

ONE: CONSCRIPTIVE:

1. STATEMENTS – confession
 2. EXTRACTED BODILY SUBSTANCES – force a blood sample, vs. take it from crime scene
 3. USE OF THE BODY AS EVIDENCE – participating in a lineup, reenacting a crime in front of the police, doesn't include photograph.
 4. DERIVATIVE EVIDENCE – looks like discoverable evidence
 - Evidence that is causally connected to the finding of one of the first three, that would not have been found had the state not violated the *Charter* in obtaining the first piece of evidence.
 - *Feeny* – confession leads to finding of cash under the mattress, was not declared derivative because they knew he had stolen cash and that victim had been robbed, so would have found the cash anyways (even if it didn't comply with *Charter*).
- OTHERS?
 - *Mellenthin* → Forced to participate in finding evidence, forced to hand it over
 - Stillman does NOT recognize this

If it is NOT CONSCRIPTIVE, it is NOT DISCOVERABLE

TWO: NON-DISCOVERABLE:

- BUT FOR the violation of the *Charter*, would the evidence still have been discovered?

- If yes, won't affect trial fairness → Must have been a constitutional way for police to obtain evidence (unlike derivative evidence).

Independent source – Entitled to have access to DNA profile, or information

- The existence of an alternative non-conscriptive means won't affect trial fairness
- Crown has to establish on a BofP that police would have used those means

Inevitable discovery –

- Would have been found anyways (search incident to arrest)

How can a statement be non-discoverable?

- Cop shows up a door to arrest someone, he confesses immediately
- Presume that people will listen to lawyers (comply with 10(b))
- Established that he had an irresistible urge to confess – section 10(b) would not have made a difference
- Have a conscriptive statement that was inevitably discoverable
- R. v. Black – p. 534

AUTOMATIC EXCLUSION?

- Used to be virtually certain that evidence will be excluded if affects trial fairness
- Now it's not as clear, may be degrees of trial unfairness, degrees to consider
- May maintain a special importance – may still generally be excluded
- We really don't know
- *** Point out whether evidence affects fairness of trial, and making an argument as to a significance of the finding that the evidence would affect the fairness of the trial.

APPLICATION:

1) Stillman

- Hair and buccal samples – swab at the police station
 - Conscriptive because accused participation was involved
 - Mere fact of participation is not enough to make evidence conscriptive
 - Non-discoverable would not have been discovered – *Charter* guarantees
 - Can try to convince someone, however this is NOT correct
 - **LAW: Needs to be a statement, bodily substance OR body used as evidence**
 - *Mellenthin* – SCC says this affects trial fairness
 - **AFFECTS TRIAL FAIRNESS** – but for the accused participation, evidence not would not be available.
 - **Bodily substance**
 - **Taken from accused**
 - **Conscription by the state – forced accused to participate**
- Dental impression
 - Not taking a substance away from their person
 - Something OF the body, taken with the accused's compelled participation
 - SCC: Conscriptive evidence
- Tissue
 - Interrogated by police, blows his nose, throws tissue into garbage
 - Police obtain tissue, there is mucus in tissue – extracted DNA

- Not taken directly from body → non-conscriptive because it was abandoned offered up by accused.
- State did not conscript the accused in producing the evidence
- Discoverability is irrelevant if it is NOT conscriptive
- Was there an alternative constitutional means of obtaining evidence? YES, this goes to the bad faith of the police. They could have obeyed the *Charter* but they didn't.

2) Feeney

- Bloody shirt
 - Affect trial fairness? Not conscriptive. Existed independently
 - Not a bodily substance in his body, its outside of his body
- Statements
 - Are they inevitably discoverable? NO
 - Conscriptive
- Shoes, Cigarettes, Cash – Not derivative conscriptive evidence
- Fingerprints – use of the body as evidence – bodily substance – conscriptive, non-discoverable therefore affect fairness of the trial

ii.... SERIOUSNESS OF CHARTER VIOLATION

- Becoming the most important fact to consider
- **Good faith** (subjective and objective) – *Collins (Therens)*
 - Flagrancy, pattern v. trivial, isolated
 - Did they think they were violating the *Charter*? If you have independent evidence that they knew they were violating the *Charter*, good thing. Likely to have evidence excluded.
 - **Objective**: Focus on individual police officer, given the knowledge and training, should they have realized they were in violation of the *Charter*.
 - Argue that the police **should have known** they were violating the *Charter*
 - This is a strong factor towards exclusion – no automatic rules
 - Was it an error in judgment?
 - Part of a pattern of abuse or negligence?
- **Intrusiveness** (*Buhay*) – **Expectation of Privacy**
 - REP in pocket of coat (*Mann*)
 - Search went beyond what was required for a safety search
- **Reasonable and probable grounds** – presence of RPG's makes violation less serious
 - S. 8 violation, police have RPG's, could have but didn't obtain warrant
- **Alternative means** – discoverability question as applied to seriousness of a breach
 - If there were other ways of obtaining evidence, violation more serious
 - S. 8 violation, police have RPG's, could have but didn't obtain warrant
- **Urgency and necessity** – makes breach less serious

Grant: Para 71

- Court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to:

1. The seriousness of the Charter infringing state conduct (admission may send the message the justice system condones serious state misconduct)
2. The impact of the breach on the Charter-protected interests of the accused (admission may send the message that individual rights count for little)
3. Society's interest in the adjudication of the case on its merits.

Stillman: p. 538

- Blatant disregard for the fundamental rights of the appellant
- Waited for the lawyers to leave, used force, threats and coercion
- Accused was young offender

Mann

- REP of pocket of coat
- No good faith of officer who made unreasonable error or was ignorant to scope of authority

Penney feels like RPG's and Alternative means are conflicting. Exact same facts could lead to exclusion or inclusion. Can point to one.

iii.... EXCLUDING EVIDENCE WOULD BRING THE ADMINISTRATION OF JUSTICE INTO DISREPUTE (Effects of Exclusion)

Seriousness of offence

- If affects fairness of trial, the fact that offence is serious, and evidence is important to crown, would make it MORE unfair to admit it.
- This goes towards NOT actually impacting police behavior
- Does this mean that when dealing with murder, *Charter* doesn't apply

Importance of evidence

- To the Crown's case

Stillman:

- Would shock the conscience of all fair minded members of the community that the police rod roughshod over a young offender's refusal to provide bodily samples.

<u>XII. TIME LIMITATIONS</u>

1) Limitation Periods

Summary convictions – 786(2) – six months limitation, unless agreed by counsel

Hybrid offences – Crown can proceed by indictment after six months

- Not in Crown's best interest to proceed on indictment – more time, money

2) Constitutional Context

Charter of Rights, s. 11(b) → Right to be tried in a reasonable time

Purpose:

- To protect individual interest:
 - *Liberty* – minimize exposure to pre-trial restrictions
 - *Security of person* – minimize anxiety and stigma of exposure to proceedings.
 - *Fair trial* – while evidence is available and fresh
- Societal interests:
 - Humane treatment – fair and speedy trial
 - Law enforcement – not give people a green light due to time passed
- Depending on the trial, might want to have it later – quite common for people who are repeat offenders,

Only to people Charged with an offence:

- When information sworn or indictment preferred (*Kalanj*)
- Delay between commission of offence and laying of charge not considered (*Kalanj, L. (W.K.)*) – sexual assault complainants usually take time to come forward
- Statute of limitations does not apply to criminal charges
- Have proceedings stayed either raise 11(d) or claim abuse of process
- Appellate delay not relevant (*Potvin*)

3) Factors: (Askov, Morin)

How much time is too long? Time period between committal and trial (SC).

- Consider relevant in excluding periods of time that don't count
- Look at period of time that DOES count, and then ask if it is too long.
- Accused bears burden of establishing a *Charter* violation
- *Askov* – two year delay, resulted in a stay of proceedings

1. Length of Delay

- From charge to trial
- No fixed guideline
- But if not sufficiently long, no violation – will NEVER win a s. 11(b)
- If extraordinarily long then violation regardless

2. Waiver of Time Periods

- Clarity and knowledge
 - Explicit or clearly implicit decision by the Δ to waive all or part of the right to a speedy trial
- May be implicit (consent to trial date)
- Mere inadvertence not waiver
 - But may be counted as “conduct of defence”
- Thus important to object to delays → object to ANY delays
 - If you consent to an adjournment without noting objection on record, can be considered delay

3. Reasons for delay

- a) **Inherent requirements**

- Complexity, intake requirements (retaining counsel, bail hearings, processing charge, time for counsel to prepare case)...
- Preliminary inquiry – longer time allowed
- Do NOT count in calculating the period of time that we judge to be reasonable or unreasonable, considered a GIVE IN.
- **b) Actions of the accused**
 - Pre-trial applications (exclusion of evidence), adjournments, change of venue, attacks on wiretap packets, attacks on search warrants, ...etc.
 - Cannot come back later and say you were not tried in a reasonable amount of time → do NOT count
- **c) Crown's actions**
 - Applications, adjournments (to obtain experts, wait forensic tests), failure or delay in disclosure, change of venue
 - This DOES count → in reasonable amount of delay
- **d) Institutional resources**
 - Parties ready but no date available → This DOES count
 - Flexible guidelines → take into account local changes causing temporary strains on resources, and difference in practices, NO transitional period
 - Deviate for prejudice and seriousness of offence
 - PC = 8-10 months
 - SC = 6-8 after committal
- **e) Others?**
 - Actions by trial judges

4. Prejudice to the accused

- Crown bears the onus to demonstrate the delay caused no prejudice to the accused
 - Prejudice to accused's ability to conduct a defence – disruption on social life, work, family, legal costs, stress and anxiety...
 - Pre-trial incarceration, restrictive bail, damage to reputation
 - Societies interest in adjudication on the merits is greater with a more serious offence

R. v. Morin

Facts: “Over 80” charge, received a court date of 14 months later as “earliest time”.

Application

- 14.5 months
- Accused did not waive rights at any time
- Reasons:
 - Not a complicated case, witnesses were officers, paperwork legitimizes some delay, but both parties were ready for trial
 - No action by accused, no actions by Crown
 - Lack of institutional resources – MAIN CAUSE (increase case loads, population increases) – allowed for a 10 month delay
- Prejudice: Accused led no evidence, Crown sent letter re delay, accused did not respond

Decision: NOT an unreasonable delay.

4) Remedies

- Changes of success → trend is for courts to be reluctant to find a s. 100(b) violation

- Minimum Remedy (*Rahey*) – is a stay of proceedings
- Other remedies possible – maybe they’ll give you more... damages? Public apology?
- *Askov* – 50,000 cases were stayed, sent a message to government

XIII. TERRITORIAL LIMITATIONS

1) Extra-territorial Jurisdiction

- Jurisdiction for offences committed outside the borders of Canada
- **General Rule: (s. 6(2))** subject to this Act, or any other Act of Parliament, no person shall be convicted of an offence committed outside Canada
- **Exceptions: s. 7**
 - General Exception (*Libman* – in order to prosecute a crime in Canada, there must be two things: 1) Real and Substantial connection to Canada, 2) Must not violate the principles of mutual respect and reciprocity among nations).
E.G. Telemarketers in Canada, phone people in the USA – sell false stocks to elderly people (securities fraud)
 - Money goes to bank account in Cayman Islands
 - Victims all in the USA
 - Canada is place where telemarketing occurred
 - SCC says because telemarketing occurred in Canada, therefore trial here – would not offend anybody else to have this trial in Canada.
 - Specific Exceptions: (Cr. C, s. 7 etc...) baot offences, terrorism, war crimes

2) Interprovincial Jurisdiction:

- What province do we try people in
- General Rule: (cannot try offence committed *entirely* in another province **s. 478(1)**)
- Statutory exceptions (**476**)
- Guilty plea and sentence (478(3)) – if crime committed in Alberta, and not a s. 469 offence, can be tried in BC if he pleads guilty and gets sentenced there. Consent of Crown.
- s. 478(1) – how do we decide in an entirely other province?

3) Case Law:

(a) Continuity of operations

- As long as one of the elements of the offence are committed in province, doesn’t matter
- May have begun crime in BC, but it continued in Alberta → tried in either

(b) Commission of Overt Act in Province of trial

- If any act attached to the crime occurs in the province – jurisdiction

(c) Generation of Effects

- While you may have physically been present in Alberta when you called up investors in Manitoba, the effects of your actions were felt in Manitoba as a result

(d) How should be categorize *Bigelow*? P. 576

Facts: Accused charged with detaining an infant with the intent to deprive the mother of her lawful custody – took lawful possession in Ontario went to Alberta

- Charges laid in London Ontario, detaining occurred in Alberta
- His defence is that because he kept the kid in Alberta, should not be tried in Ontario.
 - Had every right to take custody of his kid over the weekend in Ontario
 - Actus reus and mens rea don't coincide
- Need to take seriously the appropriate jurisdiction to try the offence

Decision: Can be tried in Ontario for three reasons:

1. Initiating acts started in Ontario where acts of the appellant progressed beyond mere formulation of a plan.
 2. Concluding acts (generation of effects) – rights of mother in Ontario deprived by acts in Alberta
 3. *Mens rea* started in Ontario by boarding plane with child
- Policy Reasons → CANNOT allow accused to get away with this – *slippery-slope argument*: don't want parents doing this all the time
 - SCC would just say apply *Libman*: real and substantial connection, wouldn't violate interprovincial relations – does it make sense to try this case in Ontario?

4) Change of Venue (*Suzack*)

- Within a province, because of adverse publicity in a particular area, you can apply to have the place of trial moved to another court in the province
- Crown discretion (470) – every court of criminal jurisdiction that has power to try an indictable offence is competent to try an accused for that offence (arrest/custody/order to be tried).
- Application (599)
 - Prejudicial Publicity – contaminate the jury with exposure to facts
 - Safeguards – no longer have impartiality, oath safeguards overcome all
- Wouldn't be fair to hold trial in this particular location – *Bernardo's* trial was moved
- If judge feels it “appears expedient to the ends of justice”
- Hard to get a change of venue

Suzack –

- Charged with first degree murder of Constable MacDonald
- Media coverage was extensive and highly emotional –
 - Heinous nature of offence
 - Called for return of death penalty
 - Sympathy for MacDonald's family

Decision: Appeal dismissed

Problem:

The accused is charged in Ontario with breaching a condition of an Ontario probation order that he keep the peace and be of good behavior. The breach is alleged to have been an assault of his girlfriend in Cuba. Both parties are Canadian citizens. Rule on the defence motion that the Ontario Court lacks Jurisdiction.

- Both residents of Canada, citizens – not ordinarily enough to grant jurisdiction
- Real and substantial connection to Canada

- Convicted him on the basis that a probation order applies to the person, not to any geographical territory of space. So wherever you go in the world, you are subject to the order. Order only enforced in Canada. Crown has to prove breach of order.

XIV. PLEA BARGAINING AND THE PLEA

A) PLEA BARGAINING

1. Definition:

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.

- Negotiated agreement between defence counsel and crown counsel
- May happen right before trial, during, may be formal or informal, may be a lengthy process
- Not subject to many rules... like a horse trade.
- Assesses likely outcome, considers both sides – reasonable settlements can occur
- Big upsides for both sides – good for society (minimize \$, trauma of witnesses), give accused opportunity for input in what happens
- **What you can get:**
 - 1) Withdrawal of charge
 - 2) Reduction in Charge – in exchange for guilty plea
 - 3) Promise not to charge with other/additional offences
 - 4) Sentence Recommendation – joint recommendation (not binding, but judge must consider it)

.... See pg. 615
- In return for some informal sanction – carry out certain conditions
- Resolution discussion
- Court will accept recommendation unless manifestly unjust

2. Explicit Plea Bargaining

- Open negotiation between the accused and Crown
- Constant elements:
 - i) There will always be a plea of guilty to one or more charges
 - ii) A bargain or benefit will only be provided if the accused pleads guilty
 - iii) The bargain must result from express or overt negotiation
- Variable elements:
 - i) Where the plea bargain occurs
 - ii) When it occurs
 - iii) With whom the bargaining is done
 - iv) What is actually bargained
 - v) Why the pleas is bargained

3. Implicit Plea Bargaining

- Person enters guilty plea without any negotiated benefit
- Acts as a mitigating factor

- Can be useless if jurisdiction has an unwritten understanding that certain offences “are worth” a particular sentence

4. Charge Bargaining

- Accused bargains to have lesser charges laid or reduced charges in exchange for a guilty plea
 - i) Reduction of the charges to a lesser or included offence
 - ii) Withdrawal or stay of other charges or the promise not to proceed on other possible charges
 - iii) A promise not to charge friends of family of the Δ

5. Fact Bargaining

- Water down or neutralize facts that he or she will agree on for a guilty plea
- Makes the factors either less aggravating or more mitigating
 - i) Not to volunteer info damaging to the accused
 - ii) Not to mention a circumstance of the offence that may be interpreted by the judge as an aggravating factor

6. Sentence Bargaining

- Discussions between counsel regarding length and type of sentence imposed
 - i) Proceed summarily
 - ii) Certain sentence recommendation
 - iii) Not to oppose defence’s recommendation
 - iv) Promise not to appeal
 - v) Not to apply for a more severe penalty
 - vi) Not to apply for a period of preventative detention
 - vii) Make representation as to the place of imprisonment, type of treatment...
 - viii) Arrange sentence before a particular judge

7. For and Against Plea Bargaining

Arguments in Favor of Plea Bargaining

- Necessity/Efficiency → keep the wheels of justice moving
 - Prevents backlogs and assists in decreasing the already long delays
 - Criminal caseloads have doubled, state has failed to respond with similar increases in funding
 - Criticism: guilty plea simpliciter vs. negotiated guilty pleas – most simpliciter, so this wouldn’t change if we outlawed plea bargaining (plea ban: p. 619)
- Accused’s best interest → results in lower sentence, first step in remorse
 - Not necessarily related to feeling remorse – easy and rational way out
 - **Lower Sentences:** Deduction for guilty plea is like a punishment to those who stubbornly insist on exercising their constitutional right to a trial.
 - **Certainty of Outcome:** not all or nothing trial process, however judge not bound by joint submission
 - **Other benefits:** saves money, embarrassment, stigma
- Efficient prosecutor’s office → over-burdened therefore can get a conviction
- Interests of society → quick resolution

- Value organized and efficient yet protective system
- Although trials demonstrate that the system actually does work. Also serves as check to state powers, foster novel legal arguments and resolve novel factual disputes.
- Victims of crime → spares emotional pain of attending public trial
 - Lots of crimes however are victimless
 - Difficulties of certain crimes are not put on display
 - Marginalizes victims –makes them feel like they have no input
 - Victims are often left dissatisfied

Arguments Against Plea Bargaining

- Abolitionists vs. Revisionists
- True objective is to search out the truth and punish those who are guilty
- Procedural and substantive safeguards should be the means in which justice is served
- PB seen as circumvention of the proper adjudicative process
- Aim to convict the guilty without convicting the innocent – PB offends against this aim
- Guilt not determined through public marshalling and testing of evidence
- Longer the delay, the more attractive the guilty plea becomes – if you plead guilty, you get out, but if you are innocent and wait, you stay in jail
- PB are lightning rods for calls for harsher sentences and legislative reform
- Deals are based on good negotiation skills rather than fact finding, adjudication and impartiality
- Degree of compliance with ethical obligations is more easily scrutinized in the public eye

8. Repudiation

- If crown repudiates can be seen as an abuse of process – two preconditions
 - Parties have to agree upon the terms of the disposition (“deal”)
 - Accused would have been prejudiced if the Crown were permitted to repudiate, usually because he/she has given up something already (contraband?)

B) PLEAS – P. 627

1) Not Guilty

- Must plead for each count
- Court will assume not guilty if you don’t say

2) Guilty

- Will be sentenced to a lesser punishment for pleading guilty – mitigating factor
- **s. 606 (1.1-1.2)**
- **Withdrawal (Adgey)** – when can you do it?
 - *Taking of plea* – when the charge is read
 - What do we need to make an effective guilty plea? S. 606
 - Some assurance that the person understands what they’re doing
 - Willingness, or voluntary choice to accept responsibility for committing all of the elements of the offence

- Informed of decision
- Absent circumstances, will assume lawyer does
- *Hearing of evidence at sentencing*
 - Up until the accused is sentenced – trial judge retains jurisdiction, can become present during the hearing that evidence will point to the innocence of the accused, or a legitimate defence.
 - Trial judge is not bound to conduct an inquiry after a guilty plea has been entered – but should make and
- *Appeal*
 - Accused can withdraw guilty plea – if valid grounds
 - Will look at effectiveness of counsel
 - High standard
 - If unrepresented – look at facts to see if it was improper to give guilty plea in the first place
- Lesser included or other offence

Adgey

- Dissent: Trial judge erred in law in permitting the guilty plea to stand
 - Was not represented by counsel when asked to plead to a succession of charges
 - Judge should inquire if duty counsel consulted with accused
 - Court should make sure that the plea is voluntary and that the accused understands the consequences of the plea
 - Appellate court should interfere and set aside plea of guilty IFF:
 - (1) The accused did not understand the nature of the charge
 - (2) The accused did not unequivocally plead guilty to the charge
 - (3) The accused, could not have in law been convicted
 - Crown must be able to still prove the elements of the offence

Rubenstein (Ont. CA) p. 635

- Appeal: judge wrongfully refused to allow the appellant to withdraw his pleas of guilty
- Not suggested that the appellant did not fully understand the charges
- No question that the facts admitted amply demonstrated the guilt of the appellant
- Just because a judge rejects a joint submission does not mean that he/she has to provide the accused with the opportunity to withdraw the guilty plea

XV. JURY SELECTION

A) ASSEMBLING THE PANEL

1. Juror Qualifications (Code s. 626)

- List of excluded persons varies from province to province – *Juror Act*

2. Challenges to the array (s. 629) – juror pool has to be:

- **Randomness** –
 - Select disproportionately from certain sub-groups or populations from the geographic

- Alberta → *Sheratt* – felt it was important (accused was aboriginal) that there was a representation from aboriginal communities. – NOT ALLOWED
- **Representativeness**
 - Problems: trial in a location that is different from location of alleged perpetrator/victim
- Both defence and Crown can challenge the array
- Challenges are rare, and are rarely successful

B) SELECTING THE JURY

1. Exclusion by judge

- **Excusing jurors** (s. 632)
 - Personal interest
 - Relationship with interested person
 - Personal hardship or reasonable cause
- **Stand By** (s. 633) –
 - If judge is concerned too many people are being excused
 - Won't outright excuse person, will tell them to wait

2. Peremptory Challenges (*Sherratt*)

- **Stand-asides**
 - Power of the Crown only – up to 40 in some cases
 - Tool to get rid of jurors favorable to defence (men in sexual assault case)
 - No explanation required, simply exercise a stand-aside
 - Say for Crown to get rid of males in a sexual assault case
 - SCC said there's no reason why an all-female jury be impartial – for centuries we had all-male juries and they were able to be impartial
 - Violation of the *Charter* – unfair advantage – s.11 (d)
- **Maximum numbers** (s.634)
 - Parliament got rid of stand asides
 - Crown and defence get a equal numbers of peremptory challenges
 - Depending on the seriousness of the case
 - S. 469 – murder – each side gets 20 peremptory challenges
 - Max. punishment 5 years or more each side gets 12
 - All others, each side only gets 4
- **Procedure**
 - Don't have to make any arguments – just like a stand aside
 - Don't need any justification
 - How do we decide to strategically use our peremptory challenges?
 - Can see what the person looks like, age, sex, appearance
 - Have their names, occupation, and address
 - Loaded with potential for discrimination
 - Have an aboriginal offender – don't want them on jury

3. Challenges for Cause (*Sheratt, Williams, Find*)

- **Grounds** (638) → Unable to be impartial between the queen and the accused

- “**Realistic potential**” for partiality, i.e. Both
- 1. (Generally) **widespread bias** in the community from which the jury panel was picked (attitudinal); and
- 2. Some jurors incapable of **setting aside despite safeguards** (behaviorial)

Once we convince judge realistic potential for partiality then...

- **Procedure**

- Defence will ask certain questions to juror to see if they’ve been exposed to pre-trial publicity that has affected impartiality, if they can disabuse themselves.
- Approved by Crown and judge
- Then judge rules on nature of impartiality – this is all the judge does
- Pick two potential jurors: become trier of the potential challenge
 - Usually last two jurors sworn
 - Asks the juror the questions

- **Types of challenges:**

1. Not indifferent - *Hubbert*
2. Pre-trial publicity → most common, tendency is that courts are skeptical to dismiss for this reason.
 - Question is whether it could prevent a juror from being indifferent as to the result.
 - “Whether the particular publicity and notoriety of the accused could potentially have the effect of destroying the prospective juror’s indifference”
3. Racism (*Williams*) → can have these, racism is systemic, cannot allow this in the justice system – making judgments.
 - Colored accused
 - Color of victim
 - Might be a problem for racist attitudes
4. Nature of the offence (*Find*) – Offence based prejudice will rarely succeed.

- **Evidence** (*Williams, Find*)

- Present evidence: social science studies about racial bias in the community, expert testimony – widespread bias
- Ask judge to take judicial notice of prejudice

Do a challenge for cause first, then use peremptory – if they survive challenge, have a decision to make.

- Must be an air of reality to the application
- Pre-trial publicity, question is

Safeguards

- Charge to the jury:
 - Look at evidence
 - Apply law to evidence
 - Only base your decision on evidence
 Jurors have to take an oath that they will be impartial
- Restricted from talking about it

- Publication bans (preliminary inquiries, bail hearings)
 - During trial told not to read/watch any media
 - Pre-trial publicity
 - Sometimes sequestered
- *Voir dire* – juries are excluded
- *Charter* Section 11. Any person charged with an offence has the right... (f)...to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for **five years or a more**
-

R. v. Parks- African Canadians

- Accused convicted of second degree murder for killing a person during a cocaine deal
- Accused wanted to know if jurors were able to judge without bias knowing that:
 - Case surrounds drugs
 - Accused is a black Jamaican immigrant, deceased is a white man
- Trial judge disallowed both questions, and after conviction, accused appealed arguing that the questions should have been allowed

DOHERTY J.A.:

- Only the second questioned is considerable, should have been allowed to be asked since this case involves a black accused's involvement in a criminal drug transaction
- Presume jurors will perform their duty according to their oath, must be balanced against the threat of a verdict tainted by racial bias
- Although there is a realistic possibility that discrimination will occur

APPEAL ALLOWED, new trial ordered

R. v. Williams

- Accused was an aboriginal man charged with robbery, relied on *Parks* to ask jurors whether their ability to be impartial was affected by his race, and victim's
- Trial judge did not allow question, BCCA dismissed appeal
- Unanimous SCC reversed

McLACHLIN J.:

- Trial judge to exercise discretion where there is potential for partiality

- **TEST:**

1. INQUIRY: Whether *challenges for cause* should be permitted
 - a. TEST: is there a realistic potential for partiality (*Sherratt* Standard)?
 - b. QUESTION: will the jury pool contain prejudice people incapable of impartiality?
2. INQUIRY: If challenges for cause granted,
 - a. TEST: Defence can question potential jurors
 - b. QUESTION: Whether the candidate is able to act impartially? Set aside prejudices
 - Only can challenge for cause if there is evidence of widespread bias in the community
 - Allowing challenges will enhance the appearance of trial fairness

APPEAL ALLOWED, new trial ordered

Whether the evidence of widespread bias against aboriginal people in the community raises a realistic potential of partiality:

- Assumption that prejudice will be judicially cleansed
 - Assumptions learned over a lifetime which shape the daily behaviour of individuals, often without any conscious reference to them
 - Instructions cannot ensure biases that are deeply ingrained will be erased
 - **Judge has to determine if racially biased, and if capable of setting it aside**
- Insistence on the necessity of a link between the racist attitude and the potential for juror partiality
 - Needs to have evidence to show bias of a particular nature
 - May play a role where a perceived link between those of the accused's race and the particular crime
- Confusion between the two phases of the challenge for cause process
- Impossibility of proving that racism in society will lead to juror partiality
- Failure to interpret s. 638(1)(b) in accordance with the *Charter*
 - Challenge for cause is a safeguard of the accused's s. 11(d) of *Charter* right – therefore cannot set too high a threshold for challenges for cause
 - And equality before the law, s. 15 of the *Charter*

Offence based challenges: Sexual Assault cases

- Every jury pool will include both victims and perpetrators of sexual abuse
- Involving children evokes strong feelings of hostility and disapprobation
- Rejected by *Find*

Find – p. 657

- No basis has been shown to support the conclusion that charges of sexual assault against children raise a realistic possibility of juror partiality entitling the accused to challenge for cause.
- Did the nature of the charges against the accused give rise to the right to challenge jurors for cause on the ground of partiality?
- Realistic potential for juror partiality generally requires satisfying the court on two matters:
 - That a widespread bias exists in the community (material bias).
 - That some jurors may be incapable of setting aside this bias, despite trial safeguards, to render an impartial decision (trial bias).