Criminal Law 420 – Midterm CAN

Chapter 1 – Sources of Criminal Law

Constitutional Context

Constitutional law

- Division of powers or federalism: Federal HoP (s.91) and Provincial HoP (s.92)
  - Determines what section of government (HoP) gets to do what. They are coequal. One cannot invade on the other's power
- Sources of rules as well as limitations of what those rules constitute of and what rules can be made
- **Supreme Law: The constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the constitution is, to the extent of inconsistency, of no force or effect**

Canadian Charter of Rights and Freedoms

- Applies to the activities of Canadian legislatures and governmental officials such as the police.
- **If a law of practice is found to infringe a charter right, it is open for the state to prove under s.1 of the Charter that it is a reasonable limit prescribed by law and demonstrably justified in a free and democratic society**
  - Infringement of rights = Justified under s.1
- ***Rights***
  - ***General Legal Right***
    - **s 7** - Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice
  - ***Specific Legal Rights***
    - **s 8** - The right to be free from unreasonable search and seizure
    - **s 9** - The right to be free from arbitrary detention
    - Individualized suspicion
    - The state must have some solid reason to expect that you have committed a criminal offence
    - **s 10** - The right to informed with the reason for your detention (s.10(a)) The right to council (s.10(b))
    - **s 11** - The right to be presumed innocent and to be adjudicated by an impartial decision maker (s.11d)
    - **s 12** - The right not to be subjected to cruel and unusual punishment
    - **s 13** - If you are compelled to testify in a criminal proceeding and you say something that is self-incriminating, that statement is protected from further proceedings
  - ***Limitation of Rights***
    - **s 1** - Subject to "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."
    - Section 7 and Section 8 do not apply to this limitation
    - There limitations are embedded within their sections (PFJ & Unreasonable)
  - ***Enforcement of Rights***
    - **s 24** - (1) General remedies ("appropriate and just in the circumstances") & (2) Exclusion of evidence (admission could "bring the administration of justice into disrepute")
  - ***Supremacy*** (Constitution Act)
    - **The constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the constitution is, to the extent of the inconsistency, of no force or effect.** Gives right to strike down law and deem laws ultra vires (judicial supremacy)

Criminal Law & DoP

- Federal s.91
  - Has authority to create criminal offences as well has authority to create regulatory offences
  - Appoints superior court judges: appeal court judges including those in the SCC
  -
- Provincial s.92
  - Has authority to only create regulatory offences
  - S. 92(14) – the administration of justice in province
    - They are responsible for the inferior court judges – appoint judges to provincial courts
    - They create courts, manage courts, hire employees, they do everything except hire and pay superior court judges
  - S.92(15) – explains what the province can do; if a province can say "we have power to regulate this field" they can enact and propose regulations and punishments
- **Federal gov. can strike down any provincial laws either for lack of constitutional power (ultra vires) or for conflict with federal legislation**

Who can create offences?

- Only federal government can create criminal offences – 91(27)
    - Provinces may be able to create other offences BUT not criminal ones
- Section 91: Federal Power
    - 91(27): "the criminal law except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters"
    - Parliament owes 100% of the criminal territory

Who handles procedure and evidence?

- Exclusive Federal jurisdiction
- When it comes to enforcing criminal offences (rules of how police are to act, how evidence is used in courts) the fed gov. controls this

Who handles enforcement (Police and Prosecutions)

- **Policing:** Constitution outlined that Fed gov. has exclusive authority to prosecute offences including criminal offences. However, the province can create a police force
    - Parliament can delegate authority to provincial level for enforcement (policing)
- **Prosecution:** Most prosecution is undertaken from provincial attorneys: CROWN PROSECUTORS (delegates of the attorney general)
    - Section 2 of criminal code
    - The federal government has delegated power to provincial level for prosecution, BUT fed does hold exclusive power

Scope of criminal law

- The 3P's: **Prohibition, Penalty and Public Purpose** = Criminal Law
    - Public purpose: some reasonable relationship to safety, public heath must exist
- Federal criminal law power is very broad
    - The distinction between criminal and prov made non-criminal offences

Limits

- **Sometimes HoP go outside there scope and thus the laws enacted get strike down**
    - Federal gov tried to regulate butter (*Margarine Reference)*, beer *(Labatte Breweries)* and apples (*Dominion Stores Ltd. V R)* – CB 10
        - It was found that there was not constitutional purpose to regulate these items
        - There were ulterior motives
            - Wanted to protect market share
        - These things belong to the jurisdiction of the provinces not 91(27).
    - Provincial gov will sometimes attempt to go beyond there jurisdictional scope and in turn they get challenged and striked down by Federal HoP → Ultra vires

Provincial Regulatory Offences

- Not criminal law, but regulatory law (quasi criminal).
    - Does not stem from 91(27).
- There are provisions in 92(15) that allow provinces to regulate and thus impose punishments for any of the classes of subjects enumerated in this section.
    - In order to regulate you are allowed to impose punishments
- Parliament can also create regulatory offences
    - Offences that do not fit into s.91 of the constitution
    - **Regulatory law:** 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 class of subjects enumerated in this section

Scope of provincial power

- Colorable attempt by the province to invade something in the federal jurisdiction then we can strike the law down
    - Law is *ultra vires*
    - If it is declared it's as if the law never existed. Regulation disappears as of that date.
    - i.e Morgentaler
        - SCC struck down NS attempt to set up restrictions to access abortion clinics under health regulations; SCC said that only parliament can regulate abortion clinics
- Intra vires to see if things are completely outrageous.
    - i.e. provinces can be involved in the censorship of movies.
        - *McNeil* Nova Scotia Case: attempted to ban Last Tango in Paris in 1970s – CB 11
    - i.e. The regulation of heroin was always a Fed issue, but the Feds said that because the Provs had a justifiable interest they could pass their own regulations
        - Mandatory treatment of illegal drugs

- i.e *Westendorp v The Queen* – Calgary Bylaw which had attempted to deal with prostitution by prohibiting a person from remaining on the street for the purpose of prostitution or approaching another person on the street for the purpose of prostition

Regulatory offences: any offence that doesn't stem from 91(27)

- Federal (regulatory and criminal), and provincial (regulatory)
- Two categories:
  - Criminal: 91(27)
  - Regulatory: 91(anything but 27) and 92(anything)
- Give the state the benefit of the doubt. **For regulatory offenses its easier for the prosecution than it is for criminal offenses**

Statutory Sources

There are many federal statutes besides the Criminal Code

- Create regulations, not crimes
- i.e. Fire arms act, Controlled substances act

Constitutional & Statutory Cases

Switzman v Elbling and AG of Quebec

Facts

- Provincial statute made it illegal to promote communism propaganda; Act under consideration is to prevent propagation of communism throughout the province and punish those who do so (imprisonment)

Findings

- The pith and substance was to *prevent* the propagation of communism and *punish* anyone who does so → Prohibition and Penalty = criminal law power

Judgment: The fact that it is about punishment makes the act unconstitutional

Ratio: **Through section 91(27) the federal government has power over criminal law**

R v Morgentaler

Facts

- Nova Scotia prohibited Abortions under its *Medical Services Act*.
- It prosecuted Dr. Morgentaler for violating it (by providing abortions).

Judgment: Unconstitutional- violated women's charter guarantee of security of the person- no longer regulated by criminal law

Findings

- Provinces are able to regulate healthcare.
- In Nova Scotia the provincial government wanted to prohibit abortion
  - Morgentaler "this is a colorful attempts to regulate criminal law
  - This is example of ultra vires

Ratio: **If the pith and substance of a provincial act is about criminalizing something it will be view was unconstitutional due to s 91(27)**

Reference re Firearms Act (CAN)

Facts

- Holders of all firearms must register and have gun licenses
- Argued that this invades the rights of citizens
- We are challenging it, this is a colorful attempt to invade the parliaments jurisdiction
- Cost and efficiency cannot affect the courts decision

Judgment: This falls under section 91(27) because deals with enhancing public safety by controlling access to firearms through prohibitions and penalties

Ratio: If the pith and substance of a provincial act deals with enhancing public safety by implementing prohibitions and penalties then it will be viewed as unconstitution due to s 91(27)

R v DLW

Defining an undefined word: Beastiality

- criminal code, s. 160(1) - Every person who commits bestiality is guilty of an indicatable offence and liable to imprisonment for a term not exceeding
- criminal code, s. 160(7) - In this section, bestiality means any contact, for a sexual purpose, with an animal

Facts

- step father sexually assaulted his 2 stepdaughters for years. He attempted to get a dog to have sex with his step daughters but no penetration occurred/worked. There is no definition of bestiality in the code.

Issue: How is bestiality to be defined?

Judgement: The definition requires penetration and because there was no penetration there was no bestiality. DLW not guilty forcing his step daughters to commit bestiality

Dissent:

- Bestiality should be defined in modern ways which would mean any sexual acts not simply penetration as most animals cannot penetrate and because half the human population cannot commit it.

Result of DLW case: change in definition of bestiality; Parliament changed the definition by adding to the definition of bestiality to say that any type of sexual contact to an animal is contained to bestiality

Ratio: "Every person who commits bestiality is guilty of an indictable offence." Court defines bestiality as penetration with a human and animal.

Common Law Sources

Despite the fact that we have codified criminal law in Canada via the criminal code and other statutes we need to turn to common law

Common Law offences

- Only if there is clear evidence that the offence had been **recognized in prior cases were common law offences allowed,** then would it be reasonable and fair to convict; cannot charge someone with a crime that does not exist at the time
    - **Section 9 of the Criminal code:** has provided that with the exception of the common law offence of criminal contempt of court, **courts cannot create new common law crimes** and you cannot be convicted of a common law offence

Amato v The Queen

Facts:

- Police officer repeatedly pressures accused to sell him cocaine

Issue: Is entrapment a justifiable defence even though it is not found in the Criminal Code or other cases?

Judgment: Yes

Findings

- As long as consistent with the Criminal Code, new defences are allowed to be developed because lawmakers cannot possible foresee all possible circumstances and justification

Ratio: **courts can use common law to create or recognize new criminal defences to criminal offences**

Frey v Fedoruk

Facts

- Peeping tom (Frey) is detained by the victim's son who attempts to make a citizen's arrest
- Frey ends up being the plaintiff and takes son to court for false imprisonment
- In order to figure out whether or not there is false imprisonment we must figure out whether or not there was a criminal offence
- No prior case where a peeping tom had been held to a criminal offense

Issue: Is voyeurism a criminal offense?

Findings

- Court found no judicial offence (Statute) that was specific enough to convict peeping
    - King's peace claim was too vague (Disturbing the people)
- If you could point to a previous case saying what Frey did has been called a criminal offense then you could say that it is fair and reasonable to say it was okay to imprison him.
    - Since there was no clear case, they decided that they were not going to convict him.
    - **Can convict for violating a statue or a clear case in common law.**
        - Was not met in this case

** After Frey v Fedoruk parliament had decided to no longer have any common law crimes, except the power of the court to impose a conviction of contempt of court. (s 9) CC

- **However, common law defenses are still allowed (s 8(3)) and can recognize new ones**

R v Jobidon

Facts

- There was a fight in a bar, which led to another fight in the parking lot.
- The victim went into a coma and eventually died.

Issue: Is it apparent that the victim consented to the fight?

- Appellant argues that the court of appeals ruled incorrectly in basing the decision off of common law. It should have based it of the code.

Judgment: No – The victim did not consent. Therefore, Jobidon is guilty

- Common law legitimately served in this appeal to find **certain situations where people are not allowed to consent** – and that already existing principles in the common law should be considered if the Code does not expressly displace the common law.

Findings

- **Consent is fundamental to criminal offences**
- It is not a good thing to allow people to voluntarily fight

Dissent (Sopinka J)

- Look at the law (Consent is consent)
- Court has created a common law offense by changing the meaning of s 265(1)(a), which the are not allowed to do under s 9 of the CC

Ratio

- **Consent must be interpreted to mean that consent will exist when trivial bodily harm is caused**
    - **If there is anything more serious, then there is no real consent (It is visciated)**
- Consent to assault is vitiated if the accused intended to cause and did cause serious bodily harm.

Consent in the Sports Context: Assault is allowed, but only within the customary norms of the game

Common law defences

- There are ways someone who is accused of a criminal offence can be acquitted despite satisfying all the necessary elements involved of the offence, but there is some justification or excuse for your act
    - i.e. **Self defence**: if someone attacks you and you use reasonable and justifiable amounts in response causing harm on the other you can use the defence to be acquitted
- Criminal Code s. 8(3)
    - Section 8(3) of the criminal code – "every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of Parliament except in so far as they are altered by or are inconsistent with this Act or any other Act of Parliament"
    - Defenses can come not only from statutes, but also from the common law (something a judge made up) and as such **change over time**
        - *Amato v The Queen*: Opened the door for a new defence of entrapment, no common-law existed to support this and no statute but judge can decide if there is a compelling enough reason
    - **Any judge can make a defence**

Strict Construction – CB 43

The criminal code has historically been interpreted in a "strict" manner designed to give the accused the benefit of a doubt concerning any textual ambiguity (favor the interpretation to the extent that it favors the accused)

- In modern liberal western democracy → use criminal law with restraint, use it as rarely and as limited as possible
- If we have an ambiguous statute → then favor the interpretation that gives the greatest benefit to the accused
- When one of the two meanings in a bilingual statue has a broader meaning than the other you would typically use the stricter version

- **The Supreme court has affirmed in a number of subsequent cases that courts should only resort to strict construction of the criminal law if there is an ambiguity after the law has been interpreted in a purposive manner**
    - Purposive approaches – acknowledge the limits of grammatical or dictionary-based interpretation of words and instruct courts to look at the broader purpose of a particular statute
- Courts will not lightly resort to the doctrine of strict construction and will often give even the most serious criminal offences a generous reading if supported by the language of enactment

R v Pare

Facts

- Pare (17 yr. old male) sexually assaulted and then murdered a 7-year-old boy two minutes after the assault after the boy said he was going to tell his mom. He was originally charged with 1st degree murder, which was reduced to 2nd degree on appeal and then restored to 1st degree by SCC
- s 231(5) CC: Murder is first degree murder when the death is caused by that person while committing [sexual assault]

Issue: Whether or not the respondent murdered the child "while committing" the indecent assault? Is it 1st degree?

Judgment: First-degree murder because the events were in a sequence

- **All a part of the same transaction – the murder was temporally and causally connect to the underlying offence (i.e. sexual assault). It formed part of one continuous sequence of events. It was part of the same transaction**
- SCC said that parliament did not intended 231(5) to be interpreted so plainly but rather it must be interpreted contextually

Ratio:

- Use contemporary approach to doctrine of strict construction; Have to look at first instance and everything that goes into statutory interpretation. Look at the underlying purpose of the provision
    - Traditional strict construction could find in favor of the defendant (pare)

Note: Strict construction will only be considered when ambiguity is present.

Codification and Certainty in the Criminal Law - CB 32

- Codification is thought to advance some of the most fundamental values of the criminal law
    - "**There must be no crime or punishment except in accordance with fixed, predetermined law**. The absence of codification does not mean that a law violates this principle"
- Another value of codification is that **criminal law should be certain (void of vagueness) and not overly broad**

- Line between permitted and prohibited actions is vague at times
  - Judges are still the ones interpreting the code, which can sometimes be a little vague – this gives them considerable power in court

Vagueness

- **When the boundary between a zone of permitted conduct and a zone of prohibited conduct is too fuzzy,**
- Value of codification: criminal law should be **certain**. **You can argue that a law is unconstitutionally vague in three ways**:
  - Section 7 of the *Charter*: It is a principle of fundamental justice that laws may not be too vague
  - Section 1 of the *Charter*: An enactment is so vague as not to satisfy the requirement that a limitation on Charter rights be "prescribed by law"
  - Fails the "minimal impairment" in s.1 in that an all-encompassing prohibition on certain things (ie. Speech) will cover too much that people won't know what they can or cannot do
- Common law gave too much power to judges to criminalize actions that they don't like, and will differ in what they think is criminal
  - **Better to codify crimes so people know what they can and cant do**

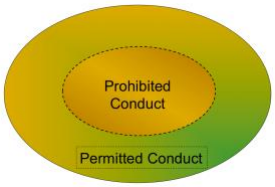
Problems with Vagueness:

- Not fair notice to citizens: absolute certainty is not required, there has to be sufficient guidance, common law and societal standards are considered. **Ignorance is no excuse.**
- Gives too much law enforcement discretion: We want to limit arbitrariness to avoid abuses by law enforcement. A law must not be so devoid

Vagueness doctrine – founded on the rule of law and in particular the principles of fair notice to citizen and limitation of enforcement discretion

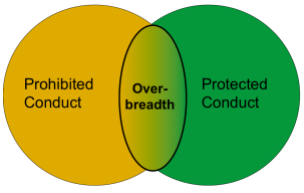
What does it mean if a statute is unconstitutionally vague:

- When the boundary between a zone of permitted conduct and a zone of prohibited conduct is too fuzzy, becomes too difficult to distinguish one from another
  - Hard to know as a citizen whether or not what you are doing is criminal
  - Extremely few examples of void for vagueness in Canada



Overbreadth

- **Definition:** means are to sweeping in relation to the objective, when trying to prohibit a specific behavior you have accidentally included many behaviors that you did not meant to
- There is prohibited conduct and constitutionally protected conduct (via charter**)**
  - Problem = statutory provision, attempts to address an evil or wrong in society, but goes too far and it bleeds into constitutionally protected conduct
    - Prohibited conduct is constitutionally protected
- **Occurs when a state employs means that are far broader than necessary for an objective**
  - Consider the means chosen by the state in relation to purpose
- Not vagueness, because we know the scope, it just includes more than it should given what the purpose of the law ought to be
  - Vagueness and overbreadth are related in that both are a result of lack of sufficient precision by a legislature in the means used to accomplish an objective



Canadian Foundation for Children, Youth and the Law v Canada AG

Facts

- The SCC considered whether section of the *Criminal Code* authorizing the use of force was void because of vagueness or over breadth
  - s 43: " every parent is justified in using force by way of **correction** toward a pupil or child if the force does not exceed what is **reasonable** under the circumstances"
    - Parents can commit assault on their children without consent under some circumstances; CORPORAL PUNISHMENT
- The foundation argues that this is overbroad because children under the age of two are not capable of correction and children over the age of 12 will only be harmed by corrective force
  - Violation of s 7

Issue: Is s 43 overbroad and unconstitutional?

Judgment: Uphold provision – Not too vague or broad, serves as guidance, not direction

Findings

- **A law is unconstitutionally vague if it:**

- Does not provide an adequate basis for legal debate and analysis
- Does not sufficiently delineate any area of risk
- Is not intelligible
- The law must offer a grasp to the judiciary
- Certainty is not required

- Section 43:
  - Delineates who may access its sphere with considerable precision
  - Identifies less precisely what conduct falls within its sphere
  - Requirement that the force be by way of correction
  - Requirement that force be reasonable under the circumstances
  - Does not permit force that cannot correct or is unreasonable – it follows that it is not overbroad
- Court upholds the law but implements provisions:
  - No harm; you can use force but you cannot cause harm
  - Ages 2-12 only; only applies to children within this age range
  - Teachers cannot punish; they can only use force to restrain or remove child from situation
  - Not degrading; cannot take off clothing, No objects, No blows to the head
  - Only for corrective reasons
  - If rules are disregarded and not followed = assault

Ratio: Section 43 every parent is justified in using force by way of correction for 2 to 12 yr. olds if the force does not exceed what is reasonable under the circumstances

R v Heywood

Facts

- s 179(1)(b) CC – it is an offence for a person with a past sexual violence conviction to be "found loitering in or near a school ground, playground, public park or bathing area"
- Heywood had 2 previous sexual offense convictions. He has the restriction of s.179(b). He took pictures of girls crotch at park and tried to develop the,

Issue: Is the provision unconstitutionally overbroad?

Judgment: Yes – s 179(1)(b) violates basic fundamental rights in section 7 of the constitution

- It is overbreadth because not all sex offenders pose a risk of harm to children, not all parks and bathing areas have children in them, and not all child sex offenders pose a risk of harm to children (could have been 19 sleeping with a 17 year old). It also does not state a distance or a time limit. If they had been rehabilitated, they still have no opportunity to have this provision removed. Vagueness is NOT used often because the courts job is to make it not vague.

Findings

- Geographic scope of the law (places where there might be no children)
  - i.e. National parks
- How long does it last / any possibility of review?
- All sex offenders, not just with respect to children
  - Not all sex offenders pose a risk to harming children; also some child offenders do not pose risk to children in parks
- No notice (you would have no idea that this law applied to you i.e. adult sexual offender)

Ratio: A crime can be deemed to be unconstitutional for being either too vague or too broad

Chapter 2 – Limits on Criminal Law

The Harm Principle

- Millian Notion: "The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is **to prevent harm to others."** (John Stewart Mill)
- Distinguishes between the use of government power to achieve moral ends, which Mill views as illegitimate and the use of such coercive power to prevent harm to others – the only permissible use of such force
  - STATE CAN ONLY JUSTIFY INTERVENING INTO PEOPLES LIBERTY WHERE THEY CAN DEMONSTRATE THEY ARE PREVENTING HARM
- The notion that the state cannot justify preventing you from harming yourself. You should be allowed to make the decision on your own

Debate…

- Paternalism: the state may have the notion to tell you to do something to prevent you from harming yourself.
  - Millian notion is too simple.
  - Harming others and yourself is not easily separated.
  - Example burden on family or society, or encourage others to do the same type of behavior.
- Sir Patrick: A collection of individuals does not make them a society, what makes them a society is, among other things, a shared or public morality.
- .

- ***Devlin-Hart debate***
  - Debate over the legalization of homosexuality/homosexual sex in Britain

        - Whether or not homosexual sex should be criminally prohibited and if the harm principle can be applied
            - Can prevent it on the basis of the protection of people (harm principle)
    - **Devlin:** The enforcement of morals
        - "What is the connexion between crime and sin and to what extent, if at all, should the criminal law of England concern itself with the enforcement of morals and punish sin or immorality as such?"
            - The Committee puts forward "The function of the criminal law… is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are especially vulnerable because they are young, weak in body or mind, inexperience, or in a state of special physical, official or economic dependence."
        - Moral judgments/feelings/intuition are part of the fabric of criminal law, they don't define it. We don't criminalize everything we find morally objectionable, even with a consensus
            - "History shows that the loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions."
        - English law has evolved into the standard of the "reasonable" man
            - "Society cannot live without morals. Its morals are those standards of conduct which the reasonable man approves"
        - Devlin and John Stuart Mill are basically polar opposites relating to criminal law
        - The right to enter a *nolle prosequi* (stay of proceedings) belongs to the Attorney-General alone
    - **Hart**
        - You cannot punish based on a guttural disgust with an action. There must be found to have definitive harm to society
- Wolfenden Report: Made consensual homosexual relations in private no longer a criminal offense

The Harm Principle & The Charter

Can limit criminal law using the Charter

- No matter what Parliaments intention was, if it is unconstitutional, you cannot criminalize it

R v Malmo-Levine; R v Caine

Facts

- Malmo-Levine: P was arrested for possession of weed
- R v Caine: P was arrested for possession with purpose of trafficking
- Ps argue that possession of marijuana does not affect society around them and should not result in a prison sentence; strips one of liberty to live life how he wants to
- Imprisonment is violation of principle of fundamental justice (s 7)
- Conduct results in little/no **harm**
- What is the constitutionality of prohibiting trafficking?

Issues

1. Does Parliament have the authority to criminalize simple possession of marijuana?
   If so…
2. Has that power been exercised in a way that is contrary to the Charter?
    - Is s 7 violated through providing prison sentences for conduct that result in little/no harm?

Judgment: 1) Yes, 2) No

Findings

- Certain groups share a particular vulnerability to the effects of marijuana, and advancing the protection of these vulnerable individuals is a policy choice that falls within the broad legislative scope conferred to parliament
- Availability of imprisonment in a statute that deals with a wide variety of drugs is not unconstitutional…imposition for marijuana offences can and should be dealt with under ordinary sentencing principles (rarely jail time)
- **There is no consensus that tangible harm to others is a necessary precondition to the creation of a criminal law offense**
- **Parliament may, as a matter of constitutional law, determine what is not criminal as well as what is.**
    - **The choice to use the criminal law in a particular context does not require its use in any other (as to why alcohol and tobacco are not treated similarly)**

Ratio

- **The harm principle does not qualify as a principle of fundamental justice within the meaning of that term in section 7 of the charter******
    - Smoking marijuana does not engage either protected liberty or privacy interest under section 7
    - Not grossly disproportionate to the states interest

The Harm Principle & Statutory Interpretation

Despite the rejection of the harm principle under Principal of Fundamental Justic we still want to use it to understand "acts of indecency"

- What types of behaviors would people tolerate others acting in?

R v Labaye

Facts
- Appellant operated a private club called L'Orage that facilitated group sex (oragy). All sex was voluntary
- Appellant was charged with running a common bawdy-house for the practice of acts of indecency (s 210(1) CC)

Issue: Are the acts committed in L'Orage acts of indecency within the meaning of the criminal law?
Judgment: No - can't make a ruling because of intrinsic disapproval of some conduct, not sufficiently objective criteria for deciding whether something is indecent or not.
- Criminal indecency or obscenity must rest on actual harm or a significant risk of harm to individuals or society
- 2-Part definition
    - Norm of tolerance of what we permit others to do is violated
    - **Harmful** effect on society

Findings
- Move toward **a theory of harm**
- **2-Step Analysis of Harm**
    - **1, Nature** of the harm – harm/significant risk of harm to others grounded in norms our society has formally recognized in constitution or other fundamental laws
    - **2. Degree** of harm – incompatible with the proper function of society
- Application: Steps were taken to protect public from being affected so no harm was established, individuals also pay and consent to actions so no degree of harm
- **Moral views don't suffice, nor does the fact that most members of the community disapprove**

Summary of test
- Indecent criminal conduct will be established where the crown proves beyond a reasonable doubt the following 2 requirements:

1. **That by its nature the conduct causes harm/presents a significant risk of harm to individuals or society in a way that undermines or threatens to undermine a value reflected in and formally endorsed through the constitution or similar fundamental laws,** for example:

- **3 types of harm have emerged from jurisprudence as being indecent**:
    - Harm to those whose autonomy and liberty may be restricted by being confronted with inappropriate conduct
    - Harm to society by predisposing others to anti-social conduct
    - Harm to individuals participating in the conduct

2. **That the harm or risk of harm is of a degree that is incompatible with the proper functioning of society**

Ratio: You can find something is indecent if there is harm to those exposed to inappropriate conduct, harm to society by predisposing others to anti-social conduct, and harm to persons participating in inappropriate conduct

Prostitution/Sex Work and the Criminal Law

Principles of Fundamental Justice
- **A criminal law that is arbitrary, irrational, vague, overbroad, or grossly disproportionate to the state interest being protected would violate section 7 of the *Charter***
    - Arbitrariness = no connection between means and ends
        - Ex: Morgentaler – law aimed at protecting women's health instead caused delays that were detrimental to their health
    - Gross disproportionality = negative effects greatly outweigh positive ones. Courts are willing to balance the benefits and costs of the criminal law in deciding whether a law is grossly disproportionate
        - Ex: Malmo-Levine – prohibition on marijuana possession was challenged to have grossly disproportionate effects (court disagreed)
    - Vagueness/over breadth = interferes with conduct with no connection to objective They fail to give fair notice to citizens and provide no limit for law enforcement discretion
        - Ex: Heywood – law applied to offenders who did not constitute risk to children and it applied to parks where children weren't likely to be present
- Parliament had never said that prostitution in and of itself is criminal
    - But everything around sex work was criminalized, and eventually found to violate s.7…

"Section 7: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Canada (AG) v Bedford

Facts
- Three applicants, all current or former prostitutes, brought an application seeking declarations that three provisions of the *Criminal Code*, are unconstitutional under CC
- The provisions criminalized various activities relating to prostitution
    - Selling sex is legal. A bawdy-house is illegal.

- Bedford argues it is unsafe to criminalize bawdy-houses as it puts prostitutes at risk and therefore is unconstitutional

Issues
- That the laws deprive sex workers of their right to security by forcing them to work in secret → That the laws prevent them from taking steps to enhance safety (ie, working indoors & with security)
- s. 7 rights (liberty) engaged because (1) prison is possible and (2) security/safety of workers at risk

Judgment: Suspended declaration of invalidity, returning the question of how to deal with prostitution to Parliament.

Findings
- Litigants focus on security of the person
  - A strategic choice
  - Liberty could have been invoked because prostitutes can go to jail
  - Wanted to make this a different kind of case than the prostitution reference
    - They wanted to focus on the safety and security of sex workers

Ratio: Everyone has right to life liberty and security of persons → section 7

Section 210 makes it a criminal offence to keep a **common bawdy house**

- By preventing them from using own homes, or their place of business, as a home for their activities, they were forced to do outcalls, or on the street, where they were much less safe
- "The harms identified by the courts below are ***grossly disproportionate*** to the deterrence of community disruption that is the object of the law. Parliament has the power to regulate against nuisances, but not at the cost of the health safety and lives of prostitutes. A law that prevents street-prostitutes from resorting to a safe haven such as Grandma's House while a suspected serial killer prowls the streets, is a law that has lost sight of its purpose."

Section 212(1)(j) makes it an offence to **live off the avails** of another's prostitution

- The SCC held that the living on the avails provision violates sex workers' constitutionally protected right to security of the person and is struck down.
- The SCC writes that the law is ***overbroad*** in that:
  - "The law punishes everyone who lives on the avails of prostitution without distinguishing between those who exploit prostitutes (such as controlling and abusive pimps) and those who could increase the safety and security of prostitutes (for example, legitimate drivers, managers, or bodyguards.)

Section 213(1)(c) makes in an offence to either stop or attempt to stop, or communicate or attempt to **communicate with someone** in a public place for the purpose of engaging in prostitution or hiring a prostitute

- In this way, the harms caused by the law are ***grossly disproportionate*** to intended objective of the law.
- The restrictions made it difficult for them on the street to work together in groups, to take the time to ensure that their john's didn't have a bad track record, to tell their colleagues where they were going and who they were going with

New Law (Nordic Model)
- Only one side of the transaction is now criminalized
- You cannot be convicted/punished for selling sex
- The purchasing of sex (John's) is now criminalized

Soliciting / Communication (213)
- Only limited restrictions on soliciting now
  - Tighter nuisance based restrictions (e.g. Can't stop traffic, can's solicit near school)

Obtaining sexual services (286.1)
- Johns can be criminally convicted or punished
- **Issue: If you criminalize one half of the transaction it still forces the transaction underground**

Living on the avails (286.2)
- There is now an opportunity for sex workers to purchase goods and services to protect themselves (Drivers, security)

Procuring (286.3)

Advertising (286.4)
- Does not include a sex worker advertising her own service, but may affect third parties doing this

Negative effects of criminalizing prostitution related activities – CB 91
- Secrecy and isolation
- Frequent change of location
- Screening Clients

Great starting blurb for an exam answer (used a starting point and great summary of this section as a whole)
"Before the enactment of the *Charter,* courts conducting a criminal trial were generally not concerned with the manner in which the police investigated crime. The *Charter* has changed this exclusive emphasis on crime control by recognizing rights to be secure against unreasonable search and seizures (section 8); rights not to be arbitrarily detained or imprisoned (section 9); and rights to be informed of the reason for arrest or detention and to retain and instruct counsel without delay (sections 10 (a) & (b)). A violation of any of these rights can result in the exclusion of relevant evidence from the criminal trial if its admission will bring the administration of justice into disrepute (section 24(2)).

Models of the Criminal Process

Crime-Control (Assembly Line) Model – Packer's Model
- Primarily concerned with **trust & efficiency**
    - Resembles a high-speed "**assembly-line conveyor belt**" operated by the police and prosecutors. The end product of the assembly-line is a guilty plea
    - Everyone who is involved in criminal justice must do the right thing and act for the public interest
    - As a result of this trust the system can operate as efficiently as possible
- If we operate trustfully, we will move people though the system efficiently, pick out the good guys from the bad guys
- **Efficiency is the heart of the justice system**. We must move people through the justice system efficiently to maximize their freedom and reduce costs
    - Idea is to processes cases as efficntly as possible; a functional and legitimate government enterprise that efficiently achieve the greatest deterrence of crime on the lowest cost
- Before the charter, there was no "judicial authority in this country or in England which supports the proposition that a trial judge has a discretion to exclude admissible evidence because, in his opinion, its admission would be calculated to bring the administration of justice into disrepute"
    - Did not necessarily condone police misconduct, but insisted that it be addressed outside of the accused's trial through civil suits
- Canadian acceptance of broad police powers is best symbolized by **writs of assistance** which give members of the RCMP open-ended powers to conduct drug or Customs searches
    - **Canada has the most crime control model – it believed in maximum crime control**
- Court's choice was to "favor the social interest in the repression of crime despite the unlawful invasion of individual interests…by public officers"

Due Process Model
- Concerned with fairness to the accused
- Is an "**obstacle course**" in which defence lawyers argue before judges that the prosecution should be rejected because the accused's rights have been violated
    - Instead of efficiency and trust we now have **procedural safe guards to check for flaws in the system**
- Requires the state to comply with various legal rights in the investigative and trial process before it could secure a conviction
    - The Charter, as interpreted by the SCC, has injected due process elements into the Canadian criminal process
- Sets up constitutional rules that require the police to justify their actions
    - Less trust in the system and less efficiency

Pure Crime Control Model
- Deal with police misconduct outside of the criminal justice system (e.g. wrongfully obtained evidence)
- Do what you need to do as long as the evidence is accurate

Questioning Suspects
- Law of police **questioning is different from that of detention and search** in one critical respect: with few exceptions, police and other law enforcement agents have no POWER to question
    - Police can use **reasonable force** when lawfully exercising detention and search powers
    - Suspects have no obligation to cooperation; right or FREEDOM to remain silent
- **If lawfully detained may have no choice but to listen; no duty to respond**
- Police have two options, voluntary cooperation to speak or trick them into speaking to covert agents
    - Because of physical and psychological advantage, may seek to abuse or exploit
    - Police may exploit their power advantage to convince others into speaking. Risk: False confessions

    ** These means are inherently unacceptable or apt to produce false confessions
- How is questioning regulated?
    - Each side has a freedom to ask or answer
    - As a citizen you have the right to lawfully not answer any questions
    - There is nothing one can do to force an answer
        - Some instances you are obligated to answer i.e Border crossing

Admissibility

- Any information that is relevant is admissible BUT there are exclusionary rules (i.e. confession rule)

False Confession

- Evidentiary rule; **whenever a person makes a statement to police of other person in authority and crown wants to submit it as evidence, prosecution must show that statement was submitted voluntarily,** otherwise all evidence collected cannot be used
    - Ensures the innocent are not convicted (false confessions contribute to convictions in about ¼ of wrongful conviction cases)
    - Society places tremendous weight on self-incriminating evidence
    - Public underestimates how often people confess to crimes that they didn't commit
    - Disincentive towards police abuses
- False confession evidence is not banned but could lead to false convictions
- Moral or spiritual inducements are not going to be involuntary because it is not within the power of the police to complete promise (god)

(Voluntary) Confessions Rule

"It has long been established as a positive rule of English criminal law, **that no statement by an accused is admissible in evidence against him unless it is shewn (shown) by the prosecution to have been a voluntary statement**, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a **person in authority**" - John Andrew Hamilton

- Laymen terms: **All statements made to a person in authority must be proven to be voluntary for them to be admissible**
- Merely a rule of evidence (common law rule) not the framework for police investigation practices

1. Shown by the Prosecution
    - Burden of proof on the prosecution to show that the statement was voluntary, beyond a reasonable doubt
        - Cannot be made by fear of prejudice or hope of advantage

2. Person in Authority – made to a person in authority
    - **Basic idea is that if the interview or questioning is being conducted by an actual police officer or peace officer** (state agents in a law enforcement capacity, list goes on), **then there is no question that the statement was made to a person in authority**
    - Only time there is an issue is when the person is not ordinarily a state agent but acting in that capacity; here is where you get the **"reasonable belief" test** (***Hodgson***)
        - Ask whether:
            - The suspect actually believed they were talking to a state agent
                - Generally does not include a security guard or a principle, etc.
            - Show that the belief was reasonable in the circumstances
        - If that test is met, then the person in authority is satisfied
    - ***Undercover police officer*** **– person in authority does not apply because the suspect does not believe they are talking to a state agent**

3. Voluntary

Crown must prove beyond any reasonable doubt they were voluntary

- **Reasonable belief test**

…… Totality of the circumstances test

→ To determine if the statement was made voluntary; must meet a number of standard tests

(1) Operating Mind

- Limited degree of cognitive ability to understand what he or she is saying and to comprehend that the evidence may be used in proceedings against the accused.
    - Accused must understand what is going on
    - Must have general sense that it could be used against you
- Mental illness, mental malfunction – a high degree is required (no ability to understand what you are saying)
    - I.e. – auditory hallucinations are still considered an operating mind. One can still comprehend the consequences.
- **Basic understanding is all that is required**
    - **Do not have to be logical or rational with what you say and how you act**
    - Police detain someone who doesn't speak the same language. They cannot have a meaningful voluntary statement if they don't understand what is going on
    - A very severe level of intoxication or drugs
- Binary finding - Either you have it or you don't
    - **If it is proven that the suspect did not have an operating mind then his confession was NOT voluntary**
- If you are drunk, you must be REALLY drunk to be said that you do not have an operating mind
    - An operating mind does not mean that you make an autonomous decision in your greater interest
    - Same goes for mental illness
- ***Whittle***
    - Facts

        - The accused was suffering from a secure mental illness, suffering from voices in his head, believed god was speaking to him and telling him to confess – felt direct voice of god to confess, expert evidence that he is schizophrenic – court said we don't care, he was able to understand what he was doing so meets threshold of operating mind
    - **Ratio**: Defined - a limited degree of cognitive ability to understand what the accused is saying and to comprehend that the evidence may be used in proceedings against the accused
        - Minimal threshold of cognitive understanding – have the ability to know what is happening in the linguistic sense

(2) Inducements (Threats & Promises)

- Can be positive or negative
- Physical abuse or threats are enough to vitiate the confession**;** Spiritual inducements may not be rendered involuntary.
- Quid pro quo – **exchange for your confession there will be some sort of benefit to you** (i.e. we won't beat you or prosecute you)
    - A mere QPQ is not necessarily sufficient to render a statement involuntary.
    - Determine how strong it is by determining whether the person would make an involuntary confession.
    - QPQ – "help"
        - Was there a trade that was offered
        - Depends how concrete the offer is → if it is very concrete it may deem confession involuntary
        - In *Oickle*, the offer of help was not found to be a QPQ because it was not concrete and you can get help outside of prison
    - **Defence has to show that the QPQ was enough to make the confession involuntary**
- Look at the strength of the QPQ while considering at the same time the level of coercion this would cause on the accused specifically
    - Has to be something strong enough to induce a person to make an involuntary statement
        - For a weaker/less knowledgeable suspect the level of inducement is lower
- Would the inducement likely lead to a false confession? → concern with the reliability so if inducement does not affect reliability then confession will stand

(3) Oppression – (catches intrinsic properties of the interrogation/questioning)

- Conditions – how long, persistent and badgering, good cop bad cop, breaks for food and rest etc.
- Trickery – if police use certain tactic that are so deceptive (false confessions), or inhumane or cruel
    - Trickery or manipulation not prohibited; but if goes too far may be considered oppressive (i.e. use of entirely fabricated evidence)
        - In *Oickle*: Polygraph is too unreliable to be admissible in court, but the police convince the suspect to confess based on the results of the polygraph test
    - The use of fabricated evidence may cause the suspect to feel that he has no way out and confess involuntarily
    - However, exaggerating strength of evidence, as in misleading suspect as to reliability of polygraph, may be permissible.

Example Shawn was questioned intensely regarding all alleged rape and murder for five and half hours. He had not slept for 26 hours before the interrogation began. Nor had he eaten for the previous 3 hours. Approximately every hour, police asked him if he needed anything to eat or drink or if he needed a short break to rest. He declined. Shawyn was 19, had grown up largely in foster care, and had an estimated IQ in the 10th percentile. Police told him that "he might be able to get help" for his addiction in prison, but that "it would have to start by him owning up to his actions". They also said that "they couldn't make any promises about rehab or therapy or anything like that". Shortly before confessing, an officer came into interrogation room and told the interrogators, "we got the forensics back – we've got him!" In fact, the police had not yet received any report on any forensic analysis.

- Operating Mind: sleep deprivation, cognitive, 5.5 hours, impaired, 19 years old
- Inducements: "help" → [QPQ] (does not cross the line), addiction
- Oppression: lie about evidence (Crown could argue that it's not a detailed lie)

Community Shock Test

- Very rare and extreme circumstances, we may wish to exclude a voluntary statement because the means to acquire it would shock the community (not aware of any cases where this has occurred)
- Broader conception of voluntariness 'that focuses on the protection of the accused's rights and fairness in the criminal process. Contextual approach required (each case turns on its facts). Did the Crown establish beyond a reasonable doubt that the suspect made a free and voluntary choice to speak to police?
    - Growing awareness that false confessions are not exceptionally rare, and lead to wrongful convictions
- May have a statement excluded because it is too egregious, immoral, shocking

Note: A considerable amount of deference is given to these findings in appeal court

- It is very difficult to get an appeal judge to overturn a voluntariness judgment

R v Oickle

→ gave us test for how to determine if a confession was voluntary

Facts

- The appellant was charged with seven counts of arson.

- The trial judge concluded that two written statements taken from the appellant by the police, after he had submitted to a polygraph exam which had produced a negative result, were voluntary and admissible, along with a subsequent re-enactment, video-taped by the police, of the appellant at the site of the alleged offences describing his actions.
- The appellant was convicted.
    - The only evidence directly implicating him were the two statements and the videotaped re-enactment.
- The appellant alleged that the statements were not made voluntarily, but under an atmosphere of **oppression,** where the police failed to make it clear to the appellant that the results of the polygraph test were inadmissible at trial and where they claimed that the test was infallible.

Issue: Does the police conduct violate the voluntary confessions rule? Was oickles confession voluntary?
Judgment: Yes, his statement was voluntary – made a choice to speak to the police
Findings

- Police have no power, but freedom to ask questions just like normal people. Citizens have the freedom to cooperate or not even though there is a power imbalance between citizens and police. Oickle was always aware of his rights and able to stop at any time. He met the requirements of voluntariness (operating mind, no inducements, no oppression)

Ratio

- Common laws/Voluntary Confessions rule (burden on the crown, beyond a reasonable doubt), "no statement by an accused s admissible in evidence against him, unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercise or held out by a person in authority (Hardson test- if you're talking to a police officer and know, then are voluntariness must be considered. If you're not talking to a cop or don't know you are the rule doesn't apply)".

R v Spencer

Facts

- D tried to make deals w/ police who refused.
- However, police allowed visit to gf conditional on giving confessions.
- No offer of leniency made to R w/ respect to gf, only withholding visit to her until at least partial confession was made - not strong enough inducement.
    - Fact that D took bargaining role was significant.

Findings

- **Affirmed use of Oickle test: Do a contextual analysis to see if will of subject has been overborne.**
- Quid pro quo is the most important consideration, but is not exclusive, when an inducement is alleged to have been offered by a person in authority
    - Regardless, it is the strength of the inducement and his or her circumstances, that is to be considered in the overall contextual analysis into the voluntariness of the accused' statement
- Inducements become improper only when standing alone or in combination with other factors
    - Only they are strong enough to raise a reasonable doubt about whether the will of the subject has been overborne

Mr. Big Scheme *(R v Hart)*

Facts of scheme

- Elaborate act that convinces a suspect to join a gang that is actually full of UC's
    - Begin with undercover police officer luring the suspect into a ficticious criminal organization created by the police. Over an extended period (weeks/months, the suspect is befriended by a UC. Through the interactions the suspect learns that involvement with the organization has potentialfor significant financial rewards. The final requirement for joining the organization, however, is meeting with/approval by the boss "Mr. Big" where the boss requests a full confession
- The catch: Suspect has to come clean in order to gain the trust of the UC's
- Issue: What if the suspect wants to put on a façade, and essentially makes a false confession?
    - Because the suspect does not know he or she is speaking to a person in authority, the confessions rule has no application
    - Because the suspect is not "detained" during such operations, the s. 10 Charter rights are not operable; for the same reasons, the s. 7 right to silence is also not engaged

Hart decision: Crown must prove on the balance of probabilities that the value of the confession (probative value) outweighs the prejudicial effect (RELIABILITY & ACCURACY)

- **Probative Value (accuracy) versus Prejudicial Justice (effect the courts/ juries opinion negatively):**
    - Characteristics of operation → as they relate to reliability (How extensive, methods used to gain compliance)
    - Characteristics of accused (Vulnerability)
    - Corroboration (Evidence supports a proposition that is already supported by some initial evidence)
    - Abuse of process (court does not want to support abusive conduct)

Problem: Jury may have strong prejudice because they know the suspect was willing to join a gang and he is therefore bad

- **Abuse of Process (**CONDUCT OF THE POLICE)
    - Even if you are satisfied that the probative value exceeds prejudice → if the conduct of the police amounted to an abuse of process the evidence is inadmissable (i.e. violence and exploitation of vulnerability)

Until recently, efforts by accused persons to exclude such confessions have proven unsuccessful

The Supreme Court of Canada noted that these confessions could result in **wrongful convictions**

- These confessions often follow powerful inducements and even veiled threats, giving rise to a concern that some suspects might confess falsely
- This evidence is inherently prejudicial as it portrays the suspect in a very negative light, showing him or her to be someone interested in joining a criminal organization
- *Abuse of process*: violence and exploitation of vulnerability

Mr. Big confessions are now presumptively inadmissible.
To secure the admission, the **Crown will need to convince the presiding judge on a balance of probabilities, that the probative value of the confession outweighs its prejudicial effect (RULES OF EVIDENCE)**

- In terms of assessing probative value, a judge must begin by evaluating the reliability of the confession in light of the circumstances in which it was made → characteristics of operation, characteristics of accused, and corroboration.
- **Defense** have the onus to prove that there was an **abusive process** (balance of probabilities)
- The judge must then look to the confession itself for markers of reliability (level of detail/whether it leads to further evidence being obtained and so on)
- Must also weight the potential "prejudice" (both moral and reasoning) that could arise for the jury stemming from a person wanting to join a criminal organization and the risk of distracting the jury from the real issues at hand

Rules of evidence - presumes inadmissibility unless the crown can show balance of probabilities, that the probative value of the confession outweighs its prejudicial effect
Abuse of process - zeros in on the inherent acceptability of the inherent conduct of the state regardless of the state (violence and exploitation of vulnerability)

Common Law → Confessions Rule, Community Shock, and Mr. Big Scheme

Confessions and the Right to Counsel

s 10: Everyone has the right on arrest or detention

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

- Requires police to convey directly or indirectly why you have been detained and this may be done promptly

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

**Trigger: if you are detained – some form of detention has occurred – then section 10 rights apply (BUT ONLY IF DETAINED)
** Every time you are under question by police, you are detained (With the exception of driving related offences) → rights only triggered when detained or arrested

Section 10(a): To be informed promptly of the reasons therefore

- Promptly (unless there is some emergency situation that would prevent police from telling you immediately upon arrest)
- Reasons: has to give you a *general reason* as to why you are being arrested (cannot tell someone they are being arrested for possession of marijuana when really they are being arrested for murder) → what is the basis for holding you
    - **Change: if the reason changes for your arrest then you need to be informed that the nature of the investigation has changed or broadened**

Section 10(b): To retain and instruct counsel without delay and to be informed of that right→ **s. 10(b) rights only arise when someone is detained!**

- Purposive – key word that the SCC has used in context of its interpretation of section 10(b) of the charter
- ***Brydges*** – must inform the person about "free legal advice" → CB 141
- Try to fulfill the purpose behind charter provisions, what is the legislative purpose behind the right to counsel, and using that broad interpretative framework, for the right to be meaningful
- Police must advise of right to lawyer, **immediately** – but also must advise if there are lawyers who will give free immediate advice
    - Legal aid
        - Publicly funded legal aid for those who cannot afford a lawyer
    - Duty counsel
        - Doesn't matter your economic situation
- Right to counsel of your choice – with some limitations (even when duty counsel is available)
    - ***R v Propsper*** "In circumstances where a detainee asserts his or her right to counsel and is duly diligent in exercising that right but is prevented from doing so because of the absence of a duty counsel program, s10(b) requires that the police hold off from trying to elicit incriminating evidence from the detainee until he or she has had a reasonable opportunity to reach counsel"

*****SECTION 10(b) MOST FREQUENTLY LITIGATED LEGAL RIGHTS IN THE CHARTER**

Example case – driver pulled over for speeding. Cop smells alcohol on breath, questions her, and gets her to walk in a straight line (which she cannot do). Officer then told her she was under arrest for impaired driving, read her the Charter caution, an issued a breath demand.
Did the officer violate s. 10(a) of the Charter? → No

***Police carry card outlining what to do

Excerpt from Penney . Criminal Procedure in Canada

s10(b): One of the most important and frequently litigated legal rights in the Charter. The following are some interpretive questions that have arisen:

1. What initial information must be provided to persons upon detention?

- Police must tell them that they **may speak to a lawyer** – RIGHT TO TALK TO LAWYER WITHOUT DELAY
- Also requires that detainees also be **informed of any legal aid or duty counsel services** available in the jurisdiction (even if they do not express any concern about being able to afford a lawyer)

2. When must this information be provided?

- Warning must be given **"immediately upon detention**", unless it is necessary to first gain control over a dangerous situation (safety exception)
  - Must re-issue the s10(b) caution when the nature of the detention changes significantly (picked up for pot possession but now further evidence shows murder)

3. What degree of understanding must detainees exhibit to be said to have been "informed" of their rights?

- Police must take **reasonable steps** to facilitate understanding when potential misunderstanding is objectively evident
- Requires detainees to exhibit a basic level of understanding before choosing whether to talk to their lawyers
- **Reasonable steps**
  - Assumption of understanding: assume detained understands
  - Reasonably apparent: if it is not reasonably apparent they understand take steps to ensure they do; precautions need to be taken
- **Operating mind** (basic awareness of language/ basic awareness of consequences)

**Best practice to ask "Do you understand?" → SCC does not require this (not a formal requirement) → card has it on it

4. What is required for detainees to invoke their right to talk to counsel?

- Requires **a positive assertion** of the right to speak to a lawyer.
  - Detainees have a duty to make it reasonably clear that they wish to exercise their right (Silence is not enough)
- **Due diligence in talking to counsel** (how long? Urgency of situation and availability of duty counsel).
  - Police do not have to hold off in cases where detainees wish to speak to a particular lawyer who is likely to be unavailable
- Once detainees have been given a single **reasonable opportunity** to talk to a lawyer, police may question or otherwise attempt to elicit evidence from them, even if they have not actually talked to a lawyer or request further information
  - **Reasonable Opportunity –** (hold-off period) indefinite time period. Two ways that this can end: detainee talked to lawyer, or detainee failed to be duly diligent in contacting a lawyer.
    - Telephone access must be in privacy and as soon as reasonably possible. Lawyer of choice is allowed and you have a reasonable amount of time to speak with them. Duty counsel is not required!
- Due Diligence:
  - Detained must demonstrate they have taken reasonable steps to speak to their lawyer
- ***Prosper* warning** is required if initially you say you don't need to contact a lawyer but then change your mind → police must explain they have a reasonable opportunity to speak with a lawyer.
  - Some case law says: lack of due diligence cancels the concept of reasonable opportunity and no prosper warning is required for police to now question
    3 ways to prove this:
    - You do not have an unlimited amount of time to talk to a lawyer – due diligence.
    - Detainee **waives** their right to counsel
    - Detainee actually talks to lawyer
  - Due diligence – reasonable time period has expired – you haven't done so for whatever reason, police shouldn't have to wait forever

5. Once the right is invoked, what must police do, and refrain from doing, to facilitate access to counsel?

- Police must provide a "**reasonable opportunity"** to exercise the right by giving detainees the means and time necessary to talk to a lawyer
- Police must **refrain from or cease "questioning** or otherwise attempting to elicit evidence from the detainee"
  - Even slight conversation that may elicit a statement could violate this
- Police must **hold off eliciting evidence (Hold off period)** until the suspect has had a reasonable opportunity to contact counsel
  - If question detainee during hold off period the police violate s10(b)
  - Time limit? No limit depends on circumstances (is the lawyer available, is there urgency, is duty counsel available)
- **Private telephone access as soon as reasonably possible** (hospital, place of business etc. are fine) → MUST BE PRIVATE.
- Ability to choose lawyer of your choice, within reason (if taking to long you may have to settle for talking to duty counsel or legal aid)
  - Puts responsibility on the detainee to demonstrate they took reasonable steps to contact lawyer; no qualified time limit (circumstance dependent)

- It *does* guarantee that the individual will have access to a phone to exercise his right to counsel at the *first* reasonable opportunity.
- ***R v Taylor* – CB 140**
  - Fact: Accused was arrested for impaired driving. He was informed of his right to counsel and said he wanted to speak to a specific lawyer. Following arrest taken to hospital and no effort was made to provide him with the opportunity to contact counsel. Section 10(b) rights violated)
  - **Ratio: constitutional obligation to facilitate the requested access to a lawyer at the first reasonably available opportunity**
  - The earliest chance that we can practically give the detainee a chance to talk to a lawyer depends on: Security, Privacy, Phone
  - Officer must at least explore the prospect of obtaining access to a phone
    - Do not need to offer their phone. In fact this may cause complications such as recording conversation

6. What limitations does section 10(b) impose on police questioning after a detainee has been afforded a reasonable opportunity to talk to a lawyer?

- **Persistent questioning** – not generally correct anymore (does not implicate 2. 10(b)). Factor under oppression but not relevant to s. 10(b)
- Denigrating lawyer - if police undermine the legal advice that the detainee has received. Has potential to rupture the relationship between detainee and lawyer – takes a clear shot at the lawyers integrity → not permitted.
- **Plea bargaining** – "if you do x, we will give you y. If you don't, we will come down hard". **Police can only do this with counsel present**. Should generally only be between two lawyers.
- Once detainees have been given a single reasonable opportunity to talk to a lawyer, police may question or otherwise attempt to elicit evidence from them, even if they have not actually talked to a lawyer or request further consultation.
- **Police are not required to permit detainee's lawyers to be present during questioning.**

7. When can the failure to comply with section 10(b) be justified under section 1 of the charter?

- **Prescribed law and reasonable … in free and democratic society** → denial arises by necessary implication from the Criminal Code's alcohol testing regime. Road side example – implicitly limited right to counsel. Courts have held that statutes like Traffic Safety Act have universally been held to limit 10(b) and are prescribed by law. Is the limit reasonable in free and democratic society?
- There is one main area where the limitation to 10(b) applies: The brief **detention of drivers** at the roadside
- You are entitled to the reasons for detention, but you are not entitled to the right to counsel while the perform screening actions
  - Have you been drinking?
  - Breathalyzer
  - Motor skills tests
- You are not allowed to refuse any of the requests unless you have a reasonable excuse
  - This has been found practical for a number of reasons
- The right to counsel is only suspended, once you pass brief detention you are entitled to your charter caution
- It is important to keep impaired drivers off the road, and there is not much counsel can do at that point in time
- Actually may be in drivers best interest if he is not impaired
  - It is inefficient and expensive to always call counsel
- Exclusively related to driving offences. Police cannot use this exception to investigate drug trafficking, or murder, etc.

****** Failure to comply with s.10(b) can be justified under s.1***
Prescribed by law and reasonable (must find a law that sets out a limitation on a charter right)

***Clarkson v The Queen*: in order to be valid and effective a purported waiver of the rights to counsel must be clear, unequivocal and informed (informed means that waiver must be premised on true appreciation of consequences of giving up right)**

Waiver

- Waiver does not mean invocation; waiver is only if there HAS been invocation
  - Failing to invoke your rights does not equate to waive your rights
- Waiver is when someone has invoked their right to council and then gives it up (may or may not be valid)
- Waiver refers to change of mind: in order for this **to be effective their needs to be prosper warning** (in order to ensure the waiver is fully informed and voluntary the police need to go through a waiver firm confirming that the detainee knows and clearly states in a fully informing way that they are waiving the right to counsel)
- **Occurs when (1) the detainee changes their mind & (2) when prosper warning is given (police inform detainee that they are entitle to reasonable opportunity to speak to a lawyer)**

Consultation

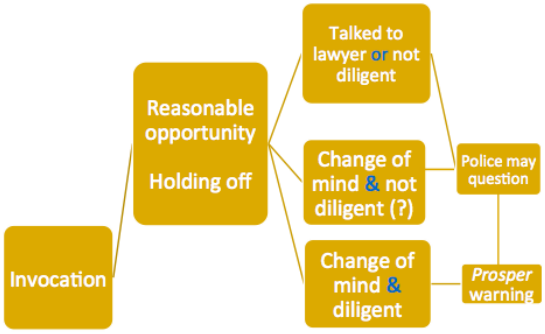
- You get 1 phone call and it better be good
- No scrutiny on the quality of legal advice (we have to assume that the advice being given is adequate)
  - **Unless detainee in some reasonable way, indicates that consultation is inadequate (line is cut off maybe, or you didn't actually talk to a lawyer).**
- Court will assume a lawyer, regardless of desired lawyer or duty counsel, gave the appropriate advice.

- As long as detainee expresses satisfaction and do not have complaints about speaking with lawyer, it will suffice.

When are detainees entitled to further consultation (re-consultation)?

- Change in investigative purpose (investigated for more serious offence etc. Does not include evidence that does not change the purpose of the investigation)
- Non-routine procedure (bodily sample, identification line-up)
- Non-understanding (when the detainee may not have understood the initial 10(b) advice of his rights to counsel)
- Other circumstances

***** Hint on exam → you will usually have s. 10(b) issues with voluntary confessions. Both separate analyses you need to evaluate individually however.**



R v Manninen [1987 SCC]

- **Violation of the Right to Counsel → must wait for counsel to be contacted to question**
- Brining the Administration of Justice into Disrepute

Facts

- M was detained
- After saying "Prove it. I ain't saying anything until I see my lawyer. I want to see my lawyer", was then questioned and his answers incriminated him.
- There was a phone in the area which M was detained, but he did not make a direct request to use the phone to call counsel nor did the officers volunteer the use of the phone.
- M did not speak with his lawyer until 8:35 p.m. at the police station.

Issue:

- Were the respondent's rights under s. 10(b) infringed upon?

Judgment: Yes

Findings

- **Section 10(b) imposes 2 duties:**
  1. **Provide the detainee with a reasonable opportunity to exercise the right to retain and instruct counsel without delay**
  2. **To cease questioning or otherwise attempting to elicit evidence from the detainee until he has had a reasonable opportunity to retain and instruct counsel**
- The police officers, even though the respondent clearly asserted his right to remain silent and to consult his lawyer, simply ignored his rights and his assertion of the right to silence and the right to counsel
  - Crown argument: Detainee waived his rights implicitly by answering questions
    - Response: No – Requires higher standard
- The right to counsel arises immediately upon arrest or detention, and that a detained individual **has access to a** phone to exercise his right to counsel at the first reasonable opportunity
- **Accused persons who answered baiting questions or participated in a line-up before being given a reasonable opportunity to consult counsel have not waived their right to counsel**

Ratio: police cannot question a detainee if they have asked for a lawyer and have not yet spoken to one

R v Brydges [1990 SCC]

Regarding what constitutes a request for counsel

Facts

- Brydges arrested and charged with 2nd degree murder. Read his rights and advised of his right to retain and instruct counsel without delay. When taken into interrogation he asked "if they have any free legal aid" as he did not have any money. Detective asked if there was a reason for wanting to talk to a lawyer and the accused responded "not right now, no". He was not advised of legal aid/duty counsel after expressing concern. He proceeded to answer questions and gave prejudicial statements until he eventually asked to see a lawyer and was provided with one

Issue

- Were the respondents rights under s. 10(b) infringed upon?

Judgment: Yes they were infringed upon and the acquittal is restored

- Brydges inquired about legal aid, it means he wanted representation. Since police questioned him and he was not given an opportunity to contact counsel his rights are infringed

Findings

- **A detainee may, either explicitly or implicitly, waive his right to retain and instruct counsel, although the standard will be very high where the alleged waiver is implicit**
  - "Clear and unequivocal that the person is waiving the procedural safeguard and is doing so with full knowledge of the rights the procedure was enacted to protect and the effect the waiver will have on those rights in the process"
- The appellant specifically stated that "the main thing" was that he was unable to afford counsel
  - The trial judge found that this amounted to a request for counsel
- The appellant was left with the mistaken impression that his inability to afford a lawyer prevented him from exercising his right to counsel
- In this context, the appellant did not understand the full meaning of his right to counsel
  - In this respect, it can hardly be said that the appellant was in a position to carefully consider the consequences of waiving that which he did not understand
  - Therefore, the appellant did not waive his right to retain and instruct counsel
- **The failure of the police to inform the appellant of the existence of Legal Aid or duty counsel at the time that he first indicated a concern about his ability to pay a lawyer, was a restriction on the appellant's right to counsel, insofar as the appellant was left with an erroneous impression of the nature and extent of his s. 10(b) rights**
- Concluded that the evidence should be excluded under s 24(2) because the evidence was of a self-incriminatory nature and that the police made a "serious error"
  - "Where ... 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."
- **Ratio: Police must provide an opportunity to talk to counsel when the accused asks about counsel**

R v Sinclair [2010 SCC]

- **The Purpose of Section 10(b) of the Charter**
- **The Right to Have Counsel Present Throughout the Interview**
- **The Right to Re-Consult Counsel**

Facts

- The defendant was charged with second degree murder.
- He was explained his s10(b) rights and spoke with a lawyer on two occasions before his formal interrogation commenced.
- After about 5 hours he expressed discomfort about being interviewed without his lawyer present. He was told that his "right to counsel" had been satisfied, but continually kept asking to speak to his lawyer.
- Eventually he made a number of incriminating statements, these were ruled voluntary and found not to have been obtained in violation of his s. 10(b) Charter right, and convicted for manslaughter. Upheld at court of appeal. Now SCC

Issue

- Does a detainee who has been properly accorded his or her s. 10(b) rights at the outset of the detention have the constitutional right to further consultations with counsel during the course of the interrogation?

Judgment: No – Not a s. 10(b) violation

Findings

- **s10(b) does not guarantee that the detainee's decision is wise;** nor does it guard against subjective factors that may influence the decision
- Sometimes developments occur which require a second consultation, in order to allow the accused to get the advice he needs to exercise his right to choose in the new situation
- A change in circumstances warranting the above may result from:
  - New procedures involving the detainee
  - A change in the jeopardy facing the detainee
  - Or reason to believe that the detainee may not have understood the initial advice of the right to counsel
  - **It is not enough for the accused to assert, after the fact, that he was confused or needed help, absent OBJECTIVE indicators that renewed legal consultation was required**
- There was no significant change in the case so Sinclair did not have right to speak to council again

Ratio: S10(b) should not be interpreted as conferring a constitutional right to have lawyer present throughout a police interview

- **The ability of the police to continue to interrogate applies even in cases where the accused and/ or counsel have indicated a desire not to talk and the interrogation is lengthy and involves confronting the accused with actual or fake evidence**

Dissenting opinion: Getting advice from counsel should be ongoing

- The words "retain" and "instruct" present in s10(b) signify a continuing relationship between client and counsel. On this basis alone, it is difficult to see how the s10(b) could be "spent" upon its initial exercise
- A detainee under total police control is particularly vulnerable. He may be wrongly persuaded that maintaining his or her right of silence is a futile endeavor (the advice originally received by counsel is now unsound)

- It is often better to remain silent in the face of the "evidence" brought against you, and leave it to the court to determine its cogency and admissibility, and forego the inevitable temptation to end the interrogation by providing the inculpatory statement sought by the interrogators
- "The right against self-incrimination and the right to silence cannot be eroded….that would favour perceived policy efficiency at the expense of constitutionally protected rights"

Confessions and the Right to Silence

Section 7 and the Hebert Rule

- The charter contains no explicit guarantee of a right to silence but such a warning is customary
- Right to silence only if you have been detained

The Hebert Rule: gives detainees a limited or qualified right to silence in the following circumstances:

- (1) Detention: When someone is detained by the state and in police custody (does not apply to UC operations in the field)
- (2) State Agent: Individual who questioned you is an agent of the state or has been deputized by state agent
    - Determined by a causal "but for" test: But for the intervention of a state agent there would not be a confession → "Would the interaction between our agent and the detainee occurred in the form and manner in which it did if there had been any involvement by the police?"
- (3) Active Elicitation: Is the nature of the questioning the functional equivalent of an interrogation?
    - If the agent or deputy does not actively elicit information (e.g. just having a casual conversation that results in confession) then the Hebert rule does not apply
    - If you exploit any vulnerabilities then there is active elicitation
- Ultimate question is whether the accused exercised free will by choosing to make a statement
    - This is because the Court is mainly concerned with the reliability of testimony. If the person provides information then they want to make sure it is voluntary
- To violate need all three (functional equivalent of an interrogation)

Application of Herbert Rule

- To apply the rule person must be detained (under the control of the state)
- The rule deals where the police are acting to trick someone
- DOES NOT APPLY: if someone goes out of their own free will and collects incriminating evidence the Herbert rule does not apply;

R v Hebert

Facts

- Accused was arrested for robbery.
- After speaking with counsel, he advised police that he did not wish to make a statement.
- Accused was engaged by an undercover police officer in a jail cell, after being arrested.
    - He made a number of incriminating statements

Issue: Whether a statement made by a detained person to an undercover police officer violates the rights of the accused under the Canadian Charter of Rights and Freedoms?

Judgment: Yes

Findings

- The right to choose whether or not to speak (to the state) is objectively defined
    - The detainee did not reverse his right to remain silent
    - Police tricked him to elicit info and therefore violated his rights
- Under section 7 of the Charter, he can only be deprived of that liberty in accordance with the principles of fundamental justice.
    - There is nothing in the rule to prohibit the police from questioning the accused in the absence of counsel after the accused has retained counsel. Police persuasion, short of denying the suspect the right to choose or depriving him of an operating mind, does not breach the right to silence
- The right to silence only applies after detention. Undercover operations prior to detention do not raise the same considerations

Ratio: Wilful and deliberate effort by police to undermine the accused's express assertion of his right to silence occurred

- If you do not know you are talking to a cop, your revelations cannot be used against you in court if they actively elicited them from you (but if you spill the beans to them can → distinction between use of agents to OBSERVE vs ELICIT).
    - Confession not admissible if: 1) right to silence 2) detention 3) state agent and 4) active elicitation

Notes:

- The essence of the right to silence is that the suspect be given a choice; the right is simply the freedom to choose (freedom to speak to the authorities and the freedom to refuse to make a statement)
- In *R v Liew*, the majority found that the right to silence was not violated in a case where an undercover officer posed as a cellmate of the accused but did not initiate the conversation that resulted in incriminating utterances

R v Singh [2007]

Issue: Concerns the detainee's pre-trial right to silence under s.7 of the Canadian Charter of Rights and Freedoms

Findings

- Focus is on the conduct of the police and its effect on the suspect's ability to exercise his or her free will
- **If the Crown proves voluntariness beyond a reasonable doubt, there can be no finding of a Charter violation of the right to silence, and vice versa**
- The use of legitimate means of persuasion is indeed permitted under the present rule
- Situations are highly fact-specific and trial judges must take into account all the relevant factors in determining whether the accused's confession is voluntary
- The number of times the accused asserts his or her right to silence is part of the assessment of all of the circumstances, but is not in **itself determinative**

Ratio: Ultimate question is whether the accused exercised free will by choosing to make a statement → court is concerned with the reliability of testimony

Summary:

	Confessions Rules	Mr. Big Rule	Charter, s. 10	Hebert Rule
Detention?	N/A (Applies whether detained or not)	No	Yes	Yes
Person in authority/known state agent or undercover?	Person in Authority	Undercover	Known state agent (otherwise no detention)	Undercover

Entrapment

Entrapment issues generally arise in the investigation of so-called consensual crimes (participants do not complain to the police) → Not a substantive defence, it is a procedural defence! It does not address the question of guilt or innocence, in theory.

- **A crime being committed that would not have occurred but for state involvement**

Rationale for the Doctrine of Entrapment

1. **It's not acceptable police conduct**
   a. The reason why we allowed defendants to invoke the idea of entrapment, not because people are morally justified when they have been entrapped, but rather police have acted in an unacceptable, abusive fashion
   b. The moral acceptability of state action as opposed to the moral culpability of the accused
2. **It's not efficient (creating an offense that would otherwise not occur)**
   a. The reason for the doctrines is that it recognizes that police must be deterred from creating crimes that otherwise would not have occurred
   b. Whether that crime would have been committed in the absence of police conduct; not a valid use of resources

What is entrapment?

- **Entrapment is a defence → a procedural defence similar to a charter claim to have evidence removed**
- When is the defence of Entrapment is presented
  - It will be presented at the end of trial **after guilt** has been proven beyond a reasonable doubt
  - It is regarding why the crime was committed not why it was committed
  - It does not absolve you of the crime as a CRIME WAS COMMITTED
- **The burden of proof falls on the accused →** The accussed must show they were entrapped and thus committed the crime; balance of probabilities

Procedural defense

- 1. There must first be a finding of guilt at trial or guilty please
- 2. The judge then enters a conviction for the defendant
  - Defense then interrupts before this happens and enters an entrapment defense. Burden is on the defense to prove an entrapment on the balance of probabilities

Remedy

- Prosecutorial stay → CC, in power of the crown, they have 1 year to bring back the charges (stay of procceedings)
- Judicial stay → it ends the proceedings forever, though the Crown still has its right to appeal. Its equivalent to an acquittal

R v Mack [1988]
Proving entrapment

Supreme Court of Canada
Facts:

- Accused was a former drug user with several drug convictions
- Over 6-month period he was repeatedly asked by a police informer to supply drugs, accused repeatedly said no

- Informer took the accused into the woods to shoot a handgun and told the accused "a person could get lost" in the woods; accused interpreted this as a threat.
- Informer took the accused to see a purchaser for the drugs (an undercover police officer) who showed the accused $50,000 in cash → Accused was arrested and charged with unlawful possession of narcotics for the purpose of trafficking when he delivered 12 oz of cocaine

Proceeding:

- Convicted at trial
  - "It is far more probable that the accused became involved in this transaction for profit, rather than through persistent inducement or fear"
  - If the issue was that the Crown had to negate entrapment beyond a reasonable doubt the trial judge would have such a doubt
- BC Court of Appeal confirmed the accused's conviction

Issue:

- Whether the police went too far in their efforts to attract the appellant into the commission of the offence

Decision:

- Allow the appeal, set aside the conviction of the appellant, order a new trial and enter a stay of proceedings

Reasoning:

- The concern is with law enforcement techniques that involve conduct that the citizenry cannot tolerate
- **Entrapment = "the conception and planning of an offence by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer."**
- Evidence or convictions may at times be obtained at too high a price, this proposition explains why as a society we insist on respect for individual rights and procedural guarantees in the criminal justice system
- The administration of justice must be kept free from disrepute that compels recognition of the doctrine of entrapment
- In the entrapment context, the court's sense of justice is offended by the spectacle of an accused being convicted of an offence which is the work of the state
- There is entrapment when:
  - (I) the authorities provide a person with an opportunity to commit an offence **without acting on reasonable suspicion** that the person is already engaged in criminal activity or pursuant to a bona fide inquiry
  - (II) although having such a reasonable suspicion or acting in the course of a bona fide inquiry, they go beyond providing an opportunity and **induce the commission of an offence**
- Predisposition of the past, present or suspected criminal activity of the accused is relevant only as a part of the determination of whether the provision of an opportunity by the authorities to the accused to commit the offence was justifiable
- **Objective entrapment is a question to be decided by the trial judge**
- In this case, the offence was clearly brought about by the police's conduct and would not have occurred absent their involvement → Police were indeed trying to make the appellant take up his former lifestyle.
- The appellant has met the burden of proof and the trial judge should have entered a stay of proceedings for abuse of process

Excerpt from Penney et al., Entrapment

- The question of entrapment is decided by the judge after guilt has been determined.
- As with other procedural remedies, defendants bear the burden of proving entrapment (on a balance of probabilities).
- When entrapment is proved proceedings are automatically stayed (terminates the prosecution – because of what the state has done, the state is not entitled to a conviction)
- Entrapment defence discourages police from causing crime that would not have been committed otherwise
  - Entrapment is considered to unfairly intrude upon the individual's liberty and privacy interests and waste law enforcement resources
- Court must consider the "totality of the circumstances"

- **Entrapment I = defendant must show that police gave them an opportunity to commit an offence without acting on responable suspicion that the person engagd in criminal activity or pursuant to a bona fide inquiry**
  - As defendant – must show that police **lacked both reasonable suspicion** (some degree of inherent credibility of the info in the mind of the police officer) and ***bona fides***
    - *Reasonable suspicion*: you have some objective reason to believe an individual has or will engage in some criminal behavior (there is some level or objectivity and corroberatign evidence → aka more than a hunch) **This threshold is low**
    - *Bona fide inquiry*: police are engaged in some legitimate crime fighting objective and are acting for legitimate lawful reason (targeted&specific)
  - Police exceed the boundaries of a bona fide inquiry when they target a suspect either (i) for dubious motives unrelated to the investigation and repression of crimes (ii) as part of a program of "random virtue-testing"
  - McLachlin argued that when applying the bona fide inquiry test, judges must consider factors relevant to the balancing process
    - Likelihood of crime at the particular location targeted
    - Seriousness of the crime in question
    - Number of legitimate activities
    - Persons who might be affected
    - Availability of other less intrusive investigative techniques

- **Entrapment I claims are unlikely to succeed because prosecution only needs to show that police reasonably suspected either that a particular person is committing a particular offence or that a particular offence is being committed by unknown individuals in a particular place**
- The suspect's known criminal propensity may be considered in entrapment cases, but only if it "can be linked to other factors leading the police to a reasonable suspicion that the individual is engaged in a criminal activity"
- If the "opportunity" requirement is satisfied, the next step for the first type of entrapment is to show that police lacked both reasonable suspicion and *bona fides* (good faith) – then this is entrapment
  - Bona fides: exceed the boundaries of a bona fide inquiry when they target a suspect either (i) for "dubious motives unrelated to the investigation and repression of crimes" of (ii) as part of a program of "random virtue-testing"
  - Barnes case – leading case on what a Bona Fide inquiry is – Geographic proximity is important (need to be reasonable in your search)
- **Disproving entrapment I**
  - From the crowns perspective – to avoid finding entrapment or to disprove entrapment 1 they need to show any of the following:
    - They did not provide the opportunity to commit the crime (show there is no inducement)
    - Show that they had a reasonable suspicion that there was criminal activity taking place
      - Reasonable suspicion negates Type 1 entrapment
      - A reasonable suspicion is less than reasonable and probable grounds that a person has committed a specific crime
    - Show that the police were conducting bona fide inquiry
      - Even if police don't have a reasonable suspicion but have a bona fide enquiry; again Type 1 entrapment is negated

- **Entrapment II = police go beyond providing a criminal opportunity and "induce" the commission of an offence** → **"Inducement"**
  - Court must consider the "totality of the circumstances"
  - Classic form of entrapment
  - **Police manufactures a crime that would not have otherwise occurred → having reasonable suspicion or acting in the course of a bona fide inquiry, they go beyond providing an opportunity and actually induce commission of offence**

Random-virtue testing = police have presented an opportunity to commit a crime without having a reasonable suspicion that the target is already engaged in the crime

The Test for Proving Entrapment (Mack)

As a defense council – two kicks at the can at **proving entrapment**

1. That the police did not have reasonable suspicion AND police were not engaged in a bona fide inquiry
   → some subset of the population or area is engaged in a type off activity, the police have reason to believe that it is criminal in nature. They can target that area and make inquires about that type of criminal activity (ex: Granville mall area → asking for drugs)

   OR
2. Police induced the commission of the offense

Type 1 = No reasonable suspicion and no bona fide inquiry = ENTRAPPED
Type 2 = Inducement = ENTRAPPED

With entrapment we are not focused on the suspects culpability, we are focused on the states culpability (Therefore often brought up after the defendant is found guilty of crime)

- We know that the suspect is "guilty", but we are arguing that the state is "guilty" of entrapment
  - Need to prove on the balance of probabilities
- Remedy: When a judge enters a stay of proceeding it is tantamount (the same) as an acquittal, but procedurally it is different

R v Nuttall [2016] BCSC 1404

Facts

- Mr. Nuttall and Ms. Korody were convicted by a jury of a number of terrorism offences for planting of explosive devices at the Legislature in Victoria
- Defendants applied for a stay of proceedings based on the RCMP's conduct
- Application is based on entrapment and a broader allegation of abuse of process by the RCMP → Defendants argued that the undercover operation was a serious violation of the principles of R v Mack
- Crown opposes and claims the undercover operation was an innovative and effective means of investigation serious terrorism offences
- Also claims that the conduct of the RCMP was neither criminal nor in violation of the defendants' religious freedom

Decision:

- "On the balance of probabilities, RCMP offered both Mr. Nuttall and Ms. Korody an opportunity to commit a terrorist offence without a reasonable suspicion that the defendants were already engaged in criminal activity."
- The RCMP entrapped Ms. Korody and Mr. Nuttall

Reasoning:

- A finding of entrapment means the state has engaged in conduct that disentitles it to a conviction → Once entrapment is found, "a judicial condonation of the prosecution would by definition offend the community"
- In this case, the police have very little evidence at the commencement of the undercover operation to support any reasonable suspicion that Mr. Nuttall was already engaged in criminal activity of any type
- Predisposition falls far short of evidence that the defendants were already engaged in terrorist activity beyond merely espousing terrorist beliefs
- Ms. Korody had no criminal record to support a reasonable suspicion, nor had she said or done things before or during the undercover operation up to that date to indicate that she was independently involved in terrorist activities
- **Offences committed by the defendants were brought about by the police and would not have occurred without their involvement = induced**
    - Police engaged in a multi-faceted and systematic manipulation of the defendants to induce them into committing a terrorist offence
    - Police were the leaders of this plot

Analysis:

- Crown relies on three entrapment cases in which the accused were convicted of terrorism offences:
    - *Hersi* ➔ Encouraging someone to reveal their settled and already formed intention to commit a crime is not the same as giving them an opportunity to commit a crime
    - *NY* ➔ Urgency of the situation facing the police figured prominently in the conviction
    - *Abdelhaleem* ➔ Accused was convicted of knowingly participating in or contributing to activities of a terrorist group
        - Accused pleaded guilty and argued that he had been entrapped by a friend who had first worked for CSIS and then became a police agent
        - Impugned conduct involved the police agent agreeing to provide chemicals required for the bomb and a location to construct it
        - Judge concluded that the police agent did not induce the offence → The police were unaware of any vulnerability the accused possessed
        - There were significant pre-planning efforts by the accused before any offer was made by the police agent

Search and Seizure

Charter s. 8 – everyone has the right to be secure against **unreasonable search or seizure** → any charter violation of Section 8 must be done by **STATE ACTION**

STAGE 1:

- **What is a "search or seizure"?**
    - **First step, was there a state action that invaded REP (reasonable expectation of privacy)**
- What is an "unreasonable" search or seizure?
    - Second step, was the search or seizure unreasonable (unreasonable means interest of public privacy is greater than state interest in rooting out criminal activity

US v Katz

Facts

- Mid 1960s, a bookmaker in LA named Charles Katz used a public pay phone booths to transmit illegal gambling wagers from Los Angeles to Miami and Boston
- Unbeknownst to Katz, the FBI was recording his conversations via an electronic eavesdropping device attached to the exterior of the phone booth.
- Katz was convicted based on these recordings. He challenged his conviction, arguing that the recordings were obtained in violation of his 4th amendment rights.

Findings

- The Court of Appeal sided with the FBI because there was no physical intrusion into the phone booth itself.
- Before this, the court had more or less found **that in order to constitute a search or seizure police had to physically trespass or invade some proprietary interest**
- "The fourth amendment protects people, not places" – *transformation of a property based view to a protection of individual privacy*

"The guarantee of security from unreasonable search and seizure only protects a reasonable expectation. This limitation…indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement."

- Borrowing from the USSC and Katz, Canada interpreted s.8 of the Charter as so

What is a "search or seizure"?

Search or seizure = invasion of a person's reasonable expectation to privacy (REP)

- Something may be a search or something may be a seizure, but not a "search or a seizure"

- **No REP = No Search or Seizure**
- Seizure does not include arrest (seizure of the person)

The "Reasonable Expectation of Privacy"

- **If no expectation of privacy, then no section 8 violation**
- **If decided that claimants REP is not violated then you don't have unreasonable S&S and thus not a S&S**
- **Consider: *(r v spencer)***
    - **1. What is the subject matter of the alleged search?**
    - **2. The claimant's interest in the subject matter**
    - **The claimant's subjective expectation of privacy**
    - **Whether the subjective expectation of privacy was objectively reasonable**

General Principles

- No distinction between a search or seizure, doesn't matter because you have neither without an invasion of a reasonable expectation of privacy…has a specific legal meaning in this context
- **Ex ante v. Ex post** *(Wong* - police placed camera in hotel room to capture illegal gambling*)*
    - Ex ante (before) – look at situation as there is an REP from perspective from police
    - Ex post (after) – look to see what was found
    - We have to access whether there is an REP based on the information available to police immediately before they intruded
- **Normative v. Description** (*Wong)*
    - REP is not wholly descriptive; it has a normative component
        - Descriptive: ask whether the circumstances are such that a person cannot reasonably expect that their personal info will remain confidential or secrete vis-à-vis the outside world (*Patrick* - garbage left for collection thus cant expect privacy)
        - Normative: ask whether police should, in a dree and democratic society, be permited to invade a realm of privacy without restrictions like warrants or probable grounds)
    - There is a sphere of privacy that we are all entitled to regardless of any external circumstances including those dictated by the state
- **No 3rd Party Rights** (*Edwards)*
    - You need standing to claim violation of rights
    - Need to show that your own REP had been infringed (i.e. an individual who occasionally stays at an intimate friend's home may have no reasonable expectation of privacy when that friend's home is searched)
    - Police may have invaded Edwards girlfriend's REP, but they did not invade his.

Issue of standing to pursue s. 8 claim:

- Ownership, Presence, Possession or control and Historical use

The question of whether one has a reasonable expectation of privacy is based on the following test…

"Totality of the Circumstances" Test

(2 Ideas: Inherent Privacy & Loss of Privacy)

(1) Inherent Privacy: The Biographical Core Test (*Plant*)

- Most important factor is the extent to which state action intrudes on the "biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state" Was the information the police got inherently private?
- Many cases are straightforward; areas such as the interior of our homes, the interior of personal belongings like purses; contents of computers and other digital devices; our bodies themselves.
    - Even the contents of an opaque garbage bag
    - All reveal intimate details of matters may wish to keep private: sexual, political, religious, etc.
- **Things get more complicated, however, in at least two scenarios**
    - *First* is when the investigative technique *only* (or almost only) reveals information about criminal activity; e.g. dog sniff – well trained and properly administered sniff search will intrude on privacy of innocent in a very small proportion of cases
        - Perhaps surprisingly, SCC has said on several occasions that the fact that an investigative technique revealed criminal information weighs heavily in favour of recognizing an REP.
    - *The second* scenario where the biographical core test can be difficult to apply is when police use a technique to obtain information from a realm that NORMALLY attracts a strong REP, like interior of a home; but the information revealed is fuzzy or indeterminate
        - Examples:
            - The infrared cameras used to detect high-intensity lights used to grow marijuana indoors
            - Use of electricity records or monitoring devices to detect usage patterns consistent with indoor grow ops.
- In *Plant*, reasonable people shouldn't care if police have access to this information (electricity records)

Supreme Court of Canada has not exactly been consistent or clear in this area

- See tension between two conflicting principles

- First, in some cases, some judges prefer to articulate simple, bright line rules that protect certain inherently private realms, even if the information actually obtained is not that revealing; police will know that can't use this without triggering *Charter* protection and regulation
    - See this in cases like *Spencer*
- Other cases, like *Plant* stressed the importance of looking at the actual capacity of the investigative technique used in the case at bar, as revealed by the evidentiary record, and judging whether the information revealed penetrates the bio core

- Dangerous for courts to speculate on future uses or capacities of technique; deal with those cases as they come before courts on proper evidentiary record.

Difficult Case Types (Contentious Cases): (see class notes p.39)

1. Criminal Information – sniffer dog example, does it invade REP? In Canada, yes.

- ***R v Kang*** (drug sniffing dogs)
- *R v Spencer* (anonymity on online space – users have a reasonable expectation of privacy in their internet service provider subscribe information, at its disclosure will often identify users intimate or sensitive activities carried out online with the expectation of anonymity)

2. Fuzzy Inferences – Situation where unquestionably the domain that the police are invading would attract REP, but the police are not entering but rather sensing what is going on via infra red, radioactive camera, electricity usage, etc.

- Police use a method to gain information but the information is not clear. Might lead you to infer but just not sure of it.
    - ***R v Tessling*** – heat-sensing cameras were used to view property, and certain buildings emitted much more heat than others. Canadian court says it does not see an issue as it not precise enough, it provides data that may add to more information.
    - ***R v Plant*** - got monthly meter read of what electricity a home is using & compared it to similar house in the area and use that to get a warrant – not precise enough to be ann issue of REP
    - ***R v Gomboc***- got a daily hourly meter read of what electricity a home was using – was precise enough to ifringe REP as you could make a picture of what was occurring
- The more fuzzy, the less likely to be an invasion of REP and vice versa.

(II) Loss of Privacy

- In some cases something may have happened to say you've lost that privacy interest → something is initially protect but under some circumstances we may expose that to the world. Once exposed we cannot expect REP
- Information obtained is generally considered inherently private; what causes loss of privacy?
- Interaction between person, place and thing
    - Something about relationship between person (accused/rights claimant), thing that is the subject matter of the search, and place that search occurs that extinguishes what would otherwise be a reasonable expectation of privacy
- Often results from failure of the person to store, keep, or safeguard the information in a way that prevents it from being readily obtained by others, including the state.
- US sometimes called the "voluntary exposure" or "third party" doctrine

Examples of Loss of Privacy:

- ***R v Mills***
    - police operation to ensnare people interest online in minors for sexual favours. Mills attempted to communicated with a 14 year old girl for grooming and sexual favours. Police caught him and Mills claimed violation of REP. Court held he had no REP because he was a stranger to communicating to a believed minor
- ***R v Edwards***
    - Boyfriend stored drugs in a closet in girlfriend's apartment
    - Ordinarily things stored in a closet in a residence would attract a strong REP
    - But didn't have enough of a connection to the place: didn't have a key, only occasional visitor, didn't control access, didn't pay rent.
- Similarly in ***Belnavis***, SCC found that while interior of vehicle normally attract an REP, passenger did not have REP as not owner or driver and did not have sufficiently close relationship with the driver
- ***R v Patrick***
    - Snooped around back alley and saw suspicious things that might be indicative of a meth lab but didn't have enough for a warrant
    - SCC found that there was no REP in garbage put out for collection, even though city by-law making it offence to interfere with such garbage and even though police committed a minor trespass to obtain it.
    - Voluntary decision to expose ordinary private information to public, including stray animals, garbage entrepreneurs, and police.
    - Sometimes referred to as the "abandonment" doctrine
- REP and Bodily samples
    - If you discard something willingly (e.g. tissue) police may analyze it
    - But, police cannot actively take sample (e.g. pluck hair)
- ***Stillman***: When detainee has no control of where they can discard bodily sample, then the idea of abandonment does not apply
    - E.g. police hand you tissue during interrogation and you put it in their trash

- ***R v Marakah*** – text messages on the recipients phone are not entitled to a reasonable expectation of privacy – accused does not have control or possession of these messages.
- ***Duarte –*** people have a reasonable expectation that their private conversations will not be intercepted or recorded by the state, even if one party is aware of the surveillance.

Public Exposure: The fact that we expose information to the outside world does not mean we have lost privacy for all purposes, or have extinguished REP

- In some circumstances, we may still reasonably expect to maintain some degree of control of information or expect that information will be used only for certain purposes, or expect that information will not be further disclosed to others, such as police.
- ***R v Duarte***
  - Informant wearing a wire – does a wire require a warrant?
  - Argument was if you choose to talk to someone who you believe is trustworthy and they turn out to be a police informant then you assume that risk; it was your choice to divulge that information
    - But Justice Laforee doesn't agree, there is a difference between recording information and someone going and telling on you
    - **Recording represents a greater threat to privacy then someone who may go against our trust**
  - **Ratio:** the voluntary decision to disclose confidences to a friend (who turned out to be a police informer wearing a wire) did not permit police to surreptitiously intercept and record conversation.
- In ***Wong,*** the Court held that we reasonably expect privacy against surreptitious police surveillance in rented hotel rooms, even if we have invited others to the room and accept that hotel staff will enter the room for legitimate business reasons.
- In ***Buhay***, same principle applied to rented bus lockers. Cannot expect this high degree of control in cases where people rent a locker or a hotel room
- In ***Cole,*** teacher issued a computer by school board. Policy in place that stated the computer can be expected by the schoolboard. Teacher kept pornographic images on the computer and IT found the pictures. Police were told and charged Cole. Court held that even though the policy existed, people still expect a reasonable level of privacy. Problem here is that the IT guy did NOT give the material directly to the police – instead, the police seized the computer → should have got a warrant. Violation of REP by police

R v Wong [1990 SCC]

Facts

- The accused had a gambling pit in a hotel room that was open to the public
- Police conducted video surveillance inside hotel room, with no audio.
- Accused claimed that this was a s. 8 violation and the evidence should be excluded under s. 24(2) of the Charte

Issue: Should there be a reasonable expectation of privacy in this case?
Judgment: Yes - When we rent hotel room, even if we invite strangers, we have a REP.

- But evidence was admitted b/c its admission wouldn't bring the AOJ into disrepute

Findings

- **The accused rights had be violated under s. 8 since the police did not obtain a warrant**
  - But that the admission of the videotape into evidence would not bring the administration of justice into disrepute under s 24(2) because the police acted in good faith and there was no *Criminal Code* provision which would have allowed them to obtain a warrant.

R v Spencer [2014 SCC]

Facts

- Spencer had child pornography on a public server, under an anonymous IP address
- Police used internet provider to track his IP address back to him

Issues

- Did the police obtaining the information about Spencer from his IP address from the Internet service provider constitute a search under s8?
- Did Mr. Spencer have a reasonable expectation of privacy? And if he did does the action by the police constitute a search under s 8

Judgment: Users have a reasonable expectation of privacy in their Internet service provider subscriber information, as its disclosure will often identify users with intimate or sensitive activities carried out online with the expectation of anonymity.

Findings

- **Court found that four categories can be considered when determining whether or not there was a reasonable expectation of privacy in the subject matter:**
  - **The subject matter of the alleged search**
  - **The claimant's interest in the subject matter**
  - **The claimant's subjective expectation of privacy**
  - **Whether the subjective expectation of privacy was objectively reasonable**
- Court found that the subject matter in this case was not just the name and address of a user that corresponded with an IP address but an identity of an internet subscriber which corresponded with particular internet usage

- It could be very dangerous to allow anonymity when using the internet because internet crime would not be able to be tracked and stopped
    - Court recognizes that there "may" be privacy interests but it is not a right
- Court found that Spencer had a reasonable expectation of privacy and that the police requesting the information constituted a search
- The court went on to consider if the search was lawful under s 8 and found that it was not, but refrained from excluding the evidence under s 24(2) emphasizing that the police had been acting in good faith and it was unclear at this time if such requests constituted a search

STAGE 2:

- What is a "search or seizure"?
    - First step, was there a state action that invaded REP
- **What is an "unreasonable" search or seizure?**
    - **Second step, was the search or seizure unreasonable**

Assessing Reasonableness: 1. Types of reasonableness; 2. Hunter standards; 3. Exceptions to Hunter

1. Types of Reasonableness (Collins test)

If a reasonable expectation of privacy (REP) is broken, then in order for the state to be able to carry out a search and seizure they must meet the guidelines below

To be considered "reasonable", a search or seizure must:

1. Be authorized by a law

- Consideration of a lawful authority for a particular search or seizure. That authority may come either from a statute or the common law. Was it grounded in a legal basis to give them authority to do what they did

2. That law must itself be reasonable

- An applicant may argue that the particular law that authorized the search or seizure is unconstitutional on its face. To succeed, the applicant must show that search or seizure power created by the law is unreasonable as a matter of general application.

3. The search or seizure must be carried out in a reasonable manner

Implicit condition - Use of excessive force, must have reasonable and probable grounds, search things that they are not entitled to search for etc. Another way to say it; it was not authorized by law because it didn't authorize the type of behaviour the police conducted

When there is a violation of Section 8 the first question is to ask "was this violation authorized by law?"

- If you can't find such a law then we say that the search or seizure was not authorized by law, and anytime you say this you automatically have a violation of section 8

Hunter v Southam* → *failed "the law must itself be reasonable"

Facts

- Competition bureau, responsible for fair competition
- The CB (federal agency) enforcing *combines act* was suspicious that Southam company was engaged in unfair competition and wanted to search offices of Edmonton journal to establish this
- Edmonton journal challenged the search and took hunter (director of CB) to court
- Challenged the law allowing the search under s 8

Issue: Concerns the constitutional validity of a statute authorizing a search and seizure under Section 8

Judgment

- A member of this commission was NOT independent of government like a judge (so not impartial) and also had an important role in the investigation. Independent body authorizing searches is required
- There was no requirement in the statute (*Combine Act)* that the search be based on reasonable and probable grounds

Findings

- Dickson – s 8 of the *charter,* will receive same kind of interpretation as the 4th amendment in *katz* – about protecting individual privacy, limited protection of invasions of a REP
    - States invasion of a reasonable expectation of privacy → TRIGGERS PROTECTION
- Without a warrant a search is prima facie unreasonable and the onus is on the police to disprove that

Ratio

- **A reasonable search and seizure occurs if:**
    - **Prior authorization** – where it is feasible to obtain prior authorization, such authorization is a pre-condition for a valid search and seizure
        - Means of preventing unjustified searches before they happen, not simply of determining, after the fact, whether they ought to have occurred in the first place

- **Neutral arbiter** – it is necessary for the person authorizing the search to be able to assess the evidence as to whether that standard has been met, in an entirely neutral and impartial manner; and
  - Person issuing the warrant must be presented with sworn evidence
- **RPG (reasonable and probable grouds)** – there are reasonable and probable grounds to believe that an offence has been committed and that there is evidence to be found at the place of the search, constitutes the minimum standard

2. The *Hunter* Standards (Default Standards for Reasonableness)

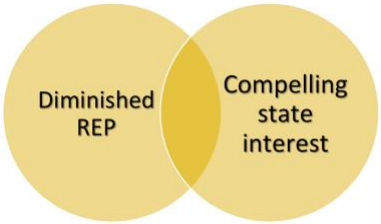
- **(1) Prior authorization from a neutral and impartial arbiter (warrant)**
  - The purpose of prior authorization is to provide an opportunity, before the event, for the conflicting interests of the state and the individual to be assessed, so that **the individual's right to privacy will be breached only where the appropriate standard has been met, and the interests of the state are thus demonstrably superior.**
  - For such an authorization procedure to be meaningful it is necessary for the person authorizing the search to be able to assess the evidence as to whether that standard has been met, in an entirely **neutral and impartial manner** → typically by a judge.
- **(2) Standard of suspicion is reasonable and probable grounds**
  - The state's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at the point where **credibly-based probability** replaces suspicion.
  - Standard refers to how certain/confident the state is that the invasion will be successful

Where the Hunter Standard is Heightened: There are some cases where you will need more than this though; the privacy interests are so strong that we impose additional conditions

- Searches of lawyers offices → risk of breaching confidentiality
- Electronic surveillance

Where the Hunter Standard is Lowered:

- In certain cases search may be reasonable under s. 8 even if standards applied are lower than those set out in *Hunter*
  - When there is a diminished expectation of privacy (There is still an REP, if there weren't we would not need the analysis) Or Where there is a compelling state interest
  - i.e. Border crossing (National safety interest), schools (keeping schools safe), etc.



Diminished REP – does not mean that you do not have an REP. Instead, there is an REP but it is not as strong it might be in the average situation. For example, when you're driving around in your vehicle → you maintain many regulation forms (insurance, registration etc).

Compelling State Interest – On the other hand, there is some compelling state interest that makes it infeasible to require a warrant or to have reasonable and probable grounds. If we required the police to obtain a warrant, this sphere would not be regulated effectively.

Two Types of Cases

- Criminal cases v Non-Criminal cases
  - Standards are inherently lower in Non-criminal cases

1) Criminal Investigations

	Warrant	No Warrant
Probable Grounds	• Hunter Standard (default)	• s. 254(3) - samples of breath or blood to determine precise alcohol concentration in blood (breathalyzer) • s. 487.11 - **exigent (pressing) circumstances** • SIA (search incident to arrest)
Reasonable Suspicion	• ss. 491.1 & 491.2 – tracking warrant; number recorders (metadata associated with telephone communications) • 487.016 & 17 & 18 – transmission and tracking and financial data	• s. 254(2) – ASD and physical coordination tests – roadside screening test • Canine sniff • SID (search incident to detention)

Note:

- **Reasonable grounds to believe = reasonable and probable grounds or probable grounds**
- **Reasonable ground to suspect = reasonable suspicion**

  - ***R v Kang Brown*:** For a sniffer-dog to be used, the police must have "reasonable suspicion" - something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds.

2) Non-Criminal Investigations

- Examples:
  - Regulatory Searches – searches conducted to enfore a regulatory regime under fed and prov. law
    - (Occupational Health and Safety etc.) – typically you don't even need reasonable suspicion but must have a legitimate purpose
  - Border Control and Transportation
  - Prisons and Schools
  - **Predominant Purpose Test:** if the purpose of the investigation changes & becomes more invasive than original search then might needs a warrant to continue
    - If you are being routinely audited for taxes, but the auditors find something incriminating, then the predominant purpose changes and the Hunter standards come back into play before conducting criminal investigation
  - In these cases warrants typically not required; indeed in many instances authorities need not have individualized suspicion
    - May permit random audits or inspections where minimally intrusive and necessary to maintain integrity of a regulatory scheme.
    - But if predominant purpose is to establish criminal liability…more likely that *Hunter* required.

****Section 8 is unlikely to be upheld under section 1 → odd to have unreasonable search upheld by reasonable limit**

Prior Judicial Authorization: The Warrant Requirement (warrants are issued by judicial officer**)**
The Supreme Court recently made clear that computers are different, given they are vast (and almost permanent) repositories of inherently private information

- If police plan to search computers found in the location to be searched, **they must first satisfy the authorizing justice that they have reasonable grounds to believe some computers they discover will contain things they are looking for**

****The police **can dispense with the need to obtain a warrant** where "the conditions for obtaining a warrant exist but **by reason of exigent circumstances** it would be impracticable to obtain a warrant"

Parliament has also legislated a number of warrant provisions applicable to particular types of search and seizures

- Intercepting private communications
- Seizing DNA samples
- Taking body impressions (handprints, fingerprints, etc)
- Electronic tracking devices
- Dial number recorder

Excerpt from Penney et al., Reasonable Expectation of Privacy

To establish a violation of s. 8 the applicant must also demonstrate that the search or seizure was "unreasonable"

- In *Hunter*, the Court pointed both to the historic importance of search warrants and American jurisprudence to conclude that a search or seizure that takes place without a warrant is presumptively unreasonable
- The party seeking to justify a warrantless search (normally the prosecution) always bears the burden of establishing that it is "reasonable" under s.8
- Where the constitutionality of a search pursuant to warrant is being challenged, the burden remains on the party asserting the violation (usually the accused)

In Hunter, the Court established what can be usefully thought of **as three "default" minimum requirements for reasonableness under section 8**

1) The law should require that **searches be authorized by warrant except in circumstances where it is not feasible to obtain one**
2) The standard for searching should **be reasonable and probable grounds,** established on oath, to believe that a crime has been committed and that the search will reveal evidence of that crime
3) The law should **require that someone capable of acting judicially** (i.e., a judge or justice of the peace) **be the one to decide adequacy of the grounds for issuing** the warrant
   a. Warrants issued under the Criminal Code and other criminal law statutes must be issued by members of the judiciary, i.e., justices of the peace, provincial court judges and superior court judges in order to make a balanced and objective decision (in an entirely neutral and impartial manner)

**** The test can be collapsed into two: (1) prior authorization and (2) reasonable and probable grounds**

Detention and Arrest

IMPORTANT EXAM NOTE: In order for there to be a s. 10 violation, you must first determine whether the subject is detained

Constitutional Protection

Section 9 of the Charter – "everyone has the right not to be arbitrarily detained or imprisoned"

Detention is the trigger to Section 10 – everyone has the right on arrest or detention

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

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

- Purpose is to protect individual liberty from unjustified state interference
- Guards not only against unjustified state intrusions upon physical liberty, but also against incursions on mental liberty by prohibiting the coercive pressures of detention and imprisonment from being applied to people without adequate justification
- **s. 9 is violated if an arrest is undertaken "because a police officer was biased towards a person of a different race, nationality or colour, or that there was a personal enmity between a police officer directed towards the person arrested"**
    - As such, racial profiling is contrary to s. 9 of the charter
        - *Death of Helen Betty Osborne and John Harper (see class notes p.39)*
    - **If police lack the requisite legal grounds to detain, s. 9 of the Charter will be violated**
- Detention also triggers informational duties under s. 10 of the Charter. A detained suspect must be informed of the reasons for detention and apprised of the right to consult counsel

What is meant by detention?

- The protection afforded by s. 9 of the Charter is contingent on the detention or imprisonment. What constitutes imprisonment is fairly obvious. Far more controversial is whether or not there has been a detention
- **Detention under ss. 9 and 10 of the Charter refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint** (legal obligation to comply with the restrictive demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply)
    - **Detention** also arises when police assume "control over the movement of a person by a demand or direction which may have significant legal consequence and which prevents or impedes access to counsel"

The Reasonable Person Test

- A person is detained where he or she "submits or acquiesces in the deprivation of liberty and **reasonably** believes that the choice to do otherwise does not exist"

Three Categories of Detention (after determining there is detention you need to see if it fall in one of the types)

- **Physical Restraint**
    - An individual subject to physical restraint is detained for Charter purposes (any significant degree of touching or physical control)
    - Police searching through your belongings while you are present constitutes detention
    - A fleeting touch would be insufficient to trigger a physical detention but if sustained it could be enough
    - Any physical contact between a police officer and a suspect that is more sustained or significant than that should undoubtedly be characterized as a physical detention
- **Psychological Restraint (with legal compulsion)**
    - This form of detention arises whenever a person may be punished for failing to comply with police directives
    - Legal obligation to comply with police and an associated punishment or fine for failing to do so is a legal obligation
    - The court has found that people stopped for routine questioning and searches at border crossings are not detained for Charter purposes. Detention arises only when people are suspected of having committed an offence and subjected to lengthier and more intrusive inquiries
    - Occurs where there is specific expressed legal implications if you don't oblige
- **Psychological Restraint (without legal compulsion)**
    - Despite their **reasonable** belief that they must comply with police requests, they actually have no legal obligation to do so (i.e. absence of criminal liability for failure to comply with it)
    - The courts have sanctioned a state of affairs in which police are permitted to approach people and ask them questions without any particularized suspicion and without any need to inform them of their legal status or rights
    - The turning point is the moment when suspects submit to police authority under the reasonable belief that they cannot do otherwise
    - **Where there is no physical restraint or legal obligation, the court may consider if there has been a detention by considering the following:**
    - **Grant factors** (IMPORTANT):

        1. The circumstances giving rise to the encounter
            - As they would reasonably be perceived by the individual.
            - Ranges from general inquiries (i.e. did you see the accident/ see what happened?) to focused investigations (i.e. an interrogation of a likely perpetrator)
        2. The nature of the police conduct
            - Including the **language** used;

- The use of **physical contact**;
- The **place** where the interaction occurred (i.e. back alley, place with no exit);
- The **presence of others**;
- The **duration** of the encounter

3. Characteristics of the Suspect

- The particular characteristics or circumstances of the individual where relevant,
- Including: age; physical stature (Big cop v small suspect); minority status; level of sophistication

***R v Grant** [1 of 2 detention]*

Facts

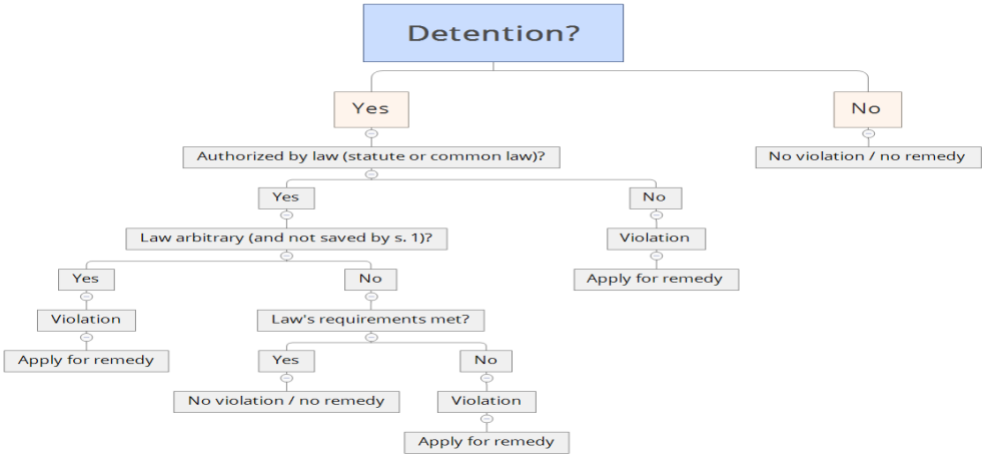
- Community policing is going on in this particular neighbourhood.
- A student-aged African American man is walking down the street in Toronto.
- Police see this man and radio over to their pal (Const. Gomez) to go check it out.
- He asks this man "what is going on?" and "do you have anything you shouldn't have?" then eventually telling the man to "put your hands out in front of you" and then two more police officers come over and stand behind Gomez
- Found drugs

Issue: When is there a detention? **No** detention when the police officer asked him his name and address **but** was detained when the police officer told him to keep his hands in front of him

Judgment: s. 9 violation

Findings:

- To determine the circumstances that conclude being deprived by the state of liberty of choice, consider: **"Grant Factors"** (See above)
- Claimed to be an **investigative detention** – however, there was no reasonable suspicion to believe Mr. Grant was committing a crime or has committed a crime. Baggy clothing and skipping school does not suffice as reasonable suspicion.



Detention Framework - how to approach said Q's

- 1. Introduction
  - a. Quote or paraphrase relevant constitutional provision (s.9)
  - b. Briefly describe its essential elements
  - c. Briefly set out its purpose, rational, and or general animating principles
- 2. Trigger: What is a detention
  - a. set out three different types of detention
  - b. Identify each incident or transaction that could plausibly be considered a detention & identify its type
  - c. set out the definition / test for that type of detention
  - d. apply the law to the facts: was the accused detained during any of identified transactions (and if so when)
- 3. Is the detention arbitrary?
  - a. set out different types of arbitrariness and identify the type at issue
  - b. is there a power to detain that applies generally in the circumstances? If so, describe its scope and limitations.
  - c. apply the law to the facts: did police adhere to the limits of any applicable detention power in the specific circumstances of this case?
- 4. If you have been asked to do so, identify and analyze any other possible other legal issues arising from the detention, such as:
  - a. whether, assuming there was at least one detention, police complied with ss.10(a) and (b) of the charter
  - b. whether police violated s.8 of the Charter in conducting any searches incidental to any detention; or
  - c. whether police violated the s.7 "Herbert" rule or induced an involuntary confession
- 5. Conclusion: make sure to answer the specific question(s) posed

Detention Powers

Traffic safety stops

- Powers to stop drivers for pretty much any reason under the sun related to driving
    - Two key types:
        - 1 power to stop drivers for safety purpose – does not requires resonable suspicion or reasonable grounds (random and arbitrary)
        - Reactive – based on observation of reasonable suspicion or grounds (not arbitrary, not random and does not need section 1 justification)
    - If a police officer asks you to pull your car over, you have to oblige
    - You are detained because there is a legal punishment for failing to stop
- Because impaired driving is such a social concern and issue, we will let police officers randomly pull people over, without a warrant and without any suspicion, limited to traffic safety related procedures
    - If police switch their interest to a non-driving related criminal investigation, then police must comply with the rules of detention
- The dual purpose is fine as long as you stay within the scope of the driving related investigation

Note: people are detained when pulled over to the side of the road by the police, and the laws authorizing random **vehicle stops violate section 9** because they provide no objective criteria to govern who is detained. Nevertheless**, these laws have been upheld under section 1** as reasonable limits necessary to prevent drunk driving and ensure traffic safety

- Section 1 analysis is not applied on a case-by-case basis
    - It is applied to a law against the people
- Comply with 10(a) but does not have to comply with 10(b)

Investigative detention (*Mann*)

- The Supreme Court has recognized and effectively created powers of investigative detention that **allows a person to be briefly detained if there are reasonable grounds to suspect that he or she is connected to a particular crime and the detention is reasonably necessary**
    - i.e. we are going to recognize a common law power to detain, and hinge this on reasonable suspicion
- RS + RPG; less suspicion … more suspicion

Powers for Investigative Detention:

- Detain
    - *Use of force*? Force can be used to a reasonable degree, more often than not people tend to comply with police
    - *How long*? It is supposed to be "brief" but there is no defined time limit
    - *Where*? Can we remove them from the scene and bring them back to the police station or does it need to be at the scene of the detention?
        - Courts are not clear; purpose is to give police a very limited ability to follow up on their reasonable suspicions without infringing on any rights
        - The longer it goes on the more we interfere with liberty and the less likely we are to conclude that it is a lawful detention
        - It would become a de facto arrest; and if there are no grounds then it could violate Section 9
- Question
    - Gather more evidence or eliminate this person as a suspect
    - *What kind*? The more intrusive, the more persistent, the less it becomes brief and preliminary and more of an interrogation
    - *Section 10*: Police have to comply with this section
        - Explain why the person is being detained 10(a);
        - And issue right to counsel caution 10(b)
- Search
    - *When*? Police can do it in any situation where there is a reasonable possibility that a weapon or another object **threatening safety** may be found on the detainee
    - *Where*? The person and perhaps any immediate surroundings that may be accessible to the person in terms of being able to grab a weapon; **needs to be safety related**
    - *For what*? Police cannot search for evidence, if you find a soft pouch of something you suspect to be drugs then you cannot pull it out and look at it (it cannot be used as a weapon)
- **Factors to determine whether there is a reasonable detention:**
    - Seriousness of the offence
    - Temporal proximity
    - Geographic proximity

Roadblock Stop – reasonable suspicion does not need to attach to a specific individual.
When there is a credible report of a serious offence and police respond in a timely manner, they may be permitted to set up a roadblock → ***R v Clayton.***

- Reports of guns at a nightclub.
- Police received description of individuals who were in possession of guns. Also received description of vehicles.
- Questioned individuals who were clearly not fit to the description.

- Court admitted this questioning based on the **timing of the stop, geographic scope of the roadblock, and seriousness of the events**.

R v Mann

Facts
- Police were looking for a break & enter suspect, described as a 21 year old aboriginal male.
- Near the scene of reported crime, police stopped A, asked him questions, conducted pat-down search and found illegal substances in his pockets.
- A was arrested for the offence of possession for the purpose of trafficking marijuana.

Issues
- Did the officer have reasonable grounds for detention?
    - YES – Matched description and was close to scene
- Was the officer's search reasonable?
    - YES & NO
    - Yes - The initial search was reasonable because the B&E was recent, it was midnight, and the someone who commits a B&E would be carrying potentially dangerous tools (Safety Concern)
    - No – The further search after feeling a soft object (weed) was not reasonable (Not intention of search and not safety concern)
        - Failure to meet investigative requirements, therefore evidence is excluded

Findings
- Court must balance:
    - Individual liberty
    - Privacy interests
    - Societal interest (Effective policing)
- Search must be reasonably necessary
    - Officer must believe safety risk

Arrest Powers
- Governed exclusively by CC section 494 and 495
- Peace officer powers: not just police but campus law enforcement, provincial sheriff, patrol officer
- Examples page 44 of class notes

Search Incident to Arrest (SIA)
- Can't arrest without reasonable and probable grounds
- Power to arrest is statutory.
- The **power to search incident to arrest** is a longstanding **common law police power** → no warrant required
- It allows police to search an arrestee's person and belongings, as well as the immediate vicinity of the arrest, when there has been a lawful arrest and the search is aimed at uncovering weapons or evidence relating to the offence arrested for
- Lawful arrest: don't need independent RPG (reasonable and probable grounds aside from the RPG to arrest) to think you are going to find anything by searching
- Lawful search: reasonable possibility that you are going to find weapons or evidence as long as that evidence is connected to the offence
    - *Weapons*
    - *Evidence* (connection to offence) – no reasonable suspicion or probable grounds
    - *Scope* – fairly broad, frisk search, immediate vicinity, personal belongings, even strip search under very limited circumstances
    - Not bodily samples or impressions (*Stillman*)

Requirements for Strip Search (*R v Golden*)
- Need to satisfy search requirements in addition to more requirements
- Probable grounds
- Done at police station → Absent exigency; if there is reason to believe evidence will not be there if you wait or if you believe there is anything dangerous (i.e. weapons)
- Minimally intrusive
- No bodily cavities
    - But this does not include mouth or anything that is "clenched" as opposed to fully inserted

** Strip searches are **highly intrusive and therefore more guarded**

Cloutier v Langlios

Facts
- Lawyer tried to charge officer with assault after they frisked him following arrest for unpaid parking tickets

Findings
- Lawyer was being verbally abusive
- Frisk is a minimal intrusion

In ***Riley v. California***, the United States Supreme Court said that police need a warrant to search a cell phone after an arrest.

- In the states, they can only do search phones without a warrant in exigent circumstances
- In Canada, we do not have this rule…

R v Fearon

Facts

- In 2009, police arrested two young black males in Toronto suspected of armed robbery of a jeweller
- At that point police believed that they had arrested everyone who had been involved in robbery, but had not yet located the jewellery or gun
- Performed a pat down search, and found an old-school mobile phone in his pants pocket.
- Looked at phone, not password protected, manipulated keyboard to look at recent communications and photographs
- Found incriminating text and photograph

Findings

- Justice Cromwell:
- **Police can search devices without a warrant incident to arrest**
- However, given the special privacy concerns attaching to digital devices, however, Cromwell conditioned such searches on the following requirements - **you do not need a warrant to search phones if:**
    - ***Recent context*** (text, email, photos, call logs); courts did not define recent
    - ***Serious offences*** (persons or property)
    - ***Investigation stymied (is thwarted) without search*****:** inconvenient, more difficult, or very serious impediment
    - ***Detailed notes*****:** to enable judicial evaluation after the fact police need to take detailed notes on their
- Ultimately found violation of s. 8 as officers could not recall precisely how extensively looked through phone; no notes but because area of law was uncertain and mistake was reasonable, evidence admitted under 24(2)

Penal Swab

- Penal swab has been permitted as an incident of arrest when they have reasonable grounds. Must be following an alleged victim of sexual assault.
- Bodily samples requires warrant.

Section 24(2) – Exclusion of Evidence

- **Exclusionary rule prevents the government from using evidence in trial which was derived from an illegal search, seizure, arrest, or integration.**

The consequence of a charter violation is the execution of 24(2)

- 24(1)Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
- 24(2) 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**.

Steps to application to exclude:

In considering D's application to exclude evidence under section 24(2), you must determine:

1. **If any breach of his rights has in fact taken place**

    ➔ If it is proven by the claimant that one of his or her rights has been violated, then, you can go to a court of competent jurisdiction, and say that I would like to have the evidence excluded

2. **You have to established on a balance of probabilities that the above right was violated and that the evidence should be excluded under s. 24(2)**

    ➔ you must…

    1. **Establishe that evidence that he seeks to exclude was "obtained in a manner" that violated one of the accused Charter rights**
        - Temporal/contextual connection between the violation and the evidence
        - Casual connection between the violation and the evidence – (i.e. but for the violation, the subscriber information would not have been obtained)
        - **Obtained in a manner =** require the claimant to show that there is a connection between the evidence obtained and the infringed *Charter* right
    2. **That the admission of the evidence would bring the administration of justice into disrepute**
        - If what the police have done would make you "want to throw up", then and only then should the court exclude it.

Good blurb on section 24(2)

Evidence obtained in violation of a section of the *Charter* will not automatically be excluded under section 24(2) of the *Charter.* Judges will apply a three-part test that examines the seriousness of the *Charter* violation, the impact of the *Charter* violation on the accused's *Charter*-protected interests, and society's interest in any adjudication on the merits.

- Grant factors (see below)

Excerpt from Penney et al., Criminal Procedure in Canada section 24(2)

Discretionary part of the exercise – "the admission of it in the proceedings **would bring the administration of justice into disrepute**"

A new approach was suggested in *R v Grant* (2009), called the **Grant factors:**

1. The seriousness of the Charter-infringing state conduct (focuses on the objective conduct of the police)

- **Situate the conduct on a culpability scale**
  - Inadvertent –> Negligent –> Deliberate
  - Where police or state actors have wilfully violated the *Charter,* the case for exclusion will be strong
- Violations have been found to be less serious when police acted in "good faith". Good faith errors must also be reasonable. Anything that is between inadvertent and negligent could be "good faith"
  - Good faith is not negligence (i.e. not reading a detainee a card properly)
- Reasonable reliance on pre-existing standards
- Isolated or systemic issue?
- Grounds for suspicion (you could have proceeded legally, but you made a deliberate or negligent choice to violate someone's charter rights)
- Exigency (police needed to act a certain way in order to obtain the evidence)
- Ignorance of *Charter* standards must not be rewarded or encouraged

2. The impact of the breach on the Charter-protected interests of the accused (focuses on the effect of the violation)

- **Two-step process:**
  - (1)Identify the interests engaged; and
  - (2) Examine the degree to which violation impact those interests
- The more serious the impact on the accused's protected interests, the greater the risk that admission of the evidence may signal to the public that *Charter* rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and brining the administration of justice into disrepute
- Section 8 – Privacy and REP
- Section 9 – Liberty Interest
- Section 10 – Coercive Self-Incrimination
- Identify the right that is violated, specify the interest that the right is meant to protect, and then discuss the impact of the violation on that right ***good framework for exam question**

3. Discoverability

- Applies to all types of evidence ➔ Would evidence have been found legally despite violation?
- Not determinative

4. Society's interest in the adjudication of the case on its merits

- Exclusion of evidence will typically detriment adjudication, but look at…
  - **Reliability of evidence** – ex. if we coerce the confession then this factor may come into play. The only type of evidence that can be questioned for reliability is statements.
  - **Importance of evidence to Crown's case (not determinative).** Serious violation and/or significant impact on the accused could outweigh this provision
    - What effect the exclusion will have on the reputation of the justice system?
    - Ask the question whether "truth-seeking" would be better served by admission or exclusion
    - If the reliability of the evidence is questionable, exclusion is favored. If not, admission is favored.
  - **Offence seriousness will play only modest role in this analysis (and in the author's view play little or no role)**
    - Allowing offence seriousness to weigh heavily in favour of admission would signal that there is a lesser need to respect constitutional rights when police perceive that they are investigating a "serious" offence.
    - This would deprive those charged with serious crimes of the protection of the individual freedoms afforded under the *Charter*, and would declare that in the administration of the criminal law "the ends justify the means"

Serious Misconduct → Significant Impact → EXCLUDE
Minor Misconduct → Slight Impact → ADMITTED

***R v Grant** [2 of 2 exclusion of evidence]*

- Given that the officers had no legal grounds to detain Grant, the detention violated his s 9 *Charter* rights
- When faced with an application for exclusion under s 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to:

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

- The violation was not deliberate or egregious and noted that there was no suggestion that the accused was the target of racial profiling
- While noting that the impact of breach on the accused's protected interests was significant, they concluded that it was not at the most serious end of the scale
- The gun was highly reliable evidence and was essential to a determination on the merits
- The significant impact of the breach on the accused's Charter-protected rights was said to weigh strongly in favour of excluding the gun, while the public interest in the adjudication of the case on its merits was said to weigh strongly in favour of its admission
- Because the police officers were operating in circumstances of considerable legal uncertainty, this tipped the balance in favour of admission

Notes on this section:

- Statements taken in violation of the right to counsel will presumptively be excluded because of the important of the police respecting the right to counsel, the adverse effect of such statements on *Charter* protected interests such as the right to silence, and concerns about the reliability of statements taken in violation of the *Charter*
- If the accused has been arbitrarily detained, there is a limit to what the criminal court can do. If evidence was obtained, it can be excluded under section 24(2)

Chapter 4 – The Trial Process

Race and Wrongful Convictions

Nature of the subject matter not really testable. Just for discussion purposes

- **Section 14** of the Charter provides that "a party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter"
- Reasonable apprehension of bias – a legal standard for disqualifying judges and administrative decision-makers for bias

R v S(RD)

Facts

- Black guy was in the process of being arrested by police
- His cousin came in to intervene
  - 2 Stories:
    - Hit officer with bike
    - Only spoke to the officer
- Cousin was charged with assault on an officer and interfering with arrest
- At trial, Judge Sparks (who is black) said the actions of the officer fit the prevailing attitude of the day
  - Crown used this to appeal on **reasonable apprehension of bias** in decision
  - This succeeds at the Court of Appeal
  - At the SCC, this was reversed. The Crown failed to prove that Judge Sparks was biased. There was nothing wrong with what Judge Sparks said, it was just "unfortunate".

Issue: Is there **reasonable apprehension of bias** on the part of the judge?

Findings

- It is expected that judges have their own view and backgrounds, and we accept that these play a role in their decisions, so long as it is not unfair.

Aboriginal People and the Criminal Justice System

- Aboriginals are dramatically over represented in the Canada prison system, and are more likely to plead guilty and to receive sentences that involve incarceration
- "There is something inherently wrong with a system which takes such harsh measures against an identifiable minority. It is also improbably that systemic discrimination has not played a major role in bringing this state of affairs into being...."
- That a resumption of their traditional roles is the key to putting an end to Aboriginal female mistreatment (by being given positions of responsibility in the justice system)
- A restoration of their traditional responsibility and position of equality in the family and community holds the key to resolving many of the problems we have identified
- With greater self-determination in their own territories, Aboriginal people can begin to feel they are being dealt with fairly
- Aboriginal approaches, as informed by Aboriginal culture and traditions, do not accord with the Canadian system. The history has been one of imposition of this system on Aboriginal people without regard to the fact that they do not share many of its elements, premises or concepts.

Wrongful Convictions and the Death Penalty

- Canada abolished the death penalty for all but a handful of military offences in 1976, and subsequently to abolish the death penalty for all offences in 1998…
- *The principles of fundamental justice are to be found in the basic tents of our legal system*
    - The avoidance of conviction and punishment of the innocent has long been in the forefront of "the basis tenets of our legal system". It is reflected in the presumption of innocence under s. 11 (d) of the Charter and in the elaborate rules governing the collection and presentation of evidence, fair trial procedures, and the availability of appeals
- The imposition of the death penalty in the retentionist states inevitably deprives the legal system of the possibility of redress to wrongfully convicted individuals
- Concern about wrongful convictions is unlikely to be resolved by advances in the forensic sciences, welcome as those advances are from the perspective of protecting the innocent and punishing the guilty.
- Leading cause of wrongful convictions is faulty eyewitness identification
- Some examples of wrongful convictions in Canada include
    - Steven Truscot and Ronald Dalton
    - Ronald Cotton – rape
    - Williamson and Frisk – rape
    - Wilton Dedge – rape

Donald Marshall, Jr.

- He was convicted in 1971 of murder by a Nova Scotia jury. He served 11 years of his sentence. He was eventually acquitted by the courts on the basis of new evidence. In 1989 he was exonerated by a Royal Commission
- Could have been prevented if those involved in the system had carried out their duties in a professional and/or competent manner. That they did not is due, in part at least, to the fact that Donald Marshall, Jr. is a native

David Milgaard

- Was given a fair trial but still convicted of murder and spent 23 years in jail. The history of the wrongful conviction of David Milgaard shows that in Canada, as in the United States, a fair trial does not always guarantee a safe verdict
- Where capital punishment is sought, the state's execution of even one innocent person is one too many

USA v Burns & Rafay

- Canadians who commit a crime in the US cane expect to be prosecuted under the respective local punishment
- Some US states have the death penalty, and history is against extradition

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The Role of the Prosecutor and Defence Counsel

"[T]he purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel has a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly**. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility**."

- **Paramount function is to ensure that justice is done.** One can be a forceful advocate as a crown prosecutor, but have to ensure that innocent isn't convicted and so on…

Boucher v The Queen

- It is the duty of the Crown to make every possible investigation, and if in the course of these investigations with our experts, the conclusion is come to that the accused is not guilty or that there is a reasonable doubt, it is the duty of the Crown…to say so, or if the conclusion is come to that he is not guilty, not to make an arrest
- The purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime

Decision to Prosecute

Charge screening – pre or post

- Police generally make the decision to charge someone themselves (most provinces including AB)
    - Post-charge screening → police ask for advice after, but prosecutor will decide if case is to follow
- In Quebec and New Brunswick, Police do not lay charges without the consent/advice of the prosecutors
    - Pre-charge screening → police ask prosecutor for advice before charge

Standard for prosecution (test to be applied in order to decide in every case whether the prosecution should continue) – outlined in the crown policy manual

- **Evidentiary threshold** – strength of evidence necessary to justify a prosecution
    - Different jurisdictions use different standards
    - **"Reasonable likelihood of conviction"** – (AB) in your assessment of the evidence, if you don't think there is a reasonable chance of the accused being prosecuted, you have to drop the charges
- **Public interest to continue the prosecution**
    - Public interest factors (punishment, alternatives, culpability, harm, wisdom of law, restitution, investigative integrity)

- "Reasonable likelihood of conviction" **(if this does not exist you cannot continue) AND "public interest to continue the prosecution"**
    - Have to make sure that the two factors don't bleed into each other
    - Reality is that in some types of cases, there is some leakage between the two standards (under reporting of crimes for example)

Two mechanisms for discontinuing prosecution

- Withdrawals
- Stays ➔ Efficiency and cost considerations are legitimate concerns

Plea bargaining – same considerations are required – can't charge unless threshold met

Plea Bargaining and Guilty Pleas

What should a court do in deciding whether to accept a guilty plea?

- To constitute a valid guilty plea, the plea must be **voluntary, unequivocal and informed**
- However, even though an appellant's plea of guilty appears to meet all the traditional tests for a valid guilty plea, the court retains a discretion, to be exercised in the interest of justice, to receive fresh evidence to explain the circumstances that led to the guilty plea and that demonstrate a miscarriage of justice occurred
- Section 606 (1.1) of the ***Criminal Code*** – a court may accept a plea of guilty if it is satisfied that the accused:
    - Is making the plea voluntarily; and
    - Understands
        - That the plea is an admission of the essential elements of the offence,
        - The nature and consequences of the plea, and
        - That the court is not bound by any agreement made between the accused and the prosecutor

Prosecutorial Discretion

- "Prosecutorial discretion" is a term of art. It does not simply refer to any discretionary decision made by a Crown prosecutor. Prosecutorial discretion refers to the use of those powers that constitute the core of the Attorney General's office and which are protected from the influence of improper political and other vitiating factors by the principle of independence
- Difficult, if not impossible, to challenge this decision. It refers to the core powers of the Attorney General's office.. ➔ **can only be overturned if there is an abuse of process (very difficult to prove) ➔ very high threshold would have to be proven that a decision made by a crown was abuse of power**

Discretion (How to prosecute/what to prosecute for)

- prosecute
- stay or withdraw
- plea bargaining
- enhanced punishment
- dangerous offender
- multiple offences
- appeals

Tactics/conduct

- tardiness
- incivility
- abusive cross-examination
- improper addresses
- inappropriate attire

One exception to the idea of that core discretion is only reviewable for abuse of process is when it violates the Charter (i.e. right to disclosure, any mistake or error is potentially reviewable, charter trumps all) ****(see below)

R v Anderson

Issue: Are crown prosecutors constitutionally required to consider the Aboriginal status of an accused when deciding whether or not to seek a mandatory minimum sentence for impaired driving?

Analysis:

- The crown submits that the Notice is a matter of **prosecutorial discretion.** As such, **it can only be reviewed for abuse of process**
- **There are two distinct avenues for judicial review of Crown decision making**: The analysis will differ depending on which of the following is at issue:

1. **Exercises of Prosecutorial Discretion**
    - The fundamental importance of prosecutorial discretion was said to lie, "not in protecting the interest of individual Crown attorneys, but in advancing the public interest by enabling prosecutors to make discretionary decisions in fulfilment of their professional obligations without fear of judicial or political interference, thus fulfilling their quasi-judicial role as 'ministers of justice"
    - Prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it
    - While the Crown Attorney retains the discretion not to disclose irrelevant information, disclosure of relevant evidence is not a matter of prosecutorial discretion but, rather, is a prosecutorial duty
    - Prosecutorial discretion provides no shield to a Crown prosecutor who has failed to fulfill his or her **constitutional** obligations such as the duty to provide proper disclosure to the defence ****

- One of the reasons for prosecutorial discretion is that a decision of the Attorney General, or of his or her agents, within the authority delegated to him by the sovereign is not subject to interference by other arms of government
- **Abuse of process** – refers to Crown conduct that is egregious and seriously compromises trial fairness and/or the integrity of the justice system (bad motives or fundamentally unfair)
    - The burden of proof for establishing abuse of process lies on the claimant, who must prove it on a balance of probabilities. However, where prosecutorial discretion is challenged, the Crown may be required to provide reasons justifying its decision where the claimant establishes a proper evidentiary foundation

2. **Tactics and conduct before the court (reviewable on the basis of correctness)**

Disclosure

- When engaged as a prosecutor, the lawyer's prime duty is not to seek a conviction, but to present before the trial court all available credible **evidence relevant to the alleged crime** in order that justice may be done through a fair trial upon the merits
- The prosecutor should not do anything that might prevent the accused from being represented by counsel or communicating with counsel and, to the extent required by law and accepted practice, should make timely disclosure to the accused or defence counsel (or to the court if the accused is not represented) of all relevant facts and known witnesses, whether tending to show guilt or innocence, or that would affect the punishment of the accused
- The inability of an accused to adequately prepare a defence threatens the fairness of the criminal justice system, and it is desirable that as much discretion and subjectivity as possible be removed from decisions concerning disclosure
    - The fundamental interest in a fair trial of the accused requires that the accused receive from the Crown all information known to the Crown that might reasonably be considered useful to the accused
- Police have a duty to disclose relevant information to the crown, and the crown is obligated to make reasonable inquires to other state agents in regard to relevant information for the case, even if those parties are not obliged to disclose

Review

- If Crown has information and believes it is clearly irrelevant, Crown must say so and give defense an opportunity to contest
    - If Crown says that doesn't have information, must say that either does not exist or does not control
    - If defense contests then it must provide evidentiary foundation for belief that evidence exists or in Crown's control; Crown must then prove not the case

Legal Prohibitions

- Crown may also say that it has relevant material but cannot disclose because it is prohibited by law from doing so
    - i.e. Privilege, court order, legislation
    - Must provide notice and can be contested
- S. 7 of the Charter has constitutionalized a broad right to disclosure

R v Stinchcombe

Facts

- A witness who gave evidence at the preliminary inquiry favourable to the defence was subsequently interviewed by the agents for the Crown.
- Crown counsel decided not to call the witness and would not produce the statements obtained at the interview

Issue: Raises the issue of the Crown's obligation to make disclosure to the defense

Findings

- The purpose of a criminal prosecution is not to obtain a conviction: it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime
- "The fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done"
- The right to make full answer and defense is one of the pillars of criminal justice
- All relevant information must be disclosed subject to the reviewable discretion of the Crown. The material must include not only that which the Crown intends to introduce into evidence but also that which it does not
- All statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that **they are proposed as Crown witnesses**

Defence Counsel

- When defending an accused person, **the lawyer's duty is to protect the client as far as possible from being convicted except by a court of competent jurisdiction and upon legal evidence sufficient to support a conviction for the offence charged**
- Admissions made by the accused to the lawyer may impose strict limitations on the conduct of the defence and the accused should be made aware of this. For example, if the accused clearly admits to the lawyer the factual and mental elements necessary to constitute the offence, the lawyer, if convinced that the admissions are true and voluntary, may properly take objection to the jurisdiction of the court, or to the form of the indictment, or to the admissibility or sufficiency of the evidence, but must not suggest that some other person committed the offence, or call any evidence that, by reasons of the admissions, the lawyer believes to be false
- The lawyer is entitled to test the evidence given by each individual witness for the prosecution and argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged, but the lawyer should go no further than that

Pre-Trial Release & Bail

- **Pre-Trial release and bail mean the same thing in a CDN context**
    - We have an over incarceration problem, over 50% are in remand (before actually being found guilty of an offense)

Presumption of Release and the "Ladder" Approach (*Antic)*

- Section 515 set out strong presumption of release for most offenses
- Must take the presumption of innocence seriously. We have to presume that the least onerous form of release should be imposed.
- In most cases, it is up to the prosecutor to show that release should not be granted
- Bottom rung of the ladder
    - (1) Undertaking (legally binding agreement that you will show up for your trial) → most freedom!
        - Rung #1 Bail without conditions (presumptive form of release, crown has to justify any more restrictive form of release) promise to show for trial
        - Rung #2 Bail with conditions (has to be applied with regard to public safety or showing up in court only)
            - Can't be unrealistic (i.e. can't require an alcoholic to stop drinking if proper safety measures are not put in place)
- Second rung of the ladder
    - (2) Recognizance (with conditions) – A pledge by the accused that if they breach any condition of their bail, then they own the crown money (Acknowledging indebtedness to crown if fail to show up to court)
        - Rung #3 Without sureties and without deposit of money, but with conditions
        - Rung #4 With sureties and without deposit, but with conditions
            - Surety: A third party who cosigns loan (money is not turned over at outset); typically family or friend who steps into the recognizance with the accused – to be holden to the crime and will owe money if accused does not show
            - It is a criminal offence to except a fee in Canada, no bail bondsmen – freely entered into without payment
        - Rung #5 With prosecutor's consent, to a recognizance without sureties but with a deposit of money in an amount directed by the justice with conditions
            - Deposits are not as common as they are in the states (Usually not that much; hundreds/low thousands)
            - the accused will deposit money in the amount of recognizance as insurance against the possibility of the accused not showing for court
            - the cc purports to require the crowns consent for the release but this may not be compatable with section 11 - not clear if it is operative
        - Rung #6 Accused does not reside in the province or within 200km of the court, recognizance with or without sureties, with conditions and with a deposit of money in an amount directed by the justice.
        - Rung #7 if crown can argue none of these option will prevent the accused from showing to trial or would allow the accused to prevent a risk to society then the court can order denial of bail

Conditions of Bail (CC ss.515(4)-(4.2)

- Code specified conditons
- Mandatory conditions
- Other reasonable conditions
- Limitation on what other kinds of conditions can be imposed
    - Purpose of bail: must be tied specifically to the purpose of bail (ensuring court attendance, that accused does not harm while on release and to maintain trust in justice system)
    - Realistic change of compliance: don't want to set up conditions that the accused will likely fail

Reverse Onuses (turns the ladder around, instead of starting with the presumption of release, we start with the presumption of detention)

- Operate within the terms of the normal bail procedure
- Accuded must justify any less restrictive form of release: 1) justify release 2) then justify less forms of release
- ss 515(10)(6), 522 [CC]
    - Growing number of offences:
        - Committing indictable while on bail for another indictable
        - Criminal organization and terrorism
        - Various weapons and drug offences
            - Even if trafficking a small amount (*Pearson)*
            - Because it is possible to get a life sentence for trafficking
        - Not ordinarily resident in Canada
- S. 469 [CC]
    - If charged under this section, you are automatically detained in custody, you have to apply for a special bail hearing at superior court where you will have to show cause for release
    - Distinct category of bail cases that require reverse onus is included in section 469 as well require application to superior court

        - All other offences made to provincial court but here application to superior court and there is no automatic bailing hearing here - formal application (request for bail hearing)
    - Includes:
        - Murder
        - Offenses against the state (Old school provision, very rare now)
- **Grounds** (Cr. C. s. 515(10))
    - The justifications that the Crown can invoke to convince the justice to detain you before trial or impose restrictive forms of release or conditions on you.
    - **(1) Primary (Attendance in Court)**
        - Where the detention is necessary to ensure accused attendance in court in order to be dealt with according too law; concerned about flight risk
    - **(2) Secondary (Public Safety)**
        - Essentially concerned with the risk that accused will commit crimes if released; where the detention is necessary for protection and safety or public… having regard to all circumstances including any substantial likelihood of re-offending or interference with administration of justice if released
    - **(3) Tertiary (Public Confidence)**
        - More rarely used; if detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances including: seriousness of offence, strength of case, nature of offence, lengthy imprisonment
        - Only relevant that by definition when we have already decided that there is no justification for detention because we are concerned the accused isnt going to show and no justification for detention because we are concerned the accused is not going to commit crimes while on release so what other grounds is there? Public confidence - community is going to be upset and fearful

R v Bray

- General Rule: Onus is on the prosecution to justify no bail (Was: s 457(7); Now: s 515(10))
- Reverse Onus Position: Places onus on the accused in some circumstances including murder
    - Reasonable limitation
    - S 11(e) does not address the issue of onus

R v Pugsley

- Under the charter it seems clear that a person who is charged with an offence is entitled to reasonable bail unless the Crown can show just cause for a continuance of his detention
- s 457.7(2)(f) of the code is inconsistent with s 11(e) of the charter, rendering the provision in the Code of no force or effect
    - Places substantial burden on accused

R v Pearson

- The accused was charged under the Narcotics Control Act
    - Justice orders detention
    - Accused gets reasonable opportunity to show why detention is not justified
- Accused was denied bail

Issue: Is this a s 11(e) infringement?

Findings

- **LAMER CJ, MAJORITY**
- section 11(e) creates a basic entitlement to be granted reasonable bail unless there is just cause to do otherwise
- The scope of these special rules is narrow and carefully tailored to achieve a properly functioning bail system – therefore conclude that there is just cause for s 515(6)(d) to depart from the basic entitlement of s 11(e) and to deny bail in certain circumstances – s 515(6)(d) DOES NOT violate s 11(e)

- **McLACHLIN, DISSENT**
- Believes that s 515(6)(d) of crime code, does violate the constitutional right "not to be denied reasonable bail without just cause" s 11(e)
- As the section stands, it can be used to deny bail to people when there is no reason or just cause for denying them bail
    - The section is not proportionate: Does not distinguish between small scale and large scale traffickers

Grounds for Bail

section 11(e) – those charged with an offence have the right not to be denied **reasonable bail** without **just cause**

- However, the legal rights guaranteed by the Charter are not absolute and under s 1 are subject to… "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"
- Denial of bail must occur only in a narrow set of circumstances.
    - The 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

515(10)(b) is sufficiently narrow to satisfy the first requirement under s 11(e).

- Bail is not denied for all individuals who pose a risk of committing an offence or interfering with the administration of justice while on bail.
- Bail is denied only for those who pose a "substantial likelihood" of committing an offence or interfering with the administration of justice, and only where this "substantial likelihood" endangers "the protection or safety of the public"

The accused is to be afforded a reasonable opportunity to show cause why detention is not justified having regard to the primary and secondary grounds in 515(10) (a) and (b)

Excerpt from Penney et al., Criminal Procudure in Canada Bail

Criteria Governing Bail

Subsection 515(10) – (a), (b), and (c) - of the *Criminal Code* – detention of an accused in custody is **justified only on one or more of the following grounds:**

1. Attendance in court: *the primary ground* (a) where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law

- Does the accused have roots in the community? (friends, family, employment, transient, recent newcomer?
- The availability of potential sureties. If someone in the community is willing to act as a surety and prepared to monitor the accused and ensure his or her attendance (and who the Court has confidence in)
- Criminal record is also relevant (won't help if you have one, but depends on type of crimes, perhaps there are no indication of failing to comply with court orders)
- How the accused responds once aware the police are interested in making an arrest? Also known as pre-arrest behaviour (signs you might try to flee or avoid prosecution) – exhibit a willingness to show up to an arraignment and bail hearing helps the accused case)
- Strength of the Crown's case and the potential for a lengthy period of imprisonment (seriousness of offence)

2. Public safety: *the secondary ground* (b) where the detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, or any person under the age of 18 years, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice

- In *R v Morales*, a portion of an earlier version of the subsection was found unconstitutional. "public interest" which was found to be unconstitutionally vague and inconsistent with s 11(e) of the *Charter*
- Public safety is now the key consideration under section 515(10)(b)
- **Detention is justified only when it is "necessary" for public safety. It is not justified where detention would merely be convenient or advantageous**
- Detention should only be ordered if it is clearly more likely than not that, if released, the accused will commit a criminal offence or interfere with the administration of justice and thereby endanger the protection or safety of the public
    i. **Criminal record** of the accused obviously a key consideration. If it is somewhat dated, or is comprised of fairly minor offences, it should not carry much weight
    ii. **Nature of the charge/strength of the case** is also an important consideration, although its use must be approached with some caution
    iii. **Seriousness of the offence** may legitimately militate against release. Detention would be justified where the accused is charged with a brutal and unexplained crime
    iv. **Mental illness and addiction** may also militate in favour of detention, especially if these problems resulted in violent or erratic behaviour (don't want to punish or treat them differently, but if the illness is connected with criminal activity…)
    v. Contemplates that public safety could be endangered by an accused who poses a substantial likelihood of interfering with the administration of justice if released. i.e. attempted to influence witnesses, destroy evidence etc.
    vi. On bail when charged (this looks really bad)

Keep in mind, the tertiary ground only needs to come into play if the first two grounds are unsuccessful (i.e. substantial concerns about showing up in court or public safety do not exist)

3. Confidence in the Justice System (public confidence): *the tertiary ground* (c)

Denial of bail is justified: If the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including

(i) The **apparent strength** of the prosecution's case,
(ii) The **gravity of the offence** (i.e. Concern about public safety in domestic violence perhaps),
(iii) The **circumstances surrounding the commission of the offence**, including whether a firearm was used, and
(iv) The fact that the accused is liable, on conviction, for a potentially **lengthy term of imprisonment** or, in the case of an offence that involves, or whose subject-matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more

- However, no one factor is determinative. The 4 factors should be analysed together, not separately. Consideration of their combined effect in the context of all the circumstances enables the court to determine if it is necessary to deny bail in order to maintain public confidence in the administration of justice
- Fairly strong case for each of the 4 factors above (but mostly without a very serious offence (violent offence) and apparently a very strong case from the crown, it wouldn't make any sense)

R v St-Cloud – "if the crime is serious or very violent, if there is overwhelming evidence against the accused and if the victim or victims were vulnerable, pre-trial detention will usually be ordered"

- The Supreme Court held that it was an error to interpret s 515(10)(c) as a residual ground that would only justify pre-trial detention in rare or extraordinary cases.
- The Court indicated that judges who interpreted the section in this manner were wrongly favoring the minority judgment in *Hall*

Any of the three grounds above (a, b or c) standing alone will be sufficient to justify pre-trial detention

Penney's view

- In our view, Parliament should require judicial confirmation of reasonable and probable grounds to support the charge(s) as a precondition for refusing bail or imposing restrictive bail conditions. Without such a requirement, the current scheme raises serious constitutional concerns.

R v Morales

Facts

- M was charged with trafficking
  - Part of major network
- Was on bail wen he was arrested
- Bail was denied and he argued validity of s 515(10)(b)

Findings

- The criterion of "public interest" as a basis for pre-trial detention under s 515(10)(b) violates s 11(e) of the Charter b/c it authorizes detention in terms which are vague and imprecise – and authorizes a denial of bail without just cause
  - The term gives the courts unrestricted latitude to define any circumstances as sufficient to justify pre-trial detention
  - But held that the public safety ground didn't violate s 11(e) of the charter
- In Pearson, I identified two factors which in my view are vital to a determination that there is just cause under s. 11(e).
  - First, the denial of bail must occur only in a narrow set of circumstances.
  - Secondly, the 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. In my opinion, the public safety component of s. 515(10)(b) provides just cause to deny bail within these criteria.
  - These criteria are met

R v Hall

Facts

- Hall committed a brutal murder
- Received a lot of media attention and created public concern
- Hall applied for bail

Findings

- Hall did not raise either the primary or secondary ground for governing bail
- While the first phrase of s 515(10)(c) (tertiary ground) is unconstitutionally overbroad for permitting denial of bail "on any other just cause being shown", the rest of the section represents a separate and distinct basis
  - Doesn't mean that all of the section is unconstitutional, the loss of the above phrases leaves intact the balance of the section which can stand alone in terms of parliaments intention

The Jury

Two steps for jury selection

1. Assemble a group of potential jurors (Assembling the array)
   - **There is both fed and prov rules regulating who can be summoned**
2. Select a group of 12 jurors from the array to form the jury (Empanelling the jury)

Assembling the Array

Qualifications

- Provincial jurisdiction
  - Qualifications vary from province to province
    - Every province has a jury act
- **Ineligible:** Cannot be on jury (lawyers, articling students, etc.)
  - Some provinces do not allow non-citizens or have been convicted of a crime
  - lawyer/articling student,
- **Exemptions:** Have the choice whether or not to participate
  - Categorical
    - Certain occupations or categories of people have the option → you are in a category so it does not need to be decided on (doctor)
  - Discretionary

        - Someone who can prove that they cannot serve on jury (i.e. because of child care duties)→ judge decides
- Individuals are given a "summons" when selected, it is a court order
- These summons may not ever be delivered due to many factors including the location of the individual and movement of people across the country
- There is a higher than number of indigenous individuals that either don't receive their summons, or are unwilling to participate/respond
- **When selecting the government only has to make a reasonable effort to ensure there is the jury is random and representative of the population**

Challenging the Array – rare and very seldom made

- Sources
    - *Criminal Code*, s. 629 – Partiality, fraud, or willful misconduct
    - *Charter*, ss. 11(*d*) – Right to a fair and public hearing by independent tribunal, 11(*f*) & 15
- Vetting
    - Any information that is discovered about jurors must be disclosed to defense
    - Crown could obtain information about the jurors and exploit it
- Random & representative (*R v Kokopenace*)
    - SCC recently recognized that lack of indigenous representation on juries
        - Need to make reasonable efforts to be inclusive
            - This is difficult though because indigenous people are less likely to respond to summoning than the rest of the population
            - Deliberate inclusion or exclusion is prohibited
            - Selection still needs to be random, but use a database like healthcare rather than voter registry, because pretty much everyone has health care, but not everyone votes

Empanelling the Jury

* After Jurors are assembled, not all of them are empanelled

Exclusion by the Judge

- Excusing jurors (s. 632)
    - Personal interest → outcome of the trial will affect you (could be monetary)
    - Relationship with interested person → all parties (defendant or lawyer, etc)
    - Personal hardship or reasonable cause → juries are not paid much. If taking time off to work on a jury can make this case
    - Public confidence → the judge
- Stand by (s. 633) – May or may not need them (likely not); could be that they indicated a bias towards an individual
    - These will affect the impartialness of the decision the individual will make

Challenge for Cause

(a) General Procedure

- Most challenges allege that some potential jurors are partial to the other side
    - **"not indifferent"** – some reason to think the juror will not be able to carry out their duties based on the evidence and the law given to them
- **The Test (For challenges for cause):**
    - Widespread bias
        - In the community from which the jury is selected
    - Incapable of setting aside
- If the air of reality threshold is met, the challenging party may question jurors about their possible partiality
- The questions must be approved by the judge
- The merits of the challenge are made by the "two jurors who were last sworn"

(b) Applying to Challenge for Cause

- Potential jurors are presumed to be impartial
- The party applying to challenge must show that there is a "realistic potential for…partiality"
- To convince the court to approve the challenge, the party must generally show that
    - A widespread bias exists in the community in which the jury was selected; **and**
    - That some jurors may be incapable of setting aside this bias, despite trial safeguards, to render an impartial decision
- If the judge agrees, he will allow questions to be asked one by one to potential jurors
- **The most common challenges are based on:**
    - **Exposure to pre-trial publicity** (i.e. jurors will have a pre-determined notion of guilt or innocence)
        - Mere reporting of facts about the case would not normally justify a challenge for cause (neutral reporting does not count)
        - The reporting itself must be biased or misleading towards the accused (might pervert or askew the juror's ability to decide the case based on merits and continue up to and close to the trial)

        - Successful challenges often involve extensive publicity that is critical of the accused and extends close to the beginning of trial
    - **Racial bias**
        - Based on race of defendant and/or race of victim
        - Often subtle and subconscious and thus difficult to counter with judicial directions
        - Where widespread bias is shown, it will be reasonable to infer that "some people will have difficulty identifying and eliminating their biases"
        - Racial challenges should be allowed on the basis of widespread bias alone, the second element of the air of reality test need to be addressed
        - Has to show that bias actually exists in the community from which the jury pool is drawn
        - Courts have refused to permit challenges on the basis of the accused's sex, youth, homosexuality and HIV positive status
        - Any not white accused essentially gives you the right to challenge
        - *R v Parks, R v Williams* (see below)
    - **Bias against people accused of certain types of offences** (Rarely Accepted)
        - Courts have rarely accepted challenges based on the generic nature of the offence, including cases involving drugs, guns, sexual violence and domestic violence
        - Courts have sometimes been willing to permit challenges based on more specific aspects of the case (street gangs in a local community, anti-police advocacy group)
        - Courts have allowed jurors to be questioned about their relationships with or views about police in cases where the accused or complainant is a police
        - The nature of the offence does not bias the jury pool. Biased towards heinous crimes but also biased towards convicting innocent people of a heinous crime. Cancels each other out

Process for challenge for cause

- Party advancing the challenge would ask the jury a few questions
    - Questions are vetted by the judge and opposing counsel. And there are only a few questions
- The trial judge would then make the decision if the individuals are suitable to act on the jury
    - Old way was to have two individuals that were on the jury act as the triers of the jury
    - Peremptory challenges?

Peremptory Challenges

- Under section 634 of the *Criminal Code*, the accused and prosecutor may challenge an equal, limited number of potential jurors peremptorily, and may be exercised without cause or explanation
- The parties are supplied with the names, occupations and addresses of potential jurors. Typically, this is all the information you are allowed when deciding who to peremptorily challenge
- If the first potential juror is not successfully challenged for cause, the accused must choose whether to use a peremptory challenge. If not, the prosecution may do so. For the second juror the prosecutor must choose first, and so on in alternating order
- Maximum number
    - s 634 of the Code, the accused and the prosecutor can make peremptory challenges of 4 to 20 prospective jurors depending on the seriousness of the charge
- Procedure (don't need cause, can just challenge)
    - Alternate between crown and defense if they want to use their challenge; if challenge will be excluded
    - If the juror would have otherwise been excluded based on a challenge for cause, the party that elected the challenge will not use their challenge
    - Occurs after the challenge of cause
- Discrimination (ripe for potential discrimination) → exclusion has been done on a discriminatory basis

R v Parks

Facts

- Accused (a black Jamaican immigrant) was convicted of second degree murder of a white man
    - Accused wished to ask prospective jurors whether their ability to judge without bias was affected by:
        - The fact that drugs were involved
        - The fact that the accused was black and the victim was white
    - Trial judge declined

Issue: Should accused have been able to question jurors?

Judgment: Yes – Questioning should be permitted in all such cases where the accused requests an inquiry

Findings

- Presumption that jurors will perform their duties accordingly to their oath must be balanced against the threat of a verdict being tainted by racial bias
    - There is a realistic possibility of discrimination when the accused is black

R v Williams

Facts

- Aboriginal man was charged with robbery
- He wanted to rely on *Parks* to question prospective jurors about the fact that he was Aboriginal and the victim was white

Issue: Does evidence of widespread bias in a community against aboriginals raise potential partiality?

Findings

- A judge exercising the discretion to permit or refuse challenges for cause must act on the evidence and in a way that fulfills the purposes of s 638(1)(b) – **to prevent persons who are not indifferent between the Crown and the accused from serving on the jury**
- Racial prejudice against the accused may be detrimental to an accused in a variety of ways. The link between prejudice and verdict is clearest where there is an "interracial element" to the crime or a perceived link between those of the accused's race and the particular crime
- Ultimately, it is within the discretion of the trial judge to determine whether widespread racial prejudice in the community, absence specific "links" to the trial, is sufficient to give an "air of reality" to the challenge in the particular circumstances of each case
- Absence evidence to the contrary, where widespread prejudice against people of the accused's race is demonstrated at a national or provincial level, it will often be reasonable to infer that such prejudice is replicated at the community level

Ratio: Where the accused establishes that there is a realistic potential for partiality, the accused should be permitted to challenge prospective jurors for cause under s 638(1)(b)

Jury Unanimity

- s 649 of the *Criminal Code* makes it a summary conviction offense for a juror to disclose any information relating to the proceedings of the jury unless in connection to the investigation and trial of the offence of obstruction of justice in relation to a juror

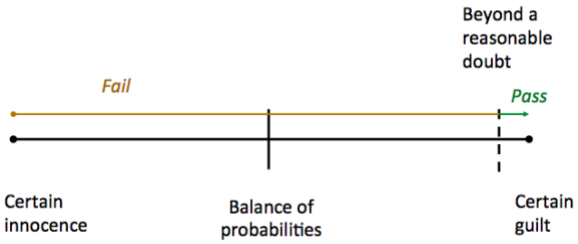
Quantum (strength/magnitude) and Burden of Proof

- Burden of proof tells you which party has to prove the issue
- Standard of proof tells you the extent to which the issue has to be proved (how much proof is required)

Terms

- Balance of probabilities is the standard. 50% ideally, roughly in the middle **
- Burden of proof tells you which party has to prove the issue
- Standard of proof tells you the extent to which the issue has to be proved (how much proof is required)

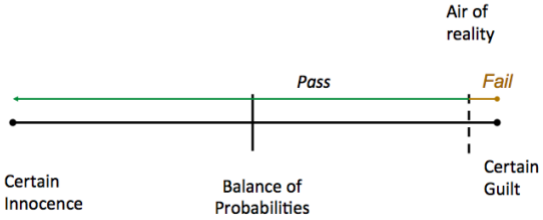
Persuasive Burden (Prosecution)



Default approach is to put the burden of proof on the crown
Crown must prove beyond a reasonable doubt
If the crown fails to prove a single element of the offence, the result will be an acquittal.

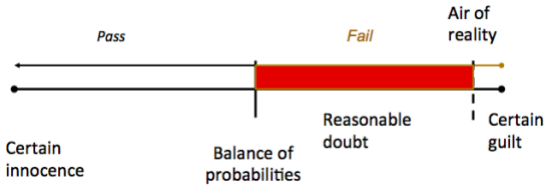
➔ Beyond a reasonable doubt → much closer to certain guilt than the middle (but not sure exactly where it lies)
Very onerous standard on the prosecution
➔There can be some doubt, but there can't be any reasonable doubt
➔ Fail anything between certain innocence to before beyond reasonable doubt

Evidential burden (Defence)
**Move left to right: obligation not to prove on any particular standard that the issue should be resolved in favor of a particular defence



- Not a burden of proof (or persuasion)
- Need to raise the issue of innocence
    - Point to some evidence in the case that is capable of proving with an air of reality
        - Crown must then meet their burden of proof to disprove defence
        - i.e. proving self defense beyond air of reality will make it so the crown must then meet their burden of proof to disprove defence (beyond a reasonable doubt)
        - If Crown cannot do this then = Acquittal
- What do we need then? We can think of it as the converse of beyond a reasonable doubt
    - If the accused faces an evidential burden on an issue, then they have to raise a reasonable doubt
    - This is also called establishing an air of reality to the thing that the evidential burden attaches to
        - i.e. law of sexual assault. One of the things the accused might face is an evidential burden to show that there was a belief in consent
        - i.e. self defense. In a criminal case, where the defense of self defense is raised, the accused bears the burden of establishing an air of reality
    - If the accused has this evidentiary burden, then they must be able to point to some evidence that says "that's enough to raise a reasonable doubt"
        - We don't have to prove consent or self defense, fair from it, we merely have to raise a reasonable doubt on this issue
    - Once that is accomplished, now the burden falls back on the prosecution to DISPROVE that issue beyond a reasonable doubt
        - i.e. proving that he did not act in self defence beyond a reasonable doubt is still a burden on the crown
    - This makes it slightly easier on the crown if there is really no credible evidence on the issue
        - requires the defense have to show SOME reasons as to why the defense should be included and streamlines the trial process
- Does evidential burden violate section 11(d)?
    - No it does not. There is still no possibility of conviction despite the existence of a reasonable doubt

Persuasive burden (Defence) – Reverse Onus



- Only relevant in rare cases (i.e. constitutional challenges)
- Defense must meet the balance of probabilities as standard of proof
- When this occurs you have to go beyond reasonable balance of probabilities and get past air of reality
- Issue: Allows people to be convicted without meeting the burden of beyond a reasonable doubt
    - Someone can be convicted even if there is a reasonable doubt that you are guilty
        - Potential violation of s 11(d)

Charter - s11. Any person charged with an offence has the right … (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal. …

- In order to be against section 11(d), needs to be justified by section 1 in for a reverse onus to apply
    - **Section 11(d)** provides that the accused has the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal"
- But statute always trumps law. If we define an offense in such a way that the defense has to prove it, then they have to prove it!
- Until the charter was enacted that was the case. But with s 11(d), we now have the presumption of innocence enshrined with a constitutional right

Facts

- Manslaughter vs Murder
- Judge says the accused will have to prove it. If he can prove on a balance of probabilities that he didn't intend to do it, then he can be convicted of a lower offense
    - Upper judges say no no no, this is not how this works, the prosecution has to prove guilt
- Woolmington, after a trial at the Somerset Assizes at Taunton on January 23, at which, after an absence of one hour and twenty-five minutes, the jury disagreed, was convicted at the Bristol Assizes on February 14 of the wilful murder of his wife on December 10, 1934, and was sentenced to death
- He appealed to the Court of Criminal Appeal, on the ground that the learned judge had misdirected the jury by telling them that in the circumstances of the case he was presumed in law to be guilty of the murder unless he could satisfy the jury that his wife's death was due to an accident

Issue: Was Woolmington denied his right to the presumption of innocence (11d)?
Judgment: Yes, appeal allowed and conviction squashed

Findings

- If the jury are either satisfied with this explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted
- "One golden thread" running "throughout the web of the English common law"
- Viscount Sankey – "throughout the web of the English Criminal Law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner's guilt subject… to the defence of insanity and **subject also to any statutory exceptions**"
    - Burden on the proof is always on the crown beyond a reasonable doubt

Ratio

- If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal
- When dealing with a murder case the Crown must prove (a) death as a result of a voluntary act of the accused and (b) malice of the accused
- For malice may be implied where death occurs as the result of a voluntary act of the accused which is (i) intentional and (ii) unprovoked
- If the jury are either satisfied with this explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted

Statutory Exceptions to 11(d)

- In order to be against section 11(d), needs to be justified by section 1 in for a reverse onus to apply
    - **Section 11(d)** provides that the accused has the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal"
- But statute always trumps law. If we define an offense in such a way that the defense has to prove it, then they have to prove it!
- Until the charter was enacted that was the case. But with s 11(d), we now have the presumption of innocence enshrined with a constitutional right

R v Oakes

s 8 Narcotics Control Act

If the accused fails to establish that he was not in possession of the narcotic for the purpose of trafficking, he shall be convicted of the offence charged.

- If you are in possession of drugs, you must prove that you were only using them for yourself, and not with the intent of trafficking
    - This does allow conviction with reasonable doubt
- ***Oakes*** found that this provision is too broad, does not differentiate between small amount and large amount of drugs
    - Act has now been repealed, and replaced (may be more specific provisions now)

Facts: Mr Oakes was caught with 10 vials of this viscous substance. Illegal to possess it and traffic it

Analysis:

- Unless we can justify the above act based on section 1 of the charter, it is not allowed
- Reverse onus was not justified under section 1. The provision was not rationally connected to the objective
- "The assumption of innocence confirms out faith in humankind; it reflects the belief that individuals are decent and law-abiding members of the community until proven otherwise"

Ratio: any statutory instruction that allows for the possibility of conviction despite the existence of a reasonable doubt, infringes on section 11 d of the charter (presumption of innocence which is now constitutionalized), unless justified under section 1 of the charter

R v White

In the ***White*** case – *Criminal Code,* s. 237(1)(a)

- …where it is proved that the accused occupied the seat ordinarily occupied by the driver of a motor vehicle, **he shall be deemed** to have had the **care or control** of the vehicle **unless he establishes** that he did not enter or mount the vehicle for the purpose of setting it in motion;
    - However, the Crowns argument failed. Still need beyond a reasonable doubt
    - But were **justified under section 1 of the Charter** for public safety reasons stemming from drunk driving

R v Keegsta

***Criminal Code*, s. 319(3)(*a*)** (*Keegstra*)

No person shall be convicted of an offence under subsection (2) [Hate speech]
(a) if he establishes that the statements communicated were true…

- Even if the crown can prove all of those things, if I can prove that my comments are true, then I'm going to be acquitted
- If I can prove that on a balance of probabilities that my comments were truthful, 51% would be fine
- When we put the burden on the defense, we provide the possibility of a conviction with a reasonable doubt

- Crown would have to prove that the method was hateful, directed towards a specific group etc.
- **Justified under section 1 of the Charter**

R v Morrison

- Criminal code, s 172.1(3)
- Evidence that the person...was represented to the accused as being under age is in the absence of evidence to the contray, proof that the accused believed that the person was under that age
- Police create a character who is allegedly under age who represents to the accused that she is under age
- There was a representation she was underage so we are going to presume that representation
- Accused need to point to some evidence that he did not believe that presumption
- May think it does not because it only proposes evidentiary burden, a burden to show there is an air of reality
    - SEE RECORDING

Mandatory presumption

- In the absence of evidence to contrary, such and such will be presumed
- There is another concept that is used in some statutory provisions – *mandatory presumption*
    - "in the absence of evidence to the contrary" that an accused was guilty of the offence of living off the avails of prostitution once the prosecution had proven that the accused was habitually in the company of prostitutes ***Excerpt from Downey*** – but it was found to violate 11 (d). Who knows why or how (Penney doesn't understand what the court was thinking)
    - Difference between this and a reverse onus is that it never said **established,** all it it said was **in the absence of evidence to the contrary**. All you would have to raise is a reasonable doubt, an air of reality. It is just an evidentiary burden. No possibility of conviction despite a reasonable doubt

Jury instructions: standard of proof

- Balance of probabilities
- Reasonable doubt (*Lifchus, Starr)*
    - Non intuitive concept of reasonable doubt
    - Reasonable doubt is not an everyday concept, much closer to absolute certainty than anything else