Law 599: Law and Policing

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Lecture 1: Introduction

Course Objectives

- Review the foundations and applications of the law in these topic areas
    - Role of judicial participants
    - Detention and arrest
    - Search and seizure
    - Use of Force
    - Critical Incident Command
    - Police Accountability

Lecture 2: Role of the Crown and Policing

Outline

1. Role of the Crown
2. Relationship between the Police and Crown
3. History of Policing
4. Legislative Framework
5. Policing in Alberta
6. Peace Officers
7. Other
8. Police Powers

Role of the Crown

- ***Boucher v The Queen***
    - "It cannot be over-emphasized that 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. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must be done fairly. The role of a prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life where there can be none charged with greater responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings."
    - Excludes notions of winning and losing, there is no conviction quotas
- **Chief Justice Fraser in *R v Karaibrahimovic***
    - "Therefore, the proposition that Crown counsel are limited to weak, timid and non-compelling advocacy without similar restrictions on defence counsel is not one we accept. … the Crown's obligation is to seek the truth, not to win at any cost … Crown counsel must have the freedom to pursue the Crown's position in a convincing, dynamic and eloquent fashion, always recognizing their special position in serving justice."

Responsibility of the Crown Prosecutor in Alberta

- **Alison Redford - Minister of Justice and Attorney General**
    - Crown prosecutors within the Criminal Justice Division are agents of the Attorney General of Alberta and are responsible for the conduct of all prosecutions falling within the jurisdiction of the Criminal Justice Division. To facilitate the on-going excellence in the conduct of these prosecutions and to assist in maintaining trust in the criminal justice system, the discretionary decisions made by Crown Prosecutors, many of which are

difficult and sometimes unpopular, must be reached in a manner that is objective, fair, transparent and consistent.
    - Not a popularity contest

Standards of Conduct (Alberta Justice Guideline)

- Serve the general public's interest, and seek to uphold the rule of law and the integrity of the criminal justice system.
- Respect the honour and dignity of his or her role and profession, maintaining the highest professional standards of honesty and fairness.
- Be, and appear to be, consistent, objective, **impartial and independent,** and seek to avoid all conflicts of interest that might undermine his or her independence or that of the Attorney General…. Not motivated by political pressures

The Relationship Between the Police and the Crown

- Although Crown Prosecutors work closely with investigators, the separation between their respective roles is of fundamental importance to the proper administration of justice

Evidence

- **Absolute Truth**
    - Crown not required to prove absolute truth otherwise no one would be convicted
- **Beyond a Reasonable Doubt (not proof to an absolute certainty)**
    - Criminal standard; is there enough credible and reliable evidence to convict?
    - Judge or jury is convinced BRD that the essential elements of the offence have been proven, including identity of the accused as the culprit
    - "I think Bob robbed the bank because he went out for an expensive dinner and is usually broke, was in town the bank was robbed, and that's his bank. He was also heard three months earlier saying he was so desperate for money he would consider robbing a bank and his car was found parked on the street the same day and time the bank was robbed and a mask the robber was wearing was spotted in his car. A teller at the bank also saw Bob when he took his mask off and his fingerprints were found at the counter."
- **Balance of Probabilities**
    - Enough evidence to convince a reasonable person that the allegation is more likely to be true than false (51% or more)
    - Standard in civil suits
    - "I think Bob robbed the bank because he went out for an expensive dinner and is usually broke, was in town the bank was robbed, and that's his bank. He was also heard three months earlier saying he was so desperate for money he would consider robbing a bank and his car was found parked on the street the same day and time the bank was robbed and a mask the robber was wearing was spotted in his car. A teller at the bank also saw Bob when he took his mask off."
- **Reasonable and Probable Grounds (RPG)**
    - Police must meet this test before arresting or charging someone
    - Need enough evidence to justify an honest belief that the accused committed the offence
    - "I think Bob robbed the bank because he went out for an expensive dinner and is usually broke, was in town the bank was robbed, and that's his bank. He was also heard three months earlier saying he was so desperate for money he would consider robbing a bank and his car was found parked on the street the same day and time the bank was robbed and a mask the robber was wearing was spotted in his car"

- **Reasonable Suspicion**
    - Average and ordinary person would share if they knew what an officer knew; a belief that something could be true
    - "I think Bob robbed the bank because he went out for an expensive dinner and is usually broke, was in town the bank was robbed, and that's his bank"
    - Can be a justifiable legal basis for some police action
        - Ex: Standard for search warrants
- **Mere Suspicion/Hunch**
    - Speculation, rumour, innuendo
    - "I think Bob robbed the bank because he went out for an expensive dinner last night"

<u>Police VS Crown Role</u>

- **The Separation of Roles (*Dix v Canada ABQB)***
    - In Canada there is a functional, legal, and ethical division between the police and prosecutors. The police conduct the investigation. Prosecutors conduct the in-court prosecution. There is a good reason for that division, as it assists in ensuring objectivity and fairness. If a prosecutor is intrinsically involved in the investigation, there is a greater risk that he or she will lose objectivity when it comes time to assess the strength of the case and hence making a determination about whether there is reasonable and probable cause to lay charges and to have the police proceed.
    - This is different from the United States and depictions on social media

<u>Police Decision to Law Charges</u>

- Investigate alleged offence(s)
- Reasonable grounds to believe an offence(s) has been committed
- If RPG, police lay charge(s) (Swear Information - outlining the information of the charge)
    - Crowns do not lay charges

<u>Crown Decision to Prosecute</u>

- Carefully review court brief and charge(s)
- Scrutinize potential evidence and potential defence theories
- Crowns read the case keeping in mind to ensure the requisite standard for initiating or continuing a prosecution is, and continues to be, met (ongoing assessment - even within a trial)

<u>Standard for Prosecution</u>

1. **Sufficiency of Evidence**
    - Reasonable likelihood of conviction (provincial) and the reasonable prospect of conviction (federal)
        - Our criminal justice system is not an inquiry into truth. It is not about whether an accused actually committed a crime **but whether there is sufficient evidence to prove that he committed it (proof BRD)**
        - To put it simply = It is not about whether an accused 'did it' but whether the Crown can prove it BRD. Considers:
            a. What material evidence is likely to be admissible;
            b. The weight likely to be given to the admissible evidence; and
            c. The likelihood that viable, not speculative, defences will succeed
        - ****Bottom line = "A reasonable jury, properly instructed, is more likely than not to convict the accused of the charge(s) alleged."**

2. **Public Interest**
    - Once it is determined that the Crown can conduct a viable prosecution and there is a reasonable likelihood of conviction, it must be considered whether the Crown should do so and pursue the conviction
    - No hard and fast rules
    - Circumstances of the offence, offender, and community concerns
    - Public Interest **IN FAVOUR** of prosecution
        a. Serious allegations
        b. Conviction likely to result in significant sentence
        c. Considerable harm to victim
        d. Use or threatened use of a weapon
        e. Vulnerable victim (child, elder, spouse, etc.)
        f. Prior criminal history of offender
        g. Position of trust or authority
        h. Offence motivated by hate, prejudice or bias
        i. Offence committed while offender under court order (probation, bail, CSO, peace bond)
        j. Prevalence of the offence
    - Public Interest **AGAINST** prosecution
        a. Conviction likely to result in insignificant penalty
        b. Desired result can be achieved without a criminal prosecution (i.e. diversion or alternative measures)
        c. Genuine mistake or misunderstanding
        d. Minor loss or harm occasioned from an isolated incident (a young person stealing a chocolate bar vs an adult stealing electronic devices)
        e. Law is of a trivial or technical nature or obsolete or obscure
    - Public Interest Additional Factors
        a. Age, intelligence, physical health, mental health, and other personal circumstances of the witness or victim
        b. Personal circumstances of the Accused including his or her criminal record
        c. The length and expense of the prosecution when considered in relation to the social benefit to be gained by it (there is a lengthy Charter argument)
        d. Elapsed time since the offence
        e. Need to maintain public confidence in the administration of justice

<u>Prosecutorial Discretion</u>
- Whether to proceed with or discontinue a prosecution
- Whether to proceed summarily or by indictment
- Whether to accept a guilty plea to a lesser offence
- What sentence to put forward
- Whether to consent to re-election
- Whether to direct indict
- **Early Case Resolution & "Plea Bargaining"**
    - What is it?
    - Why do we do it?
    - **Truth** → CJS would collapse if every trial ran. Some people who are charged do wish to plead guilty due to personal, financial reasons, etc., and the Crown sees there is a benefit

to society for those who want to resolve their matters and enter guilty pleas instead of running a trial
    - Benefit to the accused's rehabilitation, to victims who don't need to relive matters in a courtroom, etc., so Crown's can discount traditional sentences
- Prosecutorial Discretion must be Principled (principled decision making)
    - **PROPER** Considerations:
        - Prosecution standard (above)
        - Alberta Justice directives & guidelines
    - **IMPROPER** Considerations:
        - "Let the judge decide" is not aligned with the obligations of a Crown
        - Conflict of interest
        - Unprepared
        - Get along with defence counsel
        - Political pressure
        - The victim or investigator's wishes
- Prosecutorial Discretion can only be challenged as an abuse of process (because it puts the administration of justice into disrepute)

<u>Independence Principle</u>

- The distinct line between roles and responsibilities, allows both investigators and Crown Prosecutors to exercise discretion independently and objectively, and forms the system of checks and balances upon which the justice system depends.
- This does not mean consultation is not allowed (between Crown and police)
- Just simply means neither party takes instructions from the other as to how to exercise its independent discretion.

<u>Pre-Charge Consultation between Police and Crown</u>

- It is advantageous and beneficial for there to be pre-charge consultations between police and Crown. Opportunity to sit with the charging officer to discuss and give advice to the police about the charge (police can listen or not listen to the advice)
- This avoids any appearance of disagreement by charges having to be withdrawn or altered because of an assessment by the Crown that there is no reasonable expectation of conviction.
- In the majority of cases pre-charge consultation is not practical.
- Agreements have been entered into between the Crown and Police Agencies in Alberta on pre-charge consultation, particularly regarding complex cases.
- **Informal Pre-Charge Consultation Advisable in Alberta…**
    - All homicide cases
    - Other major crimes
    - Complex cases
    - Police uncertain of appropriate charge to lay
    - Questionable whether evidence supports charge (is the evidence admissible)
- **What Advisory Crown Cannot Do… (this is not the same Crown who prosecutes the case)**
    - Decide who to investigate and for what crimes.
    - Decide how to structure an investigation.
    - Decide what investigative tools or techniques to use.
    - Witness security arrangements.
    - Write warrants
    - Can't advise whether you have reasonable grounds to arrest.

    - Should generally avoid pre-charge witness interviews.
- **What an Advisory Crown Can Do…**
    - Focus a manageable prosecution
    - Ensure Disclosure meets legal requirements
    - Offer Legal advice:
    - Crown Wiretap Agent
    - Immunity agreements
    - MLATs
    - Management and Restraint Orders
    - Extradition
    - Assess the reasonable likelihood/prospect of conviction
    - Sealing/Unsealing Orders and Vetting
    - Bail hearings

Legal Advice From Crown to Police

- **Solicitor-Client Privilege** → Applies between the communications of Police and Crown when a legal opinion was sought (***Shirose*** (1999))
- Generally the police force is the client – not the individual police officer

History of Policing

- Role of citizens - preserve law and order
- **England**
    - Statute of Winchester 1285
    - London Bow Street Runners (1749) first organized police force
    - 1829 establishment of the Metropolitan Police Force by Sir Robert Peel (bobbies)
    - 1839 Police Act
- **Canada**
    - 1815 permanent constables first hired in Halifax
    - 1834 Toronto established their police force
    - Rebellions of 1837-38 in Lower Canada (present day Quebec) spurred the colonial government to create larger and more expansive police forces under control of the executive
    - Debate was centered on provincial vs. municipal police forces throughout the mid-19th century.
    - 1867 – by Confederation, most police forces were under municipal control. Eventually replaced by provincial ones.
    - Under the Constitution, responsibility for public policing is primarily a provincial matter.
    - The provinces, through *Provincial Police Acts*, have followed the British tradition and delegated the responsibility for public policing to municipalities when they are large enough to take it on.
    - Provinces exercise considerable control over policing by paying part of the cost of municipal policing and by penalizing municipalities that fail to maintain standards.
- **RCMP**
    - 1873 RCMP was created as Canada's North-West Mounted Police in response to the massacre of a group of Indigenous people by American whiskey traders in Cypress Hills.
    - Canada also created a federal "Dominion Police" whose primary purpose was to guard government buildings, but the more well-known federal force was the North-West Mounted

Police created in 1873. It took on both civil and military duties as they patrolled the Canadian frontier
    - In 1920, the Dominion Police and RNWMP merged into the RCMP. Over the next 2 decades they moved toward state security and emerged as a national organization.
- **Alberta**
    - In 1917 the Royal Northwest Mounted Police left Alberta
    - Alberta Provincial Police active between 1917 and 1932
    - 1932, Alberta requested RCMP return as a provincial police force
- **Edmonton**
    - 1892 → Edmonton Police Department created
    - 1911 → EPD hired the first aboriginal police officer in Canada
    - 1912 → First female EPD officer
    - 1919 → EPD first police force to use an airplane in a police pursuit
    - 1947 → Some formal training introduced to the department
    - 1955 → Basic Training Class Number One graduated in with 28 members completing the course
    - 1989 → EPD renamed to Edmonton Police Service
- **Calgary**
    - 1885 → Calgary Police Force created
    - 1935 → Due to the depression, the city put the police force on part time.
    - 1943 → Two police women hired on a temporary basis
    - 1946 → First full time police woman hired
    - 1973 → CPF renamed to Calgary Police Service
    - 1975 → Computerization of police files
    - 1995 → First female police chief in CPS

Legislative Framework

- Responsibility for enacting criminal law rests with the federal government (s.91(27) of the Constitution Act, 1867)
- Administration of justice rests with the provinces (s.92(14) of the Constitution Act, 1867)
- At all times police must, in conducting their duties, ensure their actions are consistent with:
    - *The Charter of Rights and Freedoms*
    - Federal and Provincial Statutes
    - Any agreements governing police service

Office of Police Officer

- Provinces and federal government have concurrent jurisdiction to create a police officer
- Status of a police officer can vary depending under what legislation the police force has been established
- Officers have duties and powers under statute and common law
    - Duty = To investigate a crime
    - Power = Ability to put up a police line to prevent crime scene contamination
- Purpose of the police is to preserve law and order

Police Officer

- There is no definition of “police officer” in the *Criminal Code*, except in sec 462.48 (17) in relation to Part XII.2 Proceeds of Crime
- **The *Criminal Code* does speak to the status of a police officer under Section 2**

- Peace officer includes
  - (a) A mayor, warden, reeve, sheriff, deputy sheriff, sheriff's officer and justice of the peace,
  - (b) A member of the Correctional Service of Canada who is designated as a peace officer pursuant to Part I of the Corrections and Conditional Release Act, and a warden, deputy warden, instructor, keeper, jailer, guard and any other officer or permanent employee of a prison other than a penitentiary as defined in Part I of the Corrections and Conditional Release Act,
  - (c) **A police officer**, police constable, bailiff, constable, or other person employed for the preservation and maintenance of the public peace or for the service or execution of civil process, (c. 1) A designated officer as defined in section 2 of the Integrated Cross-border Law Enforcement Operations Act, when
    - (i) Participating in an integrated cross-border operation, as defined in section 2 of that Act, or
    - (ii) Engaging in an activity incidental to such an operation, including travel for the purpose of participating in the operation and appearances in court arising from the operation,
  - (d) An officer within the meaning of the Customs Act, the Excise Act or the Excise Act, 2001, or a person having the powers of such an officer, when performing any duty in the administration of any of those Acts, (d.1) an officer authorized under subsection 138(1) of the Immigration and Refugee Protection Act,
  - (e) A person designated as a fishery guardian under the Fisheries Act when performing any duties or functions under that Act and a person designated as a fishery officer under the Fisheries Act when performing any duties or functions under that Act or the Coastal Fisheries Protection Act,
  - (f) The pilot in command of an aircraft
    - (i) Registered in Canada under regulations made under the Aeronautics Act, or
    - (ii) Leased without crew and operated by a person who is qualified under regulations made under the Aeronautics Act to be registered as owner of an aircraft registered in Canada under those regulations, while the aircraft is in flight, and
  - (g) Officers and non-commissioned members of the Canadian Forces who are
    - (i) Appointed for the purposes of section 156 of the National Defence Act, or
    - (ii) Employed on duties that the Governor in Council, in regulations made under the National Defence Act for the purposes of this paragraph, has prescribed to be of such a kind as to necessitate that the officers and non-commissioned members performing them have the powers of peace officers; (agent de la paix)

- ***Police Act* Definitions**
  - Peace officer → Means a person employed for the purposes of preserving and maintaining the public peace
  - Police officer means an individual who:
    - (a) Is appointed under section 36 as a police officer or a chief of police,
    - (b) Is a member of the Royal Canadian Mounted Police,
    - (c) Is appointed under section 5 as a police officer, **or**
    - (d) Is a member of the provincial police service
  - Police service means:

(a) A regional police service;
(b) A municipal police service
(c) The provincial police service (RCMP in Alberta)

- Provincial Police Service → Means the Royal Canadian Mounted Police where an agreement is entered into under section 21(1)
- **Sec 21 =** Authorizes the Minister of Justice to enter into contract with the federal government for the R.C.M.P to provide policing services
  - Defines the duties and liabilities of police officers within the province whether policed by the R.C.M.P or not (in addition to the officer's status under the R.C.M.P. Act)
- **Sec 33(1) =** Police officers serving outside their municipality
  - Allows for the Minister, with the consent of the chair of the respective commission to direct a police officer of that service to serve in any part of Alberta that is outside the boundaries of the area for which the commission is responsible

- ***Police Act* = Qualifications of Officers**
  - Sec 34 → To be eligible to be appointed as a police officer, a person must be:
    (a) A Canadian citizen or Canadian permanent resident
    (b) Meet the other qualifications specified by the regulations and the commission (a regional area of jurisdiction)
  - **Sec 38(1) → Every police officer is a peace officer and has the authority, responsibility, and duty**
    (a) To perform all duties that are necessary
      (i) To carry out the police officer's functions as a peace officer,
      (ii) To encourage and assist the community in preventing crime,
      (iii) To encourage and foster a co-operative relationship between the police service and the members of the community, and
      (iv) To apprehend persons who may lawfully be taken into custody, AND
    (b) to execute all warrants and perform all related duties and services
  - Sec 38(2) → A police officer has jurisdiction throughout Alberta
  - Purposefully very broad to allow police to carry out their duties and corresponding powers associated with those duties
- ***Peace Officer Act***
  - Sec 2 → This act does not apply to police officers under the *Police Act*
    - Peace officers are NOT police officers, although police officers are considered peace officers
    - Police officers look to the *Police Act*
  - Sec 2 → Defines a peace officer as a person referred to in s. 7(1)
  - Sec 7(2) → Appointment of a peace officer must include the following terms
    (a) The authority, responsibility and duties of the peace officer,
    (b) The territorial jurisdiction of the peace officer,
    (c) The weapons the peace officer is authorized to carry, if any,
    (d) The equipment the peace officer is authorized to use, if any,
    (e) The title the peace officer is authorized to use
    (f) Any terms and conditions the Minister considers appropriate, and
    (g) Any other matter specified in the regulations
- ***Royal Canadian Mounted Police Act***

- Solicitor General of Canada may enter into agreements with provinces and municipalities to provide RCMP policing (this is the case in Alberta where RCMP act as provincial police force essentially)
- Regulated by BOTH the *Police Act* and the *RCMP Act* (sets out their duties)
- Section 18 → Defines the duties of a police officer as follows:
    (1) To perform all duties that are assigned to peace officers in relation to the preservation of the peace, the prevention of crime, and of offences against the laws of Canada and the laws in force in any province in which they may be employed, and the apprehension of criminals and offenders and others who may be lawfully taken into custody;
    (2) To execute all warrants, and to perform all duties and services in relation thereto, that may, under this Act or the laws of Canada or the laws in force in any province, be lawfully executed and performed by peace officers;
    (3) To perform all duties that may be lawfully performed by peace officers in relation to the escort and conveyance of convicts and other persons in custody to or from any courts, places of punishment or confinement, asylums or other places; and
    (4) To perform such other duties and functions as are prescribed by the Governor in Council or the Commissioner.

- ***Provincial Police Service Agreement (PPSA)***
    - Between the Government of Alberta (GOA) and the Government of Canada
    - Establishes the RCMP as the provincial police service in Alberta
    - Solicitor General and Minister of Public Security of Alberta in cooperation with the Commanding officer of RCMP "K" Division establishes provincial policing priorities annually in the form of a three-year business plan

Peace Officers and Police Officers (NOT TESTING ON THIS)
- In Alberta peace officers are also peace officers under the *Criminal Code*
    - They are a person employed for the preservation and maintenance of the public peace
    - Sec 7(5) of the *Peace Officer Act* and sec 2(c) of the *Criminal Code*
- In Alberta police officers are also peace officers under the Criminal Code
    - Sec 38(1) *Police Act* and s. 2(c) of the *Criminal Code*

Policing in Alberta

Three Types of Policing in Alberta
1. Provincial
2. Municipal
3. Indigenous

Who Pays for Policing?
1. **Provincial Policing (70 percent)**
    - Provided to every town, village, and summer village not greater than 5,000 and every county, municipal district and Metis Settlement regardless of population
    - Alberta Solicitor General (ASG) provides this service through the Provincial Police Service Agreement (PPSA) with the federal government for RCMP policing services
2. **Municipal Policing**
    - If greater than 5,000 citizens then the municipality must pay for its own police service. Three Options:
        1. Regional Police Service (2 or more municipalities)

2. Independent Municipal Police Service
3. Municipality pays the federal government or the provincial government to deliver police services (through PPSA)

3. Indigenous Policing

- RCMP delivers policing services for most Indigenous communities
- Some Indigenous communities have worked with the Federal and Provincial Government for alternative arrangements:
- Tripartite Agreement (fed gov pays 52%, prove remainder)
- Community Tripartite Agreement

ASIRT (Alberta Serious Incident Response Team)

- Jurisdiction over all sworn police officers in Alberta
- Investigate incidents or complaints involving serious injury or death of any person, and matters of a serious or sensitive nature, that may have resulted from the actions of a police officer
- Governed by s.46.1 of the *Police Act*

Peace Officers

- Public Security Peace Officer (PSPO)
- Person who works to uphold and enforce certain laws and regulations in Alberta
- Powers and Authority given under the Peace Officer Act
- They are NOT police officers

Commercial Vehicle Enforcement

- Commercial Vehicle Enforcement officers are appointed as peace officers
- Enforce Provincial and Federal Acts and Regulations
- Also ensure compliance with National Safety Code requirements and Commercial Vehicle Safety Alliance Standards

Fish and Wildlife Officers

- Authorized to enforce provincial and federal legislation and regulations
- Ensure Albertans understand and follow legislation that protects fish and wildlife through education, prevention, and enforcement
- Administer programs for human/wildlife conflict management
- Provide support for public safety programs

Security Services and Investigators

- Security Programs Department of the Ministry of Justice and Solicitor General
- Not peace officers and have no special status in law
- Part of the Law Enforcement and Oversight Branch
- Administers the Security Services and Investigators Act (and Peace Officer Act, Body Armour Control Act, First Nations Policing and Law Enforcement Professional Standards)
- Governed by the Security Services and Investigators Act which covers the following services:
    - Security services
    - Loss prevention
    - Executive protection
    - Patrol dog services
    - Alarm responders
    - Investigators

- Locksmiths, etc

Police Powers

- Police duties and powers are DIFFERENT
- Statute and Common Law impose broad general duties on the police but provide them with only limited powers to perform those duties
    - **Ex. Statutory Authority/Power** = Sec 253 of the *CCC* there is a statutory authorization that allows police officers to take breath samples from someone who they believe their ability to operate a vehicle is impaired by alcohol
    - This is a statutory authority to interfere with that individual's right
- In performing their police duties, the police often interfere with the individual liberty or freedom of people
- Police conduct is not rendered lawful merely because it assisted in the performance of the duties assigned to police.
- If the authority for police power does not exist in statute, an analysis must occur under the common law to determine if the police action is justifiable

Common Law Powers

- ***R v Waterfield*** (England Case) - The Waterfield Test
    - In order for a police power to be justifiable in a given context, the interference with the liberty must be
        1. Necessary for the carrying out of the particular police duty and
        2. It must be reasonable having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference.
    - The Waterfield Test involves this careful balancing of competing interests.
    - "…was the officer acting within the course of his duties and was the conduct in question a justifiable use of police powers associated with that duty?"

Ancillary Powers Doctrine

- The Waterfield Test was imported into Canadian jurisprudence in the pre-Charter case of ***R v Dedman***.
- After the Charter's adoption, the SCC effectively integrated the analysis of the impact on Charter rights into the Waterfield Test. The test is now appropriately referred to as the **Ancillary Powers Doctrine**, reflecting the fact that police powers are ancillary to police duties.
- Police powers are ancillary to their duties (provide the necessary tools to do duties - so need authorizing power to do a duty)
- The Ancillary Powers Doctrine has repeatedly been applied to determine whether, and in what circumstances, a particular power exists at common law (see ***Mann*** about police power of detention***, Godoy*** about police power to do a 911 interview***, and Kang-Brown*** to use a sniffing dog)
- Ancillary Powers Doctrine Analysis → To determine whether a particular police action that interferes with individual liberty is authorized at common law (***Fleming v Ontario*** at paragraphs 38-55)
    - **Two Stages:**
        1. Does the police action at issue fall within the general scope of a statutory or common law police duty?
        2. Does the action involve a justifiable exercise of police powers associated with that duty?

- **The Court must consider at the second stage whether the police action is reasonably necessary for the fulfillment of the duty. Three factors are weighed in answering that question:**
    1. The importance of the performance of the duty to the public good,
    2. The necessity of the interference with the individual liberty for the performance of the duty, and
    3. The extent of the interference with the individual liberty

- ***R v Godoy*** → If Police receive a hang up 911 call and they arrive at the residence where the 911 call came from, can the police enter the residence? Would this interfere with an individual liberty? Yes, entering an individual's personal residence. In Godoy, Mr. Godoy opened the door and said there was no problem and the police should move on. However, police felt they had a duty to do more than just take his word for it
    1. **Does the police action at issue fall within the general scope of a statutory or common law police duty?**
        - Focuses on duty NOT power here
        - The police had a common law duty to protect life and therefore needed to do something to adhere to this duty
    2. **Does the action involve a justifiable exercise of police powers associated with that duty?**
        a. **The importance of the performance of the duty to the public good,**
            - Very important; would be horrible that in the face of a 911 hang up call, that police would not be able to follow up on the situation taking place in the home
        b. **The necessity of the interference with the individual liberty for the performance of the duty, and**
            - Yes, was the only way to ensure everyone in the home was safe and life was being preserved
        c. **The extent of the interference with the individual liberty**
            - Court found it was proportionate that the police would have the ability for a short time to force entry only to determine the extent of the concern (limited interference and is justifiable)
            - No search unless other authorities permitted them to do so

<u>Police Discretion</u>

- Police have a duty (both in statute and common law) to enforce the criminal law. But are the police automatns that must always charge people upon them doing a criminal offence?
- ***R v Beaudry*** (2007) → They have discretion to decide **<u>not to</u>** engage the judicial process. The use of discretion must be justified subjectively and objectively:
    1. Subjectively = The discretion must be exercised honestly and transparently, on the basis of valid and reasonable grounds.
    2. Objectively = The discretion must consider the material circumstances and be proportionate to the seriousness of the conduct and in the public interest.

<u>Protections for Officers Carrying out Duties</u>

- No citizen or officer is above the law
- ***R v Shirose*** (1999) → Everyone, from the highest officers of the state to the constable on the beat, is subject to the ordinary law of the land.

- The authority of a police officer to break the law in order to catch a criminal must be found in specific legislation, such as those in the *Criminal Code*.
- Primary protections lie in sections 25 and 27 of the Criminal Code which use the words "required or authorized by law"
- **Required or Authorized by Law**
    - Section 25(1) (deals with use of force by police officers) is meant to
        - Protect an officer from a reasonable mistake of fact, not a mistake of law (ignorance of the law is no excuse)
        - Protect an officer from any criminal or civil proceedings where the officer was acting in good faith and the officer's conduct was reasonable in the circumstances.
        - Protect an officer using the least amount of force necessary to perform his/her duty.

<u>Reasonable Standard</u>

- The law does not expect absolute certainty from officers when carrying out his/her duties
- Apply the "reasonable person standard"

<u>Acting in the Execution of Duty</u>

- Only when an officer exercises the powers conferred by statute or derived from the common law (ancillary doctrine) can it be said the officer is acting in the "lawful execution of his duty"
- ***R v Biron*** (1975) → Whether or not an officer was engaged in the execution of his/her duty had to be determined in relation to the circumstances that were apparent to the officer at the time he/she made the arrest.
    - If an accused is acquitted at trial, this does not mean the officer was not acting in the execution of their duty upon arrest

<u>Police Authority to Commit Crimes</u>

- ***R v Brennan*** → In the absence of some statutory authorization, police are not entitled to break the law in order to carry out their duties
- Sec 25.1 *Criminal Code* provides justification for acts or omissions that would otherwise constitute an offence

<u>Liabilities</u>

- Legislation exists federally and in the provinces protecting police officers from civil liability while in the execution of their duty (i.e. course of their employment)
    - Sec 3 of the federal Crown Liability Act
    - Sec 39 of the Police Act
    - ***Hill v Hamilton-Wentworth*** → Tort of negligent investigation exists in Canada
        - **Negligent Investigation**
            - Police are not immune from liability under the Canadian law of negligence
            - A duty of care in negligence is owed to suspects being investigated
            - Consistent with values and spirit underlying the Charter
            - Standard = How a reasonable officer in like circumstances would have acted (applied in a manner that gives due recognition to the discretion inherent in police investigation)
        - **Damages for Negligent Investigation**
            - A cause of action in negligence is established when
                1. The plaintiff shows he or she suffered compensable damage, and

2. A causal connection between the breach of the standard of care required and the compensable damage

- Imprisonment from wrongful conviction constitutes personal injury
- Lawful penalties imposed on guilty persons do not constitute compensable harm

Figueiras v Toronto Police Services Board, 2015 ONCA 208 (Ont. C.A.)

Facts:

- Paul Figueiras had come to the downtown area of Toronto with friends during the G20 summit in order to demonstrate in support of animal rights. Mr. Figueiras and his friends were stopped by police officers and told that in order to proceed they would have to allow their bags to be searched.
- Mr. Figueiras refused to consent to the search and explained that the search violated his civil rights
- When Mr. Figueiras refused to consent to a search of his bag, Sargent Charlebois wrapped his arm around Mr. Figueiras' shoulder, grabbed his shirt and said, "you don't get a choice." He then pushed Mr. Figueiras and told him to "get moving."
- Figueiras applied for a declaration that his freedom of expression, peaceful assembly, and liberty rights under ss. 2(b), 2(c), and 7 of the Canadian Charter of Rights and Freedoms had been violated. Mr. Figueiras also made a claim in tort for battery against Sgt. Charlebois, as a result of the physical altercation that had occurred.
- During his testimony, Sgt. Charlebois explained that he and his five-officer team had decided to stop anyone who "looked like a demonstrator" and require them to submit to a search of their bags in order to enter the area. However, on cross-examination he acknowledged that he had not been instructed to implement this tactic and officers in other areas had not taken similar actions. As a result, many people were permitted to enter the area without submitting to a search.

Issue:

- The officer did not have the statutory authority to require consent to a search in order to walk down a public street. Thus, the issue in dispute was whether the officers' actions were authorized under the ancillary powers doctrine under the common law

Held:

- The Ontario Court of Appeal granted Mr. Figueiras' appeal in holding that officers had infringed his Charter right to freedom of expression and his common law liberty rights, and had committed the tort of battery.

Application Judge:

- Held that the officer's conduct was authorized under the ancillary police powers test from *R v Waterfield.*
- In assessing stage 2 of the test, ***if the execution of the police conduct in question involve a justifiable use of the powers associated with the engaged statutory or common law duty,*** the application judge concluded that preventing demonstrators from proceeding lest they submit to a search was a minimal intrusion on the rights of the demonstrators. Relied on the officers' duty to preserve the peace and the power to cordon off areas to protect foreign dignitaries as found to exist in ***R v Knowlton***
- In regards to Mr. Figueiras' claim that his ss. 2(b) and 2(c) rights had been infringed, the application judge held that there could be no violation of these rights as the police conduct was found to be lawful. The judge held that if a breach of the Charter had been found, it would have withstood sec 1 test as a reasonable limit on Mr. Figueiras' rights
- In regards to the claim for battery, it was held not to have surpassed the de minimis level.

- In addition, the conduct was found to be justified under s. 25 of the Criminal Code, which permits a peace officer to use "as much force as is necessary" in the course of law enforcement, provided that the actions taken are on reasonable grounds and authorized by law.

Court of Appeal:

- **Overturned the lower court's decision**
- Justice Rouleau noted how the Supreme Court has altered the Waterfield test over time to integrate the common law with Charter-protected rights in order to define the limits of common law police powers.
- Some police powers are derived from statute – for example the duty to preserve peace stems, in part, from s. 42(1)(a) of the Police Services Act and the Criminal Code. Additional police powers flow from the common law 'ancillary powers doctrine'
- The 'ancillary powers doctrine' draws attention to a fundamental distinction: there is a difference between police duties and police powers. In Simpson, Doherty J.A. explained that, "The law imposes broad general duties on the police but it provides them with only limited powers to perform those duties." In other words, while it is the duty of police officers to preserve peace and prevent crime, and these duties are broad in scope, the powers that may be lawfully deployed in the execution of those duties are not coextensive – rather they are narrowed by competing social value
- **The Waterfield Test and Preliminary Concerns**:
- Found two infringements: freedom of expression under the Charter and the common law right to travel unimpeded down a public highway.

1. **Does the action in question fall within the general scope of a police duty imposed by statute or recognized at common law?**
    - Rouleau J.A. found no statutory basis for the police power exercised by Sgt. Charlebois and his team. While it is true that, at common law, the police have the power to limit access to certain areas, this power is not unlimited – rather its use must be confined to the 'proper circumstances' including fires, floods, car accidents, and crime scenes
    - Rouleau J.A. defined the police power exercised by Sgt. Charlebois as "the power of individual police officers to target demonstrators and, where no crime is being investigated or believed to be in progress, but with the intention of preventing crime, to require that they submit to a search if they wish to proceed on foot down a public street"
2. **Is the police action reasonably necessary for the carrying out of the particular duty in light of all the circumstances?**
    - The action was stopping the accused and searching their bad
        (a) The importance of the duty to the public good;
            - The events triggered police duties to keep the peace, and prevent property damage or personal injury.

        (b) The extent to which it is necessary to interfere with liberty to perform the duty; and
            - The conduct of Sgt. Charlebois was not rationally connected to the duty being performed because the conclusion that persons such as Mr. Figueiras were responsible for the previous days' violence was vague and speculative.
            - The Court found that "sporadic stops by one group of officers of only those persons who appeared to be demonstrators would have virtually no impact". Objectively, the measures taken by Sgt. Charlebois and his team did not serve to materially reduce the risk that a breach of peace would

develop – anyone turned away could have simply taken alternate routes to the security fence.

(c) The degree of interference with liberty

- Sgt. Charlebois searched everyone – regardless of whether there were particularized grounds to do so. The blanket application of the search requirement could not be described as having caused 'minimal impairment'. To the contrary, the Court of Appeal found that interference with the rights of would-be protestors created a greater sense of state interference (targeting all those with backpacks - implicit bias)
- If the police had searched everybody without targeting those with bags, then the interference would likely be reasonable and a police power upheld

- Police conduct did not pass the Waterfield test and as such, was not authorized by law. The Court issued a declaration to the effect that Mr. Figueiras' rights were violated
- Sgt. Charlebois lacked the common law police power to stop Mr. Figueiras in order to search him, and he therefore could not rely on s. 25(1) of the Code to shield himself from civil liability for the tort of battery.

Fleming v Ontario 2019 CarswellOnt 15608 (SCC)

Facts:

- Fleming was arrested while walking to a flag rally in response to a Six Nations' protest occupying a piece of Crown land.
- The police became aware of the flag rally in the months preceding it and had developed an operational plan, given the contentious atmosphere in the community which had on numerous occasions culminated in violent clashes between the two sides.
- Counter-protestors were informed that they were prohibited from entering the occupied property. Fleming stepped onto the property to avoid police vehicles, an officer arrested him to prevent a breach of the peace.
- Fleming refused to drop the flag he was carrying. He was then forced to the ground, handcuffed and moved to a jail cell for more than two hours.
- Fleming filed a statement of claim against the Province of Ontario and the officers involved in his arrest, claiming damages for assault, battery, wrongful arrest and false imprisonment. He also alleged violations of his ss. 2(b), 7, 9 and 15 of the Charter.

Issue:

- Must determine whether the police have a common law power to arrest someone who is acting lawfully in order to prevent an apprehended breach of the peace. Does the common law permit police officers to arrest individuals who have not committed any offence, who are not about to commit any offence, who have not already breached the peace and who are not about to breach the peace themselves?

TJ:

- Accepted that the police have a common law power of arrest to prevent an apprehended breach of the peace, provided that the apprehended breach is imminent and the risk of it occurring is substantial. However, she concluded on the facts of the case at bar that the officers' conduct had not been authorized at common law. She found that by taking the actions they did, the officers had not been "preserving the peace". She noted that a "breach of the peace" involves violence and harm to individuals and that, since neither had occurred in this case, there had been no actual breach of the peace. She also found that any apprehended breach of the peace by the approaching D.C.E. Protesters had not been imminent and that the risk of it occurring had not been substantial. She explained that the officers' concern over Mr. Fleming's safety had been

based not on the actual events of the day, but rather on a generalized concern rooted in past violence. The trial judge stated that there were less invasive options that could have defused the situation, such as setting up a buffer zone between Mr. Fleming and the protesters.

Holding:

- **Liberty Interest at Stake** → The liberty interest at issue is the capacity to arrest law-abiding individuals is an immense restriction of the liberty of those arrested without wrongdoing. Further, it violates the constitutionally protected guarantee of "[f]freedom from arbitrary arrest and detention"
- **Waterfield/Ancillary Doctrine Test:**

1. **Does the action in question fall within the general scope of a police duty imposed by statute or recognized at common law? (easily met)**
    - The purported police power was the power to arrest an individual acting lawfully in order to prevent a breach of the peace by others.
    - This power falls within the general scope of policy duties to preserve the peace, prevent crime, and protecting life and property.
2. **Is the police action reasonably necessary for the carrying out of the particular duty in light of all the circumstances? (FAILED)**
    - The SCC took issue with the purported power because it "would expressly be exercised against someone who is not suspected of any criminal wrongdoing or even of threatening to breach the peace"
    - They contended that it "would be difficult to overemphasize the extraordinary nature of this power," and that it was the Court's responsibility to "guard against intrusions on the liberty of persons who are neither accused nor suspected of committing any crime"
    - The SCC found that although "preserving the peace and protecting people from violence are immensely important," the preventative power to arrest law-abiding individuals is not reasonably necessary to further this purpose. The SCC noted that the police already have a "statutory power of arrest that can be exercised should an individual resist or obstruct an officer taking other, less intrusive measures" to diffuse a situation. They, thus, have other methods of preventing breaches of the peace, so the purported power of arrest was not reasonably necessary.
    - The SCC notes that the mere fact that the arrest of Fleming was effective in preserving the peace does not justify the interference of liberties. If a non-intrusive or less intrusive measure is possible, it will always be preferred over an intrusive police measure.

Ratio:

- Being arrested when you have not engaged in any criminal activity, and are not about to do so, is an immense and unjustified restriction on personal liberty. Fleming is an important victory for limiting overreaching police powers in an era where aggressive policing tactics are becoming increasingly normalized.

R v Edwards, 2014 ABPC

Facts: The accused are brothers who are charged with causing a disturbance by shouting. The brothers had driven to a bar and parked their vehicle on a street. When they returned to the area where their car was parked the police were investigating a homicide where a body had been located. The police put a yellow tape across the area where the homicide had taken place and officers were posted to prevent the public access to the area. The Edwards vehicle was parked in the crime scene area. The officers denied the Edwards brothers access to their vehicle

Issues:

(1) Can the police, in the scope of their duties, prohibit access of the public to property within the boundaries of a crime scene? Also, were the actions of the police here a justified use of their powers which are associated with the duty?

Analysis:

- Is it within the power of the police to exclude the public's access to crime scenes pursuant to a statute or the common law?

Relevant Legislation

- 38(1) Every police officer is a peace officer and has the authority, responsibility and DUTY
  - (a) to perform all duties that are necessary
    - (i) to carry out the police officer's functions as a peace officer,
    - (ii) to encourage and assist the community in preventing crime,
    - (iii) to encourage and foster a co-operative relationship between the police service and the members of the community, and
    - (iv) to apprehend persons who may lawfully be taken into custody, and
  - (b) to execute all warrants and perform all related duties and services.
- There is no express authority within the Act to allow the police specifically to exclude persons from crime scenes. If such authority exists, it **must be based upon common law principles**

Determining whether police conduct which interferes with individual liberty is lawful

- **Doherty in *R v Simpson (1993)* → "The law imposes broad general duties on the police but it provides them with only limited powers to perform those duties.** Police duties and their authority to act in the performance of those duties are not co-extensive. Police conduct is not rendered lawful merely because it assisted in the performance of the duties assigned to the police. **Where police conduct interferes with the liberty or freedom of the individual, that conduct will be lawful only if it is authorized by law. That law may be a specific statutory power or it may be the common law**"
- ***Simpson*** involved a warrantless search of the accused pursuant to a motor vehicle stop; the search produced cocaine, and the accused was convicted of possession for the purpose of trafficking. The conviction was quashed. The CA determined that the motor vehicle stop was not authorized by the *Narcotic Control Act* nor the *Highway Traffic Act,* and therefore, considered whether the officer's conduct was authorized by the common law. Although the officer acted within the course of his duty in investigating suspected criminal activity relating to the crack house, the interference with the accused's liberty could not be justified, as there was no articulable cause for the detention. The drugs were thereby discovered pursuant to an infringement of the actions of s. 8 and s. 9.

The "Ancillary Power Doctrine" Case Law

- ***Waterfield (1963)***
  - The police suspected that a vehicle owned by one accused and operated by another was involved in a collision. Two police officers came upon the vehicle and tried to inspect the vehicle pursuant to their sergeant's wishes. The owner of the vehicle refused to co-operate and urged his companion to drive away. One officer stood in front of the vehicle and another in back of the vehicle to attempt to stop the vehicle. The vehicle backed into one of the officers. Both individuals were convicted of assault. On appeal, the convictions were quashed
  - It is probably more convenient to consider what the police was actually doing and if such conduct was prima facie an unlawful interference with a person's liberty or property. **If so,**

it is then relevant to consider whether (a) such conduct falls within the general scope of any duty imposed by statute or recognised at common law and (b) whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty. Thus, while it is right to say in general terms that police have a duty to prevent crime and a duty, when crime is committed to bring the offender to justice, it is also clear that when the execution of these general duties involves interference with the person or property of a private person, the powers of constables are not unlimited

- ***Knowlton (1973 SCC)***
    - The Soviet Premier was visiting Edmonton. The police cordoned off an area in front of the hotel where the Premier was to stay. The accused wished to take photos of the Premier in the area that was cordoned off. The police refused him access. He attempted to push past the officers and was arrested. He was charged with obstructing a peace officer.
    - The police, having interfered with the liberty of the appellant, or more precisely, with his right to circulate freely on a public street **[need an interference with liberty FIRST]**
    - Applied ***Waterfield***
        - (1) Whether such conduct of the police falls within the general scope of any duty imposed by statute or recognized by common law, and
        - (2) Whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of the powers associated with the duty
    - Court held that the police were duty bound to provide security measures for the Premier.
- ***Dedman (1985 SCC)***
    - Court considered whether stopping the accused pursuant to a check stop program designed to detect impaired drivers was within the scope of a statutory or common law police power. The officer had detected an odour of alcohol after conversing with the accused, and demanded that he supply a sample for analysis in a roadside screening device. Accused had provided an inadequate sample and was charged with failing to comply.
    - Applied ***Waterfield***
    - **Interference of liberty =** The right to circulate in a motor vehicle on the public highway as a 'liberty." However, the right is not a fundamental liberty like the ordinary right of movement of the individual, but a licensed activity that is subject to regulation and control for the protection of life and property. It may be said that the random vehicle stop in this case was prima facie an unlawful interference with liberty since it was not authorized by statute.
    - **(1) Whether the random stop fell within the general scope of the duties of a police officer under statute or common law.**
        - Court held it fell within the general scope of the duties of a police officer to prevent crime and to protect life and property by the control of traffic
    - **(2) The interference with liberty must be necessary for the carrying out of the particular police duty and it must be reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference.**
        - The right to circulate on the highway free from unreasonable interference is an important one, but it is a licensed activity subject to regulation and control in the interest of safety. The objectionable nature of a random stop is chiefly that it is made on a purely arbitrary basis, without any grounds for suspicion or belief that the particular driver has committed or is committing an offence. It is this aspect of the random stop that makes it capable of producing unpleasant psychological

effects for the innocent driver. These effects, however, tend to be minimized and the stop would be of short duration and of slight inconvenience. Weighing these factors, I am of the opinion that having regard to the importance of the public purpose served, the random stop, as a police action necessary to the carrying out of that purpose, was not an unreasonable interference with the right to circulate on the public highway. It was not an unjustifiable use of a power associated with the police duty, within the Waterfield test. I would accordingly hold that there was common law authority for the random vehicle stop

- ***R v Williams (1986 NSCA)***
    - The appellant refused to obey an officer's instruction to abstain from proceeding down a certain road, and argued that there was no authority for the officer's conduct.
    - Upheld the conviction on the grounds that it (1) fell within the general scope of duties of a police officer to protect life and property by the control of traffic and (2) the direction by the officer was reasonably necessary and justifiable under all of the circumstances.
- ***R v Kephard (1988 ABCA)***
    - There is no exhaustive definition of the powers and obligations of the police, but they are at least those [keeping the peace, or preventing crime and protecting property from criminal injury] and they would further include the duty to detect crime and to bring an offender to justice.
- ***R v LSL (1991 SKQB)***
    - The accused provided a false identity to a police officer
    - The statutory and common law duties of police officers are extensive and onerous. Our society demands and expects more of its police force by way of prevention of crime and protection of persons and property than ever before. Police officers cannot meet these expectations unless a corresponding approach is taken respecting the interpretation of their legal authority in acting reasonably and responsibility to prevent and investigate potential crimes.
- ***R v Ferris (1998 BCCA)***
    - Traced the impact of the Waterfield decision upon the relevant Canadian jurisprudence, and in particular, its endorsement by the Supreme Court of Canada
    - It is trite that the general duties of the police include investigating and preventing crime. Discerning the parameters of police authority however is not an easy task
    - ***Waterfield "***converts the issue from one of whether the particular police action was specifically authorized to one of whether it was justifiable"
    - **Test:** The interference with liberty must be necessary for the carrying out of the particular police duty and it must be reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference'.
- ***R v Godoy (1999 SCC)***
    - The police had responded to a 911 call, originating from the accused's apartment; the line had been disconnected before the caller had spoken. Upon answering the door, the accused told police that there was no problem, and refused them entry. An officer prevented the accused from closing the door, and the police entered the residence, where they found the accused's wife, crying, and exhibiting swelling above one eye.
    - The SCC point to the ***Waterfield*** test as being a means of determining whether police conduct which interfered with an individual's liberty was authorized by common law (case then cites the two steps, which are listed above and in notes)

- (1) The police have a power at common law to enter a private dwelling in response to a disconnected 911 call in the circumstances of this case. The police were acting in the course of their duty to 'protect life' which includes preventing death or serious injury.
- (2) The interference with the appellant's liberty in this case was minimal. The police were only in the apartment for a short time and the forced entry was only to determine that there was no emergency and the 911 caller was not in distress. Having received an unsatisfactory answer from the appellant at the door, the police were obligated to enter the dwelling and investigate. Entry into a private dwelling to investigate a disconnected 911 call is justified even if someone answers the knock at the door, where that person is evasive and uncooperative in response to proper police questioning. Court stated "how demoralized would a victim of burglary, sexual assault or spousal abuse be if the culprit was able to get rid of his or her rescuers simply by telling them that 'there is no problem'?" Under all the circumstances of the case, it was a justifiable use of police powers to enter the apartment in response to the disconnected 911 call.

- ***R v Johnsgaard (2003 ABPC)***
  - The accused had been arrested after having observed an incident of what he characterized as "police brutality" on a public street. One officer had advised him that it would be in his best interests to move along, but he had remained at the scene of the incident
  - J Fraser did not deal with the ***Waterfield*** test directly but discussed articulable cause… it is not an offence simply to not do what one is told to do by a police officer. To be culpable the demand must be rooted in a power given to the police in law. It is not enough to be rooted in a general power such as to preserve the peace or prevent crime… If an officer is going to interfere with a citizen's right to circulate freely on a public street, he must have articulable cause
  - ***Simpson*** clearly made this articulable cause standard the measure for investigative detention. Judge Fraser seemed to adopt the articulable cause standard to police interference with the circulation of individuals. In Simpson, Doherty J.A. explained that the phrase had a specified meaning, i.e., the police needed articulable cause that the individual was involved in criminal activity… my reading of his reasons is that he meant that the police must be able to justify their interference with the individual's movements and their direction to that individual. This approach is consistent with the ***Waterfield*** test

Application

- **Was there an Interference?**
  - The accused had a right to access their own vehicle when it was legally parked in a public area; there is no statute granting police the power to prevent individuals from accessing personal property that has the misfortune of becoming part of a temporary crime scene
- **Was the Interference Justifiable?**
  - Whether it was justifiable will depend upon whether the interference was necessary for the carrying out of the murder investigation, and whether it was reasonable, considering the nature of the liberty interfered with, and the importance of the public purpose served by that interference
  - The interference was justifiable, in the circumstances. Preventing the accused from intruding upon an area that may have contained incriminating evidence was a justifiable use of police powers associated with investigating the murder. The temporary inconvenience to the accused was necessary to properly secure evidence from the scene.

- Restricting the public from accessing their own property on city streets constitutes an interference with individual liberty, but can also constitute a justifiable use of police powers associated with the common law duty to investigate crime.

Lecture 3: Detective Presentation

- No notes!

Lecture 4: Criminal Defence Lawyer Presentation

- No notes!

Lecture 5: Detention and Arrest

Identification

- **General Rule: People do not have to identify themselves to the police** (they may have a moral or social duty to help the police but no legal duty)
- While it may be a mark of a good citizen to identify oneself when asked to do so, a police officer must not use force to compel someone to identify themselves if they refuse, otherwise the officer will be guilty of a criminal assault and liable to civil damages: Koechlin v. Waugh (1957), 118 C.C.C. 24 (Ont. C.A.)
- Section 129(a) of the Criminal Code makes it an offence to willfully obstruct a public or peace officer in the execution of his or her duty. However, the common law has never considered it an offence of obstruction for a person to refuse to identify oneself and thus prevent a police officer from carrying out his/her general duties to investigate crimes

Lawful Authority to Identify

- Police have lawful authority to obtain identification in certain circumstances:
    1. Some legislation specifically requires a person to provide identification upon request
        - Ex: Traffic Safety Act - someone getting pulled over for speeding, the TSA requires you to ID yourself
    2. Where a person has committed an offence, the police require the name of the person in order to issue the ticket, appearance notice or promise to appear. Failure to identify oneself can result in a criminal or provincial obstruction charge

Identification of Arrested Persons

- A police officer can search an individual for identification in the following circumstances:
    1. An officer who has arrested an individual may conduct a nonintrusive search for identification as **incidental to arrest**
    2. An officer who arrests someone for failing to comply with legislation that requires he/she produce identification can **perform a non-intrusive search for identification**

Arrest

- Requires:
    1. Statement by police officer to a suspect that he/she is under arrest and/or
    2. Actual touching of the suspect's body with a view to his/her detention (R v Latimer, [1997] 1 S.C.R)
        - But this is contextual! A lack of touching may still indicate an arrest, such as an arrest by words that if the suspect attempts to leave they will be restrained

Reasonable and Probable Grounds = The Standard of Arrest***

- **Definition provided in R. v. Debot, 1989 CarswellOnt 111 (SCC):** The standard of "reasonable grounds to believe" or "probable cause" is not to be equated with proof beyond a reasonable doubt or a prima facie case. The standard to be met is one of reasonable probability.
- Always a **question of fact** depending upon the circumstances of the case
- Officers must be able to articulate these grounds on both a subjective and objective basis: (***R. v. Storrey***, 1990 CarswellOnt 78 (SCC))
- **SUBJECTIVE**
    - The personal officer must have formed and be acting on reasonable and probable grounds at the time of the arrest
    - An arresting officer must subjectively have reasonable and probable grounds on which to base the arrest.
    - Relied upon by the officer and may be based on experience, skill, knowledge, perception of events, information obtained, etc.
    - The info of third party witnesses does not have to be confirmed prior to the officer acting on it
    - A fact relied upon in establishing grounds that later turns out to be false does not render the belief unreasonable
    - **R v Storrey paras 15-17**
- **OBJECTIVE**
    - Based on the particular set of facts or circumstances, would an ordinary, cautious, prudent person be satisfied that an offence has been committed and that the accused committed the offence (come to the same conclusion as the officer)
    - The police officer's training and experience should be considered when determining objective reasonableness
    - The objective standard is assessed on the basis of what the officer knows at the time that the grounds are formed (modified objective)
    - A reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically they are not required to establish a prima facie case for conviction before making the arrest
    - Ex: We could all form an opinion of whether someone is intoxicated (speech, smell, actions, etc) based on experience, etc., and this opinion is assessed by what an ordinary person would think with the same information known at the time
- **An arrest which is lawfully made does not become unlawful simply because the police intend to continue their investigation after the arrest.**

Powers to Arrest Without Warrant

- Come from statute
- Criminal Code gives private citizens the power of arrest and give peace officers all of the powers of arrest of a private citizen, plus additional powers
- Powers of arrest of a peace officer and a private citizen for offences against a provincial statute are defined by the legislation of each province

Arrest Without Warrant by Anyone (including police but 495 is more expansive)

- **Section 494(1) of the Criminal Code authorizes anyone to arrest without a warrant:**
    - (a) a person whom he **finds committing** an **indictable offence**; or
        - Two meanings in law:

1. A situation where the accused is surprised in the very act of committing the offence
2. A situation where the accused is being pursued immediately after committing the offence

- Indictable offence includes a hybrid offence

- (b) a person who, on reasonable grounds, he believes
  - (i) has committed a criminal offence; and
  - (ii) is escaping from and freshly pursued by persons who have lawful authority to arrest that person

- Section 494(2): A person in "lawful possession" of property (or who has the authority of the owner of the property) can arrest anyone he or she finds committing a criminal offence on, or in relation to that property.
  - (a) at that time; or
  - (b) within a reasonable time after the offence and it is not feasible for a peace officer to make the arrest

<u>Fresh of Hot Pursuit</u>

- Means a continuous pursuit conducted with reasonable diligence so that the pursuit and capture of the offender along with the commission of the offence constitute a single continuous transaction R. v. Macooh (1993), 22 C.R. (4th) 70 (S.C.C.)
- Not necessary for the pursuing officer to have personal knowledge that a criminal offence was committed (i.e. saw it being committed) so long as the officer has reasonable belief that an offence had been committed and he/she saw the offending fleeing or continued pursuit had already begun (someone screaming to an officer that someone just stole their purse)
- Can pursue right into a dwelling house
  - Normally, an officer is not able to enter into a dwelling house but a hot pursuit is an "exigent circumstance" where the courts have recognized the officer can enter the dwelling
- Extends to provincial offences provided that the provincial statute and the circumstances justify an arrest without a warrant
- **Why do the Courts allow this? It is a matter of public policy!**
  - It is more likely that someone fleeing from a scene, they are more likely to be the culprit
  - Fleeing into a home without entry (wait for a warrant) can lead to the destruction of evidence

<u>Arrest ***Without*** Warrant by Police</u>

- **Section 495(1) of the Criminal Code states a peace officer may arrest without warrant**
  1. A person who has committed an indictable offence or who, **on reasonable grounds**, he believes has committed or is about to commit an indictable; OR
     - Allows preventative action
  2. A person whom he find committing a criminal offence; OR
  3. A person in respect of whom he has **reasonable grounds** to believe that a warrant of arrest is in force for that person (even though he or she does not have the warrant).
- **Sec 31 Criminal Code** – Allows a peace officer (and everyone who lawfully assists the peace officer) can arrest anyone found committing a breach of the peace of who is believed on RPG is about to join in or renew the breach of the peace

- Sec 199(2) Criminal Code – Allows a peace officer can take into custody anyone keeping a common gaming home and any person found therein
- Sec.524(2) – Allows a peace officer can arrest without warrant an accused whom he/she believes on RPG has violated or about to violate a release document or has committed an indictable offence after being placed on release

Arrest ***With*** Warrant by Police

- A warrant is a judicial authorization for the police to arrest a person (it is order from a judge)
- It is the lawful authority for the arrest
- Numerous situations outlined in the CC in which a warrant may be issued for the arrest of a person
- Form 7 in the CC used for arrest warrants
    - Provides a list of what arrest warrants can be used for
- Requires demonstration of reasonable grounds
- Ex: Failing to appear for fingerprints, failure to attend court, RPG that an offence has been committed, etc

Arrest in the Public Interest

- **Sec 495(2) of the Code directs a peace officer NOT to arrest a person without a warrant unless also in the <u>public interest</u>**
    - Recall that sec 495(1) permits arrests without a warrant (above)
    - But in practice, this is not usually discussed because of the officer has RPG than they have already met the requirement for
- Sec 495(2)(d) factors that may be taken into account in determining whether accused should be arrested in the "public interest":
    1. Establish the person's identity
    2. Secure or preserve evidence of or relating to the offence and
    3. Prevent the continuation or repetition of the offence or the commission of another offence, and
- Sec 495(2)(e) ensure the person's attendance in court
- Sec 495(3) where a police officer fails to comply with subsection (2), the arrest is still lawful and does not affect the validity of the prosecution

Arrest under Provincial Statutes and Bylaws

- Sec 91(27) CA 1867 authorizes the Parliament of Canada to pass laws relating to the criminal law
- **Provinces have the right to create offences to enforce legislation within their provincial jurisdiction (power to arrest in *Traffic Safety Act*)**
- Whether a power of arrest for provincial offences exists with or without warrant will be referenced in the statute
- Powers to arrest for municipal bylaws will depend on whether the Municipal Act of the province authorized a local municipality to pass a bylaw permitting arrest for the breach of that bylaw
    - Ex: Such as bylaws enforcing covid health orders in Alberta

<u>Detention</u>

<u>Authority to Detain</u>

- **The authority to detain is found in the common law**

- In order to detain someone for investigative detention, police only require a **reasonable suspicion** that an accused is connected to a crime under investigation and that his/her detention is reasonably necessary in the circumstances: ***R v Mann*** [2004] 3 S.C.R. 59

Detention

- A circumstance where a person has been deprived of his/her liberty, but not arrested, through significant physical restraint and/or psychological restraint (just short of arrest)
- Police officer has the right to detain a person if the officer has **reasonable grounds to suspect that the person is criminally involved in the matter under investigation** (***R v Mann*** at para. 45)
- Reasonable suspicion is a lower standard than reasonable belief, but more than a hunch. Officers must point to specific facts to support the reasonableness of his/her actions.
- Not all incidents where police delay or stop someone for a question will be described as a detention in law… an officer who officially detains someone triggers *Charter* obligations
- ***R. v. Grant, 2009 SCC 32:***
    - The SCC attempted to strike a balance between the ability of police officers to investigate crime (important public good) and the right of individuals to be free from state interference with liberty interests
    - The court concluded that an individual's constitutional rights pursuant to s. 9 and 10 of the *Charter* are not triggered in situations that involve no significant physical or psychological restraint
    - **What constitutes "significant" restraint must be addressed on a case by case basis**

Significant Physical Restraint

- Circumstances where the police physically assume control over a person are characterized as a detention, unless the restraint is not significant

Significant Psychological Restraint

- **Psychological detention is established either:**
    1. Where the individual has a legal obligation to comply with a restrictive request or demand **(with legal compulsion)** or
    2. A **reasonable person** would conclude by reason of the state conduct that he or she had no choice but to comply **(without legal compulsion)**
- Determination of a psychological detention is an objective question in which the accused bears the onus of showing, but it also means the accused is not required to testify
- In determining whether there has been psychological restraint, the court will consider such things (see ***Grant and Le***) as:
    1. The circumstances of the encounter as perceived by a **reasonable individual** (e.g. were the police providing general assistance, maintaining public order generally, or were they singling out a particular individual?)
    2. The nature of the police conduct (e.g. What kind of language was used, was physical contact used, where did the interaction occur, who else was around, how long was the encounter?)
    3. The characteristics or circumstances of the actual individual, where relevant (e.g. how old was the individual, how tall or short, was he/she a visible minority, what was his/her level of sophistication?)

Psychological Detention

- The exact lines of detention will often be fluid and highly contentious
- Where a police officer is concerned that his/her actions may lead an individual to believe that he/she is being detained, it is open to the officer to correct that belief by a clear statement to the contrary such as you are not detained and are free to go if you so wish (Grant at para. 32)
- Such clear statements by police will militate strongly against later claims of detention
- ***R v Le 2019 SCC 34***
    - Psychological detention occurs when a reasonable person in the accused's shoes would feel obligated to comply with a police direction or demand and that they were not free to leave (R. v. Grant, 2009 SCC 32 at paras. 30-31).
    - In this case, it was when the police entered the backyard and made contact. There was no statutory or common law power authorizing detention at that point, so it was arbitrary [paras. 25-30, 124-134]
    - The police conduct exceeded the norms of community policing.
    - The investigative purpose of the police is important when assessing whether the detention was arbitrary and whether they were acting in good faith, but is less relevant to determining when detention has occurred.
    - The police were trespassers on private property.
    - The reputation of a particular community or the frequency of police contact with its residents does not in any way license police to enter a private residence more readily or intrusively.
    - The fact that Mr. Le was a member of a racialized community in Canada was an important consideration.
    - **The question is how a reasonable person of similar racial background would perceive the interaction with the police.**
    - Evidence about race relations may inform whether there has been a detention under s. 9, and may, like all social context evidence, be proved in legal proceedings by direct evidence, admissions, or by the taking of judicial notice [paras. 74-106]
    - The courts below erred when they gave undue focus to Mr. Le's personal view that he felt free to leave the backyard and to try and enter the house, as that transformed the detention analysis from an objective into a subjective inquiry [paras. 111-117]

No "*Charter*" Detention

- Delays are not detentions
- A *Charter* detention is not engaged in situations where:
    1. There is no significant legal jeopardy (e.g. a traffic stop to check license and registration)
    2. Police are acting in a non-adversarial role and assisting the public (e.g. 911 call or medical emergency)
    3. Police are involved in generalized investigation and questioning someone, and
    4. Police are seeking to gain control over a crime scene and make initial inquiries

Reasonable Suspicion to Detain: ***R. v. Mann***

- The test as articulated is as follows:
    1. The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances;
    2. Those circumstances must be capable of supporting the officer's reasonable suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence

3. The particular officer must have formed a reasonable suspicion that a particular individual is implicated in the criminal activity under investigation; and
4. Those circumstances must be capable of justifying the nature and extent of interference with the particular liberty at stake

Totality of the Circumstances: ***R. v. Clayton and Farmer***

- **The Supreme Court emphasized the importance of the totality of the circumstances (for determining a *Charter* detention) at para 31:**
- The determination will focus on the nature of the situation, including the seriousness of the offence, as well as on the information known to the police about the suspect or the crime, and the extent to which the detention was reasonably responsive or tailored to these circumstances, including its geographic and temporal scope. This means balancing the seriousness of the risk to the public or individual safety with the liberty interest of members of the public to determine whether, given the extent of the risk, the nature of the stop is no more intrusive of liberty interest than is reasonably necessary to address the risk.

The *Charter* Rights

- The *Charter* guarantees everyone some rights and freedoms
- It also imposes duties on police when investigating a commission of an offence
- If an individual's right has been violated, the *Charter* provides remedies or sanctions in section 24

Protection Against Arbitrary Detention

- **Sec 9 of the Charter provides: Everyone has the right not to be arbitrarily detained or imprisoned.**
- An arbitrary detention is frivolous, unwarranted, and contrary to normal standards
- A detention is arbitrary if it is not based on reasonable grounds to suspect that the detainee is criminally implicated in the activity under investigation (R. v. Simpson)
- An arrest is arbitrary if it is not based on reasonable grounds (objective and subjective) to believe (RPG) the suspect has committed the offence (R. v. Storrey)
- A detention may be arbitrary if it is not reasonably necessary in all the circumstances (R. v. Aucoin)
    - Ex: Highway Traffic Legislation was considered arbitrary where officers could stop drivers without grounds but was saved under sec 1 to protect the public

Charter – Rights on Arrest/Detention

- **Section 10 of the Charter provides: Everyone has the right on arrest or detention**
    a) To be informed promptly of the reasons therefore;
    b) To retain and instruct counsel without delay and to be informed of that right; and
    c) To have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful

Charter – Rights on Detention

- The duties in s.10 of the Charter apply to detention
- A detained person must be told the reason for the detention and provided with the right to counsel.
- The Courts have recognized that, as situations of detention often arise spontaneously and under highly charged circumstances, it may not always be practical for officers to provide Charter rights immediately (R. v. Debot [1989] 2 S.C.R. 1140)

- As soon as the situation is brought under control, the detainee must be informed of his or her Charter rights

Charter: Right to Counsel Without Delay

- "Without delay" means as soon as is reasonably possible, if it is not practicable to retain and instruct counsel immediately
- Becomes an issue with psychological detention as opposed to physical restraint and arrest
- All detainees (whether under arrest or detention) are entitled to be immediately advised of their right to counsel except where considerations of officer or public safety warrant delay or delay is prescribed by limitation set out in law and justified under s.1 of the Charter (R. v. Suberu)
- Question at end of standard caution "Do you wish to say anything?" should be replaced with "Do you understand?" (R.v. GTD)

Charter: Right to Counsel (Informational Rights)

- When informing a detainee of the right to counsel, the police must:
    1. Provide the information in a manner and in language the detainee can understand
    2. At a time the detainee is capable of understanding
        - So if detainee is drunk, may need to wait for a period of time
- If the detainee tries to frustrate the officer's attempts, the officer must make an honest and dedicated attempt to inform the detainee R. v. Tremblay (1987), 60 C.R. (3d) 59 (S.C.C.)
- Where free and immediate preliminary legal advice exists in the jurisdiction, police must advise the detainee that it exists and how such advice can be accessed R. v. Brydges (1990), 74 C.R. (3d) 129 (S.C.C.)
- They must re-inform the detainee of the right to counsel whenever there is a fundamental and discrete change in the purpose of the investigation R. v. Black (1989), 50 C.C.C. (3d) 1 (S.C.C.)

Charter: Right to Counsel (Implementational Rights)

- Police must ensure the detainee has a reasonable opportunity to exercise his/her right to counsel. This means offering the detainee the use of a telephone to contact a lawyer: R v. Manninen (1987), 58 C.R. (3d) 97 (S,C.C.)
- As many telephone calls that are reasonably necessary to retain and instruct counsel
- Right to consult in private
- If detainee indicates they want to consult with a lawyer, all questioning must stop until they have a reasonable opportunity to retain and instruct counsel (R. v. Prosper)
- A detainee can waive the right to counsel – it need not be in writing but must be clear and unequivocal, with full knowledge of the right waived and the effect of the waiver (R. v. Bartle)
- The right to retain and instruct counsel must be exercised with reasonable diligence

Charter: Consequences of Charter Breach

- Sec 24 of the Charter gives a remedy to anyone whose Charter rights have been infringed
- **Sec 24(1) Charter Remedy**
    - Gives everyone whose rights and freedoms have been infringed the right to apply to a court to obtain a remedy
    - Application must be made to a "court of competent jurisdiction" - generally the trial court (a preliminary inquiry court is not a competent court of jurisdiction)
    - Court has the right to award such remedy as it considers "appropriate and just" in the circumstances
- **s. 24(2) Charter Remedy**

- Requires the court hearing the case to exclude evidence obtained as a result of a breach of a constitutional right
- Remedy where "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"
- Therefore, not all *Charter* breaches will result in an automatic exclusion of evidence
- Before the court can grant the s. 24(2) remedy, the accused must establish that he/she has "standing" to bring the application - R. v. Edwards (1996), 45 C.R. (4th) 307 (SCC)
    - Meaning the breach happened to them personally, not someone else or to a place

Section 24(2) Charter Remedy: ***R. v. Grant***

- The accused must establish before exclusion will be granted:
    1. That the evidence was "obtained in a manner" that infringed or denied a right or freedom guaranteed by the Charter.
        - Accused need not establish a direct relationship of causation between the breach and the evidence which the accused wants excluded. It is sufficient if the violation occurred before or during the course of obtaining the evidence.
    2. That the evidence sought to be excluded is not too remote from the initial breach. The court must examine the entire relationship between the Charter breach and the evidence, and decide each case on its unique facts
    3. Whether the administration of justice has been brought into disrepute.
- **It is an Objective Test** - It asks whether a RP informed of all the relevant facts and Charter values that the inclusion of the evidence will bring the administration of justice into disrepute
- **Analysis**
    - The Court articulated an approach to the admissibility of evidence obtained in breach of the Charter that looks at all of the circumstances to assess the effect of admitting the evidence on society's confidence in the justice system, having regard to three lines of inquiry:
        1. **The seriousness of the Charter- infringing state conduct.** Courts here should avoid sending a message that they condone serious state misconduct when they admit evidence (para 72 – the more severe the state conduct, the greater need for the court to dissociate themselves from the conduct and exclude the evidence to preserve public confidence in the rule of law)
        2. **The impact that the Charter violation has had on the Charter-protected interest.** We don't want to pay lip service to a Charter right. Therefore a brief and technical violation is less likely to be excluded than a protracted invasion that strikes at the core of human dignity
        3. **Society's interest in the adjudication of the case on its merits.** The question here is whether the truth seeking function of the criminal trial process would be better served by admission or exclusion of the evidence. The reliability of the evidence in question is an important factor. The more reliable the evidence, the less likely its admission would be to damage the long term reputation of the justice system

Searches

Searches Incident to Detention

- Common law power to search incidental to detention is more restricted than the search incidental to arrest.

- Police officers do not have the power to automatically search someone who they have detained for investigative purposes. Rather, police must believe on reasonable grounds that their safety or the safety of public members is at risk, and the officer's decision to search must also be reasonably necessary in light of the totality of the circumstances
- The general duty of officers to protect life may, in some circumstances, give rise to the power to conduct a protective pat-down search
- Officers cannot search for evidence as part of an investigative detention search
- The search must be conducted in a reasonable manner

Search Incident to Arrest (Common Law Power; don't need judicial authorization)

- An officer must exercise his/her discretion on whether to conduct a search (they don't have to search)
- The purpose of the search must be related to the purpose of the arrest; it is not automatic and a free standing power (Caslake, para. 14)
- **Three main purposes of search incident to arrest (para. 19):**
    1. Ensuring officer safety or safety of the public (including any item that might facilitate escape)
    2. Protection of evidence from destruction; and
    3. Discovery of evidence related to the off
    4. ence for which the accused is arrested (para. 22)
- Search must be conducted in a non-abusive fashion that is proportionate to the objectives sought and the circumstances of the situation (para. 14)
- A police officer who searches someone's incident to arrest is not required to establish that he/she had RPG to believe that either weapons or evidence will be found.
- **Cloutier c. Langlois (1990, 74 C.R. (3d) 316 (S.C.C.) the power to search incidental to arrest in governed by 3 considerations:**
    1. The power does not impose a duty; police have discretion in conducting the search
    2. The search must be for a valid objective in pursuit of the ends of criminal justice, such as the discovery of an object that may be a threat to the safety of the police, the accused or the public, or that may facilitate escape or act as evidence against the accused
    3. The search must not be conducted in an abusive fashion
- Can search the person, the vehicle, etc.
- Need to articulate as an officer why you decided to search
- Ex: If police arrest someone for outstanding warrants for writing bad cheques, the police can still search the vehicle to confirm ID, see if there are bad cheques, search the person, etc. for the offence that they were charged for. If you arrest someone 200m from their car, the search incident to arrest extends to searching the car
- Ex: Police see suspect leave house and go to the dentist. No problem to search the car because there is a nexus but more problematic to look in the house. Need to get a search warrant (more invasion of privacy)
- This strategic policing

Search Incidental to Arrest Strip Searches

R. v. Golden 2001 CarswellOnt 4301 (S.C.C.)

- Set out guidelines to the police in conducting strip searches of arrested persons; being subjected to a strip search is a large intrusion and potentially even humiliating, so the SCC makes clear they cannot be carried out as a matter of routine policy.

- Strip searches, pursuant to common law search incident to arrest, do not violate s. 8 of the Charter.
- In addition to RPG justifying the arrest, the police must establish **reasonable and probable grounds** for concluding that a strip search is necessary in the particular circumstances of the arrest.
- **Three types of judicially recognized methods of search that must be conducted by the police:**
    1. The pat-down or frisk of outer clothing
    2. The strip search (i.e. removal or rearrangement of some or all of the clothing so as to permit a visual inspection of a person's private areas) – genitalia, etc.
    3. Body cavity search or probe –may require assistance of medical personnel

Search Incidental to Arrest Smart Phones

- ***R. v. Fearon*** (2014), 318 C.C.C. (3d) 182 (SCC) searches incident to arrest of smart phones implicate significant privacy interests and can only be conducted where the following 4 conditions are met:
    1. The arrest itself must be lawful
    2. The search had to be truly incidental to arrest
    3. The nature and extent of the search had to be carefully tailored to the purpose of the search
    4. Officers involved in the search of the smartphone were obliged to take detailed notes of what they examined on the device and how it was searched **(this is the additional condition that is specific to cell phones)**
- R. v. Marakah 2017 SCC 59 will be discussed in detail in the Search and Seizure Unit of this course.

Other Detention Issues

- Officers can handcuff detainees for officer safety reasons. In every case they should exercise their discretion as to whether handcuffs are required and must be able to justify this choice.
- If a detainee refuses to comply with a police officer's verbal directions, or refuses to submit to a lawful investigative detention, the detainee can be charged with obstruction of a peace office or assault a peace officer.
- People do not have to identify themselves when detained (but they do when they are arrested)
- Can a witness be detained? There is no authority in law to detain and arrest a witness
- **The Length of Investigative Detention**
    - Police officers are only permitted to detain an accused for investigative reasons for a reasonable period of time (but courts have not given us an exact period of time)
    - The officer must be able to justify the length of the detention given the particular facts.
    - The seriousness of the offence is a factor to consider in determining what length of detention is reasonable (ex: murder)
    - Generally investigative detentions should be brief in nature but it is on a case by case basis

Other Arrest Issues

- **Trespass**
    - No person can enter private property except with the owner/occupier's consent or in accordance with a lawful authorization (and this applies to the police as well)

- A police officer can only enter private premises and remain there against the owner/occupier's wishes if he/she
    1. Is acting in accordance with a specific statutory duty
    2. Is in possession of a warrant,
        - Police can execute an arrest warrant to force entry into a dwelling, otherwise they are a trespasser
    3. Is exercising rights possessed through common law
        - Ex: Police do have the authority to force entry into a dwelling on a hang up 911 call (common law authority)
- If it cannot fit under these three exceptions, the police otherwise is a trespasser and the owner/occupier may use whatever force is necessary to remove him/her Eccles v. Bourque (1974), 19 C.C.C. (2d) 129 (S.C.C)

- **Trespass in Making an Arrest**
    - ***R. v. Feeney*** 1997 CarswellBC 3179 (SCC) held warrantless arrests of persons in a home following a forced entry are not permissible. Police require a warrant to enter a dwelling house to arrest someone
    - To obtain the warrant, police require RPG for the arrest and that the person intended for the arrest would be found in the dwelling
    - They also need to make proper announcement before forcibly entering
    - In response - Parliament enacted s. 529(1) of the Code to allow police to obtain a warrant and effect an arrest inside a dwelling house
- **The Feeney Warrant**
    - **Sec 529** authorizes a justice of the peace, when issuing a warrant to a police officer to arrest or apprehend a person, to authorize the officer to enter a dwelling house to carry out that arrest
    - Requires the justice to be satisfied on oath in writing that there are **reasonable grounds to believe** that:
        1. An offence has been committed, and
        2. That the person who the police believe committed the offence is or will be in the dwelling house
    - **Sec 529.1**, also added at the same time, authorizes a JP to issue a warrant to a police officer to enter a dwelling house to arrest a person. Under this section, the justice is only required to be satisfied by information on oath. There is no requirement that the information be in writing
        - **This is like a telewarrant (calling the judge) and is a much quicker process of obtaining a warrant (but still requires the same legal standard of RPG)**
    - **Sec 529.2** issuing judge/justice can include any "terms and conditions" in the warrant advisable to ensure entry into dwelling house is reasonable in the circumstances
    - **Sec 529.3(1)** also authorizes a peace officer to enter a dwelling house to arrest or apprehend a person without warrant where **exigent circumstances exist and it would be impracticable to obtain a warrant.**
        - Still need RPG for (1) an offence has been committed, and (2) that the person who the police believe committed the offence is or will be in the dwelling house
        -
        -
        - Note it only requires the officer to have **reasonable grounds to suspect** that entry is necessary to prevent imminent bodily harm or death to a person.

- **Sec 529.4** – Authorizing judge/justice can authorize officer to enter the dwelling house **"without proper announcement"** if there are RPG to believe that prior announcement would:
    1. Expose officer or any other person to imminent bodily harm or death
    2. Result in the imminent loss or destruction of evidence relating to the commission of an indictable offence

- **Announcement**
    - ***R. v. Landry* (1986), 50 C.R. (3d) 55 (S.C.C.) there are three aspects of proper announcement:**
        1. Notice of the officer's authority
        2. Notice of the officer's purpose
        3. A denied request
    - ***R. v. Cornell* 2010 SCC 31 - police should give**
        1. Notice of presence by ringing of the door
        2. Notice of authority
        3. Notice of purpose by stating a lawful reason for entry
- **Assisting a Police Officer**
    - At common law, a police officer could call on anyone for assistance in carrying out an arrest.
    - It is an offence under s.129(b) of the Criminal Code for anyone to refuse to come to the officer's assistance when requested by the officer if he/she could reasonably do so.

Charging

- The decision to charge is independent of detention and arrest
- For some offences you cannot arrest a person
    - Ex: Offence punishable on summary conviction - sec 495(2)
- There may be strategic reasons when to charge

Lecture 6: Search and Seizure

Search and Seizure

- Required Reading
    - *R. v. Marakah*, 2017 SCC 59
    - *R. v. MacDonald*, 2014 SCC 3
    - *R. v. Patrick*, 2009 SCC 17
- Has developed over hundreds of years
- Conflict between two basic interests (individual v the state)
    1. Of the individual to be secure from state interference in his privacy
    2. The interest of the state or society in detecting and proving and punishing crime

What is a Search? (*R v Evans 1996*)

- An examination
- By an agent of the state (almost always a police officer, peace officer)
- Which constitutes an intrusion of one's rights
- Upon an individual's reasonable expectation of privacy (REP)
    - The individual MUST have a REP

What is a Seizure?

- The taking of a thing from a person by a public authority without that person's consent

    - *R v Dyment 1988* = Collecting a blood sample for a DUI investigation on a car seat from an accident… the suspect did not have REP and this collection was a gathering
- A non-consensual taking by state officials of an item in which the citizen has a REP
    - *R v Borden 1994*
- If someone consents to the seizure or taking of something by the police, this is NOT a seizure (they are merely making a gathering)
- If police bust through a door with a search warrant and the suspects don't fight back and let the police act, this is NOT consenting!

****REP****

- **There is a spectrum or continuum of privacy**
- Cops need to be aware of everyone's REP! Both accused's and non-accused's
- Reasonable imports an objective standard → Would an average person of regular knowledge consider from a constellation of factors that an individual has a REP in the circumstances at issue?
- **Whether someone has a reasonable expectation of privacy depends on a number of factors which include, but are not restricted to the following:**
    - Place (outside on the street, park bench, dwelling house, your body)
    - Possession or control of the property or place searched (can't control who walks outside on a street, more control over an office room or dwelling)
    - Ownership of the property or place (remember *Edwards*)
    - Historical use of the property or item
    - Registered owner is tricky (a child could use their parents car everyday and develop a REP whether or not the vehicle is theirs)
    - Ability to regulate access, including the right to admit or exclude others from the place
    - Custodian: professional/personal relationship (e.g.. Lawyer records)
    - Legislation promising privacy (e.g.. health records, core biographical information)
    - The existence of a subjective expectation of privacy; and the objective reasonableness of the expectation
    - *Belnavis (1997)*
- **REP evolves**
    - In the past, courts were strict that only drivers of cars have a REP… but this has changed and extended to passengers based on facts
- **A warrant will be required where someone has a REP in the place proposed to be searched or things proposed to be inspected**
    - *Hunter v Southam*
    - This is the *Charter* compliant way to proceed!
- **What type of information is it?**
    - Dwhy
        - Police would use utility records to determine which houses were housing grow ups (spending thousands of dollars on heat and electricity to develop grounds). Do these records expose intimate details of lifestyle and personal choices? **No!**
        - What about using helicopters to go over houses with infrared cameras to examine heat signatures? Does this heat signature coming out of a house create a REP? **No!**
        - *R v Plant 1993 SCC*
        - *R v Tessling 2004 SCC*
- **Courts tend to be willing to take a liberal approach to deciding privacy expectations**

- *R v Law* = Person reports a stolen safe. Police found a safe in a field, opened the safe, and found documents of tax evasion, and used these documents to propel an investigation. SCC held that the owner of the safe had a REP of the safe
- *R v Buhay* = Person stored drugs in a bus locker. The people at the bus locker reported the locker for suspicion of drugs, so the police did. SCC found that the person had a REP of their locker despite the signs saying the company owned the locker.
- *R v Kang-Brown* = Using sniffer dogs to sniff luggage with drugs. SCC found people have REP over their luggage when travelling. Police need reasonable suspicion first before letting the dog sniff!
- *R v Patrick* = Garbage! REP!
- *R v McDonald* = McDonald in his house and has a REP as a result of being in his home

REP - Electronic Communications

- Author of a text message can have a reasonable expectation of privacy in electronic communications, even after the text is sent and retrieved by police from the recipients device (5-4)
    - *Marakah, 2017 SCC 59*
    - Before *Marakah*, sending a text would mean a lost of control and there would be no REP
    - Majority disagreed and said control was not the definitive factor (strong dissent against this)
    - Police officers are upset… can't use a victim's text message incriminating an accused, rather, they need a warrant to search the phone
- Seizures of stored text messages are not "interceptions" and police do not need a wiretap authorization; stored text messages can be seized by way of a production order
    - *Jones, 2017 SCC 60*
- **TEST: Establishing a reasonable expectation of privacy (using *Marakah*)**
    1. The subject matter of the alleged search
        - The text message (functional approach)
    2. A direct interest in the subject matter of the search
        - The accused has a subject matter of the search (the text made him look guilty)
    3. A subjective expectation of privacy
        - Yes, a subjective expectation of privacy of the conversation between the two individuals in a criminal enterprise
        - Marakah requested the receiver delete the text messages in fact
    4. An objectively reasonable expectation of privacy
        - **Assessing the Reasonableness of the Expectation of Privacy for Electronic Communications:**
            1. The place where the search occurred (physical or electronic location)
            2. Private nature of the subject matter/content
            3. Control over the subject matter
                - Lack of control not fatal to privacy interests (when dealing with electronic communications)

Letter v Text Messages

- If a letter is sent from an accused to a victim saying they are going to kill them, the police are lawfully able to use this letter as there is no REP
- If it was a text, there is a REP!

    - Ex: A victim cannot show the police harassing text messages from an ex-boyfriend without a warrant obtained from the police (need reasonable grounds for a warrant) because *Marakah* found the sender of text messages to hold a REP
    - This becomes difficult because judges may not sign warrants based on one person alleging criminal activity over text… the standard of obtaining a warrant is higher than suspicion (need RPG to believe)
- Richard HATES this decision
- Para 50-51**

What is a Warrant?

- Permission given by a Judicial Officer to an Agent of the State (usually a police officer) to examine and/or take a thing from a person without that person's consent
    - A paper application to the judge
    - Variety of warrants exist
    - Police needs to show on RPG to believe (done on affidavit evidence) that evidence of a certain crime is available in a certain place (ex-parte evidence; one-sided, only evidence by police but they nonetheless need to bring all evidence forward not just beneficial evidence for the Crown)
- **Judicial authority to search for and/or seize:**
    1. Specific things or information
    2. Related to a specific offence
    3. In/from a specific place or person

Section 8 of the *Charter*

- Charter is triggered when there is a REP
- Everyone has the right to be secure against **unreasonable** search or seizure
- **What is unreasonable?**
    - *Hunter v Southam (1984 SCC)*
        - Need to guarantee right against unreasonable search or seizure
        - No warrant is prima facie UNREASONABLE
        - Case by case determination
        - Individual's privacy rights vs. government interests (i.e. law enforcement)
        - Prevent unjustified searches by obtaining prior
        - Authorization where feasible (absent exigent circumstances)
- **When is a search reasonable?**
    - Justified in law (judicial authorization without a warrant):
        - Statute (i.e. drinking and driving statutory regime)
            - CC can seize breath samples who they suspect are drinking and driving when police comply with the statute
        - Common law (i.e. search incident to arrest, plain view doctrine)
        - Exigent circumstances (common law)
    - Judicial preauthorization (Warrant)
    - **A warrantless search is prima facie unreasonable** and the Crown must show complete compliance with statute or the common law to show the search was reasonable and therefore the evidence was admissible
    - **A search with a warrant is *prima facie* reasonable** and onus on defence on a balance of probabilities to show warrant deficient
- **A search will be unreasonable when it**

- Is not pre-authorized by a judicial authority (burden on Crown to show compliance with statute or common law or exigent circumstances)
- Is executed in an unreasonable manner even if judicially authorized
    - Taking trophy pictures, demolishing a residence when searching, etc
- Warrant is challenged and fails
    - If the warrant is found deficient… this would be a warrantless search

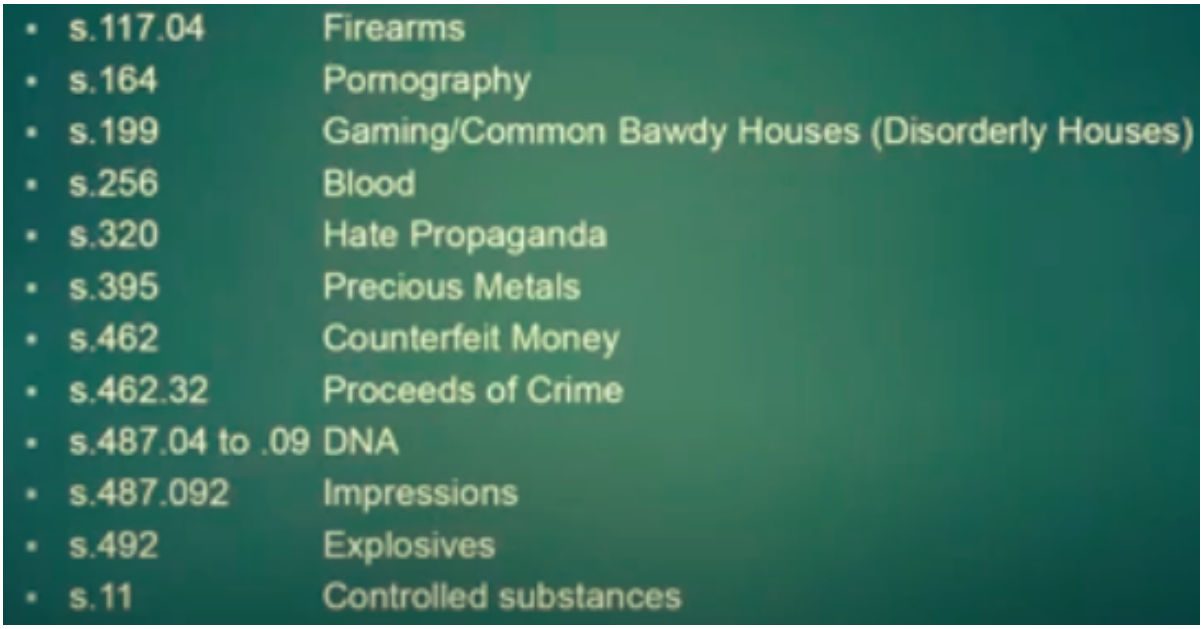
When a Search is Unreasonable: Remedies

- **Section 24(1) *Charter*** → Such remedy as the court considers appropriate and just in the circumstances (not argued very often)
    - Sentencing
    - Costs
    - Return of goods seized
    - A stay of proceedings
- **Section 24(2)** → Exclusion of evidence (most common)
    - Legal test is in *Grant*

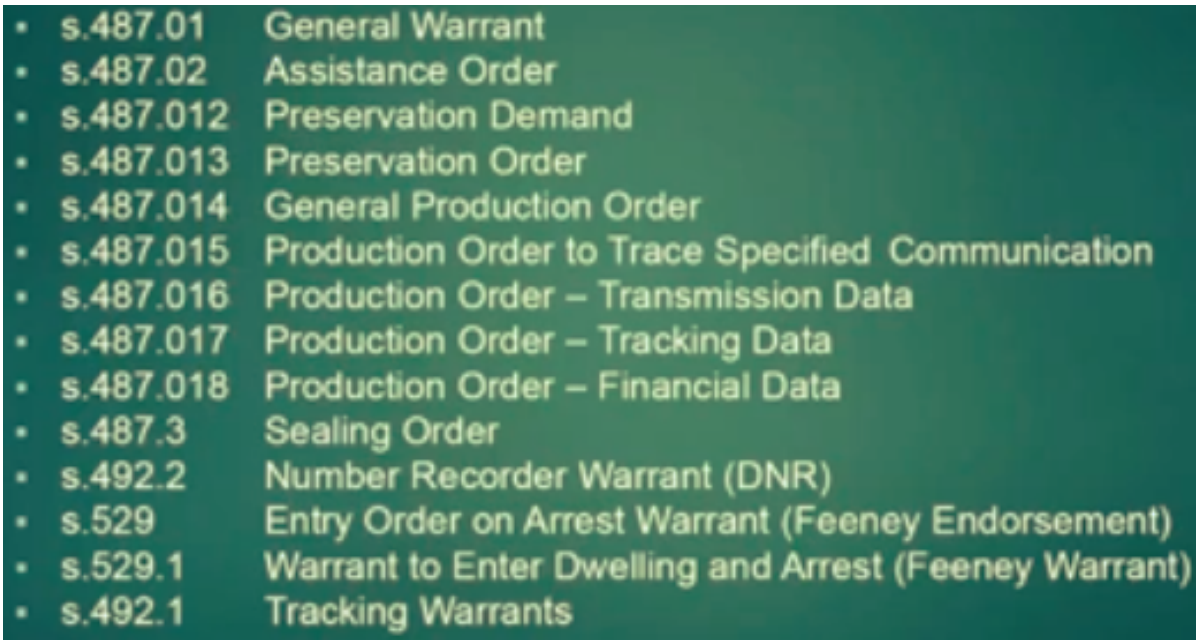
Search with a Warrant

Three Categories of Warrants

1. **Item Specific**



2. **Information and Technique Specific**



- A general warrant is not often used!
    - Ex: Sneak and peek. Sneak into someone's house to peek into it while the accused is not home, and leave before they do and they don't know you were there! This is NOT a search warrant.

3. **Non-item specific**



- Most common used warrant

<u>The 6 Most Common Orders</u>

- Search warrant
- Drug (CDSA) warranty
- General warrant
- Production order
- Assistance order
- Sealing order

<u>Things in Common</u>

- All warrants have an information on oath (an ITO in Form 1) = **Sworn to be true**
    - Containing reasonable grounds (or suspicion depending on the warrant) to believe
        - A certain offence or offences have been or will be committed
        - Certain seizable things or information exists
        - Certain places contain the things and information
- Warrant
    - Is a judicial order (police asking for it)
    - Giving authority and limits to what the police can and cannot do

<u>Reasonable Grounds to Believe</u>

- Reasonable grounds means "credibly based probability" replaces suspicion (*Baron v Canada 1993*)

- In the case of a search, it means that there is a likelihood that the thing sought will be found… not a mere possibility
- The standard envisions a practical, non-technical, and common sense probability as to the existence of the facts and inferences asserted
- Less than proof BRD
- Less than a prima facie case
- More than reasonable suspicion
- Equal to reasonable belief
- Equal to the American "probable cause"
- Based on credible information

Section 487 Search Warrant - THE MOST COMMON

- A piece of paper
- Issued by a justice who on reasonable grounds believe the "thing" is in a building, receptacle, or place (place does not mean body for a warrant nor is it a public place)
- Offence is contrary to the CCC or any Act of Parliament
- Offence has been or suspected to have been committed
- The search will afford evidence (doesn't need to be specific) or reveal whereabouts of the suspect
- Something intended to be used for committing the offence
- Any offence-related property
- Execution by a "peace officer" or "public officer"
- Can be backed extraterritorially
    - Can take the warrant signed in Alberta and have it executed in Ontario if a judge there signs it
- If these things are not on the warrant, the defence can argue it's not a good warrant

Execution of the Search Warrant (per section 487)

- Warrants may be executed any day of the week including a holiday
- Generally, police should announce their presence before entering a dwelling house
- Section 29 of the CCC requires anyone who executes a warrant to have a copy of them where feasible nad produce it when requested
- *R v Cornell 2010 SCC* - Police should give…
    1. Notice of presence by ringing of the door
    2. Notice of authority
    3. Notice of purpose by stating a lawful reason for entry
- If entry is refused, the officer is entitled to break into the premises in order to execute the warrant (*Kie v Cuddy, 1914*)
- Once the search is completed in accordance with the terms of the warrant (including time periods, i.e. must leave premise by 7pm even if searching) the right of the officers to remain on the premises is terminated and they become trespassers if they remain on or return to the premises at a later point (*R v Moran 1987*)
- Once police abandon a search, even if the warrant permits them to keep searching for some more time, the police cannot go back to the premises on the basis that the warrant still had time left

Search of Persons at Search Site (Drug Warrants)

- Section 11(5) of the Controlled Drugs and Substances Act allows a peace officer, who is executing a search warrant the right to search any person found in the place set out in the warrant
- The policy reason is that drugs are easily concealed
- In a CCC warrant, no authorization to search people on the property UNLESS they are arresting someone or detaining someone and can search incident to arrest or detention (can't just search them because they are not the focus of the search for CCC warrants)
- Officer can only search that person if he/she has reasonable grounds to believe that the person has on their person any controlled substance, precursor, property or thing set out in the warrant
- No right to search anyone found on the premises during a search conducted on a lawfully issued Criminal Code warrant, unless it is a search incident to detention or search incident to arrest.
- Officers can detain found ins where they have reasonable grounds for believing that such detention is a necessary part of the search authorized

Duties with Articles Seized

- A peace officer who executes a s.487 search warrant is required to bring the goods before a justice or make a report to a justice in accordance with s.489.1 Criminal Code
- Section 489.1 requires a peace officer to return seized property to a person lawfully entitled to its possession if the officer is satisfied there is no dispute as to ownership and items not required for further investigation or court proceedings. Officer then to report to the justice that he/she has done so
- Section 490 Criminal Code requires JP to return goods seized to the lawful owner, unless the prosecutor satisfied the justice that detention is required for further investigation or court proceedings.
- After 1 year, superior court judge makes order for further detention

R v McDonald

- REP because he was in his home
- Evans… implied license to knock
- Judicial authorization test
    - Performed the ADP analysis (happens a lot)

Searching Without a Warrant

- For the purposes of the *Charter*
- Presumed to be a section 8 violation
- Unless the search can be justified by a statutory or common law power (Ancillary)
- Burden on the Crown to show
    - That the search was authorized by law
    - That the law authorizing the search is reasonable and
    - That the search was carried out in a reasonable manner
        - *R v Collins* and *Hunter et al v Southam*
- **Some authorizations to search without a warrant**
    - Exigent circumstances
    - Plain view
    - Abandoned property
    - Perimeter Searches
    - Crime Scenes
    - Non-Dwelling vs. Dwelling Houses

- Consent
- Incident to Detention
- Incident to Arrest
- Motor vehicle searches
- Weapons searches
- School Searches
- Dog Sniffs
- Safety and Security (911)

Exigent circumstances

- Statutory power
- **Section 487.11 of the *Criminal Code***
    - A peace officer or a public officer who has been appointed or designated to administer or enforce any federal or provincial law and whose duties include the enforcement of this or any other act of Parliament, may, in the course of his or her duties, exercise any of the powers described in subsection 487(1) or 492.1(1) without a warrant if the conditions for obtaining a warrant exist but by reason of exigent circumstances it would be impracticable to obtain a warrant
    - **What is impracticable?**
        - Time sensitive, damage can be destroyed, victims injured, etc. (public policy approach)
        - Ex: Drug matters
- Similarly, the search and seizure powers in sections 11(1), (5), or (6) of the *Controlled Drugs and Substances Act*
    - May be exercised without warrant if the conditions for obtaining a warrant exist but exigent circumstances make it impracticable to obtain one (s. 11(7) *CDSA*)
- Police power to search and seize
    - Under Code sections 487(1) (search warrants) and 492.1(1) (tracking)
    - May be exercised without warrant
        - If the conditions for obtaining such a warrant exist
        - But exigent circumstances make it impracticable to obtain one (s. 487.11)
    - Exigent circumstances exist where
        - There is an imminent danger of the loss, removal, destruction, or disappearance of the evidence if the search or seizure is delayed in order to obtain a warrant (*R v Grant*)

Plain View

- Exists in both common law and in statute (a little different from each other)
- **Common Law elements of plain view**
    1. The officer was **lawfully at the location** at which the item was observed (not a trespasser) (such as executing a search warrant)
    2. The item was discovered inadvertently
    3. Item is visible (CANNOT take a positive action to make the item visible, like moving)
    4. The incriminating nature of the item was immediately apparent (para 55)
        - *R v Jones, 2011 ONCA 632*
        - Ex: Pull someone over for a traffic stop and in plain view see's a handgun on the passenger seat, a pound of coke, etc.

        - Ex: What if the officer knows that there has been a lot of liquor thefts in the city and pull someone over and notice bottles of liquor in the backseat. This is ok. If they were wearing a suit, probably not reasonable.
        - Applies unless its investigative significance is not apparent until closely inspected
            - A diary found while executing a search warrant for unrelated items required reading before significance known = Not good enough
        - Ex: Looking for evidence of a robbery
            - Find a calendar on the wall with a list of robberies = Plain view
- **Statutory Supplement s. 489(1)**
    - Section 489(1) every person who executes a warrant may seize, in addition to the things mentioned in the warrant, any thing that the person believes on reasonable grounds:
        - a) Has been obtained by the commission of an offence against this or any other Act of Parliament;
        - b) Has been used in the commission of an offence against this or any other Act of Parliament; or
        - c) Will afford evidence in respect of an offence against this or any other Act of Parliament
        - **Note that the “incriminating nature of the item was immediately apparent” is not included but it can be argued that it is intertwined in the section**
    - Section 11(6) of the Controlled Drugs and Substances Act similar authority for a peace officer exercising search powers under s.11
    - Section 489(2) Every peace officer, and every public officer who has been appointed or designated to administer or enforce any federal or provincial law and whose duties include the enforcement of this or any other Act of Parliament, who is lawfully present in a place pursuant to a warrant or otherwise in the execution of his duties may, without warrant, seize any thing that the officer believes on reasonable grounds
        - (a) had been obtained by the commission of an offence against this or any other Act of Parliament
        - (b) has been used in the commission of an offence against this or any other Act of Parliament; or
        - (c) will afford evidence in respect of an offence against this or any other Act of Parliament
    - Requires articulation

<u>Abandoned Property</u>

- If there is truly abandonment, never a reasonable expectation of privacy in the thing being gathered (no section 8 violation so no seizure)
- “Where an individual has ceased to have a reasonable expectation of privacy in something, its acquisition by the police constitutes a “gathering” rather than a seizure such that s. 8 of the *Charter* has no application
    - *Dyment (1988)*
- There is no reasonable expectation of privacy in property which has been abandoned
    - Ex: A suite which has been abandoned by its tenants may be searched without a warrant
        - *Tam (1993)*
- **Bodily Substances**
    - Police may retrieve items such as kleenex or cigarette butts discarded by a suspect who is not detained (police say you are free to leave whenever)
        - *Stillman*

- If the suspect is in custody, the police are not entitled to seize these items without consent or a warrant (person is detained, not free to leave)
- Police ma collect from an impaired driving suspect blood found on the car seat after an accident
    - *Leblanc (1981)*
    - Pre-*Charter* but used by LaForest in *Dyment* as an example of permissible "gathering"

- **Garbage**
    - An implied waiver in the setting out of the garbage - an effective abandonment
    - What about where business or government records are delivered to a shredder or recycler?
        - Need carefully investigate the relationship before trying to take such material without a warrant - which might be risky
        - *R v Patrick, 2009 SCC 17*
    - Is there a reasonable expectation of privacy for garbage?
        - YES… so much personal information can be found in garbage (like bills, habits, etc)
        - There is a subjective presumption that people don't want others going through their garbage… question is whether it was objectively reasonable in the circumstances?
            - Where is the garbage located? On the house, over the property line, down the street in bins?
            - Is it in an opaque bag or a dark bag?
            - Private service taking away garbage vs public service
    - **May need to make INFERENCES about reasonableness**

<u>Right to Enter Property</u>

- An officer can enter property and go to the door of a dwelling for the purpose of communicating with the occupant or to ascertain a house number = Implied license to knock. It cannot be used as a means to put police in a position where they can affect a visual or olfactory (smell) search of the interior
    - *R v Evans (1996)*
    - *R v Neil (1993)*
- If there is no response to a knock police have no authority to proceed uninvited into a home for the purpose of communicating with the person they believe lives there
    - *R v Plamondon (1998)*
- ***R. v. Macdonald, 2014 SCC 3***
    - Highwater mark
    - Pushing the door open constituted a "search' for purposes of s. 8 of the Charter.
    - Went beyond the implied license to know and constituted an invasion of REP
    - Search was reasonable because both stages of the Ancillary Powers Doctrine were satisfied
- **Limitations on the Implied License to Knock**
    - The person in lawful possession of the property may order police to leave unless an emergency or some specific legal authority to stay (hearing a baby cry, someone screaming, etc). Police become trespasses if they refuse to leave (person yells police to leave or tells them to fuck off in a normal day)
        - *R v Thomas (1991)*

- If, before being ordered to leave police have obtained sufficient grounds to make an arrest, they may remain and make it
    - *R v Tricker (1995)*
- In the absence of exceptional circumstances entering a dwelling-house to make an arrest requires a warrant (an abducted child is inside, etc)
    - *R v Feeney*

Perimeter Searches (picking around the house)

- Not part of an officer's implied license to knock
- Police may not trespass on private property to conduct a visual inspection where the person in control of the property is suspected of committing an offence thereon
    - *R v Grant*
- Police may lawfully visually inspect a suspect's premises from the property of a neighbour who has given them permission to come onto his property
    - *R v Klassan*
- Police may not trespass on any property for the purpose of conducting a visual inspection, even if the property is not that of the suspect
    - *R v Laurin*

Visual Examination

- What is permissible? Surveillance teams use various methods to observe suspects
- It was proper for the police to physically observe the accused and his car at all hours of the day and night. These physical observations could be enhanced by the use of binoculars as long as in a public space
    - *R v Wise (1992)*
- An officer may visually inspect the interior of a vehicle which he or she is lawfully beside
    - *R v Hebb (1985)*
    - Can a police officer use a flashlight to look in a car at night?
        - Yes they can, can visually inspect the car as long as they remind outside
        - Not allowed to videotape or a technological enhancement
- Question becomes, what is the extent of the enhancement and REP?
    - On the street looking into a house there is no REP… but if using binoculars to look into areas of the house that is not observable from the street, like the back of the kitchen, this is too much and unlawful without a warrant

Crime Scenes (Public Policy Reasons)

- Common law power
- The police have implied right to enter property when no one is apparently there in order to investigate a possible offence committed against the owner of the property (like a welfare check)
    - *R v Hern (1994)*
    - Ex: Neighbours call saying they haven't seen their neighbours in a while, curtains have been closed for 5 days, and a weird smell is coming from the house
- Once inside police can stay as long as needed to complete the investigation & secure the property
- May be unwise to search or examine extensively without judicial authority (ex, prime suspect may have reasonable expectation of privacy in the location… so to be safe, police go and grab a warrant)

- Ex: Police found a member of a gang that died from an overdose… The police use the *Fatality Act* to investigate how this person died (knew they weren't a drug user). The police when investigating found money in the microwave (about 80k) and seized it as proceeds of crime. Why look in the microwave to investigate the cause of death? They exceeded the authority under the *Fatality Act* and entered into a criminal investigation and seizing of the money was a warrantless search.

Entry of Non-Dwellings

- Police may enter private premises other than a dwelling-house, with or without a warrant, to make an arrest where they
    - Have reasonable grounds to believe the person they are looking for has committed an indica;e offence
    - Have a reasonable grounds to believe the person sought is inside
    - Make prior announcement of
        - Presence as a peace officer
        - Purpose by stating a lawful reason for the entry
        - And demand entry
            - *R v Landry (1986)*

Entry of Dwellings

- In the absence of exceptional circumstances, entering a dwelling house to make an arrest requires a warrant (*R v Feeney*)
- Applies to any dwelling regardless if the person to be arrested lives there or not
- Note: Section 529.3 - exigent entry into a dwelling house to arrest/apprehend

Consent Searches

- A search that is conducted with valid consent is lawful (a gathering)
- If an individual chooses to give something to a police officer, it is a misuse of the language to say that the police officer seized the thing given. Rather, the office simply received it
- As there has been no seizure, the reasonableness of the police officer's conduct need not be addressed
- ***R v Wils (1980)* states that when consent is given to police to perform a search, the Crown must prove on a balance of probabilities that:**
    - There was a consent, express or implied
    - Consenting person had the authority to give consent
    - The consent was voluntary in the sense it was not a product of police oppression, coercion or external conduct negating freedom of choice
    - Consenting person was aware of the nature of the police conduct to which he or she was being asked to consent
    - Consenting person aware of the right to refuse to permit the police to engage in the conduct requested (also was chartered and cautioned)
    - Consenting person is aware of the potential consequences of giving consent
- The police must not mislead a suspect being asked to consent to a search as to the actual offence under investigation (no trickier here)
    - *R v Borden*
        - Using samples from a suspect for one crime, but used the sample to connect him to a previous crime that was not under investigation the sample was originally meant for

- Officers cannot mislead the occupant of a house as to what they are looking for
    - *R v Salamon (1989)*
    - *R v Edwards* - likely not to uphold the police tricking the girlfriend into entering the house
- Where the occupier of premises gives police permission to enter for a particular purpose, once that purpose is satisfied they have no right to conduct a further search of the premises
    - *R v Smith*
- **Occupiers - Valid Consent**
    - Depending on "reasonable expectation of privacy" an occupant of premises may sometimes give consent to a search of the premises for items in the possession of a third party.
    - Examples:
        - Father could permit a police search of the teenager's room where scope of a teenager's expectation of privacy depended entirely on the discretion exercised by father so (*Rai 1998*)
        - A hotelkeeper cannot validly consent to a search of a guest's room: (*Mercer 1992*)
        - A neighbour who may be lawfully in possession of a key cannot validly consent to a search of the suspect's home: (*Blinch 1993 BCCA*)
        - A common-law spouse could not nullify her husband's reasonable expectation of privacy in a shared computer (*R. v. Reeves, 2018 SCC*)

Search Incident to Detention (CL)

- *R v Mann* recognizes that there is a limited right to search incident to a lawful detention
    - Para 40: The general duty of officers to protect life may, in some circumstances, give rise to the power to conduct a pat-down search incident to an investigative detention. Such a search power does not exist as a matter of course; the officer must believe on reasonable grounds that his or her own safety, or the safety of others, is at risk ... The officer's decision to search must also be reasonably necessary in light of the totality of the circumstances. It cannot be justified on the basis of a vague or non-existent concern for safety, nor can the search be premised upon hunches or mere intuition.
    - Safety search!
- No general power to search bags or vehicles to detention
- *R v Clayton and Farmer, 2007 SCC* arguably expands the ability to search incident to detention (with guns especially)
- Went beyond *Mann* detention which required a clear nexus between the individual to be detained and a recent or on-going criminal offence
- Court balanced the seriousness of the offence (risk to the public) with the extent to which the detention was reasonably responsive to the circumstances and no more intrusive to liberty than is reasonably necessary

Search Incident to Arrest (CL)

- The right to search is grounded in a lawful arrest
- The arresting officer must have subjective belief in objective grounds
- "There is a lawful arrest when a police officer subjectively believes that there are grounds to do so, and those grounds are objectively reasonable. The totality of the circumstances relief upon by the arresting officer will form the basis of the objective assessment. It would constitute an error in law to assess each fact or observation in isolation. An objective assessment will include the dynamics within which the police officer acted, and his or her experience" (*R v Golub 1997 ONCA)*

- At common law, a peace officer has the right to search a lawfully arrested person
    1. To guarantee safety of the police, the public, adn the accused for weapons and any items that might facilitate the prisoner's escape
    2. To prevent the destruction of evidence
    3. To discover evidence (must be reasonable prospect the evidence will relate to the charge for which the accused is arrested)
- A lawful arrest gives an officer the right to search a suspect
- Does not require grounds for belief that anything will be found but must be reasonable in the circumstances
- Available regardless of whether could have obtained a search warrant (*Cloutier v Langlois (1990 SCC)*
- There must be reasonable and probable grounds justifying **a strip search** (*R v Golden 2001 SCC)*
    - Doesn't need to be the same sex, but for policy reasons it often is
- **Search Incident to Arrest Scope**
    - The scope extends to the immediate surroundings of the suspect (consider circumstances)
        - In the case of a suspect arrested in a car, the whole car may be searched (Caslake (supra); Drapeau (1993), 19 C.R.R.(2d) 361 (B.C.C.A.); Arason (1992)
        - This includes the trunk: *Charlton* (June 22/92 B.C.C.A.)
        - Loose interior panels *(Smellie (1995 BCCA)*
        - Where its driver, having recently left it, is arrested nearby (Speid 1991 ONCA)
        - Applies to arrestee getting dressed in his bedroom, that room may be searched (Conception 1994 BCCA)
        - Applies to persons arrested in one room of a hotel suite, the rest of the rooms in the suite may be searched (Wong 1987 ONCA)
- **When and How?**
    - The search can be carried out before the arrest is made as long as reasonable & probable grounds already exist for an arrest: *Debot* (1989), 54 C.R.(3d) 120 (SCC)
        - Since an individual being searched in these circumstances is "detained" they must be advised of right to counsel: *Grant*
        - The search may be carried out before allowing the suspect the opportunity to call a lawyer: *Debot* (supra) even some hours later: *Caslake* (supra)

<u>Vehicle Inspection</u>

- While a vehicle stopped for TSA purposes may be inspected for equipment infractions, it may not be searched UNLESS reasonable grounds emerge to believe it contains contraband
    - *R v Mellenthin (1992)*
- *Mellenthin* did recognize that police have the authority to inspect, for security purposes, the interior of the vehicle in the course of a stop. At night such an inspection may be done with a flashlight.
    - An officer has the right to open the back door and look into the rear of the vehicle for safety reasons and to speak with passengers
        - *Belnavis (1997), 118 C.C.C.(3d) 405 (SCC)*
    - Where driver cannot produce registration, police have the right to look in the vehicle for documents pertaining to the ownership or registration of the vehicle: Belnavis (supra)

<u>Subsequent Searches</u>

- Where articles which may be contraband are in plain view an officer is justified in asking questions about them: Belnavis (supra)
- Otherwise, the stop cannot become a basis for questioning the driver on matters not related to the operation of the vehicle unless "articulable cause" for further investigation emerges from the encounter
    - Flows from reading together the *Simpson, Mellinthin and Belnavis* decisions.

Impounded Vehicles

- Where a motor vehicle is impounded by police pursuant to legislative authority, the owner cannot reasonably expect that police would not enter it (can only search for safety not evidentiary reasons… if they find something, need to go get a warrant unless it's plain view)
- Can't stop someone per the traffic safety act and do a vehicle search = inappropriate
- Therefore any contraband plainly visible inside can be sizes violating section 8 of the *Charter*
    - *R v Nicolosi*
- No authority to search a vehicle which has been removed from the road after the arrest of its driver merely for the purpose of inventorying its contents. It could however be searched incident to arrest
    - *R v Caslake*

Exigent Seizure of Weapons

- There is specific provision for the warrantless search of any person, vehicle or place (other than a dwelling house) where an officer believes on reasonable grounds
    - That a weapon, prohibited device, ammunition, prohibited ammunition or explosive substance was used in the commission of an offence, or
    - That a Criminal Code offence is being, or has been committed that involves, or
    - The subject-matter of which is, a firearm, an imitation firearm, a crossbow, a prohibited weapon, ammunition, prohibited ammunition or explosive substance
    - And that evidence of the offence is likely to be found on a person or in a vehicle or any place or premises other than a dwelling house
    - And that conditions for obtaining a warrant exist but it would not be practicable to obtain one by reason of exigent circumstances.
- An officer conducting such a search may seize anything by means of or in relation to which he believes on reasonable grounds the offence is being, or has been committed: s.117.02(1) C.C.

School Searches

- Due to public policy and safety, there is a decreased REP for students
- The *School Act* reduce a students REP to have a safe learning environment for youth
- School officials are entitled to search students or student's property on school property without warrant if there are reasonable grounds to believe that a school rule had been or being violated and that evidence of the violation would be found in the location or on the person of the student searched
    - Grounds for such a search may be provided by any information considered credible by the school authority
    - Searches must be conducted in as sensitive a manner as possible and take into account the age and sex of the student
    - *Charter* s. 10(b) does not apply to a student being detained for such a search
        - *R v M (1998)*
    - Authority is on school property NOT public property

- Note that normal *Charter* requirements under *Charter* sections 8 and 10 would apply if the school officials were acting as agents of the police, i.e. acting under the instructions of a pursuant to prior agreement with the police (*R v M 1998)* = **This is a problem!! (Officer saying go check it out)**

Sniffer Dog Search

- Onus is on the Crown to show that objective and ascertainable facts rise to the level of reasonable suspicion, such that a reasonable person, standing in the shoes of the police officer, would have held a reasonable suspicion of criminal activity
- Analysis of a constellation of factors
- Airport Context
    - *R. v. Chehil, 2013 SCC 49*
- Highway Traffic Stop
    - *R. v. MacKenzie, 2013 SCC 50*

Safety and Security

- Courts have an expansive view when it comes to safety and security
- Where a volatile suspect believed to have a firearm is arrested on leaving his residence, police are entitled to enter it to make sure that no one else is inside who may use the weapon, even where the presence of such other person is merely a possibility
    - *Golub (1997 ONCA)*

911 Entries

- At common law police have the power to enter a dwelling where they reasonably believe that an occupant is in distress and entry is necessary to protect life or to prevent death or serious injury (until they satisfy themselves that all parties are safe and secure - doesn't matter if the police hear noises are not cause the person could be injured, dead, tied up, etc)
    - *R. v. Godoy* [1999] 1 S.C.R. 311
    - A 911 call from a dwelling, disconnected before the caller has said anything, gives police reasonable and probable grounds to believe that there is an emergency therein and that the caller was in distress. In these circumstances the police are entitled to enter the property against the wishes of an occupant where his responses to police questions about the situation are evasive and uncooperative

Electronic Devices

- Personal Computers
    - *R. v. Morelli*, 2010 SCC 8 - Computer tech on house-call finds child porn links, calls police 4 months later and police seize computer with warrant. Held to be a warrantless search because it was 4 months since he saw the link and never actually saw child-porn.
    - *R. v. Vu*, 2013 SCC 60 - Stipulates that where police intend to seize and search a computer as part of a search warrant, they are required to outline the grounds for the search in the ITO
- Work Computers
    - *R. v. Cole*, 2012 SCC 53 - Involved the seizure of a work laptop that the accused used for both work and personal purposes. The user retains a reasonable expectation of privacy in the device and the police require a warrant to search (i.e. cannot rely on the employer's consent to search)
- Cell Phones

- R. v. Fearon, 2014 SCC 77 - provides guidelines to police on search of the contents of a cell phone incident to arrest.. Need to take detailed notes!!
    1. The search must be tailored for the purpose for which it may be lawfully conducted - must be truly incidental to the particular arrest for the particular offence
    2. The discovery of evidence purpose for a search incidental to arrest must be treated restrictively.
    3. Officers must make detailed notes of what they have examined on the phone - a "constitutional imperative"
- Internet Provider Subscriber Information
    - R. v. Spencer, 2014 SCC 43 - Require warrant to obtain subscriber information from an internet service provider (ISP)
- Cell Phone Subscriber Information
    - R. v. Boutros, 2018 ONCA 375 - court held it was still open as to whether or not Spencer, supra. should apply to subscriber information for cell phones.
- Seizure of Text Messages from a 3rd party phone
    - R. v. Marakah, 2017 SCC 59 - the sender of a text message retains a reasonable expectation of privacy in the message on the receiver's phone. Police require a warrant to retrieve the text message from the receiver's phone. Consent of the receiver is not sufficient

***R. v. MacDonald*, 2014 SCC 3**	
Facts:	- Police responded to a noise complaint at M's home in Halifax. When M opened the door, an officer observed that M had an object in his hand, hidden behind his leg. The officer twice asked M what was in his hand. Because M did not answer, the officer pushed the door open a few inches further to see. A struggle ensued and M was disarmed of a loaded handgun. M was licensed to possess and transport the handgun in Alberta, but not in Nova Scotia as he believed he was. - Mr. MacDonald's central argument is that Sgt. Boyd's action of pushing the door open further constituted an unreasonable search, contrary to s. 8 of the Charter.
Issue:	
Holding:	- Although Sgt. Boyd's action constituted a "search" for the purposes of s. 8 of the Charter, that search was not unreasonable.
Reasons:	<u>Did Sgt. Boyd's Action Constitutes a Search?</u> **- *R v Evans*** - it is only where a person's reasonable expectations of privacy are somehow diminished by an investigatory technique that s. 8 of the Charter comes into play. As a result, not every form of examination conducted by the government will constitute a "search" for constitutional purposes. On the contrary, only where those state examinations constitute an intrusion upon some reasonable privacy interest of individuals does the government action in question constitute a "search" within the meaning of s. 8. [Emphasis added; para. 11.] - There is no question that individuals have a reasonable, indeed a strong, expectation of privacy in their homes - However, Evans also established that the police have an implied licence to approach the door of a residence and knock. Doing so will not be considered an invasion of privacy constituting a search if the purpose of the police is to communicate with the occupant. But "[w]here the conduct of the police . . . goes

	beyond that which is permitted by the implied licence to knock, the implied 'conditions' of that licence have effectively been breached, and the person carrying out the unauthorized activity approaches the dwelling as an intruder" (Evans, at para. 15). In such circumstances, the police action constitutes a "search" - Initially, Sgt. Boyd's actions were compatible with the implied licence to knock. Sgt. Boyd's action of pushing the door open further constituted an intrusion upon Mr. MacDonald's reasonable privacy interest in his dwelling. <u>Was the Search Unreasonable?</u> - Warrantless searches are presumed to be unreasonable unless they can be justified, and hence found reasonable, pursuant to the test established in R. v. Collins - Under Collins, warrantless searches are deemed reasonable if (a) they are authorized by law, (b) the law itself is reasonable, and (c) the manner in which the search was carried out was also reasonable (p. 278). The Crown bears the burden of demonstrating, on the balance of probabilities, that the warrantless search was authorized by a reasonable law and carried out in a reasonable manner

***R. v. Patrick*, 2009 SCC 17**	
Facts:	- The police suspected that P was operating an ecstasy lab in his home. On several occasions, they seized bags of garbage that P had placed for collection at the rear of his property adjacent to a public alleyway. The police did not have to step onto P's property to retrieve the bags but they did have to reach through the airspace over his property line. The police used evidence of criminal activity taken from the contents of P's garbage to obtain a warrant to search P's house and garage. More evidence was seized during the search.
Issue:	Whether the police breached the appellant's s. 8 Charter protected right to be free from unreasonable search and seizure, specifically: - Whether the appellant had a reasonable expectation of territorial privacy with respect to his dwelling-house, its perimeter and the garbage bags stored thereon; and - Whether the appellant had a reasonable expectation of informational privacy with respect to the garbage bags and the information stored therein.
Holding:	- When P's conduct is assessed objectively, he abandoned his privacy interest when he placed his garbage for collection at the rear of his property line where it was accessible to any passing member of the public. - Since P had abandoned his garbage before it was seized by the police, he had no subsisting privacy interest at the time it was seized. The police conduct was objectively reasonable. P's lifestyle and biographical information was exposed, but the effective cause of the exposure was the act of abandonment by P, not an intrusion by the police into a subsisting privacy interest.
Reasons:	***R. v. Edwards*** - A majority held that an accused "demonstrated" no privacy interest in his girlfriend's apartment, and police were held entitled to take the drugs found inside during what La Forest J. described as their "constructive break-in" (para. 69). In the view of La Forest J., it was "important for everyone, not only an accused, that police . . . do not break into private premises without [a] warrant" (para. 59). The

division squarely reflected the notion, in my opinion, that the asserted expectation of privacy in things located on someone else's property must be one that an independent and informed observer is prepared to recognize as "reasonable"

R. v. M. (M.R.)

- The majority concluded that a warrantless frisking of a student for drugs by a high school vice-principal did not violate s. 8 despite the criminal law consequences

R v Tessling

- Court concluded that "it may be presumed unless the contrary is shown in a particular case that information about what happens inside the home is regarded by the occupants as private" (para. 38 (emphasis deleted)), without need of testimony from the accused

Abandonment (an issue of fact)

Whether the claimant to s. 8 protection has acted in relation to the subject matter of his privacy claim in such a manner as to lead a reasonable and independent observer to conclude that his continued assertion of a privacy interest is unreasonable in the totality of the circumstance

- The concept of abandonment is about whether a presumed *subjective* privacy interest of the householder in trash put out for collection is one that an independent and informed observer, viewing the matter *objectively*, would consider reasonable in the totality of the circumstances having regard
    1. Firstly to the need to balance "societal interests in protecting individual dignity, integrity and autonomy with effective law enforcement"
    2. Secondly, whether an accused has conducted himself in a manner that is inconsistent with the *reasonable* continued assertion of a privacy interest and,
    3. Thirdly, the long-term consequences for the due protection of privacy interests in our society.

- ***R v Dyment***
    - He held that when an accused abandons something, it is "best to put it in *Charter* terms by saying that he [has] ceased to have a reasonable expectation of privacy with regard to it"
- ***R v Law***
    - A locked safe containing confidential documents had been stolen (not discarded) and the accused had never acted in a manner inconsistent with the continued assertion of a privacy interest in the information contained therein. When the police, after recovering the stolen safe, decided to scrutinize the documents inside (and the accused subsequently was charged with tax offences), they infringed the s. 8 reasonableness line.

Totality of the Circumstances

- It was established in Edwards (para. 45), and affirmed in Tessling (para. 19), that in assessing the reasonableness of a claimed privacy interest, the Court is to look at the "totality of the circumstances", and this is so whether the claim involves aspects of personal privacy, territorial privacy or informational privacy. Frequently the claimant will assert overlapping interests.
- **TEST (para 27 and 28)**
- Did the Appellant Have a Reasonable Expectation of Privacy in this Case?
    1. What was the nature or subject matter of the evidence gathered by the police?
        - The subject matter here was "garbage"
        - Residential waste includes an enormous amount of personal information about what is going on in our homes, including a lot of

DNA on household tissues, highly personal records (love letters, overdue bills and tax returns) and hidden vices (pill bottles, syringes, sexual paraphernalia, etc.)
- A garbage bag may more accurately be described as a bag of "information" whose contents paint a fairly accurate and complete picture of the householder's activities and lifestyle
- Many of us may not wish to disclose these things to the public generally or to the police in particular.

2. Did the appellant have a direct interest in the contents?
   - The criminal "lifestyle" of the appellant was at the epicentre of what the police wanted to know and what the appellant wished to conceal (revealed intimate details of a lifestyle)
   - The appellant had a direct interest not only in the garbage itself but, in particular, its informational content.
   - The issue ought to be framed in terms of the privacy of the area or thing being searched and the potential impact of the search on the person being searched, not the nature or identity of the concealed items
   - The issue is not whether the appellant had a legitimate privacy interest in the concealment of drug paraphernalia, but whether people generally have a privacy interest in the concealed contents of an opaque and sealed "bag of information."
   - The focus is on "the person, place or thing searched and the purpose for which the search is undertaken." A warrantless search of a private place cannot be justified by the after-the-fact discovery of evidence of a crime
3. Did the appellant have a subjective expectation of privacy in the informational content of the garbage?
   - Reasonableness not at issue
   - The question is whether the appellant had, or is presumed to have had, an expectation of privacy in the information content of the bags
   - Information about activities taking place in the home, such an expectation is presumed in the appellant's favour.
4. If so, was the expectation objectively reasonable in the totality of the circumstances? In this respect, regard must be had to:
   - The police were trying to find out what was "happening inside a private dwelling, the most private of places"
   - Four factual elements are of prime importance in the appeal: (i) the garbage was put out by the appellant for collection in the customary location for removal, (ii) that location was at or near the property line, (iii) there was no manifestation (such as a locked receptacle) of any continuing assertion of privacy or control, and (iv) the police took the bags to search for information about activities within the home as part of a continuing criminal investigation

   a. The place where the alleged "search" occurred; in particular, did the police trespass on the appellant's property and, if so, what is the impact of such a finding on the privacy analysis?
      - Constitutional protection should turn on whether the bags were placed a few inches inside the property line or a few inches outside it. The point is that the garbage was at the property line, accessible to passers-by.
      - While territorial privacy is implicated in this case, the

physical intrusion by the police was relatively peripheral
    - Was not a perimeter search

b. Whether the informational content of the subject matter was in public view;
    - The garbage bags were in plain view but the appellant asserts no privacy interest in the outside surface of the bags. His concern, as was the concern of the police, was with the concealed contents of the bags, which were clearly not in public view

c. whether the informational content of the subject matter had been abandoned;
    - The appellant intended to abandon his proprietary interest in the physical objects themselves. The question is whether he had a reasonable continuing privacy interest in the information which the contents revealed to the police
    - I believe abandonment occurred when the appellant placed his garbage bags for collection in the open container at the back of his property adjacent to the lot line. He had done everything required of him to commit his rubbish to the municipal collection system. The bags were unprotected and within easy reach of anyone walking by in a public alleyway, including street people, bottle pickers, urban foragers, nosey neighbours and mischievous children, not to mention dogs and assorted wildlife, as well as the garbage collectors and the police
    - Where garbage collectors come to the garage or porch and carry the garbage to the street, they are operating under (at least) an implied licence from the householder to come onto the property. The licence does not extend to the police. However, when the garbage is placed at the lot line for collection, I believe the householder has sufficiently abandoned his interest and control to eliminate any objectively reasonable privacy interest.

d. whether such information was already in the hands of third parties; if so, was it subject to an obligation of confidentiality?

e. whether the police technique was intrusive in relation to the privacy interest;
    - the act of abandonment occurred prior to the police gathering the garbage bags, there was no privacy interest in existence at the time of the police intervention, which therefore did not constitute an intrusion into a subsisting privacy interest

f. whether the use of this evidence gathering technique was itself objectively unreasonable;

g. whether the informational content exposed any intimate details of the appellant's lifestyle, or information of a biographic nature.
    - Lifestyle and biographical information was exposed, but the effective cause of the exposure was the act of abandonment by the appellant, not an intrusion by the police into a subsisting privacy interest

- <u>If There Was a Reasonable Expectation of Privacy in This Case, Was It Violated by the Police Conduct?</u>
    - In the absence of a subsisting privacy interest at the time the police gathered the bags, there was no violation.

Abella J Concurring:	- The home is the most private of places. Personal information emanating from the home that has been transformed into household waste is entitled to protection from indiscriminate state intrusion. - The fact that what is at issue is waste left out for collection, however, argues for a diminished expectation of privacy. - Before the state can rummage through the personal information from this ultimate zone of privacy, there should be, at the very least, a reasonable suspicion that a crime has been or is likely to be committed. In this case, the evidence amply supported such a suspicion.

Leight Happner (CPS Officer)

- When looking at taking steps in an investigation regarding a search or seizure should be asking themselves
    - Is there a REP
    - If there is… what is my lawful authority to carry out this search/seizure?
        - Prior authorization (search warrant = officer writes a ITO outlining RPG and a judicial officer agrees)
        - Search incident to arrest
        - Plain view
        - Consent
        - Exigent circumstances
- Search of a cell phone incident to arrest?

Lecture 7: Police Force and Excessive Force

Introduction

- Police Officers occupy a unique place within the community, having been given the power, authority and trust to enforce the law (must also comply with the law = RULE OF LAW)
- Necessary to use some force to effect their duties… but how much force?
- Police are accorded a significant degree of latitude in their use of force to complete an arrest, to protect oneself or others, stop a fleeing felon, preserve the peace on the ground or on an aircraft
- The rule of law binds everyone in Canada, including Police Officers: ***R. v. Dedman***

Use of Force by Police

- Police Officers do not have an unlimited power to inflict harm on a person in the course of their duties, they have legal constraints on how much force they can use (what is appropriate?)
- The legal constraints are deeply rooted in our common law tradition and enshrined in the Criminal Code

Limits on Use of Force

- Courts have been careful to guard against the illegitimate use of force by police
- The allowable degree of force to be used remains constrained by the principles of:
    - Proportionality,
        - Does the number of people in danger impact the proportionality balancing? Lisa says yes
        - Justified earlier to use force
    - Necessity, and
    - Reasonableness
    - A balancing act… one does not triumph another

    - ***Nasogaluak, supra at para. 32***
- Need to take into account all the circumstances!!
- Ex: Issuing a jaw walk ticket or a ticket under the *Traffic Safety Act* ticket where the driver drives away dragging the officer out the window
    - Would deadly force be legitimate here?
    - Different degrees of force would be legitimate here

Section 25 of the *Criminal Code*

- Protection of persons administering and enforcing the law (acting under authority)
- **25(1)** Everyone who is required or authorized by law to do anything in the administration or enforcement of the law
    - (a) as a private person,
    - (b) as a peace officer (police officer is included) or public officer,
    - (c) in aid of a peace officer or public officer, or
    - (d) by virtue of his office,
- is, if he **acts on reasonable grounds,** justified in doing what he is required or **authorized to do** and in using as much force as is necessary for that purpose (and in the circumstances)
    - Reasonable grounds = Objective
    - Need grounds to arrest AND lawful authority!!
    - Do the police have authority in statute or common law (APD)? Is it justifiable in the circumstance?
- **25(2)** Where a person is required or authorized by law to **execute a process or to carry out a sentence**, that person or any person who assists him is, if that person acts in **good faith**, justified in executing the process or in carrying out the sentence notwithstanding that the process or sentence is defective or that it was issued or imposed without jurisdiction or in excess of jurisdiction.
    - Ex: The use of force to execute a warrant… if the warrant is found to be defective, the use of force will be found to be justified as long as the police officer acts in good faith and believed they have a valid warrant
- **25(3)** Subject to subsections (4) and (5), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless the person **believes on reasonable grounds that it is necessary for the self-preservation of the person or the preservation** of any one under that person's protection from death or grievous bodily harm
    - **When force is not protected**
    - Limits on justifiable uses of force
    - Police officer intends to use force (not concerned with negligence here)
    - It is an objective-subjective test
    - Ex: Bad guy shooting at traffic. The officer would be permitted to use force (like shooting them) permitted to these sections for the self-preservation or the preservation of others (drivers, pedestrians, etc)
    - Firing a gun is intentioned** = The intention is to shoot to kill
- **25(4)** A peace officer, and every person lawfully assisting the peace officer, is justified in using force that is intended or is likely to cause death or grievous bodily harm **to a person to be arrested, if**
    - (a) the peace officer is proceeding lawfully to arrest, with or without warrant, the person to be arrested;

    - (b) the offence for which the person is to be arrested is one for which that person may be arrested without warrant;
    - (c) the person to be arrested takes flight to avoid arrest;
    - (d) the peace officer or other person using the force believes on reasonable grounds that the force is necessary for the purpose of protecting the peace officer, the person lawfully assisting the peace officer or any other person from imminent or future death or grievous bodily harm; **and**
    - (e) the flight cannot be prevented by reasonable means in a less violent manner.
    - Applies to those who are to be arrested
    - Often referred to as the fleeing-felon rule when talking about use of force
    - NEED TO SATISFY ALL 5 SECTIONS!! If missing one, then can't use this as justification
    - Can't use this in a situation where arresting someone for a jaywalking ticket and they walk away
- **Overall**
    - The police officers belief must be objectively reasonable
    - Therefore, the use of force under section 25 is to be judged on a subjective-objective basis
    - Police actions are not to be judged against a standard of perfection = Police actions are to be judged in light of the dangerous and exigent circumstances they often find themselves
- **Section 25 - Assessment of Force**
    - "In determining whether the amount of force used by the officer was necessary the jury must have regard to the circumstances as they existed at the time the force was used. They should have been directed that the appellant could not be expected to measure the force used with exactitude."
        - R. v. Bottrell 1981 CarswellBC 463 (CA) at para. 28
        - Court puts themselves in the role of the office both subjectively and objectively to determine what they did was justifiable, reasonable, and proportionate
    - "Some allowance must be made for an officer in the exigencies of the moment misjudging the degree of force necessary to restrain a prisoner". The same applies to the use of force in making an arrest or preventing an escape. Like the driver of a vehicle facing a sudden emergency, the policeman "cannot be held to a standard of conduct which one sitting in the calmness of a courtroom later might determine was the best course." (Foster v. Pawsey) Put another way: It is one thing to have the time in a trial over several days to reconstruct and examine the events which took place on the evening of August 14th. It is another to be a policeman in the middle of an emergency charged with a duty to take action and with precious little time to minutely dissect the significance of the events, or to reflect calmly upon the decisions to be taken (Berntt v Vancouver)"
        - **Chartier v. Greaves at para. 64(i)**
        - Situations happen quickly - police work complex environments
        - Decisions are not made in a lab
        - Reaction time, always behind the ball when reacting to someone else's action
        - Realities of policing - little time to react

<u>Use of Deadly Force</u>

- Where police use deadly force against a person, this constitutes a serious infringement of that person's s. 7 Charter rights of Life, Liberty, and Security of the Person
    - Ex: If an officer decides to discharge their weapon, this would be the use of deadly force (because bullets kill)

- To withstand Charter scrutiny any use of such force must comply with the principles of fundamental justice
- Compliance with the principles of fundamental justice requires that deadly force be justified under the law
- Section 25 of the Criminal Code is the applicable law and must be taken to determine if its justified
    - **Davies paragraph 72 talks about the analysis!**
- **Burden of Proof**
    - The burden of proof of a Charter violation rests with the party asserting the violation and proving the breach of his/her rights on a balance of probabilities
    - Once an accused has met the burden of establishing that the police used deadly force against him or her, this constitutes a prima facie breach of s. 7 of the Charter
    - The evidentiary burden then shifts to the Crown to prove that the force used was justified in circumstances (section 25)
    - The test as to whether the use of deadly force was justified requires a combined subjective-objective analysis
        - Davies goes through this analysis at para 43 and 44 and 78 (SCC)
        - The TOF must conclude that the officer subjectively believed that use of deadly force was necessary but that it is objectively reasonable

Negligence and Use of Force

- Section 25 of the Code does not apply to cases where negligence is involved
    - Chartier v. Greaves at para. 64(a)
    - Ex: An officer accidentally discharges their weapon because the safety was off
        - The standard of behaviour is ordinary prudent officer would always have the safety on
        - Officer was negligent
- A deliberate and intended act is required to avail yourself of the s. 25 justification
- This is not available for negligent acts
- The law of negligence requires individuals to conduct themselves in a way that conforms to certain standards of conduct
- Failure to use such care as a reasonably prudent and careful person would use under similar circumstances (Blacks Law Dictionary)

Mistake of Fact v Mistake of Law

- "In effect, section 25(1) protects the officer from civil liability for reasonable mistakes of fact and authorizes the use of force. **It does not protect against reasonable mistakes of law…"**
    - Hudson v. Brantford Police Services Board, 2001 CarswellOnt 3303 (CA) at para
    - Ex: Non-compliance with the law (like an arrest, a warrant, etc) or not authorizing a police power
- Essentially, Dickson J.'s interpretation of s. 25(1) is that it does not protect police officers for any and all actions just because they have reasonable grounds to make an arrest. Rather, police officers must be required or authorized by law to do the impugned act. This was also recognized by Rosenberg J.A. in Hudson, where he stated (at paras. 25, 32):
    - To summarize, the officers had no lawful right to enter to arrest the plaintiff and, assuming Dickson, J's, analysis of s. 25(1) is correct, no defence to a claim for trespass based on the unlawful entry.

- To conclude, s. 25(1) does not provide a defence to a police officer who generally acts reasonable and in good faith. The defence must be related to the specific conduct involved and the legality of the action the officer claims is "authorized by law" within the meaning of s. 25(1).
    - Tymkin v. Ewatski, 2014 CarswellMan 9 (CA) at para. 99

Civil and Criminal Liability

- Section 25 of the Criminal Code provides a defence to both civil and criminal liability if the force was "justified" within that section
    - Priestman v. Colangelo, (1959) CarswellOnt 18 (S.C.C.)
    - Robinow v. Vancouver (City), 2003 CarswellBC 1003 (SC)

Section 26 of the Criminal Code = Excessive Force

- Justifiable force is section 25
- Criminal liability for anything that is considered excessive is under section 26
- Section 26: Everyone who is authorized by law to use force is criminally responsible for any excess thereof according to the nature and quality of the act that constitutes the excess.
    - Section 25 gives authorization to apply force
    - Constant reassessment of threat
    - If no longer necessary, then can't use force
- **Burden of Proof**
    - First burden on the accused who is alleging excessive use of force; if successful,
    - Onus of proving that the force was not excessive lies on the police officer - the one who asserts the justification
        - Chartier v. Greaves at para. 64(c)
    - Question whether the force is excessive is a question of fact
        - Chartier v. Greaves at para. 64(e)
- **Amount of Force to be Used**
    - "It is both unreasonable and unrealistic to impose an obligation on the police to employ only the least amount of force which might successfully achieve their objective. To do so would result in unnecessary danger to themselves and others. They are justified and exempt from liability in these situations if they use no more force than is necessary, having regard to their reasonably held assessment of the circumstances and dangers in which they find themselves" (Levesque v. Zanibbi et al)."
        - Chartier v. Greaves at para. 64(k)
        - Police are not required to use the least amount of force, but police can't use excessive force
        - Police are in volatile, fast, and complex situations
        - This officer in the circumstances did not use excessive force
- **Remedies when Force used is Excessive**
    - Stay of Proceedings
    - Remedy at Sentencing Stage
    - Award for Damages

Section 27 of the Criminal Code = Use of Force to Prevent a Commission of an Offence

- The subjective-objective test continues to be applied
- Proportionality, necessity, reasonableness, not having to weigh to a nicety, a dynamic situation, etc. all apply

- Section 27: Every one is justified in using as much force as is reasonably necessary (not limited to police)
    - (a) to prevent the commission of an offence
        - (i) for which, if it were committed, the person who committed it might be arrested without warrant, (indictable) and
        - (ii) that would be likely to cause immediate and serious injury to the person or property of anyone, or
    - (b) to prevent anything being done that, on reasonable grounds, he believes would, if it were done, be an offence mentioned in paragraph (a).
- "Similarly, s.27 justifies the use of force which is reasonably necessary to prevent the commission of an offence. This section is of general application and the person asserting the justification need not be a peace or public officer or a member of a restricted class of persons"
    - R. v. Hebert 1996 CarswellBC 1499 (SCC) at para. 10
    - No step ladder approach

Section 27.1 of the Criminal Code (not being tested on)

- **Section 27.1(1)Use of force on board an aircraft**
    - Every person on an aircraft in flight is justified in using as much force as is reasonably necessary to prevent the commission of an offence against this Act or another Act of Parliament that the person believes on reasonable grounds, if it were committed, would be likely to cause immediate and serious injury to the aircraft or to any person or property therein.
- **Section 27.1(2)Application of this section**
    - This section applies in respect of any aircraft in flight in Canadian airspace and in respect of any aircraft registered in Canada in accordance with the regulations made under the Aeronautics Act in flight outside Canadian airspace.

Section 30 of the Criminal Code (not tested on)

- Applies to police officers and others like a civilian
- Section 30: Everyone who witnesses a breach of the peace is justified in interfering to prevent the continuance or renewal thereof and may detain any person who commits or is about to join in or to renew the breach of the peace, for the purpose of giving him into the custody of a peace officer, **if he uses no more force than is reasonably necessary** to prevent the continuance or renewal of the breach of the peace or than is reasonably proportioned to the danger to be apprehended from the continuance or renewal of the breach of the peace.

Section 32 and 33 of the Criminal Code = Suppression of Riots (not going to be tested on)

- **Section 32(1): Use of force to suppress riot**
    - Every peace officer is justified in using or in ordering the use of as much force as the peace officer believes, in good faith and on reasonable grounds,
        - (a) is necessary to suppress a riot; and
        - (b) is not excessive, having regard to the danger to be apprehended from the continuance of the riot.
- **Section 32(3): Obeying order of peace officer**
    - Every one is justified in obeying an order of a peace officer to use force to suppress a riot if
        - (a) he acts in good faith; and
        - (b) the order is not manifestly unlawful.

- **32(4): Apprehension of serious mischief**
    - Everyone who, in good faith and on reasonable grounds, believes that serious mischief will result from a riot before it is possible to secure the attendance of a peace officer is justified in using as much force as he believes in good faith and on reasonable grounds,
        - (a) is necessary to suppress the riot; and
        - (b) is not excessive, having regard to the danger to be apprehended from the continuance of the riot.
- **32(5): Question of law**
    - For the purposes of this section, the question whether an order is manifestly unlawful or not is a question of law.
- **33(1) Duty of officers if rioters do not disperse**
    - Where the proclamation referred to in section 67 has been made or an offence against paragraph 68(a) or (b) has been committed, it is the duty of a peace officer and of a person who is lawfully required by him to assist, to disperse or to arrest persons who do not comply with the proclamation.
- **33(2) Protection of officers**
    - No civil or criminal proceedings lie against a peace officer or a person who is lawfully required by a peace officer to assist him in respect of any death or injury that by reason of resistance is caused as a result of the performance by the peace officer or that person of a duty that is imposed by subsection (1).
- **33(3) Section not restrictive**
    - Nothing in this section limits or affects any powers, duties or functions that are conferred or imposed by this Act with respect to the suppression of riots
- **Riots**
    - Parliament takes a grave view of tumultuous disturbances of the Queen's peace
    - The training, experience and orders given to a police officer are all part of what determines whether "reasonable grounds" existed for the officer's conduct
    - To determine whether reasonable grounds existed, neither what the person injured intended to do, nor the actual consequences of the force used are material considerations.
    - "Reasonable" does not mean "right". The issue is not whether the officer was "wrong", but rather, whether he lacked reason for his/her belief

<u>Arrest Without Warrant by Police</u>

- s.495(1) of the Criminal Code states a peace officer may arrest without warrant
    1. A person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence; OR
    2. A person whom he find committing a criminal offence; OR
    3. A person in respect of whom he has reasonable grounds to believe that a warrant of arrest is in force for that person (even though he or she does not have the warrant)
- **Two Sources of Analysis -** Should include both statute and common law
- Reaction time… how many times have the police officer said "drop your weapon" - satisfactory to say it once
- Imminent danger of the public (police need to protect)

<u>Use of Force Scenarios</u>

1. Cst. Fresh RECRUIT
    - Was her use of force justified or excessive?

- How many times did she say “drop your weapons”?
- She is alone, back-up is a half hour away, knows there is a minimum 2-3 people there and sees two of them with guns, the man who approached her she doesn’t know it’s Mr. Farmer (could be a bad guy)
- What if she knew the guy was Mr. Farmer?
    - The suspects are carrying firearms, now farmer is in danger too

2. Section 25
    - There are two sources of analysis for whether there is excessive use of force (common law and statutory) and the analysis should include both
    - Start with section 25
        - (1)
            - Police officers have a duty (common law - protect life, property, etc., and statutory - section 38)
            - Authorization to be there = Responding to a 911 call, not a trespasser
            - Act on reasonable grounds? = Objective test in statute
            - Necessary to use force? =
                - 3 principles from Nasgolouk
                - Use the facts here to satisfy necessity
                - To protect herself? Mr. Farmer and his family in the home with three children?
        - (3)
            - Was her force intended?
                - Yes, firing a firearm is an intention to shoot to kill
                - Not trying to shoot in the knees or shoulder
            - Preservation
                - Her own life and a whole family in the house
        - (4) (the fleeing felon rule)
            - Applies to people who need to be arrested
            - **Are the suspects going to be arrested?**
                - **Doesn’t need to be a physical act**
                - **Police, drop your weapons, hands up**
                    - Crown yes they are arrestable looking at section 494
                        - The fact they have the firearms and are approaching, they may use them as an intention to flee
                        - Taking off, couldn’t say they were under arrest or what they were arrested for
                    - Defence say no the words or actions not consistent with an arrest
            - Takes flight to avoid arrest is important
                - My officer who discharged the weapon satisfies the section (all cumulative)
            - Have to be satisfied that there is a lawful arrest
                - Section 495(1) without warrant
                - Subjective-objective grounds to believe
        - Section 25
            - The police officers belief must be objectively reasonable and thus use of force is to be judged on a subjective-objective basis

        - Subjective = Alone, this is her first posting, only on the job for 4 months, likely feeling very vulnerable, she knows there is a family in the home, potentially a third suspect she hasn't found yet
    - Section 27
        - Trying to prevent theft
        - She is out on a farm, there are a bunch of guns and are likely to be loaded and ready to go
        - Not unreasonable in the circumstances! Farmers likely to have loaded guns and not locked securely so they are accessible
        - There is an increase in rural crime as well… subjectively the officer would know there are a lot of break and enters in the area recently

Lecture 8: Critical Incident Command

- When something goes horribly wrong, this is who is called → RCMP Critical Incident Command
- The commander has a tactical and negotiating team
- The commander makes the final decisions in situations but these decisions are informed by her teams
- What if lethal force is to be used?
    - If the suspect puts people at risk (the public or police) such as shooting a gun, then lethal force may be triggered because cannot control the behaviour or actions of the suspect
    - Commander makes the final call if lethal force is to be used
- Largely Risk Management
    - Have to look at various types of risk (need to assess risk)
        1. Physical Risk = Victim, public, police, suspect
            - Victim of those injured
            - Public being around is a huge risk (public jeopardy)
            - People's lives are paramount
            - Victims and the public are the priority for the preservation of life
            - Then police and suspect safety
                - Threat to kill police
                - Police suicide
        2. Organizational Risk = Civil liability, public opinion, oversight processes, media scrutiny
            - If the police did something like damaging property like tactical armed vehicles
            - Would the general public agree or disagree with the action taken?
            - ASIRT - operating within the law
        3. Investigational Risk = Loss of evidence, Charter breaches
            - Were the officers lawfully place, was the warrant valid, etc
- Risk Environment and Risk Management (what is our environment and how do we manage risk)
    - Lawful authorities
        - What lawful authority do they have to execute their duties?
            - Pre-planned operations
                - Search warrants
            - Exigent operations
    - Use of force/civil liability
    - Always need to be lawfully place

        - How did we get the call, what brings us to the location, what is the scenario in which the police are operating in order to make successful decisions
- Risk is your currency
    - Spend it as you will, but spend it you must
    - Not making a decision to do anything, is a decision not to do anything
    - Calculated risks - those which weight the potential for success against the cost of not taking an action - are essential and must be recognized as opportunity to successfully achieve mission objectives
        - SMEAC
        - **Situation** (document and know what the situation is - domestic, public shooting, etc.)
        - **Mission Statement** - this is vital… a commander has a team and support personal (what are we here to do which gives people a clear understanding of what the command team is doing what they are doing)
            - Secure the property to execute the search warrant and take the accused into custody
            - Secure the area in question and apprehend the individuals responsible for committing the act
            - Secure an area to protect the public and what to do (executing a warrant, taking a suspect into custody, etc)
            - The critical incident commander is responsible for the mission statement
        - Execution
            - Negotiators, tactical team, and commander work together to execute mission statement
            - Document the plan on how to deal with the situation
                - What is our lawful authority
                - What is the risk and how are we going to deal with this risk
        - Administration and logistics
            - Sufficient resources on scene
                - Enough police to patrol perimeter
                - Food and water so no one is fatigued (if prolong situation)
        - Command and Communications
            - Know who is in command; only one commander at a time
            - Whoever is on the ground has “ground truth” (on the ground and understands what is going on)
- Lawful Authorities
    - Huge for police… the actions police take are scrutinized at every level and thus they must be lawfully place to execute their duties
    - First Question = Was the officer lawfully placed? Was the officer there in the course of their duties and were they allowed to take the action in which they took? (up against public scrutiny)
    - Pre-planned operations
        - Warrant executions
        - Planned arrests
    - Unplanned/emergent operations
        - Barricaded persons
        - Hostage takings
        - Suicidal persons

        - Destruction of evidence
        - EXIGENT CIRCUMSTANCES
- Armed and Barricaded
    - When someone refuses to comply with police demand and have themselves barricaded (in a house, shed, etc) and tend to be in possession of a weapon
    - Successful negotiations
        - Everyone survives - injured or not
    - Unsuccessful Negotiations
        - Not every situation has a happy ended
        - Don't have control over an individual's actions or behaviours
- Other Considerations
    - Suicide by Cop
    - Intoxicated or high individuals soak time
        - Soak time is waiting
    - Less lethal options like PDS (police dog services) CEW (conducted energy weapon) 40MM (like a rubber bullet)
    - Always make sure less lethal options are deployed first before lethal options are (last resort)
    - Are these less lethal options available on scene?
    - CS gas - barricaded individuals
    - Goal oriented individuals
        - Out to kill
        - No control over their actions
        - Utilize lethal force
        - Can never take a chance to injure a leg, always shoot to kill
- Pre-planned operations considerations
    - Lawful placement of location in question and neighboring residences
    - Types of judicial authorities
    - Adequate support units
    - Etc
    - Deliberate v immediate action taken
- Member Involved Shootings
    - A police officer fires their firearm
    - Snipers give more eyes on (pre-planned)
    - Discharging shots to sniper
    - Section 25 kicks in (authority)…. Sniper engages the individual in lethal force
    - Preservation is number 1 so would collect the suspect after they got shot and get them medical attention
    - Consequences
        - Carry the burden of satisfying the public
        - Injuries or deaths to the public
        - Injuries or death to police officers
        - Criminal charges arising from police actions from ASIRT
            - When the commander makes a decision for the police to act, the commander is the authority (police acting under her authority) and the commander will be held responsible
    - Asking suspect to surrender but continues to threat lethal force

- Not always pre-planned, have to make quick and difficult decisions based on what is known and the situation
    - Want to prevent injury or harm
    - All about risk management
    - How to calculate risks based on what is known at the time