# CRIMINAL LAW 420

# INTRODUCTION TO CRIMINAL LAW

## SOURCES OF CRIMINAL LAW

### The Constitution Act, 1867 = BNA Act

- Criminal Law: Only fed parliament can enact it [**Section 91(27)]**
    - Consequence from this
        - 1: if a province makes a law that is regarded as "criminal" it is ultra vires ("beyond the powers")
            - Ex: Morgentaler
        - 2: Parliament can validly pass laws if they can show that they qualify as criminal law
    - Has both an enabling and a disabling feature
        - Enabling – allows parliament to pass laws
        - Disabling – prevents provinces from enacting criminal laws
    - Individuals can challenge a federally enacted law and claim it is provincial jurisdiction.
        - Conversely, individuals can challenge a provincially enacted law and argue it is criminal and invalid, therefore, not enforceable
- Provinces have power over administration of justice [**section 92 (14**)]
    - Fed govt has exclusive power to prosecute federal offences but power can be delegated to provincial AG as is done in s (2) of the Criminal Code
    - SCC justice Lakin wrote "by no stretch of language... can these words be construed to include jurisdiction over the conduct of criminal prosecutions… neither logic nor grammar support this construction".
        - Yet, clear that the British govt did think crim justice was a prov responsibility (Lord Carnarvon)
- Provinces can also create "provincial regulatory offences" (quasi criminal) [**Section 92 (15)**]

### The Constitution Act, 1982

- Part I – Canadian Charter of Rights and Freedoms
    - Now the "supreme law of Canada" as per s. 52
    - → Laws or statutes that violate the charter are of "no force or effect"
        - Ex: *R v. Oakes*
- Limitation of Rights (section 1)
    - Subject to "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."
    - If a law of practice is found to infringe a charter right, it is open for the state to prove under s.1 of the Charter that it is a reasonable limit prescribed by law and demonstrably justified in a free and democratic society
    - Section 7 (right to life, liberty, and security) and Section 8 (right to be free from unreasonable search and seizure) do not apply to this limitation
- Enforcement of Rights
    - S.24 (1) General remedies ("appropriate and just in the circumstances") &
    - s. 24 (2) Exclusion of evidence (admission could "bring the administration of justice into disrepute")

### The Criminal Code / Other Statutes

- Most criminal laws fall under the criminal code
- Other statutes can employ the criminal law power (*Controlled Drugs and Substances Act, Copyright Act)*

### The Common Law

- Forms the basis for outlining evidence

## CRIMINAL LAW POWER

The "Test": All 3 of these things must be present to constitute a criminal law

1. Criminal Law Purpose (pith & substance)

    a. Prevent something that is harmful to social, economic, or political interest (e.g., public peace, order, health, security, morality)
        i. Tobacco reference – outlawing ads targeted to minors
2. Prohibition
    a. Though shall not do
    b. Whereas provinces enact a series or rules (regulatory); not outright prohibition
3. Punishment
    a. Problematic thing and therefore punished

## *Reference re Firearms Act* 2000 SCC

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| **Ratio** | • To test the jurisdiction a piece of legislation falls under, two questions must be asked:<br>  ○ what is the pith and substance of the legislation?<br>  ▪ Ask: the purpose; the legal effect of the law<br>  ○ where does the jurisdiction to regulate this type of matter lie?<br>• For something to be criminal law three criteria must be satisfied:<br>  ○ it must have a valid criminal purpose;<br>  ○ it must be backed by a prohibition; and<br>  ○ it must have a penalty. |
| **Facts** | • Parl amended code to require holders of all firearms to obtain licences and register their guns and have<br>• AB challenged parl power & argued it deals with private property & therefore provincial jurisdiction<br>• CoA upheld the law<br>• AB appealed to SCC |
| **Issue** | • Does Parliament have the constitutional authority to enact the law? |
| **Result** | • Yes, appeal dismissed and upheld the law |
| **Reason** | • Pith + substance: purpose and effect is directed towards **public safety**<br>• Jurisdiction: falls under section 91(27) bc it is a criminal law<br>  ○ Purpose: "peace, order and good government" of Canada (*Margarine Ref*)<br>  ○ purpose is connected to prohibitions backed by penalties |
| **Notes** | • The regulatory aspects are secondary and "intrusion of the law into prov jurisdiction over property & civil rights is not so excessive as to upset the balance of federalism"<br>• There was no attempt to protect or regulate industries or businesses associated with guns |

## Law's Failing the Criminal Law "Test"

- Sometimes fed parl go outside their scope and thus the laws enacted get strike down
- Federal gov tried to regulate butter (Margarine Reference), beer (Labatte Breweries) and apples (Dominion Stores Ltd. V R) – CB 10
- Example: *Margarine Reference* – Federal government does not want margarine to be colored yellow
    - Purpose - Failed – could not show butter was healthier.
    - Prohibition – banned coloring.
    - Punishment – prison
    - Held: Gov't was protecting dairy industry → ruled not criminal and unconstitutional
- See also: Light beer (*Labatte Breweries) and apples (Dominion Stores Ltd. V R)*

## PROVINCIAL LEGISLATION

- Designation of federal offence as "regulatory" or "criminal" does not hinge on whether it stems from 91(27) or some other head of power
- Provincial offences are, by definition, regulatory. If they are "criminal" they are ultra vires

### Scope of Provincial Legislation

- Provinces given power under s. 92(15) of the *Constitution Act* to impose "punishment by fine, penalty, or imprisonment for enforcing any law of the Province…"
- Prov laws can be struct down for lacking power under s. 92 or for conflict with fed legislation
    - What's a conflict? Must require the accused to act in an inconsistent manner ∴ can have concurrent jurisdiction
    - However, courts will bend over backwards to uphold prov laws
        - *McNeil Nova Scotia Case*: attempted to ban Last Tango in Paris in 1970s - upheld; prov can be involved in censorship → have a justifiable interest
        - Alberta forced treatment of drug users – upheld
        - Example, driving
            - Provincial government sets out regulations around driving
            - Federal government has some control, drunk or dangerous driving moves into criminal and into federal sphere
            - Both sides can regulate same activity, but federal handles the criminal activity
            - Not always clear when line crosses from fed to prov and vice versa

- Provincial Ultra Vires Cases
    - *Westendorp*
        - YYC by-law prohibited a person from remaining on the street for the purpose of prostitution
        - Purpose claim: reduce street traffic.
            - Real purpose: morality
            - "colourable attempt to deal, not with a public nuisance but with the evil of prostitution"
        - Failed – struck down due to Federal jurisdiction
    - *Morganteler*
        - Province (NS) tried to enact a law stating that you couldn't do abortions in a private clinic.
        - Law had little to do with treatment, was more about enforcing morality.
        - Question of morals is a criminal law concern; therefore, provinces cannot enact laws because it would be criminal.
    - Current: Persecution of those who wear religious symbols in QC
        - QC trial court upheld
        - May take the SCC to strike it down – wait & see

# SCOPE & LIMITS: COMMON LAW CRIMES

## COMMON LAW & THE RULE OF LAW IN CRIMINAL LAW

- Common law in the context of criminal law is:
    - the interpretation of statutory legislation
        - This itself then becomes law (e.g., how to apply certain principles)
    - Inclusive of the judge-made rules
        - Occurs when there is a gap in statute (e.g., evidence, police powers)
        - Ancillary powers doctrine – ability of judges to give police powers (detention, discovery of crime, warrant powers)
        - Can be replaced by statutory law (although rare)

- Rule of Law
    - Equality under the law
    - Transparency under the law
    - Independent judiciary
    - Accessible egal remedy

- ***Nullen crimen sine lege, nulla poena sine lege":*** There should be no crime or punishment except in accordance with a fixed and predetermined law
- Preamble to the Charter, Canada is founded upon principles that recognize the **rule of law**
  - Citizens will not face the arbitrary wrath of government power
  - S. 11 (g)
    - Everyone charged with an offence has the right "not to be found guilty on account of any act or omission unless at the time of the act or omission, it constituted an offence under Canadian or international law…"

## OFFENCES

### *Frey v. Fedoruk* 1950 (SCC)

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| **Ratio** | • You **cannot criminalize someone for an offence that does not exist**.<br>  ○ Decision re: what is lawful is up to parl, not the courts.<br>  ○ Importance of fairness and clear law. |
| **Facts** | • Frey was caught "peeping" on a woman in Fedoruk's house; Fedoruk imprisoned Frey.<br>• Frey was charged with "unlawfully acting in a manner likely to cause a "breach of the peace" by peeping. Overturned on appeal.<br>• Frey filed a civil suit for wrongful imprisonment. Fedoruk's defence: justified in arresting Frey because Frey was committing a criminal offence. |
| **Issue** | • Was "peeping" a criminal offence despite no specific statute? If so, were the D's justified in arresting Frey?<br>• Can the court create common law offences? |
| **Result** | • Frey won.<br>• Court said no more common law crimes. |
| **Reason** | • Great uncertainty would amount if crimes were interpreted by what each individual judge things as a "breach of peace."<br>• There is no common law precedent of a 'peeping tom' being a criminal offence<br>• There is no statute that states what Frey did as illegal (appeared in crim code in 1953).<br>→ imprisonment is not justified. |
| **Notes** | • Case shows **judicial restraint.**<br>• In 1955 → parl revised CC so no common law crimes now applied (via CC s. 9)<br>  ○ Except the power of the court to impose a conviction of contempt of court (CC s. 9)<br>  ▪ Covers array of conduct, judges trying to protect themselves, designed to maintain confidence in judicial process<br>  ○ However, common law defences still allowed and can recognize new ones (CC s.8(3)).<br>  ▪ have the power to limit extent and applicability of criminal statute |

### *R v Samir* 1994 (AB Prov court)

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| **Ratio** | • Being a jerk is not a crime. You **must do something against the law to be guilty** of a crime.<br>• Following somebody for a few blocks/ten minutes does not constitute *enough* persistence to be considered criminal under s 423(c) of the Code. |
| **Facts** | • Samir charged with s423(1)(c) → intimidation. Blocked P's way with car and followed her several blocks, whilst repeating a vulgar sexual proposal.<br>• Section 423 of the Criminal Code reads in part as follows:<br>  ○ (1) Everyone who, wrongfully and without lawful authority, for the purpose of compelling another person to abstain from doing anything that he has a lawful right to do, or to do anything that he has a lawful right to abstain from doing, (c) persistently follows that person about from place to place, is guilty of an offence punishable on summary conviction. |

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| **Issue** | • Do the facts match the criminal code explanation of intimidation? |
| **Result** | • Accused is acquitted |
| **Reason** | • Fails on (c), judge finds level of persistence is not met. "If being a jerk were sufficient to find a conviction pursuant to s. 423, I would have no hesitation on entering one. This is an example of the principle of restraint – again denying someone of their personal liberty is very serious." |
| **Notes** | • By the time this case went to court, a new crime was added to the Code (s. 264). His actions could've fit<br>• under this offence of criminal harassment. They did not convict him under s. 264 because it was not a crime at the time (**Charter 11(g) principle against retroactivity**) and was not charged of it (value of **certainty**) |

## *R v. Jobidon* 1991 (SCC) – retroactivity issue

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| **Ratio** | • At common law, **consent invalidated between adults who intentionally apply force** causing serious hurt or non-trivial bodily harm to each other during a fist fight or brawl. |
| **Facts** | • Accused charged with manslaughter following a fistfight that started in a bar. After the fight was broken up inside the bar, the two met outside. Jobidon hit the victim on the head, knocking him onto the hood of his car. Jobidon repeatedly struck his head. Victim rolled off the hood of his car and laid limp. He died.<br>• Manslaughter:<br>  ○ Section 222(5)(*a*) - causing the death of another by means of an **unlawful act** (manslaughter).<br>  ○ Can't be punished (at all) unless his act was unlawful ∴ Must first have committed an assault.<br>  ▪ CC s.265 – Assault – "A person commits an assault when, **without the consent** of another person, he applies force intentionally to that other person, directly or indirectly<br>• Procedural History<br>  ○ Trial, not guilty b/c victim's consent to "fair fight" negated assault<br>  ○ CoA reversed – guilty of manslaughter, **no consent** for this type of assault possible for policy reasons<br>• Accused appealed to SCC. |
| **Issue** | • Manslaughter requires unlawful act – Jobidon's act must have been unlawful assault – cannot be unlawful assault w/o consent. Did the victim consent to the fist fight that led to his death? Can one consent to bodily injury? |
| **Result** | • Appeal dismissed. Guilty of manslaughter because there could be no consent. |
| **Reason** | • Although assault requires a lack of consent, consent is to be interpreted<br>• Consent is automatically negated in some situations (i.e., fist fight, minor/adult altercations).<br>• Courts determined that one cannot consent to non-trivial bodily harm except in context of customary norms and rules (sports).<br>• Court invoked the concept of social utility → little utility to allow the behaviour |
| **Judgments** | **Gonthier**<br>• Crim offences are now codified but can still use common law to clarify the definitions and content from which the various principles of crim responsibility draw from (as per s.8 – common law rules + principles continue to apply if they are not inconsistent with an Act of parl).<br>• Common law developed an approach to the role and scope of consent as a defence<br>  ○ CL restricted extent to which consent may be invalidated; as do "relevant policy considerations"<br>• The limitation demanded by s. 265 as applied to the circumstances, is one which vitiates (impairs) consent between adults intentionally applying force causing serious hurt or non-trivial bodily harm to each other.<br>• Interpreted "without consent" as the other party does not agree to force **or** force causing serious hurt or non-trivial bodily harm (unless in the context of customary norms & sport)<br><br>**Sopinka (concurring but for diff reasons)**<br>• Agreed with majority but disagreed with the reasoning. |

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| | ○ The majority used CL to come to a decision they viewed was in the public interest. They decided to discard 'absence of consent' as an element of s 265 which was a specific requirement by parl that applied to <u>all</u> assaults w/o exception.<br>○ The effect of the **majority's approach creates an offence that does not exist in the Code** by application of the CL. Using CL to eliminate an element of the offence that is required by statue is beyond interpretation and is **contrary to the letter and the spirit of s 9** of the Code.<br>○ "Accused should not have to search books of common law to determine if the offence is an offence at law".<br>• Sopinka J would have deferred to trial judge's conclusion that the victim's consent did not extend after he lost consciousness. By continuing to punch the victim after he knew he was unconscious, Jobidon knowingly acted beyond the victim's consent. [**You can consent to bodily harm BUT consent does not extend past unconsciousness**]. Therefore, since Jobidon knew the victim was unconscious after 1st punch, the next punches were w/o consent |
| **Notes** | • IF apply case to BDSM → cannot consent to anything more than trivial harm<br>○ Yet to reach the SCC so no answer to this concern<br>**Criticism on Jobidon**<br>• The decision contradicts principle of fair notice and certainty of s. 9 of the Code and s. 11(g) of the Charter.<br>• This suggests the courts see themselves as being capable of dealing with social policy issues and "interpret the law" in a way that expands the scope |

- <u>Presumption of retroactivity:</u> CL principle that people cannot be punished for something that was not illegal at the time they committed the act.
- Prior to 1892, criminal law was essential common law. 1982: government enacted the *Code* to exist alongside the common law (could be convicted of either)
- Precept does not require that a person should actually know what the law is. Fairness demands that individuals can choose to find out what the rules are and act accordingly. Ignorance of the law is no excuse to criminal culpability.

## *R. v. Barton* (2017 ABCA 216) revd 2019 SCC – retroactivity issue

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| Ratio | • Retroactivity issue.<br>• There is uncertainty if Jobidon does apply as the SCC refused to address the policy considerations.<br>• So, potentially the common law expanded the criminal scope again to have consent vitiated when risk of **non-trivial harm** is foreseeable even in sexual assault causes [not just in fist fights] |
| Facts | • Bardon charged w/ first degree murder of Gladue<br>• Gladue found dead in hotel bathtub; died from blood loss from vaginal wall perforation<br>○ "Crown, defence, and trial judge all proceeded on the basis that where death results from what was consensual sexual activity, consent is only vitiated if the accused subjectively intended the bodily harm that killed the victim [applying Jobidon]".<br>○ Instructions made it clear to the jury that consent could only be vitiated if the Crown proved Barton had subjectively intended to cause Gladue serious hurt or non-trivial harm<br>• Trial court found not guilty; Crown appealed - CoA determined should be tried; appeal to SCC |
| Issue | • Whether, as a matter of law, consent or apparent consent should be vitiated for policy reasons based on objective or subjective foreseeability of the risk of bodily harm in circumstances where death results from sexual activity? |
| Result | • AT ABCA – held B should be re-tried for murder.<br>• AT SCC: 4-3. Overturned CoA. Decided B's acquittal for murder should be reinstated but held he could be re-tried for manslaughter a re-trial<br>• B was re-tried + convicted of manslaughter receiving a 12.5 year sentence (currently in another appeal) |

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| Reason | • At trial, the Crown, defence and trial judge all proceeded on the basis that where death results from what was referred to as consensual sexual activity, consent will only be vitiated if the accused subjectively intended the bodily harm that killed the victim. [Applying *Jobidon*]" [para 301]. This comes from ON extending it to sexual assault in R v Zhao.<br>○ As a matter of law, should consent or apparent consent be vitiated for policy reasons based on objective or subjective foreseeability of the risk of bodily harm in circumstances where death results from sexual activity?<br>○ Cases brought up were Ontario jurisprudence but that's not binding and also Ontario authority were cases where the complainant was alive to testify<br>○ "the jury did not know that the mens rea for manslaughter is **assessed objectively**, is satisfied by the **foreseeability of the risk of bodily harm**, and **does not require that the accused foresee death**. Confusion between the standard pathway and the Jobidon pathway in the instructions meant that this jury was left with the idea from the Jobidon pathway that the Crown had to prove that Barton subjectively intended to cause Gladue bodily harm under the standard pathway. But that is not so. **All the Crown had to prove was that any reasonable person in the circumstances would have realized that what Barton did would put Gladue at risk of bodily harm**, although not necessarily serious bodily harm or the precise kind of harm she suffered<br>○ Para 306-307 at ABCA – Court provides detailed policy analysis of where *Jobidon* <u>may</u> apply.<br>▪ Policy-based limits on consent are context driven and involve the weighing and balancing of various interests<br>▪ When a person is not alive to testify as to what actually happened, the relative ease with which an accused can then raise defences of consent or mistaken belief may also go on the policy scale in determining whether apparent consent ought to be vitiated in these circumstances<br>▪ The court will also consider "social utility o commercial sex and to consider legislative limitations on sexual relations designed to protect the vulnerable"<br>○ "The majority in Jobidon dealt only with vitiation of consent in the course of a fist fight, but **expressly contemplated that courts could develop further limitations on consent on a case-by-case basis** so that "the unique features of the situation may exert a rational influence on the extent of the limit and the justification for it". Parliament has also expressly granted the courts statutory authority to impose limits on consent for sexual offences in s 273.1(3)". → opens up the possibility of extending the law<br>• Jobidon's application raised many issues but at SCC the court declined to address them –<br>○ "In my view, for a number of reasons, this is not the right case in which to decide whether consent to sexual activity should be vitiated where the accused intentionally caused bodily harm in the course of otherwise consensual sexual activities" [para 181]<br>• Ultimately the Court held that the trial judge erred in failing to comply with the mandatory requirements set out in s 276 of the Criminal Code (admissibility of evidence about a complainant's prior sexual history)<br><br>Notes from Sankoff video<br>• S 273.1 gives list of situations where someone cannot give consent.<br>• AG of Canada pushed for SCC to recognize Jobidon principle – create a common law extension of consent (despite s9 of CC saying should have no common law).<br>○ "expand the net of criminal liability to anyone who engages in sexual activity with a consenting partner but applies force and demonstrates the 'objective foreseeability of bodily harm… in circumstances where death or serious bodily harm leaving permanent damage results from the activity'" [from AG factum]<br>○ Defence: Court should be cautious applying or expanding Jobidon to sexual activity. Jobidon's decision to vitiate consent to a fistfight when opposing party subjectively intends and causes bodily harm is well-entrenched, it remains a controversial decision. Wrong treats consent as a "defence" and "results in uncertainty" |

# SCOPE & LIMITS: STATUTORY & *CHARTER* INTERPRETATION PART 1

## Philosophical Limits

- There is a transformation occurring: From absolute authority based on religion and divine right to a society based on individual consent. The liberal idea is one that puts the primacy of self rule at the forefront. Individual autonomy and dignity should be at the forefront of any governance of society. Gives rise later in 20th century to universal rights.
- **Prior** to John Stuart Mill
    - Two ideas of how to limit the law:
        - Morality and social consensus: norms so pervasive and normal to society that they must be enforced
    - State could legislate based on harm to others (never questioned) but it could also legislate to protect the individual form harming themselves (**paternalistic** laws) at least in certain circumstances
    - Even more broadly state would be justified in protecting individuals from **moral harm** in order for society to function effectively. There are certain moral principles that need to be respected. If those values principle, then criminal punishment is deserved even in the absence of concrete evidence of harm to others.
- Most famous thinker **– John Stuart Mill** and his book "On Liberty"
    - Mill's idea is that the **criminal law must be used with restraint**
    - Should only be used where the state can demonstrate direct and concrete harm to OTHERS
    - No, you cannot legislate solely on morality, and you cannot legislate solely on the basis of protecting people (assuming they are of age and otherwise competent) unless you can show a direct causal link b/w a person's actions and harm to non-consenting other human beings. Then the criminal law = unjustified.
    - So, two essential features:
        - Rejects paternalism: prohibition of conduct that harms only the actor → needs a direct causal link from a person's actions to another (some exception for vulnerable people)
        - Excludes "moral harm": cannot justify the use of criminal law based solely on morality
    - Exception: doctrine should only apply to those with full "faculties" (i.e., not vulnerable groups)
- Mill's ideas gain traction
    - Arises in debates around abortion and criminalization of homosexuality (particularly in the UK where there were famous debates – Hart/Devlin)
        - These debates are mentioned in Justice Arbours dissenting opinion in the *Malmo levine* case
- **HART/DEVLIN DEBATE** (From *Report of the Committee on Homosexual Offences and Prostitution*):
    - **Sir Patrick Devlin**: Initially advocated for the traditional paternalistic approach.
        - **Criminal law should reflect public morality** rooted in Christian theology. Morality is the bedrock of society that is essential to protect. Without it, common bonds that hold society together would disintegrate. As such, immoral acts ought to be punished by criminal law just as vigorously as treasonous crimes because they both threaten the foundation of society to the same degree.
        - Eventually Devlin came around to supporting abolition of criminal punishment
    - **HLA Hart**:
        - Argued in favour of a harm-based approach and decriminalizaiton.
        - Morality alone is not a sufficient ground to justify the criminal law. Hart rejects the proposition that moral crimes ought to be comparable to treason because it is illogical to think that offences as homosexuality can threaten the state to the same extent as treason. In light of this, he argues for a series of principled constraints to narrow the scope of criminal law to better balance individual liberties and state interests → uses Mill's Harm Principle

## Morality Today

- Is it morally wrong to download a movie or tv show form the internet in violation of copyright? Majority said yes
    - Should such downloading be a criminal offence? Majority say no.
    - So, drawing a distinction b/w something that is morally good and criminal offences
    - Nevertheless, it is a criminal offence
        - *Copyright Act,* s42 – liable in theory up to $1m and five years of imprisonment
        - Almost never applied against individuals though

- Assuming no possibility of pregnancy, is it morally wrong for consenting adult siblings to have sex with one another? Majority yes. Universal taboo.
    - Criminal? Majority said no. Penney thinks more in public would lean yes.
    - Think – what is the concrete harm?
    - Nevertheless, is an offence
        - *Criminal code,* s 155 – liable up to 14 years

## THE HARM PRINCIPLE IN ACTION

### The Harm Principle and the Charter – Section 7

- "Everyone has the right to life, **liberty** and security of the person and the right not to be deprived thereof except in accordance with the **principles of fundamental justice".**
- Claimant must show that:
    - state deprived ONE of life, OR liberty, OR security of the person; AND
    - violated a "principle of fundamental justice"
        - must identify a PFJ that state has allegedly violated
- If there is any possibility of going to jail → right to liberty been engaged ∴ not difficult to establish
    - The difficulty is showing a violation a PFJ

### Section 1 Justification

- Even if you prove you have been deprived of one of the three elements AND a PFJ has been violated the state may justify it under section 1
- State must show that *prima facie* infringement:
    1. is prescribed by law; AND
    2. constitutes a "reasonable limit" in a "free a democratic society"

### *R v Malmo Levine; R v Caine* 2003 SCC – claim based on section 7 – Harm = not a PFJ

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| **Ratio** | • The **Harm Principle IS <u>NOT</u> a principle of fundamental justice.**<br>  ○ Fed gov't can enact paternalistic criminal laws. Harm is too imprecise to be necessary (harm to whom? What kinds of harm?)<br>• Laws will not be struck down under s.7 <u>unless</u> they are arbitrary or grossly disproportionate |
| **Facts** | • Challenged the constitutional validity of prohibition of marijuana. Claimed provision, which provides a term of imprisonment (but not required), is contrary to s.7 of the *Charter* (principles of the right to liberty) as the conduct results in little or no harms to others. |
| **Issue** | 1. Does Parliament have the authority to criminalize simple possession of marijuana? If so…<br>  a. Has that power been exercised in a way that is contrary to the Charter?<br>2. Is HARM an actus reus element that is required for any offence punishable by imprisonment? (raised in dissent) |
| **Result** | • Appeal dismissed; simple possession is *intra vires.* |
| **Reason** | **Gonthier + Binnie (with 4 others concurring)**<br>• The mere *availability* of imprisonment in a statute does not make an Act contrary to the principles of fundamental justice<br>• Is the Harm principle a fundamental principle of justice?<br>  ○ For it to be, for the purposes of s.7, it must be a <u>legal principle</u> for which there is a significant societal consensus<br>• Is the harm principle a legal principle? **No**.<br>  ○ (a) insufficient consensus that harm principle is vital or fundamental to our societal notion of crim justice<br>  ○ (b) crimes without harm exist – such as 'icky' crimes – cannibalism, indignity to dead bodies, bestiality, incest, etc.<br>  ○ (c) harm is too malleable as a concept to act as a legal standard<br>  ▪ what kind of harm [psychological, economic, social order, costs to state] – very relative. |

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| | • However, would have struck it down if it was arbitrary or *grossly* disproportionate in its effects when considered alongside the objective of protecting them from harm caused by marijuana use.<br>  ○ Found it was disproportionate, but not grossly.<br>**Dissents**<br>• **Arbour**: s. 7 requires prohibited act be harmful or pose a risk to others. Harm to self is not a valid justification for imprisonment. Harms to wider society are valid but must be measurable.<br>  ○ "whenever the state resorts to imprisonment, a **minimum of harm to others** must be an essential part of the offence" [para 244]<br>• **LaBel and Deschamp**: legislative response is disproportionate to the societal problems at issue and therefore was "**arbitrary** and in breach of s.7". Did not recognize harm principle.<br>• **Deschamps**: also unwilling to raise the harm principle to the status of a PFJ and concluded law was arbitrary due to limited harm and availability of less severe tools to address the issue |

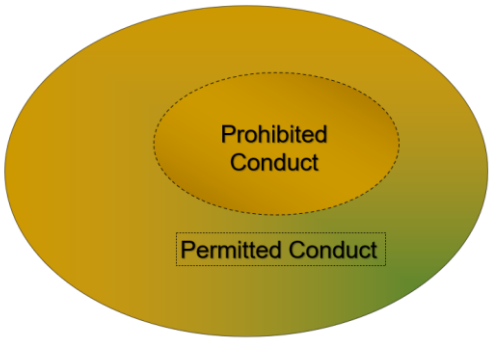
## VAGUENESS

(1) Principle of fundamental justice; and
(2) principle of interpretation

- Vagueness founded on
  - (1) Rule of law (everyone equal under the law),
  - (2) fair notice to citizens,
  - (3) limitations on law enforcement power

- **Vagueness**: When the boundary between a zone of permitted conduct and a zone of prohibited conduct is too fuzzy, becomes too difficult to distinguish one from another
  - Hard to know as a citizen whether or not what you are doing is criminal
  - Extremely few examples of void for vagueness in Canada
- The doctrine against vagueness has two rationales:
  - 1) a law must provide fair notice to citizens of the legal consequences of their conduct,
  - 2) a law must limit the discretion of those charged with its enforcement

- *Reference re ss. 193 & 195.1(a) of the CC* – SC recognized vagueness as a principle of fundamental justice
- *Nova Scotia Pharmaceutical Society* - leading decisions on the issue – "unduly"




- **Successful challenges on vagueness as a PFJ are rare**: Courts would rather interpret law strictly than strike it down
  - Difficult due to the standard applied:
    - All the legislatures must do for a non-vague law is create a definition of the offence which provides an intelligible standard for debate (i.e. an "area of risk") so the public have a general notice that what they may be doing is unlawful
  - Retrospective interpretation

        - Even if courts have interpreted the law in multiple ways, it does not prove a law is vague
        - Higher courts then provide guidance and view that as solving the vagueness rather than striking down
    - Examples of failed attempts to have legislation struck down as vague under s7.:
        - "unduly prevent or lessen competition" (*Nova Scotia Pharmaceutical Society*)
        - "reasonable use of force" by parents, guardians & teachers (*Canadian Foundation for Children, Youth and the Law)*
        - Disposing of a dead body "before birth" (*Levkovic*)
        - But see *Morales* ("public interest" in the context of denial of bail")

## *Nova Scotia Pharmaceutical Society* 1992 SCC

| | |
|---|---|
| **Ratio** | • **Courts can retroactively give meaning to words that may not be clear or certain as drafted** |
| **Facts** | • The case itself dealt with the charge of participating in a conspiracy to "unduly prevent or lessen competition" contrary to section 32(1)(c) of the Combines Investigation Act<br>• accused contended that the term "unduly" gave little notice to those caught by the law, and afforded an arbitrary power of enforcement to prosecutors who could pick and choose the type of actions trapped by the prohibition. |
| **Issue** | • whether section 32(1)(c) of the Act infringed s. 7 of the Charter because of vagueness arising from the use of the word "unduly"? |
| **Result** | • Appeal dismissed. No infringement |
| **Reason** | Gonthier rejected this contention and outlined specific propositions for vagueness<br>• Threshold for vagueness is high<br>• Vagueness as both a principle of fundamental justice (section 7) and a principle of interpretation<br>• In considering section 7, basically the government can't enact vague laws. However, more powerful, and important as principle of interpretation<br>• Doctrine of vagueness is founded on (a) rule of law (b) fair notice (c) limitation of law enforcement power (no law can be so devoid of meaning that conviction flows simply from the decision to prosecute the crime)<br>• Factors to be considered in determining whether a law is too vague include:<br>o the need for flexibility and the interpretative role of the courts<br>o the impossibility of achieving absolute certainty, a standard of intelligibility being more appropriate,<br>o the possibility that many varying judicial interpretations of a given disposition may exist and perhaps co-exist.<br>• Vagueness challenges almost always fail because judges can interpret |
| **Notes** | • Since *Nova Scotia Pharmaceutical,* the risk is left upon the individual that his or her conduct will be found to be criminal, notwithstanding poor draftsmanship<br>• Future "challenges premised on vagueness are virtually doomed to fail, even where considerable evidence demonstrates that judges – let alone citizens – are incapable of knowing with precision what type of conduct is addressed by a particular statutory instrument" |

## *Canadian Foundation for Children, Youth & The Law* SCC

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| **Ratio** | • Court prefers to interpret laws strictly rather than strike them down if they are vague (as a PFJ) |
| **Facts** | • CC s. 265: Criminal offence of ANY application of intentional force without consent<br>o Children lack legal capacity to consent<br>o Therefore, any time parents disciplined children it was considered a criminal offence<br>• CC s. 43 – Defence for above<br>o "Every parent is justified in using force by way of correction if the force does not exceed what is reasonable in the circumstances"<br>▪ Rule of law: unclear, fair notice: not sure, power: up to the courts |
| **Issue** | • Is the law vague under s 7 and thus fails? |

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| **Result** | • SCC acknowledged the wording of the law provided little guidance and the jurisprudence on the subject had "sometimes been unclear"; nevertheless….<br>• SCC rejected the challenge that s. 43 was unconstitutional due to vagueness, instead Court made limitations that guided what was "reasonable":<br>  ○ No harm, ages 2-12 only, teachers cannot punish, not degrading, no objects, no blows to the head, correction only<br>• If not followed → assault<br>**Dissent**<br>• The reading down of a statutory defence amounts to an abandonment by the courts of their proper role in the criminal law process<br>• "reasonable" = too vague |

## Indecency may refer to:

- Depravity and corruption (*Hicklin* 1868 QB)
  - Based on social morality
  - Criticized due to its arbitrary results – depending on the judge
- Community standard of tolerance (*Towne Cinema* 1985 SCC)
  - Considered a more enlightened approach
  - Introduced two-part definition of "community standards of tolerance"
  - Criticized later in Butler and Labaye – judge's standard deviates and difficult to say "while I do not tolerate X, the community does" → arbitrary
- Significant risk of harm, i.e. anti-social conduct incompatible with society's proper functioning (*Butler* 1992 SCC)
  - More objective: less opportunity for judges to impose own views
  - Resolved into a single test: risk of harm

## *R v Labaye* 2005 SCC

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| **Ratio** | • **Harm principle can be used to interpret criminal laws even though it is not a principle of fundamental justice**<br><br>• **Test for indecency (**specific law no longer exists but this test can be used where the word "indecency is used")<br>  ○ Conduct must cause **harm or significant risk of harm** that threatens to undermine a value reflected in fundamental laws<br>  ○ Harm or risk of harm is of a degree incompatible with the proper functioning of society |
| **Facts** | • The appellant appeals from a conviction of keeping a "common bawdy- house" for the "practice of acts of indecency" under s. 210(1) of the Criminal Code, R.S.C. 1985, c. C-46<br>• Appellant runs a swinger's club<br>• Indecency does not have a definition in the code<br>• generally, convict and imprison people only where it is established beyond a reasonable doubt that they have violated objectively defined norms |
| **Issue** | • whether the acts committed in his establishment were acts of indecency within the meaning of our criminal law |
| **Result** | • No. Conviction quashed. |
| **Reason** | Moved towards a **theory of harm**. Two step analyses of harm (prove BRD):<br>1. **Nature of the harm** – asks whether there is a <u>harm or significant risk of harm</u> to others that is grounded in norms which our society has formally recognized in its constitution or other fundamental laws<br>2. **Degree of harm** – whether the harm is <u>incompatible</u> with the proper functioning of society<br><br>Test for finding indecency:<br>• (1) nature of the harm<br>  ○ (1) conduct that significantly interferes with autonomy/liberty, or |

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| | ○ (2) conduct that predisposes individuals to anti-social behaviour, or<br>○ (3) conduct that will cause physical or psychological harm to those involved<br>▪ List is not closed<br>• (2) degree of the harm<br>○ Harm that is incompatible with the proper functioning of society<br>○ High threshold<br>• Conviction must be based on evidence BRD actual harm or significant risk of actual harm<br><br>Applied the test<br>• Steps were taken to ensure public who thought it was inappropriate were not exposed to conduct → no harm; no anti-social acts or attitudes; no physical or psychological harm<br><br>**Dissent**<br>• What is happening here contravenes Malmo-Levine<br>• Offences under the CC are based on principles and values other than harm. To place excessive emphasis on the criterion of harm will make it impossible to give effect to the moral principles in respect of which there is a consensus in the community.<br>○ many laws exist that may not cause social harm – incest, polygamy etc., - but still enforced |
| **Notes** | <u>Does this contravene Malmo-Levine?</u><br>• No, the two cases are trying to do two different things.<br><br>• ML: says the harm principle is too messy to be a constitutional standard<br>○ was an attempt to impose a constitutional principle that overrules parliament's choices<br>○ arguably an activist approach to trump democratically elected body<br>○ SCC is uncomfortable using the harm principle to strike down Parliament's decisions ∴ <u>not</u> a principle of a fundamental justice<br>• Labaye: Courts have been given free reign by parliament to interpret a vague provision<br>○ Harm principle is only used to interpret <u>not</u> overrule<br>○ Indecency had no definition at the time. McLachlin: we are going to apply harm and notice to define the term of indecency<br>○ SCC is comfortable using harm principle to develop legal standards where there is room to do so → harm used as an interpretation device of a statutory provision |

Counter-Majoritarian difficulty

- When we give judiciary ability to interpret AND declare law invalid
- This is where we instill another institution that is not democratically elected
- How much deference should be placed on the elected institution?
- Informs our approach to constitutional interpretation
- This idea comes to a head in the next decision…

## *Canada v Bedford* 2013 SCC

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| **Ratio** | • Recognized and reinvigorated three principles of fundamental justice:<br>○ **arbitrariness** (no rational connection between the effect and object of the law)<br>○ **overbreadth** (some part of the law has no rational connection between the effect and object of the law)<br>○ **gross disproportionality** (law's effect on claimant's interest is so grossly disproportionate to its object that it cannot be rationally supported  balances negative effect on individual and purpose of the law) |
| **Facts** | • Old Prostitution Laws prior to case<br>○ Exchange of sex for money was <u>not</u> unlawful (e.g. prostititution legal in "john's" residence" |

| | |
|---|---|
| | ○ Prohibited almost everything else related to sex work<br>▪ E.g. hiring drivers (living off avails); communication; no prostitution at third party facilities<br>• Three sex workers challenged the constitutionality of the prohibitions on bawdy houses and prostitution.<br>• They argued that the prohibition violated section 7 of the Charter because it prevents secure work environments and increases stigma.<br>• S7: right to life, liberty, security of the person<br>• Background prior to case:<br>○ Previous cases try to argue on s 2 (freedom of expression)<br>○ Robert Pickton – serial killer – had killed many prostitutes |
| **Issue** | • Did the prohibition on prostitution and body houses violate section 7 of the Charter? |
| **Result** | • Yes. Appeal dismissed; cross-appeal allowed. |
| **Reason** | • The provisions in the criminal code about sex work were shown by the challengers that they contributed to a heightened vulnerability and risk.<br>• Section 210 (bawdy house prohib):<br>○ objective was to combat public nuisance and neighbourhood disruption – ruled <u>grossly disproportionate</u> – nuisance versus the importance of a threat to safety – also only directed at in-call prostitution therefore not aimed at deterring prostitution generally<br>• Section 212 (1)(j): (living on the avails of prostitution)<br>○ objective to stop pimping and parasites who live off prostitutes.<br>○ <u>Overbroad</u>: would affect legitimate relationships such as a boyfriend, security, accountant, etc.<br>• Section 213 (1(c) (communicating in public for purpose of pros)<br>○ objective was to stop the nuisance of street prostitution.<br>○ Ruled <u>grossly disproportionate</u> – endangered sex workers because it didn't allow them ability to screen clients.<br>• Not saved by section 1 because the law was not minimally impairing; nor is the safety of the prostitutes outweighed by the law's positive effect of protecting pros from exploitative relationships |
| **Notes** | • [108] The case law on arbitrariness, overbreadth and gross disproportionality is directed against two different evils. The first evil is the absence of a connection between the infringement of rights and what the law seeks to achieve — the situation where the law's deprivation of an individual's life, liberty, or security of the person is not connected to the purpose of the law. The first evil is addressed by the norms against arbitrariness and overbreadth, which target the absence of connection between the law's purpose and the s. 7 deprivation.<br>• [109] The second evil lies in depriving a person of life, liberty or security of the person in a manner that is grossly disproportionate to the law's objective. The law's impact on the s. 7 interest is connected to the purpose, but the impact is so severe that it violates our fundamental norms<br><br>After Bedford:<br>• Parl enacted "Swedish" model that made the selling of sex legal but the purchase of sex illegal in order to eradicate prostitution from society (s 286.1)<br>• New provisions: (1) soliciting/communication (traffic flow, children) (s. 213), (2) material benefit (non-exploitative exceptions) (s. 286.2), (3) Procuring (s. 286.3), (4) Advertising (s. 286.4 & 286.5)<br>• *R v Anwar,* 2020 ONCJ 103 – struck down 2, 3, 4<br>• R v NS 2021 – Ontario Superior court also struck down 2, 3, 4 |

# PRINCIPLES OF FUNDAMENTAL JUSTICE

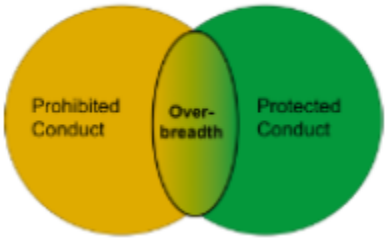
| | |
|---|---|
| arbitrariness | no connection between effect and objective of law |
| overbreadth | interferes with some conduct that has no connection to law's objective |
| gross disproportionality | negative effects greatly outweigh law's objectives |

## Arbitrariness

- No **rational connection between law's purpose and its effect** (limit it imposes) on the individual's life, liberty, or security of the person.
    - Harms the PFJ when the law bears no connection to its objective
    - e.g., *Canada (AG) v PHS Community Services Society*
        - Safe injection site in BC – The Minister of Health failed to grant them an extension for their exemption to operate
        - Purpose of the law was to reduce harm from drugs and prevent crime and yet evidence showed removing the service went against objective - SCC ruled that it was arbitrary and grossly disproportionate
    - E.g., *Morgentaler*
        - Law that required abortions performed only in hospital was arbitrary to the objective of the law bc there was no connection b/w the restriction on a woman's security + liberty & the government's objective of protecting a woman's health

## Overbreadth

- When a law goes beyond what is necessary to achieve its legislative objectives + is not rationally connected to those objectives
    - Differs from arbitrariness bc, while an arbitrary law is irrational in the sense that it bears no relation to its purpose, an overbroad law bears some relation to its purpose but goes further than is necessary
    - The law accomplishes their aims in a manner that is too sweeping in relation to the objective
    - Can be rational in some cases but also overreach in others
    - e.g., *R v Heywood*
        - anyone convicted of a sexual offence was never allowed to be near a school, park, or playground
        - purpose: protect children from sexual predators
        - issue: indeterminate duration (what if they need to take their own children?); nature of the offending (what if offence was against adults?); overbroad in relation to geographic scope
    - *Bedford*
        - Offence of living off the avails was overbroad bc it would apply to relationships outside the exploitative "pimping" relations the law intended to limit



### Gross Disproportionality

- Law's **effects** on life, liberty or security of the person are **grossly disproportionate to its purposes**
- does not consider the beneficial effects of the law for society
    - e.g., *PHS Community Services Society*
- Applies in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure (ex: keep streets clean by life imprisonment for spitting on sidewalk)

- All 3 principles compare the rights infringement caused by the law with the objective of the law, not the law's effectiveness [123]. They do not consider ancillary benefits to the general pop.

## SCOPE & LIMITS: A NEED FOR RESTRAINT?

Julie's cans have the reading notes on page 14

- Alternatives To the Criminal Process
    - Often better techniques for controlling undesirable conduct than the use of the criminal process
        - Ex: British gas suicide
            - In 1963 – suicide by domestic gas = 40% of all suicides
            - Lethal quality of the gas eliminated
            - Number of suicides dropped
    - Ex: gun control laws
        - New law created firearm acquisition cert for new long gun
        - Is the long gun registry an issue in criminal law? It costs an inordinate amount of money and resources for something that is not really an issue in Canada (handguns are a much bigger issue, and they are already covered by the Criminal Code).
    - As with the tax system, we should be more selective in prosecuting offenders of traffic offences.
        - We are likely to have fewer accidents and save more lives by using some of the resources used in prosecutions to keep repainting the white lines on highways and adding more warning devices that alert the driver that he or she is about to go off the road. We could also use more administrative penalties.
    - Is The Criminal Law a Lost Cause?
        - There is a "historical contingency" thesis that suggest that the laws being enacted bear little relation to the Government's supposed principles.
    - The decision whether or not to criminalize should be influenced by the seriousness of the wrong. Criminal law, in principle, should be used against substantial wrongs as opposed to non-serious wrongs.
    - Principle of proportionality in sentencing depends on judgments of seriousness.
    - Is there a possibility that the principle of equal treatment might be regarded in certain spheres as outweighed by the need to protect other values and to assign a more peripheral role to the criminal law?
    - There are contrasts in enforcement (perhaps caution or negotiation rather than prosecution) that raises question about whether these departures are justified. The compliance approach is more effective than the sanctioning approach. Another justification is that it is more economic to depart from regular prosecution (e.g. bringing criminal charges against companies can be very expensive).
    - In principle, the prevention of harm should be pursued through a range of initiatives in social, criminal, and environmental policy.
    - In principle, the fullest enforcement, with the most frequent use of prosecution and the highest penalties should be reserved for the most serious forms of criminality (major environmental disasters should be included with murder for example).
    - Four principles to identify a core of criminal law:
        - Criminal Law should be used, and only used, to censure persons from substantial wrongdoings.
        - Criminal Law should be enforced with respect for equal treatment and proportionality.
        - Persons accused of substantial wrongs ought to be afforded the protections appropriate to these charged with criminal offences.
        - Maximum sentences and effective sentence levels should be proportionate to the seriousness of the wrongdoing.

- Limitations on Criminalization and the General Part of Criminal Law
    - Crisis of Over-criminalization = Absence of accepted constraints on the criminal law has led to huge incarceration numbers. Virtually all criminal laws burden non-fundamental liberties and the state needs only some conceivable legitimate purpose to enact the great majority of criminal laws (e.g. The liberty to eat pizza is not fundamental and may be criminalized to protect the public from unhealthiness).

# PROSECUTION & DEFENCE

- Criminal law is… not a law at all, but a veil that hides a system that allocates criminal punishment discretionarily – William Stuntz

## PROSECUTOR'S ROLE

- **Prosecutor's primary duty** is not to seek a conviction but see that **justice is done through a fair tria**l on its merits
- P's are generally subject to very limited oversight ∴ have a lot of responsibility
- *R v Boucher* 1955 SCC
    - Role of prosecutor s not to obtain a conviction, it is to **lay before a jury credible evidence** relevant to what is alleged to be a crime, firmly and fairly
    - Function is a matter of **public duty**
- Most important decision:
    - whether to proceed or discontinue charges → "**prosecutorial discretion**" ∴ is the predominant factor determining a conviction
        - Of all charges laid about 4% result in acquittal or analogous disposition
        - Remained = withdrawn or stayed (32%); or guilt (63%)
- **Shawcross Principle**
    - In a Westminster parliamentary system, the Minister of Justice/Attorney General can supervise and have some policy influence over prosecution decisions (do not intervene in most specific cases) but if they do intervene can't be for partisan reasons
        - Ex: SNC Lavalin case – consider job losses, interests of party in QC etc.

## DECISION TO PROSECUTE

### Laying an information

- information is the document that starts the criminal justice process in a formal manner
- It typically involves the officer, who has formed reasonable grounds to believe that a criminal offence has occurred, draft an information that will be presented to a justice of the peace along with a sworn summary of the evidence.

### Pre-Charge

- Police ask prosecutor for advice before charges laid (before information is laid)
    - BC, QC, and NB first seek approval by prosecutor
- There is a shift towards this process. Why?
    - Of all charges laid, only 4% result in acquittal or analogous disposition. Remainder are withdrawn or stayed (32%) or guilt (63%)
    - Shows that evidence acquired by police will often not support a conviction
    - So, more efficient + fair

### Post-Charge

- Most provinces
- Decision to proceed with charges by police then charges move over to Attorney General (whether prov or fed)
- First step for prosecutor is to review the investigative file complied by police and decide whether to proceed w/ prosecution or end

### Standard for Decision

Charges may go forward only if:

- **Evidentiary threshold is met**: strength of evidence necessary to justify a prosecution
    - "Reasonable likelihood" of conviction (most provinces)
    - Must be satisfied both subjectively & objectively
    - Factors to consider:
        - Admissibility of evidence
        - Weight of evidence
        - Strength of any anticipated defences
        - Credibility/reliability of witnesses
    - When prosecutors have limited information, this may become fuzzy
        - Ex: sexual assault case looked likely to fail until defendant got on witnessed stand
- **Public interest to proceed**
    - Harsh consequences may flow from conviction – must be considered
    - Other factors to consider
        - Seriousness of crime
        - Severity of likely sentence
        - Nature and magnitude of harm caused
        - Alternative measures
        - Culpability…

### Discontinuing

- May discontinue a charge by:
    - withdrawing it (terminates the charge)
    - stay of proceedings (s. 579 CC) – anytime before judgment – proceedings may be recommenced up to a year after

## PROSECUTORIAL DISCRETION

- May decide to proceed on summary or indictable, or plea bargain (not in the CC but recognized as "essential" by SCC)
- Important: **P's decision on this matter is <u>not reviewable</u>** (unless on grounds of abuse of process)
    - Very difficult to prove due to high threshold
- Plea bargain is an agreement between the accused and the Crown that the former will plead guilty to an offence in exchange for a benefit such as the withdrawal of a more serious charge or a favourable sentence recommendation

### *R v Anderson* 2014 SCC

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| **Ratio** | • **Exercises of prosecutorial discretion is only reviewable for abuse of process**<br>• Tactics and conduct before the court may be subject <u>to court sanctions but the threshold is high</u><br>• No *Charter* requirement to consider Aboriginal status before deciding to seek a mandatory minimum sentence |
| **Facts** | • Anderson (D & now respondent) charged w/ impaired driving (253)<br>• Due to previous driving offences, Crown sought a mandatory minimum sentence of 120 days<br>  ○ S 727(1) CC states mandatory min is applicable only if the Crown notifies the accused of its intention to seek greater punishment by reason of previous concisions (the "notice")<br>  ○ Mandatory minimums are set out in s. 255 CC<br>• At SCC, D argues that as a PFJ, the state must consider Aboriginal status when making a decision that may affect their liberty (s. 7 of Charter) |
| **Issue** | • Are Crown prosecutors constitutionally required to consider the Aboriginal status of an accused when deciding whether or not to seek a mandatory minimum sentence for impaired driving? |
| **Result** | • No. Appeal allowed. |
| **Reason** | • SCC based their finding on the fact that it is the responsibility of the judge and not the Crown to ensure that a sentence be proportionate, and that the principle of fundamental justice advanced by the accused (that the Crown consider Aboriginal status when making decisions that limited sentencing options |

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| | available to a judge) was contrary to the traditional approach to the separation of responsibilities between Crown and judge.<br><u>Court considered whether the Notice is reviewable</u><br>There are two distinct avenues for judicial review of Crown decision making. The analysis will differ depending on which of the following is at issue:<br>• (1) exercises of prosecutorial discretion<br>○ "Prosecutorial discretion provides no shield to a Crown prosecutor who has failed to fulfill his or her constitutional obligations such as the duty to provide proper disclosure to the defence "<br>○ **Only** reviewable for abuse of process<br>▪ "Abuse of process refers to Crown conduct that is egregious and seriously compromises trial fairness and/or the integrity of the justice system. Crown decisions motivated by prejudice against Aboriginal persons would certainly meet this standard". [50]<br>○ Burden is on the claimant on a balance of proabbilities<br>▪ However, Crown may be required to provide reasons justifying its decision where claimant established a proper evidentiary foundation [52]<br>• (2) tactics and conduct before the court.<br>○ Court has power to ensure its court functions in an orderly and effective manner.<br>○ Includes power to penalize counsel for ignoring rules, tardiness, incivility, abusive cross-examination, improper addresses, or inappropriate attire.<br>○ Sanctions may include orders to comply, adjournments, extensions of time, cost awards, dismissals, and contempt proceedings.<br>○ Adversarial system accords a high degree of deference to the tactical decisions of counsel |

***R v Kaufman* 2001 QC CoA**

- prosecutor should not prejudice jury with own personal opinions and inflammatory statements, simply present evidence
- Appellant found guilty of attempted murder. Appeal allowed. New trial ordered.

***R v S. (F.)* 2000 ON CoA**

- prosecutor must be moderate and impartial, can't personalize his role in the case, can't equate himself with the jury ("we must find him guilty"), must be professional
- D convicted of sexual assault against step-daughter.
- Crown made many personal statements "our victim" ... "we have to live with this". Injected his own credibility and belief into the case. Appeal allowed. New trial ordered.

# INVESTIGATION: POLICE QUESTIONING & THE COMMON LAW

## POLICE QUESTIONING

- Police are free to approach another and seek their cooperation w/o cause, w/o warrant, w/o judicial authority
- However, nobody is obligated to respond to police questioning
- Thus, police have two options
  - Persuade people to cooperate voluntarily
  - Trick them into speaking with covert agents
    - BUT law regulates this
- This framework assumes: two players have equal status + power
  - Not always the case, as such the law occasionally steps in to regulate this general freedom to question and to empower citizens within these interactions and exercise freedom of choice in a more robust and pragmatic context
- The power of police to coerce, sometimes abuse, criminal suspects may lead to innocent parties convicted and false confessions

- NY Central Park 5
- Youth are particularly vulnerable to giving false confessions
- Ability of police to lie in the US is a factor
- False confessions can corrupt other evidence (eyewitness, forensic expert, alibis, etc. may adjust based on confession)

## Confession Rule

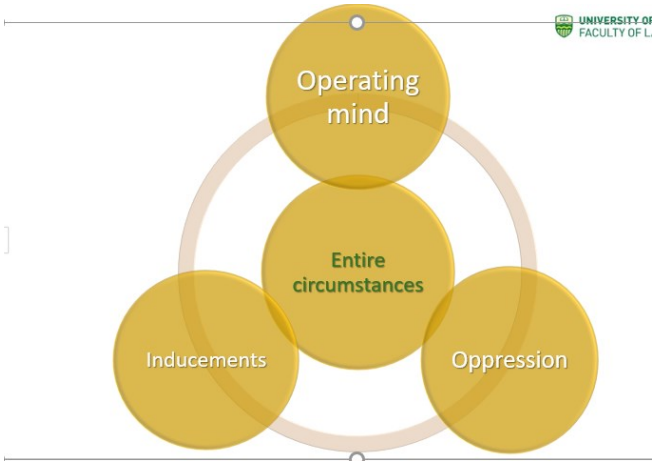
"…no statement by an accused is admissible in evidence against him unless it **is shewn by the prosecution** to have been a **voluntary** statement, in the sense that it has not been obtained from him either by **fear of prejudice or hope of advantage** exercised or held out by **a person in authority**" (*Ibrahim v The King* (1914 PC))

- There is a PRESUMPTION that a statement made by accused and TO the person in authority is not valid UNLESS prosecution show it to be voluntary
  - → Puts a burden of proof BRD on crown to show that any statement made to a person in authority was made voluntary
  - Confessions rule acts as a rule of evidence, not of criminal procedure per se.

- Prohibits the Crown from admitting at trial a statement made by the accused to a "**person in authority**" unless it proves BRD that the statements were "**voluntary**"
- Person in authority: someone who is indirectly or directly a law enforcement official (not focus of this course) –
  - objective and subjective test → accused MUST know the individual they were speaking to was a person in authority (this is why Mr. Big case was not viewed as involuntary)
- Involuntariness may arise from one or more of the following:
  - diminished capacity
  - threats or promises or
  - oppressive interrogation conditions
- Voluntary statement excluded if: police methods would "shock the conscience" of the community

- Problem: imbalance of power b/w the police and citizen
  - May be able to use instruments of power to take advantage
  - Therefore, law steps in to limit this general freedom of the police to question. At the same time, the law empowers citizens to exercise their freedom of choice in a more robust fashion.
  - Aimed at targeting false confessions

## Voluntariness




- Inquiry into whether a statement is voluntary is "contextual" having regard to the "entire circumstance"
- However, the SCC did provide three factors to consider in *R v Oickle*:

1. Operating mind
2. Inducements (aka threats/promises)
3. Oppression

- **Operating Mind**
  - *R v Whittle* 1994 SCC (schizo still found to have operating mind)
    - All this requires is a "…a limited degree of cognitive ability to understand what he or she is saying and to comprehend that the evidence may be used in proceedings against the accused"
      - Accused needs to have "sufficient cognitive capacity to understand what he or she is saying and what it said" and
      - General sense of knowing the conversation may be used against you
      - Need not be capable of "analytical reasoning"
    - → very low bar to meet
    - ∴ those with mental illness, intellectual disabilities, intoxicating substances may still be found capable of making voluntary statements
  - This factor operates as a binary, wherein if you can raise a reasonable doubt that accused had an operating mind then automatically the confession = involuntary
    - Failing this, the defence can still show some serious mental problems that should lead to a finding of involuntariness which leads to the categories of inducement and oppression.
- **Inducements (threats & promises)**
  - Any promise of a benefit or threat of a punishment or harm could induce someone to confess, potentially falsely
    - But there are very few tactics which courts have said police cannot be used with the exception of physical violence/torture
      - Threats = always results in exclusion
  - Inducements will only lead to exclusion if they "are **strong enough** to raise a reasonable doubt about whether the will of the subject has been overborne."
  - No clear rules → instead "contextual approach" considering "the entire circumstances" (including vulnerability and *quid pro quo* factor)
    - *R v Oickle* 2000
      - SCC suggested the critical factor in evaluating inducement is whether it should be characterized as a *quid pro quo* in exchange for confession
    - *R v Spencer*
      - Said QPQ was important, but it was "the ***strength* of the inducement**, having regard to the particular individual and his or her circumstances, that is to be considered in the overall contextual analysis"
      - Fact: withheld visit with GF until he confessed – yet SCC said it was not a strong enough inducement
- **Oppression**
  - Arises when a suspect is detained or interrogated under "**inhumane conditions**"
  - Two categories
    - Physical conditions:
      - May occur when suspects are deprived of necessities (food, clothing, water, sleep etc.), denied access to counsel, subjected to aggressive, intimidating, or prolonged questioning, or confronting them with inadmissible or fabricated evidence (*Oickle*)
    - **Trickery**/manipulation
      - Not prohibited outright – but if gone too far, then it might be
      - This includes use of false evidence (unevenly applied), exaggerating strength of evidence, allowing them to believe they are a witness, not a suspect, cultivating their trust.
        - → have an uncertain line so must take into the totality of the circumstances
      - In *Oickle* the police exaggerated accuracy of the polygraph test fabricated but SCC majority said it did not violate confessions rule
  - No factor is determinative
  - Courts have unevenly applied oppression.

        - Ex: some courts have found sleep deprivation enough, others not
- Class problem:
    - Bruce, highly religious, interrogated for 2.5 hours. Police say tell the truth or god would be very angry etc. Bruce confessed. Is his confession likely voluntary?
        - Police do not have a line to god. Does not change operating mind. Police cannot make god hand down judgements/feelings
    - Shawyn was questioned intensely regarding an alleged rape and murder for five and half hours. He had not slept for 26 hours before the interrogation began. Nor had he eaten for the previous 3 hours. Approximately every hour, police asked him if he needed anything to eat or drink or if he needed a short break to rest. He declined. Shawyn was 19, had grown up largely in foster care, and had an estimated IQ in the 10th percentile. Police told him that "he might be able to get help" for his addictions in prison, but that "it would have to start by him owning up to his actions". They also said that "they couldn't make any promises about rehab or therapy or anything like that." Shortly before confessing, an officer came into the interrogation room and told the interrogators, "we got the forensics back -- we've got him!" In fact, the police had not yet received any reports on any forensic analysis.
        - May go either way. No single factor. 10% is low but 1/10 people have this – can we say those people do not understand consequences? Likely not enough on its own. The rehab was carefully worded to not be a full promise. Allowed to lie about forensics. BUUUUUUT looking at the totality of the circumstances it may be viewed as involuntary.

## *R v Tessier* 2020 ABCA (granted leave to SCC in 2021)

| | |
|---|---|
| **Ratio** | • Voluntariness inquiry is contextual having regard to the entire circumstance<br>• Must ask "whether [the appellant] made a meaningful choice to speak to the police *knowing* that he was not required to answer police questions, or that *anything* he did say would be taken down and *could be used in evidence"* |
| **Facts** | • A man's body was found in a ditch dead w/ gunshot wounds to the head.<br>• Tessier (appellant) challenging first degree murder due to trial judge's decision to admit statements made by Tessier during two interviews – states: not voluntary ∴ s 7 breach<br>o 1st interview: Not cautioned or told right to consult lawyer – police say bc he was not a suspect at the time. YET police asked questions suggesting T was involved "mixed up"/"tell the truth"<br>o The 2nd interview was followed by a voluntary trip to his apartment, at T's suggestion, to show the officer where his gun was stored. The officer testified T only became a suspect and was cautioned at the apartment when it was determined his gun was missing |
| **Issue** | • Were the statements made prior to caution voluntary? |
| **Result** | • No. It was involuntary. New trial ordered.<br>• After this – Crown appealed – SCC granted leave. |
| **Reason** | Previously stated rules cited in the case:<br>• Modified objective test used to determine if person is able to make a voluntary decision – a "meaningful choice" – to speak to the police<br>• Voluntariness question – focus is on the police conduct and its effect on suspect's ability to exercise free will – objective test but individual characteristics of accused are relevant<br>• If no caution provided – person must have understood that they did not have to speak, or if they did that their answers could be used against them<br>• Detention may elevate interviewee's sense of compulsion – therefore, important to reaffirm their right to choose to speak<br>• Officers may ask pointed questions and there is no bright line determining when to issue a caution; however, if an officer expressly seeks self-incriminating info w/o cautioning, they take on the risk of receiving it and thus an increase in need for caution<br>Application |

| | |
|---|---|
| | • Trial judge used the factors in *Oickle* as a checklist rather than asking: did T make a meaningful choice to speak to the police? Did T understand what he said could be used against him, and that he was not obliged to say anything?<br>• The judge focused exclusively on the rule's concern with false confessions but failed to "recognize the other policy reason for the confessions rule, namely, fairness and the repute of the administration of justice"<br>• Judge focused on the actions of the police and whether it was reasonable to not caution until later (gun missing incident) -- instead, police conduct is just one part of the analysis, need to consider T perspective and whether the Crown had BRD that T was able to make a meaningful choice to speak to police in the absence of caution |
| **Notes** | Question for prof – why did the COA not determine if they thought it was a meaningful choice in the absence of caution? When it goes back to trial – what happens? A new judge watches the tapes and listens again then determines?<br><br>Class Notes<br>• Court found that Tessier had an operating mind<br>• Complete absence of inducements<br>• So how do you end up with conclusion it is involuntary?<br>  ○ Either court was out of step – Prof thinks SCC will state it was voluntary<br>  ○ Or the court followed SCC jurisprudence which suggests at the heart of the confessions rule is not concerned with coercion or wrongful conviction, but rather freedom of choice & autonomy |

## Mr. Big Rule – *R v Hart* SCC

- New common law evidentiary rule: **exclusion of "Mr. Big" Statements in certain circumstances**
  - Rule applies when "the state recruits an accused into a fictitious criminal organization of its own making and seeks to elicit a confession from him."

Onus and Standard of Proof

- **Presumption** that statements made in a Mr. Big sting are **inadmissible**
- Crown, on a BOP, must rebut presumption and show probative value outweighs prejudicial effect
  - Rule focuses on the confession's reliability and fear of wrongful conviction
- Even if court rebuts – court may award a remedy (exclusion or stay) if accused proves abuse of process on BOP

Probative value v Prejudicial effect

- **Probative Value**: **reliability of the statement**
  - Characteristics of the operation
    - Duration, complexity of the organization, nature and extent of inducements, threats
  - Characteristics of the accused
    - Socioeconomic status
    - Vulnerability
  - Corroboration
    - Did it lead to independent evidence or was it just the confession?
    - If former, likely to outweigh the prejudice
- **Prejudicial Effect: potential taint to the jury**
  - should be assessed by measuring the extent to which jurors' reasoning might be tainted by learning that "the accused wanted to join a criminal organization and committed a host of 'simulated crimes'

Abuse of process doctrine

- Residual power the court has under the Charter and common law to stay proceedings or exclude evidence when conduct of the state is grossly unfair
  - Occurs when police use inducements that "overcome the will of the accused and coerce a confession" (*Hart* 4.32). Includes:
    - Certain tactics are distasteful and don't want to associate the court with that type of conduct

        - Violence or threats of violence
        - Exploiting vulnerable people
- Even if the statement showed high probative value, the accused may make out an abuse of process on BOP
- Doctrine is available in all situations but should be more readily available when examining Mr. Big cases

- Note: 9/10 cases since *Hart*, court have found the evidence is admissible

# INVESTIGATION: POLICE QUESTIONING & THE *CHARTER* PART 1

- Everyone has the right on arrest or detention
    - a. to be informed promptly of the reasons therefor;
    - b. to retain and instruct counsel without delay **and** to be informed of that right.

## SECTION 10(A) – THE RIGHT TO BE INFORMED PROMPTLY OF THE REASONS THEREFOR

- **Promptly** – courts have interpreted this quite strictly, unless there is an emergency pertaining to an imminent danger to safety (very rare)
- **Reasons** – "clear and simple language"
    - Inform of every offence under investigation and any change in the nature of the investigation affecting jeopardy
- **Change** – possibility that the reason for detention may change over time
    - If police obtain information that changes the circumstances (ex. pulled over for speeding but then you become a suspect in a murder investigation) then police have to tell you that → continuous obligation
    - However, if **reasonable** person would know there was a change, then s 10 (a) complied with
        - Ex: pulled over for speeding, then cop asks about alcohol – would assume investigated for impaired driving

- Relationship between section 10(a) and section 1
    - To date, no violations of s.10(a) have become reasonable limitations under s.1
    - So far s.1 is not relevant so if s.10 is infringed then it is a final infringement, and we can move on to remedy

## SECTION 10 (B) – RIGHT TO RETAIN & INSTRUCT COUNSEL W/O DELAY & TO BE INFORMED OF THAT RIGHT

- Police must tell you about your right to speak to a lawyer promptly
- Informational duties → invocation of right → implementation (reasonable opportunity period)
- Major interpretive questions

1. **What information must be provided to persons upon detention?**
    - Must expressly tell detainee of their right
        - AND any legal aid and free duty counsel services available and how to access them
            - Duty counsel: a lawyer who is available (usually via phone) who is able to provide free and immediate legal advice to those arrested or detained. AKA brydges counsel.
    - *R. v Bartle* – theoretically possible for detainees to waive their right to be informed of their right to counsel
        - However, there has to be a reasonable basis for believing that the detainee does in fact know his rights and has waived them – the detainee simply saying "I know my rights" is not enough

2. **When must this information be provided?**
    - Immediately
    - Unless concerns for officer or public safety
        - must have specific, evidence-based concerns (rare)
    - Significant change in nature of detention → must give caution again
        - Triggered when there is a "fundamental and discrete change in the purpose of the investigation, one involving a different an unrelated offence or significantly more serious offence"

- Could also be triggered *if* charges decrease but would be harder to make a charter claim

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

- Two distinct types of claims to allege a lack of understanding:
  - 1) police failed to take reasonable steps
    - Courts have told police they can assume an understanding unless there is a reasonably apparent reason to believe there is a deficiency then the court must take reasonable steps to remedy that situation (wait for them to sober up; get a translator etc.)
  - 2) detainee's subjective capacity to understand their right
    - Even if police operated reasonably…
    - Person must have "operating mind" component of confessions rule
    - Basic awareness of language; basic awareness of consequences
- Police will often ask: "do you understand" but it is not constitutionally equired

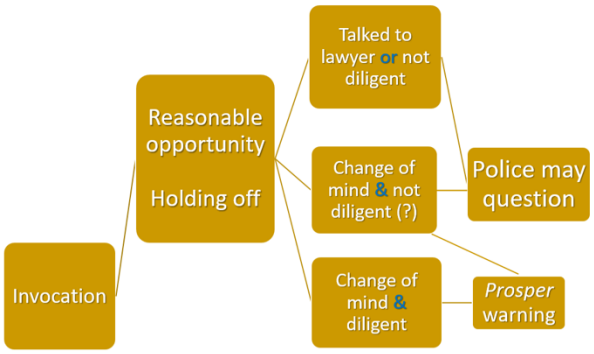
**4. What is required for detainees to invoke their right to talk to counsel?**

- Positive obligation on detainee to clearly state they want to invoke the right to counsel
  - Silence is not enough
  - "I'm not sure"; "maybe later" → will not trigger invocation which means police do not need to facilitate access
- Otherwise, police free to continue questioning
- Police must provide a reasonable time to decide (*R v Feeney)*
- Can invoke right to counsel for the first time at ANY time – does not have to be on initial arrest/detention

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

- Hold off period:
  - provide a "reasonable opportunity" to exercise the right via means and time necessary
  - refrain from or cease "questioning or otherwise attempting to elicit evidence from the detainee"
    - even if detainee begins to talk – police have to ignore or tell them they cannot discuss until the accused has had an opportunity to speak with a lawyer
  - Period expires in two ways
    - Once detainee has spoken with lawyer
    - When not spoken but D ceases to be "reasonably diligent" in attempting to do so
- "Reasonable opportunity"
  - Must have telephone access in privacy as soon as reasonably possible
  - WITH lawyer of choice
  - Factors determining what is reasonable:
    - Time of initial detention (as it relates to lawyer's ordinary business hours), duration period b/w detention and police attempts to elicit evidence, detainees' efforts, availability of duty counsel
  - *R v Taylor* 2014 SCC
    - impaired driver, taken to hospital, invoked right, gave blood, police did not attempt to facilitate access
    - Provided blood sample before able to make call
    - Given the circumstances, police had an obligation to ascertain whether private access to a phone was available (but not coppers phone)
    - Ratio: Police must provide earliest possible access to phone call where feasible
      - SCC said: question is whether the Crown has demonstrated that the circumstances are such that a private phone conversation is not reasonably feasible
  - Delays *may* be justified on safety grounds
  -
    - Must be "exceptional" and require "proof of real obstacles" to providing immediate access
- Due diligence – of the detainee
  - Detainee must be diligent in attempting to obtain legal advice

        - They have a right to speak to a lawyer of <u>their</u> choosing
    - Temporal factors: courts have been less than consistent on this matter – very circumstance dependent
    - No violation of s10(b) where detainee after given a reasonable opportunity to contract preferred lawyer freely decides to talk to duty counsel or any other lawyer
        - *R v Ross* – two detainees unable to contact chosen lawyer at 2am; then called into an identification line up – violation
        - *R v Smith* – detainee given opportunity to contact counsel at 9pm, no home phone number, then chose not to call office stating he would call him in the AM – <u>not</u> due diligence
    - <u>Duty Counsel Availability</u>
        - Detainees will be given less time to consult with chosen lawyers when duty counsel has been available all along – *R v Ross*
        - Unavailability of duty counsel may extend the period during which police must hold off – *R v Prosper*
        - Conversely, those unable to contact their lawyer will be expected at some point to use duty counsel – *R v Prosper*
        - Investigative urgency
            - not focus of course – technical area of the law – very rare
            - police must demonstrate why it was unreasonable for them to wait even if duty counsel was available (preserve evidence – ex: brethalyzer)
    - Seriousness of Offence – plays a role but not weighted heavily
- <u>Waiver</u>
    - Only possibly *after* invocation of counsel but <u>change their minds</u>
        - Invocation + change of mind = prosper warning required
    - ***Prosper*** **warning**:
        - Police must <u>remind detainee</u> of their rights and ensure waiver is fully informed & voluntary
        - Not required when D has unsuccessfully sought to contact their chosen lawyer and freely choose to speak with another lawyer
    - To establish valid waiver, prosecution must show that detainees a) indicated clearly and unequivocally that they no longer wished to speak to a lawyer, and b) had full knowledge of their rights and consequences of foregoing them
    - Due diligence:
        - *Some* courts have suggested Prosper warning is unnecessary where D has not diligently pursued contact w/ a lawyer – *R v Jones*; *R v Basko*
        - Penney's article and *some* courts disagrees w/ this approach → point is to ensure people make <u>informed</u> decisions thus we should just play it safe and always make a prosper warning)




- Consultation
    - No scrutiny

- Courts have been very clear that they are not going to scrutinize the interactions b/w the detainee and the lawyer b/c it could violate privilege
- Unless detainee (reasonably) indicates that consultation was inadequate, courts assume that advice was sufficient and conclude that obligation of police to provide reasonable opportunity has been met

▪ When are detainees entitled to further counsel consultation?
- Change in purpose of investigation
  - "Fundamental and discrete change in the purpose of the investigation", police must re-issue caution and provide second chance to consult counsel
- Non-routine procedures
  - Very few things are non-routine
  - Questioning you for a long time, showing you a video of your spouse incriminating you etc. → all good and considered routine interrogation techniques
  - Forensic identification, blood sample, search of some kind, line-up, polygraph → will trigger new caution
- Non-understanding - objective
  - Police discover a lack of sufficient understanding

**6. What limitations does section 10(b) impose on police questioning after reasonable opportunity to talk**

- Once opportunity passed, police may question even if they have not spoken to a lawyer
- Police not req'd to permit D's lawyer to attend questioning
- Something that ruptures the integrity and trust of the lawyer-client relationship →section 10(b) infringed by questioning (basically, police can't trash the lawyer)
- Persistent questioning
  - On its own, lengthy, and persistent questioning is unlikely to violate s 10(b) – *R v Sinclair*
  - Previously under *Burlingham* that badgering, repetitive, lengthy questioning might violated 10(b) but from Sinclair and Sister cases (2010) that this is questionable
    - Birmingham rule hasn't been officially overruled but inconsistent with later cases
- Denigrating the lawyer's competency and integrity
  - violates 10(b) – *R v Burlingham*
- Plea-bargaining
  - Can only happen when represented by a lawyer
  - Police shouldn't be entering into plea negotiations
  - violates 10(b) – *Burlingham*

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

- To uphold a limit, **must show it was prescribed by law** and **reasonable**
  - Prescribed – either from statute or common law
  - Reasonable – important objective, rational connection b/w rule & objective, infringement is "no more than necessary"; and proportionality b/w rules harmful & beneficial effects (not focus of course)
- Limits upheld in context of vehicle offence investigations
  - Driving related offences permits brief suspension of s. 10 (b)
    - As long as stop is for a short amount of time and related to driving-related offence; then court found it would be impractical to comply with section 10(b)
  - If detention continues beyond initial brief preliminary screening process, and there is an interview or intervention of excessive length then s.10 triggered

## SECTION 7 – THE HEBERT RULE

The right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

- PFJ – "principle against self-incrimination"
  - **Protects right to silence** → right to choose whether to speak to authorities

- Requirements for this rule to come in to play:
    - Detention – Does not apply in the field (ex: Mr. Big operations or any undercover op). Only works if there is formal detention.
    - State agency
        - has to be involvement of a state agent
        - if a private citizen (say jailhouse snitch) then as long as they received the information before speaking with police then does not trigger s 7 violation
    - Active elicitation
        - Even if you have state agent, if they sit back and listen or participate in conversation that doesn't question then it is fine
        - Conversation typically must be active and probative
            - However, if a trust relationship is exploited then there may still be a violation of s7 despite missing other features
            - Also, right to silence is more likely to be violated where the agent exploits any of the suspects vulnerabilities

| Summary | Confessions | Mr. Big | S. 10 Right to counsel | s. 7 (*Hebert*) |
|---|---|---|---|---|
| **Detained?** | n/a – applies anywhere | No<br>• It is in the field | Yes | Yes |
| • **Person in authority?**<br>• **Known state agent?**<br>• **Unknown state agent?** | Person in authority | Unknown state agent | Known state agent | Unknown State Agent |

## *R v Hebert* 1990 SCC

| | |
|---|---|
| **Ratio** | • A pre-trial right to remain silent is a fundamental principle of justice under section 7 of the Charter.<br>• police must not engage in tricks that would effectively deprive a person in police custody of their right to choose whether to speak to authorities. |
| **Facts** | • Accused arrested for robbery<br>• Consulted w/ counsel and advised to remain silent<br>• Placed in cell next to undercover cop and then made incriminating statements |
| **Issue** | • whether a statement made by a detained person to an undercover police officer violates the rights of the accused under the Canadian Charter of Rights and Freedoms |
| **Result** | • Yes, violates s. 7. |
| **Reason** | • Right to choose whether to speak is objectively defined<br>• the CL confessions rule and the privilege against self-incrimination (the accused can't be forced to testify against themself), reflect a common theme which is fundamental to our system of justice → the idea that the accused has the right to choose to speak. This right is fundamental<br>• Rights were violated because he exercised his choice not to speak to police when he advised them that he did not wish to make a statement. When he later spoke to the undercover PO he was not reversing that decision and choosing the speak to the police.<br>• the rule concerning undercover POs is subject to four limits:<br>○ (1) it does not prohibit police from questioning the accused in the absence of council after the accused has retained council<br>○ (2) the right to silence applies only after the accused is in police detention (draws on the influence of being in control of the state)<br>○ (3) does not affect the admissibility of voluntary statements made to fellow cellmates<br>○ (4) the right to remain silence is not violated if an undercover police agent simply observes and listens to the conversations – cannot elicit info |

| | |
|---|---|
| **Ratio** | • that statements volunteered by the suspect to the agent of the state will not infringe the suspect's right to silence |
| **Facts** | • Appellant arrested in connection with a drug deal, transaction with undercover officer<br>• The two were then placed in a cell block<br>• Appellant incriminated themselves<br>• Trial judge found conduct breached s 7. CoA said no – new trial. |
| **Issue** | • Whether the conduct of the police breached s. 7 of the *Charter* |
| **Result** | • Appeal dismissed. |
| **Reason** | • Hebert does not rule out the use of undercover officers<br>  ○ Hebert's concern was with "actively eliciting info" through deception which violates the accused's right to silence<br>• Guidelines to test relationship b/w state agent and accused set out in *Broyles*<br>  ○ Nature of the exchange<br>  ○ Nature of the relationship |

| | Confessions Rules | Mr. Big Rule | Charter, s. 10 | Hebert Rule |
|---|---|---|---|---|
| **Detention?** | N/A (Applies whether detained or not) | No | Yes | Yes |
| **Person in authority; known state agent; or unknown state agent?** | Person in Authority | Unknown state agent | Known state agent (otherwise no detention) | Unknown State Agent |

# INVESTIGATION: ENTRAPMENT

- A crime being committed that would not have occurred **but for** state involvement
- If proved on BOP → proceedings are stayed
- Rationale:
  - Not acceptable morally for police to be involved
  - Not efficient – waste of resources

## PROCEDURE

- Stage of Trial
  - After guilt has been decided
  - Defence then makes claim to have stay of proceedings based on entrapment
- Burden
  - Burden is on the accused to prove entrapment on BOP
- Remedy
  - Stay of proceedings
    - Practical purpose: same as acquittal (but subject to crown appeal)
    - Not guilty or guilty – not determined but cannot continue w/ process as it would be unjust/unfair

## TWO TYPES OF ENTRAPMENT

- Background -- "Buy and bust" - *Barnes*
  - Granville island with hippies and criminal activity
  - Police would go undercover and try to buy drugs off people in the area
  - Approached Barnes – who agreed to sell –

- SCC say: Police did not have reasonable suspicion over Barnes they had a basis to believe that the Granville Island Mall had concentration of drug dealers/crime → bona fide inquiry
  - BFI is a way of saying the police have a reasonable suspicion over a location (physical or virtual)

- Type 1: opportunity + no reasonable suspicion
  - Must have both
- Type 2: inducement/manufacture of crime

## Entrapment Type 1: No Reasonable Suspicion

Two elements to this
- 1) Did police give an **opportunity** to commit and offence?
  - Wasn't just following up on a mere investigative tip
- 2) If yes, did the police lack **reasonable suspicion** that the individual was already engaged in that kind of criminal activity or unspecified unknown individuals were engaging in that activity in the location or domain targeted by the police operation

→ **When state agents provide someone w/ opportunity to commit an offence w/o reasonable suspicion either that**
- i) a specific person is committing that offence; or
- ii) that the offence is being committed by unspecified persons in a sufficiently defined location (**bona fide inquiry)** – *Mack; Barnes*
- **Reasonable Suspicion** → something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds and not particularly onerous (*Chehil*) – **objective**
  - Subjective suspicion → reasonable suspicion → probable grounds (most rigorous)
- **Bona fide inquiry** → where police have a reasonable suspicion over a location or area in addition to a genuine purpose of investigating and repressing crime

- Typical Sequence police should follow (*Ahmad*)
  - Communicating with suspect without providing an opportunity ("investigating a tip")
    - Example: "I need 80" (bad) versus "Can you help me out" which leads to suspect offering up drugs
  - Obtaining information providing reasonable suspicion
  - Providing opportunity to commit
    - "[A]n opportunity will be established when an affirmative response to the question posed by the officer could satisfy the material elements of an offence"
    - "In the particular context of drug trafficking, an opportunity to commit an offence is offered when the officer says something to which the accused can commit an offence by simply answering "yes"."

## *R v Ahmad* 2020 SCC – reasonable suspicion required before opportunity

| | |
|---|---|
| **Ratio** | • A phone number can be considered a sufficiently defined location for entrapment purposes<br>• Cops must form reasonable suspicious *before* offering "opportunity" or in the course of the conversation before the offer |
| **Facts** | • In two separate cases, police received unsubstantiated tips about "dial-a-dope" schemes, i.e. operations where drug dealers connect with customers by phone or text.<br>• After calling the numbers, officers arranged in-person meetings to purchase drugs.<br>• Court considered for the first time the application of the first branch of the entrapment doctrine in the context of suspected "dial-a-dope" scheme investigations.<br>• The Court was "asked to determine when and how reasonable suspicion is established when an officer receives a tip or information that a phone number may be used for drug dealing." |
| **Issue** | • 1) Can a phone number qualify as a "place" over which police may form reasonable suspicion?<br>• 2) How Should Courts Review the Words Spoken During a Police Call to the Target?<br>• 3) What constitutes provision of an opportunity to traffic in drugs during a phone call? |

| | |
|---|---|
| **Result** | • 9: Not entrapment for Ahmad. Reversed BC CoA and affirmed the rulings of trial judges.<br>• 5-4: Entrapment for Williams. |
| **Reason** | • 1) Yes – a number can be considered a place.<br>  ○ "an individual phone number is sufficiently precise and narrow to qualify as a place for the purposes of the first branch of the entrapment doctrine".<br>  ○ Due to higher expectation of privacy with technology, reviewing courts must scrutinize the evidence that prompted the inquiry to <u>ensure the police have narrowed their scope</u> so that the purview of their inquiry is no broader than the evidence allows<br>• 2) Unless police can corroborate a tip before placing a call and form reasonable suspicion, courts are required to review the words of the convo<br>  ○ "Reasonable suspicion — like any level of investigative justification — can justify an action only on the basis of information *already known* to police" (60)<br>  ○ Courts must not focus just on the language but *all* of the circumstances<br>  ▪ However, "[i]n dial-a-dope cases, conversations are a means of forming a reasonable suspicion and the means of committing the offence itself." (61)<br>  ▪ The language of these conversations must be scrutinized by courts to ensure that an opportunity to traffic was provided *after* reasonable suspicion was formed.<br>• 3) The determination of whether a police action constitutes an opportunity to commit an offence is informed both by the definition of the offence and the context in which the action occurred (63)<br>  ○ A provision of an opportunity to traffic can occur during a call, but "only when the terms of the deal have narrowed to the point that the request is for a specific type of drug and, therefore, the target can commit an offence by simply agreeing to provide what the officer has requested." (para 66)<br>• **Summary:**<br>  ○ police investigating a dial-a-dope operation by calling a phone number they suspect is being used to traffic illegal drugs **must form reasonable suspicion before offering an opportunity** to traffic drugs.<br>  ○ If they cannot form reasonable suspicion before making the call, they **must in the course of their conversation form reasonable suspicion before making the offer**.<br>  ○ A determination of whether this requirement is satisfied must be the product of strict judicial scrutiny, taking into account the constellation of factors that indicate involvement in drug trafficking. And, if it is determined that the offer was presented before reasonable suspicion was formed, entrapment is established and the proceedings must be stayed.<br><br>**Dissent**<br>• "Individualized suspicion prong" results in judges parsing undercover calls<br>  ○ Leads to anomalous results through minute parsing of language – artificial distinctions b/w cases<br>• *bona fide inquiry* prong should be defined as a factually grounded investigation into a tightly circumscribed area, whether physical or virtual, that is motivated by genuine law enforcement purposes<br>• Some jurisdictions (like ON) distinguish b/w investigative steps and presenting an "opportunity"<br>  ○ Creates issues on how to draw the line → leads to artificial results → courts have "lost sight of the fundamental relationship b/w entrapment and abuse of processes" (123)<br>• Only distinction in Ahmad and Williams case → the former officer waited for the accused to say "what do you need" |

- Top Hat Problems:
  - Police paid a 16-year-old girl to buy cigarettes from a gas station kiosk. The cashier did not question her about her age or ask for identification. On the completion of the transaction the cashier was charged with "unlawfully furnishing tobacco to a minor." The police had no information that such sales were occurring in this kiosk, but it was "generally known" that gas stations often sold to minors.
    - Not entrapment even after ***Ahmad***. Why?
      - Courts have suggested entrapment doctrine unlikely to apply to regulatory offences
      - Know there is an incentive to sell to youth and could outweigh the negatives of "entrapment"

- Police placed the following ad in the Craigslist "erotic services" category: "Sexy young tight bodies looking for fun." Accused responded with a message saying that he "was interested." Police replied that there were two girls available, one aged 16 and one 17 and the cost would be between $150-300 per half hour. He agreed to meet and was arrested for communicating for the purposes of prostitution with a minor .
  - Not entrapment
  - Fairly common type of sting operation to catch sexual predators/pedophiles
  - Most cases pre-date *Ahmad* but the rationale has been that this is a *bona fide* inquiry
    - Location (Craigslist) is known to advertise and facilitate unlawful sexual activities
    - Analogous to ***Barnes*** and the targeting of Granville Mall

**Entrapment Type 2: Inducement (**historically what is known as entrapment)

- Police who do reasonably suspect a person or location "go beyond providing an opportunity and induce the commission of an offence" – ***Mack***
  - Essentially, police become involved in the "*manufacture* as opposed to the detection of crime" (***Mack****)*
  - The crime would not have occurred BUT FOR the actions of the police
- Whether police went beyond making an offer to inducing the offence "is to be assessed with regard to what the average, non-predisposed person would have done".
  - Not determinative though; may arise when the ordinary person would not have been induced
- Key considerations for proving #2:
  - Would an average person have committed the crime? → objective test *but* not determinative
  - The "totality of the circumstances" including
    - The number of opportuning attempts before the accused would agree
    - Nature of the inducements (deceit, reward, threats etc.)
    - Ongoing criminal activity
    - Was a relationship exploited? Was a personal vulnerability exploited?
    - degree of police involvement in committing the offence
    - undermining of constitutional values
    - was the criminal amenable to other investigative techniques?
      - As in could they have used other techniques instead to get to the same place
- TopHat problem
  - Police received a tip that drivers for SNL Taxis were selling cocaine. An attractive female undercover officer asked an SNL driver if he could "hook her up." After he declined she winked flirtatiously and said: "c'mon, you must know someone who can; why don't you make some calls? Drop me off here at my girlfriend's. I'll call you in an hour and maybe you can come party with us." The driver called a friend (not a fellow driver) and purchased a small quantity of cocaine from him, which he proceeded to sell to the officer upon picking her up. "Where's the party?" he asked. "Downtown," she replied as she showed her badge and arrested him.
    - Could go both ways
    - Have been several cases like this where courts have been reluctant to find entrapment where all that has been done is a subtle lowkey sexual innuendo with no specific promises
    - But looking at the factors above they kind of have manufactured a crime that would not otherwise have been committed – driver does not appear to already be in the business of selling drugs

# INVESTIGATION: SEARCH & SEIZURE & THE *CHARTER* (PRIVACY) - SECTION 8

- Section 8 of the Charter protects privacy rights and your right to be free from unreasonable search and seizure.
- "Everyone has the right to be secure against unreasonable search or seizure".
    - Shows that implicitly the police/authorities already have the right to search or seize but cannot be unreasonable

## There are three elements to any section 8 violation

- (i) state action
    - For our purposes, assume whoever committed the alleged search or seizure it was a state actor
- (ii) constituting a "search or seizure"
    - Answered by deciding whether it invaded a "reasonable expectation of privacy" (REP)
- (iii) that is "unreasonable" for *their* privacy expectation

- If any of these elements is absent → section 8 is not infringed.
- If each is established, the applicant may apply for relief under one of the Charter's remedial provisions (most commonly the exclusion of evidence under section 24(2)).
- Note: no difference between search and seizure. "Search or seizure" = unitary phrase = violation of REP

- If there is no REP, then there is by definition no search or seizure and cannot claim violation of s8
- If there is an REP, then there is a search or seizure, and the question becomes whether it was unreasonable

Background to rules

- Canada imports protections from US case of *Katz* that focus is on protecting individual privacy from overreaching surveillance by the state.
- Also imports the idea of reasonable expectation
    - "… security from unreasonable search and seizure only protects a **reasonable expectation**". (*Hunter et al v Southam* Inc., [1984] 2 SCR 145)
- Dickson essentially says there is no intrinsic right to privacy via section 8; but should be free of unreasonable intrusions. Thus, the court must balance within the confines of s8 the individuals right to be left alone vs interests of law enforcement
    - "….[A]n assessment must be made as to whether … the **public's interest in being left alone** by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably **those of law enforcement**".

## What constitutes a reasonable expectation of privacy? Consider:

***R v Mills***

1. What is the subject matter of the alleged search?
    a. Helps to capture the nature of the intrusion into the privacy of the individual and the interests at stake
2. Did the claimant have a direct interest in the subject matter?
    a. Plays little to no role as claimant typically does have an interest
3. Did the claimant's have a subjective expectation of privacy in subject matter?
    a. Rarely influential
    b. Can we assume or imply that the claimant would expect privacy?
    c. Accused does not have to provide evidence of this; courts will just assume it is a yes
4. Was this expectation of privacy **objectively reasonable**, considering totality of circumstances?
    a. Most important see below "principles of REP"

# PRINCIPLES OF REASONABLE EXPECTATION OF PRIVACY

## Ex Ante v Ex Post

- Decision should be made ex ante. Use info that was known to police immediately before they intrude to make decision
- Ex Ante: Before fact; must assume no criminal activity within protected domain and assume reasonable expectation of privacy
- Ex Post facto: After the fact
    - Finding criminal activity AFTER the fact to justify an invasion if there was an REP
- *R v Wong* 1990 SCC
    - Illegal gambling in hotel room
        - Police used a pinhole camera
            - Violation of s. 8. The fact that the police were right about illegal activity did not give them a right to install cam.
            - REP in a hotel room
    - Court says ask broadly: should people generally expect a degree of privacy in renting a hotel room? Not whether people engaging in illegal activities should expect privacy
        - "… it would be an error to suppose that the question that must be asked in these circumstances is whether persons who engage in **illegal activity** behind the locked door of a hotel room have a reasonable expectation of privacy"
        - "Rather, the question must be framed in **broad and neutral terms** so as to become whether in a society such as ours persons who retire to a hotel room and close the door behind them have a reasonable expectation of privacy."

## Normative v Descriptive inquiry of REP

- REP is not wholly descriptive, there is a normative component
- Descriptive: ask whether the circumstances are such that a person cannot reasonably expect a REP
    - if state puts citizens on notice that they could be observed and surveyed for anything and anywhere-→ No REP
- Normative:
    - imposition of limits on the degree that the gov't can conduct searches and surveillance on private activities
    - Court asks: Is it "objectively reasonable" to allow police to have free reign on this type of investigative technique?
    - "Expectation of privacy is a normative rather than a descriptive standard… It is one thing to say that a person who puts out the garbage has no reasonable expectation of privacy in it. It is quite another to say that someone who fears their telephone is bugged no longer has a subjective expectation of privacy and thereby forfeits the protection of s. 8." *R v Tessling* 2004

## No 3rd Party Rights

- S8 does not protect 3rd parties directly → no standing to make a section 8 claim
    - Must show it was <u>your own expectation</u> of privacy that was violated
- *R v Edwards* → You cannot assert someone else's privacy interests in your s 8 claim
    - Found coke in girlfriend's closet
    - If unconstitutional search of apartment → exclude evidence
    - Court said: not your apartment so no REP
- *Belnavis* – Interior of vehicle normally attracts REP, passengers did not have REP b/c they weren't the vehicle owner, weren't driving, didn't have intimate connection with owner of vehicle

## Territorial Privacy and REP

- Even though there is no formal link between property and privacy rights, there are still links
- To make a s8 claim, the person must have a reasonable interest in the searched property
- Courts will consider the following to determine REP

- Ownership
- Presence
- possession/control
- historical use

- *R v Edwards* -> He was a privileged, occasional guest
  - No keys, not owner, not paying anything, can't control access, etc.

## Inherent Privacy: The Biographical Test

- Extent to which state action intrudes on the "biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from the dissemination of the state"
- Biographical Core: how confidential would the reasonable person assume that the information should stay within the person's power (e.g., embarrassing, stigmatizing, or may be used against you; religious beliefs, political beliefs, etc.)
- Most cases intuitive
  - high REP about sanctity of the **home**, **interiors of personal belongings** (inside purses, trunks, glove compartments), **personal digital devices** (phones laptops, **bodies themselves)**

## Difficult Case Types regarding Biographical Core Test

- 1. Criminal Information
- 2. Fuzzy Inferences
- 3. Loss of Privacy

**1. <u>Criminal Information</u>**

- Just because the technique reveals evidence of criminal information it does not mean it was a reasonable search and seizure
  - *R v Kang-Brown* 2008 SCC – Drug sniffing dogs
    - The mere fact that the intrusive technique detects illegal activity if drugs are present does not negate s8 requirements → favours finding REP despite finding illegal activity
      - Police intrude on REP when using drug-sniffing dog to detect odour of narcotics emanating from an individual's person or luggage
    - Need a reasonable suspicion
  - *R v Spencer*
    - Court said REP attached to the subscriber info (ex. Name, billing address, username) that was held by internet service provider
      - Police attempting to find out who was trading child porn online, knew which IP address was associated with activity but they needed identity of that person
      - Court said disclosure of that identity invaded REP

**2. <u>Fuzzy Inferences</u>**

- A remote sensing device of some kind or infrared camera – detects heat (*R v Tessling* 2004 SCC*)* – that allows police to make inferences about what MAY be going on but does not tell them directly
  - *Tessling* - no REP
    - areas of high heat from camera inferred to be marijuana grow-op → no REP
    - Yes, you are getting information about the home but you are not getting biographical core of personal information
    - Too vague to make it protected information
  - *R v Plant* 1993 SCC - no REP
    - Monthly readout of electricity usage per day
    - Average house electricity usage compared with specific house
    - Does not invade biographical core
  - *R v Gomboc* 2010 SCC - REP
    - Different from Plant as this was an hour readout of electricity usage
    - Cannot tie to any specific activity but still precise enough to draw strong inferences
    - Can correlate data with people leaving/going etc.

### 3. Loss of Privacy

- the reasonable expectation of privacy attaching to inherently private places or information may be lost by exposure to public view
- Often results from a failure of the claimant to store, keep, safeguard the relevant information (subject matter) in a way that prevents if from being obtained by others
- *R v Patrick* 2009 SCC – no REP in garbage
    - Calgary meth producer
    - No REP in garbage put in opaque bags put out for collection, even though there was a city by-law preventing interference with garbage and even though the police committed a minor trespass by reaching over property line to collect bag
    - Yes, garbage contains a lot of biographical information BUT fair game
- *R v Duarte* 1990 SCC - REP
    - Undercover cop or informant wearing a wire
    - No authorization of the state to create a permanent record of a private conversation
    - Rejected the risk analysis
    - Recording of private communication without consent of all parties = s. 8 search → violated s. 8
    - We bear risk that if we disclose something to a friend they may tell the police, we don't reasonably expect that the police will be listening in and recording the conversation
        - The former is inevitable in society, but the latter is something we don't have to tolerate in a free and liberal society
- *R v Marakah* 2017 SCC
    - Court found that sender of a text retains REP over that text even after it was received by intended recipient and seized from the recipient's device by the police

***R v Mills*** **2019 SCC – no REP when communicating with a child who is a stranger to you**

| | |
|---|---|
| **Ratio** | • Mills had REP but failed at step 4 (was not objectively reasonable). Police created fake account and waited for it to be approached, they didn't intercept anything. Adults don't have a REP when communicating with children that they don't know online |
| **Facts** | • Accused, Mills, was charged with child luring after arranging to meet undercover police officer posing as 14-year-old girl.<br>• Mills sent sexually explicit electronic communications, and these were screen captured.<br>• Mills applied to exclude evidence as illegally obtained private communications<br>• Trial judge: should've obtained warrant, S.8 breach identified, but evidence not excluded<br>• CA reversed trail judge's findings on s.8 (meaning no breach) on the basis that Mills' expectation of privacy was not objectively reasonable |
| **Issue** | • whether the state should be permitted to conduct warrantless surveillance of private, electronic communications, or whether that state surveillance should be regulated |
| **Result** | • Holding: Appeal dismissed, no s.8 breach<br>○ Majority: step 4 was not successful (Mills subjective expectation of privacy was not objectively reasonable)<br>○ Concurring: s.8 was not even engaged b/c there was no S&S<br>○ Dissenting: s.8 was engaged and breached but would have admitted evidence under s 24(2) of *Charter* |
| **Reason** | <u>Analysis – Majority (Brown)</u><br>• it is that Mills **cannot** establish an objectively reasonable expectation of privacy in these particular circumstances, where he conversed with a *child* online who was a *stranger* to him and, *most importantly*, where the police knew this when they created her<br>• (1) What Was the Subject Matter of the Alleged Search?<br>○ Electronic communications over Facebook chat and email<br>○ He meant to have one-on-one conversation – this supports REP<br>• (2) Did Mills Have a Direct Interest in the Subject Matter?<br>○ As participant and co-author of messages, he did |

- (3) Did Mills Have a Subjective Expectation of Privacy in the Subject Matter?
  - Yes – trying to avoid detention, regularly told girl to delete messages, users expect conversations to be private
- (4) Is Mills' Subjective Expectation of Privacy Objectively Reasonable?
  - Totality of circumstance: must investigate (1) nature of investigative techniques used by police, and (2) relationship b/w communicants

Nature of techniques used

  - Police created a completely fake girl, meaning they *knew* she was a stranger
  - s. 8 jurisprudence is predicated on police obtaining prior authorization before a *potential* privacy breach.
    - Police knew from outset the relationship was fictitious & thus knew s 8 concerns would not arise from reviewing communications
  - Difference b/w this and ***Wong*** – in this case, police made fake profile and waited for people to message profile
    - In Wong police were interfering with an unknown (to them) relationship, not a relationship what was known to be strangers from the beginning

Relationship b/w communicants

  - Mills asserts informational privacy interest, which has 3 understandings: secrecy, control, and anonymity
  - Control – says he wasn't able to control conversation with intended recipient, but court disagrees
  - Difference b/w child and adult; and stranger and knowing someone
  - In the interest of protecting children, adults cannot reasonably expect privacy online with children they do not know, and communication online adds extra layer of unpredictability (not privacy)

Analysis – Concurring (Karakatsanis) – prof did not cover

- Mills had no REP (s.8 not even engaged) b/c texts were read by intended recipient, not intercepted, and screen capture is just a reproduction of a written record, not a recording. Differentiates b/w oral communication that doesn't exist after it is said and text communication that is, by definition, permanent
- Police did not S&S anything under meaning of s.8, not reasonable to expect that your messages will be kept private, so s.8 not engaged
- Police conduct was not S&S b/c they did not take anything from accused or intrude on private conversation – they simply received messages sent to them (direct participants, not overhearing or intercepting something else)
  - Conversation with informer or police officer is not S&S, only the recording of such conversation is
- Screen capture technology was a copy of pre-existing written record, not a separate permanent record created by the state
  - Different than when police make a recording of an oral conversation that would not exist otherwise
  - In this case, the suspect is using written medium – by definition this already exists permanently
  - Normally, police are required to obtain a warrant before accessing text message conversations stored by telecommunications providers and are normally protected by s.8 (same as viewing texts b/w two other parties w/o their consent)
    - This case doesn't apply – Mills messages were read by the person he intended to send them to, by sending messages over the internet to strangers, he was opening himself up to the possibility that it might be a police officer. Charter doesn't protect us from poor choices

Analysis: Dissenting (Martin) – PROF THINKS THIS SHOULD BE MAJORITY

- It is objectively reasonable to expect that the state cannot acquire permanent (written) records of private conversations at their sole discretion. Mills had REP to expect not to be subjected to warrantless state acquisition of permanent electronic recordings of his private communications

| | |
|---|---|
| | • Mills had a REP in the circumstance and the state's surveillance of those private conversations constituted a search<br>• Using screen recording technology → officer should've had warrant before he did this<br>• "Participant surveillance" - Court held warrantless electronic participant surveillance infringes s.8<br>  ○ *Duarte* - Parliament changed participant electronic state surveillance to require warrants<br>• Written forms of communication (when participant knows this) does not extinguish REP that state shouldn't read these messages<br>• It is objectively reasonable to expect that the state will not acquire records of private conversations at its sole discretion?<br>  ○ Majority said that Mills did not have REP b/c hoping that a complete stranger will keep communications private is a gamble (not objectively reasonable)<br>  ▪ Difference b/w the risk that one's co-conversant may disclose a private communication does not affect the reasonableness of the expectation that the state, in the absence of such disclosure, will not intrude on the private conversation – they are different things<br>• Recall *Marakah* – Court said that sender of texts has REP to their content even after sent to their intended recipient and retrieved by the police<br>• Despite the capacity of modern technology to record electronic communications, individuals still retain both subjective and objective expectations of privacy in those communications |
| | |

### Problem in class

- ADC under drivers' seat – was there a REP?
- Courts have been split
- NO REP:
  - Information limited → 2.5 second of data
  - Nothing about biographical core – nothing embarrassing (although maybe stigmatizing later?)
  - Analogous to a public witness
- Argument for REP
  - Biographical core – had to go IN TO the car, not like infrared from afar
    - Essentially, trespass could reveal information

# INVESTIGATION: SEARCH & SEIZURE & THE *CHARTER* (REASONABLENESS) - S 8

- S&S that takes place without warrant is presumptively unreasonable so party seeking to justify warrantless search (usually prosecution) bears burden of establishing that it is "reasonable" under s.8
- Other hand, where constitutionality of search with warrant is challenged, presumption is it is reasonable → burden to prove s.8 violation rests on accused

## REASONABLENESS – COLLINS TEST 1987 SCC

Collins test only applies AFTER confirming there is a REP

### *R v Collins* 1987 SCC

- Facts:
  - Appellant was in a pub when suddenly she was seized by the throat and pulled to the ground by a cop
  - Object in her hand – told to let go – was heroin in a balloon
  - Throat hold is to prevent them from swallowing evidence
  - Appellant argued for exclusion of evidence by claiming it was an unreasonable search
  - Outlined the requirements for a reasonable S&S

**Types of Reasonableness: To be considered "reasonable" a S&S must:**

1. Be authorized by Law AND
2. The law must be reasonable AND
3. Must be carried out in a reasonable manner

- 1. Be Authorized by law
  - Statute or common law
    - Crown can also argue for recognition of new common law search power through ancillary powers doctrine
  - *Stillman* – common law search incident to arrest but that didn't authorize them to extract bodily substances, so evidence was excluded as s.8 violation
  - *Wong* – no statutory or common law authority to conduct video surveillance in a hotel room where a REP existed
    - Police thought there was a loophole that allowed them to do this. Common law did not explicitly exclude it but still no authority. Was it a reasonable S&S? no, did not have reasonable probable grounds (law changed and now need a warrant).
- 2. Law Itself is Reasonable
  - An applicant may argue that the **particular law** that authorized the search or seizure is **unconstitutional on its face** (facial challenge, not specific to the case)
    - To succeed, the applicant must show that search or seizure power created by the law is unreasonable as a matter of general application (i.e., statute did not provide proper balance b/w protection of policy and police interest)
    - If police act according to law that is later determined to be unconstitutional, this is violation of s.8 but reasonable reliance on the law counts in favor of not excluding evidence under s.24(2) *Charter*
  - *R v Canfield*
    - AB CoA found *Customs Act* provisions unconstitutional as they permitted device searches w/o suspicion → no reasonable balance b/w security and privacy of individual
  - *Hunter* – law purporting to authorize warrantless search was unreasonable
  - Reasonable search will occur when there is prior authorization from a neutral party (judge) based on reasonable and probable grounds
    - If police act according to law that is later determined to be unconstitutional, this is violation of s.8 but reasonable reliance on the law counts in favor of not excluding evidence under s.24
- 3. Reasonable law is applied unreasonably
  - Looks to the case facts specifically
  - Common challenge: CC s.487 says police must have RPG to get a warrant. They go to judge, judge issues warrant, and they conduct search. Cannot then argue the there is no law, or it is unreasonable.
    - Defence will then focus on stating law was applied unreasonably
    - How? The statute and the Charter require **reasonable and probable grounds**
      - Statute: If say, we find out on review after the fact that police lacked RPG to get the warrant then key piece was missing and search was unlawful → unreasonable → violates s8
      - Charter: Invasion of strong expectation of privacy it has got to require RPG under s8, so even if it weren't a condition under 487 it would still be a violation under s8 as s8 under this type of search requires RPG
  - *Collins* 1987 – violently grabbing person by the next to make sure they don't swallow drugs that you don't know 100% are there is unreasonable

## REASONABLENESS

***Hunter v Southam*** 1984 SCC

| | |
|---|---|
| **Ratio** | • (1) The law should require that searches be authorized by warrant except in circumstances where it is not feasible to obtain one.<br>• (2) The standard for searching should **be reasonable and probable grounds**, established on oath, to believe that a crime has been committed and that the search will reveal evidence of that crime. |

| | |
|---|---|
| | • (3) The law should require that someone capable of acting judicially (i.e., a judge or justice of the peace) the one to decide upon the adequacy of the grounds for issuing the warrant. |
| **Facts** | • *Combines Act* allowed Director of Investigation to enter premises and examine anything within, if they thought there was relevant evidence to an investigation<br>• To exercise power, director needed authorization from Restrictive Trade Practices Commission<br>• Hunter was director of branch of competition bureau<br>  ○ Received authorization to investigate Southam Newspaper chain<br>  ○ Accused of price fixing or predatory pricing of the ads<br>  ○ Authorized others to enter premises |
| **Issue** | • whether s. 10(3), and by implication s. 10(1), of the *Combines Investigation Act* are inconsistent with s. 8 of the Charter by reason of authorizing unreasonable searches and seizures and are therefore of no force and effect. |
| **Result** | • S.10(1) and S.10(3) of Combines Act are unreasonable b/c:<br>  ○ (1) No prior authorization from a neutral and impartial arbiter (2) No reasonable and probable grounds |
| **Reason** | • Focus on analysis should be on "reasonable" vs "unreasonable" impact on the subject of the S&S, not on the rationality in furthering some gov't objective of<br>• (1) **Balance of interests to be assessed**: prevent unjustified searches by requiring prior authorization and having rebuttable presumption for Crown to justify warrantless searches<br>• (2) **Who grants authorization**: neutral and impartial party that assesses evidence to determine that individual's right to privacy is breached only where appropriate standard is met<br>  ○ Criminal code and statutes: must be members of judiciary. Other laws: doesn't have to be a judge but they must be capable of acting judicially<br>• (3) **What basis must balance of interests be assessed**: Purpose of objective criteria is so that there is consistency to know when the state interest > individual interests<br>  ○ State interest > individual interest only when credibility-based probability replaces suspicion<br>  ▪ "The state's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at the point where credibly-based probability replaces suspicion." → defines "reasonable and probable grounds"<br><br><u>Application</u><br>• (1) Searches under this Act would be unreasonable w/o prior authorization<br>• (2) The Director has an investigatory and prosecutorial role, and the RTPC has an investigatory and judicial role<br>  ○ RTPC cannot be neutral and impartial enough to authorize searches – therefore s.10(3) is inadequate to satisfy the requirement of s.8 so S&S under this act are unreasonable<br>• (3) Combines Act only states that S&S may be made based on opinion of Director<br>  ○ Balance of these interests cannot depend on subjective appreciation of individuals – needs objective standard<br>  ○ No evidence of such balance in s.10<br><br>• reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search, constitutes the minimum standard |

## HUNTER STANDARDS

1. The law should require that **searches be authorized by warrant except** in circumstances where it is not feasible to obtain one
2. The standard for searching **should be reasonable and probable grounds** established on oath, to believe that a crime has been committed and that the search will reveal evidence of that crime
3. The law should require that **someone capable of acting judicially** (i.e., a judge) be the one to decide upon the adequacy of the grounds for **issuing the warrant**

Collapsed into two: (1) **prior authorization** (implicitly means has to be conducted by someone acting neutrally and impartially) and (2) **reasonable and probable grounds**

➔ **Applies to both common law and statute to determine whether a search was reasonable**

### Prior Authorization

- Purpose: prevent unjustified searches *before* they happen and strike **balance b/w interests** of state and individual
- For authorization to be meaningful, person "authorizing must be **neutral and impartial**"

### Reasonable and Probable Grounds

- Police must demonstrate discovery of evidence is *likely*
  - "**state's interes**t in detecting and preventing crime **begins to prevail** over the individual's interest in being left alone at the point **where credibly-based probability replaces suspicion**".
    - Less demanding than BRD proof but more than suspicion
  - Mixed subjective + objective standard

- S 8 violations are rarely justified under section 1
  - Bc how can an unreasonable search then constitute a reasonable limit under s 1?
  - Nevertheless, SCC has conducted some cursory s 1 analyses in decisions but has never upheld s 8 infringement

## DEVIATING FROM *HUNTER*

- Reasonableness under s.8 requires a warrant (where feasible) and reasonable and probable grounds (*Hunter*)

### Situations where reasonableness requires MORE than the Hunter standards

- The default standards in *Hunter* are reasonable and probable grounds.
  - Sometimes courts have required more prerequisites before allowing warrant
    - Occurs primary in cases with very sensitive privacy interests or interests other than the search target's privacy
- All warrant-based search powers must leave issuing authorities with a residual discretion to impose prerequisites and conditions → it not = unconstitutional

### Situations where reasonableness requires LESS than the Hunter standards

- Courts have yet to recognize any circumstances warranting a higher standard for reasonable and probable grounds
- But have upheld searched based on a lower standard of "**reasonable suspicion**"
- **Reasonable suspicion**
  - No strict definition
    - Less than reasonable and probable grounds
    - More than a purely subjective hunch or intuition
      - Not stringent, relatively low, only the possibility of criminality
    - Flexible standard requiring a "contextual approach"
  - *R v Wise*
    - SCC suggested that reasonable suspicion would have been sufficient to justify the installation of a tracking device on the persons vehicles
    - As a result, s 492.1 CC enacted to impose the reasonable and probably grounds standard for devices "usually carried or worn by the individual"
    - Reasonable suspicion remains standard for tracking vehicles and other non-worn items
  - S 492.2 originally authorized police to acquire transmission data associated with cell phones, including numbers and locations of phones connecting to the target phone.
    - Courts used reasonable suspicion
    - Current version encompasses analogous metadata from other communications devices and upheld under s8
- Driving Offence Searches

- Suspected of being impaired may be compelled to provide breath or urine samples, or submit to physical coordination tests
- Two categories:
  - 1) Roadside screening for investigative purposes only (test results may be used to provide grounds but not as evidence at trial)
    - Cop may compel drivers to provide breath sample w/o suspicion
  - 2) Testing producing evidence potentially admissible in court
    - Requires probable grounds
    - More accurate machine at station
- No warrant required for either category
  - Courts have noted vehicle travel is highly regulated, drivers have a diminished expectation of privacy and deterring impaired is a pressing objective

# INVESTIGATION: SEARCH POWERS – S 8

- If a power violates section 8:
  - **Statute** – remedial action is to "read down" the legislation
  - **Common law** – any issues the judges can just adjust the law (at the appropriate level – SCC)

## SEARCH WARRANTS - READING

### Statutory Search Power – Section 487

- Most frequently used warrant provision is s. 487 CC
  - Justice who is satisfied… that there are **reasonable grounds** to believe that there is in a building or place…
    - (a) anything of which any offence has been or is suspected to have been committed,
    - (b) anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence, or will reveal the whereabouts of a person who is believed to have committed an offence…
    - (c) anything that there are reasonable grounds to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant, or
      - (c.1) any offence-related property,
    - May issue a warrant to search the building or place, as soon as practicable to
      - Search the place for any such thing and to seize it

### "Reasonable Grounds to Believe" = reasonable and probable grounds

- Judicial officer must be satisfied there are reasonable grounds that an offence has been committed and that relevant evidence or contraband will be found in the "building, receptacle or place" to be searched
- What is reasonable?
  - Totality of the circumstances considered
  - Three general factors (three C's)
    - Whether the info predicting the commission of the offence is *compelling*
    - Whether the source of the tip is *credible*
    - Whether the info has been *corroborated* by investigation prior to search
  - RE anonymous tips – very cautious approach

### Application Process, Hearsay and Confidential Informants (CI)

- To obtain warrant:
  - Information to Obtain (ITO): Cop ("informant") outlines reasons for believing there are reasonable grounds and go to justice with an ITO
  - ITO examination:
    - **Location and evidentiary value:** ITO must show objective reason to believe that you are going to find evidence – what does the cop expect to find? Some degree of specificity
    - **Subjective and objective**
      - Subjective: officers themselves must believe they have RPG

        - Objective: objectively reasonable to believe that a crime was committed, and evidence would be found at that location
    - **Basis for belief** (ex. sources of info, indicators of reliability, reputation of suspect)
    - **Hearsay**: Presumptively hearsay evidence is inadmissible at trial but can be used to justify ITO
- Assessing whether police have satisfactorily justified receiving a warrant and reaching RPG
    - **Credible**: How credible were people that provided info about crime?
    - **Compelling**: Detailed evidence? Internally consistent? Contrary to human experience?
    - **Corroborated**: Key factor. Distinguishes RPG from RS

- Despite onus to full disclosure, informant may not identify CI
    - Accused has right to disclosure – but courts will edit out reference to informant
    - Subsequent review: *in camera* hearing –
        - crown and informer only
        - defence may make submissions in absence (inc. on scope of the privilege)
        - judge may ask defence to suggest questions for witnesses at the *ex parte* proceedings
- Risk to identifying CI?
    - Crown may… reveal with CI consent
    - Treat search as warrantless and attempt to justify
    - Stay or withdraw charges

## Manner of Execution

- S 29(1) CC: "It is the duty of everyone who executes a process or warrant to have it with him, where it is feasible to do so, and to produce it when requested to do so."
- Enables the occupant to understand their legal position and authority of the search
- Must occur during the day unless received an exception
- "knock and announce"
    - Notice of presence by knocking/ringing
    - Notice of authority by identifying themselves
    - Notice of purpose by stating reason for entry
    - Exceptions recognized by SCC but cops have onus to establish necessity
        - Must show reasonable grounds of safety concerns
        - Cannot rely on *ex post facto* justifications
- Cops may use "reasonable force" to gain entry and then "control the premises" to ensure safety and prevent evidence destruction
- All of this does not automatically entitle cops to search those on premises – must have some other legal justification

## Section 487.11 – Search w/o a Warrant BEFORE S&S

- 487.11 A peace officer … may … exercise any of the powers described in subsection 487(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.
    - Essentially, if obtaining a warrant is impractical or would risk the loss or destruction of evidence, then the cops can conduct the search w/o the warrant
    - Other provisions then require the documentation cops had before hand and during the search to be turned over
    - A *ex post facto* warrant process occurs (court will review it all) as a check + balance of this search power
    - If cops can convince the court AFTER THE FACT that RPG existed, and a true situation of EXIGENCY existed then they can be said to comply w/ section 8
    - Test of exigency set out in R v Grant
        - "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"
        - Must have concrete objective reasons to believe that delaying search to obtain a warrant will result in loss

## Section 487.1 - Tele-Warrants

- Warrant may be requested by phone or other telecommunications (487.1(4)) – tele-warrants
    - Must include a statement of circumstances that make it impracticable for the office to attend personally before the justice; statement of the indictable offence alleged; the place to be searched and the items liable to seizure; statement for grounds for believing such items will be found; statement as to any prior application for a warrant
- This makes it much more difficult for police to justify searches w/o warrant (487.11) as they can receive one very quickly

## *R v Vu* 2013 – Search of Computers

- Unless cops have exigent circumstances, they need specific authorization to search digital information
    - Therefore, need to specify information/grounds for searches of computers/phones/laptops etc.
- "It is difficult to imagine a more intrusive invasion of privacy than the search of a personal or home computer"
    - "…prior authorization to search a computer found in the place of search ensures that the authorizing justice has considered the full range of the distinctive privacy concerns raised by computer searches and… decided that this threshold has been reached … This means that if police intend to search any computers found within a place they want to search, they must first satisfy the authorizing justice that they have reasonable grounds to believe that any computers they discover will contain the things they are looking for.

## Section 487.01 General Warrant

- Permits police to do almost anything they want to that would constitute a S&S (i.e., would invade a REP) if there is no other specific provision in a federal statute that would permit that type of intrusion
    - Residual power
    - Requires the same as the rest (RPG)
    - It also incorporates a specific regime for video surveillance that are analogous to those require for to wiretaps or electronic communication surveillance
- Enacted in response to *R v Wong*
    - violation of REP in hotel room (pinhole cam)
    - Not authorized by law and so violated section 8

## Body Samples

- Breath alcohol screening (s 320.27) – no RS req'd
    - Occurs at the roadside w/o warrant
    - USED to require reasonable suspicion
        - Now (as of 2018): Police can demand that any lawfully-stopped driver provide a preliminary breath sample to test for alcohol w/o reasonable suspicion that the driver has alcohol in their body.
    - Once the device gives a reading which is over the limit (this is not admissible in court as it is not accurate enough) BUT gives the cops RPG to arrest you, take you to the station and do an accurate test (which is admissible)
        - Sober or not, a driver who refuses to provide a breath sample would be criminally charged with refusal to provide a sample (as of 2018).
- Samples for alcohol & drug testing (ss 320.28-320.29) – RPG
    - Suspected of being impaired may be compelled to provide breath or urine samples, or submit to physical coordination tests
    - Must have objective RPG, but need not obtain a warrant
    - Courts have noted vehicle travel is highly regulated, drivers have a diminished expectation of privacy and deterring impaired is a pressing objective
- Forensic DNA samples (s 487.05) - RPG
- DNA database (s 487.051)
    - If convicted of offence, generally speaking can be compelled to provide bodily sample for DNA identification purposes and housed in a database to potentially solve other crimes

## Electronic Surveillance (Part Vi, 183-185)

- Interception of the content of private communications (i.e., oral or text-based conversations) governed by Part VI of the *Code*
    - Generally speaking, police need special "authorizations" to conduct this kind of surveillance;
    - often (but not always) have to establishing something called "investigative necessity"
- Standards for obtaining non-content information, such as location, metadata (e.g., who is calling whom, when, and for how long) are lower, but still require warrant.
- For exam, just know → this requires more onerous requirements

## Production Orders (s 487.014 – 487.018)

- Used to obtain information from third parties to the police
- PO requires them to produce the designated information and if they don't, they will be in contempt of police
    - E.g., Telephone service provider, Internet service provider, education institution, hospital, physician etc.
- Less intrusive but there is sensitive data regarding important privacy interest, so it requires prior authorization
- Ask how much does it violate the biographical core?
    - May require RPG OR if it's less invasive RS may be enough
- Example problem
    - Police wish to follow suspect's movements by tracing the location of her mobile phone (using cell network + GPS data)
    - They need: warrant + probable grounds
    - S 492.1(2) A justice or judge who is satisfied … that there are **reasonable grounds** to believe that an offence has been or will be committed … and that tracking an individual's movement by identifying the location of a thing that is **usually carried or worn by the individual** will assist in the investigation of the offence may issue a **warrant** authorizing a peace officer or a public officer to obtain that tracking data by means of a tracking device.
        - Applies only to tracking movement using an item usually carried by the individual
        - Reasonable suspicion remains standard for tracking vehicles and other non-worn items

# Common Law Search Powers

## Ancillary Powers Doctrine

- Police Actions that interfere with individual liberty are permitted at common law if they are ancillary to the fulfillment of recognized police duties.
- 1. Does police action fall within scope of police duty?
    - rarely contested – protection, safety, law and order
- 2. Is it reasonably necessary for the fulfillment of the duty, considering:
    - a. The importance of performing the duty to the public good
    - b. The necessity of the interference with the individual liberty
    - c. The extent of the interference with the individual liberty
- essentially a cost-benefit analysis

## Search Incidental to Arrest – requires reasonable probable grounds

- Courts employed the ancillary powers doctrine to recognize the power to search incident to arrest
- Baseline ability to search when arresting someone

Three preconditions

- 1) Person must have been **lawfully arrested**
    - Do not need independent grounds for the search; instead, just need grounds for an arrest
        - if the police lack the requisite grounds to carry out an arrest, the search gets tossed
        - contrary to *Hunter* standards but still upheld by SCC at common law
            - Hunter requires a search to have (1) prior authorization and (2) reasonable and probable grounds
- 2) Search must **be truly incidental** to the arrest

- the search must be as an incident of the lawful arrest = searching for purposes related to the arrest
  → **nexus to the offence**
  - Nexus – warrant for outstanding traffic fines; cannot search for anything but weapons if there is believed to be a safety issue
  - Must have logical possibility of finding evidence
    - Practically speaking must have some logical possibility of finding evidence related to the offence that you have been arrested for; otherwise, cannot show that nexus and search incident to arrest would be unlawful, and would violate s. 8 -- bc all unlawful searches are unreasonable
  - Example:
    - If someone is arrested while driving a car because of a warrant relating to outstanding traffic fines, incidental search will be limited to safety concerns and will not extend to discovery or preservation of evidence. Why? no offence for which the accused is being arrested and no justification to search for evidence
- Police must *subjectively and reasonably* (objective) believe they are searching for something that relates to the preservation of evidence, ensuring the safety of the police and/or public, or the discovery of an object that may facilitate an escape
  - *Caslake*
    - Accused was arrested, vehicle was towed to a garage. Six hours later, officers searched the vehicle, when he testified, said it was for inventory of the vehicle in impound. Ruled not related to the arrest, and the search was thrown out.
    - No statutory or common law powers for this search b/w it was unrelated to the arrest
    - "Absence of the requisite subjective mindset on the part of the officer conducting the search was fatal"

- 3) Conducted **Reasonably**

## earches of the Person

- Frisk searches, photographs and fingerprints are okay. Not dental impressions at common law – require warrant

- The person of the individual arrested can be searched incidental to a lawful arrest
  - *Cloutier v Langlois*
    - Supreme Court endorsed the use of a "frisk" search – describing it as a relatively non-intrusive procedure and brief.
    - Pat down basically, pockets may be examined but clothing is not removed
- Reluctant to authorize very invasive procedures as part of search incidental to arrest, especially when not preserving destructible evidence
  - *R v Stillman*
    - SCC declined to expand common law search incidental to arrest to dental impressions or bodily samples
    - Why? Personal privacy essential to human dignity
      - But courts have tolerated it when inaction or delay could result in a loss of evidence
      - Bodily impressions and samples --- allowed now via a warrant due to CC amendment

Strip Searches

- Warrant not required but police must have RPG that they are necessary to preserve weapon/evidence, must be done at police station (except necessary circumstances) and must be done reasonably and minimally intrusive
- More invasive (removal of clothing) and unlike body samples, lots of circumstances where failure to strip search could jeopardize safety of police and others in custody and lead to destruction of valuable and disposable evidence → therefore need RPG
- R *v Golden* 2001 SCC
  - court rejected claim that cops NEED a warrant for a strip search
  - BUT must be in privacy of police station (unless urgent circumstances arise)
  - Only **justifiable** when a search is **necessary in the circumstances to either secure a weapon or preserve evidence**

        - if done in the field, burden is on the police to show why they could not wait
- Requirements
    - RPG
    - Necessity
    - Minimally intrusive
        - UK Guidelines used by the court to determine is search carried out in a reasonable manner:
            - Conducted in a manner that respects health and safety of all
            - Supervisory officer authorized
            - Same gender
            - Number of officers is no more than necessary
            - Minimal Force
            - Carried out in privacy
            - Quickly as possible and in a way that the person is not completely undressed at any one time
            - Visual inspection of genital and anal area
                - If visual inspection reveals a weapon or evidence, give the individual the option to remove, or have it removed by a medical professional

Penile Swabs

- Police need RPG to believe they will collect evidence that the accused was arrested for. Must be necessary and minimally intrusive. Consider timing, allegations of no contact. Must be done reasonably at police station. Note: used for collecting complainant's evidence. Warrant and RPG still required to use/collect suspects DNA.
- Bodily samples cannot be obtained during a search process [different from penile swab + strip searches] only by warrant or consent
- R v Saeed (4-3)
    - penile swab constitutes a significant intrusion on the privacy interests
    - The arrest itself must be lawful, and the swab must be administered "truly incident to the arrest"
- Requirements for Penile Swabs (same as strip searches):
    - Must have reasonable and probable grounds to believe that the swab will afford evidence for which the accused was arrested
        - Different and additional than the others grounds to arrest
        - Relevant considerations include timing of the offence, nature of allegations, and whether there is evidence that substance may have already been destroyed
            - Ex: sexual assault, if you caught the accused a day later - no grounds as evidence degraded/washed away; or if penis did not make contact during assault
    - Establish some necessity
        - There's not an alternative way to get the evidence
    - Conduct procedure in a minimally intrusive fashion. Some guidelines:
        - Accused should be given the opportunity to take the swap himself, if he does not choose this, swab given by a trained officer or medical professional
        - Keep a proper record of reasons for and manner
        - All other strip search guidelines apply
        - Can't be used to get the accused DNA through procedures w/o warrant (*Stillman*)

Search of Digital Devices

- Can search digital device incident to arrest (w/o warrant) but there are extra requirements. Police also cannot compel you to give them your passcode.
- *R v Fearon* 2014
    - Court divided 4/3 – majority held that the search incident to arrest power included authority to search contents of devices
    - Due to personal info that may be stored, special rules to limit search to:
        - 1. **Recent content**
            - Must "tailored to the purpose" for which it was lawfully conducted
            - Meaning both the nature and extent of the research must be "truly incidental to the particular arrest" so only recent content is viewed
        - 2. **Serious offences**

- such as violence, putting public safety at risk, serious property offences involving readily disposable property and drug trafficking
- 3. **Investigation stymied** without the search
  - If all subjects and any firearms and stolen property are in custody and been recovered, no purpose to search the phone
- 4. Police must take **detailed notes**
  - What they searched, and when they searched etc.

- Dissent: the majority created an overly complicated template rather than just "require warrants" to search device contents except in exigent circumstances, as when delaying the search would compromise public safety or cause evidence to be destroyed. Should exist only in exigent circumstances.
  - What is recent? What is considered serious? How to determine if investigation "stymied" → gives police a lot of discretion

## Safety Searches (during investigative detentions and more)

- Officers can detain someone based on RS (*Simpson*; *Mann*)
- Can do a frisk search for weapons only (not evidence) based on RPG (*Mann*)
  - problem is that they need RS to detain but RPG to search. RPG gives them arrest powers so quite confusing.
- General safety search power also recognized at common law based on RPG (*MacDonald*)
- Remember: **lawfully detained is different from arrest***
  - An investigative detention is defined precisely by the absence of reasonable grounds for arrest
  - As a result, courts have held a **search cannot be automatically conducted even during a detention**. Rather, there must be independent reasonable grounds justifying the search
- Police have a common law power to conduct searches incidental to *investigative detention* but for this search to be a justified use of police power, the officer must have **reasonable grounds** to **believe that his safety or the safety of others is at risk** (*R v Mann*)
  - Frisk search only
  - Search for weapons only
    - Does not permit police to search for evidence
    - If do frisk and feel something like a bag of drugs, then pull it out → s8 violated
    - If feel something hard, like a weapon, then search would be permitted
  - Reasonable grounds to believe

### Search Incidental to Investigative Detention

- Note: keep in mind that investigative detentions are separate from searches. They are discrete powers that MAY be used together. RS for detention. RPG for search.
- *R v Simpson* (ON CoA) - detention power granted but silent on corresponding search power
  - For a decade, courts followed it, and some went further and created a power to search those detained
  - Then *R v Mann*…
- *R v Mann* – recognized investigative detention power + **search incident to investigative detention**
  - SCC applied ancillary powers doctrine to recognize an investigative detention power at common law
    - "To summarize… police officers **may detain** an individual for investigative purposes if there are **reasonable grounds to suspect** in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary". [para 45]
    - Case provides legal authority to briefly detain for investigative purposes where, in the totality of circumstances, a police officer has reasonable grounds to **suspect a clear nexus** between the individual being detained and a recent or ongoing criminal offence
  - Further, when an individual is lawfully detained for investigative purposes, **may be subjected to a limited protective pat-down search** --- but requires "**reasonable grounds to believe**" safety is at **risk** [para 43]
    - In this specific case -- police could have conducted a pat-down search (justified as perp matched break & enter description and may have had weapons) but by reaching inside Mann's pocket and removing a baggie containing marijuana, they went over the line

        - Further probing beyond the pat down only justifiable where a police officer feels something during initial protective search
    - Many issues remain unanswered after *R v Mann* case:
        - 'Reasonable Grounds to Believe'
            - Wording is confusing and blurs distinction with conventional arrests
                - If police had RGB then could arrest suspect and conduct a far more probing search; essentially, the detention power to search because redundant
            - Think of it as "reasonable grounds to *suspect* that an individual who is being lawfully detained is armed"

<u>Safety Searches during Investigations (do not need detention)</u>

- SCC recognized a police power to conduct safety searches in response to an "imminent threat" to themselves or public (*R v MacDonald* 2014)
    - Recognized a more general safety search power that goes beyond the context of investigative detention
        - Reactionary measure not a tool for proactive policing
        - Police can't deliberately seek out individuals for the purpose of subjecting them to safety searches
        - Limited to a search which is "reasonably *necessary* to eliminate any threat" → weapon search not for evidence
        - Must only be acted upon reasonable and specific inferences from the known facts
        - Endorsed the "**reasonable grounds to believe**" standard
    - Facts:
        - Police responded to a complaint about excessive noise
        - MacDonald opened the door partially after delay
        - Police noticed something black and shiny in MacDonald's right hand that was in a shadow and partially hidden
        - Police asked MacDonald what was in his hand twice. No response.
        - Officer pushed the apartment door open and found that MacDonald was holding a handgun
    - SCC stood by the awkward language
    - As noted in the dissent – majority approach means police officers are "empowered to detain individuals they suspect are armed and dangerous for investigatory purposes, **but no power to conduct a pat down search** to ensure safety as they conduct these investigations". Minority wanted a reasonably suspicion standard.
        - Side note: while you cannot conduct a search without RPG, in reality the "degree of probability required [in the RPG standard] is probably far lower than the RPG required in search warrants" (penney) → as in, despite both safety searches and warrants being based on RPG the courts tend to relax the probability requirement or else the power is essentially useless as the minority noted.

### Drug-Sniffing Dogs

- Drug sniffing dogs are S&S b/c they encroach on REP. But police can use RS w/o warrant. No legislation for drug dogs so falls under common law powers
- Encroach on reasonable expectation of privacy – *R v Kang Brown, R v M (A)* ∴ triggers s 8 reasonableness requirements
- Majority in the two cases concluded Court should use ancillary powers to create new police power
- Power to conduct sniff search based on "**reasonable suspicion"**
    - Why? Less intrusive than other searches. Also, prior-judicial approval impractical. Finally, *Hunter* standards would make dogs unnecessary.

## Searches For Non-Criminal Investigative Purposes

- Deviations from *Hunter* = more common <u>outside</u> the realm of ordinary crim investigative process
- Theme: the state's interest goes beyond criminal law enforcement, while the individual's privacy expectations are somewhat diminished.

### Regulatory Searches

- Minimal expectation of privacy in locations or documents subject to regulation
- Section 8 requires only those inspections be carried out in good faith and in accordance with the purposes of the regulatory scheme.

- However, reasonableness must be assessed in light of the intrusiveness of the search, the nature of the regulatory scheme and the purpose of the investigation
- Courts have upheld regulatory powers to inspect businesses, sometimes even residences, for regulatory purposes
    - Non-privileged business and tax records do not generally require prior authorization or objective grounds for suspicion
- Fact that some regulatory offences provide for imprisonment does not in itself demand for prior authorization on RPG
- *Thomson*
    - legislation empowered competition regulators to compel production of documents without authorization or evidence
    - Upheld – administrative or regulatory in nature

### Border Control

- Court suggested (dictum) in *Hunter* that reasonableness might have to be assessed differently "where state security is involved"
- *R v Simmons*
    - diminished expectation of privacy upon crossing the border
    - states have legitimate interest in preventing entry of undesirable persons or goods
    - justifies routine pat-down and luggage searches w/o warrant or individualized suspicion
- Strip searchers at border – require reasonable suspicious but not prior authorization
- Digital devices
    - Courts divided on whether border agents must have objective grounds for suspicion
    - *R v Canfield*
        - AB CoA found *Customs Act* provisions unconstitutional as they permitted device searches w/o suspicion

### Institutional and Disciplinary Settings

- *Weatherall v Canada*
    - can search prisoners and cells w/o suspicion
    - Necessary for "security"
- *R v M. (M.R.)* 1998
    - schoolchildren have diminished privacy expectations
    - Vice principal searched a student in the presence of an officer. Viewed as not acting as an agent of police, *hunter* standards didn't apply.
    - Must have reasonable grounds to believe a school rule has been, or is being violated, and evidence of that violation will be found in the location searched
        - And conducted by school themselves
- *R v M (A)* 2008
    - court rejected the use of taking a drug sniffing dog through a school to try to find drugs in students' lockers w/o reasonable suspicion
    - distinguished from R v MMR as this case involved police *doing* the search

| | **Warrant** | **No Warrant** |
|---|---|---|
| **Probable Grounds** | • n/a [Hunter Standards] | • Exigent circumstances<br>• Breathalyzer demand |
| **Reasonable Suspicion** | • Metadata warrant | • Canine sniff |
| **No Suspicion** | • n/a | • ASD – roadside breathalyzer in certain situations<br>• Regulatory audits (Tax audits) |

## INVESTIGATION: DETENTION & THE *CHARTER* – SECTION 9

- Carding/street checks

    - Video Toronto Stars
    - Happens in Edmonton too
    - Dynamic of what goes into the street check is important
    - Racial profiling does occur
- Police rely more on community policing
    - Greater effect on crime if police get more face-to-face contact with police
- EPS: street checks
    - Looked at the file dated; interviews; focus groups etc.
    - Findings from diverse communities
        - Confusion about street checks
        - Perception of bias and racial police
        - Use their discretionary powers
        - Did not reflect procedural justice – treating fairly
            - "lack of respect"; "dehumanization"
    - 2018 – said they would continue with carding but adopt recommendations
    - Since YEG report – new police chief
        - Tone slightly different
        - Would you want people checked if a crime was committed? But how the check is conducted and how it is recorded is important. Police work means talking to people. Dismissive?
    -
-
- *R v Le* 2019, SCC
    - Research now shows disproportionate policing of racialized and low-income communities in Canada
- 2020 – AB formally banned carding [randomly questioning and collecting personal info] BUT still allowed to stop people and gather info via a "street check". Providing info via a street check is voluntary.

## GENERAL

"Detention" is a trigger for the constitutional protection provided by s.9 AND it is one of the threshold requirements for engaging the safeguards found in s.10

- s. 9: Everyone has the right not to be **arbitrarily detained** or imprisoned
- s.10: Everyone has the right **on arrest or detention**
    - (a) to be informed promptly of the reasons, and
    - (b) to retain and instruct counsel without delay and to be informed of that right
- Can't be arrested w/o being detained
    - But can be detained w/o getting arrested
- If the detention threshold crossed:
    - (1) s.9 violation if police lack requisite legal grounds to detain,
    - (2) Also triggers informational duties under s.10
        - s.10a (right to be informed of charge), and
        - s.10b (right to consult counsel)
- Reasons for objective criteria for determining if detention has occurred:
    - (1) Enables the police to know when a detention occurs and therefore allows them to fulfill their obligations under the Charter and afford individual its added protections
    - (2) Ensures rule of law is maintained so that claims of all individuals are subjected to same standard (all individuals treated equally and have same Charter protections regardless of subjective thresholds)
    - (3) Accounts for the reality that some individuals will be incapable of forming subjective perceptions when interacting with the police
- *Therens* recognized three categories of detention (reaffirmed in *Grant*):
    - psychological restraint (with legal compulsion),
    - psychological restraint (without legal compulsion) and
    - physical restraint
- Duty to comply = detained

- If there is a legal duty to comply with police demand (i.e., sanctions for non-compliance) then a detention has occurred

## PSYCHOLOGICAL RESTRAINT W/ LEGAL COMPULSION

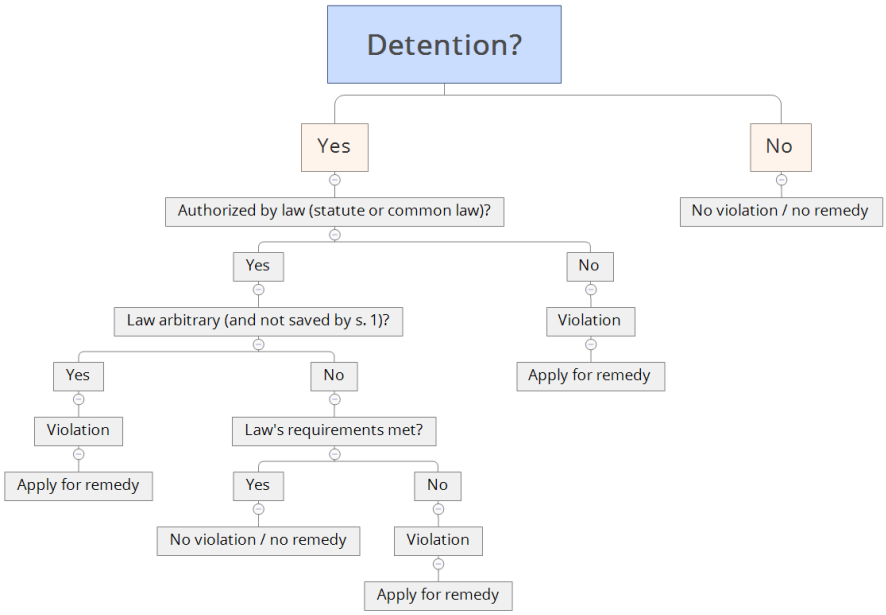
- If there is legal penalty for not complying, then you have a detention under s.9 and s.10
- Whenever a person may be punished for failing to comply with police directives
- Every motor vehicle stop constitutes a "detention" of the driver
  - Split as to whether passengers are considered detained
- Vehicle stops motivated by traffic safety concerns are subject to less exacting constitutional standards
  - No issue of detention to figure out when driver is stopped → that driver IS detained
    - Any time a driver is stopped, driver has an obligation to provide documentation (insurance, DL, etc)
  - Have used s.1 to override 9 + 10(b)

## PSYCHOLOGICAL RESTRAINT WITHOUT LEGAL COMPULSION

- Justice Le Dain also said (in obiter in *therens*) that also detention may also sometimes arise even if there is neither physical restraint nor a legal duty to cooperate
  - "[I]t is not realistic … to regard compliance with a demand or direction by a police officer as truly voluntary… .Most citizens are not aware of the precise legal limits of police authority." (*Therens*)
  - "Rather than risk the application of physical force or prosecution … the reasonable person is likely to err on the side of caution, assume lawful authority and comply with the demand." (*Therens*)
  - challenge in identifying the line b/w consensual and coerced encounters
- *Grant* 2009:
  - A person is detained where he or she "submits or acquiesces in the deprivation of liberty and **reasonably believes** that the choice to do otherwise does not exist."
  - *Grant* Factors to consider:
    - The **circumstances** giving rise to the encounter.
      - Viewed as on a spectrum from police providing general assistance, making general inquires (unlikely detention) ------→ to singling out the individual for a focused investigation (likely detention)
      - Ex: custodial interrogation is likely to trigger a finding of detention
      - Ex: attending a scene of an accident and inquiring – not a trigger
    - **Nature of the police conduct**
      - Look to the **language** used, the use of physical **contact** (keep in mind anything *more* than a trivial physical – ex pat on the back – would constitute a physical restraint), place **where** the interaction occurred, presence of others, **duration** of the encounter
    - **Characteristics or the suspect** where relevant
      - including **age**, **physical** stature, **minority** status, level of **sophistication**.
- R v Grant
  - At what point, if any, was Grant detained?
    - When the cop told him to keep his hands in front of him
- Courts will usually state, a detention was triggered no later than point X

## PHYSICAL RESTRAINT

- Usually obvious - arrest or where the police take physical control of the individual then there is restraint
- Search belongings or put a person in a car or grab a person
- More than a tap on the shoulder
- Physical restraint does not usually apply where the police block or prevent a person's movement in a non-physical way
  - Intimidation may be a factor in finding psychological detention, but it doesn't count as physical detention




## *R v Le* 2019 SCC – detention – reasonable person – relevance of race

| | |
|---|---|
| **Ratio** | • Someone is "detained" when an ordinary person in the same situation would think that they weren't free to leave and had to comply with police demand<br>  ○ Considered the role of race in determining interaction with police |
| **Facts** | • Mr. Le and four friends were in a backyard talking. Police had a report that this house was a 'sketchy' place used to sell drugs.<br>• The officers went into the yard without asking permission, questioned the men, told one to keep his hands visible and carded them. One officer did a perimeter check around the place before hopping the fence into the yard.<br>• Mr. Le said he didn't have ID, when the officer asked what was in his bag, Le ran away. He was arrested and found to have a gun, drugs and cash<br>• Trial judge claimed he was only detained when asking about the bag. Detention was legal because of reasonable suspicion of crime. Court of Appeal agreed. |
| **Issue** | • When was Mr. Le detained and was there legal grounds for the detention? |
| **Result** | • Detained when police entered private yard. No legal grounds for detention. |
| **Reason** | • A detention requires "significant physical or psychological restraint" (*r v Mann; Grant)*<br>  ○ Police "exchanges [may] become more invasive . . . when consent and conversation are replaced by coercion and interrogation". In determining when this line is crossed (i.e., the point of detention, for the purposes of ss. 9 and 10 of the Charter), it is essential to consider all of the circumstances of the police encounter.'<br>• There was no legal authority requiring the men to answer questions or produce ID<br>• Psychological detention: when an ordinary person would think they weren't free to leave and had to comply<br>  ○ First step, was claimant detained?<br>  ○ Second, whether detention was arbitrary?<br><br><u>Step 1: Whether claimant was detained, if yes then move to step 2</u><br>• **Grant factor 1: circumstances of encounter**<br>  ○ No reason for the police to enter the backyard- not called for any reason, not maintaining order<br>  ○ Police didn't give warning and obvious to RP they were being interrogated<br>• **Grant factor 2: Nature of the Police Conduct** |

- "When three officers entered a small, private backyard, without warrant, consent, or warning, late at night, to ask questions of five racialized young men in a Toronto housing co-operative, these young men would have felt compelled to remain, answer and comply'. [para 97]
- **Police themselves were trespassing** – suggests detention at this point in time
- **Language**: stern language used, curt commands, clear orders about required conduct
- **Physical contact**: none but physical proximity and deliberate police positioning to block exits
  **Location**: private residence where people expect to be left alone (Court distinguished this from another case – *Mann*- that involved questioning on a downtown street)
- **Mode of entry**: police jumping over the fence suggests urgency and force; coercive and intimidating
  - Judge found that the police would be less likely to just enter and ask what people were doing in a more affluent and less racialized community
- **Presence of others**: each saw what was happening to the other people and repeatedly watching the sequence of police giving orders and people complying gives the sense that the people are not free to leave
- **Duration** of encounter: not really a factor in this case

- **Grant Factor 3: Characteristics of suspect**
  - In the analysis important to note that it is a ***reasonable person of a similar racial background*** and how they would perceive the interaction
  - **Race and timing** of detention: reasonable person word know how relevant race relations would affect police interactions.
    - Lots of studies showing that racial minorities are both treated differently by the police, and that such differential treatment does not go unnoticed by them
    - "The documented history of the relations between police and racialized communities would have had an impact on the perceptions of a reasonable person in the shoes of the accused".
  - **Level of sophistication**: Court doesn't agree with trial judge's finding that more frequent police encounters make it less likely that a person feels "detained". Court finds that Mr. Le's level of sophistication suggests detention arose when the police entered the backyard
  - Mr**.Le's Subjective Perception**: detention is an objective analysis and so his subjective perception should not be given priority
  - **Age and Stature:** his lack of maturity means the power imbalance was even more pronounced. His small stature may make it more likely that he felt overpowered and conclude that it was not possible to leave backyard

Step 2: Whether detention was arbitrary

- Recall *Collin* standards: detention must be authorized by law, the authorizing law must not be arbitrary, and the manner in which the detention is carried out must be reasonable
  - Not authorized by law therefore arbitrary

- Police tried to invoke *Trespass to Property Act* – but that only exists where police have RPG to believe that someone was trespassing and that didn't happen here
- Police tried to invoke common law power to detain for investigative purposes – only used when there is RPG to suspect a clear nexus b/w individual and a recent/still unfolding crime. This also didn't exist here

# INVESTIGATION: DETENTION POWERS – SECTION 9

- Unlawfully interfering with liberty necessarily violates section 9 of the Charter

## POWER TO DETAIN MOTORISTS FOR TRAFFIC SAFETY PURPOSES

- Most powers to detain motorists occur via **statutes** such as the *Traffic Safety Act*
- Police do not require any degree of suspicion the individual has committed any kind of offence
- This is a violation of the *Charter* – arbitrary detention

- BUT upheld as "reasonable limit" under s1 of the *Charter*

- The police have the power to conduct both proactive and reactive traffic safety stops
  - **Proactive** – police empowered to stop vehicles at fixed-point stops, or through roving and random stops in order to confirm sobriety and inspect driving related documents, along with examining the vehicle for mechanical fitness.
  - **Reactive** – Police have the power to stop a motorist who they reasonably suspect to be impaired or who they observe committing a moving violation
- Do not have to comply with section 10b
  - No exceptions to 10a. Always in effect regardless of the type of detention.
  - 10b is suspended only for the lawful preliminary traffic stop. The moment it transforms to a drunk driving or other criminal investigation or regulatory (just something worse) the police must let you go or invoke some other power (i.e. detain for investigatory purposes, arrest, etc.)

## Checkpoint Traffic Safety Stops (sobriety checks) – STATUTORY DETENTION

- Police power first recognized in *R v Dedman*
  - Slim majority relied on *Waterfield* to grant police a power at common law to conduct random stops
  - As this went through trial, Ontario amended *Highway Traffic Act* to grant police express statutory authority
  - Now in most provinces by statute
- Challenged in *R v Hufsky*
  - Challenged as being contrary to the right to not be arbitrarily detained (s9)
  - Court upheld as demonstratable justifiable under section 1 – due to high toll of injury, death, and damage
    - So, where you have a fixed-point stop (check stop) and every car is stopped (or every 10th car etc.) the SCC said that seems reasonable
    - BUT did not indicate whether this extended to roving and random stops…

## Roving and Random Traffic Safety Stops - STATUTORY DETENTION

- Randomly pulling people over while roving violates s.9 (arbitrary) but is saved under s.1 (*Ladouceur*)
- R v *Ladouceur* 1990
  - Roving stop: driver is driving, and cop is driving
  - Stopped car at random to check documentation, license suspended, so charged with the *Highway Traffic Act*
  - Majority **found violation justified** using the Oakes test.
    - reasoned those roving and random stops would enhance the deterrence of drunk, unlicensed and uninsured drivers by increasing the threat of detection
  - Minority doubted that adding a power to conduct roving random stops significantly enhanced deterrence provided by fixed-point stops. How many innocent drivers would be stopped meant the cost was too great
    - At the time, lacked empirical basis for fear of racial bias – court may reconsider this analysis in future
    - Sopinka's criticism of the power (Penney agrees with this)
      - "[T]he roving random stop would permit any individual officer to stop any vehicle, at any time, at any place. The decision may be based on any whim."
      - "Individual officers will have different reasons. Some may tend to stop younger drivers, others older cars, and so on. Indeed, ... racial considerations may be a factor too."

## Preventive Power

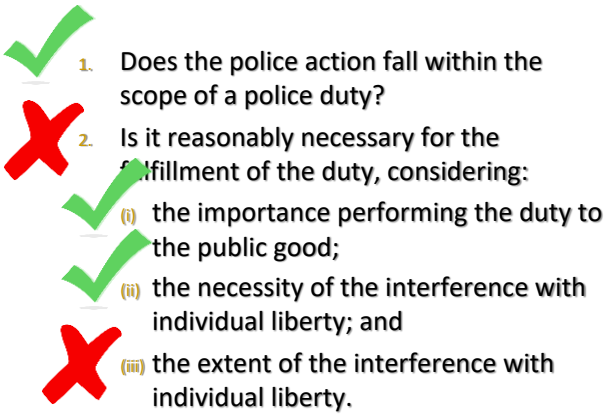
- Court did not recognize common law power to arrest after using ancillary powers doctrine. Remains in Canada that all arrest powers must come from statute.

### *Fleming v ON* 2019 SCC – no common law pwr to arrest

| | |
|---|---|
| **Ratio** | • No common law power to arrest someone to prevent breach of the peace; there are other ways to handle the issue |
| **Facts** | • Fleming was on his way to join a counter-protest. This protest was against a First Nations group.<br>• There was significant tension between the groups. |

| | |
|---|---|
| | • The police saw a potential violent situation happening, and told Mr. Fleming to drop the flag, he refused.<br>• Officers forced him to the ground, took his flag and handcuffed him.<br>• Let him go a few hours later, chargers were dropped. |
| **Issue** | • Did the police have the power to detain Mr. Fleming? |
| **Result** | • No |
| **Reason** | • Police get their powers from statutes and common law.<br>  ○ Under common law, police can limit someone's freedom if it is reasonably necessary to carry out their duty.<br>• Police argue that they were authorized by ancillary powers doctrine (from *R v Waterford)*<br>  ○ Common law police power to arrest individuals to prevent breach of the peace<br>  ▪ Essentially, arrest someone not committing an offence and not about to<br>  ○ This power does not exist<br>• The Ancillary Powers Doctrine<br>  ○ To determine whether a particular police action that interferes with individual liberty is authorized at common law → use "Waterfield test (below)<br><br>**<u>Waterfield Test</u>**<br>Police Actions that interfere with individual liberty are permitted at common law if they are ancillary to the fulfillment of recognized police duties.<br>• At the preliminary step of the analysis, the court must **clearly define the police** power that is being asserted and the **liberty interests that are at stake**<br>  ○ a. Doctrine comes into play where the power in issue involves prima facie interference w/ liberty<br>• 1. Does the police action at **issue fall within the general scope** of a statutory or common law **police duty**?<br>• 2. Does the action involve a **justifiable exercise of police powers** associated with that duty? (R. v. MacDonald, 2014 SCC)<br>  ○ a. Was the police action **reasonably necessary** for the fulfillment of the duty?<br>  ○ b. In MacDonald, the majority of the Court set out three factors to be weighed in answering this question:<br>  ▪ i. the **importance of the performance** of the duty to the public good;<br>  ▪ ii. the **necessity of the interference** with individual liberty for the performance of the duty; and<br>  ▪ iii. the **extent of the interference** with individual liberty.<br>• Onus is on the state to justify the power<br>• For exam → know the basic idea of the key elements from the test<br><br><u>Using the test:</u><br>• Preliminary analysis: liberty interests<br>  ○ the power at issue in this case would target individuals who are not suspected of being about to break any law or to initiate any violence themselves<br>  ○ even "provocateur" conduct is not itself unlawful<br>  ○ on balance the rights of individuals to liberty would be severely interfered with<br>• Stage 1 – police duty<br>  ○ power falls within the general scope of the duties of preserving the peace, preventing crime<br>• Stage 2: justifiable?<br>  ○ No. Police power to arrest someone who is acting lawfully in order to prevent a breach of the peace is not reasonably necessary for the fulfillment of the relevant duties<br>  ○ Factor (1): Yes, duty is very important<br>  ○ Factor (2): Yes, necessity of the infringement for the performance of the duty is possible in some exceptional circumstances. Some circumstances interference with liberty is required in order to prevent breach of the peace<br>  ▪ But if there less invasive measures available, police should use these<br>  ○ Factor (3): No. Court doesn't see how a power as drastic as arrest can be reasonably necessary, such that there are no other options at common law or legislation |

## Ancillary powers doctrine




## DETENTION FOR CRIMINAL INVESTIGATIVE PURPOSES

- Current common law powers from APD: fixed check stops (*Dedman*), investigative detentions (*Mann*), searches incident to arrest (*Cloutier*), 911 home entries (*Godoy*), sniffer dog searches (*Kang-Brown*), safety searches (*MacDonald*)

### Investigative Detention

- Power is premised on **reasonable suspicion** (arrest is based on a higher standard of reasonable and probably grounds)
  - First recognized in *R v Simpson*
  - Confirmed in *R v Mann*
  - Reasonable suspicion (RS) is lower than reasonable and probable grounds (RPG)
    - RS < RPG
      - Something to point to that says there's a reasonable possibility that this person has recently involved in criminal activity
  - Detention → needs to be brief
  - Questioning → accussotry questioning may exceed scope and would then need grounds to arrest
- Need Reasonable Suspicion and comply with 10(a) and (b)

- Prior to 1993, Canadian Law had no police powers to detain short of carrying out a formal arrest
- Changed in *R v Simpson* 1993 ON CoA
  - Used ancillary powers doctrine to recognize a power to briefly detain when police have "articulable cause" to believe the person is involved in criminal activity
- *R v Mann* – approved the new police power by applying the ancillary powers doctrine to recognize an investigative detention power
  - Court held police are empowered to **briefly detain** a person where they have **reasonable grounds to suspect** (aka reasonable suspicion) that the individual is connected to a recently committed or still unfolding criminal offence
  - Detain
    - How long? **Brief** – matter of minutes not hours
    - Where can you detain? Courts have failed to provide exact rules
      - Safety issues – police could move individual into police car or away from scene
    - Use of force?
  - Question

        - Accusatory / interrogation type questioning may exceed the scope provided and would then need grounds to arrest
        - Must apply w/ section 10
            - 10(b) applies when criminal investigation begins; also when breath test for admission in court
    - But for search remember it is
        - Limited to frisk search
        - Cannot search for evidence
        - & search requires RPG

## Reasonable Suspicion

- Reasonable suspicion standard in *Mann* is difficult to define
- Test has both an objective and subjective component
    - Police Officer's subjective belief to be backed by objectively verifiable indications
    - based only on the grounds in existence when the detention was initiated; ex post facto reasoning is not permitted
- Something more than a mere suspicion and something less than a belief based upon reasonable and probable ground
    - Reasonable possibility, rather than probability of crime
- To determine if standard is met, must consider totality of circumstances
    - *Mann*
        - Presence in high crime area is not enough
    - Not enough on their own for detention:
        - If individual is nervous, person asserting constitutional rights not to talk, or by walking away, or refusing a search or remaining silent
    - BUT travelling under false name or running away from police or the odour of drugs from a vehicle is enough to give reasonable suspicion
    - Case law suggests that although police are not entitled to search, or arrest based on an anonymous tip predicting that a suspect will be in possession of contraband at a specific time and place – they can use this for an investigative detention
- The use of investigative profiles as the foundation for reasonable suspicion has proven controversial
    - *R v Chehil*
        - "Drug courier profile" = unhelpful as it suggested assessment based on stereotyping and discriminatory factors
        - Instead, analysis must consider totality of the circumstances, including characteristics, contextual factors and the offence suspected
        - However, fail to account for incidence of indicators in the larger population – base rate fallacy
- Police training and experience can be considered in assessing whether the reasonable suspicion standard was satisfied
    - *R v MacKenzie* – Police Experience
        - Assessment considered through "a reasonable person 'standing in the shoes of the police officer'"
        - Minority and Penney – view danger in extending deference to police officer's experience

## Roadblock Stops

- Permits stops without individualization
    - Implicit within any standard of suspicion is that it attaches to a specific suspect not some generic possibility of someone
- *R v Clayton* – Police occasionally justified in using a roadblock for criminal investigative purposes
    - 911 call reported 4 of about 10 "black guys" outside strip club with handguns. Police responded. Didn't let anyone leave a parking lot. Clayton told to exit car – took flight – found with handgun – was the roadblock permissible?
    - Provided factors to consider:
        - (1) Initial detention was reasonably necessary to respond to **seriousness of offence**
        - (2) **Temporally** proximity

- (3) **Geographically** proximity
    - Scope should be limited to what is needed

## DETENTION PROBLEM

- Midterm:
    - Will be asked about Charter problems and/or remedies
    - Most commonly seeking exclusion of evidence
    - Are you arguing s. 9/10a/10b, all three? Etc. determine which section
- Intro/context [short paragraph or 2]
    - Paraphrase/quote the relevant charter provisions
    - Here – s9
        - Set out the basic elements
        - Need to show detention, ___
        - What is the purpose of this charter (policy goal)
- Trigger – "detention"
    - Whether or not, and if so, where detention occurred
    - 3 Types → ID and Select
        - Physical, psychological w/ and w/o restraint
        - Focus on the type – do not waste time describing the two that are irrelaeant
        - Psychological contract w/o legal compulsion → first ask, would a reasonable person would have felt compelled to go?
    - Grant Factors
        - 1. Circumstances of the encounter – briefly state what this means
        - 2. Nature of police conduct
        - 3. Personal Characteristics of the accused
          → APPLY THESE 3 TO THE FACTS
- Arbitrary?
- Other Questions?
-
    - Court held police are empowered to **briefly detain** a person where they have **<u>reasonable grounds to suspect</u>** (aka reasonable suspicion) that the individual is connected to a recently committed or still unfolding criminal offence

### Example – criminal investigative detention

Police received an anonymous tip that Joffrey may have committed some "break and enters." Joffrey is 20 years old, white, and has a criminal record for possession of cannabis and assault. Police did not have grounds to arrest him, so they drove to his house to question him. Officer told Joffrey that she was investigating some break and enters and asked him to come to the police station to discuss them. Joffrey replied, "Just talk to me here". Officer said that the police station "is a better place to talk" but added that Joffrey did not have to go with her. He agreed to go with the police. Joffrey arrived at the station at about 9:30 p.m. and was immediately taken to a small interview room. Officer closed the door behind her but told him that it was unlocked and that he was free to leave at any time. For the next two hours he was questioned by Officer and a senior detective. One of the officers always remained in the room. Joffrey became increasingly nervous and gave inconsistent answers during the interview. The police confronted him with these inconsistencies and repeatedly suggested that he was lying. They questioned him about evidence pointing to his guilt and contradicted him with information they had obtained from other sources. At about 11:30 p.m., after prolonged questioning, Joffrey broke down, began to cry, and confessed that he had participated in the break and enters. Was Joffrey detained? If so, when?

- Psychological contract w/o legal compulsion → first ask, would a reasonable person have felt compelled to go?
    - Technically leaving it up to Joffrey but stated station is a better place to talk
    - BUT stated Joffrey did not have to go with her
    - Nevertheless, would a reasonable person feel compelled?

- Grant Factors
    - 1. Circumstances of the encounter –
        - Door locked BUT said can leave at any time
    - 2. Nature of police conduct
        - Interrogation techniques
            - "Confronted him" ; suggested he was lying
            - Contradicted him with info they obtained from other sources
        - One officer always remained in the room
        - Two hours of interview despite requirement to be "brief" – is this brief? arguable
    - 3. Personal Characteristics of the accused
        - Nothing
    - → conclude detention occurred no later than when the police started asking accusatory questions

- Remember if detention is found 10(a)+(b) applies
    - trigger is arrest or detention
    - Requires police to convey promptly reasons for detention
    - 10(b) right to retain and instruct counsel w/o delay and be informed of that right

- Prof answers:
    - Detention outcome answer:
        - likely closed the door is not the strongest but the best answer is D → when police confronted him with inconsistencies and suggested he was lying
    - Assuming that Joffrey was detained before his arrest, the detention violated s. 9 because police lacked **reasonable suspicion** to detain for investigative purposes
    - Assuming that Joffrey was detained before he was arrested, police violated s(10)b
        - Not 10(a) as it was obvious why he was being detained – investigating break & enters

# ARREST POWERS

## Defining Arrest

- Arrest "consists of the actual seizure or touching of a person's body with a view to his detention". The mere pronouncing of words of arrest is not an arrest unless the person sought to be arrested submits to the process and goes with the arresting officer" (*Whitfield*1970)
    - Failure to use the word arrest = not determinative rather is it the substance of the encounter that matter
        - use of language that reasonably leads an individual to believe they are in police custody and not free to leave
- Arrest v Investigative Detention
    - Critical to keep distinction between them clear
    - Otherwise, if beyond scope of ID, then it should be classified as arrest
    - If police had power to arrest, then that's fine.
    - If not, then unlawful and violation of s. 9

## Citizens Arrest

- Indictable offence:
    - Section 494(1)(a) – citizen's arrest – to arrest without warrant "a person whom he finds committing an indictable offence
        - " a person whom he **finds committing** an **indictable** offence" → been interpreted to mean "apparently committing"
            - Two limitations

    - Have to see the person actually committing the offence or seems like it to a reasonable observable
    - Has to be an indictable offence (covers about 95% of offences in CC – hybrid is treated as indictable until prosecution decides how to proceed)
- Property:
    - Section 494(2) The **owner or a person in lawful possession of property**, or a person authorized by the owner or by a person in lawful possession of property, may arrest a person without a warrant… if they find them committing a criminal offence in relation to that property
        - (a) at the very moment the person commits the offence; or
        - (b) "within a reasonable time after the offence is committed and they believe on reasonable grounds that it is not feasible in the circumstances for a peace officer to make the arrest.

### Peace Officers

- 495 (1)(a) – a peace officer may arrest without a warrant on reasonable grounds has committed or is about to commit an indictable offence or b) a person he finds committing a criminal offence
    - Most common arrest power
    - Recall RPG grounds has both subjective and objective component and is higher than RS
    - Their grounds must usually be supplied as information from someone else (like dispatch telling them something
    - RPG standard is said to be met at "the point where credibly-based probability replaces suspicion."

## INVESTIGATION: EXCLUSION PART 1 – SECTION 24

Exclusionary rule prevents the govt from using evidence in trial which was derived from an illegal search, seizure, arrest, or interrogation.

- History
    - Common Law
        - resisted excluding evidence based on how it was obtained
    - Other commonwealth countries started allowing exclusion
    - US
        - Early 20th century
        - 1960's: recognition of exclusionary rule (IV amendment, V amendment)
            - Applied to the states → monumental as most crim law is state law
        - Presumptively inadmissible evidence when unconstitutionally obtained
            - Fruit of poisonous tree
- Canada
    - Before the Charter
        - Resisted idea that there should be exclusion of evidence even if by torture
            - Why? Did not make sense to exclude reliable evidence as there were other ways we could deal with improper police. Cannot let criminals go free.
        - *People v Defore* (US)
            - Super abusive, inhumane and cruel way to get evidence
            - "Criminal is to go free because constable made a blunder"
            - Two wrongs don't equal right
            - Exclusion of evidence is counterproductive
    - After *Charter*
        - Section 24(2)
        - Why?
            - To preserve integrity of justice system → must exclude evidence in some circumstances
            - To encourage compliance with constitutional norms

- In the US, the rational is courts must dissociate themselves from wrongful conduct by other state actors. This isn't as strong a reason in Canada.

- Alternatives to ensure compliance
  - Professional regulation/discipline
    - Police commissions, professional accountability
  - Civil law against officers
    - Sue police for assault, trespass, etc.
  - Arrest/prosecution of officers
    - → these have not been very effective
    - Why? People find it hard to discipline cops whose jobs are difficult/dangerous
    - Therefore, s24 is currently most effective
      - Even if we excluded s24 and came up with regulatory mechanisms to achieve compliance, then necessarily that would have the police saying "if I break the law" I could get fired. Therefore, they would not break into the home and find the meth lad → would lose probative evidence .
        - Shows it is not as simple as stating "just put in aregulatory system"
- Hidden Costs
  - Knowing that exclusionary rule is discretionary -> police may do shady things to try to get evidence
    - Police have incentive to investigate in grey areas of charter violations
  - If there is serious civil liability or professional regulation, may prevent police from acting when they were entitled to search
    - Fear of strong, negative personal effect (disciplined, demoted, etc)
  - Alternatives can lead to overdeterrence
  - Career discipline may be more effective.

## SECTION 24(1) – REMEDY FOR CHARTER VIOLATION

- 24(1) **Anyone whose rights or freedoms**, as guaranteed by this Charter, have been **infringed** or denied may apply to a **court of competent jurisdiction** to obtain such remedy as the court considers appropriate and just in the circumstances.
  - First question → do you have STANDING to seek a remedy?
    - Cannot seek a remedy based on the violation of someone else's rights
  - Nonetheless, the discretion must be exercised with the following considerations in mind:
    - (i) the need to effectively vindicate the Charter right in question;
    - (ii) the separation of functions among the state's legislative, executive and judicial branches;
    - (iii) the particular capacities and competence of courts and the judicial function; and
    - (iv) ensuring fairness to the party against whom the order is made.
  - Courts award various remedies under 24(1) including
    - Stay of proceedings
    - Costs
    - Procedural remedies (e.g., disclosure orders and adjournments)
    - **Exclusion of evidence** → focus of course

## SECTION 24(2) – EXCLUSION OF EVIDENCE

- s 24 (2) Where, in proceedings under subsection (1), a court concludes that evidence was **obtained in a manner** that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would **bring the administration of justice into disrepute.**
- To have evidence excluded under section 24(2), claimants must prove that:
  - (i) one of their own Charter rights was violated;
  - (ii) the evidence was "obtained in a manner" that violated this right; and
  - (iii) the admission of the evidence could "bring the administration of justice into disrepute."

## "Obtained in a manner"

- Must be a sufficient connection b/w the violation and obtaining of the evidence
- To determine this, courts assess the presence and strength of three types of connections:
    - Causal
        - Evidence would not have been found "but for" the *Charter* breach
        - **Causal connection is NOT necessary but**
        - This will **usually satisfy the requirement** but not always – *R v Goldhart*
            - Marijuana grow op – search warrant of known suspect – arrested an unknown person whose testimony was then "obtained in a manner" that violated *Charter* – testimony would not have been available "but for" the violation – nevertheless the casual nexus was not sufficient
    - Contextual (most important)
        - Practical investigative relationship b/w two events – as in whether they can be viewed as part of a "single transaction"
        - Evidence obtained "following the breach of a Charter right", it reasoned, will generally satisfy the "obtained in a manner" requirement, unless the former event is too "remote" from the latter
        - Conversely, the "obtained in a manner" requirement may not be met if the violation is "severable" from the "investigatory process which culminated in discovery of the impugned evidence;" in other words, if the connection between the two events was "broken by any intervening events
            - Meyer's religious conversion and desire to cooperate severd the link b/w testimony and unconstitutional search (*R v Goldhart*)
    - Temporal
        - Lapse in time b/w violation + the obtaining of the evidence
        - *R. v. Pino* 2016 – ON CoA held that evidence can be "obtained in a manner" that violates the Charter even when police acquire it before the violation.

- Does the Connection Exist + If so, what is its strength = Obtained in a manner that violated the charter

- Example Problem
    - The accused was lawfully arrested for impaired driving and taken to the police station. He was lawfully required to give a breath sample and did so at 10:30 pm. At 11:15 pm police strip searched him and placed him in cells in violation of the Charter. The Crown wishes to adduce the "certificate of analysis" obtained from the breath sample at trial. Was it "obtained in a manner" that violated the Charter?
        - Yes -- the breach and obtaining of the evidence were part of the same transaction
        - AND No -- the evidence was obtained BEFORE the breach

## Repute of the Administration of Justice – *R v Grant*

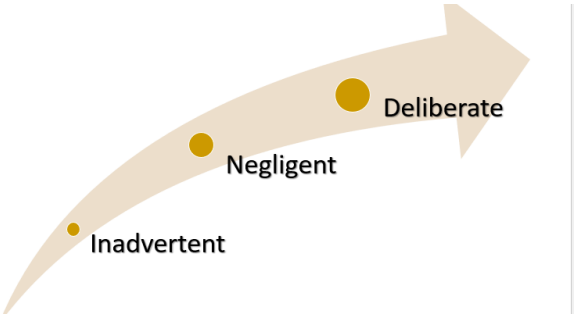
- History of Disrepute
    - Not common before 1982
    - Dude who brought it up (Eugene) when called to a committee before entrenching the right said "only to be used in the most extreme cases"; so egregious, so awful that must be excluded → "Vomit Test" for exclusion
    - Where trial courts finds a Charter violation, in what percentage of cases is evidence excluded? 60%
        - So Eugene ??SP was wrong

- *R. v. Le*, the SCC said a section 24(2) inquiry asks:
    - "Whether the admission of evidence risks doing further damage by diminishing the reputation of the administration of justice--such that, for example, reasonable members of Canadian society might wonder whether courts take individual rights and freedoms from police misconduct seriously."
    - Further "the reputation of the administration of justice requires that courts should dissociate themselves from evidence obtained as a result of police negligence in meeting Charter standards" [para 143]

- The Grant Court stated that admissibility should be assessed by considering:
  - (1) "the seriousness of the Charter-infringing state conduct"
  - (2) "the impact of the breach on the Charter-protected interests of the accused"; and
  - (3) "society's interest in the adjudication of the case on its merits."

Grant Factor 1: Seriousness of the Charter-Infringing State Conduct

- Scale of actions by the state that created violation of constitution
  - Inadvertent, reasonable mistakes ←→ Negligence (varying degrees) ←→ Deliberate or systemic




**Inadvertent, reasonable mistakes**

- When the violation is both non-deliberate and non-negligent
- Subjective belief conduct was lawful – acted in "**good faith**" [honest] t
  - BUT must be reasonable under the circumstances
  - "… ignorance of Charter standards must not be rewarded or encouraged, and negligence or wilful blindness cannot be equated with good faith …" *(R v Grant*, para 75)
- Important - reasonable reliance on standards. For example,
  - Law later overturned , or
  - Law unsettled or indeterminate
    - *Wong* and *Duarte*
      - Surveillance techniques complying with then-existing Criminal Code standards
      - "acted in accordance with what they had good reason to believe was law and before they had a reasonable opportunity to assess the consequences of the *Charter* on their established practices"
    - *Cole*
      - "Unsettled" law relating to expectations of privacy in workplace computers in favour of admission where police conducted a warrantless search of the accused's laptop
    - *Fearon*
      - Police cannot choose the least onerous path whenever there is a gray area in the law
      - Err on the side of caution by choosing a course of action that is more respectful of the accused's rights
    - *Grant*
      - unclear when detention happens tipped balance in favour of admission

**Negligent**

- Moderately serious
- "Ignorance of Charter standards," the majority stated, "must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith." (*R v Grant,* para 75)
- Some degree of culpability and weighs in favour of exclusion
- Police must know law

**Deliberate/Systemic**

- They blatantly violated the charter
- Ask is it isolated or systemic?

    - If conduct is found to be systemic or part of a broader part of misconduct this can increase strength of violation
    - Fact that violation was isolated doesn't necessarily mitigate seriousness but a finding that it was a product of systemic problem can aggravate misconduct
- Exigency
    - Courts may find subsequent charter violation is less serious than it otherwise would've been
- "…Even where the *Charter* infringement is not deliberate or the product of systemic or institutional abuse, exclusion has been found to be warranted for clear violations of well-established rules …." (*R v Paterson,* 2017)
- *R v GTD* 2017
    - Police caution card at the very bottom said, "do you wish to say anything?
    - After individual was read rights and invoked right to lawyer, Officer gave a further caution and read the six words above → Blatant violation of section 10b → must have opportunity to speak with lawyer first when right is invoked
    - "The next issue is whether this breach warrants the exclusion of G.T.D.'s statement under s. 24(2) of the Charter. A majority of the Court is of the view that it does, and relies substantially on the reasons of Justice Veldhuis at the Court of Appeal. As she noted at para. 83 of her reasons, the Crown had ample opportunity to call further evidence about Edmonton Police Service training or policy, but chose not to do so. The majority would therefore allow the appeal and order a new trial.
    - The arresting officer's **good faith does not significantly mitigate the seriousness** of a *Charter* breach if his good faith misunderstanding of the law was a result of EPS training or policy that <u>did not properly educate the officer about his obligations</u> under the *Charter*. Instead, such an institutional or systemic *Charter* breach is more serious than an isolated incident….
        - Casted blame as the EPS as a whole not the individual officers

<u>Grant Factor 2: Impact on Accused's Charter-protected Interests</u>

- Courts measure the extent to which the Charter breach "actually undermined the interests protected by the right infringed." "The more serious the impact on the accused's protected interests"
- **First step** – **<u>identify the interests protect and engaged</u>** (e.g., section 8/9/10)
    - Section 8 → protecting privacy
        - Key consideration: strength of the accused's REP and extent of invasion
            - More serious if invade high expectation of privacy (home, body, computer, private info etc.)
            - Less serious (vehicle, office)
    - Section 9 → protection of liberty from unjustified state interference
        - Relevant factors: detention's duration and the magnitude of any physical or psychological coercion accompanying it
    - Section 10 → protection against self-incrimination
        - In assessing impact of this violation, look at circumstances and ask whether or not the violation actually infringed to a significant extent to the right against-self incrimination
- **Second step** – **examine the <u>degree</u> to which the violation impacted those interests** (e.g., frisk vs. body cavity search)
    - **<u>Discoverability</u>** (*Côté*)- "situations where unconstitutionally obtained evidence **of any** nature could have been obtained by lawful means had the police chosen to adopt them" [para 66]
        - → impact of violations diminishes
        - Applies to all types of evidence
            - Statements, physical evidence, and non-derivative physical evidence
            - Not considered discoverable unless it can be determined "with confidence" that police would have acquired it lawfully without the violation
        - Not determinative but one factor to consider
        - Question asked: Would the evidence have been found despite the violation?
            - If answer is yes, then this moderates the impact on the relevant Charter protected interests
- **Problem**

- Police have warrant to search home B due to RPG there is a meth lab. Accidentally go into home A which coincidentally has a meth lad. Big violation as there was an expectation of REP and there was no RPG.
- Alternatively, if warrant is wrong (?) and the police search B. Because they could have found it lawfull, while B rights are violated, the impact is diminished.
- Police had probable grounds to search Jane's home, but they wrongly and unreasonably believed that they didn't need one because they had previously arrested her outside the home and could search the home as an "incident of arrest." All else equal, these fact support
  - Exclude evidence? Or include? Both.
  - The fact they failed to get a warrant does not necessarily move the needle in any direction under the first factor.
  - But if they failed to get a warrant BC they were lazy and wanted lawyers to figure it out this will weigh towards exclusion
  - Under the second, if evidence could have been obtained w.o the beach, this lessens the impact and weights at least a little.
  - How the police acted is not a consideration under the second. It is just about whether evidence could have been obtained lawfully.
- The police receive an anonymous tip that André is operating a meth lab. To collect further evidence in support of a search warrant application, they climbed over a fence and entered onto his property to retrieve garbage bags located by the side of the house. The bags contained drug manufacturing paraphernalia. André testified on the voir dire that it was his practice to put his ordinary household waste in that location before ultimately putting them out in front of his house for removal by the city garbage service. The court finds that search violated section 8 of the Charter, distinguishing this case from R. v. Patrick, where the Supreme Court ruled that garbage put out for removal did not attract a reasonable expectation of privacy. The court ruled, however, that the warrant would have been issued despite the evidence found in the bags. Should the following evidence be excluded: a) the items found in the bag; b) the evidence found pursuant to the search warrant.
  - Both excluded

- Essentially, under the **first *Grant factor***, if police could have acted legally but were either negligent or deliberate in failing to do so, seriousness is aggravated.
  - In contrast, if police acted reasonably in proceeding as they did, seriousness is **mitigated**.
- Under the **second**, if the evidence **could have been** obtained without the breach, this **lessens** (but does not extinguish) the impact on the accused.
  - Courts should not speculate; if it is unclear that the evidence would have been lawfully discovered, this variable should play no role under s. 24(2).

<u>Grant Factor 3: Society's Interest in Adjudication of the Case on its Merits (Adjudication on Merits)</u>

- Courts must ask whether truth-seeking would be better served by admission or exclusion
- Requires consideration of three factors: the reliability of the evidence, its importance to the prosecution's case and the seriousness of the offences charged.
- **(**1) Reliability of evidence
  - Concerned about the connection between the Charter violation and the reliability of the evidence
  - Physical evidence ("real evidence") is almost always assumed reliable – in favour of admission
  - Statements from the accused – usually in favor of exclusion
- (2) Importance of evidence to prosecution's case
  - More important → More likely to be admitted
    - Only if the evidence is reliable though
  - SCC has emphasized that where the seriousness of Charter-infringing state conduct and the impact of the violation on Charter-protected interests both favour the accused, exclusion may be warranted even if it would "leave the prosecution with essentially no case against the accused".
- (3) Seriousness of the offence (unclear post *Grant*)

- Exclusion of evidence should be less for bigger crimes/but SCC says can go both ways
  - More serious → greater reason to admit for greater accountability
  - More serious → more important to encourage compliance with Charter (*R v Harrison)*
- Cannot overwhelm other two factors

- In Practice
  - Serious misconduct + significant impact -→Exclusion
    - regardless of third grant factor – does not mean we skip it, but it is unlikely to change the result
  - Minor misconduct + slight impact → Admit
  - First two factors generally work towards aiding the accused, third is balance for the Crown. Scale can't be tipped by the third one alone – but can by one of the first two.
  - McGuffie formula → two factors go one way, then you get the same result

- Qualification
  - R v Le 2019 – used for a lot of this material but only 5 justices heard the case and it was split 3-2
  - R v Omar – 7 judge panel – the two judges in the minority in Le managed to attract a majority o judges to say the opposite.
    - More expansive conception of "good faith"
      - Bried endorsement – hard to interpret
    - Resists "categorical" characterization of McGuffie formula
      - Idea that where you have both the first two grant factors moving in the same direction you always get the same result
    - Consider alternative remedies?
      - *PERHAPS* should be considered in deciding whether to exclude
      - If this is taking up this would be radically different where exclusion under s.24 would be rare
  - The law is still Grant but these cases show the current justices are maybe trying to push s24(2) into a more admitting evidence friendly space

## ***R v Le*** 2019 **(same as above re: detention but this time looking at *Charter* violation)**

| | |
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| **Ratio** | ○ |
| **Facts** | • Mr. Le and four friends were in a backyard talking. Police had a report that this house was a 'sketchy' place used to sell drugs.<br>• The officers went into the yard without asking permission, questioned the men, told one to keep his hands visible and carded them. One officer did a perimeter check around the place before hopping the fence into the yard.<br>• Mr. Le said he didn't have ID, when the officer asked what was in his bag, Le ran away. He was arrested and found to have a gun, drugs and cash<br>• Trial judge claimed he was only detained when asking about the bag. Detention was legal because of reasonable suspicion of crime. Court of Appeal agreed. |
| **Issue** | • whether the administration of justice would be brought into disrepute by its admission of evidence? |
| **Result** | • Appeal allowed. Evidence set aside. Acquittal. |
| **Reason** | • Our Charter directs that such evidence [that would bring administration of justice into disrepute] must be excluded, not to punish police or compensate for a rights infringement, but because it is necessary to do so to maintain the integrity of, and public confidence in, the justice system<br>○ Any evidence that would bring the administration of justice into disrepute<br>○ Looking at the overall repute of the justice system in the long term by a reasonable person, informed of all relevant circumstances and of the importance of Charter rights |

| | |
|---|---|
| | • Grant identified three factors to guide consideration of evidence: 1) seriousness of the *Charter*-infringing conduct; 2) impact of the breach on protected interests of the accused; and 3) society's in terest in the adjudication of the case on its merits<br>• when considering the seriousness of the Charter-infringing conduct, a court's task is "to situate that conduct on a scale of culpability"<br>• an absence of bad faith does not equate to a positive finding of good faith and the officers were not acting in "good faith" simply because they were not engaged in racial profiling<br>  ○ good faith cannot be ascribed to these police officers' conduct. Their own evidence makes clear that they fully understood the limitations upon their ability to enter the backyard to investigate individuals<br>• 1) Circumstances of Le's detention did not take the police into unchartered legal water or otherwise raise a novel issue about constitutionality of their actions.<br>  ○ Police should know what the law is, and this was an unconstitutional detention and therefore a serious police misconduct<br>• 2) Impact on interests of accused<br>  ○ Via s. 9 – right to liberty from unjustified state interference<br>  ○ Le is entitled like any other members of Society to live his life free of police intrusion<br>  ○ Even though the length of the detention was brief, the impact on his liberty was not necessarily trivial<br>  ▪ police force took the form of an intrusion into private residence<br>  ○ Firearm and drugs were not discoverable absent a breach<br>• 3) society's interest<br>  ○ Serious offence and evidence is highly reliable<br>• Conclusion → The police crossed a bright line when, without permission or reasonable grounds, they entered into a private backyard whose occupants were "just talking" and "doing nothing wrong".<br>  ○ The end does not justify the means<br>  ○ Care is needed not to fall into the trap of making and justifying special rules for neighbourhoods that are thought to have higher crime rates<br>  ○ When segments of society believes that it has been unfairly targeted by police, it will de-legitimize the police in their eyes which would hinder effective policing<br>  ○ Effective law enforcement depends on cooperation of the public and police must act in a manner that fosters cooperation and contributes to the public's perception of police legitimacy<br>  ○ While exclusion of evidence may provoke immediate criticism, our focus is on the overall repute of the justice system, viewed in the long term by a reasonable person informed of all relevant circumstances and of the importance of Charter rights<br>• Dissent - Moldaver<br>  ○ Trial judge found that this was not a case of egregious police misconduct but rather a case of 3 police officers performing legitimate investigatory duties<br>  ○ There's no palpable and overriding error and Le hasn't argued that any exists<br>  ○ Police put their lives in danger<br>  ○ Trespass that police committed inadvertently in the context of a legitimate investigation also dominates the s. 24(2) analysis<br>  ○ It exonerates a drug dealer and guts the prosecution of serious criminal offences<br>  ○ Police and law-abiding members of the public would be demoralized and discouraged by majority's decision |

## Practice Problems

- Police receive a tip that Andre is operating a meth lab. To collect further evidence in support of a search warrant application, they climbed over a fence and entered onto his property to retrieve garbage bags located by the side of the house. The bags contained drug manufacturing paraphernalia. Andre testified on the voir dire that it was his practice to put his ordinary household waste in that location before ultimately putting them out in front of his house for removal by the city garbage service. The court finds that search violated s. 8 of the Charter, distinguishing this case from Patrick,

where the Supreme Court ruled that garbage put out for removal did not attract a reasonable expectation of privacy. The court ruled, however, that the warrant could have been issued despite the evidence found in the bags
  - Should the following evidence be excluded:
    - (a) The items found in the bag
    - (b) The evidence found pursuant to the search warrant
  - Answer: Both excluded
  - Even though the evidence would've been found in any event, overall the conduct of the police was fairly serious breach. They should've known what the rule was and they clearly breached the rule
- Police receive a tip that Dude is carrying cocaine, arrest him, bring him to the police station and conduct a strip search for potentially secreted drugs. Assume that all of this is done in strict accordance with the Court's rules for conducting strip searches. Police find a small quantity of cocaine which the accused seeks to suppress at trial. The trial judge finds that the search violated s. 8 of the *Charter* because the information from the tip, while enough for reasonable suspicion, fell short of probable grounds. Police otherwise acted reasonably.
  - Should the cocaine be excluded?
  - Answer: yes and no
  - Seriousness of the violation→ not especially a serious breach
    - Had almost reasonable and probably grounds, just short of it
    - The police believed they were acting within the rules
    - Modestly serious breach if not serious at all
  - Profound impact on constitutionally protected right to privacy and bodily integrity
    - Search wouldn't have occurred but for the violation which favours exclusion
- Police had probable grounds to search Jane's home, but they wrongly and unreasonably believed that they didn't need a warrant because they had previously arrested her outside the home and could search the home as an "incident of arrest."
  - All else equal, these fact support:
    - Answer: exclusion and admission of evidence
      - Under the **first *Grant* factor**, if police could have acted legally but were either negligent or deliberate in failing to do so, seriousness is **aggravated**.
        - In contrast, if police acted reasonably in proceeding as they did, seriousness is **mitigated**.
      - Under the **second**, if the evidence **could have been** obtained without the breach, this **lessens** (but does not extinguish) the impact on the accused.
        - Courts should **not speculate**; if it is unclear that the evidence would have been lawfully discovered, this variable should play no role under s. 24(2).
  - All else equal, should judges be more inclined to admit or exclude evidence when the offence is very serious?
    - Answer: More inclined to admit and neither admit or exclude
  - The accused was charged with first degree murder. Following his arrest, police read him all the required s. 10(b) information (including information about duty counsel) but forgot to read the part about legal aid. He replied, "I know about all of that but I don't care. I killed that son-of-a-bitch 'cause he murdered by brother." How serious was the Charter-infringing police conduct?
    - Slight/moderate/serious → all answers correct
    - Penney would argue that this is at least a moderately serious violation
      - If you decided this was slight bc it didn't have much of an effect on what transpired, then you're wrong bc that is not something we consider in the first grant factor. The effect/impact on accused' charter impact applies in the second factor. Difficult to suggest this was as bad faith but it is probably negligent. Probably somewhere in the middle according to Penney. They just need to read the scripted card.

# TRIAL PROCEDURE: PRETRIAL RELEASE

- System is too risk averse
  - Judges are very afraid that someone released on bail will commit a terrible crime
  - This happens. But how often does this happen?
  - Consider this against the consequences – family, social, economic
  - Is it worth to pre-detain someone before being found guilty?

- Public get mad when this occurs
- However, presumption in law is release
- Most bail cases are adjourned – means more nights in remand
  - Often just because bail court has ran out of time
  - Cost to the system – having to house the individual – but also huge on the person who may have a job, family obligations etc.
  - Indigenous are over represented in pre-trial detention even when controlling for other factors

## PRE-TRIAL RELEASE AND BAIL

- In relation to Charter s11(e): right not to be denied reasonable bail without just cause
- Presumptive rule: release of accused persons should occur, detention is the exception. Court must allow unconditional release of accused and burden on Crown to show why a more restrictive form of release is justified

### Intake procedures & "police bail"

- Refers to discretion police have:
  - No arrest – could issue an appearance notice
  - Arrest & release –may arrest to do a check on you; then release
  - Arrest & custody – when there is no alternative and public interest then poice should arrest & keep in custody. This is supposed to be the exception and not the rule.
    - First appearance – if kept in custody within 24 hours individual has first appearance
      - This transfers authority over the individual to the court
      - Matter is likely adjourned and not deal w/ in the 24 hour period

### Ladder Approach

- SCC: "the release of accused persons is the cardinal rule, and detention is the exception"
  - *R v Zora*, 2020
    - "… the condition to 'keep the peace and be of good behaviour' is a required condition in probation orders, conditional sentence orders, and peace bonds, but is **not** a required condition for bail… it should be **rigorously reviewed** when proposed as a condition of bail" [at para 94]
  - Presumption accused should be released on an undertaking without conditions
  - 515(1) obliges the justice to order unconditional release unless the Crown "shows cause"
- Unless Crown shows cause why detention is justified, the *Code* uses a "ladder" approach with the Crown required to justify more restrictive forms of release up each rung of the ladder
  - Each condition imposed must be necessary and reasonable

<u>The Ladder</u>

- Undertaking – must appear
  - *without* conditions
  - *with* conditions (such as to keep the peace)
- Recognizance – pledge made by accused to forfeit money (with conditions)
  - *without* sureties and *without* deposit of money [debt – not payment]
  - *with* sureties and *without* deposit [friend or family who on their own free will guarantee half the debt]
    - bails bond men are illegal in Canada – cannot receive payment for providing surety
  - Deposit but no surety (with the Crown's consent)
    - Cash bail
    - A lot of criticism of this regarding disadvantages and impoverished individuals
    - Very few people have access to large sums
    - Option of last resort
  - Outside province or 200 km, deposit with or without surety
- Detention in remand is the highest rung

- *R v Antic* – "recognizance with <u>sureties is one of the most onerous forms of release</u>" and "surety should not be imposed unless all the less onerous forms of release have been considered and rejected as inappropriate."

- Terms of release… may "only be imposed to the extent are necessary to concerns related to the statutory criteria for detention and to ensure that the accused can be released. They must **not** be imposed to change an accused person's behaviour or to **punish** an accused person."

- Section 493.1
  - "…[A] justice or judge shall give primary consideration to the release of the accused at the earliest reasonable opportunity and on the least onerous conditions that are appropriate in the circumstances, including conditions that are reasonably practicable for the accused to comply with, while taking into account the grounds referred to in … [s. 510]".
- Section 515(2.01)
  - The justice shall not make an order containing the conditions referred to in one of the paragraphs (2)(b) to (e) unless the prosecution shows cause why an order containing the conditions referred to in the preceding paragraphs for any less onerous form of release would be inadequate.

## Section 515(10) controlling provision - Grounds for pre-detention

- detention of accused is justified only one or more of the following grounds
  - **Attendance in Court**: the primary ground – where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law
  - **Public Safety**: the secondary ground – where the detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, or any person under the age of 18 years, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice;
  - **Confidence in Justice System**: the tertiary ground – if the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including:
    - Apparent strength of the prosecution's case
    - Gravity of the offence
    - Circumstances surrounding the commission of the offence, including whether a firearm was used
    - The fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject-matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more.
- Any one factor is sufficient
- considerations govern bail determinations from the accused's first appearance until conviction, including reviews of the initial bail determination by either the accused or the prosecution.

- **Primary - Attendance in Court (s. 515(10)(a))**
  - Roots in the community – more likely to be released
    - Problem – work against marginalized populations (homeless, socially isolated, unemployed)
  - Availability of potential sureties
    - Release is more likely if a responsible member of the community who knows the accused is willing to act as a surety
  - Criminal Record
    - May shed light on the accused track record
    - Failure to attend court, etc. weigh in favor of detention.
    - Very old convictions for failure to attend may not have as much weight, especially if the accused has faced criminal charges and shown attendance more recently
    - Whether the accused runs or turns themselves in
  - how the accused responds once aware that the police are interested in making an arrest
  - Strength of the Crown's case and potential for lengthy period of imprisonment
    - Dangerous to place too much weight on the Crown's untested case this early
- **Secondary - Public Safety (s. 515(10)(b))**
  - *R v Morales* – declared 'public interest' detention unconstitutional under section 11(e)
    - But "protection of safety of the public" was okay
  - Bail denied only for those who pose a "substantial likelihood" of committing an offence or interfering with the administration of justice

        - Substantial likelihood meaning = controversial
        - Slightly enhanced balance of probabilities test – detention should only be ordered if it is clearly more likely than not that, if released, the accused will commit a criminal offence
    - Relevant factors
        - Criminal record can weigh in
        - Nature of previous offences
        - Whether the accused was on bail when charged or on probation
        - Nature of the charge
        - Mental illness or addiction
        - Potential to interfere with potential witnesses, destroy evidence, etc.
- **Tertiary - Confidence in Administration of Justice (515(10)(c))**
    - Most controversial
    - *R v Hall* found opening phrase ("or any other just cause") to be unconstitutional because it conferred open-ended discretion to refuse bail
        - Many factors listed for tertiary grounds also relevant to primary and secondary grounds
        - Judge must be satisfied that detention is not only advisable but necessary. Not just for any goal, but to maintain confidence in the administration of justice. Can only deny bail if satisfied that in the view of these factors and related circumstances, a reasonable member of the community would be satisfied that denial is necessary
    - Courts later interpreted Hall narrowly and use tertiary ground only in exceptional circumstances
        - *R v St. Cloud* – said this approach = too restrictive
            - Tertiary ground focuses simply on whether it is necessary in light of four factors
                - 1. **Apparent strength of prosecutions case**
                    - Physical evidence more reliable than witness statement
                    - Circumstantial less reliable than direct, etc
                    - Must consider any plausible defences
                - 2. **Gravity of the offence**
                    - Objective gravity in comparison with other offences
                    - Assessed based on maximum sentence and minimum sentence (if any) for each offence charged
                - 3. **Circumstances surrounding the commission,** incl whether a firearm was used
                    - Violent, heinous or hateful
                    - Domestic violence
                    - Criminal gang or terrorist organization
                    - Vulnerable victim
                - 4. **Liable for potentially lengthy term of imprisonment** or in the case of an offence that involves a firearm, a minimum punishment of three years or more
            - The four factors must be considered "together with any other relevant factors" such as age, criminal record, physical or mental condition, membership in a criminal organization, etc. as well as "the status of the victim and the impact on society of a crime against that person".
    - "Reasonable person" (as per *Hall/St Cloud)*: someone properly informed about the 'philosophy of the legislative provisions, Charter values and the actual circumstances of the case'; not one who is prone to emotional reactions; or whose knowledge about the circumstances of the case is inaccurate; but not a legal expert

- The role of Gladue Principles (Aboriginal Accused and Bail)
    - *R v Gladue* – when sentencing, take judicial notice of systemic and background factors affecting Aboriginal people
    - *R v Ipeelee*
        - But factors don't provide excuse, rather they help to give context for determining appropriate sentence
    - *R v Robinson*
        - Extended principle to bail
    - However, Gladue considerations cannot displace the function of the primary, secondary and tertiary grounds.

- R v Antic
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## *R v Antic* 2017 SCC

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| **Ratio** | • Lays out approach to bail moving forward → presumed innocent; least onerous option; go through each ladder step |
| **Facts** | • Judge erred by requiring a cash deposit with a surety (one of the most onerous forms of release) even though Antic had offered a surety with a monetary pledge (aka a recognizance)<br>• After over a year in pre-trial custody (and three bail reviews), Mr. Antic raised sufficient funds to pose the $100 000 cash deposit and was released |
| **Issue** | • Whether bail was unreasonable |
| **Result** | • Appeal allowed, Trial judge erred b/c the type of bail was unreasonable (didn't follow the ladder) and amount was too high that it became de facto prison (inconsistent with the Charter right not to be denied reasonable bail without just cause) |
| **Reason** | • "ladder principle", which is codified in s. 515(3) of the Code, requires a justice or a judge to impose the least onerous form of release on an accused unless the Crown shows why that should not be the case.<br>• The bail review judge erred by requiring a cash deposit with a surety (most onerous forms of release) even though Antic had offered a surety with a monetary pledge (recognizance)<br>  ○ Both give financial incentive to abide by the release order but requiring cash can be unfair because it makes the release contingent on the accused's access to funds<br>  ○ Cash bail is only an alternative to a pledge where the accused person or their sureties have reasonably recoverable assets to pledge<br>  ○ Can't fix the amount of a surety or cash deposit so high as to effectively constitute a detention order<br>  ▪<br>• Right not to be denied bail without just cause<br>  ○ 515(6)(d) constitutes a denial of bail under s11(e) of Charter as it puts onus on accused to justify pre-trial release<br>  ○ The right imposes a constitutional standard that must be met for valid bail denial<br>  ○ Just cause to deny bail<br>  ▪ If the denial occurs n narrow set of circumstances; and<br>  ▪ Denial of bail is necessary to promote the proper functioning of the bail system and is not undertaken for any purpose extraneous to the bail system<br>• Right to reasonable bail<br>  ○ Relates to terms of bail imposed on accused for the release period<br>  ▪ Including quantum of any monetary component and other restrictions<br>  ○ Protects accused from conditions and forms of release that are unreasonable<br>  ○ Discretion under s 515(4) for justice/judge to decide the form of release with terms that are specific to the circumstances of the accused<br>  ▪ So the legislated form of release and the specific terms of release ordered by a judge can be unreasonable and unconstitutional<br>**<u>Approach to Bail Moving Forward</u>**<br>• Accused persons are constitutionally presumed innocent<br>• Section 11(e) guarantees both the right not to be denied bail without just cause and the right to bail on reasonable terms<br>• Unconditional release on an undertaking is the default position<br>• Ladder principle favours release at the earliest reasonable opportunity and on the least onerous grounds<br>• If Crown opposes, must show why<br>• Judge can't impose a more restrictive form unless the Crown has shown its necessary<br>• Each rung of the ladder must be considered individually, and must be rejected before moving to the next<br>• Recognizance with sureties is one of the most onerous forms of release; should not be imposed unless all less onerous forms have been considered + rejected |

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| | • Not necessary to impose cash bail if they or their sureties have reasonably recoverable assets and are able to pledge them; functionally they are equivalent<br>• Cash bail only in exceptional circumstances<br>• Amount can't be so high as to effectively mean a detention order; so, must inquire into accused's ability to pay<br>• Terms of released imposed under s. 515(4) may only be imposed to the extent necessary<br>• Not to change an accused behaviour or punish<br>• When bail review is applied for, must follow *St-Cloud* process<br>•<br>• |

***R v Zora*** **2020 SCC – use this to consider when reviewing what conditions, if any, to impose**

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| **Facts** | • Zora charged with drug possession and released on bail w/ several conditions<br>• Issue was regarding mens rea requirement for breaching bail – not relevant here |
| **Result** | • Conviction overturned; new trial ordered |
| **Analysis** | • B/c release w/o conditions is the default; first issue is whether a need for any condition has been demonstrated<br>• Restraint and the ladder principle require anyone proposing to add bail conditions to consider if any of the risks in s. 515(10) are at issue and understand which specific risks might arise if the accused is released without conditions<br>• Questions to ensure principles of restraint and review are firmly grounded:<br>o If released without conditions, would the accused pose any specific statutory risks that justify imposing any bail conditions?<br>o Is this condition necessary?<br>o Is this condition reasonable?<br>o Is this condition sufficiently linked to the grounds of detention under s 515(10)(c)?<br>o What is the cumulative effect of all the conditions?<br>• Consider whether a proposed condition meets a demonstrated and specific risk, and whether it is proportionate that a breach of this condition would be a criminal offence or become reason to revoke the bail. |

- Problem
  - Dude was arrested in Edmonton for trafficking a small quantity of cocaine. He has a somewhat lengthy record for minor property offences, but there are no instances of either offending or breaching conditions while on release. An unemployed second cousin has agreed to act as a surety. What is the best disposition?
    - Released on an undertaking
      - No real right answer; but Antic and Zora point to the lack of breach; and the type of offence it is likely this option. Court would ask, is surety really appropriate? A second cousin has less sway too. A closer family member may be able to sway an individual to get their head straight.
  - Guy is charged with theft over $5,000 for stealing a motorcycle. He has an extensive criminal record, but no convictions for failing to abide by court orders and no convictions of any kind in the past 10 years. He is a cocaine addict who had been clean for many years but recently began using again. Evidence indicates that his criminality is closely linked to his addiction. Guy should be:
    - Released with a condition to keep the peace and attend drug counselling/rehabilitation sessions
      - Why? Because he only offends when addicted and under assumption there is a likelihood it would work. If not much is known about the nature of the program, or he has failed at rehab lots this would then not hold.
  - Buddy is charged with the first-degree murder of his wife. His wife was shot while driving her car by someone in a passing vehicle during the middle of the day on the busy main street of SmallTown, Alberta. Multiple witnesses provided descriptions of the killer and none even remotely match Buddy. The Crown's theory is that Buddy hired a hitman to commit the crime. Buddy's internet browser history included searches for "how to hire a hitman" and "how to kill your spouse", but the actual killer has not been found and there no

evidence linking Buddy to a hitman. Buddy is a long-time resident of the community, owns a small business, and has many friends and relatives in town. He should be:

- given some form of release with conditions
  - it is situational; unlikely to occur again while out on bail EVEN if he was guilty.
- although may argue - held in custody under the tertiary ground
  - public may be less than pleased. It is a serious charge. There is accountability issues.

### Reverse Onus

- CC s. 515(6) and (522) puts a reverse onus on the accused.
  - → Offences in 515(6) + murder trigger reverse onus
- 515(6)
  - Unless the **accused**, having been given a reasonable opportunity to do so, **shows cause** why the accused's detention in custody is **not justified**, the justice shall order … that the accused be detained in custody until the accused is dealt with according to law, if the accused is charged… with having committed an offence punishable by **imprisonment for life** under any of section 5 to 7 of the *Controlled Drugs Act*
    - Section 5 of the Controlled Drugs and Substances Act
      - If convicted of trafficking… potential imprisonment for life in prison
      - Therefore, traffic even a small amount of cocaine will have to prove to court you should be released on bail. Trafficking includes sharing b/w friends w/o payment.
  - In these occasions, the default is detention, and the accused has to be given a reasonable opportunity to show cause of why their detention in custody is not justified.
  - The section lists offences. The one offence not listed which requires a reverse onus is murder.
- S 522
  - Criminal offences that are subject to reverse onuses under CC s.522 are found in CC Section 469 – most are irrelevant and archaic or rarely used offences. Only offence that is important under this section is MURDER.
    - Ex. In *Pearson*, CC s515(6)(d) constitutes a denial of bail under s.11(e) b/c it puts the onus on an accused to justify pre-trial release if they are charged with certain offences
- Problem
  - In which of the following circumstances would the accused face a reverse onus on bail?
    - A: Charged with possession for the purposes of trafficking a small quantity of cocaine

## TRIAL PROCEDURE: THE JURY – SECTION 11

- Most criminal trials are tried by a judge w/o jury
- Jury usually reserved for the more serious offences (mandatory for murder)
- Section 11(f) of the *Charter* → people charged with an offence have the right "to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment."
- Jury's role
  - Follow the judge's legal directives
  - Resolve the factual issues in dispute
  - Decide whether the accused is guilty, not guilty, not criminally responsible for each of the offences charged
- Involvement of jury is thought to foster public confidence in the criminal justice system
  - Act as the conscience of the community
  - Jury can act as the final bulwark against oppressive laws or their enforcement
  - Means whereby the public increases its knowledge of the criminal justice system
  - Increases societal trust in the system as a whole through the involvement of the public
- Law governing jury selection designed to ensure that the jury is impartial and representative of the community

### ASSEMBLING THE ARRAY – FOCUS IN UPPER YEAR, NOT NOW

Representativeness is achieved by provincial legislation governing assembly of the array

- Qualifications
  - Governed by provincial legislation (slightly different in each province)

- Ineligible
  - <18
  - Lawyer/Articling Student
  - Non-citizen
  - Criminal History
- Exemption (Not ineligible but can automatically be exempted if you want to be)
  - Categorical – you are in the category, so it doesn't need to be decided on
    - Certain professional groups
  - Discretionary – Judge gets to decide

- Summoning
  - **Challenging the array** (right as of s 629 CC) → partiality, fraud, or wilful misconduct on the part of the sheriff or other officer
  - Accused can challenge the process via the *Charter* - s 11(d) – right to fair trial conducted by "impartial tribunal", 11(f) – impartiality in the right up to a trial, and section 15 – right to equal protection and equal benefit of the law /wo discrimination
  - Vetting
    - Group representation must be random and representative BUT not entitled to a particular composition
      - *R v Kokopenace* – Not entitled to a jury roll of any particular composition
        - Assembly of jurors requires 3 elements
          - Assembly must be representative of the community (does not need to reflect demographic composition though) – assessed on reasonableness standard
          - Random selection – binary and absolute
          - Reasonable efforts to contact people

- "Stand By" (s. 633 CC)
  - Persons stood aside will be called for selection only if the array is exhausted before a full jury is sworn.
  - Typically, due to personal hardship or "any other reasonable cause"
  - Now power to set aside to maintain "confidence in the administration of justice"
    - Those who might be partial
- Problem
  - Accused, who is Black, is charged with trafficking cocaine. 84 prospective, available jurors have been summoned, none of whom is Black. What are the options available to the judge?
    - None of the above.
      - Cannot redo the list; or go corral people from the street

## CHALLENGES FOR CAUSE – SECTION 638

- If prospective jurors whose names are drawn are neither excused nor stood aside, both the prosecutor and accused may challenge them for cause
- CLASS NOTES:
- Most common challenge – juror is not impartial
  - Threshold
    - Widespread bias in the community
    - Incapable of setting aside this bias
  - Non-white accused there is a de facto presumption there is racism and bias
- Three types
  - Averse publicity
  - Race and other personal characteristics
  - Nature of offence
    - Will not be successful
- Peremptory Challenges [repealed]
  - Parl did this then upheld by SCC 0 r v Chouran (below

- Example
    - Accused: 24 year old individian Canadian male, graduate student, alleged to have sexually assaulted complainant at a campus party. The issue is consent.
    - Complainant: 22 years old. Moved to Edmonton from S. K nine months ago to go to school
    - Role as a prosecutor – exercise peremptory challenges
        - Who would we exclude?
            - Juror 1 – white upper middle class male – accept
            - Juror 2 –lower class male – looks white but could be indigenous – accepted (but was half/half)
            - Juror 3 – nurses aid – lower class – all crown chose accept; all defence said excuse
            - Juror 4 – asian upper class – most crown chose accept; half/half for D

    - Demonstrate grounds
        - Convince there is a "air of reality" to the challenge
        - If threshold met jurors may be questions about possible partiality or other challengeable ground
    - Challenges must be based on one of the following (638(1)):
        - Name of juror does not appear on panel
        - Juror is not impartial (**s 638(1)(b))**
            - Primary way to challenge
            - "Not impartial" → prejudiced or not indifferent
            - Usually grounded on the potential partiality of unspecified members of the entire array
            - the party must generally show that:
                - (i) "a widespread bias exists in the community"; and
                - (ii) that some jurors "may be incapable of setting aside this bias, despite trial safeguards, to render an impartial decision
        - Juror has been convicted of an offence for which they were sentenced to imprisonment for 2+ years
        - Juror is an alien
        - Juror is physically unable to perform the duties of a juror properly
        - Juror doesn't speak the language in which the trial will be conducted, where an order under s. 530 of the CC has been granted

## Juror is not impartial (s 638(1)(b)))

- The three most common challenges are based on are:
    - (i) bias flowing from exposure to **pre-trial publicity**;
    - (ii) bias against persons with **disfavoured characteristics** (such as racial identity); and
    - (iii) bias **against people accused** of certain types of offences
- **Pre-trial publicity**
    - So much extensive and critical publicity, we need to ask jurors about their exposure to that publicity, their attitude and their ability to set aside any information they received prior to trial
    - *R v Sherratt*
        - Media widely reported in grisly details of a murder
        - Mere reporting of facts about the case would not normally justify a challenge for cause
        - Reporting must be biased or misleading
            - "Media misrepresents the evidence, dredges up and widely publicizes discreditable incidents from an accused's past or engages in speculation as to the accused's guilt or innocence"
        - Threshold not met in *Sherratt* because reporting occurred months before trial and focused not on the accused but on the victim's reputation and search for his body
- **Bias against Minorities**
    - Bias against racial, ethnic, religious or other minorities
    - *R v Parks*

        - ONCA used social science evidence to say that a challenge should have been allowed based on the fact that the accused is black, and the victim is white.
    - *R v Williams*
        - Refused to follow *Parks* to challenge jurors for racial prejudice against Indigenous accused, but SCC overrode
        - Challenges should be allowed based on widespread bias alone and the second element of the air of reality test does not need to be addressed
    - *R v Spence*
        - Did not allow a challenge based on a black man robbing an East Indian
            - "no evidence complainant's race was relevant" just the accused's
            - No evidence, the Court ruled, that such bias is compounded when the victim belongs to another visible minority.
        - Allowed a challenge on "the poor and homeless" and "anti-muslim" bias
    - Courts have refused challenges based on sex, youth, homosexuality, and HIV status
        - But have allowed a challenge based on bias on "the poor and homeless" and "anti-muslim" bias
    - *R v Chouhan*
        - Signalled an openness to challenges on other characteristics
        - "a wide range of characteristics--not just race--can create a risk of prejudice and discrimination, and are the proper subject of questioning on a challenge for cause…. counsel may point to characteristics of the accused, complainant or victim, such as race, addiction, religion, occupation, sexual orientation or gender expression, and ask prospective jurors whether, in light of such characteristics, they would have difficulty judging the case solely on the evidence and the trial judge's instructions
    - Typically, courts have preferred to limit the number and scope of questions to potential jurorors
        - SCC in *Chouhan* though indicated more may occasionally be warranted but reiterated restraining counsel's ability to secure a "favourable" jury
- **Offence-based Challenges**
    - Question potential jurors on biases relating to the nature of the offence
    - *R v Williams* – opened the door to these challenges
    - *R v Find*
        - SCC upheld judge refusal to challenge for bias against sexual assault of children
        - It is normal/natural to be horrified by such offences, but the bias is not against the person who committed
        - Does not necessarily mean that they believe the accused did it
        - Beliefs about certain crimes does not point fingers at who did it

## *R v Chouhan* 2021 SCC – Peremptory challenges

| | |
|---|---|
| **Ratio** | |
| **Facts** | |
| **Issue** | • Constitutionality of changes to the CC<br>• whether a reasonable person, fully informed of the circumstances, would consider that the new jury selection process gives rise to a reasonable apprehension of bias |
| **Result** | • Appeal allowed.<br>• the jury selection regime since Parliament enacted Bill C 75 continues to provide the independent and impartial jury that each accused is owed under s. 11(d) of the Charter.<br>• Moldaver, Brown + Wagner = reasons for judgment<br>• Martin, Karakatsanis and Kasierer – separate concurring<br>• Rowe – Concurring reasons<br>• Abella – dissenting in part<br>• Cote - Dissent |
| **Reason** | **Moldaver, Brown, and Wagner**<br>• Peremptory Challenges |

- The CC changes in question abolished the long-standing practice of allowing the Crown (prosecution) and the accused to exclude a certain number of potential jurors without having to explain why.
- peremptory challenges were "entirely discretionary and not subject to any condition
- Parliament then abolished it
- So, the question is whether a reasonable person, fully informed of the circumstances, would consider that the new jury selection process gives rise to a reasonable apprehension of bias so as to deprive accused persons of a fair trial before an independent and impartial tribunal
- Court of Appeal rightly emphasized the continued availability of an unlimited number of challenges for cause under s. 638(1)(b), which allow the accused to request the removal of a juror on the basis that the juror "is not impartial" after limited questioning
- cannot endorse a view of jury selection which measures a juror's impartiality by whether that juror shares a characteristic of their identity with the accused or the victim
- the abolition of peremptory challenges will go far to minimizing the occurrence of homogenous juries. The in-court jury selection process, and in particular the peremptory challenge, has long undermined the provincial governments' efforts to compile jury rosters that bring together a "representative cross section of society, honestly and fairly chosen

- Jury instructions
  - trial judges should consider providing the jury with instructions that will "expose biases, prejudices, and stereotypes that lurk beneath the surface, thereby allowing all justice system participants to address them head on — openly, honestly, and without fear
- Challenge for Cause Procedure
  - trial judge necessarily enjoys significant discretion to determine how and under what circumstances the presumption of impartiality will be displaced, and how far the parties may go in the questions that are asked on a challenge for cause
- Stand-aside power (s 633)
  - Can now use power to "maintain public confidence"
  - Provides flexibility to exclude those who *might* be partial
    - Public confidence is assessed from the perspective of a reasonable + informed person
    - It is not to bolster jury diversity

**Karakatsanis, Martin and Kasirer**

- part ways with Moldaver et al to the extent they suggest limits on how stand asides and challenges for cause may be developed under the new jury selection regime, particularly since we heard no submissions on those limits in the appeal → preferable not to address them as it was not the issue at hand
- However, some comments
  - Randomness should not be overstated → has never been one of pure random selection
    - Many factors distort composition of the jury roll and ultimate selection
- Agrees that questions in challenges may extend beyond those in *R v Parks*
  - But to err on side of caution and balance privacy interests of the potential juror

**Rowe**

- Agree with Moldaver et al but "compelled to write separate on the risk that constitutionalizing statutory provisions through the jurisprudence poses"

**Abella**

- The enhanced stand-aside mechanism in s. 633 seeks to counteract systemic discrimination in jury selection and recognizes that public confidence in the administration of justice is undermined when random selection routinely results in all-white juries
- trial judges can use the legislative tools that they have been given in Bill C-75 to actively promote jury diversity on a case-by-case basis

**Côte (dissent)**

- the proper course of action for Parliament was not to abolish peremptory challenges but to regulate them