520 CRIMINAL PROCEDURE

O'Neill + Al Khatib

Chapter 2: **Detention + Arrest**

Grant, 2009 SCC 32 | *Le*, 2019 SCC 2019 | *Therens*, [1985] 1 SCR 613 | *Koechlin v Waugh and Hamilton*, [1957] OWN 245 | *Mann*, 2004 SCC 52 | *Storrey*, 1990

"At the heart of a free and democratic society is the liberty of its subjects" – Justice Iacobucci (*R v Hall* (2002))

- Even in the freest of societies, public safety concerns will sometimes justify state interference with an individual's freedom of movement
- Everyone's freedom would suffer if the state lacked the legal tools necessary to apprehend and imprison those who perpetrate crime

Liberty is not an absolute right

- Requires the balancing of freedom of movement with public safety

Detention + Arrest **Pre-*Charter***

The historic importance of protecting liberty can be traced back to the *Magna Carta*

- It included the legal safeguard that liberty *could only be* interfered with when justified by the law
    - This idea became known as the *principle of legality*

At common law:

- Arrest was the only recognized way that state officials could suspend an individual's liberty
    - Civil suits brought by persons claiming to be victims of unlawful or improper arrests led courts to create more precise legal rules...
- A suspected felon could be arrested without a warrant first being procured
- A constable had a right and a duty to arrest if he had reasonable grounds to believe that a felony had been committed and that the party to be arrested was guilty of that crime
- An arrest was permitted to prevent the commission of a felony

However,

- Neither a private citizen, nor a public officer could make an arrest for a misdemeanour without a warrant (one exception: if the misdemeanor involved a breach of the peace)

Today, arrest powers are derived <u>exclusively</u> from statute

Pre-*Charter*, the protection of individual liberty against unjustified state intrusions was more theoretical than real (there was only the *Canadian Bill of Rights* and the principle of legality for protections – but neither had meaningful remedies)

- Also consider how there was an absence of a power to exclude illegally obtained evidence, so unlawful detentions were immune from scrutiny at criminal trials
- The principle of legality didn't empower courts to evaluate the *substance* of laws, so Parliament could authorize depravations of liberty on the most arbitrary bases (i.e., internment of Japanese Canadians)

Constitutional Limitations: Section 9 of the *Charter*

Charter of Rights and Freedoms

Detention or imprisonment
9 Everyone has the right not to be arbitrarily detained or imprisoned.

This sets down the minimum constitutional standards for regulating state interference with individual liberty

Section 9 of the *Charter* serves ***2 important functions***:

- It permits constitutional scrutiny of the of the decision to detain in individual cases
    - When an officer detains or arrests, s 9 supplies a basis for assessing the constitutionality of that encounter
- It permits courts to assess the law itself – the substance of statutory and common law powers authorizing detention (the laws authorizing detention – whether those are constitutional) – this was not a thing before 1982

Purpose + Drafting History of Section 9

Cases involving s 9 of the *Charter* are before the SCC often

- It took over 25 years for the SCC to finally identify the purpose underlying s 9 guarantee (*Grant*)

Purpose (from *Grant*)

> "The purpose of s. 9, broadly put, is to protect individual liberty from unjustified state interference... "liberty", for Charter purposes, is not "restricted to mere freedom from physical restraint", but encompasses a broader entitlement "to make decisions of fundamental importance free from state interference"... Thus, s. 9 guards not only against unjustified state intrusions upon physical liberty, ***but also against incursions on mental liberty*** by prohibiting the coercive pressures of detention and imprisonment from being applied to people without adequate justification. The detainee's interest in being able to make an informed choice whether to walk away or speak to the police is unaffected by the manner in which the detention is brought about."

S 9 also has a purpose related to s 24(2) → remedy that we will talk about later in the course

Much of the confusion around s 9 (pre-*Grant*) was due to the wording: "arbitrarily"

- The use of the word "arbitrary" is used in almost all human rights documents internationally and historically (p. 105)

In drafting s 9, the provinces and federal government went back and forth many times with the wording

Elements of s 9

Every s 9 breach requires all three of the following:

- **State action**
- **Resulting in an individual being detained or imprisoned**
    - Being detained is more elusive
    - Critically important because it is a trigger for constitutional protection
    - S 10 depends on "detention" or imprisonment too
    - We need to know when 9 or 10 is triggered, so we need to know when there is detention so that police can give the detained their rights
- **In an arbitrary manner**

If each element is established, then a breach is established

Triggering s 9

The Meaning of "Imprisoned"

The Meaning of "Detained"

In determining if there has been a detention for *Charter* purposes, much will depend on where a particular encounter is situated along the spectrum of potential interactions between the police and the public

The SCC has attempted to define detention for s 9 + 10 purposes:

- *R v Grant* (2009):
    - "Not every trivial or insignificant interference with this liberty attracts *Charter* scrutiny"
    - Detention requires "significant deprivation of liberty"
    - A detention only occurs when "deprivation of liberty may have legal consequences"
    - "***Detention arises only when police have significantly constrained an individual's freedom to choose whether to cooperate with them in a situation where the individual faces significant legal jeopardy***"
- *R v Mann* (2004):
    - the police cannot be said to "detain", within the meaning of ss. 9 and 10 of the *Charter*, every suspect they stop for purposes of identification, or even interview. The person who is stopped will in all cases be "detained" in the sense of "delayed", or "kept waiting". But the constitutional rights recognized by ss. 9 and 10 of the *Charter* are not engaged by delays that involve no significant physical or psychological restraint.

The first case that raised the meaning of detention before the SCC:

R v Therens
R v Therens, [1985] 1 SCR 613 **Facts**:

- Therens (T) crashed his car into a tree
    - The police officer demanded T provide samples of his breath for analysis (per the *Code*)
- T went to the police station with the officer, complied with the breath sample, and was charged with a driving under the influence charge of some sort
- When police demanded his breath sample, they did not apprise him of his 10(b) right to counsel

Trial: T's counsel objected to the admission the breath evidence and applies (s 24 *Charter*) for its exclusion on the ground that he had been denied the right, guaranteed by s. 10(*b*) of the *Charter*, to be informed, upon arrest or detention, of his right to retain and instruct counsel without delay

- TJ allowed application; dismissed the charge for lack of evidence of T's blood alcohol level → T had been detained within the meaning of s 10, so the court was empowered by s 24(1) to exclude

CoA: Decision upheld

Issue: Was T ***detained*** following the breath sample demand and before his arrest?

Decision: Appeal dismissed; T was detained

Reasoning:

- Under the *Canadian Bill of Rights*, the court had previously held that breath demands do not trigger a detention
    - Detention, under the *Canadian Bill of Rights*, was limited to situations of "actual physical restraint"

**Justice Le Dain concluded the meaning of detention under the *Canadian Bills of Rights* was not controlling under the *Charter*

- Detention under the *Charter* should be read more broadly
    - Physical restraint
    - It also arises when police assume ***"control over the movement of a person by a demand or direction which may have significant legal consequences, and which prevents or impedes access to counsel"***
        - In T's case, the legal consequence was providing a breath sample that would find him guilty
- Le Dain also held that detention could arise even whether there is neither physical restraint, nor "criminal liability for failure to comply with a legal duty"
    - "The element of ***psychological compulsion***, in the form of a reasonable perception of suspension of freedom of choice, is enough to make the restraint of liberty involuntary. Detention may be affected without the application or threat of application of physical restraint if the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist."

3 years after *Therens*, in *R v Hufsky* (1988), the SCC concluded that there is no reason "in principle why the general approach to the meaning of detention reflected in those cases should not be applied to the meaning of "detained" in s 9"

3 Categories of Detention
***Justice Le Dain created these three categories in his dissenting opinion in *Therens*; affirmed in *Grant* ¶30

1. **Psychological constraint <u>with</u> legal compulsion**
    - Breathalyser example
    - Person can be punished for not complying with the police demands
    - Drivers who refuse to comply with a lawful breath demand are guilty of a criminal offence, those demands automatically trigger a detention
        - Drivers are detained *any* time they are stopped by police (since provincial legislation requires them to comply with such demands and punished non-compliance); however, the court has refrained from applying the same constitutional standards to all stops – they have upheld legislated overrides of s 9 as reasonable limits under section 1 of the *Charter*
        - Also, interesting – Court has found that people stopped for <u>routine</u> questioning and searches at border crossing are not detained for *Charter* purposes (*R v Simmons* → detention only arose once the suspect was strip-searched, but not before that as it was routine)
2. **Physical restraint**
3. **Psychological constraints <u>without</u> legal compulsion**
    - Psychological detention without legal compulsion will occur where "the person submits or acquiesces in the deprivation of liberty and reasonable believes that the choice to do otherwise does not exist"
        - This seems to suggest a mixed subjective/objective standard
    - The Court restated the *Therens* mixed subjective/objective standard in a purely objective way:
        - *R v* Grant → "The question is whether the police conduct would cause a reasonable person to conclude that he or she was not free to go and had to comply with the police direction or demand. As held in *Therens*, this must be determined objectively, having regard to all the circumstances of the particular situation, including the conduct of the police."
        - *R v Le* → It remains, and should remain, that ***the detention analysis is principally objective in nature***. Prior to *Grant*, the objective nature of the test may have been unclear. For example, in *Therens*, this Court held that a detention will arise when an individual "submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist" ... — a statement that may have suggested that the analysis focuses on the reasonableness of an individual's subjective perceptions. But in *Grant*, this Court clarified that the analysis is objective."

Grant said that detention is an objective test, then *Le* confirmed

R v Grant
R v Grant, 2009 SCC 32

Facts:

- Young black man in Toronto was walking down the street when an officer stopped him because he was "fidgeting with his coat and pants in a way that aroused suspicion"
- Plainclothes police officers requested that the uniform officers have a "chat" with him
- Officer asked what he was doing and requested his name and address
    - In doing so, the officer stood directly in Grant's intended path
- Grant behaved nervously and the officer told him to keep his hands in front of him
- Plainclothes officers joined, flashed their badges, and stood behind the uniformed officer
- Officers asked Grant if he had "anything he shouldn't have"
- Upon questioning Grant, the officers found out that he was carrying weed and a firearm
- Police searched him, then arrested him, then advised him of his rights
- Grant claims that his section 8, 9, + 10(b) *Charter* rights were violated

Trial: TJ found no *Charter* breach and admitted the firearm; Grant was convicted of 5 firearm offences

CoA: Upheld the convictions reasoning that the detention had crystalized during the conversation with the uniformed officer, before the accused made his incriminated statements, and the detention was arbitrary and in breach of s 9

- CoA held that the gun should be admitted into evidence under s 24(2) of the *Charter*

Issue: What constitutes detention for the purposes of s 9 of the *Charter*?

- Was Grant detained prior to confessing the firearm to police?

Decision: Yes

Psychological detention occurs when a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply

Reasoning:

The Court will consider the following factors when determining whether a reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice:

1. The circumstances giving rise to the encounter as they would reasonably be perceived by the individual
2. The nature of the police conduct
3. The particular characteristics or circumstances of the individual where relevant

The Circumstances giving rise to the encounter as would be reasonably perceived by the individual

- Court found that the officer that stopped Mr. Grant initiated the encounter and made contact and connection with him – detention was not triggered, but then when the police officer told him to keep his hands in front of him and said "do you have anything that you aren't supposed to have" led to a level of detainment
    - Tactical adversarial position of two additional officers after Grant was told to keep his hands in front of him

The nature of the police conduct

- When the two back up police officers appear, there is three in very close range – what if they had encircled Mr. Grant on all sides?
    - Not determinative, but important
- Tactical and adversarial position taken by the officers made it seem as detention

Grant Factors

Number of Factors that go into the mix (clearly spelled out in *Grant* and *Le*)

3 factors whether there was psychological without legal compulsion (not exhaustive, but general categories) → "To answer the question whether there is a detention involves a realistic appraisal of the entire interaction as it developed, not a minute parsing of words and movements"

1. Circumstances giving rise to the encounter *as they would reasonably be perceived by the individual*
    - Were the police providing general assistance/maintaining general order?
    - Were the police making general inquiring regarding a particular occurrence, or singling out the individual for focussed investigation?
2. The nature of the police conduct including:
    - The language used
        - The tone of voice – were voices raised?
    - The use of physical contact
    - The place where the interaction occurred
        - Reasonable person might feel freer to say no to a police officer while in public and other people are around
    - The presence of others
    - The duration of the encounter
        - The shorter the interaction, the less likely the court will find detention
        - However, *Le* was less than a minute and detention was found, so this is not a bright line test

- Very important consideration
- One forceful word or act can turn something into detention "stop, put your hands in front of you" being yelled is a detention, but maybe if it just spoken it would be less clear
- *Would a reasonable person believe that they had no other choice?*

****One of these factors could be determinative, or not... all depends

3. Particular characteristics of the individuals
    - Age, physical stature, minority status, level of sophistication, etc.

Police officer's objective intent is not determinative

Suspects perceptions are relevant but not determinative (not subjective)

- Not about what was in the accused's minds, but considering the entire circumstances
- This is *objective*

R v Le

R v Le, 2019 SCC 34

Facts:

- Le (L) and 4 of his friends were together in a private backyard of a townhouse at a Toronto housing co-operative when 3 police officers arrived
    - All 5 were young, racialized men
- The men didn't appear to be doing anything wrong
- 2 officers entered the backyard without warrant or consent and began questioning the young men on their identification while the third patrolled the perimeter of the property
    - The third stepped into the backyard and told one man to "keep his hands where he could see them"
    - Another officer questioned Le and asked him what was in the satchel he was carrying
- Le fled, was pursued, and arrested
- Le was found in possession of a firearm, drugs and cash

Trial: Le sought the exclusion of evidence under s 24(2) on the basis that the police breached his ss 8 and 9 of the *Charter*

- TJ held Le lacked standing to advance a s 8 claim (he was only detained when the officer asked him about the contents on his bag, the detention was not arbitrary, and even if there was *Charter* right breaches, the evidence would be admissible)

CoA: Appeal of convictions dismissed

Issue: When was Le detained per s 9?

- Is the evidence admissible?
- Were Le's ss 8 + 9 rights breached?

Decision: Appeal allowed; evidence excluded; convictions set aside; acquittals entered

Reasoning:

When was Le detained?

- In determining the point of detention for the purposes of s 9 of the *Charter*, *R v Grant* adopted three non-exhausted factors that aid in the analysis:

The circumstances giving rise to the encounter s they would reasonably be perceived by the individual:

- The conduct of the police exceeded the norms of community policing
    - No obvious cause for any police presence in the backyard
    - The police never expressly communication to the young men why they were there
    - The height of the fence allowed full interaction without entry
- A reasonable person would not perceive the police entry into the backyard as merely assisting in meeting needs or maintaining basic order
- Detention arose when police officers crossed the bounds of community policing initiative
    - Police went too far, and detention arose quickly after

- Conclusion**:** Detention arose prior to the officer's inquiry about the contents of Le's bag

The nature of the police conduct

- The actions of the police and the language used may show that the police are immediately taking control of a situation
- Police yelled, "keep your hands visible"
- Physical proximity and the officers positioned themselves in a way to question specific young men apart from the others, in a manner to block the exit, this was a small backyard
- Presence of others: 5 young men and 4 of them start complying, so it would make sense that the 5th person would reasonably think that they should also comply
- The place where the interaction occurred and the mode of entry, the nature of any police intrusion into a home or backyard is reasonably experienced as more forceful, coercive and threatening than if this situation where to occur in public
- Conclusion**:** Detention arose as soon as the police officers entered the backyard and started asking questions

The particular characteristics or circumstances of the individual

- "Courts must appreciate that individuals in some communities may have different experiences and relationship with police than others and such may impact upon their reasonable perceptions of whether and when they are being detained"
- "At the detention stage, the analysis takes into consideration the larger, historic and social context of race relations between the police and the various racial groups and individuals in our society" → **racialized community** (racial profiling)
    - Binnie talked about this in 2009 in *Grant,* and then the Court acknowledged it again here and the law of biases
- "Research studies have established that racial minorities are both treated differently by the police and that such differential treatment does not go unnoticed by them"
- "...it is in this larger social context that the police entry into the backyard and questioning of the accused and his friends must be approached. It was another example of a common and shared experience of racialized young men: being frequently targeted, stopped, and subjected to pointed and familiar questions"

Conclusion**:** Detention took place the moment the officers entered the backyard and started asking questions

Even absent a legal obligation to comply with a police demand or direction, and even absent physical restraint by the state, a detention exists in situations where a reasonable person in the accused's shoes would feel obligated to comply with a police direction or demand and that they are not free to leave.

- An individuals' particular circumstances can be relevant in determining "power imbalance"

Koechlin v Waugh + Hamilton

Pre-*Charter*

- Police did not inform the person why he was being arrested, so they were liable in damages for false imprisonment

R v Mann

As two police officers approached the scene of a reported break and enter, they observed M, who matched the description of the suspect, walking casually along the sidewalk. They stopped him. M identified himself and complied with a pat-down search of his person for concealed weapons. During the search, one officer felt a soft object in M's pocket. He reached into the pocket and found a small plastic bag containing marijuana. He also found a number of small plastic baggies in another pocket. M was arrested and charged with possession of marijuana for the purpose of trafficking. The trial judge found that the search of M's pocket contravened s. 8 of the *Canadian Charter of Rights and Freedoms*. He held that the police officer was justified in his search of M for security reasons, but that there was no basis to infer that it was reasonable to look inside M's pocket for security reasons. The evidence was excluded under s. 24(2) of the *Charter*, as its admission would interfere with the fairness of the trial, and the accused was acquitted. The Court of Appeal set aside the acquittal and ordered a new trial, finding that the detention and the pat-down search were authorized by law and were reasonable in the circumstances.

Held (Bastarache and Deschamps JJ. dissenting): The appeal should be allowed and the acquittal restored.

- Police were entitled to detain M for investigative purposes and to conduct a pat-down search to ensure their safety, but the search of M's pockets was unjustified and the evidence discovered therein must be excluded.

Police Detention + Arrest Powers

Given that unlawfully interfering with liberty necessarily violates s 9 of the *Charter*, deciding whether the police acted lawfully in purporting to detain, or arrest is essential in assessing the constitutionality of these encounters

In order to avoid a constitutional violation, police restraints of liberty must come within parameters of one of the powers listed:

Detention Powers

Most of the powers emerged after the enactment of the *Charter* (usually through the courts' use of the ancillary powers doctrine to recognize new common law police powers)

The Power to Detain Motorists for Traffic Safety Purposes

Pre-*Charter*, the legal authority of police to stop motorists was uncertain, but now police have the power to conduct *both* proactive and reactive traffic safety stops
**most of the reasons that police can stop motorists randomly are from common law

Proactive: police are empowered to stop vehicles at a fixed-point check stop or through roving and random stops to confirm driver's sobriety, inspect driving-related documents, and examine 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 contract to the provincial traffic legislation

Checkpoint Traffic Safety Stops

R v Dedman (1985) → SCC recognized for the first time a police power to conduct fixed-point sobriety checks of motorists **the power was not statute-based, but through common law

- Stops do not need to be based on any degree of suspicion
- Slim majority relied on English case *R v Waterfield* to grant police power at common law to conduct random stops at sobriety check stops:
    - Do the police actions fit within their broad scope of police duties?
        - Almost always "protect society, apprehend criminals"
        - Random safety stop fits within the broad powers of investigating crime and apprehending criminals
    - Assuming yes, what are the benefits vs. the cons of allowing police to do this?
        - Almost like s 1 analysis
        - Weigh the deleterious effects vs the benefits

***R v Dedman* was controversial because many thought it allows the judiciary to make value and morality judgements and create new criminal law

- It is molding together the executive branch and the judicial branch
- When some things are legislated by the courts, there is no review – the legislature could push out the common law I guess, but they don't usually do that
- Legislation by the courts is problematic
- *Fleming v Ontario* recognizes that a little bit better:
    - Protest and then counter-protest
    - While this is happening, guy with Canada flag walking down the street as the police are driving by to the protests and tells the guy to go home
    - The police the see him later and tackled him and arrest him, but the guy wasn't doing anything that was unlawful
    - Police officer said he arrested him for an anticipated breach of the peace – could that be a legit police power under the ancillary? Police had some sort of limit on their power to arrest (ancillary has **not** been used to limit police powers before this)

R v Hufsky (1988) → made its way up to the SCC (after *Dedman*) after Ontario amended its traffic safety legislation to grant police express statutory authority to conduct traffic stops:

- The provision was challenged as being contrary to the right not to be arbitrarily detained under s 9
- Police had stopped the accused at a random checkpoint
- SCC unanimously held that the provision was in violation of s 9, but it was justified under s 1
    - SCC did not specify any criteria for deciding which drivers to stop (leaving the police with absolute discretion)
    - SCC did not specific whether the s 1 justification extended to roving or moving stops (so, they answered that in *Ladouceur*)

R v Ladouceur (1990)

- Police stopped Ladouceur's car without grounds for suspicion to check documentation
    - Ladouceur's license had been suspended, and he was charged accordingly
- *slim* majority held that roving stops were justified under s 1
    - Justice Cory reasoned that prohibiting roving stops would fail to adequately deter impaired, unlicensed and uninsured drivers because checkpoints are "frequently well-known or visible in advance" and drivers "could easily avoid the consequences of their dangerous misconduct"
    - Vehicle stops are minimally intrusive – short, require the production of only a few documents, and drivers are asked a few questions
- The minority was concerned about the unfettered discretion that this decision would provide police
    - In Sopinka J.'s opinion, the government failed to demonstrate that roving stops were essential to roadway safety

When *Ladouceur* was decided, there was almost no empirical basis for fears that racial bias might influence police detention decisions, but a growing body of evidence has since emerged showing that police disproportionately detain Indigenous and Black Canadians – also evidence that these groups are subject to traffic stops more often

**Lower courts have held since these cases that police have the common law authority to conduct fixed and roving stops in commercial parking lots open to the public (courts are dividing on whether this power extends to property associated with private residences)

Reactive Stops for Particularized Traffic Safety Reasons

Reactive stops raise different consideration than proactive stops from a constitutional standpoint

- Stops made for a legitimate, particularized reasons (i.e., speeding), are not *per se* arbitrary under s 9
- If the police exceed the scope of their lawful powers in a particular case, then the detention will necessarily be arbitrary and violate s 9

Limits on Traffic Safety Stops and Criminal Investigative Purposes

The unfettered authority to conduct vehicle stops for traffic safety purposes are subject to *strict limits*:

- Police must have a genuine traffic safety purpose in making the stop
    - If this purpose is lacking, and the traffic safety purpose is simply a pretext for a stop made solely for criminal investigative purposes, the detention will violate s 9 from the start

However:

R v Nolet (2010) → SCC held that police may harbour ulterior criminal investigative purposes during a traffic stop

- They must limit their inquiring to traffic safety-related concerns for the duration of the stop; if they do so, the fact that they are simultaneously interested in discovering evidence of another offence does not make it unlawful
- Without suspecting an offence, an office stopped a commercial truck to make inquiries authorized by provincial regulatory legislation
    - The documents produced were inadequate, so the officer searched the vehicle (authority under the statute) and found a large amount of money in small denominations – this is typical of drug transactions, so the officer arrested the driver for possession of proceeds of crime
        - He then searched the truck further *incidental* to that arrest and found 392 lbs of marijuana
- The fact that the officer had earlier suspected that the vehicle might be transporting illegal drugs did not detract from the legitimacy of this search
    - Inconsistent documents + reasonable reliance on the provincial authority over commercial trucking

How to distinguish between a dual-purpose traffic safety detention (lawful) and a pretextual traffic safety detention (unlawful)?

- Honestly, it's tough (¶2.129/2.130)

Since *Nolet*, courts have regularly upheld dual purpose vehicle stops even when the police's interest in traffic safety was trivial compared to their interest in criminal investigation

- Some courts have gone as far as permitting detentions motivated *exclusively* by criminal investigative concerns (as long as police strictly adhere to the limits of the traffic stop power in making their inquiries), but others have held that stops have to be subjective motivated (at least in part) by a traffic safety purpose

If police acquire "plain view" information relating to non-driving offences during a lawful traffic detention, they can use it to justify the use of one of their criminal investigative powers (such as arrest, search incident to arrest, investigative detention, search incident to detention, or canine sniffs)

Questioning during a lawful traffic stop: SCC had repeatedly stated that the questions must be related to the driving offences, but many lower courts still have permitted questioning with little,

if any, connection to traffic safety (this arises often when police ask questions about drivers' itineraries)

- The passengers in vehicles that are pulled over have found that these individuals are necessarily detained without legal compulsion either from the outset of the of the stop, or upon any questioning or requests for identification

Case-by-Case Explication of Associated Powers

The development of police powers to detain motorists is not straightforward

- Some powers originate at common law (under ancillary powers doctrine)
- Other powers flow from open-ended grants of authority under provincial traffic legislations
- Others stem from *Code* impaired driving provisions

Lots of ambiguity

R v Orbanski + Elias (2005) → SCC held that some degree of ambiguity is unavailable because it's impossible to predict all the aspects of such encounters and is impractical to legislative exhaustive details as to how they must be conducted

- The solution is to rely on the common law as a guide for resolving unanswered questions
- The court suggested in this case that the scope of police power to make impaired driving inquiring during roadside detentions should be decided by a case-by-case reasonableness inquiry
    - Reasonable = if they can be performed at the site of the detention, with dispatch, with no danger to the safety of the detainee and with minimal inconvenience to the detainee
- The Court applied this reasonableness case-by-case approach in *R v Aucoin* (2012):
    - The issue was the legality of the officer's decision to place a driver in the rear of his cruiser while issuing him minor vehicle infraction tickets (he did so because it was a busy street, and the vehicle was being impounded)
    - Before placing the driver in the vehicle, he did a safety-search that revealed illegal drugs
    - Court held *it was not reasonably necessary to place the accused in the cruiser* (the officer could've waited a few moments for backup to arrive)
        - Court also held there may be a different factual matrix that would support a finding of reasonable necessity to put an accused in the cruiser

OVERALL, this area of law is not great, very ambiguous, and as long as the courts continue to legislate on it, Parliament will have little incentive to step in and regulate the area of interaction between police and the public

Detention for Criminal Investigative Purposes

When state actors want to interfere with an individual's liberty or privacy interests for the purposes of a criminal investigation, the law usually demands greater justification than it does for regulatory matters (such as traffic safety)

- The enhanced protection is warranted by the fact that criminal investigation and prosecution case people to suffer greater disapprobation and punishment

This degree of protection will vary depending on the nature and strength of the state's crime control interest and the individual's interests in liberty and privacy

Investigative Detention

Pre-1993: no police power to detain short of a carrying out a formal arrest, then...

R v Simpson (1993) → ONCA recognized, after applying the ancillary powers doctrine, a power to briefly detain when police have an "articulable cause" to believe that the power is involved in criminal activity

- This investigative detention power was recognized by appellate courts across the country, then (11 years later)...

R v Mann (2004) → the SCC applied the ancillary powers doctrine to recognize an investigative detention power

- Police are empowered to briefly detain a person where they have reasonable grounds to suspect that the individual is connected to a recently committed or still unfolding crime AND the detention is reasonably necessary in all of the circumstances

***An investigative detention that is carried out in accordance with the common law power, is not "arbitrary" and thus, does not infringe section 9

Subsequent decisions have made it clear that the investigative detention power Is not restricted to crimes actually known to the police, but extends to crime that are "reasonably suspected"

What is reasonable suspicion?

- This standard that is endorsed in *Mann* is difficult to define
- *R v M.(A.)* (2008) → a reasonable suspicion required "the police officer's subjective belief to be backed by objectively verifiable indications" (subjective + objective components to this test)
- *R v Kang-Brown* (2008) → reasonable suspicion is "something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds"
- *R v Chehil* (2013) → reasonable suspicion is a lower standard than reasonable and probable grounds; the two standards should not be conflated because the reasonable and probable grounds standard is more demanding (more innocent persons will be caught under it than under the reasonable and probable grounds standard)
    - Reasonable suspicion is more demanding than a generalized suspicion
        - Generalized = a suspicion that attaches to a particular activity or location rather than to a specific person

***the assessment of reasonable suspicion should be based only on the grounds in existence when the detention was initiated; *ex post facto* reasoning is not permitted

Roadblock Stops

R v Clayton (2007) → SCC (in applying the ancillary powers doctrine) recognized that the police would occasionally be justified in employing a roadblock for criminal investigative purposes

- The police were responding to a 911 call that reported that "four of about 10 black guys in a parking lot in front of a strip club were openly displaying handguns"
    - The caller identified 4 vehicles
- Marked police cruiser blocked the rear evidence of the club's parking lot
- A car drove towards the exit immediately (was not one of the cars that was identified) and the officers stopped it despite this
    - Both men inside were directed out of the vehicle; Clayton ran after getting out of the vehicle – he was caught and found in possession of a loaded handgun
- Was the use of a roadblock permissible in these circumstances?
    - SCC said yes!
        - "In the totality of the circumstances, therefore, the initial detention in this case was reasonably necessary to respond to the seriousness of the offence and the threat to the police's and public's safety inherent in the presence of prohibited weapons in a public place, and was temporally, geographically and logistically responsive to the circumstances known by the police when it was set up. The initial stop was consequently a justifiable use of police powers associated with the police duty to investigate the offences described by the 911 caller and did not represent an arbitrary detention contrary to s. 9 of the *Charter*."

The reasonableness of criminal investigative roadblocks will turn on:

i. The seriousness of the offence investigated (less serious, non-violent crimes would likely not qualify)
ii. The timeliness of the police response (the slower the response, the less likely the roadblock will be justified), and
iii. The size of the area affected (the larger the area, the less likely the roadblock will be justified)

***there have been very few cases dealing with roadblock stop power since *Clayton*

Citizen's Arrest

Criminal Code of Canada

Arrest without warrant by any person
494(1) Anyone may arrest without warrant
a) a person whom he finds committing an indictable offence; or
b) a person who, on reasonable grounds, he believes
    i. has committed a criminal offence, and
    ii. is escaping from and freshly pursued by persons who have lawful authority to arrest that person.

Arrest by owner, etc., of property
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 on or in relation to that property and

(a) they make the arrest at that time; or
(b) they make the arrest 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.

A private citizen who makes an arrest under any of these provisions is obligated to "forthwith deliver the person to a peace officer" – not necessarily immediately, but as soon as reasonably possible or practicable under all the circumstances (*R v Cunningham*)

The Duty Not to Arrest or to Release Following Arrest

What is an arrest?

- Uttering words of detention or arrest
- Putting your hands on a person in order to stop them from going somewhere
- Even if you don't have the magic words or touch, the substance of an interaction can lead to finding of arrest
- Court will look to the substance of an interaction rather than its form

What amount of force is allowed?

- Reasonable force – what is reasonable is dependent on circumstances and the amount of resistance

What is an arrest?

- Deprivation of movement

Why is the difference between a detention and an arrest is important?

- Good question
- When your arrested, you have a bunch of stuff that happens to you when you get arrested that doesn't happen
    - Arrest – finger printing and identifying information will be taken and be put into a police data base… just by being arrested, a bunch of your private information will be accessible to the police on an ongoing basis – they are supposed to destroy this information when you are innocent (doesn't always happen)
    - Immediate consequences upon arrest that deprive you of certain autonomy

What is reasonable suspicion?

- "Something more than a hunch"
- Some subjective but also objective basis to suspect that this person is associated with a criminal activity is being investigated

What constitutes reasonable and probable grounds?

- The answer is that nobody really knows
    - ¶2.197 - text
- Officer has to believe it themselves, but the belief has to be grounded in an objective belief – would a reasonable person have believed this too?
- Courts have not defined this with any degree of specificity

Chapter 3: **Search + Seizure**

Readings Notes:

Privacy is a pillar of freedom, and protecting it against unjustified state intrusion is an essential feature of liberty in any free society

- There is an "inevitable tension" between protecting/maintaining privacy and the state's interest in infringing on it to protect societal interests (enforcement of the law)
- ***How do we balance these two, competing priorities?***
    - To understand how we balance them, we have to look to various statutes, case law interpreting those statutes, cases that define the common law search powers *and section 8 of the Charter*

Charter of Rights and Freedoms

Search or seizure

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

Search + Seizure at **Common Law**

Common law search powers that go along with the common law detention powers:

Semayne's Case

The limitations on state power at common law has a long history dating back to 1604 in this case where Lord Coke famously declared "the house of everyone is to him as his castle and fortress" (¶3.6 Text)

- Even state authority needs lawful authority → ***principle of legality***
- The Court emphasised that the private papers deserved a large type of protection
- Power of state officials to search are very limited
    - It had to be proven that your property was within someone else property

However, the modern formation of search + seizure protections is *often* traced back to *Entick v Carrington*:

Entick v Carrington

Entick v Carrington (1765)

Facts:

- In 1762, 4 men broke into Entick's home and searched for a prolonged period of time for materials that would secure evidence of materials inciting people to rebel against the authority of the monarch
- Carrington and the 3 other men undertook this search + seizure under the authority of an official who had signed a warrant; they argued that they were acting lawfully under a warrant
- Entick sued the men for damages – this was a civil suit

Issue: Did the official (Secretary of State for the Northern Department) have authority to issue such a warrant?

Decision: NO, the official did not have the authority to issue this warrant; ruling for Entick

Reasoning:

- The laws of England at the time held every invasion of private property as a trespass even if no damage is caused; if trespass is proven, then the burden shifts to the trespasser to justify through showing a law that empowered them to trespass
- "According to this reasoning, it is no incumbent upon the defendants to show the law by which this seizure is warranted. If that cannot be done, it is trespass."
- Because the papers were taken from Entick's home, and not merely looked at and placed back, the "aggravation of trespass" is higher and requires greater damages
- There is no magistrate with such power

"What would the parliament say, if the judges should take upon themselves to mould an unlawful power into a convenient authority, by new restrictions? That would be not judgement, but legislation"

Key Takeaways from Entick v Carrington:

- **Principle of Legality:** state officials can only interfere with individual property when they have *clear lawful* authority to do so
- Although Lord Chief Justice Camden stressed the protection of Entick's private papers by the common law, in our modern *Charter* era, we have a broader conception of privacy that isn't specifically tied to trespass
- In early common law, the power of state officials to search and seize evidence was limited only to when there were good grounds to believe stolen property was hidden was hidden a particular place
- The Court was wary to recognize a new search power because it was seen as encroaching on the power of the legislative branch of government

Search + Seizure **before the *Charter***

Law enforcement's need to search + seize in situations beyond the investigation of property led to legislative action – in **1892**, Canada enacted the *Criminal Code* with a provision authorizing search warrants. Today, it is s 487:

Criminal Code of Canada

Information for search warrant

487(1) A justice who is satisfied by information on oath in Form 1 that there are reasonable grounds to believe that there is in a building, receptacle or place

(a) anything on or in respect of which any offence against this Act or any other Act of Parliament 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, against this Act or any other Act of Parliament,

(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 at any time issue a warrant authorizing a peace officer or a public officer who has been appointed or designated to administer or enforce a federal or provincial law and whose duties include the enforcement of this Act or any other Act of Parliament and who is named in the warrant

(d) to search the building, receptacle or place for any such thing and to seize it, and

(e) subject to any other Act of Parliament, to, as soon as practicable, bring the thing seized before, or make a report in respect thereof to, the justice or some other justice for the same territorial division in accordance with section 489.1.

Execution in Canada

487(2) A warrant issued under subsection (1) may be executed at any place in Canada. A public officer named in the warrant, or any peace officer, who executes the warrant must have authority to act in that capacity in the place where the warrant is executed.

Operation of computer system and copying equipment

487(2.1) A person authorized under this section to search a computer system in a building or place for data may

(a) use or cause to be used any computer system at the building or place to search any data contained in or available to the computer system;

(b) reproduce or cause to be reproduced any data in the form of a print-out or other intelligible output;

(c) seize the print-out or other output for examination or copying; and

(d) use or cause to be used any copying equipment at the place to make copies of the data.

Duty of person in possession or control

487(2.2) Every person who is in possession or control of any building or place in respect of which a search is carried out under this section shall, on presentation of the warrant, permit the person carrying out the search

(a) to use or cause to be used any computer system at the building or place in order to search any data contained in or available to the computer system for data that the person is authorized by this section to search for;
(b) to obtain a hard copy of the data and to seize it; and
(c) to use or cause to be used any copying equipment at the place to make copies of the data.

Form
487(3) A search warrant issued under this section may be in the form set out as Form 5 in Part XXVIII, varied to suit the case.

Before the *Charter*, the **principle of legality** (state officials can only interfere with individual property when they have *clear lawful* authority to do so) was the only thing protecting individuals from state intrusion of privacy; this protection was limited:

- Courts weren't empowered to evaluate the substance of law that interfered with individuals' liberties
    - Government could give its official broad and unchecked power to search and seize for evidence
    - "Writs of assistance" are an example – it authorized police to enter and search any place they believed there was drugs present (no requirement for neutral judicial official to review it) *the *Charter* ended these writs
- There were no practical consequences when police/the state disregarded the limits on their authority
    - Civil cases like *Semayne's Case* + *Entick v Carrington* were rare + criminal court had no way to exclude evidence based on illegality to remedy privacy violations
        - *NO EXCLUSIONARY RULE*
    - Because of this, there is little jurisprudence outlining the law of search + seizure and if there was a case about it, it was usually where an accused was obstructing or interfering with an officer in executing their duties

Search + Seizure **– Section 8 of the *Charter***

Charter of Rights and Freedoms

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

Origins and Drafting of Section 8

Unlike the other legal rights that the *Charter* guarantees, there was no analogous provision of section 8 in the *Canadian Bill of Rights* (1960) [this was likely influenced by the Fourth Amendment of the U.S. Constitution]

- Strong pushback from the provinces almost resulted in s 8 taking on "an entirely different and much less effective form" (¶3.18)
- October 1980 draft read "Everyone has the right not to be subjected to search of seizure except on grounds, and in accordance with procedures, established by law"
    - Civil liberties' organizations expressed that if s 8 was left unchanged (from the above), it would result in individuals having no other rights than they already had under the principle of legality → in response, the Fed.'s changed it back to s 8 as we know it now

The **Purpose** of Section 8

In 1984, the SCC had their first opportunity to explain s 8 in *Hunter v Southam Inc.*:
"... in guaranteeing the right to be secure from unreasonable searches and seizures, ***s 8 acts as limitation*** on whatever powers of search and seizure the federal or provincial governments already and otherwise possess. ***It does not itself confer any powers***, even of "reasonable" search and seizure on these governments"

- A broad and purposive approach of interpretation was taken to provide the right a "wider ambit" (¶3.21) **SCC did not restrict the right to protection of property OR only relating to trespass as historically has been done

The SCC concluded that privacy – and not property – is the source of s 8 protection

Hunter v Southam

- Edmonton Journal was searched, and the authorization was very brief
- Section 10 of the *Combines Act*
- S 8 has to be looked at with a "purposive approach" aka look at *why* and what the goals of the section is

Note: The conception of privacy that has been adopted is broad, but does not include the freedom to make fundamental personal decisions without interference from government (this is more s 7 and other sections)

The Balancing of Priorities:

- Individual privacy interests must be balanced against collective societal concerns
- Justice Dickson: "an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement" (*Hunter v Southam*)
- Courts must undertake a cost-benefit analysis of each case balancing an individual's privacy interests with societal priorities such as crime control or national security

The **Elements** of Section 8

Three elements of any section 8 violation:

1. State action → if it is a private party, you only have remedy in civil/tort

2. Constituting a search or seizure
3. That is *unreasonable*

All three elements are required for a s 8 infringement

Reasonable Expectation of Privacy **Test**

In establishing that the state action constitutes a search or seizure, we must decide whether the action "invaded a reasonable expectation of privacy" **an individual claiming a violation of s 8 must show that state action invaded *their own* expectation of privacy (no standing otherwise)

Did the state action invade a reasonable expectation of privacy?

→ If no, there is no search or seizure and no violation of s 8

→ If yes, was the invasion of privacy reasonable?

**this seems like a step-by-step process: (1) was it state action? (2) did the state action invade a reasonable expectation of privacy? (3) did the state action invade X's expectation of privacy (can't claim for another person)? and (4) Was the invasion unreasonable?

What is a search or a seizure?

- Often, intrusions are characterized as either a *search* or a *search and seizure*
  - Exception: *R v Dyment* (1988) → SCC held that the taking of a blood sample from a suspect by a physician then give to police is a *seizure*
  - Seizure**:** the taking of a thing from a person by a public authority without that person's consent (¶3.27)
- In the case law, there is no difference between the two – textbook authors use interchangeably

"Intrusion on a person's reasonable expectation of privacy"

The recognition of a reasonable expectation of privacy gives courts the power to regulate the state's use of a particular investigative techniques in certain contexts

The legal framework for assessing whether a particular state action intrudes on a reasonable expectation of privacy takes account 4 factors: (*Edwards*)

1. The subject matter of the alleged search
2. The claimant's interest in the subject matter
3. The claimant's subjective expectation of privacy in the subject matter
4. Whether this subjective expectation of privacy was objectively reasonable, having regard to the totality of the circumstances

Each factor will be analyzed below:

The Subject Matter of the Alleged Search

- Courts must identify the precise nature of the intrusion that is alleged to be search + seizure → characterize the information
- *What is the subject matter?*

- The nature must be defined ***broadly and functionally*** with "reference to the nature of the privacy interests potentially compromised by the state action" (*R v Marakah*)
    - Examples:
        - Electronic text communications → the Court characterized the subject matter of the search as "conversation" between the parties
            - Interesting characterization because to obtain access to **conversations** typically, the police either have to overhear the conversation or get a warrant to wiretap
            - *Marakah* is a good example of this
        - Subscriber information → the Court characterized the subject matter of the search as the link between the customer's identity and "particular Internet usage"
            - This characterization eludes to metadata and what it is used for (creating a profile)
        - Remote sensing techniques (like drug sniffing dogs) → the Court characterized the subject matter as the legally-relevant inference that the technique revealed rather than "the scent"
            - What is the subject matter of the police search of a sniffing dog? The subject matter isn't the scent, it is the inference drawn based on the smell of the contents of the bag
                - Mo privacy interest in scent

Court will characterize to find a privacy interest

Marakah → what if a person hands over the text conversation to the police?

- Risk
    - Problematic because the SCC ssaid "we don't do s 8 analysis on risk analysis" – how likely it is that police can get ahold of the information – nothing to do with probability
    - Do I have a reasonable expectation of privacy in the other person?
- Emerging area of the law

The Claimant's Interest in the Subject Matter

- This is rarely contentious → the claimant will usually have a direct interest in the subject matter
    - Even if the interest is not direct, the Court has considered whether the claimant enjoyed an objectively reasonable expectation of privacy in the circumstances (Example: *R v Spencer* → the claimant regularly used his sister's Wi-Fi)

You should not be able to surprise people on the stand with their previous statements in sexual assault (s 278 of *Code*)

The Claimant's Subjective Expectation of Privacy in the Subject Matter

- This is rarely contentious, too.
- To have a subjective expectation of privacy is ***not a high threshold*** to meet (*R v Patrick*)

- Even without direct evidence of subjective intention, the SCC has ***inferred*** an expectation
    - Example: *R v Spencer* (2014) → SCC inferred that Spencer would have an expectation of provide from his use of "network connection to transmit sensitive information"
- Even when a claimant doesn't assert an interest in the subject matter, an expectation can still be found
    - Example: *R v Jones* (2017) → to avoid incriminating himself, Jones argued that his subjective expectation of privacy could be inferred from the prosecution's theory of the case [SCC agreed – Jones should not have to choose between incriminating himself or foregoing a s 8 claim]
- *Except in sexual assault

Whether this subjective expectation of privacy was objectively reasonable, having regard to the totality of the circumstances

the most important factor for assessing the reasonableness of a search and seizure
SCC has articulated a few principles of general application:

1. The decision must be made from an *ex-ante* perspective, without regard to the fact that evidence of illegal activity was discovered
    - *R v Wong* (1990):
        - The question is not "whether persons who engage in illegal activity behind the locked door of a hotel room have a reasonable expectation of privacy" but instead the question is "in a society such as ours, do persons who retire to a hotel room and close the door behind them have a reasonable expectation of privacy?"
    - BROAD AND NEUTRAL TERMS
2. The reasonable expectation of privacy decision is a normative inquiry
    - The fundamental question for the courts is "whether giving their sanction to the particular form of unauthorized surveillance in question would see the amount of privacy and freedom remaining to citizens diminished to a compass inconsistent with the aims of free and open society." (*R v Wong*)
    - Normative not descriptive inquiry

Applying the Reasonable Expectation of Privacy Test (p 234 – 289)
Bodily Substances

- most intrusive search that a person can be subjected to

The one wrinkle is when people "abandon their bodily substance"

- They smoke a cigarette and leave a butt
- The blow their nose and leave the tissue in the garbage
- *Stillman* → used tissue paper and left it in his cell and prisons authority used it for DNA sample (majority said HELL no), but then our courts have gone on to distinguish every other case from *Stillman* – should've put the tissue in his pocket – did x have any other option other than to leave this with the police?

Private Personal Property

- Dog sniffing violates s 8 that's why you don't see dogs sniffing bags at the airport unless there has been a warrant given to do so
- *Kang Brown*

When is Search + Seizure **Unreasonable**?

SCC has developed guidelines to help courts decide whether a search or seizure is unreasonable

- History + American jurisprudence concludes that a search or seizure that takes place *without a warrant is presumptively unreasonable*
    - The Crown bears the onus to prove that a search or seizure is reasonable under s 8
- If a claimant challenges a search that took place *with a warrant*, the claimant bears the onus of proving that the search or seizure was unreasonable or unconstitutional

Analytical Framework for Assessing Reasonableness

R v Collins (1987) → to be reasonable:

1. A search or seizure must be authorized by law
2. The law itself must be reasonable
3. The search or seizure must be conducted in a reasonable manner

*Any of the three factors can be challenged on the grounds of unreasonableness

This is a very context driving analysis where the court, again, must balance individual privacy and public interest

Lawful Authority

- This authority can either come from legislation or from common law; if there is no such authority, s 8 is violated
- Example:
    - *R v Stillman* (1997) → the common law power to search incident to arrest did not authorize police to extract bodily fluids from the arrestees (violation of s 8 found)

Unreasonable Laws

- Even if a search or seizure was lawfully undertaken, applicants can still argue that the law is unreasonable under s 8
    - To be successful, it would need to be shown that a legislative search power is "unreasonable as a matter of general application" (¶3.131)
    - Applicants can also argue that a common law search power is unreasonable (consider that SCC previously recognized this power), so the applicant would need to show that the search was not undertaken within the limitations of the power
    - Applicants can also just challenge the unreasonableness of a common law search power, but that's not very practical given the SCC has previously recognized it

The Reasonable Conduct of the Search or Seize

- Applicants can claim that the police undertook a constitutionally valid search power in an unconstitutional way (through violating conditions imposed on search powers)
- Searches can be deemed infringing as either "authorized by law" or "reasonable manner"
    - Example:
        - *R v Collins* (1987) → SCC found that it was unreasonable for police to grab Collins violently by the throat to prevent her from swallowing drugs that may have been in her house (they did not have probably grounds to believe that she was concealing drugs in her mouth)
            - This search was *both* unlawful and conducted in an unreasonable manner

Hunter Standards

The SCC established three *minimum* requirements for reasonableness under s 8 in *Hunter v Southam* (1984):

- The law should require that searched by authorized by warrant except in circumstances where it is not feasible to obtain one
- 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
- The law should require that someone capable of acting judicially (judge or justice) be the one to decide upon the adequacy of the grounds for issuing a warrant

Prior Authorization + Reasonable and Probable Grounds
^these standards are the default position and will not apply if it can be shown they are inappropriate given the circumstances

***Deviations from the Hunter Standards*:**
295-301 - text

Situations where *higher* *reasonableness standards than Hunter will apply:*
All warrant-based search powers must leave issuing authorities with a residual discretion to impose prerequisites and conditions; if not, they are *prima facie* unconstitutional
Additional requirements are likely to be imposed in cases involving: (i) especially sensitive privacy interests or (ii) important interests other than privacy; these arise in 2 main cases:

- ***Electronic Communications***: state interception of private, electronic communications poses a grave threat to privacy, so courts have put particular emphasis on the fact that such interceptions should only be conducted when necessary to combat *serious threats to the public order*
    - Part VI of the *Code* imposes constraints on wiretapping beyond prior authorization on probable grounds
    - It is possible that an authorization can be unreasonable under s 8 even if the authorities complied with all the statutory requirements:

- When the authorization would invade the privacy of a large number of individuals who are not suspects
    - *R v Thompson* (1990) → police had authorization to intercept conversations made at any pay phone that might be used by the targets of an investigation – Sopinka found that the authorization should've at a minimum provided that phone calls "not be intercepted unless there were reasonable and probable grounds for believing the target was using the phone at the time that the listening device was activated"
- When Parliament authorizes a type of communications surveillance with requiring one of the prerequisites traditionally attached to wiretap authorizations
    - SCC continuously mentions "the interception of private communications between two or more persons oblivious to the intercept" when justifying the constitutionality of ordinary wiretaps
        - *R v Tse* (2012) → the lack of a notice requirement in section 184.4 of the *Code* violated s 8 of the *Charter*
            - Notice helps to ensure accountability and deter abuses of employment of this highly intrusive search power
            - Thus, after-the-fact notice is constitutionally required in this extraordinary, warrantless surveillance power

Criminal Code of Canada

Immediate interception — imminent harm

184.4 A police officer may intercept, by means of any electro-magnetic, acoustic, mechanical or other device, a private communication if the police officer has reasonable grounds to believe that

(a) the urgency of the situation is such that an authorization could not, with reasonable diligence, be obtained under any other provision of this Part;

(b) the interception is immediately necessary to prevent an offence that would cause serious harm to any person or to property; and

(c) either the originator of the private communication or the person intended by the originator to receive it is the person who would commit the offence that is likely to cause the harm or is the victim, or intended victim, of the harm.

- It is not clear whether investigative necessity is constitutionally required for wiretap authorization, but it is clear from Part IV of the *Code* that police must show that other investigative procedures have been tried and failed and that other investigative procedures or strategies are unlikely to work (and again, police must always show that there is some type of urgency)

- *R v Araujo* (2000) → SCC said that investigative necessity was one of the safeguards that made it possible to uphold these parts of the *Code* on constitutional grounds

Section 1 of the *Charter*

Charter of Rights and Freedoms

Rights and freedoms in Canada
1 The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 8 violations are rarely justified under s 1. Why?

- S 8 does not entitle people to an unrestricted zone of individual liberty → it only gives protection from "unreasonable" search + seizures
  - How could an *unreasonable* search constitute a *reasonable limit* under s 1?
- S 8 already balances state interests and individual interests that is supposed to be balanced in s 1 **the reasonableness standard found in s 1 is already incorporated
- ***SCC has NEVER upheld a s 8 infringement*** – unreasonable searches fail either "prescribed by law" (unauthorized search undertaken) OR the minimal impairment requirement in the *Oakes* test

Consent Searches

Individuals are entitled to waive their s 8 protections (these are called consent searches)

- Consent searches are warrantless, and the Crown bears the burden of proving that there was a valid waiver

3 requirements for a valid consent search:

1. The person providing it must have the authority to do so
2. It must be voluntary
3. It must be informed

Each requirement will be analyzed below:

The Person Providing it must have the Authority to do so

- One person cannot consent to a search on behalf of another
  - Examples:
    - *R v Cole* (2012) → an employer purported to consent to police searching an employee's work-related computer
    - *R v Reeves* (2018) → the accused's spouse could not give consent to the seizure of a shared computer from the family home given the "deeply intimate nature of information that can be found on a person computer"
- "Third-party consent" is based on notions that have been long-rejected

    - It is also incompatible with the requirements that consent must be informed and voluntary *on the part of the person whose privacy interest is being surrendered*

***However*,**

- There are exceptions to the findings in *Cole* and *Reeves*
    - Courts have held that one party to a text conversation can disclosed received communications to the police (even though the sender has a reasonable expectation of privacy in sent messages accessed on the recipient's phone)
    - Some appeal level courts have also permitted individuals to consent to searches of shared physical spaces → this level of courts have consistently held that one resident of a shared space can consent to police entry into shared areas of a home despite another person having a reasonable expectation of privacy in that space
        - The benefits of consenting? Crime victims + witnesses can facilitate police investigations (or consider a manager tasked with ensuring safety in an apartment building)
        - The issue that often arises if trying to determine which spaces in a home are shared and which are private to the person being searched/seized
            - ¶3.217 → Condo board or apartment manager consenting to a police entry into common areas
            - ¶3.218 → Parent or guardian consent to a search of a youth's room
        - SCC declined to answer this question in *Reeves*

It must be Voluntary

- To be considered voluntary, consent "must not be procured by intimidating conduct or by force or threats of force by the police" (*R v Goldman*)
- Individual giving consent must also have the capacity to do so – must be of an "operating mind" just as is true for the confessions rule [extremely intoxicated? Possibility for lack of capacity]

It must be Informed

The individual must have enough information to ensure there is a meaningful choice of whether to allow the search or seizure; what does this look like?

- Informed consent requires compliance with s 10(b) of the *Charter:*
    - **10(b)**: Everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right
    - If this right is violated, the consent is vitiated
    - Example of motorists searched following traffic stops!!
- Informed consent requires that the subject be aware of the right to refuse permission for the search or seizure
    - If the individual does not know they can refuse a search/seizure, it is not informed consent

    - State authority isn't required to tell the individual of their right to refuse, but if they don't, it is very hard for the Crown to prove that the accused knew of this right and chose to consent
- Informed consent requires that the individual to be aware of the potential consequences of the search or seizure. The individual must know:
        - The investigative purposes for which consent is being sought
        - Anything that is found could be used against them to substantiate a criminal charge
    - Example:
        - *R v Borden* (1994) → Borden signed a consent waiver for a blood sample to be taken for police investigations (plural); Borden was only aware that the blood sample was being used for an investigation for a sexual assault allegation against an exotic dancer, but the police also used it to investigate Borden's involvement in the rape case of an elderly woman [SCC found that the non-disclosure violated Borden's s 10(a) right and undermined the validity of the accused's consent for taking the blood]
    - To obtain informed consent, the police only need to disclose the uses that are anticipated at the time the consent was given [*R v Arp* (1998) → Arp gave consent to use hair samples during an investigation, but they were used over 2 years later in a different investigation when Arp had become a suspect – SCC rules that the consent is not limited on the use of the evidence]
- Informed consent requires police to be forthright regarding their legal position
    - *R v O'Connor* (2002) ONCA → O'Connor only consented to a search after the police told him that they would get a warrant if he didn't consent and come back at a time that may not be convenient for him – the police knew that they didn't have the grounds for a warrant and the ONCA held that as soon as the possibility of a warrant was raised, the police had the responsibility to tell O'Connor about the correct situation (namely, that they did not have sufficient grounds for a warrant)

Withdrawing Consent

- Individuals who give consent are entitled to withdraw it
- Provided that nothing *illegal* has been found, the reassertion of an individual's right to privacy should *abruptly* end any search
- Once incriminating evidence is found, the authority of police to search and seize no longer depends on the individual's consent

Refusing Consent

- Individuals who refuse to consent does not provide legal grounds to believe that an individual is hiding something illegal
    - If lack of consent constituted grounds for a search, then police lacking grounds to search could just go request consent, and then when it wasn't given, obtain it anyways → there would be no right to be free from search and seizure

R v Colet

R v Colet, [1981] SCJ No. 2

Facts:

- Colet was charged with 5 counts including 2 counts of attempted murder + 2 counts of intended to cause bodily harm
- The charges arose when Colet attempted to defend his property against what he thought was a wrongful intrusion of police officers under a warrant to seize firearms
    - Colet's property was to be demolished as instructed by the City of Prince Rupert
- The police had obtained a warrant under Justice Hutcheon who acted pursuant to s 105 of the *Criminal Code*:

> 105(1) Where, upon application to a court made by or on behalf of the Attorney General with respect to any person, the court is satisfied that there are reasonable grounds for believing that it is not desirable, in the interests of the safety of that person or of other persons, that person should own or have in his possession, custody or control a firearm or other offensive weapon or any ammunition or explosive substance, the court may issue a warrant authorizing the seizure of any firearm or other offensive weapon or any ammunition or explosive substance owned by or in the possession, custody or control of that person.

- The police attended the property and said they had a warrant to ***search*** the property for firearms

Chapter 4: **Questioning**

What is the difference between a right and a freedom?

- Right is a positive obligation (corresponding duties)
- Charter was drafted when people still cared a lot about language (not anymore)

Questioning is a key component of criminal investigations → it helps police further their investigations and obtain incriminating statements for trial

- Police ***do not have any legal power to question people*** unlike the power to search, detain, seize, and arrest → there is no legal authority to compel answers
- This is why it is often said that people have a right to remain silence

Because police have no legal authority to have people answer questions, there are two options:

1. Persuade people to cooperate voluntarily
2. Trick people into speaking to covert agents

There is much regulation that is designed to balance the state's interest in detecting, deterring and punishing criminals against individuals' interest in avoiding cruel questions practices, unfair self-incrimination, and false confessions that could lead to wrongful convictions

- The Court explicitly says in *R v Oickle* that "it is important to keep in mind [the CLCR's] twin goal of protecting the rights of the accused without unduly limiting society's need to investigate and solve crimes"
- Many controversies surrounding police questioning stem from disputes over the relative importance of these interests

- Do not listen to your client's story until you get *all* of the disclosure
    - If your client tells you a story then the disclosure says differently, you are ethically obliged to not put your client on the stand and testify a lie

The first thing you do when you get disclosure is to look to see if both sides have given a statement?

- If you don't have enough in the disclosure, then write to the Crown (there will always be things missing – look to the police notes)
    - Example: disclosure where police took the phone
        - ITO's
        - Warrant's
        - The phone or a picture of the phone
- What if the information in the disclosure is wrong? – Crown is allowed to amend the information, but if you're concerned you arrested the wrong individual, then bring it up immediately

First thing to ask: was this voluntary or involuntary?
Involuntary = coerced in the legal world

- Involuntary are either driven by too much fear or too much hope

The Confessions Rule

Broadly speaking, the common law "confessions" and "Mr. Big" rules prohibit the admission of statements of the accused induced by police that may be *unreliable* or a product of unacceptable methods

What is the confessions rule?

- A common law doctrine
    - In its OG form, it was designed to prevent wrongful convictions when statements were made by suspects before of "fear of prejudice" or "hope of advantage" (*Ibrahim v The King* (1914))
    - The rule still does this, but also encompasses concerns for inhuman interrogation + unfair self-incrimination
- A part of the law of evidence
    - It prohibits the Crown from admitted a statement at trial made by the accused to a *person in authority* unless it proves BARD that the statements were *voluntary*
- In this way, the confessions rule regulates police questioning because police must be careful to avoid tactics that could induce an *involuntary* confession

What are the circumstances in which an involuntary confession can arise?

1. Diminished capacity → quite hard to show this
2. Threats or promises → direct promise or threats are bad, but most authorities are smart enough to veil the promise or threats (veiled is more ambiguous)
3. Oppressive interrogation conditions

Voluntary statements can also be excluded if induced by police by methods that would "shock the conscience" of the community (*R v Oickle*)

The SCC's leading decision on the confessions rule is *R v Oickle*:

R v Oickle

R v Oickle, [2000] 2 SCR 3

Facts:

- During a police investigation, Oickle agreed to a polygraph
    - The test took place in a motel where the accused was properly informed of all his rights – he was informed that while the interpretation of the polygraph results was *not admissible*, anything he said was admissible
    - When the test finished (5pm), the officer told Oickle he had failed the test and was further questions for another hour
- Oickle admitted to setting one fire in his fiancée's car to a second office and gave a statement (7:10pm) – he was emotionally distraught, but arrested and taken to the station
- Oickle was again questioned at the police station – at 8:30 + 9:15 Oickle said he was tired and wanted to go home (officers informed him he was under arrest and couldn't leave)
- A third officer questioned Oickle and at 11pm Oickle confessed to 7 of the 8 fires that were involved in the investigation (he provided a written statement)
- 2:45am Oickle was put into a cell to sleep
- 6am, officers took the accused on a drive for him to re-enactment of the fires – Oickle was provided his rights, and told that he could stop at anytime
- Oickle was charged with 7 counts of arson

Trial: TJ ruled on a *voir dire* that Oickle's statements (including the video re-enactments) were voluntary and admissible → Oickle was convicted on all counts

CoA: Statements (confessions) were excluded; Oickle entered an acquittal [wrote by Cromwell]

Issue: Are Oickle's confessions admissible based on the CLCR?

Decision: Appeal allowed; conviction restored

Reasoning:

- CLCR can provide protections beyond those in the *Charter* → these two things can be interpreted in light of one another (but it is wrong to assume one subsumes the other)
- Application of the CLCR *requires* contextual consideration (there are no hard + fast rules) → TJ should consider all relevant factors
- The judge should strive to understand the circumstances surrounding the confession and ask if it gives rise to a reasonable doubt as to the confession's voluntariness, taking into account all the aspects of the rule; ***relevant factors include*:**
    - ***Threats or promises***
    - ***Oppression***
    - ***The operating mind requirement***
    - ***Police trickery***

Threats or Promises

- Imminent threats of torture will *obviously* render a confession inadmissible
- Veiled threats, or inducements offered to the suspect to obtain a confession are a grey area
    - These become improper when the inducements or threats are strong enough to raise a reasonable doubt about the *voluntariness* of the confession
    - This can be said for both if the inducement or threat is standing alone, or in combination with other factors
- LOOK for a *quid pro quo* offer by interrogators → you give me X; I'll give you Y
- *R v Rothman*

Oppression

- Oppressive conditions and circumstances have the potential to produce involuntary confessions
- Examples:
    - Depriving a suspect of food, water, sleep, medicine, or clothing
    - Confronting a suspect with fake evidence
    - Aggressively questioning a suspect for a long period of time

Operating Mind Doctrine

- This requires that the accused *know what they are saying* and that it could be used against them
    - This is just one application of the general rule that involuntary confessions are inadmissible

Police Trickery

- The specific objective in considering this factor is maintaining the integrity of the CJS → "there may be situations in which police trickery, though neither violating the right to silence nor undermining voluntariness *per se*, is so appalling as to shock the community"
    - In these situations, the confession/statement should not be included

Application to the Case:

- CoA applied the wrong standard of appellate review
- Whether or not a confession is voluntary is a question of fact (or of mixed law + fact)
    - ***CoA disagreed with the weight TJ gave to certain pieces of evidence → this is not grounds to reverse a finding of voluntariness***
- Police did everything right (proper investigation) – the questioning was never hostile, aggressive or intimidating (persistent and accusatorial, but not hostile)
    - The alleged inducements do not raise a reasonable doubt about the voluntariness
- *See headnote on CanLii*

The police are giving a lot of leeway when it comes to confessions rule – think about

Person in Authority

The confessions rule only applies to statements made to persons in authority

This traditionally meant persons who defendants believed were involved in their arrest, detention, examination, or prosecution, but issues arose when it was alleged that a defendant (accused) *believed* that the questioner was not a law enforcement official

R v Hodgson

R v Hodgson, [1998] 2 SCR 449

Facts:

- Hodgson sexually assault the complainant while babysitting her beginning when she was 8 until 11
- Complainant's parents confronted Hodgson at work upon finding out about the assaults – they testified that Hodgson confessed to the assaults (during the confrontation, the mother hit Hodgson, and the father pulled a knife after the confession to prevent Hodgson from leaving before the police arrived)

Trial: Hodgson testified that he was confronted at work, but denied making a confession

- He states he was stunned, shocked and upset, but not frightened or threatened
- Hodgson did not raise an objection to the admission of the confession evidence
- Conclusion**:** TJ convicted appellant

CoA: Court found for the proposition that *in some circumstances,* persons other than those engaged in the arrest, detention, examination, or prosecution of an accused may be considered persons in authority (the parent of an infant complainant may be considered to be a person in authority)

- However, a statement made to a person not ordinarily considered a person in authority *requires that the defence raise* the issue at trial and ask for a *voir dire* to determine whether the receiver of the confession was a person of authority
- The admissibility of the statement was not challenged, and the only issue at trial was the weight to be given to it – TJ found as he was entitled to do
- Conclusion**:** Appeal dismissed

Issue: Did the TJ err in failing to hold a *voir dire* of his own motion to test the *voluntariness* (CLCR) of certain out-of-court statements made by the accused before admitting them?

- Should the CLCR only apply to statements made to persons in authority, or should it be expanded to capture out-of-court statements made by the accused?

Decision: Appeal dismissed; evidence failed to trigger the TJ's obligation to hold a *voir dire*

Reasoning:

- Court rejects the subjective approach to "person of authority" → the approach that held the defendant's belief was sufficient to find that the questioner was a person in authority (even if that belief was wrong)
- ***Court affirms the subjective plus objective approach to "person of authority"*** → the approach that holds questioners can only be found to be persons in authority if they were both believed to be **and actually were** state agents
- The person in authority requirement would be met when there is a "relationship of agency or close collaboration between the receiver of the statement and the police or prosecution, and that relationship was known to the accused"

The person in authority requirement will be established only when the accused ***"reasonably believes the person receiving the statement is acting as an agent of the police or prosecuting authority and could therefore influence or control the proceedings against them"***

- The reasonable belief (objective part of the test) refers to the *actual* relationship between the questioner and the authorities and not the reasonableness of the defendant's believe about the relationship

Put another way, by Justice Abella, in *R v Grandinetti*:
"It is not enough, however, that an accused reasonably believe that a person can influence the course of the investigation or prosecution. As the trial judge correctly concluded:

Reason and common-sense dictates that when the cases speak of a person in authority as one who is capable of controlling or influencing the course of the proceedings, it is from the perspective of someone who is involved in the investigation, the apprehension and prosecution of a criminal offence resulting in a conviction, an agent of the police or someone working in collaboration with the police. It does not include someone who seeks to sabotage the investigation or steer the investigation away from a suspect that the state is investigating."

The rationale for the subjective plus objective approach is to deter *state misconduct*

- It follows from this rationale that if the questioner is not in face a state actor, then it should nor matter whether the accused's contrary believe was reasonable or not

The CLCR applies if:

1. The suspect believed that the questioner was an agent of law enforcement
2. The questioner *actually was* such an agent

If the questioner was not employed in an official law enforcement capacity, the second part can be resolved by asking: *would the exchange between the accused and the questioned have taken place, in the form and manner in which it did take place, but for the intervention of the state or its agents?*

- Forming the question in this way ensures that the relationship that develops after the statement would not make a questioner a person of authority after the fact
- Private persons are only agents if their relationship with the authorities is such that the relevant transaction was "materially different from what it would have ben had there been no such relationship" (*R v Broyles* (1999))

Does Hodgson adequately protect against the danger of false confessions coerced by non-state actors?

- The person in authority rule permits the admission of dangerous unreliable confessions, the Court declined to abolish it → the Court held that it is an issue for Parliament

**Courts could also just use the general evidentiary discretion to exclude evidence (confession) when its prejudicial effect would outweigh its probative value

- This discretion is exercised when there is a reasonable possibility that the TOF would place undue weight on a coerced confession made to a person not in authority

- *R v Wells* [2003] 174 CCC (3d) 310 (BCCA)
    - "The majority opinion in ***Hodgson*** cannot be taken to require that all confessions to persons not in authority, regardless of whether the confession is obtained by violence or threats of violence, must be admitted into evidence. To so hold would ignore the court's discretion to exclude evidence, the probative value of which is outweighed by its prejudicial effect, and the power and discretion of the courts to ensure the fair trial of an accused."
- Courts have also found that confessions coerced by persons not in authority can be excluded under the *Charter* when their admission would compromise the fairness of the trial

Voluntariness

At the heart of the confessions rule is decided whether a statement made to a person in authority is "voluntary"

- The SCC has emphasized the importance of the voluntariness inquiry in preventing the admission of false confessions that might lead to wrongful convictions (especially considering that jurors often find it difficult to believe that an innocent person would falsely confess)
- The CLCR provides some protection against self-incrimination and cruel interrogation, but *police are permitted to use a variety of manipulative and unpleasant means to "somehow convince the suspect that it is in their best interests to confess"*

How do judges determine if a statement was made voluntarily?

- The inquiry is contextual having regard to the entire circumstances
    - Including the objective nature of the tactics used by police and the suspect's subjective reactions to those tactics (*Oickle*)
- The SCC in *Oickle* grouped the relevant factors to consider under 3 distinct headings:
    i) Operating mind
    ii) Inducement (threats or promises)
    iii) Oppression

"The judge should strive to understand the circumstances surrounding the confession and ask if it gives rise to a reasonable doubt as to the confession's voluntariness, taking into account all the aspects of the rule."

"Because of the criminal justice system's overriding concern not to convict the innocent, a confession will not be admissible if it is made under circumstances that raise a reasonable doubt as to voluntariness. Voluntariness is the touchstone of the confessions rule and a useful term to describe the various rationales underlying the rule. If the police interrogators subject the suspect to utterly intolerable conditions, or if they offer inducements strong enough to produce an unreliable confession, the trial judge should exclude it. Between these two extremes, oppressive conditions and inducements can operate together to exclude confessions. If the trial judge properly considers all the relevant circumstances, then a finding

regarding voluntariness is essentially a factual one and should only be overturned for some palpable and overriding error which affected the trial judge's assessment of the facts."

Operating Mind

- A statement is not voluntary unless it I the product of an operating mind
    - The issue typically arises when the accused suffered from a "cognitive deficiency" when making the statement

R v Whittle (1994) → SCC declared that to have an operating mind, the accused need only have "sufficient cognitive capacity to understand what he or she is saying and what is said" including "the ability to understand a caution that the evidence can be used against the accused"

- Voluntariness does, therefore, *not require* a more thorough understanding of the consequences
- A suspect doesn't need to be capable of exercising "analytical reasoning" or "making a good or wise choice or one that is in his or her interest"

Examples of *voluntary statements*:

- Intoxicating substances → *R v McKenna*, *R v McPherson*, *R v Richard*
- Mental illnesses → *R v Whittle*, *R v Nagotcha*, *R v Santinon*
- Intellectual disabilities → *R v Otis*, *R v BE*
- Biochemical imbalances → *R v Sabaeni*, *R v Arkell*

Is the operating mind requirement satisfied when suspects (mistakenly) believe that their statements are being made "off the record?"

- Some courts held that this renders the confession inadmissible and other have not

Community Shock

Voluntary statements can also be excluded if induced by police by methods (trickery) that would "shock the conscience" of the community [however, it's hard to think of tactics that would shock the community and still get a *voluntary* confession]

- Even if none of the circumstances apply such as diminished capacity, threats or promise, and oppressive interrogation conditions, they can community shock

- This community shock standard has also been applied to statements made to undercover agents (*R v Rothman*)
- Admission of statements derived from undercover questioning that would shock the community (and be excluded) can be relevant in two circumstances:
    - Where the undercover agents passively elicit statements from detained suspects
    - Where such agents obtain statements from suspects outside of custody
        - Mr. Big cases → courts have rules that elaborate operations designed to trick suspects into confessing to police posing as gang member would ***not shock the community***

¶4.41 → new common law rule mandating the exclusion of statements obtained by undercover agents outside of custody in certain circumstances

Evidentiary Issues

Voluntariness Voir Dire

- Whenever the Crown wants to rely on a statement made by the accused to a person in authority, a *voir dire* must be held to determine the admissibility (even if the statement appears obviously voluntary – *R v Erven*)
- The defense can waive the right to a *voir dire*
- If counsel doesn't require a *voir dire*, the judge's obligation to hold one will be triggered by evidence that the receiver was "closely connected to the authorities" (TJ decided it was not closely connected in *Hodgson*)

If a voir dire is held:

- Defense must prove that the statement was made to a person in authority
- If the defense can prove this, the Crown must prove:
    - The receiver was not a person in authority OR
    - The statement was voluntary

Section 10 of the *Charter*

Charter of Rights and Freedoms

Arrest or detention

10 Everyone has the **right** on arrest or detention

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

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

(c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Right = positive obligation on the state to provide this right

Freedom to associate – the state does not have a positive obligation to facilitate peoples coming together

Charter of Rights and Freedoms

Exclusion of evidence bringing administration of justice into disrepute

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.

The SCC has imposed obligations on police that go beyond s 10's express language – this purpose is to help suspects make information and voluntary choices in their interactions with the police

- The right to talk to a lawyer (+ the right to be informed of that right) ensures suspects are aware of their legal situation
- The right to know the reasons for detention helps suspects make informed decisions about whether or talk to police or to counsel with counsel

These are important to prevent suspects from unintentionally making inculpatory statements

The SCC has not read s 10 to forbid police from pressuring suspects to self-incriminate

- Instead, the SCC has tried to balance the suspects' interest in avoiding unfair self-incrimination and the state's need to obtain confession evidence to effectively deter, prosecute and punish crime

Triggering Mechanisms: Arrest or Detention

Section 10 of the *Charter* and the rights that are associated with it are ***triggered*** upon arrest or detention.

Section 10(a) of the *Charter*

Charter of Rights and Freedoms

Arrest or detention

10 Everyone has the right on arrest or detention

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

Section 10(a) of the *Charter* obliges police to tell people who have been detained the reasons for that detainment

- Police must do so in "clear and simple language" (*R v Mann*)
- Detainees must be told about:
    - Every offence under investigation (*R v Borden* → police failed to tell Borden about *both* sexual assaults that he was being investigated for), but it is not required that police give investigative details or mention *every* conceivable offence that might eventually be charged
    - Any change in nature of the investigation affecting the extent of their jeopardy (*R v Evans*)
- Only supposed to be told that you have prejudice against you

R v Evans

"When considering whether there has been a breach of s. 10(a) of the *Charter*, it is the substance of what the accused can reasonably be supposed to have understood, rather than the formalism of the precise words used, which must govern. The question is whether what the accused was told, viewed reasonably in all the circumstances of the case, was sufficient to permit him to make a reasonable decision to decline to submit to arrest, or alternatively, to undermine his right to counsel under s. 10(b)."

- Decided *well* before *Sinclair*
- This would be different given the finding in *Sinclair*

Section 10(b) of the *Charter*

Charter of Rights and Freedoms

Arrest or detention
10 Everyone has the right on arrest or detention
(b) to retain and instruct counsel without delay and to be informed of that right;

Section 10(b) of the *Charter* requires police to tell detainees that they have a right to talk to a lawyer and gives detainees who wish to exercise that right a reasonable opportunity to do so before being questioned

- ***The most important and frequently litigated legal right in the Charter***

Questions:

- What initial information must be provided to persons upon detention?
  - The reasons (10(a))
  - They have the right to speak to a lawyer
  - Allowed to call counsel if they want to
  - Have to be given at least a duty counsel line
- When must this initial information be provided?
  - Upon detention or arrest
  - Courts are strict about this
  - If there is anything more than a rather brief delay that is required for operational necessitates (if they get put in a cop car, they should know their counsel)
  - Cops should not speak to them until the right to counsel has been exhausted
- What degree of understanding must detainees exhibit to be said to have "informed" of their rights?
  - Police say, "do you understand" and they say "yes" then that's good enough
  - Police have to be careful about this
  - Easier if police just mandated that accused talked to a lawyer
  - Footnote 294 → "language that one comprehends"
- What is required for detainees to invoke their right to talk to counsel?
  - If their detained, but not arrested, they still have a right to speak to counsel
- Once this right is invoked, what must police do, and refrain from doing, to facilitate access to counsel?
  - As soon as they say they want counsel, *immediate duty on police to give access*
  - Give access *before continuing with any questions*
  - **Duty to "hold off"** → *Prosper* (1994) what are the duties on police inherent in 10(b)?
    - Informational:
      - Number to call
      - Why they are arrested
      - Information of a duty line

        - Implementational:
            - Facilitate access (give them phone, their own phone, access to a phone room)
        - The duty to hold off
            - Once someone has said they want counsel, police have a *duty to hold off*
        - On a 10(b)-breach claim, argue one of these three things ^^
    - *Prosper* warning – if they say they want to speak to counsel, and then change their mind OR if they decline to speak to counsel, that they have a duty to hold off until they talk to their lawyer
- What limitations does section 10(b) impose on police questioning after a detainee has been afforded a reasonable opportunity to talk to a lawyer?
    - …
- When can the failure to comply with the section 10(b) be justified under s 1 of the *Charter*?

R v Prosper
R v Prosper, [1994] 3 SCR 236

- We do this so accused know what they are giving up
- Potentially giving up their right to silence, the ability to not self-incriminate

R v GTD
R v GTD, 2018 SCC 7 - The police have a duty to hold off trying to elicit incriminating evidence from a detainee until after they have a had a reasonable opportunity to reach counsel – this holding off prevents police from asking "do you wish to say anything" - Holding off was violated - Important case out of AB - The fact that the police had a "standard" warning (that wasn't *Prosper*) – 24 year jurisprudence o Information provided on the script then says "do you want to say anything"

In light of *Sinclair*, should Oikle been given another call with counsel at any point?

This created so many rights and so much case law that it could be the subject of a text all on its own

R v Hunter → sometimes regulatory offences, or certain investigatory searches will warrant application of the *Charter*

Section 7 of the *Charter* and Undercover Questioning

Section 7 limits the ability of police to use covert operatives to obtain statements from people in their custody and prohibits the state, from using legally-compelled statements in proceedings against the person who made them (in some circumstances)

Chapter 5: **Intake Procedures**

After arrest...

Intake Procedures are the procedures that control an individual's entry into the adjudicative phase of the criminal process (from a suspect/arrestee to a person charged with a crime appearing in court)

Police can either arrest and hold a person in custody for a bail hearing OR decide instead to use less coercive options to compel attendance in court

Laying the Information

The first step in the process of initiating a criminal prosecution is the *laying an information* by an *informant*

- Information = the document that charges someone with a criminal offence (the same for all types of offences)
    - The document is sworn under oath before a justice of the peace or a provincial judge (almost always justice of the peace)
- Informant = an officer assigned to court duties (but this can be anyone (even a private person) who lays an information in writing and under oath)

The Information

- Sets of the key aspects of the criminal allegation
    - Name of the person charged
    - Particulars of the allegation (time, place, nature of offence, alleged victim)
- One information can set out multiple accused persons, charges or victims
- Laying of information takes place *ex parte* (without accused present) and *in camera* (behind closed doors)
    - Other processes are followed in other places in the world – more information is gathered before charges are brought, so laying an information is grounded in solid basis
    - "Charge Approval" → before charges are brought, information sworn, or person arrest, police officer has to seek approval for the charges (Crown must 'sign off')
- A screening process is likely a good idea – judicial economy, reputation protection, etc.
    - Charge approval also prevents the type of thinking that sometimes happens in our institution – if we spend a lot of money on something, we should have something to show for it

- Sometimes in the CJS the same type of thinking occurs, 10 million dollars was spent on an investigation of a political figure – it turns out that the person hadn't done anything (Raj Grewal) – he was just gambling a lot and borrowed that money from friends and family, but police said... well, we need to charge him with something (charged him with breach of trust)
    - Institutions can't back down now

The Informant

- *Pro forma* → mostly just a formality
- Informant must swear they have reasonable grounds or has personal knowledge that the person who is charged committed the offence
- Informant doesn't need to explain the grounds supporting the charge

Absent any *facial defect* (CC s 504) the justice will receive the information and complete this ministerial function **no discretion to refuse it***

Information sworn = person charged with an offence

- Once information is sworn, the clock begins for 11(b) *Charter* right for a person charged with an offence to be tried within a reasonable time

Laying of information can take place electronically – instead of swearing under oath, an informant will make a statement swearing the truth of the contents of the information – which is beneficial for remote areas

When will laying of information take place?

If police issue one of their own processes for compelling appearance (appearance notice / undertaking) → information will be laid after this is done and before policy apply for a court order confirming the process issued

If police arrest the accused and hold them in custody → the information will be laid after the arrest and before the accused's first court appearance

If police seek to compel appearance through a court-issue process (summons or arrest warrant) → information will be laid before applying for that process

Confirming + Cancelling Police Issued Process

Unless a person is being arrested for a very serious offence, police who intended to charge someone with an offence to avoid having that person in custody *unless they have reasonable grounds that:*

1. The person's detention is necessary in the "public interest," or
    - Police must consider all the circumstances including the need to establish identity, secure or preserve evidence, or prevent the continuation or commission of another crime

2. The person will fail to attend court in answer to the charge

Police can compel attendance in Court:

1. Arrest and hold the accused in custody until their first appearance before a justice
2. Give the accused an appearance notice or have them enter into an undertaking with conditions
3. Obtain a summons or arrest warrant from a court

Appearance notices and undertakings are police issued processes

- S 505 *CC* requires information to be laid before a justice "as soon as practicable after the issuance or release, and in any event before the time stated in the appearance notice or undertaking for their attendance in court"
    - This is to ensure that the information is in fact before the court when the accused attends on the date they were told to
        - Failure to comply with 505?
            - If accused shows up to court → deficiency in process becomes irrelevant; information remains valid; court retains jurisdiction
            - If accused *doesn't* show up to court → any charge for failure to appear is removed; court is impeded from issuing an arrest warrant

After information is laid, the Justice decides whether to ***confirm or cancel*** the process issued by police

Pre-Inquiry:

- Justice's role turns to judicial → *in camera* + *ex parte* – the Justice will hear and consider the allegations, evidence of the witnesses, etc.
    - Informant and witnesses will be sworn
    - Evidence will be recorded
- If the Justice believes there is a sufficient case made out → they will confirm the process and endorse the police process OR cancel the police process and issue a summons or warrant of their own (if they believe the police were wrong to release the accused)
- If the Justice believes there is ***not*** a sufficient case made out → they are required to cancel the appearance notice or undertaking and notify the accused of cancellation immediately

What does it mean to have a "sufficient case made out?"

- Discretionary – control standard for Justice's is subjective and vague
- ONCA interpreted it as: "there is disclosed by the evidence a *prima facie* case of the offences alleged (*R v Whitmore*, 1989)
    - This requires that there be *some evidence against the accused on all the essential elements of the charge*

Low threshold… essentially it is discretionary

The confirmation or canceling of police issued processes is really just *pro forma* (this sucks because besides a preliminary trial there is no other stage for a neutral arbiter to examine the Crown's evidence and decide whether it is sufficient to merit a trial)

CPT + JPT (Crown PreTrial + Judicial PreTrial Conference) – these can be months into it

Issuing a Summons + a Warrant

Police who decided to either not arrest OR arrest and release a person they intend to charge can obtain a summons from a justice to compel the persons' attendance in court

Police who haven't yet arrested can obtain a warrant – a warrant is entered into the Canadian Police Information Computer, so that any officer that encounters the person can arrest them even without having personal knowledge of the circumstances

- Warrants usually only happen when someone isn't showing up because there is more judicial inquiry into obtaining an arrest warrant

Summons and warrants are governed by essentially the same procedure:

- Police must law an information before a justice
- Once received, the justice must decide whether to issue a summons or warrant
    - **pre-inquiry for whether a sufficient case is met**
- Much like the police issued processes, the Justice will decide if the case is sufficient, or as the SCC said in obiter in *R v Storrey* → that there is "reasonable and probable grounds to believe the person to be arrested has committed the offence"
    - If the Justice believes there is ***not*** sufficient case made out → the police try again in front of a different justice with additional evidence [if they do not have additional evidence and simply go before another justice, it can be abuse of process]

Summons vs. Warrant

- Justices are directed to prefer a summons over a warrant unless "the evidence discloses reasonable grounds to believe that it is necessary in the public interest to issue a warrant for the arrest of the accused" (s 507(4))
- What does public interest mean?
    - 5.24

Warrants

- Warrants should be issued where accused has:
    - Been issued a summons, appearance notice, promise to appear or recognizance fails to attend for fingerprinting and photographing (s 512.1)
    - Fails to attend court as required (s 512.2)
    - Appears to be evading service of a summons (s 512.2(c))
- Form 7
    - Names the person to be arrested

    - Sets out offence charged and orders that the person be arrested and brough before the court from where the warrant originates
- Warrants remain in force until the person named is arrested
    - If accused appears voluntarily, then warrant is deemed executed
- Once an accused is arrested, a Justice may endorse the warrant to authorize the accused's release – police retain discretion whether to release the accused through an appearance notice or undertaking
    - The endorsement takes away the requirement for the arrested to be taken before the court before release

Summons

- Form 6
    - Indicates the offence charged and directs the accused to attend court at a time and place
    - Can also require the person to attend to be fingerprinted and photographed
    - *Must* set out a summary of the *Code* offences for failing to attend court (or fingerprinting and photographing) – put accused on notice of necessary compliance
- Must be served on the accused
    - If the person can't be "conveniently found," it can be left at their residence with a person over the age of 16

**For police to enter a private residence to effect an arrest, they require a specialized warrant – a *Feeney* warrant – to authorize that entry (unless in hot-pursuit or exigent circumstances)

Private Information

- The reason they exist is when a person has
- An individual had been detained, pending transfer to a mental health institute (they were supposed to be transferred immediately – clearly schizophrenic), but instead they were taken to a prison that was 2 hours away from the mental health institute for 2 weeks (prison guards recorded this person and sent them to other people to try to get the person transferred) unfortunately, during an episode, he was beaten to death – the guard's admitted to the conduct and the police refused to lay charges (not even for assault besides the all the other ones)
- The family of the person are pursuing a private information
    - Certain requirements have to be met that are greater than ordinarily – less trust of private citizens, but probably a good thing, so that private citizens don't just go around laying charges on each other

24-hour Rule

The *Code* requires that police present anyone they arrest and hold in custody to a justice "without reasonable delay" (s 503(1)(a))

- What does this mean?
    - Presumably allowed to do so to secure or preserve evidence

- It is also reasonable to delay the first court appearance to fingerprint, photograph, conduct an identification line-up, or interrogation

As soon as reasonably possible with a maximum of 24-hours

503(1) of the *Code*

Criminal Code of Canada

Taking before justice

503 (1) Subject to the other provisions of this section, a peace officer who arrests a person with or without warrant and who has not released the person under any other provision under this Part shall, in accordance with the following paragraphs, cause the person to be taken before a justice to be dealt with according to law:

(a) if a justice is available within a period of 24 hours after the person has been arrested by the peace officer, the person shall be taken before a justice without unreasonable delay and in any event within that period; and

(b) if a justice is not available within a period of 24 hours after the person has been arrested by the peace officer, the person shall be taken before a justice as soon as possible.

**24 hours is the outer limit (assuming a justice is available) **judicial orders purporting to authorize a longer detention is a no-go

- This requirement is not a matter of form
  - The limit "reflects an important fundamental right in our society, namely, the liberty of the subject, which is not to be taken away except in accordance with the law" (*R v Poirier* (2016))

If police fail to comply with the 24-hour requirement:

- The detention will be unlawful
  - Per *Grant*, an unlawful detention is necessarily arbitrary and violated s 9 of the *Charter*
- If the police have a good reason for missing the deadline, it will only be considered when determining remedy for the violation of Section 24 of the *Charter*
- Evidence may be excluded under s 24(2)
- Courts may order substantial sentence reduction as a remedy for failing to comply with 503(1)
  - In the extreme case, courts can award a stay of proceedings

*****Any subsequent detention after appearing in court will be a provincial remand centre, not in police holding cells – an individual cannot return to police custody after they appear in court

What's the relationship between the Crown and the Police?

- It *should* be arm's length

- Crown should be able to say *no* we will not be continuing – it can be tough when it is a younger prosecutor too
- Too much insularity breeds group think

Chapter 6: **Bail**

When police arrest and hold an accused, they will law the information before the first court appearance (there is no pre-inquiry) – instead, the accused is entitled to a ***bail hearing***

Bail (judicial interim release) is the term used to describe an accused person's custodial status pending trial

- Should an individual be released or detained before trial?

If bail is refused, there are profound consequences to the detainee – studies have also shown that an individual who is subject to pre-trial detention are more likely to plead guilty, be found guilty after trial, and receive harsher sentences if convicted
***both Black + Indigenous Canadians are more likely to be detained than other before trial – racial bias can influence the bail process

Bail is governed by XVI of the *Code* (direct descendant of the *Bail Reform Act* (1970))

- SCC has made significant changes over the years through invaliding statutory provisions inconsistent with 11(e) of the *Charter*

Charter of Rights and Freedoms

Proceedings in criminal and penal matters
11 Any person charged with an offence has the right
(e) not to be denied reasonable bail without just cause

Current Legislative Scheme

P. 621
Unless accused plead guilty or is charged with one of the offences in s 469 of the *Code*, the justice will decide the question of bail

- S 469 offence? (i.e., murder, conspiring to commit murder, or accessory after the fact to murder) the justice must order the accused to be detained in custody (the accused wishing to be released on bail must make an application for release to a superior court)

Role of Justices of the Peace

With the exception of s 469, "justices " make bail determinations

- Justices = justices of the peace or provincial court judges
    - This is slightly concerning considering that justices of the peace do not need to be lawyers or have any legal training but are making decision about accused's custodial status pending trial
- Now, most justices of the peace are lawyers and end up becoming judges too

Presumption in Favour of Release

Presumption in Favour of Release, Release Options + the Ladder Principle

- "The release of accused persons is the cardinal rule and detention, the exception" (*R v St. Cloud* (2015))
    - A justice is required to order release without conditions unless the prosecutor shows cause why either the accused's detention in custody or a more restrictive form of release is justified
        - ^^not applicable to s 469 offences, s 515(1) or s 515(6)

Default = release without conditions
Release with conditions
Release with a promise to pay (as opposed to cash deposit)
Release with a surety
Release with cash deposit

- It used to be release, and how much $ do you have?
    - This became a huge issue because people did not have the money
- $200 bail is the same as denying bail if that person can't raise that
- Judges slowly adjusted

Criminal Code of Canada

Justification for detention in custody
515(10) For the purposes of this section, the detention of an accused in custody is justified only on ***one or more of the following grounds***:

(a) where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law;
(b) where the detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, or any person under the age of 18 years, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice; and
(c) if the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including
(i) the apparent strength of the prosecution's case,
(ii) the gravity of the offence,
(iii) the circumstances surrounding the commission of the offence, including whether a firearm was used, and
(iv) the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject-matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more.

Bail Conditions

A justice who decides to grant an accused bail has the authority to include conditions in a release order (515(4))

- Conditions are tailored to the circumstances of an accused and to alleviate the concerns that might otherwise warrant pre-trial detention

Starting point: *unconditional release*

- The burden is on the Crown to justify the need for more restrictive forms of release (including a release order with conditions)

Criminal Code of Canada

Conditions authorized

515(4) When making an order under subsection (2), the justice may direct the accused to comply with one or more of the following conditions specified in the order:

(a) report at specified times to a peace officer, or other person, designated in the order;
(b) remain within a specified territorial jurisdiction;
(c) notify a peace officer or other person designated in the order of any change in their address, employment or occupation;
(d) abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the order, except in accordance with any specified conditions that the justice considers necessary;
(e) abstain from going to any place or entering any geographic area specified in the order, except in accordance with any specified conditions that the justice considers necessary;
(f) deposit all their passports as specified in the order;
(g) comply with any other specified condition that the justice considers necessary to ensure the safety and security of any victim of or witness to the offence; and
(h) comply with any other reasonable conditions specified in the order that the justice considers desirable.

515(4.1) outlines that when an accused is charged with certain enumerated offences, the justice must include a prohibition on possessing weapons, ammunition, and explosives unless he or she "considered that such a condition is not required in the interests of the safety of the accused or the safety and security of a victim of the offence or any other person"

R v Zora (2020) → SCC provided guidance concerning a justice's authority to include conditions in release orders

- SCC emphasizes the need for restraint and the ladder principle
    - Conditions should only be included if they are necessary to "address concerns related to the statutory criteria for detention and to ensure that the accused can be released"

- Conditions can only be imposed that are narrowly targeted to one or more of the grounds:
    - The accused will fail to attend court
    - The accused will compromise public safety
    - The accused's release will cause the public to lose confidence in the administration of justice
- Conditions must be reasonable, clear, minimally intrusive + proportionate to any risk
    - ONLY conditions that the accused can realistically comply with

"To keep the peace and be of good behaviour" is no longer included in conditions – it is not reasonable, necessary or "least onerous"

***Even if the accused consents*, the justice must ensure that the conditions are necessary, reasonable, and minimally onerous – this is given the fact that accused are often trying to get released at the earliest possible opportunity, so they may consent to the imposition of conditions that are more intrusive than required

Sureties

A surety is someone that is well-known to the accused (usually a family-member, friend, employers etc.) who agrees to supervise the accused while on bail to ensure that he or she attends court and complies with any condition of release

- The surety will acknowledge a debt to the Crown – the amount pledged is subject to forfeiture if the accused fails to attend court or breaches the terms of release

Adjournments + Delay

Criminal Code of Canada

Release order without conditions
515(1) Subject to this section, when an accused who is charged with an offence other than an offence listed in section 469 is taken before a justice, the justice shall, unless a plea of guilty by the accused is accepted, make a release order in respect of that offence, without conditions, unless the prosecutor, having been given a reasonable opportunity to do so, shows cause, in respect of that offence, why the detention of the accused in custody is justified or why an order under any other provision of this section should be made.

This section, on its face, suggests than an accused deserving of bail will be released within 24 hours of arrest; *however, it is common for the bail hearing to be adjourned* (Crown must have a "legitimate reason" for adjournment)

- The only limitation is that accused must consent to an adjournment longer than 3 days
- Defense adjournment requests are entirely different from Crown requests – there are a variety of legitimate reasons that defense may request an adjournment

If a bail hearing is adjourned, the accused is remanded in custody to a prison (*not* to be held in holding cells while awaiting the bail hearing)

Reversal of Onus under 515(6)

Criminal Code of Canada

Order of detention

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, despite any provision of this section, that the accused be detained in custody until the accused is dealt with according to law, if the accused is charged

(a) with an indictable offence, other than an offence listed in section 469,

(i) that is alleged to have been committed while at large after being released in respect of another indictable offence pursuant to the provisions of this Part or section 679 or 680,

(ii) that is an offence under section 467.11, 467.111, 467.12 or 467.13, or a serious offence alleged to have been committed for the benefit of, at the direction of, or in association with, a criminal organization,

(iii) that is an offence under any of sections 83.02 to 83.04 and 83.18 to 83.23 or otherwise is alleged to be a terrorism offence,

(iv) that is an offence under subsection 16(1) or (2), 17(1), 19(1), 20(1) or 22(1) of the *Security of Information Act*,

(v) that is an offence under subsection 21(1) or 22(1) or section 23 of the *Security of Information Act* committed in relation to an offence referred to in subparagraph (iv),

(vi) that is an offence under section 99, 100 or 103,

(vii) that is an offence under section 244 or 244.2, or an offence under section 239, 272 or 273, subsection 279(1) or section 279.1, 344 or 346 that is alleged to have been committed with a firearm, or

(viii) that is alleged to involve, or whose subject-matter is alleged to be, a firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, any ammunition or prohibited ammunition or an explosive substance, and that is alleged to have been committed while the accused was under a prohibition order within the meaning of subsection 84(1);

(b) with an indictable offence, other than an offence listed in section 469 and is not ordinarily resident in Canada,

(b.1) with an offence in the commission of which violence was allegedly used, threatened or attempted against their intimate partner, and the accused has been previously convicted of an offence in the commission of which violence was used, threatened or attempted against any intimate partner of theirs;

(c) with an offence under any of subsections 145(2) to (5) that is alleged to have been committed while they were at large after being released in respect of another offence under the provisions of this Part or section 679, 680 or 816; or

(d) with having committed an offence punishable by imprisonment for life under any of sections 5 to 7 of the *Controlled Drugs and Substances Act* or the offence of conspiring to commit such an offence.

R v Pearson (1992) → an accused facing a reverse onus should not have difficulty in obtaining release if it can be shown that the circumstances do not match the archetype that that led Parliament to reverse the onus

R v Hall

R v Hall, 2002 SCC 64

Facts:

Liberty lost is never regained and can never be fully compensated for

- we should not be holding people presumed innocent
- Hall was charged with first degree murder
    - The murder was highly publicized and caused significant public concern and general fear that a killer was on the loose
- Hall applied for bail; the bail judge denied bail under s 515(10)(c) in order to *maintain confidence in the administration of justice*
    - Why?
        - The highly charges aftermath of the murder
        - The strong evidence implicating the accused
        - The other factors referred to in (c)
- Hall challenged the constitutionality of 515(10)(c) filing a *habeas corpus* application
    - Superior court judge dismissed the application
    - CoA affirmed the decision

Issues:

- Does the part of 515(10)(c) authorizing denial of bail "on any other just cause being shown" infringe the presumption of innocence and right "not to be denied reasonable bail without just cause"?
- Does the part of 515(10)(c) authorizing denial of bail in order "to maintain confidence in the administration of justice" infringe the right "not to be denied reasonable bail without just cause"?
- Did the TJ err in denying bail in order to maintain confidence in the administration of justice?

Decision: Appeal dismissed

Reasoning:

Does the part of 515(10)(c) authorizing denial of bail ***"on any other just cause being shown"*** **infringe** the presumption of innocence and right "not to be denied reasonable bail without just cause"? **YES**

- This part is unconstitutional because the impugned phrase confers an open-ended judicial discretion to refuse bail
    - This is inconsistent with the presumption of innocence and s 11(e) of the *Charter*

- It is a PFJ that an individual cannot be detained by virtue of a vague legal provision – Parliament *must* lay out narrow and precise circumstances in which bail can be denied
- Conclusion**:** The phrase cannot be justified under s 1 of the *Charter* (no proportionality)

Does the part of 515(10)(c) authorizing denial of bail in order ***"to maintain confidence in the administration of justice***" infringe the right "not to be denied reasonable bail without just cause"? **NO**

- It provides a basis for denying bail not covered by s 515(10)(a) or (b)
- Public confidence is essential to the proper functioning of the bail system and the justice system as a whole, so it is an essential means of denying bail when the recourse to this ground arises
- It complies with 11(e) of the *Charter* because it is sufficiently narrow and precise AND it provides an intelligible standard for debate and for the exercise of discretion
    - Proportionality is met – the means chosen do not go further than necessary to achieve Parliament's purpose of maintaining public confidence in the system

(¶41) Parliament has hedged the provision with important safeguards: a judge can only deny bail if satisfied that, in view of the ***four specified factors and related circumstances***, a reasonable member of the community would be satisfied that denial of bail is necessary to maintain confidence in the administration of justice. The provision is not overbroad but strikes an appropriate balance between the rights of the accused and the need to maintain justice in the community.

Did the TJ err in denying bail in order to maintain confidence in the administration of justice? **NO**

- The bail judge **correctly** considered the relevant factors (including the strength of the Crown's case and the gravity and horrific nature of the crime) found it necessary to deny bail to maintain public confidence

NOT a lawyer → just a reasonable person who gets it

R v St. Cloud

R v St. Cloud, 2015 SCC 27

Facts:

- St. Cloud (S) was charged with aggravated assault (s 268) for assaulting a bus driver with two other people
    - Crown opposed the interim of S
- Justice of the peace who heard the initial application for release found that detention was necessary for the *protection or safety of the public, and to maintain confidence in the administration of justice* (s 515(10)(b) + (c))
    - Preliminary inquiry took place
- The second justice of the peace who heard the application for release found that detention was still justified under s 515(10)(c) – to maintain confidence in the administration of justice
    - S applies for review under s 520 to a Superior Court Judge

        - 520: "If a justice, or a judge of the Nunavut Court of Justice, makes an order under subsection 515(2), (5), (6), (7), or (12) or makes or vacates any order under paragraph 523(2)(b), the accused may, at any time before the trial of the charge, apply to a judge for a review of the order")
    - Superior judge found the detention was not necessary under 515(10)(c) + ordered release of S
- Crown appeals

Issues: Did the reviewing judge err in exercising his role by simply substituting an assessment of evidence for that of justice of peace?

- How should justices of the peace determine whether it is necessary to continue the detention of an accused in order to *maintain confidence in the administration of justice*? What is the proper interpretation?

Decision: Appeal allowed; detention order restored

Reasoning:

Did the reviewing judge err in exercising his role by simply substituting an assessment of evidence for that of justice of peace? **YES**

-

Addresses the tertiary ground of bail

- Back when the Code was amended, the tertiary ground was reserved for only the most heinous offences, but not anymore

R v Antic

R v Antic, 2017 SCC 27

- Antic (A) was arrested and charged with multiple drug and firearm offences
    - A was denied release at his bail hearing
    - A sought review of the detention order
- Bail review judge denied changing the order and said that he would have released him if he could have imposed both a surety and a cash deposit as release conditions
    - This can only be imposed when the accused is from out of the province or does not ordinarily reside within 200 km of the place in which he or she is in custody (515(2)(e))
        - A didn't meet these criteria
- A brought a subsequent bail review and challenged the constitutionality of 515(2)(e)
    - The bail review judge found that the geographical limitation in this section prevented him from granting bail on the terms that he deemed appropriate, the provision violated s 11(e) of the *Charter*

Issue: Does the geographical component in s 515(2)(e) violate s 11(e) of the *Charter*?

- Did the bail review judge err in its reasoning?

Decision: Appeal allowed; declaration of constitutionality ***reversed***

Reasoning:

Did the bail review judge err in its reasoning? **YES**

- Bail review judge erred by requiring a cash deposit with surety (when Antic had offered surety with monetary pledge)
    - Antic could have been offered reasonable bail based on the surety with monetary pledge, so the provision does not have the ***effect*** of denying Antic reasonable bail
- S 11(e) of the *Charter* is not triggered

The Ladder Principle

- The ladder principle is a central part of Canadian law of bail
    - An unconditional release on an undertaking is the default position when granting release
    - Alternative forms of release are to be imposed in accordance with the ladder principle (***release is favoured at the earlier reasonable opportunity and on the least onerous grounds***)
- Crown must show why an alternate form of release is necessary
- Each "rung" of the ladder must be considered individually and must be rejected before moving on to a more restrictive form of release
- Go up the ladder based on the nature of the offence....
- Judges can impose all kinds of bail conditions

R v Myers

R v Myers, 2019 SCC 18

Facts:

- Myers (M) was arrested and charged with several firearm offences
- M sought bail 11 months after he was arrested and charged, but his application was dismissed
    - Judge was not satisfied that any terms of release would adequately address the risk that M would commit other offences or interfere with the administration of justice if released
-

Chapter 7: **Disclosure**

Disclosure refers to the rules and procedures governing the exchange of information between the parties (and sometimes third parties) to facilitate preparation of legal proceedings

The parties are not on an equal footing when it comes to disclosure because of concerns for fairness to the accused and the avoidance of wrongful convictions – this has resulted in an asymmetrical regime – ***the Crown's disclosure obligations are far broader than the accused's***

¶7.1 → the importance, and benefits, of disclosure

There are three distinct sets of rules that govern the disclosure of potentially relevant information to the defence:

1. The Crown has a duty to disclosure relevant information to the defence
2. The *Code* regime resulting the production of disclosure and certain personal records of complainants and witnesses in sexual offence prosecutions
    - This regime applies to records possessed by the Crown or third party
    - The regime recognizes the heightened sensitivity of confidential records in sexual cases as well as society's interest in encouraging the reporting of sexual violence
    - Two stages:
        - The accused must apply to have the material produced in court
        - If successful, the court will decide whether or not to disclosure any portion of it to the defence
        - *R v JJ*
3. The process for obtaining information from third parties that are not subject to the *Code* regime
    - Governed by *O'Connor* and operates in a roughly similar manner as the two-stage *Code* regime

How do we decide which of the three disclosure rules apply?

- Start by determining whether the material sought is covered by the *Code* regime
    - If not, the questions because who of the two other regimes do
- In deciding between the two other regimes, Courts should ask (as per *Gubbins* (2018)):
    - Is the information sought is "in the possession or control of the prosecuting Crown? AND
    - Is the nature of the information being sought such that the police or another Crown entity in possession or control of the information ought to have supplied it to the prosecuting Crown?
- If yes, to either of the above questions, the first party *Stinchcombe* regime applies
- If not, the third-party *O'Connor* regime does

The purpose of both the first party and the third-party regime is to protect the accused's "right to make full answers and defence, while at the same time recognizing the need to place limits on disclosure when required" (*Gubbins* (2018))

Disclosure by the Crown to the Defence (First Party Disclosure)

706-724

- It is the Crown's duty to disclose relevant information to the defence
    - As a result of *Stinchcombe*, this duty is mandated by the *Charter* and is explicitly grounded on the police of preventing the conviction of the innocent
- If the Crown refuses disclosure, it bears the burden to show the information is clearly irrelevant or otherwise protected from disclosure by law

Pre-*Charter*

Even before the *Charter*, it was recognized and accepted that the prosecutor's role is supposed to be non-partisan; however, there really was obligation (minimal disclosure is actually required)

Ethical rules:

- *R v Boucher* (1954) provides the *classic* statement of the prosecutor's special function in the CJS:
    - "Counsel has a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which is civil life there can be none charged with a great personal responsibility. It is efficiently performed with an ingrained sense of dignity, the seriousness, and the justness of judicial proceedings"
- Part of this well-accepted role was the obligation on prosecutors to *bring forward evidence on every material fact known to the prosecution whether favourable tot eh accused or not* [*R v Lemay* (1951)]
- The application of this obligation was subjective, and materiality was typically held by courts to be a matter of *prosecutorial discretion*
    - This led to huge variations in disclosure practices
- ***There is no right to disclosure at the prelim hearing

Code rules:

- Section 603

*Remember → disclosure ≠ particulars (s 587)

- Disclosure deals with the evidence the Crown will rely on in proving allegations
- Particulars relate the material facts the Crown seeks to prove at trial
    - Particulars supplement an indictment with sufficient detail to allow an accused person to adequately prepare a defence

Ethical and *Code* rules were not enough to ensure systemic and fulsome disclosure

- i.e., Donald Marshall Jr. case → one of the factors identified by the Royal Commission that investigates causes of his wrongful conviction was the prosecutor's failure to disclosure exculpatory information

Then, in 1991, the SCC ruled in *Stinchcombe*

Disclosure Under the *Charter* (*Stinchcombe*)

The legal landscape governing the Crown's duty to disclose underwent a revolutionary change with the SCC's landmark decision in *R v Stinchcombe*:

The right to make full answer and defence is a principle of fundamental justice under s 7 of the Charter

- This acknowledgement mad disclosure a *substantive constitutional right* not merely a matter of prosecutorial discretion
    - Because it is a substantive constitutional right, it can be enforced under the remedial provisions of the *Constitution* including s 24 of the *Charter*
- Entitled to know the case to meet!

EXPLICITLY GROUNDED IN PREVENTING WRONGFUL CONVICTIONS

R v Stinchcombe

R v Stinchcombe, [1991] 3 SCR 326

Facts:

- Stinchcombe (S) was a lawyer who was charged with breach of trust, theft, and fraud
- There were some ethical problems, but the question was whether this was a criminal offense
    - A former secretary of S's gave evidence favourable to the defence at the prelim inquiry despite being a Crown witness
- Before trial (after the prelim), the same witness was interviewing by RCMP, and an audio recorded statement was taken
    - During trial the witness was interviewed again, and a written statement was taken
- Defence knew the statements existed, but didn't know of the contents of them
    - Defence's request for disclosure was refused
- During the trial, Crown said they wouldn't call that witness, so defence sought an order that the witness be called, or that the Crown disclose the contents of the statements
    - TJ dismissed the application

Trial: The accused was convicted on breach of trust and fraud

- Conditions stays entered for the theft counts

CoA: Affirmed the convictions

- No reasons provided

Issue: Did the Crown have the obligation to disclose the contents of the witnesses' statements?

Decision: Appeal allowed; new trial ordered; Crown had the obligation to disclose

Reasoning:

Did the Crown have the obligation to disclose the contents of the witnesses' statements? **YES**

- ***The Crown has a legal duty to disclose all relevant information to the defence***
    - "Relevant information" = Crown's discretion [this is reviewable by the TJ who should be guided by the general principle that information should not be withheld if there is a reasonable possibility that this will impair the right of the accused to make full answer and defense]
- Evidence that is in the possession of the Crown are not Crown property to be used to secure a conviction, but instead, they are property of the public to be used to ensure that justice is done
- Defence counsel must bring any failure of the Crown to comply with its duty to disclose to the TJ at the earliest opportunity after becoming aware
    - This allows the TJ to remedy and prejudice to accused (and avoid a new trial)

Initial disclosure should include:

- All relevant information
    - Whether the Crown intends to introduce into evidence or not

    - Whether the evidence is inculpatory or exculpatory
- All statements obtained from persons who have provided relevant information to the authorities (even if not proposed as Crown witnesses)
- If no statements, other information, such as notes, should be

Crown counsel was not justified in refusing disclosure here on the ground that the witness was not worthy of credit (whether a witness is credible is for the TJ to determine)

1. Is there information
2. Is the nature of the information such that it could be relevant

Contents

What must be disclosed?

The Crown's duty to disclose was reiterated and summarized by the SCC in *R v Taillefer; R v Duguay* (2003):

- "The Crown must disclose all relevant information to the accused, whether inculpatory or exculpatory, subject to the exercise of the Crown's discretion to refuse to disclose information that is *privileged or plainly irrelevant*. Relevance must be assessed in relation both to the charge itself and to the reasonable possible defences... Moreover, all statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses"

Relevance

- Very low threshold
- Instead of thinking it as passing along relevant materials, the Court has described this prosecutorial discretion as discretion to withhold only when something is "clearly" and "plainly" irrelevant

Crown should err on the side of inclusion over disclosure (*Chaplin* (1994)) – there are very few downsides to over-disclosure

- SCC has said:
    - "Information will be considered relevant if it... can reasonably be used by the accused either in meeting the case of the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence" (i.e., whether to call evidence)

Inculpatory vs. Exculpatory

- Relevant information must be disclosed regardless of whether it is considered inculpatory or exculpatory
- *Stinchcombe* (1991):
    - The distinction between inculpatory information and exculpatory information is "unworking" and would lead to "interminable controversy at trial"

Witness Statements

- The duty to disclosure extends to witness statements
- In some cases, these statements will simply be recorded in notes taken by police (the notes or copies should be produced)

    - If the police did not memorialize a statement by the witness, disclosure must still be made of the name, address, and occupation of the potential witness along with a "will say" statement that summarizes the potential evidence that the witness could provide (*Stinchcombe*)
- The duty of the Crown to provide full disclosure extends to all *relevant* information in its possession

Protections on Crown information

Beyond information that is clearly irrelevant, the Crown's ability to withhold information in its possession is limited to material protected from disclosure by either

- A form of privilege (this includes the duty to protect the identity of confidential informants)
- A court order or statute (s 278.1 – 278.91)
- The Crown can also choose not to disclose on grounds of specific "public interest" (s 37 of the *Canada Evidence Act*)
- Sexual Offences (s 278.1 – 278.91)

The Crown must disclose:

- Fruits of the investigation
    - The information contained in the police's investigative files (*Gubbins*)
        - This does not include operational records or background information
    - This includes information provided by police regarding the accused's ability to meet the Crown's case, raise a defence, or otherwise consider the conduct of the defence (i.e., material setting out the testing and operating procedures for speed measurement devices p. 712-713)
        - The Court in *R v G.(S.)* noted how this also has salutary effects beyond the accused's right to make full answer and defence (such as enhancing transparency and accountability in policing (p. 713)))

Timing of Disclosure

The disclosure duty is triggered by the defence making a timely request

- If the accused is unrepresented, the court should ensure that they are aware of their right to disclosure

Once the request is made, the disclosure should be provided before the accused is called upon to elect the mode of trial or to plead

- Usually this is provided during the intake procedure
    - This can be as early as the first appearing or in the weeks following
- In serious cases, disclosure can take several months to complete

The Crown retains discretion to delay disclosure of information to protect witnesses or persons who have supplied information to the investigation (*Stinchcombe*)

Summary Convictions → usually the accused is given substantial disclosure at their first appearance

More serious criminal charges → usually involve staggered disclosure over a few months due to ongoing investigations and the preparation of expert reports

- Regardless of this, Crown's duty remains to disclose information as soon as it becomes available and not unnecessarily delay disclosure for tactical reasons

The Crown's obligation to disclose continues through the appeal process (*R v Trotta* (2004)(ONCA))

- There is no onus on the appellant to request further disclosure at this stage
- Should the information come to light after all the appeals have been exhausted, the Crown still has a duty to disclose
    - This evidence may be of assistance in an application for ministerial review on grounds of a miscarriage of justice (s 696.1)

Entities Subject to Stinchcombe

This duty extends not only to material in the hands of prosecutors, but also to information in the possession of the police

- The police have a duty to provide all required material to the prosecution, and the prosecution has a corresponding obligation to request and procure the information from the police (*R v McNeil*)
    - The police + the prosecution are treated as a single entity for these purposes

However,

- *McNeil* →
    - Not all state authorities constitute a single entity
        - The Crown disclosure obligations under *Stinchcombe* do not go as far as requiring it to "inquire of every department of the provincial government and federal government and every police force whether they are possession of material relevant to the accused's case"
- Crown entities other than the prosecuting Crown are considered third-parties under the *O'Connor* production regime

Crown's Obligation to Preserve Evidence

716

The obligation on the Crown to disclose all relevant information in its possession or under is control imposes a further duty on prosecutors and police to preserve relevant evidence (*R v La* (1997))

- Where the Crown is unable to comply with its disclosure obligations because potentially relevant evidence has been lost or destroyed, s 7 and s 11(d) of the *Charter* will be violated unless the Crown can show that the loss was neither deliberate nor the product of unacceptable negligence (*R v La* (1997))
    - Did the police and Crown take reasonable steps to preserve the evidence?
- Spectrum of how bad the consequences will if the evidence is destroyed (speculative value and evidence destroyed, not as bad)

Example: *R v Hersi* (2019)(ONCA) → deleted text messages

Electronic Disclosure

Disclosure must be given in a timely, accessible manner (a way that the accused can use to make full answer and defence)

The distribution of disclosure has evolved from papers and binders to bytes and hard drives

- Disclosure can easily be transferred digitally
    - But apparently, some defence lawyers still request in the form of paper

R v Piaskowski (2007)(MBQB) → Court set out the following useful principles in dealing with disclosure in electronic form:

1. .
2. ..
3. ...
4. The Crown must disclose materials in a manner which the accused can reasonably access.
5. Where an accused is represented by counsel; electronic disclosure is not objectionable merely because of counsel's lack of computer skills unless it can be shown that access to the materials would be beyond the competence of the average reasonably skilled person.
6. Where the Crown wishes to make electronic disclosure as opposed to paper disclosure, the Crown has a further obligation to assist counsel lacking familiarity with the software utilized, and an unrepresented accused who *bona fide* has limited or no computer skills with reasonable access to materials that form part of the disclosure. This further obligation may range from training on the use of the software through the provision of computer equipment and may include the obligation to provide paper copies of all disclosure. This would depend on the circumstances of each case.
7. Electronic disclosure must permit counsel to be able to print copies of the documents and images in a readable manner so as to be able to communicate effectively with his or her client.
8. The expense to the Crown of providing hardcopies of the documents is a factor the court can take into account in determining whether electronic disclosure is reasonable, but it cannot trump the accused's right to a fair trial.
9. If the cost of producing hardcopies of the electronic documents interferes with the accused's ability to make full answer and defence, the court can order the Crown to provide hardcopies of electronic disclosure at Crown expense.

Physical disclosure – must be given access if needed (and experts may need access to them to examine them – held in secure facilities)

Judicial Review of Non-Disclosure

The withholding of information by the Crown is reviewable by the court (*Stinchcombe*)

- If the Crown claims that information is being withheld based on privilege, then the accused must seek disclosure based on an exception to that privilege (i.e., innocence at stake)

The Test (*McClure*, 2001 SCC 14)

First stage: **threshold test** – getting the issue on the table:

1. No other source
    - Ask whether or not there is any other source of the information that is sought from the lawyer-client privilege?
    - If there is another source for the same information, then the test will fail at this stage
2. No other way to raise reasonable doubt
    - The accused's is required to show *without the information that is protected by lawyer-client privilege*, there is no other way to raise a reasonable doubt
    - If there is other information that is available that could raise a reasonable doubt, then the test will fail at this stage

If we meet the first two criteria at the threshold stage, we go onto to determine whether innocence is truly at stake...

Second stage: **innocence at stake**:

1. Production ("could raise")
    - Must decide whether or not the protected material should be produced to the court for examination
        - There is an evidentiary burden here!
        - Must show that the information *could* raise a reasonable doubt
    - If this step of the test is met, then the information will be produced to the court (not disclosed to the defence yet) and the court will decide if the information is likely to raise a reasonable doubt
2. Disclosure ("likely to raise")
    - After the production of the information, the court will decide if the information is *likely* to raise a reasonable doubt about the accused's guilt
    - If yes = privilege is breached and information will be disclosed to the defence

In cases where the Crown does not disclosure because it believes the material is clearly irrelevant, Sopinka suggested the following procedures on behalf of the Court in *R v Chaplin* (1994):

"... the Crown must justify non-disclosure by demonstrating either that the information sought is beyond its control, or that it is clearly irrelevant or privileged. The trial judge must afford the Crown an opportunity to call evidence to justify such allegation of non-disclosure. As noted in *Stinchcombe* at 12:

> This may require not only submissions but the inspection of statements and other documents and indeed, in some cases, *viva voce* evidence. A *voir dire* will frequently be the appropriate procedure in which to deal with these matters."

If the non-disclosure relates to material the existence of which is in dispute:

"... the defence must establish a basis which could enable the presiding judge to conclude that there is in existence further material which is potentially relevant... The existence of the disputed material must be sufficiently identified not only to reveal its nature but also to enable the presiding judge to determine that it may meet the test with respect to material which the Crown is obliged to produce...

Although the obligation cast upon the defence which I have characterized as "a basis" is in the nature of an evidentiary burden, I prefer not to call it that because it can, and in many cases will, be discharged not by leading or pointing to evidence but by oral submissions of counsel without the necessity of a *voir dire*..."

Remedy for Breach of Disclosure Right

A failure to provide timely disclosure can contribute to a violation of 11(b) → unreasonable delay in an accused being tried will result in a stay of proceedings (*R v Godin* (2009))

- More often, late disclosure will lead to claims of a breach of an accused's right to make full answer and defence as guaranteed by s 8
    - The accused must demonstrate "actual prejudice to their ability to make full answer and defence" to be entitled to a remedy pursuant to s 24(1) (*O'Connor*)

→ the most common remedies for such violations are adjournments and further disclosure orders (*R v Bjelland* (2009))

- Costs can be awarded when it's flagrant

Proof of malice is not required for a *Charter* remedy to be sought

- A cause of action will lie where the Crown, in breach of its disclosure obligations, causes harm to the accused by intentionally withholding information when it knows, or would reasonably be expected to know, that the information is material to the defence and that the failure to disclose will likely impinge on the accused's ability to make full answer and defence (*Henry v B.C. (AG)* (2015))

In exceptional cases, a TJ may exclude evidence for late disclosure where its admission would result in an unfair trial or would otherwise undermine the integrity of the justice system (*Bjelland*)
In only the clearest case will a stay of proceedings be appropriate – where the prejudice to the accused's ability to make full answer and defence or to the integrity of the justice system is irremediable (*O'Connor)*

What about when the appellant seeks a new trial on appeal by proffering fresh evidence not available to the defence at trial due to the Crown's failure to disclose (p 723)

- *Certiorari* cannot be used to seek interlocutory review of a disclosure order

Inadvertent Disclosure

There may be occasions when defence counsel obtains privileged information inadvertently disclosed by the Crown

- In these cases, the defence must return the material immediately upon discovering the information is possibly privileged and inadvertently disclosed
- Inadvertent disclosure of privileged information does not waive privilege

R v Ward (2016)(ONCA) →

"While waiver of solicitor-client privilege can be express or implied, whether privilege has been waived by inadvertent disclosure is a fact-specific inquiry, which may include consideration of the following factors:

- The way in which the documents came to be released;
- Whether there was a prompt attempt to retrieve the documents after the disclosure was discovered;
- The timing of the discovery of the disclosure;
- The timing of the application;
- The number and nature of the third parties who have become aware of the documents;
- Whether maintenance of the privilege will create an actual or perceived unfairness to the opposing party; and
- The impact on the fairness, both actual or perceived, of the processes of the court."

Inadvertent disclosure does not automatically require the defence lawyer who received the material to withdraw from the case – if defence counsel has reason to believe that the exposure to the information has put counsel in a conflict between their obligation to the client and the potential risk of relying on privileged information, then counsel may seek to be removed from the case (*R v Nguyen* (2015)(ABQB))

The Statutory Scheme for Sexual Offences

Not in Syllabus – 725-730

In 1997, Parliament enacted legislation to govern applications by the accused for the production of personal records relating to complaints or other witnesses in sexual offence prosecutions

- These provisions displace both *Stinchcombe* and *O'Connor*, but only for situations covered by the legislation (includes fresh evidence on appeal)

After *O'Connor*, Parliament created a procedure that safeguarded the privacy interests of complainants + witnesses while not unduly hindering an accused's ability to make full answer and defence

- The constitutional of this legislation was upheld by the SCC in *Mills* (1999):

R v Mills

R v Mills, [1999] 3 SCR 668

Facts:

- Mills (M) was charged with sexual assault and unlawful sexual touching
- On the day of trial, Crown provided the accused with a statement of the complainant
- Defence obtained partial disclosure of therapeutic records and notes relating to the complainant that were in the possession of a counselling organization
- Defence later sought production of records relating to the complainant held by a psychiatrist and a child and adolescent service association
- The *Code* was then changed mid-proceedings

The accused was charged with one count of sexual assault and one count of unlawful sexual touching. On the scheduled day of the trial, the Crown provided the accused with a statement of the complainant L.C. Counsel for the accused also obtained partial disclosure of therapeutic records and notes relating to the complainant that were in the possession of a counselling organization. Counsel for the accused later sought production of records relating to the complainant held by a psychiatrist and a child and adolescent services association. The trial judge then informed the parties that on May 12, 1997, Bill C-46 was proclaimed into force and amended the *Criminal Code* to include ss. 278.1 to 278.91, which deal with the production of records in sexual offence proceedings. The accused brought a constitutional challenge attacking the validity of these provisions on the basis that they violated ss. 7 and 11(*d*) of the *Canadian Charter of Rights and Freedoms*. The trial judge concluded that the new *Criminal Code* provisions infringed the accused's rights under ss. 7 and 11(*d*) of the *Charter* and, in a separate judgment, ruled that the impugned provisions were not saved by s. 1 of the *Charter*.

Held (Lamer C.J. dissenting in part): The appeal should be allowed. Sections 278.1 to 278.91 of the *Criminal Code* are constitutional.

The success of Parliament in creating this procedure is a consequence of the SCC's own dexterity in interpreting the legislation to give greater leeway to the defence than the plain language of the statute would have suggested

Prerequisites

The legislation applies *only if two prerequisites are met*

1. Applies only to records containing person information for which there is a "reasonable expectation of privacy" (medical, psychiatric, therapeutic, counselling, educational, employment, child welfare, adoption and social services records, as well as personal journals and diaries)
    - <u>*Does not include*</u>: "records made by persons responsible for the investigation or prosecution of the offence" even if they contain sensitive information
        - This does not extend to "police occurrence reports" – record interactions with complainants or witnesses obtained during investigations of persons other than the accused (there are subject to the *Code* regime)
    - ****Statements collected from complainants and other witnesses as part of the police's investigation of the accused as subject to *Stinchcombe* (even for sexual offences)
2. The statutory regime applies only to prosecutions of the sexual offences enumerated in section 278.2 of the *Code*
    - In contrast to *O'Connor*, the legislation applies not only to records in the hands of third parties, but also those in possession or control of the Crown unless the "complainant or witness to whom the record relates has expressly waived the application of the legislation" (s 278.2(2))

- SO, if the prosecutor comes into possession or control of such record and the complainant or witness does not waive their privacy interest in it, the prosecutor has to notify the accused that the record is in the prosecutor's possession but "not disclosure the record's contents" (s 278.2(3))
    - If the accused wants to access the record, they have to bring an application for production

Procedure + Decision Standards

When the defence seeks information covered by the regime, the first step is to serve a formal application on the Crown (with at least 60 days' notice), the person who has possession or control of the record, the complainant or witness, and any other person to whom the record relates (278.3(5))

- The accused must also serve a subpoena on the person who has possession or control of the records at the time the application is served (s 278.3(5))
- The application can only be brought before the trial court, not before a judge conducting a preliminary inquiry

A hearing will then be held *in camera* (no jury or public) to decide whether to order the person who has possession of the record to produce it to the court for review by the judge (s 278.4(1))

- The accused bears the burden of demonstrating that the record contains information that is "likely relevant" to an issue at trial or the competence of a witness to testify AND that the production of the record is "necessary in the interest of justice"
- The complainant witness, or other person who has a privacy interest in the record has the right to be represented by counsel and make submissions, but are not compellable witnesses

The accused is required to set out the specific grounds upon which the record is sought

- S 278.3(4) contains several assertions that "on their own" can't establish that a private record is relevant:

Criminal Code of Canada

Insufficient grounds

278.3(4) Any one or more of the following assertions by the accused are not sufficient on their own to establish that the record is likely relevant to an issue at trial or to the competence of a witness to testify:

(a) that the record exists;

(b) that the record relates to medical or psychiatric treatment, therapy or counselling that the complainant or witness has received or is receiving;

(c) that the record relates to the incident that is the subject-matter of the proceedings;

(d) that the record may disclose a prior inconsistent statement of the complainant or witness;

(e) that the record may relate to the credibility of the complainant or witness;

(f) that the record may relate to the reliability of the testimony of the complainant or witness merely because the complainant or witness has received or is receiving psychiatric treatment, therapy or counselling;
(g) that the record may reveal allegations of sexual abuse of the complainant by a person other than the accused;
(h) that the record relates to the sexual activity of the complainant with any person, including the accused;
(i) that the record relates to the presence or absence of a recent complaint;
(j) that the record relates to the complainant's sexual reputation; or
(k) that the record was made close in time to a complaint or to the activity that forms the subject-matter of the charge against the accused.

- The accused must point to some "case specific evidence or information" that is not readily available to the defence or has potential impeachment value (*Mills*)
- Inconsistencies in the evidence of a complainant respecting only minor matters will not meet the likely relevant test (*R v Snipe* (2003)(ONCA))
- An accused cannot rely on speculative or stereotypical assumptions to satisfy the onus (*R v Batte* (2000)(ONCA))

Despite this being hard given the defence hasn't seen the document, the SCC in *Mills* held there is a sufficient evidentiary basis from which the accused can draw assistance

- Crown disclosure
- Defence witnesses
- The cross-examination of the Crown witnesses at the preliminary inquiry and trial
- Expert evidence

Before ordering production of the records to the court, the TJ must be satisfied that such an order is "necessary in the interests of justice" (s 278.5(1)(c))

Criminal Code of Canada

Factors to be considered
278.5(2) In determining whether to order the production of the record or part of the record for review pursuant to subsection (1), the judge shall consider the salutary and deleterious effects of the determination on the accused's right to make a full answer and defence and on the right to privacy, personal security and equality of the complainant or witness, as the case may be, and of any other person to whom the record relates. In particular, the judge shall take the following factors into account:
(a) the extent to which the record is necessary for the accused to make a full answer and defence;
(b) the probative value of the record;
(c) the nature and extent of the reasonable expectation of privacy with respect to the record;
(d) whether production of the record is based on a discriminatory belief or bias;

(e) the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates;
(f) society's interest in encouraging the reporting of sexual offences;
(g) society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and
(h) the effect of the determination on the integrity of the trial process.

The test requires a balancing of the salutary and deleterious effects on the accused's right to make full answer and defence and on the right to privacy and equality of the person to whom the records relate (the TJ should err on the side of caution in close cases and order production to the Court)

After review of the document, the judge will determine whether, and to what extent, the records should be disclosed to the accused (using the same factors as above) (s 278.7(2))

If production is ordered, the judge may impose conditions on the record:

Criminal Code of Canada

Conditions on production
278.7(3) If the judge orders the production of the record or part of the record to the accused, the judge may impose conditions on the production to protect the interests of justice and, to the greatest extent possible, the privacy, personal security and equality interests of the complainant or witness, as the case may be, and of any other person to whom the record relates, including, for example, the following conditions:
(a) that the record be edited as directed by the judge;
(b) that a copy of the record, rather than the original, be produced;
(c) that the accused and counsel for the accused not disclose the contents of the record to any other person, except with the approval of the court;
(d) that the record be viewed only at the offices of the court;
(e) that no copies of the record be made or that restrictions be imposed on the number of copies of the record that may be made; and
(f) that information regarding any person named in the record, such as their address, telephone number and place of employment, be severed from the record.

If the judge refuses to order production to the accused, the record will be kept in a sealed package by the court until the expiry of the time for any appeal

- After that period, the record will be returned to the person lawfully entitled to its possession or control

Third Party Production (*O'Connor* Regime)

731-736

Where the defence seeks information in the possession and under the control of someone other than the Crown (and the information is not covered by the *Code* regime for sexual offences), the defense has two options:

1. Ask the third-party to voluntarily provide the information
2. If (1) doesn't work, the accused can apply for an order compelling its production to the Court under the common law *O'Connor* regime
    - If (2) is successful, the court will review the information and decide whether to release it (in whole or part) to the defence
        - This is because it is up to the accused to satisfy a judge that the information is likely to be relevant

*This procedure applies to all records not in possession of the Crown (not simply those of a personal nature) *(R v MB)* (1990)(ONCA)
**The SCC clarified that any such record is at least initially subject to the *O'Connor* process, even if it is later determined not to attract a reasonable expectation of privacy (*R v McNeil (2009)*)

O'Connor is a common law application for the court to review

- Affidavit first, what is going to be mentioned
- Specific record
- This is where it is
- This is why I need (likely relevant to an issue at trial)
- Written and oral argument

The difference between sexual offence provisions and the regime in *O'Connor* is that a presumption of privacy does not attach in respect of all third-party records that fall outside the *Code's* purview

- The "likely relevance" standard under the *Code* serves to counter the myths about sexual assault victims and the usefulness of private records in sexual assault proceedings

In contrast**, as mentioned in *McNeil*, the "likely relevance" threshold under *O'Connor* is "intended to rather to screen applications to ensure the proper use of statute authority** in compelling production of third-party records and to establish the appropriateness of the application as to avoid squandering scarce judicial resources"

*Third-party production at the appellate level is also governed by the principles set out in *O'Connor* with appropriate modifications for the appeal process

1st Stage: Production to the Court for Review

- An accused has the onus of satisfying a judge that the information is "likely to be relevant"
    - The judge must be satisfied that there is a "reasonable possibility that the information is logically probative to an issue at trial or the competent of a witness to testify"

- The Court in *O'Connor* acknowledged that because the accused has not seen the documents, the initial threshold to provide a basis for production can be satisfied by counsel's oral submissions standing alone
    - The burden is not onerous → likely relevance is lower than true relevance

R v Gubbins (2018) → the likely relevance threshold is a "first-step inquiry designed to prevent fishing expeditions, but nothing more"

Material that is relevant to the credibility or reliability of a complainant is particularly important in a case where the Crown's case hinges entirely upon that one witness

- Non-disclosure of that evidence in such a case impairs the core of the accused's right to make full answers and defense by depriving the accused of the only tools available to him or her to test the Crown's case through cross

Procedure (*O'Connor*):

- The accused is to bring a formal, written application supported by an affidavit setting out the grounds for production
- The notice must be given to the third-parties in possession of the documents
    - + to any persons who have a privacy interest in the records
- The custodian of the records must be subpoenaed to ensure the records are brought to court
- The application should be made to the TJ

2nd Stage: Production by the Court to the Accused

If the accused can demonstrate "likely relevance", the third-party record holder can be ordered to produce the records for inspection by the judge to determine whether production should be ordered to the accused

- In making that determination, the judge must examine and weigh the salutary and deleterious effects of a production order and determine whether a non-production order would constitute a reasonable limit on the ability of the accused to make full answer and defence
- In balancing the competing rights in question, the following factors should be considered:
    - (1) the extent to which the record is necessary for the accused to make full answer and defence;
    - (2) the probative value of the record in question;
    - (3) the nature and extent of the reasonable expectation of privacy vested in that record;
    - (4) whether production of the record would be premised upon any discriminatory belief or bias and
    - (5) the potential prejudice to the complainant's dignity, privacy or security of the person that would be occasioned by production of the record in question"

(*O'Connor* ¶30 + ¶ 31)

**After Parliament modified the *O'Connor* regime for sexual assault cases, the SCC recognized that (4) and (5) were unlikely to be of assistance in other contexts, but they are still there (*McNeil* (2009))

Any additional submissions by counsel at this stage should be made *after* the TJ has had an opportunity to review the records

- The TJ can then direct specific questions to counsel about the issues raised by that inspection
- The private information that is not relevant to an issue at trial should be edited out of the copies produced to the defence to minimize any possible prejudice to personal dignity and privacy of the witness

Discipline Records of Police Witnesses

735

The Crown has a duty to disclose disciplinary records relevant to the credibility of officers where the police misconduct could reasonably impact the case against the accused

R v McNeil (2009) →

[57] The Ferguson Report concluded that leaving the entire question of access to police disciplinary records to be determined under the *O'Connor* regime for third party production "is neither efficient nor justified" (p. 15). In order to assist in bridging the gap between first party disclosure and third party production, the Ferguson Report made a number of recommendations, including the automatic disclosure by the police upon request by the Crown of the following information regarding acts of misconduct by a member of the Toronto Police Service who may be a witness or who was otherwise involved in a case before the court (at p. 17):

a) Any conviction or finding of guilt under the *Canadian Criminal Code* or under the *Controlled Drugs and Substances Act* [for which a pardon has not been granted].
b) Any outstanding charges under the *Canadian Criminal Code* or the *Controlled Drugs and Substances Act*
c) Any conviction or finding of guilt under any other federal or provincial statute.
d) Any finding of guilt for misconduct after a hearing under the *Police Services Act* or its predecessor *Act*.
e) Any current charge of misconduct under the *Police Services Act* for which a Notice of Hearing has been issued.

[58] The Ferguson Report recommended that upon receiving this information from police, the Crown act as "gate-keeper", sorting out what parts of this material, if any, should be turned over to the defence in compliance with the Crown's *Stinchcombe* obligation of disclosure. The Ferguson Report made the further recommendation that any concerned officer who was the subject of disciplinary records produced to the Crown be notified in writing and be given the opportunity to make submissions to the Crown.

McNeil disclosure → records of police disciplinary records of any officer who may be called as witness

Breathalyzer Maintenance Records

Disclosure applications of historical maintenance records for breathalyzer instruments have been held to fall under the third-party *O'Connor* regime (*R v Gubbins* (2018))
Gibbins →

- The Court observed that the defence will rarely be able to show the likely relevance of these records to the issue of determining whether an instrument was malfunctioning or operated improperly
- The Crown presented expert evidence to the contrary – Court found this persuasive
- Because this is a technical question rather than a doctrinal one, disclosure could be ordered in future proceedings if the accused "leads persuasive evidence that maintenance records are likely relevant"

**"Time-of-Test" records that are contemporaneous with the breath testing that led to the criminal charge are a part of the "fruits of the investigation" and should be disclosed by way of the first party *Stinchcombe* disclosure

Disclosure by the Defence

736 – 744
The defence generally has no obligation to disclose the information to the Crown
Stinchcombe → the suggestion that disclosure "should be reciprocal may deserve the consideration by this Court in the future but it is not a valid reason for absolving the Crown of its duty"

- The lack of duty for disclosure is justified by counsel's purely adversarial role toward the prosecution

However, there are important exceptions (where Defence has the duty to disclose):

Incriminating Physical Evidence

- A lawyer who actively conceals incriminating evidence invites both criminal liability and professional discipline
- While discussions about incriminating evidence are protected by solicitor-client privilege, *physical evidence is not protected by solicitor-client privilege*

Although it is an inevitable dilemma for a defense lawyer, they cannot withhold production on the basis of solicitor-client privilege
**this doesn't arise very often according to O'Neill

R v Murray (2000)(ON) (Bernardo's counsel) → Court found that a lawyer acted improperly in removing and maintaining custody of incriminating video recordings made and hidden by his client

Alibi

A failure to disclose an alibi may have negative consequences for the accused at trial

- An adverse inference can be drawn against the accused if the defence does not give the Crown timely and adequate notice of the alibi before trial (*R v Cleghorn* (1995))
    - In these cases, the TOF will be instructed to approach the evidence with caution (diminishing its weight)
- The rationale for this rule is that false alibis are easily procured and difficult to disprove

*Technically this is a rule of evidence, but from a tactical standpoint, it effectively requires the defense to disclose any alibi evidence that it plans to present at trial (*R v Noble* (1997))

Constitutional Applications

Defence has an obligation to give the Crown advance notice of any constitutional relief that will be sought

- If an accused intends to seek the exclusion of evidence or the invalidation of a statute at their trial, notice must be served on the Crown and filed with the Court

Expert Evidence

The *Code* imposes a disclosure obligation on ***both sides*** in criminal litigation when a party intends to call expert evidence as part of its case

Criminal Code of Canada

Notice for expert testimony

(3) For the purpose of promoting the fair, orderly and efficient presentation of the testimony of witnesses,

a) a party who intends to call a person as an expert witness shall, at least thirty days before the commencement of the trial or within any other period fixed by the justice or judge, give notice to the other party or parties of his or her intention to do so, accompanied by

(i) the name of the proposed witness,

(ii) a description of the area of expertise of the proposed witness that is sufficient to permit the other parties to inform themselves about that area of expertise, and

(iii) a statement of the qualifications of the proposed witness as an expert

b) in addition to complying with paragraph (a), a prosecutor who intends to call a person as an expert witness shall, within a reasonable period before trial, provide to the other party or parties

(i) a copy of the report, if any, prepared by the proposed witness for the case, and

(ii) if no report is prepared, a summary of the opinion anticipated to be given by the proposed witness and the grounds on which it is based; and

c) in addition to complying with paragraph (a), an accused, or his or her counsel, who intends to call a person as an expert witness shall, not later than the close of the case for the prosecution, provide to the other party or parties the material referred to in paragraph (b).

If notices not given
(4) If a party calls a person as an expert witness without complying with subsection (3), the court shall, at the request of any other party,

(a) grant an adjournment of the proceedings to the party who requests it to allow him or her to prepare for cross-examination of the expert witness;
(b) order the party who called the expert witness to provide that other party and any other party with the material referred to in paragraph (3)(b); and
(c) order the calling or recalling of any witness for the purpose of giving testimony on matters related to those raised in the expert witness's testimony, unless the court considers it inappropriate to do so.

- While 657.3 doesn't expressly given the TJ the authority to refuse to allow the expert to testify, a TJ retains broad discretion to determine the admissibility of evidence as an aspect of controlling the trial process
    - Example: *R v Doonanco* (2020)
        - SCC held the TJ should've precluded a Crown rebuttal expert from testifying because the Crown did not provide a copy of the report to defence until after the defence had called its own expert witness on the issue and closed its case

**If you have late expert evidence, *tell the Court* right away

Defence Already in Possession of Third-Party Records

Until recently, where the defence came into possession of a record concerning a complainant without having to make an application to obtain it under the *Code* or *O'Connor*, it was free to use this evidence in any manner consistent with the law of evidence

- The defence had no obligation to disclose this evidence to the Crown before seeking to use it at trial
- These records would typically be admissible as long as they were relevant and prejudice value > probative value
- *R v Shearing* (2002) →
    - The accused came into possession of the complainant's diary from many years before the trial
    - The Court held the admissibility of the diary was governed by the admissibility of defence evidence at the time
        - The TJ could have limited cross-examination on the diary on if the prejudice to the complainant's privacy interests caused by the extended cross-examination would substantially outweigh its probative value

Then, Parliament modified this procedure with respect to certain enumerated sexual offences in 2018

**If the record contains information that would engage s 276 (twin myths) then admissibility requires meeting the conditions in 276(2)

- In all other cases, the evidence will be considered:

Criminal Code of Canada

Admissibility — accused in possession of records relating to complainant

278.92(1) Except in accordance with this section, no record relating to a complainant that is in the possession or control of the accused — and which the accused intends to adduce — shall be admitted in evidence in any proceedings in respect of any of the following offences or in any proceedings in respect of two or more offences at least one of which is any of the following offences:

(a) an offence under section 151, 152, 153, 153.1, 155, 160, 170, 171, 172, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 286.1, 286.2 or 286.3; or

(b) any offence under this Act, as it read from time to time before the day on which this paragraph comes into force, if the conduct alleged would be an offence referred to in paragraph (a) if it occurred on or after that day.

Requirements for admissibility

(2) The evidence is inadmissible unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 278.93 and 278.94,

(a) if the admissibility of the evidence is subject to section 276, that the evidence meets the conditions set out in subsection 276(2) while taking into account the factors set out in subsection (3); or

(b) in any other case, that the evidence is relevant to an issue at trial and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

Factors that judge shall consider

(3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account

(a) the interests of justice, including the right of the accused to make a full answer and defence;

(b) society's interest in encouraging the reporting of sexual assault offences;

(c) society's interest in encouraging the obtaining of treatment by complainants of sexual offences;

(d) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;

(e) the need to remove from the fact-finding process any discriminatory belief or bias;

(f) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;

(g) the potential prejudice to the complainant's personal dignity and right of privacy;

(h) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and

(i) any other factor that the judge, provincial court judge or justice considers relevant.

This does not include records that an accused has come to possess or control through Crown disclosure or through a successful *Mills* application

S 278.93 addresses various matters of procedure concerning applications for hearing to decide the admissibility of evidence under section 278.92(1) or 276(2), including:

- the need for an application
- the formal requirements
- the requirement for a preliminary *in camera* (no jury or public) hearing to consider the application
- after determining that the accused has met the prerequisites for admissibility, the authority of the court to embark on an admissibility hearing
    - If the judge decides to hold an admissibility hearing, s 278.94 requires that it also be held *in camera,* the complainant is not compellable, the complainant has the right to represented by counsel and be informed of that right, and that the judge must provide reasons for the admissibility decision

The new statutory scheme was upheld in *R v JJ* (2022)

Chapter 8: Prosecutorial Function

Your reputation is everything
If you have integrity, that's all that matters

Prosecutors play a critical role in the CJS – they conduct the Crown's case at preliminary proceedings, trial, sentencing hearing, and appeals
Crown has various discretionary decisions such as:

- Whether or proceed with or continue charges
- Enter into plea agreements
- Proceed by way of summary conviction or indictment (in the case of hybrid offences)
    - To prefer direct indictments

They also provide legal advice during criminal investigations

Unlike defense lawyers who ethically mandated to be zealous advocates for their clients, Prosecutors duty is to ensure that justice is done

- Their role is to be a "minister of justice" (*R v Puddick* (1865))

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

efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings" (*R v Boucher* (1954))

- ***Justice required that prosecutors seek the truth while respect the legal and constitutional rights of the accused and others involved in the case***

**Prosecutors are not entirely non-adversarial

- *R v Regan* (2002) →
    - "Commitment to the case, belief in the allegations, and the desire to see justice done not incompatible with objectivity and fairness"

**Prosecutors must balance these responsibilities

R v Boucher

R v Boucher, [1954] SCJ No. 54

[HeadNote Info]

The appellant was found guilty of murder. His appeal to the Court of appeal was unanimously dismissed. He now appeals to this Court, by special leave, on grounds of misdirection with reference to reasonable doubt, circumstantial evidence and inflammatory language used by Crown counsel in his address to the jury.

Held (Taschereau and Abbott JJ. dissenting), that the appeal should be allowed, the conviction quashed and a new trial ordered.

1. There was no misdirection in the trial judge's charge with respect to the doctrine of reasonable doubt.
    - *Per* Kerwin ,C.J., Kellock, Estey, Locke, Cartwright and Fauteux JJ.: Difficulties would be avoided if trial judges would use the well known and approved adjective "reasonable" or "raisonnable" when describing that doubt which is sufficient to require the jury to return a verdict of not guilty.
2. There was misdirection by the trial judge with reference to the rule as to circumstantial evidence. Neither the language of *Rex v. Hodge* ((1838) nor anything remotely approaching it was used.
    - *Per* Kerwin C.J. and Estey J.: Even though expressions other than the ones used in the *Hodge* case are permissible, a trial judge should use the well settled formula and so obviate questions arising as to what is its equivalent.
3. Crown counsel exceeded his duty when he expressed in his address by inflammatory and vindictive language his personal opinion that the accused was guilty and left with the jury the impression that the investigation made before the trial by the Crown officers was such that it had brought them to the conclusion that the accused was guilty.

    It is improper for counsel for the Crown or the defence to express his own opinion as to the guilt or innocence of the accused. The right of the accused to have his guilt or innocence decided upon the sworn evidence alone uninfluenced by statements of fact by the Crown prosecutor, is one of the most deeply rooted and jealously guarded principles of our law.

4. Per Kerwin C.J., Rand, Kellock, Estey, Cartwright and Fauteux JJ.: It could not be safely affirmed that had such errors not occurred the verdict would necessarily have been the same.

Prosecutorial Authority

Provincial Prosecutions

Most criminal prosecutions are conducted by provincial prosecutors (c-46 *Code*)

- Authority to prosecute most *Code* offences if given to the Attorney General of the province that the proceedings are taken
    - AG then delegate to the provincial Crown counsel
    - Provinces have (to varying degree) given authority to provincial prosecutors a measure of independent and autonomy from the AG
        - AG still remains responsibility for prosecutions conducts by the provincial Crowns

Federal Prosecutions

Federal government also plays a role in criminal prosecutions

- The federal prosecutorial power is with the AG Of Canada (including their lawful deputy)

Federal prosecutions are conducted by counsel from the Public Prosecution Service of Canada (a quasi-independent body responsible to the AG of Canada)

- Federal Crowns are responsible for prosecuting offences in the territories and most offences under federal enactments other than the *Code*
    - *Controlled Drugs and Substances Act*
    - *Fisheries Act*
    - *Cannabis Act*
    - *Income Tax Act*
    - *Immigration and Refugee Protection Act*
    - **Both federal and provincial Crowns prosecute cases where drug or other non-*Code* federal charges are combined with the same indictment with *Code* charges (how the case is ran is determined by various formal/informal agreements between offices)
- i.e.,
    - Offences of conspiring, attempting or counseling the contravention of such statutes (which are technically *Code* offences)
- *Code* provides that such offences, the AG is responsible for "proceedings commenced at the instance of the Government of Canada and confused by or on behalf of that Government"
    - This means that the provincial Crowns can prosecute non-*Code* federal offices if the AG does not do so
    - Even if the provincial law enforcement officials place these charges, Federal prosecutors can still conduct the case

    - Federal prosecutors can prosecute *Code* offences under a specific grant of authority from a provincial AG

Federal AG has concurrent jurisdiction with their provincial counterparts over certain *Code* offences of ***national or international concern

- Federal Crown can take charge of the prosecution of any federal offence with these concerns
- Some *Code* offences cannot be prosecuted without the federal AG's consent – whether it is conducted by federal or provincial (i.e., crimes in space, assisting a Canadian Forced deserter, accepting bribes by a judge, etc.)

Private Prosecutions

Although private parties can lay information and in theory conduct the ensuing prosecution, in practice, Crown prosecutors *almost always* exercise their power to take control of the proceedings (this includes a discretion to discontinue the proceedings – this power is recognized at various levels ¶8.9)

Prosecutors' Role in Criminal Investigations

Police and other law enforcement officials (who are independent of both AG's and prosecutor's office) have the responsibility of investigation of crimes

- Prosecutors participate in the investigative process *before* and *after* the charges are laid

R v Regan (2002) →

- The accused (former premier of NS) was charged with sexual offences spanning many years and involving many women
- Before charges were laid, a prosecutor interviewed several alleged victims (who had previously been interviewed by police) to help them decide whether to become involved in the case, assess their credibility as witnesses, and prepare for the preliminary inquiry
    - Regan argued that these interviews violated the principle of police independent and constituted an abuse of process
- SCC concluded that prosecutors' independent and objectivity are not necessarily compromised by conducting pre-charge interviews
    - It is not improper for the prosecutors to discuss potential charges with police, even in jurisdictions where police may lay them without prosecutorial approval
        - Interviews and discussions may be especially helpful in sexual assault cases by helping to screen out "fruitless complaints," "encouraging proper charges to go forward," and by "signalling to the larger society that complainants can bring sexual assault charges to the courts without further undue trauma, and that where charges are properly laid, they will be prosecuted"

Prosecutors also assist and cooperate with police in other aspects of the criminal investigation:

- Provide advice on the legality and constitutionality of investigative methods

- Apply for (or help the police apply for) certain types of search warrants, peace bounds, and restraint orders
- Work closely with police when investigating sophisticated criminal and terrorist enterprises that are regional, national or international in scope
    - I.e., federal prosecutors have been assigned to work in integrated units with police and other law enforcement and intelligent agents to investigate organized crime, terrorism, and offences involving financial markets

Charging Decisions

The Decision to Prosecute

The most important decision that prosecutors make is whether to proceed or discontinue charges

- The predominant factor determining conviction is prosecutorial discretion (they only prosecute when conviction is likely)

In AB, the initial decision to charge a person with a criminal offence is made by the police (exceptions: BC, QC, NB)

Pre-charge prosecutorial screening > post-charge prosecutorial screening

Pre-charge screening jurisdictions (not AB):

- Crowns will often conclude that the evidence acquired by the police will/will not support a conviction
- Stays and acquittals are much less common

Post-charge screening jurisdictions:

- Charges often linger for months before they are stayed or withdrawn
    - These delays waste scarce resources and disrupt the lives of presumptively innocent people
- The first step is for a prosecutor to review the investigative file compiled by police and decide whether to proceed
    - The review should occur soon after the charges are laid (not always the case in practice – weeks or months)
    - This decision is often made by a front-line prosecutor, but sometimes is made by a person in the AG office or the AG themselves (this decision must be made without considering political ramifications – even if the person making the decision occupies a political office)

Krieger v Law Society of Alberta (2002) →

- Prosecutorial function is quasi-judicial in nature
    - Independence from partisan influence is a constitutional principle recognized as a principle of fundamental justice under s 7 of the *Charter*

Partisan ≠ political

- *R v Cawthorne* (2016) → the AG and other public officials exercising a prosecutorial function serve the public interest and a regard for "***social repercussions***" of the decision whether to prosecute properly "***informs prosecutorial discretion***"
    - Example: it would not offend the principle of independence for the government to mandate a policy of "strict prosecution" of certain offences as long as the motive for the policy is in the public interest
    - **This principle will be violated when a "prosecutor acts not for the public good, but 'for the good of the government of the day'"

Standard for Decision

When the decision is made (by whoever makes it), the standard for decision is similar across jurisdictions:

**each of these criteria must be satisfied for *every charge* *throughout the entire course of the prosecution* – if at any time, one of the requirements is no longer satisfied, the prosecution must end

1. **The evidence meets a certain threshold relating to the probability of conviction**

- ***Evidentiary Threshold***
    - In most cases there is no substantial judicial scrutiny of the evidence to determine if it warrants a trial – so the prosecutors have to assess the prospect of conviction objectively *carefully*
        - Heavy caseloads, fragmented responsibilities and partisanship can work against the goal of a thorough, independent prosecutorial screening of cases
- The specific evidentiary threshold that must be met to justify prosecution in most provinces (including AB) is ***a reasonable likelihood*** of conviction; this requires:
    - Sufficient evidence to believe that a reasonably jury, properly instructed, ism ore likely than not to convict the accused of the charge(s) alleged
        - BC + QB require a higher standard – a *substantial likelihood* of conviction
        - ON + the Fed's require the lowest standard – a *reasonable prospect* of conviction
- Whatever the standard used, it must be satisfied objectively and subjectively
    - The prosecutor must believe that the standard is met and that belief must be reasonable in the circumstances

Alberta Prosecution Service Manual provides the following questions that Crowns should ask:

1. Are there inherent (e.g., as with in-custody informants) or other concerns respecting the accuracy, credibility, or reliability of any of the Crown's witness?
    i. Do any of these witnesses have improper motives that may affect his or her credibility?
    ii. Is there evidence that may support or detract from the credibility of any of these witnesses?
2. If the identity of the offender is in issue, of what strength is the evidence identifying the accused as the offender?
3. Are there grounds for believing that some inculpatory evidence will likely be excluded?

4. If the case depends in part on an admission by the accused, is there evidence that might support or detract from the reliability of this statement?
5. Has the accused attempted to explain the (alleged) conduct or present a defence? If so, is it clear that the explanation or defence (by itself or in the context of other evidence or information) will be sufficient to raise a reasonable doubt?
6. Does the evidence, as presented by police, include information which, if believed, would constitute a viable defence? If so, who bears the onus as it relates to that defence? (For example, where there is an air of reality to the defence of self- defence, the prosecution bears the onus of disproving the defence beyond a reasonable doubt. Section 34(2) of the *Criminal Code* sets out a number of factors that must be considered in determining whether a purported act of self- defence was reasonable in the circumstances. These factors include, among others, the "nature of [any] force or threat" presented, the "relevant circumstances of the [accused]" and the accused's "role in the incident". If an incident occurs in a remote or rural location, and self-defence is raised, a prosecutor may give consideration to the nature of the location when weighing all of the relevant factors.)

2. It is in the public interest to proceed

- Even if the evidentiary threshold is met, the prosecutor must determine whether it's in the public interest to proceed
    - The reality is that criminal prohibitions capture a lot of conduct that is not really that harmful or deserving of criminal punishment
        - Lord Shawcross in the HOC in the UK said:
            - "It has never been the rule in this country – I hope it never will be – that suspected criminal offices must automatically be subject to prosecution. Indeed, the very first regulations under which the Direct of Public Prosecutions worked provide that he should... prosecute, amongst other cases: "wherever it appears that the offence of the circumstances o its commission is or are of such a character that a prosecution in respect thereof it required in the public interest." That is still the dominant consideration."
            - This principle applies equally in Canada
- Many factors are relevant in deciding whether prosecution is in the public interest (prosecutors' manuals outline the following):
    - The inherent seriousness of the offence
    - Severity of the likely sentence
    - The nature and magnitude of any harm caused
    - Existence of alternative measures
    - Accused's degree of culpability
    - Contemporary relevance of the law infringed
    - Accused's efforts to remedy loss or harm
    - Accused's rehabilitation of demonstration of remorse
    - Harm caused by prosecution to confidential informants
    - Ongoing investigations

- International relations
- National security
- Personal circumstances of the accused
- Complainant and witness
- Expected length and expense of the prosecution
- Time elapsed since the alleged commission of the offence
- Expiry of a summary conviction period for a hybrid offence
- Willingness and ability of complainant and witnesses to testify
- Accused's past and future cooperation in investigation and prosecution of others
- Availability of compensation
- Restitution or forfeiture
- Need to maintain public confidence in the administration of justice
- Accused's decision, as a consequence of plea negotiations, to plead guilty to a less or different offence

Thus, the public interest can never justify a prosecution where the odds of conviction are low AND even a certainty of conviction does not warrant pursuing a prosecution that's not in the public interest

Withdrawals + Stays

Prosecutors who decide to discontinue a charge (including one laid by a private citizen) have two options:

1. **Withdraw**

- A withdrawn terminates the prosecution of that charge
  - There are no *Code* provisions authorizing this process, but it is a necessary corollary of the Crown's responsibility to decide whether to proceed
  - This is a matter of prosecutorial discretion that courts can overturn *in only very limited circumstances*
- A charge can be withdrawn any time after process is issued
  - The court's leave might be required if the prosecutor seeks to withdrawn after the plea has been entered or evidence is taken
    - At this stage, the judge might bar the withdrawal on the grounds it would unfairly prejudice the accused
    - Example: this could happen when the prosecutor attempts to law a new information after calling evidence at trial

2. **Stay**

- A stay discontinues proceedings
  - S 579 for provincial prosecutors
  - S 579.1 for federal prosecutors
- A prosecutor may enter a stay of proceedings at any time after laying of the information (even if process has not yet issued) and before judgement
  - The decision is administrative (not judicial) and does not require the Court's leave or approval

        - Only reviewable for an abuse of power because it's prosecutorial discretion
- A prosecutorial stay ends the proceedings and vacates any orders relating to pre-trial detention or release
    - Unlike a judicial stay (or a withdrawal of charges by the prosecutor) proceedings may be recommenced after a prosecutorial stay under the same information or indictment within one year (or in the case of summary conviction proceedings, before the expiry of the limitation period)
        - The prosecutor can revive the proceedings simply by giving notice to the clerk of the court where the stay was entered
            - This almost never happens
        - There is no impediment to recommencement as long as the time period is respected and there is no abuse of power
            - Absent an abuse of power, there is no bar to laying a new information either before or after the expiry of the recommencement period

Prosecutorial Discretion in Proceeding with Charges + Plea Bargaining

Once prosecutors decide to approve of or proceed with charge, they then have to decide precisely how they should be prosecuted

- Depending on the classification of the offences charges, the prosecutor may choose to proceed:
    - By way of summary conviction or indictment
    - Include charges on indictment for which the accused was not committed to stand trial a preliminary inquiry, or
    - Prefer a direct indictment
- A prosecutor's decision on these matters is not reviewable

One important aspect of the prosecutor's charging discretion (that is not mentioned in the *Code*) is plea bargaining

- Aka resolution discussions
- *R v Anthony-Cook* (2016) →
    - Plea bargaining is an essential aspect of the criminal justice process that helps it "function smoothly and efficiently"
- A plea bargain is an agreement between the accused and the Crown that the accused will plead guilty to an offence in exchange for a benefit
    - Benefit example: the withdrawal of a more serious charge or a favourable sentence recommendation
- Prosecutors cannot engage in plea discussions over a charge that does not meet the threshold for prosecution (evidentiary threshold and public interest threshold)
    - Prosecutors cannot proceed on charges (or threaten to do so) to induce the accused to plead guilty to a lesser charge

        - The prospect of a severe sentence upon conviction for a charged offence may induce an innocent defendant to plead guilty to a lesser one
- It is *improper* for prosecutors to revoke on plea agreements (unless exceptional circumstances) (*Nixon* (2011))
    - The decision to retract an agreement, like the decision to make one, is a matter of prosecutorial discretion reviewable only on abuse of process ground

Review of Prosecutorial Discretion

Crown prosecutors' decisions can be reviewed by courts and law societies in at least some circumstances; there are three main types of oversight:

- Judicial review
- Professional regulation
- Civil liability

Krieger v Law Society of Alberta (2002) →

- The SCC distinguished between two types of decisions made by the Crown in criminal cases:
    - Decisions falling with the concept of "prosecutorial discretion" (afforded deference)
        - The core elements of this discretion "involve the ultimate decision as to whether a prosecution should be brought, continued, or ceased, and what the prosecution ought to be for"
        - Was the decision part of or analogous to the paradigmatic choice to pursue or not pursue a particular charge against an accused?
        - **In *R v Anderson* (2014), the SCC shunned this "core" language
            - It was causing courts to interfere unduly in prosecutorial decision-making
            - This is where the court distinguished between prosecutorial discretion and tactics and conduct
    - Decisions in matters of "tactics or conduct before the court" (no deference)

"¶43: "Prosecutorial discretion" is a term of art. It does not simply refer to any discretionary decision made by a Crown prosecutor. Prosecutorial discretion refers to the use of those powers that constitute the core of the Attorney General's office and which are protected from the influence of improper political and other vitiating factors by the principle of independence. ¶45: These powers emanate from the office holder's role as legal advisor of and officer to the Crown. In our theory of government, it is the sovereign who holds the power to prosecute his or her subjects. A decision of the Attorney General, or of his or her agents, within the authority delegated to him or her by the sovereign is not subject to interference by other arms of government. An exercise of prosecutorial discretion will, therefore, be treated with deference by the courts and by other members of the executive, as well as statutory bodies like provincial law societies."

Judicial Review in Criminal Proceedings

The scope of review differs markedly depending on whether the conduct challenged is a matter of prosecutorial discretion

Courts can intervene in matters of prosecutorial discretion only in *exceptional cases* *when there has been an abuse of power*

- This is apart from cases where prosecution conduct infringes the *Charter*

- Abuse of power = when prosecutor's act "dishonestly," in "bad faith" for an "improper purpose" or with a lack of "objectivity"
    - No defence is owed to the exercise of prosecutorial discretion in these cases the conduct will, by definition, outside the scope of the AG's office + justification for the deference will have evaporated

*Claimants bear the burden of proof in establishing an abuse of proceed

- Prosecutors are not required to provide an explanation for decisions lying within their discretion

Nixon (2011) → when applicants provide an "evidentiary foundation" for the abuse of process claim, the Crown must typically provide an explanation for the impugned decision

- Evidence that prosecutors violated their own policies or guidelines may support an abuse of process claim (not determinative)

Courts may intervene in matters of tactics and conduct even if there is no evidence of abuse of power

- These decisions fall within a court's "inherent jurisdiction" to control its own process and ensure the orderly and efficient functioning of the trial

What kind of decisions form part of prosecutorial discretion?

Krieger (2002) → decisions to:

- Prosecute a charge laid by police
- Enter a stay of proceedings in private and public prosecutions
- Accept a guilty plea to a lesser charge
- Withdrawn criminal proceedings altogether
- Take control of a private prosecution

Nixon (2011) → decisions to:

- Enter into and repudiate plea agreements

Anderson (2014) → decision to:

- Trigger an enhanced minimum sentence

Other decisions:

- To seek a dangerous offender designation
- To prefer a direct indictment
- Charge multiple offence
- Negotiate plea bargains
- Proceed summarily or by indictment
- To appeal

- A Crown's refusal to consent to an accused's request to change the mode of trial is protected by prosecutorial discretion

Other courts have held that the discretion does not include decisions to override an accused's election for a judge-alone trial and require trial by judge and jury; however, most courts have found that a Crown's refusal to consent to change the mode of trial is protected
- Textbook authors think that both should fall within prosecutorial protection

Decisions not protected by prosecutorial discretion:
R v Keyowski (1988) →
- A stay of proceedings can be awarded to prevent an accused from being re-tried after a mistrial or order a new trial only appeal without showing Crown misconduct

Decisions unrelated to the laying of charges are unlikely to form part of prosecutorial discretion:
- The decision to delay disclosure of relevant evidence (*Krieger*)
    - Disclosure is an ethical and legal duty
- Discretionary decisions made in the context of pre-trial proceedings (bail hearings + jury selections)
- Courts have sanctioned prosecutors for misconduct *during* the trial itself (*Trochym* (2007))
    - Making inflammatory remarks during opening and closing addresses
    - Alluding to facts not properly in evidence
    - Expressing an opinion on the accused's guilt
    - Expressing an opinion on a witness's credibility
    - Eliciting improperly prejudicial testimony
    - Mistreating witnesses during questioning
- Judges should not interfere in matters of trial strategy *unless this would cause unfairness to the accused* or a *Charter* violation

Professional Regulation

Until *Krieger* (2002), it wasn't clear whether Crowns were subject to the oversight and discipline of the provincial law societies
- The Court held that they are, at least with respect to conduct falling outside the ambit of prosecutorial discretion
    - The law society had the authority to review and impose discipline on a prosecutor for failing to disclose information to the defence
- Conduct falling within the proper scope of prosecutorial discretion cannot be the subject of professional discipline
    - *However*, decisions made in bad faith, or for an improper purpose, may be sanctioned by the law society

Malicious Prosecution

A prosecutors conduct in rare cases can be subject to civil liability

- Prosecutors were completely immune from liability in tort for their discretionary decisions until *Nelles v Ontario* (1989)
    - SCC held that a prosecutor could be liable for the tort of malicious prosecutor for perpetrating "a fraud on the process of criminal justice"

To establish malicious prosecution, a plaintiff must prove:

- The prosecution was:
    i. Initiated by the defendant;
    ii. Terminated in favour of the defendant;
    iii. Undertaken without reasonable and probable cause;
    iv. Motivated by malice or a primary purpose other than that of carrying the law into effect

A prosecutor can be liable in tort only for the same kind of egregious misconduct that would constitute an abuse of process in criminal proceedings

- Conduct ***not*** performed in bad faith (even if grossly negligent) is not actionable

**Successful claims are *exceptionally rare*

Chapter 9: Preliminary Inquiry + Preferring Indictments

A lot of rules – important !!

Depending on the offence charges, the Crown might have certain choices to make regarding the forum and the procedure by which a criminal charge will proceeding

- The accused will sometimes have a choice to make regarding the forum of trial and the procedures that precede it

Elections

The *Code* confers choices or elections on the Crown + the accused

Elections by the Crown

Three types of criminal offence: summary, indictable, and hybrid (dual procedure)

- Most offences found in the *Code* fall into the hybrid offence category
    - These provisions specify that a charge may be prosecuted by indictment or on summary conviction
        - The choice of how to proceed belongs to the Crown

Crown Election = choice to proceed by indictment or summary conviction for a hybrid offence

- Choice of election falls within prosecutorial discretion
    - *Only reviewable for abuse of process*
- Crown can change its election
    - This may require the consent of the accused and leave of the court

Crown's election will determine the accused person's trial options

Timing of the Crown's Election

Code is silent on the question, so it varies between jurisdictions

- Some require formal election on the first court appearance
    - Others require it later in the proceeding (but an informal election is required much earlier)
- The SCC has suggested that it would be best for the Crown to declare explicitly whether it's proceeding on a hybrid offence summarily or by indictment *before the accused is asked to plead*

**Until the Crown elected to proceed summarily, the *Interpretation Act* deems hybrid offences to be indictable offences

- In arresting a person for a hybrid offence, police can use the more robust arrest powers reserved for indictable offence (i.e., fingerprinting and photographing)
    - Some courts have held that fingerprinting and photographing may be required for persons arrested for hybrid offences even after an election to proceed summarily
        - Other courts have disagreed
- Police can easily avoid this uncertainty by requiring the accused to appear for fingerprinting and photographing *before their first appearance in court* as the Crown can only make the election after this appearance

Summary Elections

If the Crown elects to proceed summarily, the hybrid offence is treated in all respects as a summary conviction offence

These charges are tried in provincial court before a judge alone in what is termed a "bench" trial

- Governed by Part XXVII of the *Code*
    - **Summary proceedings must be instituted within 12 months "after the time when the subject matter of the proceedings arose unless the prosecutor and defendant so agree" (s 786(2))**
        - Accused will usually consent to an out of time summary prosecution to avoid the same charge being prosecuted by indictment (harsher max. punishment) or a prosecution by indictment for a related offence that covers the same conduct
        - This consent must be "informed, clear, and unequivocal" (*R v Dudley* (2009))

***What if the Crown fails to make its formal election*?**

- Where the matter had proceeded to trial before a summary conviction court, it will be presumed the Crown elected to proceed summarily
- The Crown will have "deemed to have elected to proceed by indictment where the accused has been put to the election as to mode of trial required, for example, by s 536 of the *Code*, so long as the proceedings take place in a court having jurisdiction over the alleged offence" (*R v Dudley* (2009))
- If the Crown fails to make an election and the case proceeds to trial in a summary conviction court and the charge was not initiated within the limitation period, a mistrial

should be declared (if discovered before the verdict is rendered) *unless* the parties agree to waive the limitation period
    - If the parties waive, the trial can proceed to its conclusion
    - If the defect is discovered after a verdict has been rendered, the remedy is an appeal to the summary conviction appeal court, which should set aside the conviction on this basis

**If a mistrial or new trial is ordered on appeal, the Crown can proceed with the charge by indictment and avoid the limitation period

- *R v Dudley* (2009) →
    - Such prosecution can only be barred where the "evidence discloses an abuse of process arising from improper Crown motive, or resulting prejudice to the accused sufficient to violate the community's sense of fair play and decency"
    - The decision of whether to proceed after mistrial is prosecutorial discretion, not judicial discretion (¶9.11)

The situation is different where an accused is acquitted of an offence that was out of time but proceeded to trial before a summary conviction court (without consent) – the SCC held that the Crown may <u>*not*</u> seek to overturn an acquittal on appeal on this basis

- *R v Dudley* (2009) →
    - "The Crown should not be heard to complain *after an adverse adjudication on that merits* that it neglects to obtain the consent of the accused before the accused was acquitted"

Superior courts do not typically have jurisdiction to try summary offences (s 798)

- Summary conviction court ≠ superior courts or superior court judges

Superior courts sit as the appellate court for summary proceedings

Limited Circumstances where summary convictions are heard in superior courts:

S 606(4) *Code*

Criminal Code of Canada

Pleas

Included or other offence

606(4) Notwithstanding any other provision of this Act, where an accused or defendant pleads not guilty of the offence charged but guilty of any other offence arising out of the same transaction, whether or not it is an included offence, the court may, with the consent of the prosecutor, accept that plea of guilty and, if the plea is accepted, the court shall find the accused or defendant not guilty of the offence charged and find him guilty of the offence in respect of which the plea of guilty was accepted and enter those findings in the record of the court.

- If an accused in proceedings by indictment pleads not guilty to the offence charged, but guilty to another office "arising out of the same transaction" (could be a summary conviction offence)

662(1) *Code*

Criminal Code of Canada

Verdicts

Offence charged, part only proved

662(1) A count in an indictment is divisible and where the commission of the offence charged, as described in the enactment creating it or as charged in the count, includes the commission of another offence, whether punishable by indictment or on summary conviction, the accused may be convicted

(a) of an offence so included that is proved, notwithstanding that the whole offence that is charged is not proved; or

(b) of an attempt to commit an offence so included.

- If the accused is charged with an indictable offence, the *Code* permits conviction for an offence included in the indictable offence charges where the Crown fails to prove that offence but does prove the included offence (the included offence can be a summary conviction offence)

R v Clunas (1992) → the SCC has suggested that indictable and summary conviction charges can be tried together in a superior court (without a jury)

If the Crown elects to prosecute a hybrid offence by indictment (or where the offence charged is an indictable offence), the accused may have their own choices to make…

The Accused's Election

An accused charged with an indictable offence can have an election as to their mode of trial

- Whether they have this choice is a function of the type of indictable offence charged
- There is no election for summary offences

Circumstances w/ No Election

The options for a person charged with an indictable offence (or hybrid where the Crown elects to proceed by indictment) are:

- A bench trial before a provincial court judge
- A trial in a superior court before a judge and jury
- A trial in superior court before a judge alone

When there is no choice:

Exclusive Jurisdiction (469) Offences

Criminal Code of Canada

Jurisdiction

Court of criminal jurisdiction

469 Every court of criminal jurisdiction has jurisdiction to try an indictable offence other than

(a) an offence under any of the following sections:

i. section 47 (treason),

ii. [Repealed, 2018, c. 29, s. 61]

iii. section 51 (intimidating Parliament or a legislature),

iv. section 53 (inciting to mutiny),
v. section 61 (seditious offences),
vi. section 74 (piracy),
vii. section 75 (piratical acts), or
viii. section 235 (murder);

Accessories
(b) the offence of being an accessory after the fact to high treason or treason or murder;
(c) an offence under section 119 (bribery) by the holder of a judicial office;

Crimes against humanity
(c.1) an offence under any of sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*;

Attempts
(d) the offence of attempting to commit any offence mentioned in subparagraphs (a)(i) to (vii); or

Conspiracy
(e) the offence of conspiring to commit any offence mentioned in paragraph (a).

- Always tried in a superior court
    - Superior court judge usually tries these offences with a jury (often after an accused has had a preliminary inquiry in provincial court)

Absolute Jurisdiction (553) Offences

Criminal Code of Canada

Absolute jurisdiction
553 The jurisdiction of a provincial court judge, or in Nunavut, of a judge of the Nunavut Court of Justice, to try an accused is absolute and does not depend on the consent of the accused where the accused is charged in an information

(a) with

(i) theft, other than theft of cattle,
(ii) obtaining money or property by false pretences,
(iii) unlawfully having in his possession any property or thing or any proceeds of any property or thing knowing that all or a part of the property or thing or of the proceeds was obtained by or derived directly or indirectly from the commission in Canada of an offence punishable by indictment or an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence punishable by indictment,
(iv) having, by deceit, falsehood or other fraudulent means, defrauded the public or any person, whether ascertained or not, of any property, money or valuable security, or

(v) mischief under subsection 430(4),

where the subject-matter of the offence is not a testamentary instrument and the alleged value of the subject-matter of the offence does not exceed five thousand dollars;

(b) with counselling or with a conspiracy or attempt to commit or with being an accessory after the fact to the commission of

(i) any offence referred to in paragraph (a) in respect of the subject-matter and value thereof referred to in that paragraph, or

(ii) any offence referred to in paragraph (c); or

(c) with an offence under

(i) section 201 (keeping gaming or betting house),

(ii) section 202 (betting, pool-selling, book-making, etc.),

(iii) section 203 (placing bets),

(iv) section 206 (lotteries and games of chance),

(v) section 209 (cheating at play),

(vi) [Repealed, 2019, c. 25, s. 251.1]

(vii) [Repealed, 2000, c. 25, s. 4]

(viii) section 393 (fraud in relation to fares),

(viii.01) section 490.031 (failure to comply with order or obligation),

(viii.02) section 490.0311 (providing false or misleading information),

(viii.1) section 811 (breach of recognizance),

(ix) subsection 733.1(1) (failure to comply with probation order), or

(x) paragraph 4(4)(a) of the *Controlled Drugs and Substances Act*.

(xi) [Repealed, 2018, c. 16, s. 219]

Less serious indictable offences

- Trials of such offences are tried in provincial court before a judge along (no juries in provincial court)
- They are within the *absolute jurisdiction* of the provincial court
- **not exclusive
    - Under s 468 – the superior courts have jurisdiction to try *any indictable offence* including those listed in 553
- Should an absolute jurisdiction offence come before the superior court because it is charged along with a non-absolute jurisdiction indictable offence for which an accused elect's trial in a superior court, the superior court will have the authority to deal with both types of indictable offences

Where Provincial Court Judge Intervenes

Criminal Code of Canada

Election before justice

555(1.1) If the judge has decided not to adjudicate, the judge shall put the accused to an election in the following words:

You have the option to elect to be tried by a judge without a jury or to be tried by a court composed of a judge and jury. If you do not elect now, you are deemed to have elected to be tried by a court composed of a judge and jury. If you elect to be tried by a judge without a jury or by a court composed of a judge and jury or if you are deemed to have elected to be tried by a court composed of a judge and jury, you will have a preliminary inquiry only if you are entitled to one and you or the prosecutor requests one. How do you elect to be tried?

- This gives a trial judge in provincial court the authority to halt the proceeding so that it may be transferred to the superior court – this power can be exercised any time before the accused has entered a defence
    - "If it appears to the provincial court judge that for any reason the charge should be prosecuted in superior court"
- If the accused is entitled to a preliminary inquiry, and either the accused or the Crown requests one, the TJ must continue the proceedings as a preliminary inquiry
    - This has been limited by Courts in two ways:
        - Applies only to indictable offence
            - Where summary is charged, the provision cannot be invoked to require a prosecution by indictment
            - It can be invoked for all indictable offences (including absolute jurisdiction offences)
        - The discretion conferred by this provision must be exercised judiciously
            - Unless there is a judicial reason for overruling the accused's election to be tried by a provincial court judge then the accused should be entitled to proceed in that way
                - This does not include a desire to clear the court's docket

Where the AG Directs a Jury Trial

Criminal Code of Canada

Attorney General may require trial by jury
568 Even if an accused elects under section 536 or re-elects under section 561 or subsection 565(2) to be tried by a judge or provincial court judge, as the case may be, the Attorney General may require the accused to be tried by a court composed of a judge and jury unless the alleged offence is one that is punishable with imprisonment for five years or less. If the Attorney General so requires, a judge or provincial court judge has no jurisdiction to try the accused under this Part and a preliminary inquiry must be held if requested under subsection 536(4), unless one has already been held or the re-election was made under subsection 565(2).

- If accused elects to be tried by a provincial court judge or a superior court judge without a jury, 568 provides that the AG can require a trial by judge and jury (but only if the offence is punishable with imprisonment for more than five years)
    - Prosecutorial discretion!

- This is most likely to be used where a provincial court judge, faced with differing elections by co-accused, fails to exercise the jurisdiction to decline the recording of an election, which would have the effect of deeming each accused to have elected trial by jury

Direct Indictments

Criminal Code of Canada

Direct indictments
577 Despite section 574, an indictment may be preferred even if the accused has not been given the opportunity to request a preliminary inquiry, a preliminary inquiry has been commenced but not concluded or a preliminary inquiry has been held and the accused has been discharged, if

(a) in the case of a prosecution conducted by the Attorney General or one in which the Attorney General intervenes, the personal consent in writing of the Attorney General or Deputy Attorney General is filed in court; or
(b) in any other case, a judge of the court so orders.

The prosecutor may prefer a direct indictment for any offence "even if the accused have not been given the opportunity to request a preliminary inquiry, a preliminary inquiry has commenced, but not concluded or a preliminary inquiry has been held and the accused has been discharged"

- This can only be exercised with personal, written consent from the AG or Deputy AG
- A direct indictment has the effect of sending an accused directly to trial in the superior court (depriving the accused of their election to have a preliminary inquiry)
    - Accused is deemed to have elected to be tried by a court composed of judge and jury and not to have requested a preliminary trial

Preliminary Inquiry

Judicial process:

- The accused is entitled to be present and represented by counsel, to cross-examine witnesses, *not* to be compelled to testify, and to be discharged if the evidence was inadequate to justify a trial

Two purposes:

1. Formally, it helps to protect the individual from the ordeal of prosecution where the case lacks sufficient evidence to warrant a trial
2. Practically, it gives the accused a measure of disclosure of the prosecution's case

*pre-*Stinchcombe*, this was important because the defence's ability to obtain disclosure of the prosecution's case prior to trial was limited

- Now it's described as ancillary or incident to the charge screening function

Must be Requested + Only Available for Most Serious Indictable Offences

Preliminary inquiries must be requested AND are only available to accused charged with an indictable offence punishable by up to 14 years or more of imprisonment (536(2) + 536.1(2))

- Must be requested either when they are put to their election or within a period fixed by the Rules of Court
- If co-accused, if one of more accused requests it, preliminary inquiry must be held with respect to all of them

**Remember, that trial to preliminary inquiry is possible (s 555(1.1) as example)

The only time that a preliminary trial is available: 14+ years imprisonment, 469 offences, other

Specifying the Issues + Witnesses + Focus Hearing

Amendments were made to the *Code* to streamline the preliminary inquiry process

- Counsel for the party requesting the process must not provide the opposing party and the court a statement that identifies:
    - The issues on which the requesting party wants evidence to be given at the inquiry
    - The witnesses that the requesting party wants to hear
    - **this does not apply to unrepresented accused
- Statement must be provided within time period fixed by any rules of court of specified by the justice

On the application of the accused, the prosecutor, or on the court's own motion, the court may convene a "focus hearing" (536.4):

- Available in cases involving represented *or* unrepresented accused
- The purpose:
    - Assist the parties to identify the issues on which evidence will be given at the inquiry
    - Assist the parties to identify the witnesses to be heard at the inquiry
    - Encourage the parties to consider any other matters that would promote a fair and expeditious inquiry
- The justice must record any admissions of fact agreed to by the parties and any agreement reached by the parties

Criminal Code of Canada

Agreement to limit scope of preliminary inquiry

536.5 Whether or not a hearing is held under section 536.4, the prosecutor and the accused may agree to limit the scope of the preliminary inquiry to specific issues. An agreement shall be filed with the court or recorded under subsection 536.4(2), as the case may be.

Powers + Procedures

A justice will provide over a preliminary inquiry

- Justice of the peace or a provincial court judge

**Almost always a provincial court judge

Justices have no inherent jurisdiction

- Powers are limited to those expressly granted by (or necessarily flow from) the *Code*
- S 537 lists the bounds of the justice's authority
    - Elsewhere, there is also the power that the presiding judge or justice can vacate any bail order previously made on "cause being shown" and "make any other order… for the detention or release of the accused until his trial is completed" (only available when not charged with 469 offences) 523(2)(b)

Publication Bans

- Standard publication ban that is ordered at almost all preliminary inquiries

539(1)

- Upheld constitutionally as a reasonable limit on the right to freedom of the press guaranteed by s 2(b)

Automatic ban prohibiting the publishing or broadcasting of the fact that an admission or confession was tendered as evidence

- Bans on certain enumerated circumstances that apply to preliminary inquiries
    - i.e., a ban can be ordered with respect to information in cases where an accused is charged with an enumerated sexual offence

Authority to Regulate the Inquiry

537(1)(i)

- The justice can "among other things, limit the scope of the preliminary inquiry to specific issues and limit the witnesses to be heard on these issues"
- Can also be used to fill procedural gaps
    - Presiding judge can:
        - Make security arrangements (accused remaining shackled)
        - Disqualify counsel from acting based on a conflict of interest
        - Compel a witness to testify, answer questions, or produce documents
        - Etc. (822)
    - What the presiding judge can't do:
        - Compel production of witness's police statement
        - Sever co-accused
        - Exclude some members of the public from the courtroom, but not others
        - Etc. (823)

Not a Court of Competent Jurisdiction for Charter Purposes

Preliminary inquiries are not a court of competent jurisdiction for section 24 of the *Charter* purposes

- Cannot grant stay of proceedings under s 24(1)
- Cannot exclude unconstitutionally obtained evidence under s 24(2)
- Cannot strike down legislation under s 52(1) of the *Constitution*

****Charter* still very much applies

***Superior courts have constant and complete jurisdiction under the *Charter*

- The superior court should decline to intervene unless it's better suited than the trial court to assess and grant a just and appropriate remedy

- i.e., preliminary inquiry justice lacks jurisdiction to order disclosure, but they may adjourn the inquiry to allow a disclosure application to be made to the superior court

Continuing in Absence of an Absconding Accused

If the accused doesn't show up to the preliminary inquiry, the *Code* deems the accused to have waived their right to be present and entitled the presiding justice to either continue the inquiry in the accused's absence, or issue a warrant for the accused's arrest and adjourn the inquiring pending their appeared

Witnesses + Evidence

Several provisions bearing on the testimony of the witnesses at a preliminary inquiry and the admissibility of the evidence

Testimony Under Oath + Recorded

- Witnesses must testify under oath and affirmation and their evidence must be recorded
- The evidence is recorded by a court reporter who later produces a certified transcript of the proceeding that can be used at trial

Measures to Assist Witnesses

Because preliminary inquiries constitute "proceedings against the accused", the various measures found in the *Code* for easing the ordeal of child witnesses apply to these hearings

Committal + Discharge

Once all the evidence has been taken, the justice must make one of the determinations set out in s 548

Criminal Code of Canada

Order to stand trial or discharge

548(1) When all the evidence has been taken by the justice, he shall

(a) if in his opinion there is sufficient evidence to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction, order the accused to stand trial; or

(b) discharge the accused, if in his opinion on the whole of the evidence no sufficient case is made out to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction.

The Test

The standard for committal is the same as that governing a motion for a directed verdict at trial or the decision to extradite a fugitive →

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

- the sufficiency of evidence cannot be assessed without reference to the ultimate burden on the Crown to prove the case BARD
- The justice is not permitted the assess the quality, credibility, or reliability of the evidence
    - Those are only for the TOF at trial
- The impact of defence evidence turns on the nature of the Crown's case
    - If the Crown has adduced "direct evidence on all the elements of the offence, the case must proceed to trial, regardless of the existence of defence evidence, as by definition the only conclusion that needs to be reached is whether the evidence is true"

The justice may also commit the accused to stand trial on any offences "included" in those charged in the information

- The power exists independently from the authority in s 548(1)(a) to commit an accused to stand trial for "another other indictable offence in respect of the same transaction"

Pretty much all of the above information comes from *Arcuri* (2001)

Committal for "any other indictable offence in respect of the same transaction"

S 548(1)(a)

- An accused could very well emerge from the preliminary trial facing more charges than when the hearing began
    - Challenged under 11(a) of the *Charter* in *R v Cancor Software Corp.* (1990)

In criminal proceedings, reasons will be required

Committal on Consent

At any stage of a preliminary inquiry, with the consent of the accused and the prosecutor, the presiding justice may order the accused to stand trial without taking or recording any or further evidence (s 549(1))

- Where the prosecutor and accused agreed under s 536.5 to limit the inquiry to specific issues, the justice, without recording evidence on any other issues, may order the accused to stand trial (s 549(1.1))

Review

There is no statutory right of appeal against the decisions of the preliminary inquiry justice

- The venue for doing so is the superior court and the mechanism was the prerogative writ (*prohibition, mandamus, certiorari*) (843)

Decisions During the Course of the Preliminary Inquiry

A justice has considerable authority when it comes to regulating the course of the inquiry

- There are few legal errors that a justice can make during an inquiry that will warrant intervention
- Some examples where reviewable error has been found where the presiding judge:

    - Completely denies the accused the opportunity to cross-examine prosecution witnesses ***OR*** the right to call witnesses
    - Denies a defence request to cross-examine a witness whose statement was proffered under s 540(7) with regard to s 540(9)
    - Directs the crown to call particular witnesses
    - Prevents the crown from calling further witnesses
    - Fails, at the completion of the Crown's evidence, to inquire whether the accused has anything to say or wishes to call evidence
    - Refuses to hear submissions from the accused on whether or not there should be a committal or discharge
- Non-examples - ¶9.118

Decisions Relating to Committal or Discharge

The justice's decision to either commit or discharge the accused will be open to review by way of *certiorari* where it results from jurisdictional error

- This arises when the accused is committed to stand trial in the absence of evidence of an essential element of the offence

Re-laying Charges after Discharge

The main purpose of the inquiry is to safeguard the individual against unwarranted criminal charge

- It would be undermined if the Crown were free to charge the accused again with the same offence
- Courts have held that *unless the inquiry justice made a significant legal error*, the re-laying of a charge for which the accused was discharged would likely constitute an abuse of process
    - Where a justice had made a legal error in discharging an accused, the SCC has sent mixed messages on whether relaying the charge would amount to an abuse of process

The Future of the Preliminary Inquiry

849

In the aftermath of *Stinchcombe*, the inquiry has come under attach

- Accused persons can now receive full disclosure as a matter of course
    - The minimal evidentiary threshold makes the effectiveness of protecting against unjustified charges is questionable as well
- Witnesses required to relive trauma twice
- Many criminal cases don't involve a preliminary inquiry
- The dedication of scarce time and resources toward maintaining the inquiry is no longer justified

The Good:

- The solution to the "ineffective device for ending unjustified prosecution" is not to get rid of the inquiry, but to make the standard for committal more onerous
- Disclosure is not a substitute for the detailed information gleaned from questioning witnesses under oath
- Tactical benefits:
    - Enables the defence to flesh out the Crown witness's story and commit the witness to a specific and detailed account
    - If the witness's testimony at trial conflicts with their evidence from the inquiry, the inconsistencies will provide a basis for impeachment

Legislative Reform: ¶9.127 – 9.130

Preferring the Indictment

853

The indictment is the document filed with the superior court that sets out the details of the charge an accused is facing

- It is the charging document for criminal allegations in the superior court

Mechanics

If the accused foregoes a preliminary inquiry and elects a trial in superior court or has a preliminary inquiry and is committed to stand trial, the entire provincial court (information and all exhibits) is transferred to the superior court

- Before the accused makes their first appearance in superior court, a prosecutor will prepare an indictment

Indictment, unlike an information, is not a sworn document

- It's a piece of paper that names the accused and sets out the particular of the offence(s) charge (who, what, when, where)
    - Signed by the prosecutor on behalf of the AG and filed with the court shortly before the date of the accused's first appearance in the superior court

The preparing the filing of the indictment with the court is referred to as "preferring and presenting" the indictment

- The prosecutor who signs the indictment is not obligated to personally prosecute the case
    - Any prosecutor authority by the AG may take carriage of it

If for any reason the Crown does not assume carriage of the prosecution where there is privately laid charges, the written order of a superior court judge is required before a private prosecutor can prefer an indictment

Charges that May Be Included

The charges that may be included in the indictment are a function of several variable including the charges in the information, whether there was a preliminary inquiry, the evidence at the inquiry, and the justice's decision with respect to committal and discharge

- If an accused didn't request an inquiry and opted instead to go directly to trial in the superior court, a prosecutor may only include in the indictment a charge that was contained in the information or any included offence to that charge

If an accused has a preliminary inquiry, the prosecutor's options are much more expansive (¶9.140 - 855)

Direct Indictment

Criminal Code of Canada

Direct indictments

577 Despite section 574, an indictment may be preferred even if the accused has not been given the opportunity to request a preliminary inquiry, a preliminary inquiry has been commenced but not concluded or a preliminary inquiry has been held and the accused has been discharged, if

(a) in the case of a prosecution conducted by the Attorney General or one in which the Attorney General intervenes, the personal consent in writing of the Attorney General or Deputy Attorney General is filed in court; or

(b) in any other case, a judge of the court so orders

AG may prefer a direct indictment

- Sends an accused directly to trial in the superior court and trumps and entitlement to a preliminary inquiry that an accused might otherwise have
    - Courts have read this provision purposively and granted the AG with a vast power to avoid the consequences of a preliminary inquiry

Circumstances that courts have found that a direct indictment may be preferred:

- If the accused was committed to stand trial at a preliminary inquiry
- On a charge for which an earlier committal to stand trial had been quashed
- Where a young person would otherwise have been entitled to a preliminary inquiry under the *Youth Criminal Justice Act*

Where an accused's bail status has already been determined, the existing order continues in place after a direct indictment is preferred

Chapter 10: *Charter* Remedies

864-981

When a criminal procedure rule is breached, the person affected will usually be able to seek a remedy – "A right without a remedy, it is often said, is of little value" (*Therens*)

Sources of Remedies:

1. Common Law
2. Ordinary statutes
3. Constitution

The focus will be on constitutional remedies:

Constitution Act, 1982

Primacy of Constitution of Canada
52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

s 52(1) of the *Constitution Act, 1982*

- This section is invoked to challenge the constitutionality of the law itself

Charter of Rights and Freedoms

Enforcement of guaranteed rights and freedoms
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.

Exclusion of evidence bringing administration of justice into disrepute
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.

s 24 of the *Charter*

- This is employed to challenge the discretionary acts of government agents acting pursuant to constitutional laws
- It provides two different classes of remedies:
    - **Any remedy** that the court considers "appropriate and just in the circumstances"
    - The **exclusion of evidence** "obtained in a manner" violating the *Charter* that, if admitted, could "bring the administration of justice into disrepute"
- These two sections are mutually exclusive because ...

Before either of the above remedies can be ordered, two preliminary questions must be answered:

- Does the applicant have standing to apply for a remedy?
- Does the court have the authority to grant the remedy?

Standing

24(1) "**Anyone** whose rights or freedoms... have been infringed or denied may apply to a court..."

- This statement seems to indicate the following:
    - The infringement must have occurred before a remedy can be sought

        - SCC hasn't insisted that the breach must already have occurred – standing may be granted to persons alleging apprehended *Charter* violations
            - The potential arises when sufficient facts are available to permit a proper adjudication on both violation and remedy (*R v Vermette* (1988))
            - S 24 remedy potentially possible for anticipated violation of 11(b)
    - A remedy cannot be awarded for the violation of the rights of anyone other than the applicant
        - The court has been strict on this point
        - Example: *R v Edwards* (1996) → the SCC held that the evidence that may have been obtained in violation of the accused's girlfriends s 8 rights *could not be excluded at his trial*
        - This strict interpretation limits the court's capacity to deter investigative abuses
            - The standing rule permits police to obtain admissible evidence against a suspect who lacks a reasonable expectation of privacy in the location searched by committed violations of the section 8 rights of third parties
        - Could do have some ways to discourage violations of the rights of third parties:
            - Interpret the relevant procedural right to protect the interests of third parties
            - Find that the evidence obtained by violating a non-defendant's rights would be "unfair" or constitute an abuse of process
            - Third parties can apply for s 24 remedies for violations of their own rights arising from the trial of an accused
                - i.e., media entities challenging publications bans or witnesses seeking protection for their privacy, confidential relationships, or religious practices

Court of Competent Jurisdiction

A court of competent jurisdiction is a court that has jurisdiction over the person, the subject matter, and the remedy (*Singh v Canada* (1985))

- Whether a tribunal has jurisdiction over the person, or the subject matter is rarely contentious – it is almost allowed whether it has jurisdiction to award *Charter* remedies

Superior Courts have inherent jurisdiction to award *Charter* remedies
For other tribunals, the power to award these remedies derives exclusively from statute

- Legislatures may expressly authorize a tribunal to grant *Charter* remedies
- More commonly, the question will be if the legislation *implicitly* grants the power to order remedies under s 24

General Principles

R v Conway, 2010 SCC 22

"The question instead should be institutional: Does this particular tribunal have the jurisdiction to grant *Charter* remedies generally? The result of this question will flow from ***whether the tribunal has the power to decide questions of law***. If it does, and if *Charter* jurisdiction has not been excluded by statute, the tribunal will have the jurisdiction to grant *Charter* remedies in relation to *Charter* issues arising in the course of carrying out its statutory mandate (*Cuddy Chicks* trilogy; *Martin*). A tribunal which has the jurisdiction to grant *Charter* remedies is a court of competent jurisdiction. The tribunal must then decide, given this jurisdiction, whether it can grant the particular remedy sought based on its statutory mandate. The answer to this question will depend on legislative intent, as discerned from the tribunal's statutory mandate (the *Mills* cases)."

- Justice Abella also signalled support for allowing tribunals to award *Charter* remedies saying, "over two decades of jurisprudence has confirmed the practical advantages and constitutional basis for allowing Canadians to assert their *Charter* rights in the most accessible forum available, without the need for bifurcated proceedings between superior courts and administrative tribunals "

To determine whether the legislature intended to empower the administrative tribunal to grant a specific remedy, courts should consider the following:

1. Tribunal's statutory mandate
2. Tribunal's structure
    - The judicial or quasi-judicial nature of the proceedings
    - The role of counsel
    - The applicability of traditional rules of proof and evidence
    - Whether the tribunal can issue subpoenas
    - Whether evidence is offered under oath
    - The decision maker's expertise
    - The tribunal's institutional experience with the remedy in question
    - The tribunal's workload
    - The time constraints that the tribunal operates under
    - The tribunal's ability to compile an adequate record for a reviewing court
3. Tribunal's function
    - The tribunal's role
    - The legislative scheme
    - Whether jurisdiction to order the remedy would "frustrate or enhance this role"
    - The importance of the remedial power to the tribunal's "effective and efficient functioning"
    - The tribunal's function in the "broader legal system"
    - The availability of another, more appropriate forum to redress the violation

Superior Courts

S 96 Courts are always courts of competent jurisdiction under s 24 and have inherent jurisdiction to award *Charter* remedies that cannot be ousted by statute

- The *Conway* test for determining a court of competent jurisdiction does not apply to superior courts

- Despite having the inherent jurisdiction, it may still be arguing that the requested remedy would "not be appropriate and just in the circumstances"
- Superior courts, when not acting as trial courts, are the courts of last resort

Superior courts are always competent, but should set aside unless no other court is fit to award the remedy

Criminal Trial Courts

- Trial courts are the preferred forum for s 24 applications
    - When not serving as the trial court, the superior court should generally decide *Charter* claims only when the trial (i) has not yet been assigned, (ii) lacks the power to order the remedy sought, (iii) is implicated in the alleged violation

All courts conducting criminal trials, including inferior courts of criminal jurisdiction, may issue s 24 remedies

- Trial courts are presumed the best form to redress breaches as they are usually the best situated to assess the relevant circumstances
- The decision to award or refuse a remedy can be made before or during trial
- Interim appeals are not generally permitted

The remedies available to inferior criminal courts are restricted to *only* imposing remedies traditionally available in the criminal process:

- Stays
- Exclusion of evidence
- The appointment of counsel (*amici*)
- Publication bans
- Disclosure of evidence
- Costs

**they cannot order civil remedies such as damages or prerogative relief (these orders must be made to the superior courts)

Preliminary Inquiries

Preliminary inquiry justices are not courts of competent jurisdiction

- They are not courts of competent jurisdiction for *any* purposes under s 24 including the exclusion of unconstitutionality obtained evidence under s 24(2)

R v Mills + *R v Hynes* both confirmed these holdings

- Preliminary inquiry justices serve a limited function conferred on them by statute – deciding whether to commit the accused to stand trial – and do not have jurisdiction to order the usual array of criminal remedies
    - Even though preliminary inquiry justices can apply other evidence exclusionary rules such as the confessions rule
- Cannot grant *Charter* relief at the preliminary stage

Other Pre-Trial Proceedings

The trial judge is the preferred "court of competent jurisdiction" under s 24

What about the other proceedings before a trial judge that inferior criminal court preside over?

- Courts have said that *Charter* remedies cannot be ordered at any of these pre-trial proceedings
    - The solution to this jurisdiction challenge is for the accused to be arraigned and enter a plea before the presiding judge, thereby making him or her the trial judge

Regulatory Offence Trial Courts

SCC held that a provincial court presiding over a trial of provincial regulatory offence is a court of competent jurisdiction for the purposes of awarding costs against the Crown for a violations of its *Charter* disclosure obligations (*R v 974649 Ontario Inc.* (2001))

- Regulatory trial courts are the preferred forum for issuing *Charter* remedies in the cases originating before them

Extradition Judges

Historically:

Extradition judges were not courts of competent jurisdiction under s 24 pursuant to the SCC ruling in *Argentina [Republic] v Mellino* (1987)

- The only way to fugitives to make *Charter* claims is to file a *habeas corpus* writ in the superior court [this procedure was required even when the extradition judge was a superior court judge)

Currently:

Parliament amended the *Extradition Act* to confer express jurisdiction on extradition judges who are now always superior court judges [did so to better judicial economy]

The SCC ruled + explained in *United States of America v Cobb* (2001) how an extradition judge is "competent to grant *Charter* remedies, including a stay of proceedings, on the basis of a *Charter* violations but only insofar as the *Charter* breach pertains directly to the circumscribed issues relevant at the committal stage of the extradition process"

Administrative Tribunals

R v Conway (2010) – unless an administrative tribunal's enabling legislation states otherwise, it is a court of competent jurisdiction if they have the power to decide questions of law

- Whether they can award any particular *Charter* remedy continues to turn on the "function and structure" inquiry

Procedure + Practice

In addition to establishing standing before a court of competent jurisdiction, applicants for *Charter* remedies must also follow certain rules of practice and procedure to ensure that their claims are heard on the merits

Must provide:

- Written notice to the Crown and court of their intention to apply for a Charter remedy
    - If not, the application may be refused
    - Typically needs to be done *at least* 30 days in advance
    - Ideally, this should be given before the trial, but courts may entertain later application in appropriate circumstances (*Guindon v Canada* (2015) – where

doing so would not procedurally prejudice the opposing party, and where the refusal to consider it would risk an injustice)
    - Factors to be considered by courts exercising this discretion:
        - Existence of any statutory notice rules
        - Practice direction
        - Crown objections at time of the application
        - Timing of the application
        - The nature of the claim
        - The extent of any prejudice to the Crown
        - Whether the trial is in provincial or superior court
        - Whether there has been a preliminary inquiry
        - The impact of the application on the course of the trial
- Proper factual foundation for their claims
    - This stems from the fact that applicants bear the burden of proof (BOP) of the right violation and the entitlement to a remedy under s 24

Charter applications should be decided at the end of the trial (although there may be exceptions to this)

- Appeals of *Charter* decisions follow the usual *Code* procedures
    - The verdict may be appeals and allegations that the TJ erred in making those decisions will be grounds of the appeal
    - TJ's s 24 rulings will be afforded ***deference***
        - Unless the TJ erred in law or principle, gave inadequate weight to relevant factors, failed to find or mischaracterized a *Charter* violation, made unreasonable factual findings, provided inadequate reasons, or was "so clearly wrong as to amount to an injustice"
    - No deference will be afforded to TJ's alternative decisions to admit evidence under s 24(2) when they did not find any *Charter* breach
- Appeal courts are reluctant to consider *Charter* claims not raised at trial
    - Appeal courts can decide to hear those claims when there is adequate factual foundation, doing so would not prejudice the opposing party, and failing to do so could cause injustice (*R v Brown* (1993); *Guidon v Canada* (2015))

Types of Remedies

After a person with standing has established that the court has the jurisdiction to apply for a remedy under s 24 of the *Charter*, the court must decide whether to grant the remedy sought (or any other remedy)

- This is where the difference between 24(1) and 24(2) becomes relevant
    - Applicants seeking the exclusion of evidence "obtained in a manner" violating the *Charter* must follow the route prescribed in 24(2)
    - All other remedies flow from 24(1)

24**(1)** Remedies

> ***Charter of Rights and Freedoms***
>
> **Enforcement of guaranteed rights and freedoms**
> **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***.

- This is a wide and fetter discretion
- Novel and creative remedies may be necessary to "meet the challenges and circumstances" of the case at hand

The discretion must be exercised with the following considerations (*Doucet-Boudreau v Nova Scotia (Department of Education* (2003)):

- The need to effectively vindicate the *Charter* right in question
- The separation of functions among the state's legislative, executive and judicial branches
- The particular capacities and competence of courts and the judicial function
- Ensuring fairness to the party against whom the order is made

Stay of Proceedings

Judicial stays of proceedings may be awarded in both *Charter* and non-*Charter* cases

- A judicial stay permanently terminates proceedings against the accused (usually before the case has been decided)
- Further prosecution for the same conduct is barred by the double jeopardy rules
- Stay = acquittal
    - It will only be awarded when other remedies cannot adequately redress the wrong – high threshold
- Stays are hard to get – need to be the clearest of cases

Three categories of judicial stays:

1. Stays awarded under section 24(1) of the *Charter* for violations of section 11(b) [the right to be tried within a reasonable time]
    - Stays are automatic once a section 11(b) violation is found [other 24(1) remedies can also be awarded]
2. Remedies for entrapment
    - A finding of entrapment automatically triggers a stay
    - These stays do not hinge on the violation of any *Charter* right, but stem from the courts' inherent power to control procedural abuses
    - Courts have treated entrapment as a procedural remedy that limits police power without regard to the accused's culpability
3. Stays awarded as a remedy for other abuses of process
    - Where the abuse involved the violation of a *Charter* right, stay is awarded under 24(1)

- Where the abuse does not involve the violation of a *Charter* right, it flows from the court's inherent or implied power to control the proceedings
- *A stay will only be granted in the "clearest of cases"*

Entrapment

- Defendant's bear the burden of proving entrapment (BOP) – entrapment can only be found in the clearest of cases (heavy burden in establishing the element of the defence)
- Unlike other abuses of process, there is no need to conduct a discrete analysis to decide whether the abuse is one of the "clearest cases" warranting the stay – it is automatic

The entrapment defence discourages police from causing crime that would not have been committed otherwise

Two species of entrapment:

- Where state agents provide someone with an opportunity to commit an offence without reasonably suspecting either
  - That a specific person is committing that offence, or
  - That the offence is being committed by unspecified persons in a sufficiently defined location or analogous domain
- When police who do not reasonably suspect a person or location "go beyond" providing an opportunity and induct the commission of an offence"
- The only proper remedy for entrapment is a stay

R v Nuttall

R v Nuttall, 2018 BCCA 479

Facts:

- Entrapped them into bombing the BC legislature

Stays awarded as a remedy for other abuses of process

Courts finding an abuse of process in a non-entrapment case may award a stay or proceedings to remedy two types of prejudice:

1. Prejudice to the accused's right to a fair trial or to make "full answer and defence" and
   - "Fairness prejudice"
   - The most likely to generate a stay
   - Relates to concerns about adjudicative reliability (the possibility of wrongful conviction or other incorrect disposition)
   - Fairness prejudice <u>does not need to arise from abuse state conduct</u>
2. Prejudice to the integrity of the justice system
   - "Integrity prejudice"
   - Only rarely will this justify a stay
   - Recognizes that there are "limits on the type of conduct society will tolerate in the prosecution of offences"
   - The conduct prejudicing the integrity of the justice system <u>does not need to affect</u> the accused's rights or interests or be committed by a state actor

^where both types of prejudice are present, the cumulative effect can be considered when determining if a stay should be granted (*O'Connor* (1995))

Regardless of which type of prejudice is present, a stay will only be appropriate if two conditions are met:

1. The prejudice must be "manifested, perpetrated, or aggravated through the trial's conduct or outcome", and
2. There must be no other remedy capable of removing it

Costs

Courts can award costs against the Crown in both criminal and regulatory proceedings
Costs can be ordered in three types of cases:

1. As remedies for *Charter* violations under 24(1)
2. As remedies for state misconduct not involving any *Charter* violation
3. In exceptional circumstances such as test cases

Costs awards are *extraordinary* – they do not flow routinely to successful defendant's

- They are not exceptionally rare because they have played an important role in enforcing Crown's disclosure obligations

If costs are based on misconduct, they are generally only awarded when there has been a marked and unacceptable departure from reasonable standards accepted of prosecution (inadvertent error is not sufficient)

- This would look like "abuse of process, improper motive, bad faith, egregious misconduct, or oppressive, vexatious or reckless conduct" (*R v Billiard* (2021 NLCA))
- The stringent standard can be relaxed when the applicant is not a criminal defendant (i.e., *R v Ciarniello* (2006) → ONCA awarded costs to a non-accused person who had sued for the return of unconstitutionally seized property, despite the absence of serious prosecutorial misconduct)

If there is no misconduct, courts may order costs when the prosecution pursues public interest applications that have little practice effect on the accused (*R v Ciarniello* (2006)); however, exceptional circumstances has not been authoritatively defined

Quantity of Costs

- Appellate courts have provided guidance on how costs should be quantified in criminal proceedings
    - Costs in criminal proceedings are designed primarily to "discipline and deter misconduct" (*R v Fercan Development Inc.* (2016) ONCA) [compensation for loss plays less of a role]
- Costs are paid out of public funds, and not by private litigants, so should therefore be limited to a "reasonable" proportion of actual costs

Considerations (*R v Fercan Development Inc.* (2016) ONCA):

- Nature + complexity of the case

- Length of proceedings
- Nature and magnitude of Crown misconduct
- Conduct of and impact on third parties

Damages

Damages may be awarded under 24(1) as a remedy for *Charter* breaches when:

1. The application is made to a court or tribunal empowered to do so, and
    - The law is clear that claimants may pursue damages before superior courts in a civil lawsuit brough against state actors who allegedly perpetrated the violation
        - ***Damages are not available in inferior courts (provincial criminal courts)
        - It is implied that damages may be sought in criminal proceedings before the superior courts
    - Applicants are not required to exhausted private law remedies before pursuing *Charter* damages
    - The appropriate forum for an award of damages under s 24(1) is a court which has the power to consider *Charter* questions and which by statute or inherent jurisdiction has the power to award damages (superior courts of criminal jurisdiction fulfill both these criteria) (*Vancouver v Ward* (2010) following *R v Conway* (2010))
2. They would be an appropriate and just remedy in the circumstances

Are damages ever an appropriate and just remedy in criminal proceedings?

- NO:
    - Some argue that the criminal trial process lacks the procedural mechanisms (i.e., pleadings and discovery) necessary to fairly and accurately assess damages
- YES:
    - Others argue that the criminal trial courts should be able to award the *Charter* damages
        - Damages can be the best way to compensate claimants for harms from *Charter* breaches and deter future infringements
        - Subjects of *Charter* breaches shouldn't have to pursue separate civil claims

Ward Framework for deciding whether to award *Charter* damages:

1. Damages should only be awarded against governmental entities (not individuals)
2. Damages should only be awarded to the extent that they "serve the objectives of:
    (1) compensating the claimant for loss and suffering caused by the breach;
    (2) vindicating the right by emphasizing its importance and the gravity of the breach; and
    (3) deterring state agents from committing future breaches"

The SCC stressed in *Henry v BC (AG)* that there should be a high threshold for awarding *Charter* damages – even in *Vancouver v Ward*, only modest damages were awarded for an egregiously unconstitutional strip search by police

- The action of applying a law that is later found to be unconstitutional will not result in *Charter* damages unless it is clear wrong or in bad faith
- The stringent standard does not apply to acts committed pursuant to police rather than legislation

Quantum

SCC in *Ward* stressed that the award must "reflect what is required to functionally serve the objects of compensation, vindication of the right and deterrence of future breaches, insofar as they are engaged in a particular case, having regard to the impact of the breach on the claimant and the seriousness of the state conduct" keeping in mind the need to avoid the duplication of any damages awarded under private law causes of action

Exclusion of Evidence

As a remedy for state misconduct, the exclusion of evidence takes place usually under 24(2)

R v Therens (1985), Le Dain J. stated:
"In making explicit provision for the remedy of exclusion of evidence in s 24(2), following the general terms of s 24(1), the framers of the *Charter* intended that this particular remedy should be governed entirely by the terms of s 24(2)"

- The exclusion of evidence then would never be appropriate or just under s 24(1)
- SCC has modified this position slightly

Evidence may be excluded under s 24(1) as a remedy for violations unconnected to the evidence's acquisition

- *R v Bjelland* (2009) ruled that this will only occur where:
  - (i) The admission would result in an unfair trial or would otherwise undermine the integrity of the justice system, and
  - (ii) A less intrusive remedy cannot be fashioned to safeguard the fairness of the trial process and the integrity of the justice system

4 main situations where courts have excluded evidence under s 24(1):

1. Properly obtained evidence that would violate an accused's *Charter*-protected interests if admitted at trial
   - *R v White* (1999):
     - SCC held that the admission of an accused's statutorily compelled accident report would violate the right to silence protected by s 7
     - Police didn't violate the rights in ***obtaining*** the statement, so section 24(2) didn't apply
     - Court held, instead, that ***admitting*** the statement (or any evidence derived from it) at trial that would result in violation of rights
     - Evidence excluded under 24(1)
2. Improperly obtained evidence where the *Charter* does not apply
   - *R v Harrer* (1995):

        - Evidence collected outside the *Charter's* territorial ambit may nonetheless be exclude if its admission would make the trial unfair
        - This exclusionary power could derive from 7 or 11(d), but preferably (in *Charter* cases) comes from 24(1)
            - Practically, the outcome is the same – evidence is excluded when its admission would render the trial unfair
    - *R v Buhay* (2003):
        - SCC has also suggested that evidence improperly obtained by non-state actors in Canada may be exclude in the same circumstances
3. As a remedy for untimely disclosure in violation of defendant's s 7 right to full answer and defence
    - ONLY WHEN lesser remedies would not cure the prejudice (i.e., orders for disclosure, adjournment, a mistrial, or costs)
    - *R v Bjelland* (2009):
        - Exclusion might be needed to protect trial fairness when evidence is given mid-trial after decisions about the defence have been made by the accused
        - Exclusion might be required to protect the integrity of the justice system where the pre-trial custody would be significantly prolonged or where the Crown withheld evidence that would amount to misconduct
4. As a remedy for an abuse of process at common law (even without a *Charter* violation)
    - *R v Babos* (2014):
        - SCC overturned a stay where police colluded in testifying – any harm to the integrity of the justice system could have been cured by excluding evidence against a co-accused even though his rights were not violation in obtaining the evidence
    - *R v Hart* (2014):
        - Confessions made to undercover agents during a Mr. Big operation may be excluded if state misconduct inducting them amounted to an abuse of process

Reduction in Sentence

For many years, Courts differed on when it would be "appropriate and just in the circumstances" to order sentence reductions under section 24(1) as a remedy for *Charter* violations

- *R v Nasogaluak* (2010):
    - SCC adopted a broad approach to ordering sentence reductions concluding that state misconduct should generally be considered in sentencing without resort to the *Charter*
    - Justice LeBel: misconduct is a mitigating factor in sentencing *as long as it relates to the circumstances of the offence or the offender*
    - Misconduct unrelated to the circumstances cannot reduce a sentence - remedies for such misconduct must be sought outside the sentencing process

Is the misconduct sufficiently connected to the offence or offender?

- Misconduct causing direct and serious hard to the accused (such as excessive force used in carrying out an arrest qualifies) (*R v Nasogaluak*)

Sentence reductions should eb considered when the misconduct has a *significant causal, temporal, or contextual connection with the offence or offender, regardless of the nature of the harm*

- If this minimal threshold is met, then the court should go on to decide whether reducing the sentence would be appropriate in light of the seriousness of the misconduct and other sentencing principles

The sentence imposed must adhere to any mandatory minimums or other statutory restrictions – the sentencing judge in *Nasogaluak* erred in this regard

R v Nasogaluak

R v Nasogaluak, 2010 SCC 6

Facts:

- RCMP received a tip about an intoxicated driver which led to a high-speed pursuit of Nasogaluak (N)
- When N finally stopped, the police had to remove him forcibly (he resisted)
- On officer (C) punched him twice in the heard while wrestling him out of the car (N continued to resist once outside of the car)
- C yelled at the accused to stop resisted and punched him a third time
- N was pinned face down on the pavement with C straddling his back and another officer kneeling on his thigh
- N refused to offer his hand to be cuffed, so a second officer, D, punched him twice in the back which broke N's ribs and led to a punctured lung
- Once at the police department, N gave breath samples
    - The officers did not report the force they used and provided little information about the incident
    - N had no signs of injury and did not request medical assistance
    - N did twice tell an officer that he was hurt; he was observed crying; he was heard to say he could not breathe; he was observed leaning over and moaning
- The accused was released and the following morning he checked himself into a hospital – it was found that he suffered broken ribs and a collapsed lung that required emergency surgery

Trial: N entered a guilty plea to charges of impaired driving and flight from police

- TJ held that the police had used excessive force in arresting the accused, and breached his rights (including s 7)
- As a remedy under s 24(1), TJ reduced N's sentence below what would have otherwise been imposed [12-month conditional discharge on each count w/ 1 year driving ban]

CoA: Upheld the decision to grant reduced sentences under s 24(1), but added that the sentencing judge has no discretion to reduce a sentence below a statutorily mandatory minimum sentence

- Set aside conditional discharge on the impaired driving sentence, entered a conviction, and ordered a minimum fine for a first offence mandated by the *Code*
- CoA did not interfere with the conditional discharge for the offence of evading a police officer

Issue: Were the sentences lawfully reduced as a remedy for the excessive force used by police?

Decision: Appeal's dismissed; the CoA correctly substituted the order of a conditional discharge on the offence of impaired driving with the statutorily mandated minimum fine

Reasoning:

- CoA correctly stated the legal principles involved in deciding whether the force was excessive and held that the TJ had adhered to those principles, regardless of whether he had cited the case law and provisions of the *Code*
- There was sufficient evidence to support the TJ's finding of excessive force
- "The substantial interference with N's physical and psychological integrity that occurred upon his arrest and subsequent detention clearly brings this case under the ambit of s 7"
- ***The sentencing judge correctly treated the police's use of excessive force in arresting the accused as mitigating but erred in ordering a more lenient sentence than permitted under the Code***

Sentence Reduction to Remedy a Charter Breach

- The objectives and principles of sentencing are codified to bring greater consistency and clarity to sentencing decisions
- Consider the fundamental purpose of sentencing as that of contributing, along with crime prevention measures, to "respect for the law and the maintenance of a just, peaceful and safe society"
- Need to find a sanction that reflect the usual array of sentencing objectives: denunciation, general and specific deterrence, separation of offenders, rehabilitation, reparation, and a recent addition: the promotion of a sense of responsibility in the offender and acknowledgement of the harm caused to the victim and to the community
- ¶[40]: "The objectives of sentencing are given sharper focus in s. 718.1, which mandates that a sentence be "proportionate to the gravity of the offence and the degree of responsibility of the offender". Thus, whatever weight a judge may wish to accord to the objectives listed above, the resulting sentence must respect the fundamental principle of proportionality."
- Although the CoA did not need to rely on s 24(1) of the *Charter*, it crafted a fit and appropriate sentence which address the circumstances of the accused, while remaining within the statutory parameters of the *Code*

State Misconduct + the Proportionality Principle

- Justice LeBel: "sentencing includes consideration of society's collective interest in ensuring that law enforcement agents respect the rule of law and the shared values of society"

- State misconduct *can* reduce an offender's sentence below the usual range set out in the case law
    - A sentence falling outside the regular range of appropriate sentences in not necessarily unfit
    - Regard must be had to all the circusmtances of the offence and the offender and to the needs of the community in which the offence occurred

Trial Process Remedies

¶10.103 (932)

Criminal defences and third parties can seek a variety of s 24(1) remedies to ensure their liberty, trial fairness, and other *Charter*-protected interests. Some of the remedies of this nature include:

- Ban the publication of court proceedings, prohibit access to evidence or enjoin media broadcasts
- Produce or disclose evidence in possession of the Crown or a third party
- Provide an interpreter
- Require the Crown to pay for legal representation
- Adjourn proceedings
- Recall witnesses for cross-examination
- Grant a mistrial or a new trial
- Require the. Return of seized goods
- Require further proceedings be held in front of a different judge
- Require the accused to be tried by a judge without a jury
- Substitute a lesser charge
- Have detainees brought to court to determine the lawfulness of other detention by way of *habeas corpus*

24**(2)** Remedies

Pre-*Charter*, there was no mechanism (apart from the confessions rule) to exclude evidence obtained by improper or illegal means

Charter of Rights and Freedoms

Exclusion of evidence bringing administration of justice into disrepute

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.

**not being tested on Collins – or the history of 24(2)

To have evidence excluded under 24(2), claimants must establish:

1. One of their *Charter* rights was violated (standing – see above section ^)
2. The evidence was "obtained in a manner" that violated this right

3. The admission of the evidence could "bring the administration of justice into disrepute"

What is the purpose of excluding unconstitutionality obtained evidence? (Per *Grant*)

- To maintain the integrity of, and public confidence in, the justice system
    - *Not* to punish police or compensate defendants
    - Primary aim is not to deter breaches, but to encourage police to respect the requirements of the *Charter*
- To dissociate courts from state deviation of the rule of law
    - This will be necessary where a reasonable person, informed of all relevant circumstances and the values underlying the *Charter* would conclude that the admission would create further damage to the repute of the justice system
    - The 24(2) inquiry asks "whether the admission of the 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" (*R v Le* (2019))

Courts should focus less "on the particular case than on the impact over time of admitting the evidence obtained by infringement of the constitutionally protected rights of the accused" (*R v Morelli* (2010))

"Obtained in a Manner"

It is not enough to show that police violated one of the accused *Charter* rights and obtained the impugned evidence – there must also be a ***sufficient connection*** between these two events

Three types of connections:

Causal Connection

Established if the evidence would not have been found *but for* the breach

- Causal connection is not *required*, but it will satisfy the requirement if present (*R v Strachan* (1988))

If causation were a prerequisite for exclusion, it would give police little reason to skip abuses unlikely to produce evidence:

Leading case on the exclusion of evidence under 24(2) subsequent to a violation of a right

R v Strachan

R v Strachan, [1988] 2 SCR 980

Facts:

- Lawful search and found the drugs, but then violated Strachan's right to counsel [10(b)]
- There was no causal connection because the police would have found the drugs had the complied with the *Charter*

- Court held that the contextual connection gave rise to a successful pitch to exclude evidence – even though they would have found the drugs anyways
    - Court mandated an inquiry into the *entire chain of events during which the* breach occurred, and the evidence was obtained (contextual connection)
- Evidence obtained following a breach will generally satisfy the obtained in a manner requirement unless the obtaining of the evidence is too remote from the breach

R v Goldhart

R v Goldhart, [1996] 2 SCR 463

Facts:

- Police were investigating a marijuana grow operation
- Police were executing a search warrant at Goldhart's residence (known suspect) when they arrested Mayer (unknown previously)

Preliminary Inquiry: Mayer plead guilty

- Mayer explained he had undergone a religious conversion and wished to atone to his misdeeds
- Plea was accepted despite his lawyer's advice that the marijuana would likely be excluded under 24(2)

Goldhart's Trial:

- Search violated s 8 rights
- All the marijuana was excluded, but the prosecution then called Mayer (even if the drugs are inadmissible under 24(2), they still had Mayer as a witness)
- Accused objected from Mayer (the testimony was obtained in a manner that violated the *Charter* + should be excluded – causal connection)
    - They would never have found Meyer if it weren't for the violation – passes the but for test
- CoA agreed, but SCC overturned – the causal and other connections were tenuous – the evidence was only obtained when Mayer decided to testify, not when the police first discovered him (this decision was made long after the breach)
- It was not obtained in a manner that violated the *Charter* – the mere existence of a causal connection was not sufficient if it were too remote (yes, causal connection but it was not proximate)

Courts must consider the presence and strength of causal and other connections in deciding "on a case-by-case basis" whether the discovery of the evidence was linked closely enough to the violation to justify exclusion

Contextual Connection

Can the two events be viewed as a part of a "single transaction"?

The most important type of connection!

- The "non-causal" connection between the violation and the discovery of the evidence

The critical question: ***can the two events be considered to have occurred during the "same transaction"?***

R v Grant → although the unconstitutional search was not causal connected to the evidence, it formed "an integral component in a serious of investigative tactics" that lead to its discovery

The obtained in a manner requirement may not be met if the violation is severable from the investigatory process which culminated in the discovery of the impugned evidence – if the ***connection between the two events was broken by intervening events*** [i.e., *Goldhart* → Mayer's religious conversion rendered the link between his testimony and the search extremely tenuous]

R v Wittwer

R v Wittwer, 2008 SCC 33
Facts:
- Wittwer made an incriminating statement after police twice violated his right to counsel
    - Police realized that it would likely be inadmissible in court
- 5 months later, Police questioned him again *after providing 10(b)* rights for 4 hours
    - The interrogating officer confronted Wittwer about the prior statement and Wittwer made another incriminating statement

Contextual connection
Important for the transactional connection bit
- Court considered the temporal and contextual links and whether there was a causal link
    - Found all three connections

Issue: Is the latter incriminating statement admissible?
Trial: Admitted latter statement; Wittwer convicted
CoA: Convictions upheld
Decision: Appeal allowed; new trial ordered
Reasoning:
- The statement should have been excluded as per 24(2)
- The connection between the two statements was direct and obvious
- It was temporally, causal, and contextual
- The interrogating officer concluded that he would not obtain the incriminating admissions sought unless he confronted the accused with the latter's earlier inadmissible statement – the officer made use, knowingly and deliberately, of an unconstitutionally obtained statement
    - This alone was sufficient to taint the subsequent statement

A statement is obtained by an earlier breach of an accused's constitutional rights if the breach and the impugned statement can be said to be part of the same transaction or course of conduct.

Temporal Connection

Refers to the lapse in time between the violation and the obtaining of the evidence

- It is inextricably bound with the contextual connection: the shorter the period between the events, the more likely the court will find that the evidence was acquired during the same transaction as the violation
- Passage of time not always indicative:
    - Short gaps have been found to not meet the requirement (*R v Henrikson*)
    - Long gaps have been found to meet the requirement (*R v Wittwer*)

Can a court find that evidence was "obtained in a manner" when discovery of the evidence preceded the breach?

- SCC hasn't explicitly said yet
- ONCA: *R v Pino* (2016) → YES
    - Foreclosing the possibility of exclusion where the evidence was obtained before the breach would inhibit courts' ability to dissociate themselves from unacceptable state conduct
    - *R v Do* (2019) ONCA → NO
        - Evidence was not obtained in a manner when the transaction producing the evidence was "largely completed" before the breach occurred

Repute of the Administration of Justice

The moist contentious aspect of 24(2) is deciding whether the admission of evidence would bring the administration of justice into disrepute

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 interest of the accused
3. Society's interest in the adjudication of the case on its merits
    - Society has an interest in the truth – putting away people who break the law

These three factors should be weighed and balanced without the aid of any overarching rule (such as any rule of automatic exclusion for any time of violation or class of evidence)

Seriousness of the Breach

¶74 *Grant*: At one end of the spectrum, admission of evidence obtained through inadvertent or minor violations of the *Charter* may minimally undermine public confidence in the rule of law. At the other end of the spectrum, admitting evidence obtained through a wilful or reckless disregard of *Charter* rights will inevitably have a negative effect on the public confidence in the rule of law, and risk bringing the administration of justice into disrepute.

The Courts will focus on the reasonableness of the state conduct comprising the violation

Bad faith, wilfully violating the *Charter* → case for exclusion will be strong

Good faith, subjective belief that the conduct was lawful → case for exclusion will be weaker (however, the law is now clear that any finding that police acted carelessly, negligently or with culpable ignorance militates in favour of exclusion to some degree – the phrase "good faith" shouldn't be used in this context)

How do courts decide if state conduct is negligent?

- A key factor is whether authorities have reasonably relied on standards set out in legislation, policy, practices, or case law
    - I.e., when police relied on statutory or common law powers not yet found to violate the *Charter*
        - *R v Duarte* (1990) + *R v Wong* (1990) → SCC found that police acted in good faith when they used surveillance techniques complying with then-existing *Code* standards
        - *R v Cole* (2012) → Court concluded that "unsettled" law relating to expectations of privacy in workplace computers militated in favour of admission where police conducted a warrantless search of the accused's laptop
        - *R v Fearon* (2014) → police cannot chose the least onerous path whenever there is a gray area in the la and should generally err on the side of cation by choosing a course of action that is more respectful of the accused's rights
    - Courts will find conduct reasonably likely if there is substantial jurisprudential support BUT exclusion will be warranted for clear violations of well-established rules governing state conduct
- Example: in *Grant*, the majority noted that the point where an encounter becomes a detention isn't always clear, so the failure to comply with s 10(b) was understandable given the police were "operating in circumstances of considerable legal uncertainty"
    - The breach was *less serious* because of this uncertainty in the law
    - ***conversely, exclusion will follow when police break an unambiguous rule even if it's an isolated mistake – police are expected to know what the law is

The standard extends to all state actors and institutions who contributed to the *Charter* violation (not just the individual officers who were its proximate cause) (*R v Reeves*)
Culpability can also extend to police agencies for failing to properly train officers on their *Charter* obligations

- Systemic training deficiencies militate in favour of exclusion
- *R v D(GT)* (2017) → police read a caution card to an arrest containing the question "do you wish to say anything?
    - This question clearly violates 10(b)
    - Although the question appeared on the standard caution card issued by the agency, SCC found the breach to be systemic and institutional
    - "Police services have an ongoing obligation to consider whether their practices have kept pace with developments in *Charter* jurisprudence"

What if police rely on the advice or authorization of other state actors?

- In *R v Stillman* (1997), the SCC suggested that the unreasonable advice from prosecutors *aggravated* the seriousness of the violation
- Whereas, in *R v Généreux* (1992), the SCC found police reliance on such advice to be *mitigating*

**What about when it's a facially valid search warrant? MITIGATING

- Violations are less serious when police acted on what they believed were valid search warrants (*R v Goncalves* (1993); *R v Erickson* (1993)) *unless* police deliberately or negligently mislead the issuing justice (*R v Morelli* (2010))

Isolated nature of a *Charter* violation is not mitigation, but systemic and institutional violations are more serious

The SCC in *Harrison* found that the violations were serious:

- "The departure from *Charter* standards was major in degree, since reasonable grounds for initial stop were entirely non-existent"
- The seriousness of the violation was as compounded by misleading police testimony

R v Harrison

R v Harrison, 2009 SCC 34

Facts:

- Police officer on highway patrol in Ontario stops a vehicle because it did not have a front license place (realized it was an AB vehicle (where a front plate is not needed) so there was no reason to pull him over) – he continued to pull him over because abandoning the detention "might have affected the integrity of the police in the eyes of observers"
    - Ran a check on the driver's license
    - Driving the speed limit in a place where everyone usually speeds
    - Knows that drug movers rent vehicles usually
- Officer arrested the accused after finding out his license was suspended
- Search incidental to arrest (the discovery of license was not needed for the charge of suspended license)

Trial: the initial detention of the accused was premised on a hunch rather than probable grounds – arbitrary detention (s 9)

- The warrantless search of the vehicle was unreasonable (s 8)
- 24(2) analysis – TJ held that the violations were serious; however, admitted evidence on the ground that the repute of the administration of justice would suffer if excluded
- Accused convicted of trafficking

CoA: Trial decision upheld; affirmed the conviction

Issue: Should the cocaine be admitted into evidence?

Decision: Appeal allowed; acquittal entered; 77lbs of cocaine excluded from evidence

Reasoning:

- The *Charter* breaches are clear – the sole issue is whether the cocaine should be admitted into evidence or not

- Court applies the revised test set out in *Grant* (the three lines of inquiry relevant to determining admissibility of evidence):

Seriousness of the Breach

- "The conduct of the police that led to the *Charter* breaches represented a blatant disregard for *Charter* rights, further aggravated by the officer's misleading testimony at trial."

The Impact of the Breach

- "The deprivation of liberty and privacy represented by the unconstitutional detention and search was a significant, although not egregious, intrusion on the accused's *Charter*-protected interests."

Society's Interests

- "To appear to condone wilful and flagrant *Charter* breaches amounting to a significant incursion on the accused's rights does not enhance, but rather undermines, the long-term repute of the administration of justice."
- TJ erred in placing undue emphasis on this factor

The price paid by society for an acquittal in these circumstances is outweighed by the importance of maintaining Charter standards

What about breaches in exigent circumstances?

- Parliament and the courts have incorporated exigent circumstances exception into statutory police powers and *Charter* rights – i.e., warrantless searches are allowed to protect public safety or the prevent the imminent loss of evidence
- If there is insufficient urgency to justify an intrusion, perceived exigency should not weigh in favour of admission
    - The only exception is where the constitutional rules governing police conduct in the circumstances is unclear

Impact on Accused's Charter-protected Interests

Under this category, courts measure the extent to which the *Charter* breach "actually undermined the interests protected by the right infringed" (*Grant*)

- More serious the impact = the greater the risk that the admission of the evidence would signal to the public that these rights are of little actual benefit to the citizen

What are the interests protected by the right violated?

S 8

- Key consideration: the strength of the accused's reasonable expectation to privacy and the extent to which the police invaded it
    - Violations are more serious if they invade somewhere with a high expectation of privacy (i.e., one's body, home, computer, or private communication)
        - Examples: ¶10.148

- Violations may be discounted if there are lesser privacy expectations (i.e., a vehicle)
    - However, SCC has warned that violations may still have profoundly negative effects (so it depends)

S 9

- Main purpose: "to protect individual liberty from unjustified state interference by prohibiting the coercive pressures of detention … from being applies to people without adequate justification" (*R v Le* (2019))
- Relevant factors:
    - Duration of detention (**even a brief detention can have substantial harm)
    - Magnitude of any physical or psychological coercion

S 10

- The protected interest is usually characterized as "preserving the individual's freedom to choose whether to speak to police" – protect against compelled self-incrimination
- *R v Taylor* (2014) →
    - SCC stated that denying the accused the access to counsel deprived him "of the opportunity to make an informed decision about whether to consent to the routine medical treatment that had the potential to create – and in fact did create – incriminating evidence that would be used against him in trial"
- A s 10 violation may have a significant impact *even if it does not create incriminating evidence*
    - *R v Rovers* (ONCA) (2018) →
        - ¶45: "The right to counsel is a lifeline for detained persons. Through that lifeline, detained persons obtain, not only legal advice and guidance about the procedures to which they will be subjected, but also the sense that they are not entirely at the mercy of the police while detained. The psychological value of access to counsel without delay should not be underestimated."

Society's Interest

Under the final *Grant* category, courts must ask whether truth-seeking would be better served by admission or exclusion

Must consider the following factors:

- The reliability of the evidence
    - Courts gauge whether the state conduct associated with the violation raises questions concerning the reliability of the unconstitutionally obtained evidence – Courts *do not* weigh the overall strength of the evidence
        - Physical evidence will always be deemed reliable under this analysis (militates in favour of admission) because physical evidence exists independently of any state misconduct
        - Statements obtained through state misconduct can undermine the reliability of the confessions (statement will likely be excluded)

- The importance of the evidence to the Crown's case
    - More important evidence = the greater society's interest in admitting it to determine the truth of the allegations against the accused
    - Dubious evidence = likely to be excluded
    - SCC has emphasized that exclusion might be necessary where other factors strongly favour it even if it would leave the prosecution with no case against the accused (*R v Morelli* (2010))
- The seriousness of the offences charged
    - Pre-*Grant*, jurisprudence said that exclusion would be less likely when the offence was serious, but since *Grant*, this is ambiguous
        - Offence seriousness will be considered, but it can go either way
        - Seriousness of the offence in question (in *Grant* = gun possession) did not militate in favour of either exclusion or admission
    - This factor has been treated differently from time to time – sometimes Courts effectively ignore it, and other times it seems to count in favour of admission
        - *R v Spencer* (2014) → "society undoubtedly has an interest in seeing a full and fair trial based on reliable evidence, and all the more so for a crime which implicated the safety of children"
    - Courts are less willing to exclude evidence for more serious offences
    - *R v Harrison* (2009) → "allowing the seriousness of the offence and the reliability of the evidence to overwhelm the s. 24(2) analysis "would deprive those charged with serious crimes of the protection of the individual freedoms afforded to all Canadians under the *Charter* and, in effect, declare that in the administration of the criminal law 'the ends justify the means'"

It is essentially the balancing of the accused rights and the public's right to the proper administration of justice

- Hundreds of applications made by O'Neill
    - Always conceded to the Crown
- The factors will almost always favour admission; however, "this must not be permitted to overwhelm the 24(2) analyses" (*R v Cole* (2012))

Balancing the Grant Factors:

There is no mathematical precision to the weighing of factors, but the SCC has recognized patterns in the jurisprudence that correlate strongly with exclusion or admission:

- *R v Le* (2019) → Where the first and second inquiries, taken together, make a strong case for exclusion, the third inquiry will seldom if ever tip the balance in favour of admissibility. Conversely, if the first two inquiries together reveal weaker support for exclusion of the evidence, the third inquiry will most often confirm that the administration of justice would not be brought into disrepute by admitting the evidence."
    - If one of the first two factors pulls strongly towards exclusion, exclusion may be warranted → "serious *Charter*-infringing conduct, even when coupled with a weak impact on the *Charter*-protected interests, will on its own support the

finding that admission of tainted evidence would bring the administration of justice into disrepute"

- Regardless, ***all three factors need to be considered or else the purpose and application of s 24(2) is undermined***

Application to Types of Evidence (¶10.175)

Non-discoverable statements: presumed exclusion

- Near automatic rule of exclusion pre-*Grant*
- After *Grant*, this is not an automatic rule, but *presumed*
- When police have acted reasonably, and there are no concerns about reliability, courts should generally find the presumption of exclusion has been rebutted
- Evidence obtained through deliberate or negligent misconduct should be excluded even if it was *discoverable*

Non-discoverable bodily samples

- Pre-*Grant* – almost always excluded
- Post-*Grant*, bodily samples are given the same treatment under 24(2) as non-bodily physical evidence
- ¶10.179 – breath sample evidence in impaired driving cases

Physical Evidence

- Key consideration will be the extent to which the intrusion invaded the claimant's reasonable expectation of privacy

R v Jones

R v Jones, 1996 (ONCA)

Facts:

- Jones and Francis were arrested and charged with a number of very serious crimes in September 1994
    - They were denied bail and their detention orders were affirmed after bail review application in October 1994
    - They remained in custody for 2 years on these charges – not bringing any further applications for release (nor have they received the 90-day bail hearing mandated by the *Code*)

Preliminary Inquiry:

- November 1994 – June 1995 when J + F moved to quash the prelim inquiry and for an order prohibiting the continuation of the prelim inquiry
- May 1996: Prohibition was issue and the matter was remitted to the Ontario Provincial Court so that the Crown could proceed with a fresh preliminary inquiry before a different judge

"In any event, I cannot agree that the possibility of an order staying a judgment pending a Crown appeal renders the Crown right of appeal unconstitutional. The claim that a stay would have the effect of infringing a detained person's constitutional rights is an argument which

goes to the propriety of granting the stay and not to the constitutionality of the right of appeal. The Crown right of appeal under s. 784(5) does not infringe a detained person's constitutional rights as set out in s. 10(c) of the *Charter.*"

R v Imoro

R v Imoro, 2008 (ONSC)

Three issues will be brought before the SCC:

1. Did the under cover police officer entrap the appellant by asking "you can hook me up?"
    - Not a finding of entrapment
2. Can the issue of entrapment be determined by a trial judge as a *Charter* application prior to a finding of guilt?
3. Is exclusion of evidence pursuant to s. 24(2) of the *Charter* available as a remedy for entrapment?

Dismissed

Chapter 11: Information + Indictments

987-1024

Information and Indictments are the documents used at trial to set out the charges against the accused = charging documents

Remember (Chapter 5) that prosecution begins with a person laying an information before a justice, swearing that they have personal knowledge or believe on reasonable grounds that the person charged committed the offence(s) specified

In provincial court (either summary conviction or indictable), the information is also the charging document at trial

Vs.

In superior court, the information is replaced by an indictment (prepared and signed by a Crown prosecutor often after the accused is committed to stand trial at a preliminary inquiry)

- Superior court obtains jurisdiction to try the matter when the prosecutor "prefers" the indictment and formally lodges it with the court
- The prosecutor can prefer a "direct indictment" for an offence – even if the accused has not been given the opportunity to request a preliminary inquiry, a preliminary inquiry has been commenced or not concluded, or a preliminary inquiry has been held and the accused has been discharged [direct indictment requires written consent of the AG]

    - If direct indictment is preferred before any information is laid, the indictment serves as the charging document throughout

**Direct Indictment – ¶9.02(2)(a)(v) + ¶9.03
***Watch for Abuse of Process
Abuse of Process = where the Crown takes step only to obtain a conviction rather than to seek the truth

Purpose of Charging Documents: to given defendant adequate notice of the charges against them

- This is the *golden rule*
    - If this is satisfied, a charge should not be quashed even if it is defective in some way
    - Judges have discretion to ignore or correct defects in charging documents to permit the case to continue and be decided on its merits

Structure + Content

Structure of Charges ("Joinder")

The practice of including multiple "counts" (whether they relate to one accused or several) in the same charging document is known as a joinder

- A series of indictments can be characterized as comprising either one charge or many
- A single information or indictment can include multiple charges against one accused
    - If the charges are distributed amount several charging document, a separate trial will normally be held for each document
- When one offence is alleged to have been committee by more than one person, a single charging document can contain charges against each of those persons – this would result in one trial against all accused
    - If an accused doesn't like the structure of the charges, they can apply for an order to sever count from the charging documents (which would result in a separate trial)
    - If the application to sever counts is a purely criminal information, courts will order separate trials where a joint trial's costs would outweigh its benefits

2022 ONCA 274 – availability of joinder
The prosecution's freedom to join counts is not unbounded:
→ no count alleging an offence other than murder may be included in the same indictment as a murder count unless it "arises to of the same transaction" as the murder or the accused consents
→ a summary conviction offence cannot be tried by a judge and jury (even if it alleged to have been committed during the same transaction as an indictable offense) [if it non-jury trials, summary and indictable offences can be tried together *when it is in the interests of justice and the offences or accused could initially have been jointly charges*]

Joint trials of summary and indictable offences should be conducted on the basis of the indictable offence procedures (*R v Clunas* (1992) – see footnote) [accused rights are not going to be compromised]
When there is an appeal on both summary and indictable charges, the parties can appeal the disposition of the summary charges (along with the indictable) directly to the court of appeal

Joint trials of criminal summary and provincial offences can be held in provincial court when the charges "share a sufficient factual nexus and it is in the interests of justice to try them together" – efficiency favours trying these charges together (absent any express statutory language) (*R v Sciascia*)

- The evidentiary rules that conflict should be handed pragmatically

Persons under 18 charges under the *Youth Criminal Justice Act* cannot be tried jointly with adults

Contents of Charges

Format for an information is set out in Form 2:

FORM 2
(Sections 506 and 788)

Information

Canada,

Province of _____,

(*territorial division*).

This is the information of C.D., of _____, (*occupation*), hereinafter called the informant.

The informant says that (*if the informant has no personal knowledge state that he believes on reasonable grounds and state the offence*).

Sworn before me this _____ day of _____, A.D. _____, at _____ .

_____
(*Signature of Informant*)

_____
A Justice of the Peace in and for _____

Note: The date of birth of the accused may be mentioned on the information or indictment.

R.S., 1985, c. C-46, Form 2; R.S., 1985, c. 27 (1st Supp.), s. 184.

Format for indictments set out in Form 4:

FORM 4

(Sections 566, 566.1, 580 and 591)

Heading of Indictment

Canada,

Province of _____,

(*territorial division*).

In the (*set out name of the court*)

Her Majesty the Queen

against

(*name of accused*)

(*Name of accused*) stands charged

1 That he (*state offence*).

2 That he (*state offence*).

Dated this _____ day of _____ A.D. _____, at _____ .

_____

(*Signature of signing officer, Agent of Attorney General, etc., as the case may be*)

Note: The date of birth of the accused may be mentioned on the information or indictment.

R.S., 1985, c. C-46, Form 4; R.S., 1985, c. 27 (1st Supp.), s. 184; 1999, c. 3, s. 58.

Besides "state offence," neither form directs how the charges should be described; some guidance is provided in s 581:

Criminal Code of Canada

Substance of offence

581 (1) Each count in an indictment shall in general apply to a single transaction and shall contain in substance a statement that the accused or defendant committed an offence therein specified.

(2) The statement referred to in subsection (1) may be

a) in popular language without technical averments or allegations of matters that are not essential to be proved;
b) in the words of the enactment that describes the offence or declares the matters charged to be an indictable offence; or

c) in words that are sufficient to give to the accused notice of the offence with which he is charged.

(3) A count shall contain sufficient detail of the circumstances of the alleged offence to give to the accused reasonable information with respect to the act or omission to be proved against him and to identify the transaction referred to, but otherwise the absence or insufficiency of details does not vitiate the count.

R v R.(G.) (2005) → SCC emphasized that these provisions imposed two distinct notice requirements:

1. The charging document must properly "specify the charge" [***legal sufficiency***]
2. The charging document must provide "sufficient supporting detail of the underlying transaction nor circumstances [***factual sufficiency***]

Legal and factual sufficiency ensure that the accused is able to prepare adequately for trial

Legal Sufficiency

Legal sufficiency ensures that the accused has prior knowledge of the legal elements of the offence

- It should also be understood to include the *rule against duplicity*
    - Forbids the prejudicial characterization of a charge as encompassing multiple offences with different legal elements

Legal sufficiency requires that the "accused be able to clearly ascertain from the offence charged, the charges for which he or she risks conviction" (*R v R.(G.)*)
**legal sufficiency is rarely an issue, but there are 3 types of problems that occasionally come up:

1. When the document inadequately identifies the offence charges
    - It is not required (per 581(2)(a)) to use language describing the offence set out in the *Code* or list the legal elements of the offence
        - If this language is used, it can be taken from either the provision describing the offence or any provision setting out the punishment
    - The court will consider the fact that the document refers to the statutory section number (when determining legal sufficiency)
    - ***an accused cannot be convicted of first-degree murder or treason "unless in the indictment charging the offence they are specifically charged with that offence" (s 582 *Code*)

2. Duplicity
    - At common law, this rule prevented a single count in a charging document from encompassing more than one offence (*R v Kipp* (1964))

    - The rule against duplicity differs from the "single transaction" rule set out in s 581(1) of the *Code* → this limits a count to a single factual situation while the duplicity rule limits it to a single legal issue
- Any prosecution arising from the same transaction today would be prohibited by the double jeopardy principles
    - Modern courts have accordingly been interpreted the rule to apply only hwne the accused if "prejudiced in the preparation of his defence by ambiguity in the charge"

3. Arises from the rules regarding "included" offences
    - If offence Y is included within offence X, then despite the absence of an express reference to Y in the document charging X, the accused may be convicted of Y even if acquitted to X
    - To qualify as an included offence, the charging document must adequately convey to the accused the risk of conviction for Y [if not, no legal sufficiency]
- An offence is "included" in another offence if:
    - (i) It is expressly included by statute (i.e., ss 660 and 662(2) to (6) in the *Code*)
    - (ii) It is necessarily committed when the offence charged is committed (i.e., simple assault is subsumed within sexual assault)
    - (iii) It becomes included through the addition of words of description to the principal charge (i.e., driving over 80 included offence of care or control over 80)

999 – 1000

- The way you run your case differs based on what you are charged with not what you could be charged with

Factual Sufficiency

Factual sufficiency ensures that the accused has sufficient notice of the alleged facts undergirding the legal elements of the offence charged (why they have been charged)

- The document must describe the offence with enough precision to "lift it from the general to the particular"
    - However, very specific facts will limit the Crown's case

Does the document properly identify the specific transaction(s) alleged to constitute the offence?

- S 581(1) states that each count shall "in general apply to a single transaction"
    - What about cases in ongoing abuse?
- "In general" grants the Crown considerable leeway in deciding whether to charge of series of indictments as a single count or to law separate charges for each (*R v Barnes* (1975) – single charge valid despite fact that evidence revealed 4 discrete, but similar, instances of indecent assault)

Does the charging document contain "sufficient detail of circumstances of the alleged offence" to "identify the transaction" and given the accused "reasonable information" as required by s 581(3)?

Criminal Code of Canada

Certain omissions not grounds for objection
583 No count in an indictment is insufficient by reason of the absence of details where, in the opinion of the court, the count otherwise fulfils the requirements of section 581 and, without restricting the generality of the foregoing, no count in an indictment is insufficient by reason only that

a) it does not name the person injured or intended or attempted to be injured;
b) it does not name the person who owns or has a special property or interest in property mentioned in the count;
c) it charges an intent to defraud without naming or describing the person whom it was intended to defraud;
d) it does not set out any writing that is the subject of the charge;
e) it does not set out the words used where words that are alleged to have been used are the subject of the charge;
f) it does not specify the means by which the alleged offence was committed;
g) it does not name or describe with precision any person, place or thing; or
h) it does not, where the consent of a person, official or authority is required before proceedings may be instituted for an offence, state that the consent has been obtained.

Charging documents typically contain little detail beyond the time and place of the alleged offence – however, sometimes even these facts don't need to be set out precisely (i.e., *R v B.(G).* (1990) → the nature of the offence (sexual assault) and the young age of the complainant made the court rule it was sufficient to allege that the assault occurred during a 19-day span)

- Unless the time or place is either an element of the offence or crucial to the defence, a variance between the charging document and the evidence does not invalidate the charge

Sometimes factual sufficiency required more than time and place of an alleged offence

- *R v Wis Development Corp.* (1984) → SCC found that a count alleging that the defendant operated a "commercial air service" without the requisite licence at a specified time and place did not provide sufficient detail of the circumstances of the offence because the statute's definition of "commercial air service" contemplated many unrelated uses
    - Because of the nature of the statute, the time and place was not enough (required to say, violated *by doing x, y, z*)

If details are included in a charge, then they must be proven to gain a conviction – subject to 2 exceptions: (1) if details are not necessary for factual sufficiency they may be deleted by

amendment, and (2) absent amendment, the court may find that the details are mere "surplusage" such that failure to prove them is not fatal to conviction (*R v Vézina* (1986))

Remedies for Deficient Charges

While the provisions setting out these rules typically refer to indictments and appear in parts of the *Code* dealing with trials in superior court, because of section 12 and 795 of the *Code*, they apply equally to proceedings in provincial court, included those prosecuted summarily

Remember: charges are unlikely to be found deficiency unless they are misleading or otherwise prejudicial to the accused

- Even when a charge is found deficient, it is very unlikely to be quashed... it usually can be quashed by one of the following remedies:

Particulars

Under 587, the court may order the prosecutor to "furnish particulars" to ensure a fair trial – particulars will be ordered when the charging document fails to provide enough detail to meet the factual sufficiency standard

Criminal Code of Canada

Particulars

What may be ordered

587 (1) A court may, where it is satisfied that it is necessary for a fair trial, order the prosecutor to furnish particulars and, without restricting the generality of the foregoing, may order the prosecutor to furnish particulars

a) of what is relied on in support of a charge of perjury, the making of a false oath or a false statement, fabricating evidence or counselling the commission of any of those offences;
b) of any false pretence or fraud that is alleged;
c) of any alleged attempt or conspiracy by fraudulent means;
d) setting out the passages in a book, pamphlet, newspaper or other printing or writing that are relied on in support of a charge of selling or exhibiting an obscene book, pamphlet, newspaper, printing or writing;
e) further describing any writing or words that are the subject of a charge;
f) further describing the means by which an offence is alleged to have been committed; or
g) further describing a person, place or thing referred to in an indictment.

Regard to evidence

(2) For the purpose of determining whether or not a particular is required, the court may give consideration to any evidence that has been taken.

Particular

(3) Where a particular is delivered pursuant to this section,

a) a copy shall be given without charge to the accused or his counsel;
b) the particular shall be entered in the record; and
c) the trial shall proceed in all respects as if the indictment had been amended to conform with the particular

A request for particulars cannot be used to restrict the prosecution to only one theory of the case – in deciding whether to order particulars, the court may consider the evidence taken at trial up to the point

The cases suggest that only the TJ has the power to order particulars

- When particulars are ordered, they become part of the information or indictment
- Subject to an amendment or finding of surplusage, the particular must be proved for conviction

Quashing or Amending

The *Code* gives courts very broad powers to amend deficient charges (*R v Moore* (1988) → "since the enactment of our Code in 1892 there has been... a gradual shift from requiring judges to quash to requiring them to amend [instead]"

**extremely broad powers to amend – neither prof's can think of a time where an amendment wasn't granted

Criminal Code of Canada

Amending defective indictment or count

601 (1) An objection to an indictment preferred under this Part or to a count in an indictment, for a defect apparent on its face, shall be taken by motion to quash the indictment or count before the accused enters a plea, and, after the accused has entered a plea, only by leave of the court before which the proceedings take place. The court before which an objection is taken under this section may, if it considers it necessary, order the indictment or count to be amended to cure the defect.

Amendment where variance

(2) Subject to this section, a court may, on the trial of an indictment, amend the indictment or a count therein or a particular that is furnished under section 587, to make the indictment, count or particular conform to the evidence, where there is a variance between the evidence and

a) a count in the indictment as preferred; or
b) a count in the indictment
    i. as amended, or
    ii. as it would have been if it had been amended in conformity with any particular that has been furnished pursuant to section 587.

Amending indictment
(3) Subject to this section, a court shall, at any stage of the proceedings, amend the indictment or a count therein as may be necessary where it appears

a) that the indictment has been preferred under a particular Act of Parliament instead of another Act of Parliament;
b) that the indictment or a count thereof
    i. fails to state or states defectively anything that is requisite to constitute the offence,
    ii. does not negative an exception that should be negatived,
    iii. is in any way defective in substance,

and the matters to be alleged in the proposed amendment are disclosed by the evidence taken on the preliminary inquiry or on the trial; or

c) that the indictment or a count thereof is in any way defective in form.

Matters to be considered by the court
(4) The court shall, in considering whether or not an amendment should be made to the indictment or a count in it, consider

a) the matters disclosed by the evidence taken on the preliminary inquiry;
b) the evidence taken on the trial, if any;
c) the circumstances of the case;
d) whether the accused has been misled or prejudiced in his defence by any variance, error or omission mentioned in subsection (2) or (3); and
e) whether, having regard to the merits of the case, the proposed amendment can be made without injustice being done.

Adjournment if accused prejudiced
(5) Where, in the opinion of the court, the accused has been misled or prejudiced in his defence by a variance, error or omission in an indictment or a count therein, the court may, if it is of the opinion that the misleading or prejudice may be removed by an adjournment, adjourn the proceedings to a specified day or sittings of the court and may make such an order with respect to the payment of costs resulting from the necessity for amendment as it considers desirable.

An application under 601 results in one of three outcomes: (1) quashing the charge, (2) amending it (*if any prejudice or variance can be cured by amendment*), (3) leaving it as written (*if the charge as written does not prejudice the accused and is supported by the evidence*)

- The charge should only be quashed if (i) proceeding with it would cause the accused "irreparable prejudice" OR (ii) as amended, it would not be supported by the evidence

Division + Severance

Severance:

1. Co-accused where the defendant wants to run a cut-throat defense (one accused)

    - Their interests are not aligned
2. No cut-throat, btu one defendant wants to try to force the co-accused to testify and the co-accused is going to try to keep their right to silence

They can also be brought because there are a number of charges, for a jury to hear all the charges at once, it would create a large amount of prejudice (1 count of sexual assault vs. 90 charges of sexual assault) – jury unable to assess these counts individually

- *Must be in the interest of justice* (i.e., if the judge wants to do it or not)

1014-1025
R v Weir !!!

- O'Neill's husband and wife drunk driving trial example

Chapter 12: Territorial Limits

1025-1046

Extraterritorial Limits

Criminal Code of Canada

Offences outside Canada
6(2) Subject to this Act or any other Act of Parliament, no person shall be convicted or discharged under section 730 of an offence committed outside Canada.

- Codifies a well-established rule in international law known as the *principle of territoriality*
    - States only apply their laws within their boundaries

This requires that a significant portion of the activities constituting the offence take place in Canada or a real and substantial link between an offence and this country (*R v Libman* (1985))

- The test for real + substantial link → 1027

Exceptions Prefaced on Universality + Nationality Principles

- The crime of piracy on the high seas
- Any state that obtains custody of an individual who is alleged to have committed a genocide, a crime against humanity, or a war crime is entitled to try and punish
- Nationality principle → states can regulate and adjudicate regarding actions committed by national abroad (enforcement of the rules must take place when the nations are within their own state's borders)
- *Crimes Against Humanity and War Crimes Act*
- S 7 of the *Code* also sets out a number of exception to the territoriality requirement (all are prefaced on having some nexus to Canada)

Offences Defined so as to Apply Extraterritorially

There are some offences in the *Code* that are defined in such a way to extend the reach of Canada's criminal laws beyond its border

- i.e., the offence to conspire in Canada to commit an offence in another country

Interprovincial Limits

Criminal Code of Canada

Offence committed entirely in one province
478(1) Subject to this Act, a court in a province shall not try an offence committed entirely in another province.

Exceptions Where Offence Transcends Provincial Boundaries

The *Code* deals with the committing of offence between provinces in 476
"territorial divisions" = any province, county, union of counties, township, city, town, parish or other judicial division or place to which the context applies"
Examples:

- Offence committed in a vehicle or on a vessel, it is deemed to be committed within any territorial division through which the vehicle/vessel passes during its journey

Criminal Code of Canada

Special jurisdictions
476 For the purposes of this Act,

> **(b)** where an offence is committed on the boundary of two or more territorial divisions or within five hundred metres of any such boundary, or the offence was commenced within one territorial division and completed within another, the offence shall be deemed to have been committed in any of the territorial divisions;

- The Canadian courts have evidenced a willingness to construe this provision "flexibly and sensibly and to avoid restricting its operation by interpreting it narrowly or technically"

R v Bigelow (1982)(ONCA) → 3 bases for conferring jurisdiction under 476(b):

1. Where there is continuity of operation extending over more than one province, any province where a component of the offence took place may exercise jurisdiction
2. Where an overt act that forms an element of the offence takes place in the province, the courts in that province will also have jurisdiction to try the offence
3. Where the act of an accused in one province generates effects in another, the second province has jurisdiction

**just examples (non-exhaustive) of the more general "real and substantial link" principle in the context of extraterritorial jurisdiction

Transfer for Guilty Plea

Criminal Code of Canada

Idem
478(3) An accused who is charged with an offence that is alleged to have been committed in Canada outside the province in which the accused is may, if the offence is not an offence mentioned in section 469 and

> **(a)** in the case of proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government, if the Attorney General of Canada consents, or
> **(b)** in any other case, if the Attorney General of the province where the offence is alleged to have been committed consents,

appear before a court or judge that would have had jurisdiction to try that offence if it had been committed in the province where the accused is, and where the accused consents to plead guilty and pleads guilty to that offence, the court or judge shall determine the accused to be guilty of the offence and impose the punishment warranted by law, but where the accused does not consent to plead guilty and does not plead guilty, the accused shall, if the accused was in custody prior to appearance, be returned to custody and shall be dealt with according to law.

The transfer can only occur with the consent of the appropriate AG in the province where the proceedings were initiated

- Once the charge is transferred, the accused must plead to the offence as charged (the charge cannot be plead down in the second province); nor can the accused proceed tot rial in the receiving province
    - If any of that is failed, the charge must be returned to the OG province

Transfer for guilty pleas is explicitly allowed (except for murder)
The Crown's will often agree to each other's

- SHOULD BE TRIED WHERE THE OFFENCE TOOK PLACE
- Part of justice being seen to be done is that the community that sees the crime should also see the trial

Intra-Provincial Limits

These rules are far more permissive

Territorial Jurisdiction of Courts with Province (470 *Code*)

Criminal Code of Canada

Jurisdiction over person
470 Subject to this Act, every superior court of criminal jurisdiction and every court of criminal jurisdiction that has power to try an indictable offence is competent to try an accused for that offence

(a) if the accused is found, is arrested or is in custody within the territorial jurisdiction of the court; or
(b) if the accused has been ordered to be tried by
(i) that court, or
(ii) any other court, the jurisdiction of which has by lawful authority been transferred to that court.

- This provision gives all criminal courts within a province expansive jurisdiction to try indictable offences no matter where they are alleged to have been committed in the province
    - Courts can't make the trial far away from witnesses or complainants because it effects the accused's ability to make full answer and defences
- 470(b) permits a justice presiding over a preliminary inquiry in one region to order the accused to stand trial before a court located in a different region within the province
    - There is not requirement that the accused be present in the second region at the time of the committal
        - The Crown usually has a vested interest in keeping the prosecution in the location where the crime is occurred
    - An accused who wishes to change the venue of trial must first convince a judge that doing so is expedient to the ends of justice – this can be troubling given the Crown's prosecutorial power to move it

Transfer for Guilty Plea

Criminal Code of Canada

Offence outstanding in same province
479 Where an accused is charged with an offence that is alleged to have been committed in the province in which he is, he may, if the offence is not an offence mentioned in section 469 and

- **(a)** in the case of proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government, the Attorney General of Canada consents, or
- **(b)** in any other case, the Attorney General of the province where the offence is alleged to have been committed consents,

appear before a court or judge that would have had jurisdiction to try that offence if it had been committed in the place where the accused is, and where the accused consents to plead guilty and pleads guilty to that offence, the court or judge shall determine the accused to be guilty of the offence and impose the punishment warranted by law, but where the accused does not consent to plead guilty and does not plead guilty, the accused shall, if the accused was in custody prior to appearance, be returned to custody and shall be dealt with according to law.

- permits an accused charged with an offence to have a charge dealt with in a different division within the province

- The appropriate AG must consent
    - The accused may plead guilty to the offence in the receiving region
        - Cannot plead down or plead not guilty – if so, the charge is returned to the OG region

Change of Venue

There is a longstanding presumption that criminal cases should be tried in the locale where the offence was allegedly committed

Criminal Code of Canada

Reasons for change of venue

599 (1) A court before which an accused is or may be indicted, at any term or sittings thereof, or a judge who may hold or sit in that court, may at any time before or after an indictment is found, on the application of the prosecutor or the accused, order the trial to be held in a territorial division in the same province other than that in which the offence would otherwise be tried if

(a) it appears expedient to the ends of justice, including

(i) to promote a fair and efficient trial, and

(ii) to ensure the safety and security of a victim or witness or to protect their interests and those of society; or

(b) a competent authority has directed that a jury is not to be summoned at the time appointed in a territorial division where the trial would otherwise by law be held.

- The decision to order a change of venue lies within the discretion of the judge hearing the motion
    - The judge must consider whether a change in venue is necessary in order:
        - To ensure that an accused has a fair trial with an impartial jury

Applications are rarely successful because of adversity of the public

- There must be "very strong evidence of a general prejudicial attitude in the community as a whole" (*R v Alward* (1976)(NBSC))
- These applications have been allowed where the publicity was extensive and included prejudicial and likely inadmissible information (*R v Frederick* (1978)(ON))
    - + where there is overwhelming and widespread sympathy toward the alleged victim of a crime in the community (*R v Talbot* (1997)(ON))

Change of venue application – where the jury pool is too bias
Two criteria:

- To promote fairness and efficiency in the trial
- To ensure safety and security of a victim or witness

These are hard to prove unless you're in a very rural or small town

- The police officer that died in Calgary (judge-alone)→ Al-Khatib's example of the failed change of venue to outside of Calgary

Criminal Code of Canada

Change of venue
531 Despite any other provision of this Act but subject to any regulations made under section 533, if an order made under section 530 cannot be conveniently complied with in the territorial division in which the offence would otherwise be tried, the court shall, except if that territorial division is in the Province of New Brunswick, order that the trial of the accused be held in another territorial division in the same province.

A change of venue is mandatory under this provision when the accused wishes to be tried in their own official language, but that request cannot be conveniently complied with in the region where the trial is scheduled to occur (significant in jury cases, not really in bench trials)

Court Marshalls are a bit different – the military operates out of Canada so they have separate courts (operate differently and charge very differently)

Chapter 13: Temporal Limits

1047-1066
In civil litigation, a limitation period typically acts to bar remedies
Temporal limits in criminal law creates a bar to prosecution itself

Statutory Limitation Periods

There is only one true limitation in Canadian criminal law

Criminal Code of Canada

Limitation
786(2) No proceedings shall be instituted more than 12 months after the time when the subject matter of the proceedings arose, unless the prosecutor and the defendant so agree.

- For *summary proceedings*
    - There are only a few offences that fall into this category (¶1.02(3)(b))

This serves as a bar to the Crown electing to proceed summarily with respect to hybrid offence where the charge is laid more than 12 months after the events
If summary proceeding for a summary offence + limitation passed + defence declines to consent with the charge continuing → the Crown has no way to proceed
If summary proceeding for a hybrid matter + limitation passed → the Crown can choose to proceed by indictment
**This does not bar amendments that substitute one offence for another in a summary conviction proceeding – they are instituted at the time the information is laid (amendment alters the previously laid information

Key case: *R v Dudley* (2009)

Unreasonable Delay (11(b) *Charter*)

Charter of Rights and Freedoms

Proceedings in criminal and penal matters
11 Any person charged with an offence has the right
(b) to be tried within a reasonable time;

R v Jordan (2016) →
"...timely trials further the interests of justice. They ensure that the system functions in a fair and efficient manner; tolerating trials after long delays does not. Swift, predictable justice, "the most powerful deterrent of crime" is seriously undermined and in some cases rendered illusory by delayed trials"

Before Jordan...
R v Askov (1990) → trial judges throughout the country began applying mechanical formulae in staying charges deemed to have violated the 6-to-8-month rule purportedly set out in this case
- Huge public outcry because of all the charges thrown out

R v Morin (1992) → SCC quickly revisited the question
- Acknowledged the fallout
- Stated in much clearer language that the approach is determining whether an individual's right to trial within a reasonable time has been infringed "is not an application of a mathematical or administrative formula but rather by a judicial determination balancing the interests which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay"

This worked for almost 25 years + appellate courts afforded high defence to trial judges' s 11(b) rulings

However, this also came to foster a "culture of complacency within the system towards delay" so the SCC revisited the question again in *Jordan* (2016)
Core component of the new framework is a presumptive ceiling on the time it should take to bring an accused to trial:
- 18 months for cases going to trial in provincial court
- 30 months for cases going to trial in superior court

¶81: "To be clear, the presence of exceptional circumstances is *the only basis* upon which the Crown can discharge its burden to justify a delay that exceeds the ceiling. As discussed, an exceptional circumstance can arise from a discrete event (such as an illness, extradition proceeding, or unexpected event at trial) or from a case's complexity. The seriousness or gravity of the offence cannot be relied on, although the more complex cases will often be those involving serious charges, such as terrorism, organized crime, and gang-related activity. Nor can chronic institutional delay be relied upon. Perhaps most significantly, the absence of prejudice can in no circumstances be used to justify delays after the ceiling is breached. Once so much

time has elapsed, only circumstances that are genuinely outside the Crown's control and ability to remedy may furnish a sufficient excuse for the prolonged delay."

The *Jordan* Framework

The 18-month presumptive ceiling has one exception – rare cases where a trial proceeds in provincial court after a preliminary inquiry was conducted (the ceiling will be 30 months)

R v Jordan

R v Jordan, 2016 SCC 27

Facts:

- J was charged in ***December 2008*** for his role in a dial-a-dope operation
- J's trial ended in ***February 2013***
- J brought an application under 11(b) of the *Charter* seeking a stay due to delay
- The total delay from J's charges to the conclusion of the trial was 49.5 months

Trial: TJ dismissed application

- TJ applied the framework set out in *Morin*
- J convicted

CoA: Dismissed appeal

Issue:

Decision:

Reasoning:

- A new framework is created for applying s 11(b)

Presumptive Ceiling

¶49: "The most important feature of the new framework is that it sets a ceiling beyond which delay is presumptively unreasonable. For cases going to trial in the provincial court, the presumptive ceiling is 18 months from the charge to the actual or anticipated end of trial. For cases going to trial in the superior court, the presumptive ceiling is 30 months from the charge to the actual or anticipated end of trial. We note the 30-month ceiling would also apply to cases going to trial in the provincial court after a preliminary inquiry. As we will discuss, defence-waived or -caused delay does not count in calculating whether the presumptive ceiling has been reached — that is, such delay is to be discounted."

The clock starts running when the information was sworn

First Step: Calculating Total Delay

"Calculating the total delay from the charge to the actual or anticipated end of trial"

- A person is charged when an information is sworn alleging an offence OR where a direct indictment is laid again them when no information is sworn (*Morin* + *Jordan*)

Clock starts at the date of the swearing of information

- Pre-charge delay doesn't count

Anticipating end of trial = end [or anticipated end] of evidence and argument

- 11(b) cannot be violated by delay occurring after the close of evidence and argument (i.e., verdict deliberation time)
- *K.(K.G.)* (2020)

Second Step: Subtract Defence Delay

This is done because the defence should not be able to benefit from its own delay-causing conduct

- The net delay is then compared to the presumptive ceiling

**Defence Delay is divided into two components:

1. Delay waived by the defense
    - Implicit or explicit, but must be clear and unequivocal with full knowledge
2. Delay caused solely by the defense
    - If you adjourn and you have full disclosure, you're essentially waiving the length of time that is adjourned (defense) – explicit or implicit
    - Defense caused delay: change counsel last minute
        - Or defense withdraws

R v Cody (2017) → SCC emphasized that the two examples given in *Jordan* do not exhaustively define deductible defence delay

- The court should let TJ determine whether defense conduct has caused delay warranting a deduction
- TJ is uniquely positioned to gauge the legitimacy of defence actions
    - Appellate courts should show deference

Where the Net Delay Falls Below the Presumptive Ceiling

- The defence has the onus to show that the delay is unreasonable by establishing:
    - It took meaningful steps that demonstrate a sustained effort to expedite the proceedings AND
    - The case took markedly longer than it reasonably should have
- **stays beneath the ceiling should be rare and limited to clear cases
    - ***_may_ be more likely in youth offender proceedings

Where the Net Delay Exceeds the Presumptive Ceiling

- The delay is presumptively unreasonable
- The Crown has the onus to rebut this presumption by establishing the presence of "exceptional circumstances"
    - If Crown cannot, a stay will follow
- Exceptional circumstances like outside the Crown's control in the sense that:
    - They are reasonably unforeseen or reasonably unavoidable
    - The crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise; arise in two types of cases (1059-1061):
        - ***Discrete Events***
        - ***Particularly Complex Cases***
            - *R v Pickton* (2010) – such a complex case that it took 5 years from charges to trials (and that was okay)

- Good example of complex case not being able to fit within

Transitional Cases

The *Jordan* framework applies to cases that were in the system at the time the decision was released, but there are two qualifications:

- Where there is delay that exceeds the presumptive ceiling, the transitional exception will apply where the Crown satisfies the court that the time the case was taken is justified based on the parties' reasonable reliance on the law as it previous existed
- The cases currently in the system in which the total delay falls below the ceiling, the relevant criteria to consider as defence initiative and whether the time the case has taken markedly exceeds what was reasonably required

Standard of Review

ONCA has said:

- TJ's ultimate decision whether delay was unreasonable is to be reviewed on a standard of correctness
    - the standard of correctness also applies to the review of the TJ's characterization of various periods of time
- Underlying findings of fact are to be reviewed on a standard of palpable and overriding error

This is in keeping with *Housen v Nikolaisen* (2002)

The Impact of the Pandemic

Pandemic was considered a discreet, exceptional event within the *Jordan* framework

Chapter 14: The Plea

1067-1084

Guilty Pleas

Reasons an accused might plead guilty

- Genuine remorse
- A desire to be released from custody
- An agreement with the prosecutor to plead guilty in exchange for a charging or sentencing benefit

The consequences of a guilty plea are dramatic

R v Adgey (1973) →

- A guilty plea "carries an admission that the accused so pleading has committed the crime charged and a consent to a conviction being entered without any trial"

    - The accused "relieves the Crown of the burden to prove guilt BARD, abandons his non-compellability as a witness, and his right to remain silence and surrenders his right to offer full answer and defence to a charge"

At the hearing of a guilty plea, the facts are "read in" by the Crown

- If the facts are admitted by the defence + the judge is satisfied that there is proof of all the essential elements of the offence, the judge records a finding of "guilt"
    - The hearing then proceeds to sentencing
- If the accused disputes any "aggravating" facts beyond the essential elements of the offence, an evidentiary hearing must be held (Crown must prove BARD)

R v Youvarajah (2013) →

- SCC suggested that a more rigid procedure may be required where:
    - Co-accused has made admissions in their own interest as a part of a plea bargain for a conviction of a lesser crime and favourable sentence, and
    - The Crown wishes to use those admissions against another co-accused at their trial
    - (p 1069 for procedures of what that would look like)

The Plea Inquiry

The Court can only accept a guilty plea if it is satisfied that the accused is making it voluntarily and understands (s 606(1.1)(a) + (b)):

i. That the plea is an admission of the essential terms of the offence
ii. The nature of consequences of the plea
iii. That the court is not bound by any agreement made between the accused and the prosecutor
iv. The facts support the charge

The court will satisfy itself of a guilty plea's validity by asking the accused a serious of questions about these matters

- This minimizes the risk of appeal on the basis that the accused did not understand the plea
- This inquiry is not mandated in s 606(1.1)
    - Regardless of when it takes place, if the judge is not satisfied that the conditions are met, it will proceed to trial

Failure to inquire does not automatically render the plea invalid

- This is especially true where the accused is represented by counsel at the time they enter it
    - A failure to make proper inquiry is relevant in deciding whether the plea should be struck on the basis it was uninformed, involuntary, or equivocal

Where an accused pleads guilty as a result of a plea agreement to:

- A serious personal injury offence (s 752)
- Murder

- An indictable offence with a maximum punishment of 5+ years

The court must ask the prosecutor if reasonable steps were taken to inform the victims of the offence of the agreement

- Even if they didn't, it doesn't affect the validity of the plea

Remote Guilty Pleas

606(5) *Code* → permits a guilty plea to take place by video link if the accused agrees and the court so orders

- The Courts interpreted this in light of COVID to permit guilty pleas to be taken remotely
- What about guilty pleas by audio?
    - Courts were divided at the start of COVID on this

Striking the Guilty Plea

A guilty plea is presumed to be valid

- The accused can attempt to demonstrate (BOP) that their plea was not valid

An application to strike or withdraw a plea should be brought before the completion of the sentencing hearing (judge has no jurisdiction to strike a plea after a sentence has been opposed)

- The decision to strike a plea is discretionary

After sentencing, an accused can seek to have the conviction quashed on appeal on the basis of an invalid guilty plea

A guilty plea is only valid when it is informed, voluntary, and unequivocal (1073 – 1077)

Courts will consider when determining this:

- Whether the accused was represented at the time of the plea
- Whether the accused has a strong claim of incompetent representation
- Whether an inquiry under s 606(1.1) was undertaken at the time of the plea
- Whether the plea was entered by the accused personally
- How much time has passed between entering the plea and the accused's first assertion of invalidity
- Whether any explanation has been given for delaying in challenging the validity of the plea

To be informed…

The accused must be aware of the:

- Nature of the allegations
- Effect of the plea
- Consequences resulting from the plea

**Must be aware of the non-criminal collateral consequences of a guilty plea

R v Wong (2018) →

- SCC held that to be properly informed, the accused must have been ignorant of a legally relevant consequence (one that bears on sufficiently serious legal interests of the accused)

    - In this case, immigration consequences
- Beyond this, the accused must *also* establish prejudice by demonstrating a "reasonable possibility that they would have either (i) opted for a trial and plead not guilty, or (ii) plead guilty, but with different conditions

Other legally relevant consequences: indefinite driver's licence suspension OR consequences of NCR

To be voluntary…

- It will be involuntary if the accused never intended to enter it, never intended to admit a fact comprising an essential element of the offence, or admitted facts fail to disclose the commission of the offence charged
- The degree of cognitive capacity to make a volitional choice is not high
    - Accused can't just show that doing so was not in their best interest or rationale
    - The standard is the same as the one used in deciding whether a person is fit to stand trial – they understand the process, communicate with counsel, and make active or conscious choices

1075-1077

Special Pleas (Double Jeopardy)

Accused persons cannot be prosecuted on charges similar to one for which they had previously been acquitted or convicted

607 *Code*

Criminal Code of Canada

Special pleas

607 (1) An accused may plead the special pleas of

a) *autrefois acquit*
b) *autrefois convict*
c) pardon; and
d) an expungement order under the *Expungement of Historically Unjust Convictions Act*.

- When the accused makes one of these pleas, the TJ must rule on the matter (without the jury) before the accused is called on to plead further
- If the plea is accepted, the accused will be discharged in respect of that count
- If the pleas are disposed of against the accused, they can plead guilty or not guilty

Plea of Pardon

- The accused offers proof of a pardon for the same offence before the court

Autrefois Acquit + Autrefois Convict

- Can be raised in both indictable and summary conviction proceedings, but not at a preliminary inquiry

To plead either, the accused must:

i. State that they have been lawfully acquired, convicted, or discharged of the offence charged in the count to which the plea relates
ii. Indicate the time and place of the acquittal, discharge or conviction

The accused must also show:

i. There was a final adjudication on the prior charge on its merits
ii. The matter is the same (in whole or in part) and the new count must be the same as the first trial (or be implicitly included in that of the first trial – either in law or on account of the evidence presented if it had been legally possible at the time to make the necessary amendments)

Autrefois Acquit

- Found to apply only in cases where the first charge did nto result in a final adjudication due to a withdrawal of a previous information by the Crown at the outside of the trial
- A discharge at a preliminary inquiry
- A stay of proceedings
- An appeal that resulted in a new trial

*Divorce counter-example

Autrefois Convict

Res Judicata

Closely associated with the special pleas of *autrefois acquit* + *autrefois convict*

- Common law defence meaning "a matter adjudged"

2 branches:

1. Double jeopardy
    - Double jeopardy is concerned with the total cause of action and the ultimate result of the litigate
        - This is governed by the special pleas in the *Code*
2. Issue estoppel
    - Issue estoppel is concerned with the particular issues arising in two different pieces of litigation
        - Must be raised under a plea of not guilty

R v Mahalingan (2008) →

Issue estoppel "operates to prevent the Crown from relitigating an issue that has been determined in the accused's favour in a prior criminal proceeding, whether on the basis of a positive finding or reasonable doubt"

- Accused has the onus to satisfy the court of this
- The court has no residual discretion to refuse to apply the doctrine if it established

**Issue estoppel does not apply when an appellate court orders a new trial on a criminal charge: the issues tried are litigated *de novo*

The *Kienapple* Principle

Related to the doctrine of *res judicata*

- This is the rule against multiple convictions (first articulated by SCC in *Kienapple* (1974))
    - Accused cannot be convicted for more than one offence arising out of the same delict (crime, tort, wrongdoing)

For this principle to apply, there must be sufficient factual and legal nexus between the charges

- The factual nexus will be established if the same act of the accused undergirds each of the charges
- The legal nexus will be established if "there is no additional and distinguishing element that goes to guilt contained in the office for which a conviction is sought to be precluded by the *Kienapple* principle" (*Prince* (1986))

Examples:

- Drinking + driving cases → finding of guilt with respect of offences of "impaired driving" and "over 80" routinely lead to a conditional stay of the conviction of one of the charges
- Sexual assault + sexual interference cases

Examples where it *doesn't* apply:

- Does not foreclose multiple convictions for sexual assault with a weapon + gang sexual assault
- Corporation + directing mind
- Breach of trust by a public official + obstruction of justice

**doesn't actually matter for sentencing because of the "one transaction rule"

- It is conditional, so if the convicted successfully appeals the charge that was not *Kienapple*d, then the conditional stay dissolves and the appellate court can make an order remitted to the TJ the count that was conditionally stayed

Chapter 15: Jury Selection

If you're defense, ***you need to advise your client about their option for jury trial (the benefits/cons of jury and judge alone)***

- Make your client sign a letter saying that got advice about this so you insulate yourself from appeal on the grounds that the client did not know their option of jury trial

560 of the *Code* deals with re-election

- Can re-elect 60 days before the trial, or within the 60 days with consent of the Crown

If it's in your client's interest to re-elect, you should really try to do so

Most criminal trials are tried by a judge sitting without a jury

- Most trials take place in provincial or territorial courts which do not use juries
- In the superior courts too, many trials are conducts by a judge alone

Defendants can choose to be tried by a judge and jury

- Some offences (such as murder) have mandatory juries unless the parties consent to a trial by a judge alone

Charter of Rights and Freedoms

Proceedings in criminal and penal matters
11 Any person charged with an offence has the right
(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

This guarantees a limited right to a jury trial – there is no converse right to a trial by a judge alone

The Jury's Role

- Follow the judge's legal directives
- Resolve the *factual* issues in dispute
- Decide whether the accused is guilty, not guilty, or not criminally responsible for each of the offence's charges

Judges perform these functions in judge-alone trials, courts have stated that jury trials foster public confidence in the criminal justice system

- *R v Sherratt* (1991) →
    - "The jury, through its collective decision making, is an excellent fact finder; due to its representative character, it acts as the conscience of the community; ***the jury can act as the final bulwark against oppressive laws or their enforcement***; it provides a means whereby the public increases its knowledge of the criminal justice system and it increases, through the involvement of the public, societal trust in the system as a whole."
- Why is collective decision making important?
    - To average out the extreme voices (on either end)
    - You have to justify your opinions and why you think the way you do

Because of this function, the law governing jury selection is designed to ensure that the jury is impartial and representative of the community; ***the selection is divided into two steps***:

1. Assemble a group of potential jurors – "assembling the array"
    - Representativeness is achieved by provincial legislation governing this
2. Choose people from the array to form the jury – "empanelling the jury"
    - Impartiality is secured by the *Code* provisions

Assembling the Array

Provincial statues governing the assembly of the array find their constitutional authority in s 92(14) of the *Constitution Act, 1982*

Constitution Act, 1982

Subjects of exclusive Provincial Legislation
92 In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

- s 626 of the *Code* recognizes this jurisdiction
- Each provincial statute sets out qualifications for jury service and dictates *how* arrays can be summoned

Provincial Requirements:

- **Qualifications** vary between provinces:
    - All require jurors to be the age of majority and residents of the province
    - Most require jurors to be Canadian citizens
    - Each disqualifies or permits exemptions for persons with certain occupations
        - Law enforcement officials, legislators, judges, court works, lawyers, articling students, and individuals convicted of criminal offences are typically disqualified
        - People working in various "essential services" are often disqualified or eligible for exemption (*R v Church of Scientology of Toronto* (1997) → upheld exclusion of physicians, vets, and coroners – repealed spouses of legal personnel)
        - People unable to serve because of physical, mental or linguistic difficulties, or individuals who provide religious objections, recent jury service, or personal hardship and other factors → statutes allow for disqualification or allowable exceptions
- **Procedure** for summoning arrays:
    - Provinces can adopt different procedures
    - The task is performed by a court official (a sheriff) who choses people at random from a representative database (provinces can specify the source or sources to be used – i.e., health insurance database OR leave it to the sheriff's discretion)
    - Under s 629 of the *Code*, both the accused and the prosecutor can challenge the array based on "partiality, fraud or wilful misconduct on the part of the sheriff or other officer by whom the panel was returned"
        - If the judge upholds the challenge, they must order the summoning of a new array
        - The accused can also allege that the process violated the *Charter*
            - These claims have been brought under 11(d), 11(f) or 15
        - Claimants must bring the applications at the outset of the trial and provide an evidentiary basis for the assertion that the assembly process was unlawful or unconstitutional
            - Remedies for violation can include order the assembly of a new array, declaring a mistrial, or ordering a new trial [s 24(1) remedies]
    - Form problems with the jury cannot be appealed → s 670(a) + 671 of the *Code*
        - Substantive errors – when the accused is deprives of statutory of constitutional rights – can be appealed

Criminal Code of Canada

Challenging the jury panel
629 (1) The accused or the prosecutor may challenge the jury panel only on the ground of partiality, fraud or wilful misconduct on the part of the sheriff or other officer by whom the panel was returned.

In writing
(2) A challenge under subsection (1) shall be in writing and shall state that the person who returned the panel was partial or fraudulent or that he wilfully misconducted himself, as the case may be.

Form
(3) A challenge under this section may be in Form 40.

***R v Kokopenace* (2015)** → the lawful assembly of potential jurors requires three elements:

1. The assembly must be representative of the community
    - Official compiling lists of potential jurors must use sources drawing from a "broad cross-section of society"
    - These do not need to perfectly reflect the demographic composition of the juror district
    - Representativeness is limited by a plethora of factors (the arbitrariness of district boundaries, the uneven distribution of demographic attributes with and across boundaries and statutory exclusions and exceptions)
    - A deliberate attempt to exclude members of distinctive groups (such as those based on race or sex) would clearly violate this requirement
2. The assembly must be randomly selected
    - Every person in the source list must have an equal change of being chosen to be a potential juror
        - This requirement excludes any efforts to achieve demographic equity
    - "Even if a perfect source list were used, it would be impossible to create a jury roll that fully represents the innumerable characteristics existing within our diverse and multicultural society." – Moldaver
        - The calculated intention of a particular group is *prohibited* (*R v Born with a Tooth* (1993))
3. A lawful selection process requires adequate efforts to deliver notices to people who have been randomly selected as potential jurors
    - "The adequacy of the delivery must be assessed on the facts of each case, bearing in mind the particular challenges that this undertaking presents" – Moldaver

***How does a court decide whether these requirements have been met*?**

- Random selection is absolute and binary – if it is not random, the process violates the *Code* and the *Charter,* and a remedy can be sought

- Representativeness and delivery requirement are assessed on a reasonableness standard
    - The focus is on the *selection process* not the ultimate composition of the roll
- The test (Moldaver): "whether the state provides a fair opportunity for a broad cross-section of society to participate in the jury process" – it will be met if the state made "reasonable efforts to (1) compile the jury roll using random selection from lists that draw from a broad cross-section of society, and (2) deliver jury notices to those who have been randomly selected"

The state does not need to show that the assembly meets any objective standard of representativeness – only reasonable efforts

- The law also does not require governments to take measures to actively encourage members of underrepresented groups (i.e., Indigenous persons) to participate
- ***Courts have consistently rejected claims that arrays and juries must include members of any particular demographic or group (including members of groups that the accused belongs to)*** (¶15.16)

Empanelling the Jury

General Procedure

631 – 644 of the *Code* governs the process for empanelling a jury

- Absent a challenge to the array, **judges will begin by pre-screening** the prospective jurors for partiality and hardship

S 632 authorizes the judge to exclude jurors:

> ***Criminal Code of Canada***
>
> **Excusing jurors**
> **632** The judge may, at any time before the commencement of a trial, order that any juror be excused from jury service, whether or not the juror has been called pursuant to subsection 631(3) or (3.1) or any challenge has been made in relation to the juror, for reasons of
> (a) personal interest in the matter to be tried;
> (b) relationship with the judge presiding over the jury selection process, the judge before whom the accused is to be tried, the prosecutor, the accused, the counsel for the accused or a prospective witness; or
> (c) personal hardship or any other reasonable cause that, in the opinion of the judge, warrants that the juror be excused.

- **Judges will often ask the array to identify themselves if they wish to be excused** on hardship grounds or have any conflicts of interests set out in (a) or (b)
    - Judges can either excuse the potential juror summarily or question them on their reason for exemption
- Courts have interpreted 632(c) broadly to include:
    - Financial and logistical difficulties
    - Psychological harm arising from the nature of the offence
- Potential jurors will only be excused for partiality at this stage in the most obvious cases
    - non-obvious cases must be dealt with under the "challenge for caused" process
- **The next step is to select people (one-by-one) for further vetting**

    - **Names are assigned numbers** and addresses of each member of the array is **written on cards**
    - **The court clerk puts the cards in a box, shakes them and draws one from the box**
        - The person chosen can then be excused or "stood aside" by the judge or successfully challenges for caused by one of the parties
    - If neither of the above happen, **the individual will be sworn as the first juror**
        - This process continues until the judge decides that there are enough people to comprise a fully jury and alternates (s 631(3)) – 12 with the possibility of 2 alternates and 2 additional jurors
- ***If the array is exhausted without enough jurors sworn***, the judge may order the sheriff to "summon without delay as many persons, whether qualified jurors or not, as the court directs" (s 642(1))
    - These individuals are called talesmen – assembled from any place and are selected to the jury in the same way as the initial array
    - The sheriff cannot pre-screen talesmen

Excusing

When prospective jurors' cards are drawn (regardless of whether or not the array has been pre-screened), the judge may excuse the individual on one of the grounds set out in s 632 (above)
***sworn jurors can also be excused under 632 at *any time before* the trial begins

Stand Asides

Trial judges can also order prospective jurors to "stand by" under s 633 of the *Code*:

> ***Criminal Code of Canada***
>
> **Stand by**
> **633** The judge may direct a juror who has been called under subsection 631(3) or (3.1) to stand by for reasons of personal hardship, maintaining public confidence in the administration of justice or any other reasonable cause.

- Aka the "stand aside" power

Individuals stood aside will be called for selection only if the array is exhausted before a fully jury is sworn

-
- 2019 → Parliament added the power to set aside to maintain "public confidence in the administration of justice" (this power is added to the power to stand aside only for "personal hardship" and "any other reasonable cause"
    - Any other reasonable cause + the maintain public confidence = Courts have interpreted these grounds as permitted trial judges to stand aside jurors who ***"might be partial"*** but were not successfully challenged for cause (*R v Chouhan* (2020))
    - *R v Martin* (2021) (ONCA) → jurors have been stood aside when there were objective-grounded concerns about their competence to serve

- In the same case, majority found that stand asides cannot be used to attempt to achieve a jury that is more racially diverse than it otherwise might be

Challenges for Cause

¶635-640 of the *Code*

- Usually made for racial or religious bias that could cause inherent prejudice OR pre-trial media

If an individual's name is drawn and they are not excused or stood aside, the prosecutor and the accused can challenge them "for cause" – this is a two-step process:

1. The challenging party (most often the accused) must convince the judge the claim has an *air of reality*
    - Most challenges allege that some (usually unspecified) potential jurors are partial to the other side
    - If the air of reality test is met, move to the second step:
2. Jurors are questioned about their possible partiality (or other challengeable ground)
    - *R v Chouhan* (2020) → trial judges are the arbiters of the challenge (they ask the questions) rather than counsel
    - Before the questioning begins, judges should "as a rule exercise their power to exclude jurors from the court room" – this is to encourage candour amount prospective jurors reluctant to admit prejudice before their peers
    - After the questioning is done, the judge decides whether the juror is suitable (if yes, the juror is sworn – in *very limited cases* will judges consult counsel's input before making this decision)
    - "The defence may question potential jurors as to whether they harbour prejudices against people of the accused's race, and if so, whether they are able to set those prejudices aside and act as impartial jurors. At this stage, the question to be determined by the triers is whether the candidate in question will be able to act impartially" (*R v Williams* (1998))

Applying to Challenge for Cause

Challenges for case must be based on at least one of the following grounds set out in 638(10 of the *Code, but no others*:

Criminal Code of Canada

Challenge for cause

638 (1) A prosecutor or an accused is entitled to any number of challenges on the ground that

(a) the name of a juror does not appear on the panel, but no misnomer or misdescription is a ground of challenge where it appears to the court that the description given on the panel sufficiently designates the person referred to;

(b) a juror is not impartial;

(c) a juror has been convicted of an offence for which they were sentenced to a term of imprisonment of two years or more and for which no pardon or record suspension is in effect;
(d) a juror is not a Canadian citizen;
(e) a juror, even with the aid of technical, personal, interpretative or other support services provided to the juror under section 627, is physically unable to perform properly the duties of a juror; or
(f) a juror does not speak the official language of Canada that is the language of the accused or the official language of Canada in which the accused can best give testimony or both official languages of Canada, where the accused is required by reason of an order under section 530 to be tried before a judge and jury who speak the official language of Canada that is the language of the accused or the official language of Canada in which the accused can best give testimony or who speak both official languages of Canada, as the case may be.

No other ground
(2) No challenge for cause shall be allowed on a ground not mentioned in subsection (1).

- 638(1) is the ground most often litigated

At this stage of the jury selection, individuals with conflicts of interest will usually have been excused or stood aside – if not, and a party has reason to believe that the juror may be biased, they party can apply to challenge them

- Usually parties don't have this knowledge, so the challenges for cause are usually grounded on ***potential partiality of unspecified members of the array***

R v Sherratt (1991) →

- The presumption is that potential jurors are impartial
- The party applying to challenge must show that there is a "realistic potential" for partiality
    - However, challenges for cause should not be considered exceptional circumstances – the right to challenge is an important one designed to ensure a fair trial

R v William (1998):

"Section s. 638(1)(*b*) is intended to prevent persons who may not be able to act impartially from sitting as jurors. This object cannot be achieved if the evidentiary threshold for challenges for cause is set too high. To require evidence that some jurors will be unable to set their prejudices aside is to ask the impossible. Similarly, extreme prejudice is a poor indicator of a realistic danger or potential of partiality. Widespread racial prejudice is not exceptional."

- The evidentiary standard of application to challenge for caused based on racial prejudice is a "realistic potential for partiality" (the rule in *R v Sherratt*)
- Absent evidence to the contrary, where widespread prejudice against people of the accused's race is demonstrated at a national or provincial level, it will often be reasonable to infer that such prejudice is replicated at the community level
- Prejudice less than widespread might in some circumstances meet this test

This is key to upholding the *Charter* right to right to fair trial

R v Williams

R v Williams, [1998] 1 SCR 1128

Facts:

- Williams, who is an aboriginal, pleaded not guilty to a robbery charge and elected a trial by judge and jury

Trial: TJ allowed questions to be put to potential jurors, but the Crown successfully applies for a mistrial on the basis of the procedural errors of "unfortunate publicity" of the jury selection process

Second Trial: the judge who heard the accused's motion for an order permitting to challenge jurors for cause dismissed the motion

- TJ dismissed a renewed application and did not warn the jury, either in the opening or closing addresses, to be *aware of or to disregard any bias or prejudice* that they might feel towards the accused as a "native person"

CoA: dismissed am appeal from conviction

- The courts below accepted that there was widespread prejudice against aboriginal people in the community

Issue: Does the evidence of widespread bias against aboriginal people in the community raise a realistic potential of partiality?

Decision: the appeal should be allowed; the TJ erred in refusing to allow an Indigenous accused to challenge prospective jurors for racial prejudice (p 1112)

Reasoning:

Rule:

- Prosecution and the defence are entitled to challenge potential jurors for cause on the ground of partiality
    - Prospective jurors are presumed to be indifferent or impartial
    - The party seeking the challenge calls evidence substantiating the basis of the concern
- TJ has wide discretion in controlled the challenging process – TJ should permit challenges if there is a realistic possibility that the jury pool may contain people who racial prejudice might incline them to favour the Crown rather than the accused in deciding the matters that fall to them in the course of the trial
    - Judicial directions to act impartially cannot always be assumed to be effective in countering racial prejudice
- the contention that there need be some evidence of bias of a nature and extent against aboriginal persons, or even further, that racial prejudice in the community must be linked to specific aspects of the trial, ***is unduly restrictive***

→ evidence of widespread racial prejudice may, depending on the nature of the evidence and the circumstances of the case, lead the conclusion that there is a realistic potential for partiality

- The trial judge has the discretion to determine whether widespread racial prejudice in the community, absent specific "links" to the trial, is sufficient to give an "air of reality" to the challenge in the particular circumstances of each case

- It is impossible to provide an exhaustive catalogue of those circumstances. Where specific "links" to the trial exist, the trial judge must allow the challenge to proceed.

- SCC adopted the approach taken in *Parks*
- ***The court notes that since the test for challenging jurors on cause speaks to the potential of partiality, a "reasonably generous approach is appropriate"***
- ***The TJ's decision to allow to refuse the challenge is discretionary and accorded deference on appeal***

R v Find (2001) →

To convince the court to approve the challenge, the party must show that:

(i) "A widespread bias exists in the community" **AND**
- This requires proof that some people in the community harbour a bias that could "include a juror to a certain party or conclusion in a manner that is unfair" and that such bias is "sufficiently pervasive in the community to raise the possibility that it may be harboured by one or more members of the representative jury pool"

(ii) That some jurors "may be incapable of setting aside this bias, despite trial safeguards to render an impartial decision"
- This requires a demonstration that some jurors may be "unable to set aside their bias despite the cleansing effect of the judge's instructions and the trial process"

The nature of the evidence required to meet these conditions depends on the type or partiality alleged:

- The most common are:
  - Bias flowing from exposure to pre-trial publicity
  - Bias against persons with characteristics (such as racial identities) that may be disfavoured by some members of the community
  - Bias against accused of certain types of offences

Pre-trial Publicity

This type of challenge aims to mitigate the risk that jurors will be biased by exposure of information about the cause before trial

- The leading decision is *R v Sherratt* (1991)
  - Media had reported widely on the gruesome details of a murder before trial
  - TJ denied the challenge
  - SCC upheld – the mere reporting of facts about the cause would not typically justify a challenge for cause
  - The reporting *itself must be biased or misleading*
    - "Where the media misrepresents evidence, dredges up and widely publicizes discernible incidents from an accused's past or engages in speculation as to the accused's guilty or innocence"

        - *Sherratt* didn't meet this threshold – the reporting was only about the victim's reputation and the search for his body and happened months before the trial

***Widespread publicity alone does not justify a challenge for cause*

- Successful challenges often involve extensive publicity that is critical of the accused and extends close to the beginning of the trial
    - i.e., *R v Zundel* (1987) → ONCA reversed the TJ's decision to deny a challenge on the widespread media reports of the accused's Holocaust denials as "generally adverse" to the accused
    - *R v Keegstra* (1991) → Challenge allowed because of widespread adverse publicity (remakes by the Premier and parliamentarians) "continued unceasingly" up until the beginning of trial

In contrast:

- *R v Merz* (1999) (ONCA) → Court upheld the refusal to permit a challenge where all but a few of many "mostly factual" articles about the case were published more than a year before the trial [one article revealed negative and inadmissible information about the accused, but it was published two years before, so it "provided an adequate antidote against any realistic possibility of prejudice"

When a publicity-based challenge is permitted, the court will ask questions focusing on the prospective juror's:

- Exposure to information about the case
- Opinions on the guilty or innocence of the accused
- Ability to set aside any such opinions and decide the case only on the evidence and the TJ's directions
    - Cross-examination or follow-up questions are rarely allowed – this is not a fishing expedition (*R v Sherratt* (1991))

Bias Against Persons with Characteristics Disfavoured by Some Members of the Community

Racial bias challenges are common (ever since *R v Parks* (1993))

- ONCA overturned the TJ's refused to allow a race-based challenge in the trial of a Black defendant in Toronto – Justice Doherty canvassed an extensive body of social science evidence documenting the pervasive nature of racism concluding "there can be no doubt that there existed a realistic possibility that one or more protentional jurors . . . consciously or unconsciously, come to court possessed of negative stereotypical attitudes towards black persons"
- The safeguards available in the trial proves to mitigate the bias could not ensure that subtle and invidious stereotypes wouldn't influence jurors

SCC in *R v Williams* adopted the approach taken in *Parks*

1112 – 1120

- There is a presumption when there is a racialized accused, there is discrimination – regardless of ethnicity or religion

Challenge for cause has to happen in a different room

- Abella called for new and probing forms of questions (in *Chouchan*)

Offence-Based Grounds

Accused persons have attempted to question potential jurors on biases relating to the nature of the offence

- *Williams* (1998) → SCC suggested that prejudice could arise from the nature of the crime itself
- *Find* (2001) → SCC upheld the TJ's decision to refuse a challenge based on bias against persons charged with sexual assault of child
    - McLachlin: despite high rates of victimization of sexual violence, widespread criticism of the law as being too accommodated of alleged sexual offenders, and the likelihood of strong emotional reactions to child sexual assault allegations, there was no evidence that people with these experience, beliefs and reactions would be more likely to be biased against defendant in child sexual assault causes than those accused of other serious crimes
        - She also rejected the contention that the existence of widespread bias was proven by the fact that many potential jurors had been dismissed in ON after such applications had been permitted to proceed
        - She was also unconvinced that social science evidence suggestive of widespread negative attitudes toward sexual assault were indicative of widespread bias
        - Unlike racial bias, the "aversion, fear, abhorrence, and beliefs alleged to surround sexual assault offences" do not "point a finger at a particular accused"

Since *Find*, courts have rarely accepted challenges based on the generic nature of the offence (examples: see 1121 + 1122)

Peremptory Challenges

Chouhan – jury selection took place on the revocation of peremptory challenges provision

- Peremptory challenges were used by the defense counsel to disclose all indigenous people (it seemed like – exercised in a way that were discriminatory) – Colton Boushie case – SK

Removal + Replacement of Sworn Jurors

There are several ways for judges to dismiss and replace sworn jurors under the *Code*

- Jurors can be dismissed at any time before or during the trial on grounds of partiality, personal hardship, or other reasonable cause

Before the "commencement of trial" = occurs when the accused is put in the charge of the jury → judges use 632 because it applies equally to sworn and unsworn jurors

After the trial begins, jurors can only be discharged under s 644

Criminal Code of Canada

Discharge of juror

644 (1) Where in the course of a trial the judge is satisfied that a juror should not, by reason of illness or other reasonable cause, continue to act, the judge may discharge the juror.

- Courts have interpreted "other reasonable cause" to include personal hardship and potential partiality (*R v Pan; R v Sawyer* (2001))

When deciding whether to discharge a juror under 644, TJ should exclude the other jurors from the courtroom and conduct an inquiry in open court, on the record, with all counsel present

- Counsel can suggest questions to ask, but juror should not be put on oath or cross-examined

12 + 2 alternates + 2 additional – 2 alternates are excused the day of trial

- Additional jurors hear the evidence and do not know until the deliberations start whether they will form the jury or not

Once a juror is discharged, they are to be replaced at any time before the jury has begun hearing evidence

- If jurors are excused before the trial begins, they can be replaced by randomly selecting from:
    - Members of the array whose cards have not yet been drawn
    - Stand asides
    - Summoned talesmen
- If there is not a full jury immediately before the trial begins, the judge can substitute alternate jurors chosen
    - Trials can commence with 12, 13, or 14 jurors
    - Accused cannot consent to a jury fewer than 12
- Jurors discharged *after the commencement of trial*, but before the jury has heard evidence, can be replaced with anyone still available from the initial array of talesmen

TJ can elect not to replace a juror after the trial begins, but at least must consider doing so (remember: the accused should not be lightly deprived of a full jury)

Once evidence has been heard at trial, jurors cannot be replaced (even with alternates)

- After commencement, the trial can continue with as little as 10 jurors
    - If jurors drop below 10, TJ can either dismiss mistrial or continue without a jury (with the consent of the parties)
- If additional jurors were chosen and more than 12 remain immediately before deliberations begin, the excess must be dismissed by random selection

Chapter 16: Trial Procedure

Trials are dynamic processes where rules of criminal procedure intersect with rules of evidence

- Trial procedure is governed by both statute (federal and provincial) and common law
    - *Criminal Code*

- *Canada Evidence Act*
- *Control Drugs and Substances Act*
- *Youth Criminal Justice Act*
- Etc.

Regardless of whether the trial is proceeding by judge alone or judge and jury, the TJ responsibility is to "manage the trial and control the procedure to ensure that the trial is effective, efficient, and fair to both sides" (*R v Snow* (2004)(ONCA))

Questions of law – always decided by the TJ
Questions of fact – decided by the TJ *OR* the jury following instructions as to the applicable legal rules and principles

Burden + Standard of Proof

The prosecution must prove the guilt of the accused BARD

- *R v Lifchus* (1997) → if "the presumption of innocence is the golden thread of criminal justice then proof beyond a reasonable doubt is the silver and these two threats are forever intertwined in the fabric of criminal law"

R v Lifchus

R v Lifchus, [1997] 3 SCR 320
Facts:

- L was charged with fraud
- TJ told the jury in her charge on the burden of proof:
  - "'Proof beyond a reasonable doubt' . . . in their ordinary, natural everyday sense", and that the words "doubt" and "reasonable" are "ordinary, everyday words that . . . you understand". The accused was convicted of fraud. On appeal, he contended that the trial judge had erred in instructing the jury on the meaning of the expression "proof beyond a reasonable doubt"

CoA: Allowed appeal; ordered a new trial
Issue: Was the TJ's charge to the jury incorrect / sufficient?
Decision: The appeal should be dismissed
Reasoning:
SCC provides ***a suggested charge:***
¶39: "Instructions pertaining to the requisite standard of proof in a criminal trial of proof beyond a reasonable doubt might be given along these lines:

- The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the Crown has on the evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty.
  - What does the expression "beyond a reasonable doubt" mean?
- The term "beyond a reasonable doubt" has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that

some think it needs no explanation, yet something must be said regarding its meaning.
- A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.
- Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.
- On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.
- In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt.

- In *R v Starr* (2000) →
    - Iacobacci suggested that the jury be told that the reasonable doubt standard "falls much closer to the absolute certainty than to proof on a balance of probabilities"

**Most TJ's instruct jury's using the language in *Lifchus* and the supplemental language in *Starr* is optional

R v Starr

R v Starr, 2000 SCC 40

Facts:

- S was convicted of two counts of first-degree murder
    - S was accused of shooting C and W by the side of the highway after drinking with S in a hotel
    - C and W offered a couple a ride home in W's station wagon (W drove)
    - The group first stopped at an adjacent gas station, where G, a sometime girlfriend of C, approached the station wagon and had a conversation with C
    - During the conversation, G observed a car beside the gas station, and saw the accused in the car
    - She became angry with C because he was out with W rather than her, and she walked away from the car
    - C got out of the car and followed her into a laneway, where they had a further conversation
    - G asked C why he would not come home with her
    - According to G, C replied that he had to "go and do an Autopac scam with Robert" – she understood "Robert" to be the accused
    - A day or two later, G saw a picture in the newspaper of what she believed was the car in which she had seen the accused

    - The car had been found at the scene of the murder
    - She phoned the police and told them she had seen the car on the night of the murders at the gas station, with the accused in it
    - The Crown's theory was that the killing was a gang-related execution perpetrated by the accused
    - W was an unfortunate witness who was killed simply because she was in the wrong place at the wrong time
    - The theory was that the accused had used an Autopac scam as a pretext to get C out into the countryside
    - The trial judge found that G's anticipated testimony regarding the scam was admissible under the "present intentions" or "state of mind" exception to the hearsay rule

The Couple

- Two police officers visited the couple who had been given a ride
- One of the officers testified that the wife, B, had told them that she had seen a man talking to C at the gas station
    - The officer testified that B indicated that the man in one of the photographs she was shown looked like the man whom she had seen at the gas station talking to C and who was also "probably driving the other car" – the photograph was a photo of the accused
- Following a *voir dire* the TJ ruled that the officers' anticipated testimony was admissible pursuant to the prior identification exception to the hearsay rule, notwithstanding the fact that B had not testified at trial as to having seen a man talking to C at the gas station, or as to having identified that man in one of the photographs presented to her by the police

CoA: convictions upheld

Issue: Did the Court err in affirming the TJ's decision to admit G's testimony regarding a statement of intention made by the deceased (C)?

- CoA affirmed the TJ's decision to admit the testimony of the police officer regarding B's out-of-court identification
- The TJ had explained the concept of reasonable doubt to the jury in a adequate manner

Decision (SCC): Appeal allowed; new trial ordered

Procedural Orders

Publication Bans

Courts operate under the presumption of openness

- The public has the right to attend court and the media has the right to disseminate information about what occurs there

This open court principle can be curtailed by publication bans imposed under common law and statutory authority

Two types of publication bans:

1. Mandatory
    - Statutory powers may be mandatory or discretionary
2. Discretionary
    - Common law powers to order publication bans are always discretionary

When the judge has discretion to order a publication ban under the *Code* of common law, the decision must be made with reference to the test formulated in *R v Mentuck:*

- A publication ban should only be ordered when
    - It is necessary to prevent a serious risk to the proper administration of justice because reasonably alternative measure will not prevent the risk, and
    - The salutary effects of the ban outweigh the deleterious effects on the rights to free expression, the right of an accused to a fair and public trail, and the efficacy of the administration of justice

Mandatory for the defense if a publication ban is requested
Discretionary if the Crown requests it

Common forms of publication bans:

Young Persons

- *Youth Criminal Justice Act* prohibits the publication of the name of a young person charged with a criminal offence or any other information that would identify the person
- Young person can apply to set aside the ban – Court must be satisfied that publication of information about the matter "would not be contrary to the young person's best interests or the public interest"
- Publication ban is not available in a case involving a young person who received an adult sentence

The *Youth Criminal Justice Act* also protects the identity of young persons as having been a victim of, or as having appeared as a witness in connection with an offence committed or alleged to have been committed by a young person

- This information can be published by that young person after they attain 18 years of age or before that age with the consent of their parents
    - Or the parents of that young person can consent if the young person his deceased

Exclusion of the Public and Media

In addition to publication bans, the TJ has the discretion to exclude the public and the media from the proceedings

Criminal Code of Canada

Exclusion of public
486 (1) Any proceedings against an accused shall be held in open court, but the presiding judge or justice may, on application of the prosecutor or a witness or on his or her own

motion, order the exclusion of all or any members of the public from the court room for all or part of the proceedings, or order that the witness testify behind a screen or other device that would allow the witness not to be seen by members of the public, if the judge or justice is of the opinion that such an order is in the interest of public morals, the maintenance of order or the proper administration of justice or is necessary to prevent injury to international relations or national defence or national security.

- Mere offence or embarrassment will not suffice for the exclusion of the public and media from the courtroom
- *Canadian Broadcasting Corp. v New Brunswick (AG)* (1996) →
    - "It must be remembered that a criminal trial often involves the production of highly offensive evidence, whether salacious, violent or grotesque. Its aim is to uncover the truth, not to provide a sanitized account of facts that will be palatable to even the most sensitive of human spirits. The criminal court is an innately tough arena."

Courts will recognize an exception to the open court principle when the invasion of privacy becomes an "affront to the affected person's dignity" (*Sherman Estate v Donovan* (2021))

In exercising its discretionary power to exclude the public and media, the TJ should draw from *Dagenais/Mentuck* principles and:

- Consider the available options and consider whether there are any other reasonable and effective alternatives available
- Consider whether the order is limited as much as possible
- Weigh the importance of objectives of the order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate

^ *Canadian Broadcasting Corp. v New Brunswick (AG)* (1996)

The burden is on the party displacing the general rule of openness lies on the party seeking the exclusion of public

Exclusion of Witnesses

TJ has common law discretion to order the exclusion of witnesses during the trial

- Excluding witnesses mitigates the risk that hearing other witness's evidence will influence a proposed witness's testimony
- Exclusionary orders apply to all witness's to be called by the Crown and defence
    - The witness will remain outside the courtroom until all the evidence, including that given in rebuttal, is completed
    - *If there is failure to abide by an exclusion order*, witness will not typically be disqualified, but the weight of their testimony can be diminished
- This does not apply to the accused as a witness

Criminal Code of Canada

Accused to be present
650 (1) Subject to subsections (1.1) and (2) and section 650.01, an accused, other than an organization, shall be present in court during the whole of their trial, either in person or, if authorized under any of sections 715.231 to 715.241, by audioconference or videoconference.

- Courts cannot exclude the accused during his own testimony to resolve evidentiary or procedural manners

Compelling Attendance of Witnesses

The parties in criminal cases often resort to the *Code*'s subpoena provisions to ensure the attendance of witnesses – a subpoena may be issued and served upon a person who "is likely to give material evidence in a proceeding" (698(1))

- The subpoena can also require the witness to bring with them anything that they have in their possession or under his control relating to the subject-matter of the proceedings
- Subpoena compels the witness to remain in attendance for the duration of the particular proceeding for which it was issues (unless excused by the judge)
    - i.e., a subpoena issues for a preliminary inquiry, would expire at the end of the hearing and a new one would be required to compel the witness's attendance at trial

When a person is required to give evidence before a superior court, a CoA, or a court of criminal jurisdiction other than a provincial court judge, a subpoena must be issued out of the court requiring the person's attendance (effective anywhere in Canada)

- When a person is required to give evidence before a provincial court judge, a summary conviction or in proceedings over which a justice had jurisdiction, *a subpoena* must be issued by:
    - A provincial court judge or justice, where the person is within the province in which the proceedings were instituted, or
    - By a provincial court judge or out of a superior court of criminal jurisdiction of the province in which the proceedings were instituted, where the person is not within the province

A prospective witness may move to quash a subpoena on the basis that they do not have material evidence to give

- When the subpoena was challenged, the party who obtained it must prove, on BOP, that the person is likely to give material evidence

Screened Testimony

486.2 of the *Code* allows certain witnesses to testify outside the courtroom or behind a screen in order not to see the accused

- Witnesses under the age of 18 or who have difficult in communicating by reason of mental or physical disability are entitled to testify outside the courtroom or behind a screen unless doing so would "interfere with the proper administration of justice"
    - Common applications
    - The screen allows the accused and the court to see the witness, but the witness does not have to see the accused

Criminal Code of Canada

Other witnesses
486.2(2) Despite section 650, in any proceedings against an accused, the judge or justice may, on application of the prosecutor in respect of a witness, or on application of a witness, order that the witness testify outside the court room or behind a screen or other device that would allow the witness not to see the accused if the judge or justice is of the opinion that the order would facilitate the giving of a full and candid account by the witness of the acts complained of or would otherwise be in the interest of the proper administration of justice.

For all other witnesses, the Crown must satisfy the judge "that the order is necessary to obtain a full and candid account from the witness of the acts complained of"
The judge must consider:

Criminal Code of Canada

Factors to be considered
486.2(3) In determining whether to make an order under subsection (2), the judge or justice shall consider

(a) the age of the witness;
(b) the witness' mental or physical disabilities, if any;
(c) the nature of the offence;
(d) the nature of any relationship between the witness and the accused;
(e) whether the witness needs the order for their security or to protect them from intimidation or retaliation;
(f) whether the order is needed to protect the identity of a peace officer who has acted, is acting or will be acting in an undercover capacity, or of a person who has acted, is acting or will be acting covertly under the direction of a peace officer;
(f.1) whether the order is needed to protect the witness's identity if they have had, have or will have responsibilities relating to national security or intelligence;
(g) society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process; and
(h) any other factor that the judge or justice considers relevant.

If an order is made allowing a witness to testify outside the courtroom or behind a screen, arrangements must be made for the accused, the judge and the jury to watch the testimony of the witness by means of close-circuit TV or equivalent means

- the accused must be permitted to communication with counsel while watching the testimony

The SCC upheld 486.2's predecessor under 7 and 11(d) of the *Charter* in *R v Levogiannis* (1993)

- Screening does not impair the accused's ability to cross-examine because it does not obstruct the view of the complainant by the accused, defence counsel, the Crown or the judge
- A properly informed jury would not draw an adverse inference from the fact that a witness testified behind a screen or outside the courtroom

Remote Appearances

In 2019, Parliament expanded the use of video and audio technology by participants in criminal manners – this helped in COVID

- The *Code* presumes that all participants (including the judge) will be physically present in the courtroom throughout the proceedings, but a Court can order that an accused appear via audio conference or video conference if the court is of the opinion that it would be "appropriate" [715.23] considering the following:

Criminal Code of Canada

Accused and Offenders

Considerations — appearance by audioconference or videoconference

715.23 Before making a determination to allow or require an accused or offender to appear by audioconference or videoconference under any of sections 715.231 to 715.241, the court must be of the opinion that the appearance by those means would be appropriate having regard to all the circumstances, including

(a) The location and personal circumstances of the accused or offender;
(b) the costs that would be incurred if the accused or offender were to appear in person;
(c) the suitability of the location from where the accused or offender will appear;
(d) the accused's or offender's right to a fair and public hearing; and
(e) the nature and seriousness of the offence.

- If **accused persons** are in custody and will not have access to legal advice during the remote proceedings, the court must be satisfied that they are capable of understanding and making voluntary decisions with respect to the proceedings

The judge can also order a **participant** "other than an accused, a witness, a juror, a judge, or a justice" to participate by audio or video if the court is of the opinion that it would be appropriate given the following:

Criminal Code of Canada

Participants

Participation by audioconference or videoconference

715.25(2) Except as otherwise provided in this Act, the court may allow a participant to participate in a proceeding by audioconference or videoconference, if the court is of the opinion that it would be appropriate having regard to all the circumstances, including

(a) the location and personal circumstances of the participant;
(b) the costs that would be incurred if the participant were to participate in person;
(c) the nature of the participation;
(d) the suitability of the location from where the participant will participate;
(e) the accused's right to a fair and public hearing; and
(f) the nature and seriousness of the offence.

The **judge** themselves can also preside by audio or video if it is "necessary" having regard to:

Criminal Code of Canada

Presiding by audioconference or videoconference
715.26 (1) Except as otherwise provided in this Act, the judge or justice may preside at the proceeding by audioconference or videoconference, if the judge or justice considers it necessary having regard to all the circumstances, including
(a) the accused's right to a fair and public hearing;
(b) the nature of the witness' anticipated evidence;
(c) the nature and seriousness of the offence; and
(d) the suitability of the location from where the judge or justice will preside.

**In making any of the above orders, the judge retains the discretion to cease or vary the use of technological means at any time

There is also availability for remote **witness** testimony if the court is of the opinion that it would be appropriate considering:

Criminal Code of Canada

Audioconference and videoconference — witness in Canada
714.1 A court may order that a witness in Canada give evidence by audioconference or videoconference, if the court is of the opinion that it would be appropriate having regard to all the circumstances, including
(a) the location and personal circumstances of the witness;
(b) the costs that would be incurred if the witness were to appear in person;
(c) the nature of the witness' anticipated evidence;
(d) the suitability of the location from where the witness will give evidence;
(e) the accused's right to a fair and public hearing;
(f) the nature and seriousness of the offence; and
(g) any potential prejudice to the parties caused by the fact that the witness would not be seen by them, if the court were to order the evidence to be given by audioconference.

- The *Code* presumes that witnesses outside of Canada will testify by video "unless one of the parties satisfies the court that the reception of such testimony would be contrary to the principles of fundamental justice" (714.2(1) this section is presumptive and mandatory because it reflects the reality that a potential wtiness outside of Canada cannot be compelled to return to testify (*R v Schertzer* (2010)(ONCA))

    - Before making this determination, the court will consider the same factors as those relating to witnesses testifying remotely within Canada

It remains to be seen whether remote appearances will continue to be used frequently post-pandemic. While they can certainly enhance efficiency and help mitigate the risk of unreasonable delay, the Court cautioned in *Isssakiark* (2021) to "ensure that the use of technology is for the purpose of enhancing the administration of justice and not a matter of simple convenience"

Religious Accommodation

Typically, witnesses are required to show their faces to assist counsel in conducting cross-examination and help the TOF assess credibility. In *R v S.(N.)* (2012) the SCC held that courts may make an exception to this rule to accommodate a religious face-covering requirement

- TJ must be guided by these 4 questions:
    1. Would requiring the witness to remove the niqab while testifying interfere with their religious freedom?
    2. Would permitting the witness to wear the niqab while testifying create a serious risk to trial fairness?
    3. Is there a way to accommodate both rights and avoid the conflict between them?
    4. If no accommodation is possible, do the salutary effects of requiring the witness to remove the niqab outweigh the deleterious effects of doing so?

Adjournments

One of the most commonly exercised of the court's discretionary powers to control its oown process is the granting of adjournments

- As long as the discretion is exercised judicially and does not cause a miscarriage of justice, it will not be interfered with on appeal; in deciding whether to grant, the court should consider (*R v White* (2010)(ABCA)):
    - Gravity of the charges
    - The number of previous adjournments
    - The consequences of adjournment for the Crown and accused

When an adjournment is required to procure the attendance of a witness, it must show (*R v Darville* (1956)):

- The witness is a material witness
- It has not been guilty of laches or neglect in failing to ensure the witness's attendance
- The witness can reasonably be expected to attend on the date that the trial would commence if adjourned

TJ commits an error in law by refusing a request without allowing the party an opportunity to demonstrate the conditions ^ are met

Withdrawal of Counsel

- A breakdown in the relationship with a client may require defence counsel to withdraw from the case
- Withdrawal is not a two-way street
    - An accused has an unfettered right to discharge their counsel at any time and for any reason, but a lawyer's wish to be removed from the record typically requires leave of the court and must conform to any applicable rules of professional conduct
- *R v Cunningham* (2010) →
    - Withdrawal should be permitted without inquiring into the reasons for the request if it is sought far enough in advance of any schedules proceedings that new counsel can be retained and adequately prepare for the matter
- If this temporal threshold is not met, the court may require an explanation for withdrawal such as accused demanding that counsel act in violation of professional obligations, non-payment of fees, workload, or another specific reason
    - If lawyer cites ethical reasons or non-payment of fees, court must accept at face-value and cannot investigate further (lawyer-client privilege)

If withdrawal is sought for ethical reasons, the court must grant it (*R v Cunningham*)

- Withdrawal for non-payment may be refused if it would cause serious harm to the administration of justice, considering the list of (non-exhaustive) factors from *Cunningham*:
    - Whether it is feasible for the accused to represent themselves
    - Other means of obtaining representation
    - Impact on the accused from delay in proceedings, particularly if the accused is in custody
    - Conduct of counsel (i.e., if counsel gave accused reasonable notice to accused to seek other representation)
    - Impact on the Crown or any co-accused
    - Impact on complainants, witnesses and jurors
    - Fairness to defence counsel (including consideration of the expected length and complexity of the proceedings)
    - The history of the proceedings (i.e., if the accused has changed lawyers repeatedly)

The Trial Process

1153-1167

Trial Management of the TJ

As part of the Court's inherent jurisdiction to control its own process, a TJ can give directions to ensure a fair and orderly trial

- This includes:
    - Placing reasonable time limits on oral submission s

- During submissions be made in writing
- Requiring an offer of proof before embarking on a lengthy *voir dire*
- Deferring rule
- Directing the conduct of a *voir dire*
- Directing the order in which evidence is called

TJ has no authority to direct an accused to call witnesses in particular order to give evidence before any other witness

Prescence of Accused

Indictable Matters

650(1) *Code* – accused has the right to be present in court during the whole of their trial

- This right is not absolute
  - The court can order the removal of the accused where they "misconducts themselves by interrupting the proceedings so that to continue the proceedings in their proceedings would not be feasible" (650(2)(a))
  - Removal can also be ordered to determine whether the accused is unfit to stand trial
  - The judge make also permit the accused to be out of the court during the whole or any part of the trial on such conditions as the court deems proper (650(2)(b))

The right is also limited to proceedings constituting part of the "trial"

- *R v Hetrich* (1982)(ONCA) → trial includes:
  - Arraignment + plea
  - Jury selection
  - Reception of evidence (including *voir dire*)
  - Rulings on evidence
  - Arguments of counsel
  - Addresses to the jury
  - The judge's charge to the jury
  - Receipt of the verdict
  - Sentencing
  - Supplemental oral testimony to written submissions (*R v McDonald* (2018)(ONCA))
- Meetings with the TJ in chambers (1154)
- Designated counsel can be permitted (1154)
- Where the accused absconds (1155 – 475 *Code*)

Summary Convictions

Defendants can appear personally or by counsel or agent (although the court may require them to appear personally)

- 650.01 *Code* → a designated counsel can appear on behalf of the defendant on the date of arraignment and enter a plea of not guilty

- If the defendant is represented by a non-lawyer, the TJ should ensure that the choice is an informed one:
  - Make sure the defendant is aware of this fact and will accordingly not have recourse to the remedies that would be available if the agent were a lawyer and performed inadequately
  - Informing the defendant that provincial laws may not require that agents receive any training or demonstrate any level of expertise before being allowed to take money in return for representing persons in criminal matters
  - Advising the defendant that while the law expects certain minimum standards of competence from lawyers, it imposes no such standards on those who are not

Position of Accused in Courtroom

Up to the TJ!

Interpreters

S 14 of the *Charter* provides this

- *R v Tran* (1994) → SCC explained that this right applies to all accused (irrespective of the gravity of the offence charged and its classification)

Arraignment

King's Bench

The trail begins with the person who charged being "arraigned"

- Charges are formally read to the accused person or defendant in order to ensure the accused is aware of the exact charges their pleading to, and that all parties to the proceedings have a common understanding of the charges that are the subject of the proceedings

For indictable: the information is read to the accused following by their election (if any) to the mode of trial

- In jury trial, arraignment generally takes place before the jury is selected in the presence of the jury panel (unless its impractical to do so)

For summary: the substance of the information is read to the defendant by the clerk or registrar of the court and the defendant is asked whether they plead guilty or not-guilty to the charges contained in the information

Opening Statement or Address of Counsel

Opening statement – judge-alone

Opening address – jury case

Code is silent on the Crown's right to make an opening address, custom and tradition have cemented the practice

- Limits on the scope as observed by ONCA in *R v Mallory* (2007) →
    - "The opening address is not the appropriate forum for argument, invective, or opinion"
    - It should be used to "introduce the parties, explain the process, and provide an overview of the evidence that the Crown plans to call in support of its case"

S 651(2) *Code* – provides defence counsel the right to make an opening + examine witnesses as they see fit

- This typically happens at the end of the Crown's case
- If the defence wants to address the jury immediately after the Crown's opening address, it must show (based on special circumstances) that failing to do so could imperil the fairness of the trial (*R v Dalzell* (2003)(ON))

Admissions at Trial

Criminal Code of Canada

Evidence on Trial

Admissions at trial

655 Where an accused is on trial for an indictable offence, he or his counsel may admit any fact alleged against him for the purpose of dispensing with proof thereof.

- Admissions can be formally made (writing and entered as exhibit), but counsel's informal acknowledgment that the Crown has proved an issue does not constitute an admission

An accused cannot admit a fact until the allegation has been made and the prosecutor consents

- Facts admitted pursuant to s 655 are deemed to be conclusively proven (*R v Wiwchar* (MBCA))
    - They are binding on parties and may only be withdrawn with leave of the court

Examination of Witnesses

The rules respecting examination of witness derive from both evidentiary and procedural law

Direct Examination

Examination in Chief

- No leading questions unless:
    - The issue is not contentious – "your name is x, you live at y, is that correct?"
    - Where the witness has been declared "hostile" at common law or "adverse" under s 9 of the *Canada Evidence Act*

Cross-Examination of Witnesses

- You can definitely lead in cross-examination – that's the whole point

Right to cross-examine is protected by s 7 and 11(d) of the *Charter*

- TJ have a broad discretion to prevent harassment, misrepresentation, repetitiousness or the asking of questions that have a great prejudicial effect than probative value
    - Counsel also has to have a good faith basis for asking the question

- Preliminary inquiry - 1162

Re-examination of Witnesses

Re-examine only if you want the witness to clarify or explain something that has come up since the first examination

- It can also serve to rehabilitate the credibility of a witness that was harmed during cross-examination

Questioning of Witnesses by Judge

- Judges shouldn't really ask questions
    - Only ask questions for the purposes of clarification and amplification
- Judges must wait until both sides have finished their questioning
- Excessive interventions by a TJ may compromise the appearance of fairness and raise concerns of bias

Expert Evidence

S 7 of the *Canada Evidence Act* → each party is permitted to call up to 5 expert evidence witnesses (unless the courts grants leave to call more)

657.3(1) and 657.3(2) of the *Code* → provide a statutory expectation to the hearsay rule by allowing the evidence of an expert to be given by "means of a report accompanied by the affidavit or solemn declaration of the person, setting out, in particular, the qualifications of the person as an expert"

- The TJ retains discretion to require the expert to appear for examination or cross-examination

657.3(3) and 657.4(4) set out the notice requirements for parties intending to call an expert witness

- If either party fails to comply with the notice requirements, the TJ will (at the aggrieved party's request) grant an adjournment, order the party to provide the aggrieved party with more fulsome material, or order the calling or recalling of any witness for the purpose of giving testimony on matters related to those raising the expert witness's testimony"

Mental Disorder Issues

When an accused is alleged to suffer a mental disorder, two questions can arise:

1. Whether the accused is "unfit to stand trial"
2. Whether the accused is not "criminal responsible"

Fitness to Stand Trial

S 2 – *Code* → **unfit to stand trial** means unable on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to

(a) understand the nature or object of the proceedings,
(b) understand the possible consequences of the proceedings, or
(c) communicate with counsel

An accused is presumed fit to stand trial unless the contrary is proved BOP (s 672.22)
P 1166

- If the accused is found unfit, the court may proceed directly to a disposition hearing and order the accused to be released and placed in custody
    - Or the court can defer the disposition to the Review Board (committee established in each province to make or review disposition for accused found unfit or NCR)

Not Criminally Responsible

Criminal Code of Canada

Defence of mental disorder
16 (1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

Presumption
(2) Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities.

Burden of proof
(3) The burden of proof that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party that raises the issue.

The party claiming the accused is NCR must prove these elements BOP

- Accused is entitled to raise the issue of NCR by reason of mental disorder at any stage of the trial
- The prosecutor can normally raise the issue *only* after a finding of guilty (but before conviction)
    - If the accused's own evidence puts their mental capacity to commit the crime into question, the prosecutor may raise the issue without awaiting a guilty verdict (*R v Swain* (1991))

As with fitness to stand trial, the court may order an assessment (for up to 30 days of the accused's mental condition to help it decide the issue)

- IF NCR is found, the judge must "render a verdict that the accused committed the act or made the omission but is not criminally responsible on account of mental disorder"
    - The judge can then either proceed directly to a disposition hearing or defer disposition issue to the Review Board

Closing of the Case

1168

Reply + Re-opening the Case

At the close of the Crown's case, the accused is entitled to present a defence (650(3))

- If an accused takes advantage of this right, the Crown can be permitted with leave of the court to present "reply" or "rebuttal" evidence
    - Reply evidence is generally admissible only where the matter arises out of the defence's case, is not collateral, and the Crown could not have foreseen its development
- If the Crown adduces evidence to rebut a defence, the accused may be permitted to adduce surrebuttal evidence
    - In determining the admissibility of the surrebuttal evidence, the NLCA outlined the following factors in *R v Norris* →

1. The relevance of the proposed surrebuttal testimony;
2. Whether the accused had the opportunity during the presentation of his or her defence to address the issues for which surrebuttal evidence is requested
3. Whether the accused failed to provide a complete foundation for the defence, and sought, instead to split its case;
4. The extent to which the evidence adduced by the Crown in rebuttal is new, for example, evidence directed to an alternative explanation not dealt with in the defence evidence, or Crown rebuttal evidence that included observation of the accused during the trial, as in *Ewert*
5. Whether the Crown conducted vigorous cross-examination of the defence witnesses so as to reduce the probable need to recall the witness for surrebuttal evidence
6. The extent to which the whole of the evidence is inter-related, making the definition of a permissible scope of examination more difficult; and
7. Whether the witness giving surrebuttal evidence is new or has previously testified on behalf of the accused

**It is important to distinguish between reply evidence and "re-opening of the case"

The TJ can permit re-opening any time before the sentence is passed (if a party neglects to adduce evidence during the presentation of its case), but only if the other side would not suffer any prejudice – the later the stage of the proceedings, the less likely the request to re-open will be granted (*R v G.(S.G.)* (1997) p 1170)

- Three examples of the narrow circumstances in which the Crown should be allowed to re-open its case after the defence has commenced to answer the Crown's case (*R v P.(M.B.)* (1997)):
    i. Where the conduct of the defence has either directly or indirectly contributed to the Crown's failure to adduce certain evidence before closing its case
    ii. Where the Crown's omission or mistake was over a non-controversial issue to do with purely formal procedural or technical matters, having nothing to do with the substance or merits of a case

iii. Where the interests of the accused warrant re-opening the Crown's case

- If the defence seeks to re-open its case before verdict or judgment, the trial judge should consider the following factors in exercising its discretion whether to permit the reopening (*R v Hayward* (1993)(ONCA)):
    i. Whether the evidence is relevant to a material issue in the case
    ii. The potential prejudice to the other party
    iii. The effect of permitted reopening on the orderly and expeditious conduct of the trial

**An accused who has been found guilty, but not yet sentences can also apply to re-open the defence, but will have to meet the test for admission of fresh evidence (*R v Palmer* (1979))

Final Submissions + Closing Addresses of the Counsel

After all the evidence has been presented, counsel will alternate in making "final submissions" in a judge-alone trial or "closing addresses" in jury trials

- If the defence choosing to call a witness (or a co-accused in a joint trial), the defence must present first (*R v Rose* (1998) – SCC upheld this)

Both Crown and defence counsel are expected to refrain from inflammatory closings (Crown has a heightened obligation of fairness) (*R v B.(R.B.)* (2001)(BCCA)):

> "Crown counsel is the surrogate of the Attorney General, the chief law officer of the Crown, and thus represents the guardian of law and order and as such he or she has a greater potential to influence the jury than counsel for the defence. Moreover, Crown counsel leads off in the trial and sets the tone of the proceeding. Emotions tend to run high in jury trials dealing with serious crimes especially in cases like the present one. Crown counsel is expected to behave in a dispassionate and impartial manner to reduce the emotional level and foster a rational process. It takes no skill to whip up feelings against the accused in a case like this and it threatens the integrity of the trial. Applying opprobrious labels to the accused, as was done here, does nothing to advance the case; instead it cheapens the dignified position that the Crown should occupy in the criminal law."

Charge to the Jury

At the conclusion of closing address by both parties, the TJ will provide instruction to the jury before the jurors begin their deliberations; there is no universal formula for jury charges, but the SCC in *R v Daley* (2007) set out the elements that should be covered

1. Instruction on the relevant legal issues, including the charges faced by the accused;
2. An explanation of the theories of each side;
3. A review of the salient facts which support the theories and case of each side;
4. A review of the evidence relating to the law;
5. A direction informing the jury they are the masters of the facts and it is for them to make the factual determinations;
6. Instruction about the burden of proof and presumption of innocence;

7. The possible verdicts open to the jury; and
8. The requirements of unanimity for reaching a verdict

Counsel will be given an opportunity to raise objections to the jury charge in the absence of the jury and the TJ retains the discretion as to whether to re-charge the jury upon consideration of the objections

- TJ's decision on what to include in or exclude from a jury charge can be subject to appellate review (*R v Khill* (2021))

The Verdict

1173

Direct Verdict

At the close of the Crown's case, an accused may decide to bring a motion for a direct verdict (no-evidence or non-suit motion)

- In doing so, the accused assert that the prosecution has failed to make out a prima facie case and they should be acquitted without having to decide whether to call evidence

The test for directed verdict is articulated in *USA v Sheppard* (1976) →

- TJ must determine whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty

The SCC elaborated on the test in *Monteleone* (1987) →

- "Where there is before the court any admissible evidence, whether direct or circumstantial, which, if believed by a properly charged jury acting reasonably, would justify a conviction, the trial judge is not justified in directing a verdict of acquittal. It is not the function of the trial judge to weigh the evidence, to test its quality or reliability once a determination of its admissibility has been made. It is not for the trial judge to draw inferences of fact from the evidence before him. These functions are for the trier of fact, the jury."

The existence of evidence on every essential element will result in dismissal of the directed verdict motion

- The assessment by the TJ will depend on whether the Crown's evidence is direct or circumstantial
    - Direct evidence → no weighing of the evidence
    - Circumstantial evidence → TJ must engage in a limited weighing of the evidence to determine whether the evidence can reasonably support an inference of guilt (*R v Arcuri* (2001))
- If the Crown's case consists solely of eyewitness testimony that would necessarily leave reasonable doubt in the mind of a reasonable juror, the TJ must direct an acquittal upon a motion for a directed verdict (*R v Hay* (2013))

Trial by Judge Alone vs. Jury Trial

In non-jury trials, the responsibility to decide the case rests with the TJ who must provide reasons (orally or written) that demonstrate a sufficient basis for the judgement and allowed for meaningful appellate review

- In jury trials, a jury is only required to arrive at a verdict of "guilty" or "not guilty"
    - It does not provide reasons
- Jury verdicts are considered the gold standard of criminal law (*R v Wills* (2014)(ON))
    - The jury must be unanimous in its verdict
        - Does not need to be unanimous in the evidential route taken to reach the conclusion
- When a jury cannot reach a unanimous verdict, the TJ will decide whether to exhort the jury to try to achieve unanimity
    - If that doesn't work, the TJ has discretion to declare a mistrial, discharge the jury and direct a new jury be empanelled to try the case again

Mistrial

Mistrial is a remedy of last resort

TJ's have considerable power to ensure that trials are conducted fairly and efficiently

- An incident can occur that poses "a real danger of prejudice to the accused or danger of a miscarriage of justice" that requires a judge to declare a mistrial (*R v Burke* (2002))
    - Before declaring this, the judge should consider other means of remedying the situation (*R v Siu* (1998) (BCCA))

Courts have granted mistrials in a variety of circumstances including where:

- Jurors were exposed to prejudicial media coverage (*R v CHBC TV* (1999) (BC))
- Counsel's "inflammatory invective" during the closing address to the jury exceeded the bounds of propriety (*R v Karaibrahimovic* (2002) (AB))
- Delayed disclosure deprived the accused of the opportunity to make full answer and defense (*R v Antinello* (1995) (AB))

After entering the verdict, a TJ's jurisdiction to declare a mistrial is much more restricted

- The judge is general *functus officio* and the verdict cannot be altered except on appeal (*R v Lessard* (1976) (ON))

Chapter 17: Sentencing

1179-1258

Sentencing is an art where a judge blends the primary principles of deterrence, denunciation, and rehabilitation to craft an appropriate sentence

Concept of Punishment

1181-1182

Sentencing Purpose and Principles

Criminal Code of Canada

Purpose

718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
(b) to deter the offender and other persons from committing offences;
(c) to separate offenders from society, where necessary;
(d) to assist in rehabilitating offenders;
(e) to provide reparations for harm done to victims or to the community; and
(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

Fundamental principle

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Other sentencing principles

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
    i. evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity or expression, or on any other similar factor,
    ii. evidence that the offender, in committing the offence, abused the offender's intimate partner or a member of the victim or the offender's family,
    (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,
    iii. evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,
    (iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,
    (iii.2) evidence that the offence was committed against a person who, in the performance of their duties and functions, was providing health services, including personal care services,

iv. evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization,
v. evidence that the offence was a terrorism offence,
vi. evidence that the offence was committed while the offender was subject to a conditional sentence order made under section 742.1 or released on parole, statutory release or unescorted temporary absence under the Corrections and Conditional Release Act, and
vii. evidence that the commission of the offence had the effect of impeding another person from obtaining health services, including personal care services,

shall be deemed to be aggravating circumstances;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

Courts have further guidance as to how these sentencing principles should be applied in practice:

Nasogaluak (2010):

"The language in ss. 718 to 718.2 of the *Code* is sufficiently general to ensure that sentencing judges enjoy a broad discretion to craft a sentence that is tailored to the nature of the offence and the circumstances of the offender. The determination of a "fit" sentence is, subject to some specific statutory rules, an individualized process that requires the judge to weigh the objectives of sentencing in a manner that best reflects the circumstances of the case . . . No one sentencing objective trumps the others and it falls to the sentencing judge to determine which objective or objectives merit the greatest weight, given the particulars of the case."

**SCC explained that sentencing judges have wide discretion because "[they] have the advantage of having hear and seen the witnesses, sentencing judges are in the best position to determine, having regard to the circumstances, a just and appropriate sentence that is consistent with the objectives and principles set out in the *Code*" (*R v Lacasse* (2015))

- It is appropriate for a judge to consider the fact that a **type of offence occurs with particular frequency in a given region** as a relevant factor in determining a just and appropriate sentence

The Role of Appellate Courts

The SCC has also recognized that appellate courts also play an important "dual role" in sentencing (*R v Friesen* (2015)):
Appellate courts must:

- Intervene when the sentencing judge has either applied the sentencing principles incorrectly or imposed a sentence that is "demonstrably unfit"
- Assist in "developing the law and providing guidance" to sentencing judges
    - This involves distilling and summarizing the existing law into a single statement, a range of statements or perhaps a starting point (that the sentencing judge can more readily use)
- *May* also "set a new direction, bringing the law into harmony with a new societal understanding of the gravity of certain offences or the degree of responsibility of certain offenders" [i.e., *Friesen* → the existing sentencing ranges for sexual offences against children didn't properly reflect contemporary understandings of the wrongfulness of these offences or the harms associated with them]

SCC has clarified the role that the ranges and starting points established by appellate courts play in the sentencing process (*R v Parranto* (2021)); different tools to help sentencing judges impose a proportionate sentence:

1. "Starting points and ranges are not and cannot be binding in theory or in practice (*Friesen*, at para. 36);
2. Ranges and starting points are "guidelines, not hard and fast rules", and a "departure from or failure to refer to a range of sentence or starting point" cannot be treated as an error in principle (*Friesen*, at para. 37);
3. Sentencing judges have discretion to "individualize sentencing both in method and outcome", and "[d]ifferent methods may even be required to account properly for relevant systemic and background factors" (*Friesen*, at para. 38, citing *Ipeelee*, at para. 59); and,
4. Appellate courts cannot "intervene simply because the sentence is different from the sentence that would have been reached had the range of sentence or starting point been applied" (*Friesen*, at para. 37). The focus should be on whether the sentence was fit and whether the judge properly applied the principles of sentencing, not whether the judge chose the right starting point or category (*Friesen*, at para. 162)."

The Parity Principle

Criminal Code of Canada

Other sentencing principles
718.2 A court that imposes a sentence shall also take into consideration the following principles:

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

Similar sentences for co-accused convicted for joint ventures and order a sentence for an offender that is broader similar to sentences order for similar offenders who have committed similar offences

- *Friesen* (2010) → parity = proportionality / "a consistent application of proportionality will lead to parity"
- *R v Lacasse* (2015) → while parity is a "desirable objective, the fact that each crime is committed in unique circumstances by an offender with a unique profile cannot be disregarded"

As a consequence, an offender is not automatically entitled to the benefit of a more lenient sentence imposed on a co-accused

- A more severe sentence may be justified (for example) by a more significant criminal record or a more active role in the commission of the offence

Unless there is some reason why there should be a discrepancy ...

The Effect of a Criminal Record: The Gap Principle + Jump Effect

A criminal record will often be an aggravating factor in sentencing because it shows the person is a reoffender – this is not a *Code* principle, but courts have held that the presence/absence of a record (and its contents) are relevant to the codified sentencing principles
Gap → the gaps of time between offences

Gap Principle

- The more dated the record, the less likely it is to be considered aggravating
    - The "gap principle" recognizes that the long period of time since the offender's last transgressions demonstrates an effort at rehabilitation
        - The principle also makes allowances for period when the offender committed only relatively minor crimes
- Courts are less likely to apply the gap principles for offences causing death or serious bodily harm (*R v Lockyer* (2000) (NFLD CA)) OR drinking + driving cases where there is evidence of ongoing alcohol abuse (*R v MacLeod* (2004) (NSCA))

Jump Effect | Step Principle

- Sentences for a repeat offender should increase gradually, rather than by large leaps
    - This rests on the principles of rehabilitation and proportionality
- It gives an offender a second chance

Jump effect is applied where the offences are "at the relatively less serious end of the criminal conduct spectrum" (*R v Muyser* (2009) (ABCA))

- Little or no application where the crime is severe, violent and serious
    - When it's serious, the need for denunciation and deterrence outweighs rehabilitation considerations

Mitigating Factors

Nasogaluak (2010):

Mitigating vs. Aggravating Factors:

¶43: "The relative importance of any mitigating or aggravating factors will then push the sentence up or down the scale of appropriate sentences for similar offences. The judge's discretion to decide on the particular blend of sentencing goals and the relevant aggravating or mitigating factors ensures that each case is decided on its facts, subject to the overarching guidelines and principles in the *Code* and in the case law."

The *Code* doesn't set out specific factors to be considered to mitigate the culpability of an offender, but courts have under the common law:

- Good character, family responsibilities, employment record and mental health issues

Crown will often stress aggravating factors, and sometimes even mitigating too

- As a defense lawyer, you always have to stress mitigating issue
    - Intoxication
    - Diction issues
    - Good character
    - Family responsibilities
    - Cooperation with police
    - Mental health issues
    - Positive employment record
    - Remorse
    - Age
    - Etc.

Three most commonly invoked mitigating circumstances:

Guilty Plea

- Significant mitigating factor because it *saves resources* + *indicates remorse*
- General rule: sentencing discount will be ¼ - 1/3 the sentence for a guilty plea
    - This general rule will vary with circumstances
    - *R v Layte* (1983)(ON)
- Timing:
    - An early guilty plea can avoid lengthy sentence even if a strong Crown case
    - Significant reduction in sentence if it spares victims from testifying

Age

- Youth is usually a mitigating factor [age 12-17 are subject to the special sentencing under the *YCJA*]
- Deterrence and rehabilitation are paramount sentencing objectives for younger, first-time offenders
    - Usually this means suspended sentence and probation (*R v Stein* (1974)(ONCA))
- If prison is the sentence, it should be "the shortest possible sentence to achieve the relevant objectives" (*R v Priest* (1996)(ONCA)) **this is not the case for serious or violent offences

Stringent Pre-trial Bail Conditions

- Was the offender subject to stringent bail conditions when awaiting trial?
    - This requires a flexible approach
- The more restrictive conditions (i.e., house arrest), the greater the mitigating effect on sentence (not 1:1 for time on house arrest)
- If the bail terms lacked any punitive sanction, they won't be considered mitigating (*R v Higgings* (2001) (MBCA))

Collateral Consequences

- Sentencing judge will consider all the relevant circumstances related to the offence and the offender *including any* <u>*collateral consequences of conviction*</u>
    - *R v Suter* (2018) → this includes:
        - Physical, emotional, social, or financial consequences "arising from the commission of an offence, the conviction for an offence, or the sentence imposed for an offence"
        - It can't be reduced to the point where the sentence becomes disproportionate to the gravity of the offence or the moral blameworthiness of the offender

Type of Offender

Young Persons

1192 – 1196

Completely different world for sentencing – great document says Ed (can't be charged under 12) YCJA from 12-17 (rehabilitation is top)

Everything is tried in the youth courts then there is an application made *if the crime is serious enough* to have an adult sentence imposed

Indigenous Offenders

1197 - 1199

When sentencing Indigenous offenders, courts have to pay attention to all available sanctions other than imprisonment that would be reasonable in the circumstances (s 718(2)(e) of the *Code*)

- This is not preferential treatment from the CJS or that Indigenous status is a mitigating favor on sentence (*R v Kakekagamick* (2006)(ONCA))
    - However, attention has to be paid to the ***circumstances of Indigenous offenders*** "because those circumstances are unique, and different from those of non-aboriginal offenders" (*R v Gladue*)

Dangerous + Long-Term Offenders

Part XXIV of the *Code* → aims to protect the public from habitual, violent offenders with the highest risk of recidivism by enabling lengthy prison terms and enhanced post-release supervision

**2 different classes: dangerous offenders + long-term offenders

- To get this designation, the Crown has to make an application – it includes assessments conducted by mental health experts and have a report prepared for the use at a designation hearing
    - The Crown needs:
        - Consent of the provincial Attorney General
        - Give the offender at least 7 days' notice of the application
        - File a notice of the application with the court

Both dangerous and long-term offender designations can be appealed the decision to the CoA

Corporations

Criminal Code of Canada

Organizations

Additional factors

718.21 A court that imposes a sentence on an organization shall also take into consideration the following factors:

(a) any advantage realized by the organization as a result of the offence;
(b) the degree of planning involved in carrying out the offence and the duration and complexity of the offence;
(c) whether the organization has attempted to conceal its assets, or convert them, in order to show that it is not able to pay a fine or make restitution;
(d) the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees;
(e) the cost to public authorities of the investigation and prosecution of the offence;
(f) any regulatory penalty imposed on the organization or one of its representatives in respect of the conduct that formed the basis of the offence;
(g) whether the organization was — or any of its representatives who were involved in the commission of the offence were — convicted of a similar offence or sanctioned by a regulatory body for similar conduct;
(h) any penalty imposed by the organization on a representative for their role in the commission of the offence;
(i) any restitution that the organization is ordered to make or any amount that the organization has paid to a victim of the offence; and
(j) any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence.

Deterrence + denunciation will be of paramount importance in sentencing an organization

- Rehabilitation will still play a role (*R v Panarctic Oils Ltd.* (1983) (NWT))

Range of sentences available differs (cannot be incarcerated); the primary sanction will be a fine
- *Code* limits the max. fine to be imposed for a summary conviction to 100K (no max. for indictable)
    - Discretion of the court to decide the fine amount – the quantum imposed should consider the continued economic viability (but is not determinative) – bankruptcy alone does not preclude a fine

¶17.46 → Parliament has authorized judges to order probation for corporations

Dispositions

Custodial Dispositions

Custodial Arrangements = imprisonment and conditional sentences

Imprisonment

718(c) of the *Code* provides that offenders should be separated from society "where necessary"

Sentences of 2+ years → served in federal penitentiary
Sentences of less than 2 → under the authority of provincial correctional systems
- If a provincial inmate receives a subsequent sentence that, in combination with the unexpired first sentence, is more than 2 years they will be transferred to the penitentiary

National Parole Board – manages decisions respecting the conditions release of inmates

Consecutive + Concurrent Sentences

Judges often have to sentence an accused for multiple offences
- 719(1) – *Code* → a sentence begins when it is *imposed*
    - Sentences imposed for each offence will be deemed to run <u>*concurrently*</u>
        - This is unless the sentencing judge orders they be served consecutively

Criminal Code of Canada

Cumulative punishments

718.3(4) The court that sentences an accused shall consider directing
- (a) that the term of imprisonment that it imposes be served consecutively to a sentence of imprisonment to which the accused is subject at the time of sentencing; and
- (b) that the terms of imprisonment that it imposes at the same time for more than one offence be served consecutively, including when
    - i. the offences do not arise out of the same event or series of events,
    - ii. one of the offences was committed while the accused was on judicial interim release, including pending the determination of an appeal, or

iii. one of the offences was committed while the accused was fleeing from a peace officer.

Sentencing judges have a broad discretion in choosing between concurrent and consecutive sentences

- If the judge choses a cumulative sentence, they are bound by the ***totality principle***
  - Totality principle requires that the "cumulative sentence rendered does not exceed the overall culpability of the offender" (*R v M.(C.A.)* (1996))
- Judges are also curtailed by certain *Code* provisions:
  - Consecutive sentences are mandatory for some offences (s 85(4))
  - A term of imprisonment imposed in default of a payment of a fine made in lieu of forfeiture of proceeds of crime must be served consecutively with any other term of imprisonment ordered (s 462.37(4)(b))

Minimum Sentences

There are many minimum sentences in the *Code*

- *R v Nasogaluak* (2010) → "a relatively new phenomenon in Canada law, the minimum sentence is a forceful expression of governmental policy in the area of criminal law"

The most severe minimum sentences are for murder (both minimum of life inmprisonment)

Minimum sentences are constrained by s 12 of the *Charter* (prohibits cruel + unusual punishment)

- A minimum sentence will be cruel and unusual when it is grossly disproportionate to the sentence that would have been imposed if there was no minimum

SCC established a 2-party analysis to determine if a minimum sentence is cruel + unusual in *R v Nur* (2015) →

1. Is the sentence grossly disproportionate to what the offender deserves for the particular offence in the offender's circumstances? OR
2. Would the sentence be grossly disproportionate in reasonably foreseeable circumstances represented by a "reasonable hypothetical"?

If the inquiry reveals that the sentence is grossly disproportionate, then it's a *prima facie* violation of s 12 and the inquiry moves to a s 1 *Charter* justification analysis

R v Nur (2015) → mandatory minimum sentences for possession of a loaded firearm under s 95(2) of the *Code* were unconstitutional

R v Lloyd (2016) → mandatory minimum sentences for designated substances offences under the *Controlled Drugs and Substances Act* were struck down

Intermittent Sentences

Criminal Code of Canada

Intermittent sentence

732(1) Where the court imposes a sentence of imprisonment of ninety days or less on an offender convicted of an offence, whether in default of payment of a fine or otherwise, the court may, having regard to the age and character of the offender, the nature of the offence and the circumstances surrounding its commission, and the availability of appropriate accommodation to ensure compliance with the sentence, order

(a) that the sentence be served intermittently at such times as are specified in the order; and

(b) that the offender comply with the conditions prescribed in a probation order when not in confinement during the period that the sentence is being served and, if the court so orders, on release from prison after completing the intermittent sentence.

**intermittent sentences can be converted into a consecutive sentence on application by the offender

***intermittent sentences should not be seen as an "indulgence" – it extends the period considerably and involves repeated surrender into custody (this can often be more harsh on an offender than a single term) (*R v Wood* (1993)(BCCA))

Time Served

A "time served" sentence ***cannot*** be imposed

R v Mathieu (2008) → The SCC noted that pre-sentence custody cannot really be characterized as a "sentence" since pre-sentence custody refers to custody before the verdict is rendered

- A sentence commences when the sentence is pronounced!
- Courts often impose a nominal fine or a sentence of one-day imprisonment to get around this requirement

Conditional Sentence

It's styled as a form of "imprisonment" an offender who successfully fulfills the requirements of conditional sentence ***will not spend any time in prison*** and instead serve the sentence in the community

Conditional sentence order

- You either commit a new offence or get a new charge
- Don't complete your conditions, and file paperwork of breach
    - Court report that says how they had been doing before they got the new charge, the recommendations:
        - Partial custody → serve x days of your SCO in jail, then continue to do CSO on outside
        - Termination → CSO over, going to serve the rest of the time in jail
        - No action → if they're in jail, the time between counts, so they get credit
            - No more time, CSO

      *lots of these people are getting out and their CSO is suspended (follow conditions until the month they go back until their court date for their breach)

- This is a halfway between probation and imprisonment

R v Proulx → probation is designed to denounce and deter as well as rehabilitate and restore

- Conditional sentences typically include punitive conditions that substantially restrict the offender's liberty
    - "There may be certain circumstances in which the need for denunciation is so pressing that incarceration will be the only suitable way in which to express society's condemnation of the offender's conduct"
    - The same is true for deterrence

Prerequisites to Imposing a Conditional Sentence

- The judge can take into consideration all the evidence, no matter who adduces it to inform his or her decision about the appropriateness of a conditional sentence

Criminal Code of Canada

Imposing of conditional sentence
742.1 If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the conditions imposed under section 742.3, if

- **(a)** the court is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2;
- **(b)** the offence is not an offence punishable by a minimum term of imprisonment;
- **(c)** the offence is not an offence under any of the following provisions:
    - **(i)** section 239, for which a sentence is imposed under paragraph 239(1)(b) (attempt to commit murder),
    - **(ii)** section 269.1 (torture), or
    - **(iii)** section 318 (advocating genocide); and
- **(d)** the offence is not a terrorism offence, or a criminal organization offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years or more.

Compulsory conditions of conditional sentence order
742.3(1) The court shall prescribe, as conditions of a conditional sentence order, that the offender do all of the following:

- **(a)** keep the peace and be of good behaviour;
- **(b)** appear before the court when required to do so by the court;
- **(c)** report to a supervisor
    - **(i)** within two working days, or such longer period as the court directs, after the making of the conditional sentence order, and
    - **(ii)** thereafter, when required by the supervisor and in the manner directed by the supervisor;

- **(d)** remain within the jurisdiction of the court unless written permission to go outside that jurisdiction is obtained from the court or the supervisor; and
- **(e)** notify the court or the supervisor in advance of any change of name or address, and promptly notify the court or the supervisor of any change of employment or occupation.

Procedure on breach of condition
742.6(1) For the purpose of proceedings under this section,

- **(a)** the provisions of Parts XVI and XVIII with respect to compelling the appearance of an accused before a justice apply, with any modifications that the circumstances require, and any reference in those Parts to committing an offence shall be read as a reference to breaching a condition of a conditional sentence order;
- **(b)** the powers of arrest for breach of a condition are those that apply to an indictable offence, with any modifications that the circumstances require, and subsection 495(2) does not apply;
- **(c)** despite paragraph (a), if an allegation of breach of condition is made, the proceeding is commenced by
  - **(i)** the issuance of a warrant for the arrest of the offender for the alleged breach,
  - **(ii)** the arrest without warrant of the offender for the alleged breach, or
  - **(iii)** the compelling of the offender's appearance in accordance with paragraph (d);
- **(d)** if the offender is already detained or before a court, the offender's appearance may be compelled under the provisions referred to in paragraph (a);
- **(e)** if an offender is arrested for the alleged breach, the peace officer who makes the arrest or a judge or justice may release the offender and the offender's appearance may be compelled under the provisions referred to in paragraph (a); and
- **(f)** any judge of a superior court of criminal jurisdiction or of a court of criminal jurisdiction or any justice of the peace may issue a warrant to arrest no matter which court, judge or justice sentenced the offender.

742.1 → pre-conditions for imposing a conditional sentence
742.3 → types of conditions that can be imposed as part of the sentence
742.6 → the procedure for dealing with breaches

A conditional sentence can only be imposed if it meets 3 requirements:

1. The offender cannot have been convicted of an offence statutorily excluded from the conditional sentence regime:
   - Any offence punishable by a minimum term of imprisonment

- Any indictable offence with a maximum prison term of 14 years or more
- Indictable terrorism and criminal organization offence with a maximum prison term of 10+ years
- An indictable offence with a max prison term of 10 years that caused bodily harm; involved the import, export, trafficking or production of drugs; or involved the use of a weapon
- Any of the following indictable offences: prison breach, criminal harassment, sexual assault, kidnapping, trafficking in persons, abduction of person under 14, motor vehicle theft, theft over 5K, breaking and entering a place other than a dwelling-house, being unlawfully in a dwelling house, or arson for fraudulent purpose

2. The sentencing judge must determine that the offender would have a received a sentence of less than 2 years in prison
3. The judge must be satisfied that serving the sentence in the community "would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing"

A sentencing judge can also impose a conditional sentence consecutive to another conditional sentence (as long as the total sentence including pre-trial custody does not exceed 2 years)

- A conditional sentence can be blended with an intermittent sentence or another sentence of incarceration provided it doesn't exceed 2 years

Conditions Imposed

If a conditional sentence is imposed, the following 5 conditions are required (742.3(1)):

(a) keep the peace and be of good behaviour;
(b) appear before the court when required to do so by the court;
(c) report to a supervisor
    i. within two working days, or such longer period as the court directs, after the making of the conditional sentence order, and
    ii. thereafter, when required by the supervisor and in the manner directed by the supervisor;
(d) remain within the jurisdiction of the court unless written permission to go outside that jurisdiction is obtained from the court or the supervisor; and
(e) notify the court or the supervisor in advance of any change of name or address, and promptly notify the court or the supervisor of any change of employment or occupation.

The judge can also choose to impose (742.3(2)):
(2) The court may prescribe, as additional conditions of a conditional sentence order, that the offender do one or more of the following:

a) abstain from the consumption of drugs except in accordance with a medical prescription, of alcohol or of any other intoxicating substance;
    (a.1) provide, for the purpose of analysis, a sample of a bodily substance prescribed by regulation on the demand of a peace officer, the supervisor or someone designated under subsection (7) to make a demand, at the place and time and on the

day specified by the person making the demand, if that person has reasonable grounds to suspect that the offender has breached a condition of the order that requires them to abstain from the consumption of drugs, alcohol or any other intoxicating substance;

(a.2) provide, for the purpose of analysis, a sample of a bodily substance prescribed by regulation at regular intervals that are specified by the supervisor in a notice in Form 51 served on the offender, if a condition of the order requires the offender to abstain from the consumption of drugs, alcohol or any other intoxicating substance;

(a.3) abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the order or from going to any place or geographic area specified in the order, except in accordance with any specified conditions that the justice considers necessary;

a) abstain from owning, possessing or carrying a weapon;
b) provide for the support or care of dependants;
c) perform up to 240 hours of community service over a period not exceeding eighteen months;
d) attend a treatment program approved by the province; and
e) comply with such other reasonable conditions as the court considers desirable, subject to any regulations made under subsection 738(2), for securing the good conduct of the offender and for preventing a repetition by the offender of the same offence or the commission of other offences.

Proulx → punitive, liberty-restraining conditions such as house arrest or strict curfews should be the norm, not the exception

Non-custodial Dispositions

Discharges

An absolute or conditional discharge is the least severe sentence available under the *Code*

- Discharges are only available for offences with
  - No minimum punishment
  - Punishable by imprisonment of less than 14 years
  - Organizations (corporations) *cannot* receive discharges
- The more serious the offence – the less likely a discharge will be ordered (not in the *Code*, but in practice)

Criminal Code of Canada

Conditional and absolute discharge

730(1) Where an accused, other than an organization, pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for fourteen years or for life, the court before which the accused appears may, if it considers it to be in the best interests of the accused and not

contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or on the conditions prescribed in a probation order made under subsection 731(2).

Where person bound by probation order convicted of offence
(4) Where an offender who is bound by the conditions of a probation order made at a time when the offender was directed to be discharged under this section is convicted of an offence, including an offence under section 733.1, the court that made the probation order may, in addition to or in lieu of exercising its authority under subsection 732.2(5), at any time when it may take action under that subsection, revoke the discharge, convict the offender of the offence to which the discharge relates and impose any sentence that could have been imposed if the offender had been convicted at the time of discharge, and no appeal lies from a conviction under this subsection where an appeal was taken from the order directing that the offender be discharged.

**no conviction is entered; no permanent criminal record results; neither can be combined with a fine (a fine cannot be imposed without convicting the accused)

Suspended Sentence

Criminal Code of Canada

Probation

Making of probation order
731(1) Where a person is convicted of an offence, a court may, having regard to the age and character of the offender, the nature of the offence and the circumstances surrounding its commission,

(a) **if no minimum punishment is prescribed by law**, suspend the passing of sentence and direct that the offender be released on the conditions prescribed in a probation order; or
(b) in addition to fining or sentencing the offender to imprisonment for a term not exceeding two years, direct that the offender comply with the conditions prescribed in a probation order.

**a judge *cannot* suspend the sentence and impose a fine

- Usually these are non-serious offences
    - *Unlike a discharge*, a suspended sentence results in a criminal record (it is the sentence that is suspended, not the conviction)

R v Ursel (1997)(BCCA) →
"Where a suspended sentence is granted, in conjunction with a probation order, the court does not pronounce any sentence. The form of penalty to be imposed remains unknown, and if the offender complies with the conditions of the probation order, may never be imposed. If a condition of a probation order is breached, the offender may be charged with breach of the probation order, which is a separate offence. Proof of that offence must be made to the usual

criminal standard, that is, beyond a reasonable doubt. The court may, as well, on proof of the breach, revoke the earlier order suspending sentence and impose the penalty it would have imposed for the original offence had the sentence not been suspended."

Probation

- Probation orders *must* attach to conditional discharges and suspended sentences
- Probation can also be ordered in addition to a fine *or* a sentence of imprisonment (that is less than 2 years)
    - No authority for a sentencing judge to order probation, a fine AND imprisonment
- Probation order cannot last more than three years

Prior to *Knott,* there was confusion regarding the effect on a probation order where subsequent to its imposition a further sentence was imposed taking an offender's total period of custody beyond two years

- The court clarified that probation orders that are valid when made are not invalidated by subsequent sentences imposed on the offender
    - Reviewable error

For example: in a proceeding involving multiple counts, indictments, or information, the sentencing court must not adjourn the sentencing on some of the offences in order to make a probation order that would otherwise contravene s 731(1)(b)

In sentencing an offender who is already subject to an existing probation order, a sentencing judge is required to consider the appropriateness of a fresh probation order by taking into account the unexpired prior sentence, the particular circumstances of the offence, the character and needs of the offender, and the purpose and relevant principles of sentencing
732.1(2) → required conditions
732.1(3) → discretionary conditions

**there is no authority to impose terms that effectively banish an accused from a jurisdiction or province, OR to require an accused to comply with conditions imposed in unrelated family court proceedings

Although the primary purpose of probation is rehabilitation, it also has a punitive aspect

- *R v Prieduls* (ONCA) → "a person on probation is not a free man… he is under supervision and must earn his ultimate freedom"

Fines

- Most common sanction imposed by courts

Advantages:

- Simple to administer
- Cause less disruption + stigma to the accused
- Less burden on the public purse
- Serve the objectives of denunciation and deterrence

Criminal Code of Canada

Power of court to impose fine
734(1) Subject to subsection (2), a court that convicts a person, other than an organization, of an offence may fine the offender by making an order under section 734.1

(a) **if the punishment for the offence does not include a minimum term of imprisonment**, in addition to or in lieu of any other sanction that the court is authorized to impose; or

(b) **if the punishment for the offence includes a minimum term of imprisonment**, in addition to any other sanction that the court is required or authorized to impose.

Offender's ability to pay
(2) Except when the punishment for an offence includes a minimum fine or a fine is imposed in lieu of a forfeiture order, a court may fine an offender under this section only if the court is satisfied that the offender is able to pay the fine or discharge it under section 736.

A criminal record necessarily results from the imposition of a fine *because* conviction is a pre-condition for a fine

Unless there is a minimum fine or a fine is imposed in lieu of a forfeiture order, the offender's ability to pay must be considered

- If the judge finds that the offender has the ability to pay, the onus shifts to the offender to prove otherwise

R v Desjardins (1996)(NBCA) →
"Courts are no ignorant of the ease with which many convicted persons can prove their financial incapacity by showing their lack of legal financial resources at the moment of sentencing. It is for this reason that, where traffickers are concerned, the courts will infer financial capacity on the basis of the illegal profits realized from trafficking and impose a term of imprisonment in default of payment"

- When an offender is fined, a term of imprisonment is deemed in default of payment (734(4)) [calculated by the formula set out in s 734(5))]
  - ¶17.80
  - The deemed period of imprisonment cannot exceed the max. term of imprisonment that the court could have imposed on conviction
- If a deemed period of imprisonment is not included, the max. deemed period is:
  - 5 years for indictable offences
  - 2 years less a day for summary conviction offences

Only conditional sentence, probation, release orders have reporting obligations

Ancillary Orders

Restitution
S 718(e) → "reparations for harm done to victims or to the community"

- This can be done through ordering restitution under 738 or 739

Restitution can be granted for:

- Lost, damaged or destroyed property (not exceeding the replacement value)
- Pecuniary damages for bodily or psychological harm
- Moving-related expenses incurred by members of the accused's household in domestic violence cases
- Expenses associated with identity theft
- Expenses incurred to remove intimate images from the Internet or other digital network

**fines can't be ordered unless the "amount is readily ascertainable", but 739.1 of the *Code* provides that an offender financial means or ability to pay does not prevent a court from making a restitution order

- Ability to pay is not determinative – it's discretionary and the ability remains a relevant consideration as to the terms and timing of such an order

Restitution orders have priority over forfeiture orders (740) → a sentencing judge "shall first make the order of restitution and shall then consider whether and to what extent an order of forfeiture or an order to pay a fine is appropriate in the circumstances"

Alternative to Criminal Sanctions

Diversion

Alternative measures were introduced in 1996 by Parliament to deal with minor offences outside of formal criminal proceedings

Criminal Code of Canada

Alternative Measures

When alternative measures may be used

717(1) Alternative measures may be used to deal with a person alleged to have committed an offence only if it is not inconsistent with the protection of society and **the following conditions are met**:

(a) the measures are part of a program of alternative measures authorized by the Attorney General or the Attorney General's delegate or authorized by a person, or a person within a class of persons, designated by the lieutenant governor in council of a province;

(b) the person who is considering whether to use the measures is satisfied that they would be appropriate, having regard to the needs of the person alleged to have committed the offence and the interests of society and of the victim;

(c) the person, having been informed of the alternative measures, fully and freely consents to participate therein;

(d) the person has, before consenting to participate in the alternative measures, been advised of the right to be represented by counsel;

(e) the person accepts responsibility for the act or omission that forms the basis of the offence that the person is alleged to have committed;

(f) there is, in the opinion of the Attorney General or the Attorney General's agent, sufficient evidence to proceed with the prosecution of the offence; and
(g) the prosecution of the offence is not in any way barred at law.

Restriction on use
(2) Alternative measures shall not be used to deal with a person alleged to have committed an offence if the person
(a) denies participation or involvement in the commission of the offence; or
(b) expresses the wish to have any charge against the person dealt with by the court.

Admissions not admissible in evidence
(3) No admission, confession or statement accepting responsibility for a given act or omission made by a person alleged to have committed an offence as a condition of the person being dealt with by alternative measures is admissible in evidence against that person in any civil or criminal proceedings.

The discretion to offer diversion rests with the Crown Prosecutor

- The *Code* doesn't restrict diversion to any particular offences, but alternative measures are thought to be most suitable for "offenders with no record, who have committed less serious offences and are unlikely to reoffend"
    - Alternative measure can include:
        - Written apology
        - Community service
        - Donation to charity
- Threats or assaults that are more than transient in nature, domestic violence, and drug trafficking offences are usually not eligible

If an accused completes the alternative measures program successfully, the charge is withdrawn, and the accused avoids a criminal record

- If it is not completed, criminal proceedings can be instituted (court can still dismiss the charge if it finds the prosecution would be unfair given the accused work in the alternative measures)

Peace Bonds

A prosecutor can seek a peace bond to resolve existing charges despite the peace bond being designed to prevent *anticipated charges*

- Peace bonds will be used "often as a result of concerns including those for the strength of the Crown's case, the availability of witnesses, the views of the complainant, the best interest of the administration of justice and/or the overcrowded court dockets" (*R v Musoni* (2009) (ONCA))

**A peace bond can be ordered at common law or pursuant to the *Code*

If pursuant to the *Code*:

Criminal Code of Canada

Sureties to Keep the Peace

If injury or damage feared

810 (1) An information may be laid before a justice by or on behalf of any person who fears on reasonable grounds that another person

(a) will cause personal injury to them or to their intimate partner or child or will damage their property; or

(b) will commit an offence under section 162.1.

Where fear of serious personal injury offence

810.2 (1) Any person who fears on reasonable grounds that another person will commit a serious personal injury offence, as that expression is defined in section 752, may, with the consent of the Attorney General, lay an information before a provincial court judge, whether or not the person or persons in respect of whom it is feared that the offence will be committed are named.

- 1237-38

If pursuant to common law:

- Peace bond does not require a sworn information
- Broader in scope
- Encompasses a reasonably apprehended breach of the peace
- No maximum period for duration
- Preliminary hearing judge has jurisdiction to impose a common law peace bond
- Trial judge at the end of a trial in which the accused is acquitted of a criminal offence can impose a common law peace bond

**Not a finding of guilt; does not result in a criminal record; accused does not enter a guilty plea or make any admission of criminal liability

- Once it is signed and entered into, charges are formerly withdrawn

Different tests for common law and statutory peace bonds – what are they?

Other Factors Impacting Sentence

Joint Submissions

As a result of plea negotiations, the accused and prosecutor sometimes agree to make a joint submission as to sentence

- Judges are not bound by a joint submission, but the courts have recognized that for plea-bargaining to be effective, the parties have to have confidence that the court will respect their proposed resolution

R v Anthony-Cook (2016): ****keep this in your back pocket****

- A judge should not depart form a joint submission on sentence *unless the proposed sentence would bring the administration of justice into disrepute or would otherwise be contrary to the public interest*

    - Rejection indicates "a submission so unhinged from circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the important of promoting certainty in resolution discussion, to believe that the proper functioning of the justice system has broken down"
- SCC offered guidance to sentencing judges on the approach they should take when they are troubled by a joint submission on sentence:
    1. Trial judges should approach the joint submission on an "as-is" basis. . . If the parties have not asked for a particular order, the trial judge should assume that it was considered and excluded from the joint submission. However, if counsel have neglected to include a mandatory order, the judge should not hesitate to inform counsel. . .
    2. Trial judges should apply the public interest test when they are considering "jumping" or "undercutting" a joint submission. . . Where the trial judge is considering "undercutting", he or she should bear in mind that the community's confidence in the administration of justice may suffer if an accused enjoys the benefits of a joint submission without having to serve the agreed-upon sentence
    3. When faced with a contentious joint submission, trial judges will undoubtedly want to know about the circumstances leading to the joint submission — in particular, any benefits obtained by the Crown or concessions made by the accused. The greater the benefits obtained by the Crown, and the more concessions made by the accused, the more likely it is that the trial judge should accept the joint submission, even though it may appear to be unduly lenient. . .
    4. If the trial judge is not satisfied with the sentence proposed by counsel . . . an opportunity be afforded to counsel to make further submissions in an attempt to address the . . . judge's concerns before the sentence is imposed . . .
    5. If the trial judge's concerns about the joint submission are not alleviated, the judge may allow the accused to apply to withdraw his or her guilty plea. . .
    6. Trial judges who remain unsatisfied by counsel's submissions should provide clear and cogent reasons for departing from the joint submission. . .

If there is no joint submission, a judge who is considering imposing a sentence greater than proposed by the Crown should tell the parties and given them an opportunity to make further submissions (this is accepted practice in Ontario)

Without breaking privilege, tell the judge (if they are pushing back on the joint submission) why you are resolving it the way that you are

- Strike the plea if the judge is really giving push back

Pre-Trial Custody

When deciding the appropriate sentence, a judge can take into account any time an accused spent in custody waiting for trial or sentencing (s 719(3) – *Code*)

- If bail is denied, then remand centre!!

- They get credit for any pre-trial custody
- Know exactly how much time they were in
- 30 days pre-trial custody = 45 days in jail subtracted from your sentence

Even for minimum sentences, (Wus) you take away the pre-custody
90 days or less can serve weekends
Statutory release rule – no one serves more than 2/3 of their sentence, so it will never pay off

Immigration Status

For non-citizens, a conviction + sentence can also have adverse immigration consequences

Immigration and Refugee Protection Act s 36(1)(a) – a non-citizen will be rendered inadmissible and face deportation due to serious criminality "having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of more than six months has been imposed"

Collateral immigration consequences are relevant factors in fixing the appropriate sentence
"provided that the sentence that is ultimately imposed is proportionate to the gravity of the offence and the degree of responsibility of the offender" (*R v Pham* (2013))

- A judge should not impose an inappropriate sentence solely for the purpose of avoiding immigration consequences

Notice to Seek Greater Punishment

Criminal Code of Canada

Previous conviction
727(1) Subject to subsections (3) and (4), where an offender is convicted of an offence for which a greater punishment may be imposed by reason of previous convictions, no greater punishment shall be imposed on the offender by reason thereof unless the prosecutor satisfies the court that the offender, before making a plea, was notified that a greater punishment would be sought by reason thereof

- This provision is applied often in drinking and driving cases due to the graduating scale of punishment for each subsequent conviction
- A judge can consider the offender's record in crafting a sentence (regardless of whether notice under s 727 has been given to the offender)

The Crown must be able to prove that before the accused entered a plea, they notified the accuse that a greater punishment would be sought by the Crown by reason of some "previous conviction" of the accused – if there is no appropriate notice, the sentence must be within the range of first-time offenders

The *Coke Principle*

In determining whether to impose a greater punishment, courts sometimes engage this old English common law rule

There has to be a conviction for the first penalty before you can impose a severer penalty
"The general rule is that before a severer penalty can be imposed for a second or subsequent offence, the second or subsequent offence must have been committed after the first or second conviction, as the case may be, and the second or subsequent conviction must have been made after the first or second conviction, as the case may be." (*R v Skolnick* (1982))

- The idea is that he conviction and penalty of the initial offence (and the peril of more severe penalty for a subsequent offence) will be present in the mind of the offender and guide their future conduct (*R v Cheetham* (1980) (ONCA))

In applying the principle:

1. The number of convictions *per se* does not govern in determining whether the Coke rule applies.
2. Where two offences arising out of the same incident are tried together and convictions are entered on both after trial, they are to be treated as one for the purpose of determining whether a severer penalty applies, either because of a previous conviction or because of a subsequent conviction.
3. The rule operates even where two offences arising out of separate incidents are tried together and convictions are entered at the same time.

The principle has been mainly applied in cases where a statutory minimum sentence is called for with respect to a second or subsequent offence

- The principle does not apply in dangerous offender proceedings (allows a court to considered subsequently committed offences when considering dangerousness)

Parole

Eligibility for parole for federal prisoners is governed by *Corrections and Conditional Release Act*

- Sentencing judges can't really dictate when an offender should be eligible to apply for parole – two exceptions to this:
    - Offences of high treason + murder
        - Persons convicted of these offences will always be sentenced to life imprisonment without eligibility for parole for 25 years
        - ¶7.120 → first-degree murder vs. second-degree murder
        - Ignore what's in the book about first-degree murder (Harper was trying to follow USA model)
    - Sentences of imprisonment of 2+ years on convictions for (a) an offence set out in Schedule I or II of the *Correction and Conditional Release Act*; (b) a criminal organization offence; or (c) a terrorism offence
        - In these cases, the judge can direct that the offender is not eligible for parole until one half of the sentence is served or 10 years (whichever is less)

Life 25 is the maximum – unconstitutional for life 40 or 50 or 75
If there's no reason to get out, it's just safer for everyone in jail

Sentence Reduction to Remedy State Misconduct

R v Nasogaluak → state misconduct, including *Charter* breaches, can be considered in sentencing

- State misconduct can be treated as a mitigating factor if it relates to the circumstances of the offence or the offender
    - The sentence imposed must adhere to any minimums or statutory restrictions (unless constitutionality is challenged) (or it's an exceptional case)

Evidence Presented at Sentencing

In order to "fit the sentence to the offender rather than to the crime" (as the SCC held in *Gardiner*), a sentencing judge needs to have as much information concerning the background of the offender as possible!

- So long as it's credible and trustworthy, hearsay evidence is accepted (*Gardiner*)
- Evidence adduced at a sentencing hearing is often based on counsel's oral submissions

Burden of Proof

The traditional strict rules governing trials do not strictly apply at a sentencing hearing, the resolution of contested facts does require proof

- If the Crown wishes to rely on a fact in dispute alleged to be aggravating, it must prove it BARD (this only comes into play when the fact is unequivocally denied by the accused)

Gardiner recognized this principle, then it was codified:

Criminal Code of Canada

Disputed facts

724(3) Where there is a dispute with respect to any fact that is relevant to the determination of a sentence,

(a) the court shall request that evidence be adduced as to the existence of the fact unless the court is satisfied that sufficient evidence was adduced at the trial;

(b) the party wishing to rely on a relevant fact, including a fact contained in a presentence report, has the burden of proving it;

(c) either party may cross-examine any witness called by the other party;

(d) subject to paragraph (e), the court must be satisfied on a balance of probabilities of the existence of the disputed fact before relying on it in determining the sentence; and

(e) the prosecutor must establish, by proof beyond a reasonable doubt, the existence of any aggravating fact or any previous conviction by the offender.

Criminal Record

Record is a factor to be considered because it provides insight into the offender's character and prospects for rehabilitation

- Records are usually tendered in the form of a record produced by the Canadian Police Information Centre – the accused will usually consent to this and acknowledge it's accuracy
    - If the accused does not admit to it, the Crown has to prove it using s 667 of the *Code*
        - Usually this requires a certificate signed by a judge, court clerk, or designated fingerprint examiner

Pre-sentence Reports

A judge can order the preparation of a pre-sentence report if it would be of assistance (s 721 – *Code*)

- Reports aren't required when serious offences + lengthy jail is the only possible sentencing option

Pre-sentence reports are prepared by a probation officer and contain information on the offender's age, maturity, character, behaviour, attitude, and willingness to make amends (721(3)(a) – *Code*)

- The report should <u>not</u> contain "the investigator's impressions of the facts relating to the offence charged, whether based on information received from the accused, the police, or other witnesses, and whether favourable or unfavourable to the accused" (*R v Rudyk* (1975) (NS CA))
    - Details about the commission of the offence or self-serving statements by the offender shouldn't be included either

If an objection is taken to any of the assertions made in the pre-sentence report, the party relying on the assertion has the burden to prove it (724 – *Code*)

Cross-examination of the probation officer is allowed to confirm that the report is "accurate, independent and balanced assessment of an offender, their background, and their prospects for the future" (*R v Junkert* (2010)(ONCA))

Lose control over the sentencing process by handing it over to someone else to argue for your client

Impact of Race and Culture Assessment Reports

These have become commonplace for placing systemic and individuals' information about African Nova Scotian offenders before sentencing courts in NS

- ONCA has also endorsed these reports, but use them less often

The Federal Government endorsed the use of these reports and proposed funding for them in 2021 – they will likely become more common across Canada

Victim Impact Statements

Our adversarial system reserves little room for victims

Sentencing is one of the few stages of the CJS where victims are entitled to participate (in a limited way)

Criminal Code of Canada

Victim impact statement

722(1) When determining the sentence to be imposed on an offender or determining whether the offender should be discharged under section 730 in respect of any offence, the court shall consider any statement of a victim prepared in accordance with this section and filed with the court **describing the physical or emotional harm, property damage or economic loss suffered by the victim as the result of the commission of the offence and the impact of the offence on the victim.**

Inquiry by court

(2) As soon as feasible after a finding of guilt and in any event before imposing sentence, the court shall inquire of the prosecutor if reasonable steps have been taken to provide the victim with an opportunity to prepare a statement referred to in subsection (1).

Adjournment

(3) On application of the prosecutor or a victim or on its own motion, the court may adjourn the proceedings to permit the victim to prepare a statement referred to in subsection (1) or to present evidence in accordance with subsection (9), if the court is satisfied that the adjournment would not interfere with the proper administration of justice.

Presentation of statement

(5) The court shall, on the request of a victim, permit the victim to present the statement by

(a) reading it;
(b) reading it in the presence and close proximity of any support person of the victim's choice;
(c) reading it outside the court room or behind a screen or other device that would allow the victim not to see the offender; or
(d) presenting it in any other manner that the court considers appropriate.

Photograph

(6) During the presentation

(a) the victim may have with them a photograph of themselves taken before the commission of the offence if it would not, in the opinion of the court, disrupt the proceedings; or

(b) if the statement is presented by someone acting on the victim's behalf, that individual may have with them a photograph of the victim taken before the commission of the offence if it would not, in the opinion of the court, disrupt the proceedings.

Consideration of statement
(8) In considering the statement, the court shall take into account the portions of the statement that it considers relevant to the determination referred to in subsection (1) and disregard any other portion.

Who is a victim? S 2 – *Code*

R v G.(A). (2015)(ONCA) → a sentencing judge is entitled to consider the impact of the crime on a victim, as described in a victim impact statement, as an aggravating factor

O'Neill says the problem with them is that if the victim is vengeful or forgiving victim (this can effect the sentencing)
Incorporate emotion into the process – courtrooms can't really have emotions because the law must be applied objectively

Community Impact Statements

In 2015, the *Victims Bill of Rights Act* expanded the use of impact statements in the sentencing process to include Community Impact Statements

Criminal Code of Canada

Community impact statement
722.2(1) When determining the sentence to be imposed on an offender or determining whether the offender should be discharged under section 730 in respect of any offence, the court shall consider any statement made by an individual on a community's behalf that was prepared in accordance with this section and filed with the court describing the harm or loss suffered by the community as the result of the commission of the offence and the impact of the offence on the community.

- This is subject to similar form and presentation limits as victim impact statements
- "Community" is not statutorily defined, it falls to the court to determine the admissibility of community impact statements on a case-by-case basis

If a community impact statement doesn't comply with the statutory requirements, there are 3 remedies:

1. The statement is excluded in its entirety
2. The statement is subject to redactions and then presented in redacted form
3. The statement is not redacted, but the court disregards the portions of the statement that are irrelevant or improper

Opportunity for Offender to Speak

Criminal Code of Canada

Offender may speak to sentence
726 Before determining the sentence to be imposed, the court shall ask whether the offender, if present, has anything to say.

- This question will be put to the accused after argument and just before sentence is imposed

R v Gouthro (2010)(ABCA) → 726 calls for more argument, not evidence – this can include "an expression of remorse or intention, or an apology

"Shall" = obligatory to ask the offender

- However, if the court fails to ask, this does not invalidate the sentencing proceeding
- Where counsel has had the opportunity to make full submissions on behalf of the offender at the sentencing hearing, appellate courts have viewed the failure to comply as harmless or an inadvertent slip

Keep in mind what BCCA said in *R v Rigler* (2013) (BCCA):
"Too often, sentencing judges inadvertently forget to ask whether the accused wishes to personally address the court prior to sentencing. To some extent, this is understandable. Defence counsel can generally be trusted to say all that can be said on behalf of the accused in the course of sentencing submissions. The accused's right to personally address the court, however, serves several purposes beyond simply ensuring that the court has all of the information it needs before imposing a sentence. It serves as an opportunity for the accused to personally and publicly express remorse. It also serves as a reminder to the courts and to the public that the accused is a real human being, and not an abstract concept."

R v Gardiner

R v Gardiner, 2 SCR 368
Facts:
Crown has the burden of proving every aggravating BARD

R v Gladue

R v Gladue, [1999] 1 SCR 688
Facts:

Particular attention has to be paid to the ***circumstances of Indigenous offenders*** "because those circumstances are unique, and different from those of non-aboriginal offenders"

- "A restorative approach to sentencing Indigenous offenders may assist in ameliorating the serious problem of over-representation of Indigenous people in Canada's prisons"

Following *Gladue*, the over representation of Indigenous people in the CJS did not change

The SCC revisited *Gladue* and s 718.2(e) in *R v Ipeelee* to "resolve the misunderstandings (from *Gladue*), clarify certain ambiguities, and provide additional guidance so that courts can properly implement this sentencing provision"

R v Ipeelee

R v Ipeelee, 2012 SCC 13
Facts:

Clarifications:

- Court made clear that sentencing judges must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower education attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and higher levels of incarceration for Indigenous people
- An Indigenous offender need not establish a causal link between his or her specific circumstances and the commission of the offence in question before being entitled to have those factors considered by the sentencing judge
    - To require a causal connection would display an "inadequate understanding of the devasting intergenerational effects of the collective experiences of Aboriginal peoples"
- An application of the *Gladue* principles is required in every case (including serious offences) involving an Indigenous offender

Pre-sentencing (*Gladue* reports) are tailored to specific circumstances of Indigenous offenders – they are indispensable to a judge fulfilling their responsibilities under s 718.2(e)

R v Nasogaluak

R v Nasogaluak, 2010 SCC 6
Facts:

State misconduct including *Charter* breaches can be considered in sentencing

- Such misconduct can be treated as a mitigating factor if it relates to the "circumstances of the offence or the offender"
- The sentence imposed must adhere to any minimums or other statutory restrictions unless their constitutionality is successfully challenges (except for exceptional cases)

"A relatively new phenomenon in Canadian law, the minimum sentence is a forceful expression of governmental policy in the area of criminal law."

"The language in ss. 718 to 718.2 of the *Code* is sufficiently general to ensure that sentencing judges enjoy a broad discretion to craft a sentence that is tailored to the nature of the

offence and the circumstances of the offender. The determination of a "fit" sentence is, subject to some specific statutory rules, an individualized process that requires the judge to weigh the objectives of sentencing in a manner that best reflects the circumstances of the case. . . No one sentencing objective trumps the others and it falls to the sentencing judge to determine which objective or objectives merit the greatest weight, given the particulars of the case."

General / Mitigating / Aggravating Factors
"The relative importance of any mitigating or aggravating factors will then push the sentence up or down the scale of appropriate sentences for similar offences. The judge's discretion to decide on the particular blend of sentencing goals and the relevant aggravating or mitigating factors ensures that each case is decided on its facts, subject to the overarching guidelines and principles in the *Code* and in the case law."

Harper took away a lot of eligibility for conditional sentencing
- Also set a bunch of minimums for sentencing

Appeals

The appeals process serves 2 functions:
1. Appellate courts identify and redress legal errors in the decision of inferior courts
2. While doing this, appellate courts help to clarify and further develop the law

*When the SCC decides an appeal, the primary function is resolving legal questions of national importance

Three types of appeal in criminal cases:
1. Appeals of indictable matters (as of right) to the provincial or territorial courts of appeal
2. Appeals of summary matters, initially (as of right) to the summary conviction appeal court and from there (with leave) to the court of appeal
3. Appeals to the Supreme Court of Canada (with leave)

Types of Appeals

Appeals of Indictable Matters to the CoA

The *Code* gives the accused and the Crown the right to appeal decisions of the trial court in indictable mattes rot the provincial court of appeal

Criminal Code of Canada

Right of Appeal

Right of appeal of person convicted
675 (1) A person who is convicted by a trial court [whether tried in provincial or superior court] in proceedings by indictment may appeal to the court of appeal

(a) against his conviction
    i) on any ground of appeal that involves a question of law alone,
    ii) on any ground of appeal that involves a question of fact or a question of mixed law and fact, with leave of the court of appeal or a judge thereof or on the certificate of the trial judge that the case is a proper case for appeal, or
    iii) on any ground of appeal not mentioned in subparagraph (i) or (ii) that appears to the court of appeal to be a sufficient ground of appeal, with leave of the court of appeal; or
(b) against the sentence passed by the trial court, with leave of the court of appeal or a judge thereof unless that sentence is one fixed by law.

If accused of indictment, a person can appeal on a ground of appeal involving:

i. A question of law alone
ii. A question of fact or question of mixed and fact (with leave of court)
iii. Any other ground (with leave of the court)

686(1)(a) of the *Code*:
An appeal against conviction can be allowed only on the basis that:

- The verdict is unreasonable or cannot be supported by the evidence
- An error of law was committed
- A miscarriage of justice occurred

1263 - 1268

Overturning a Conviction

Unreasonable Verdict (686(1)(a)(i))

Error of Law (868(1)(a)(ii))

A Miscarriage of Justice (868(1)(a)(iii))

Available Remedies

If a conviction is quashed as an unreasonable verdict, the court will enter an acquittal

If the appeal is allowed due to legal error or because of a miscarriage of justice, the customary order is for a new trial

If the court dismisses an appeal under 8686(1)(b)(i), the court has the further power to substitute a guilty verdict on an included offence

- The court can affirm the sentence by the trial court, impose a sentence of its own or remit the matter to the trial court for sentencing

Most often, the remedy with be a re-trial

If a case is totally circumstantial, the Crown must show that the only possible inference is guilt (there is no not guilty inference in the evidence); no explanation of this evidence that would lead to not-guilty verdict

- If a person is convicted in a circumstantial case, must show that there are *other possible explanations*
    - If the COA agrees there were other possible findings of the evidence, just ask for an acquittal

Crown Appeals

The Crown has the right to appeal acquittals in indictable matters (only on questions of law)

- A TJ's evidentiary assessments can sometimes generate errors of law appealable by the prosecution

R v H.(J.M.) (2011) → the SCC set out a non-exhaustive list of circumstances where a TJ can make an error of law:

- Factual finding for which there is no evidence
- Mischaracterizations of the legal effect of findings of fact or undisputed facts
- Assessments of evidence based on a wrong legal principle
- Failures to consider all of the evidence in relation to the ultimate issue of guilt/innocence

Goldfinch (2019) → the SCC found that the improper admission of "relationship evidence" in a sexual assault case that could support an inference of prior sexual activity between the accused and the complainant constituted reversible error because it could have had a material bearing on an acquittal

The Crown cannot appeal on an "unreasonable acquittal"

- The Crown is also limited by the onerous standard of obtaining a new trial after an acquittal
    - It must be established to a reasonable degree of certainty that the *error was material to the verdict*

Where the Crown is successful in appealing against an acquittal, the appellate court will ordinary order a new trial pursuant to 686(4)(b), but the court can exercise any of the powers conferred by section 686(2), (4), (6), or (7) to "make any order, in addition, that justice requires"

- Under the residual power, 3 requirements must be met:
    - The court must have exercised one of the triggering powers conferred under 686(2), (4), (6), or (7)
    - The order issued must be ancillary to the triggering power and not be "at direct variance with the court's underlying judgement"
    - The order must be one that "justice required"

Sentence Appeals

When an accused is convicted in indictable proceedings, they can appeal the sentence imposed [675(1)(b)]

- Leave to the court is required to appeal sentence
    - Appellate courts usually permit an application for leave to appeal sentence to be argued at the sentence appeal proper

687 → CoA has the power to vary a sentence on appeal

- The reviewing court must heed to the guiding principle of deference
    - There is a range of reasonable options from which the TJ can make the selection
    - Nothing to say that the appellate court repeating the same exercise would reach a more appropriate sentence

When a sentencing appeal, you can attack a part of sentencing order such as an ancillary order

- The length of the sentence, too!

Sex offender registry orders are now up in the air (pretty severe orders); they're monitored for life essentially

- If you can show that you client isn't likely to reoffend you can challenge this now

R v Lacasse (2015) → an appellate court will not interfere with the sentence imposed unless the sentencing judge:

- Made an error of law or an error of principle that had an impact on sentence, OR
- Failed to consider a relevant factor or overemphasized appropriate factors that had an impact on sentence, OR
- Imposed a sentence that is demonstrably unfit

Errors in principle that justify appellate intervention have included failing to consider an important mitigation or aggravating factor

Summary Conviction Appeals

Appeals to the Summary Conviction Appeal Court

Summary conviction appeals are governed by Part XXVII of the *Code*

- Summary conviction appeals can be brought under s 813 or 830

Appeals under 813 are heard by provincial superior trial-level court (ABKB) (not CoA) and can be pursued by both the accused and the Crown *as of right*

- The accused can appeal against conviction or sentencing or a finding that the accused is unfit to stand trial or NCR
- The Crown can appeal on an orders staying proceedings or dismissing an information, the sentence or a finding that the accused is unfit to stand trial or NCR

Criminal Code of Canada

Appeal by defendant, informant or Attorney General

813 Except where otherwise provided by law,

(a) the defendant in proceedings under this Part may appeal to the appeal court
   i) from a conviction or order made against him,
   ii) against a sentence passed on him, or
   iii) against a verdict of unfit to stand trial or not criminally responsible on account of mental disorder; and

(b) the informant, the Attorney General or his agent in proceedings under this Part may appeal to the appeal court
   i) from an order that stays proceedings on an information or dismisses an information,
   ii) against a sentence passed on a defendant, or
   iii) against a verdict of not criminally responsible on account of mental disorder or unfit to stand trial,

and the Attorney General of Canada or his agent has the same rights of appeal in proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government as the Attorney General of a province or his agent has under this paragraph.

- *Unlike indictable matters*, the Crown (under 813) can appeal on questions of pure fact as well as questions of law and mixed law and fact

****822(1) of the *Code* makes ss 683 + 689 applicable to 813, so a summary conviction appeal court will only interfere with a TJ's decision where:

- The conviction is unreasonable or cannot be supported by the evidence
- There is an error of law
- There has been a miscarriage of justice

As with indictable appeals, the summary conviction appeal court may *dismiss or allow the appeal, or set aside the verdict and order a new trial*

Appeal under s 830 and is a mode of appeal for summary conviction matters titled "Summary Appeal on Transcript or Agreed Statement of Fact"
This encompasses ss 829-838

Criminal Code of Canada

Appeals

830(1) A party to proceedings to which this Part applies or the Attorney General may appeal against a conviction, judgment, verdict of acquittal or verdict of not criminally responsible on account of mental disorder or of unfit to stand trial or other final order or determination of a summary conviction court on the ground that

(a) it is erroneous in point of law;
(b) it is in excess of jurisdiction; or

(c) it constitutes a refusal or failure to exercise jurisdiction.

Powers of appeal court
834(1) When a notice of appeal is filed pursuant to section 830, the appeal court shall hear and determine the grounds of appeal and may
(a) affirm, reverse or modify the conviction, judgment, verdict or other final order or determination, or
(b) remit the matter to the summary conviction court with the opinion of the appeal court,
and may make any other order in relation to the matter or with respect to costs that it considers proper.

These provisions allow for a more streamlines appeal on an agreed statement of facts rather than a trial transcript

- The accused has to be prepared to forgo their right to challenge questions of fact or fitness of sentence
- These appeals are heard by the "superior court of criminal jurisdiction" (in AB = ABKB or CoA)

Appeals <u>from</u> Summary Conviction Appeal

Criminal Code of Canada

Appeals to Court of Appeal

Appeal on question of law
839(1) Subject to subsection (1.1), an appeal to the court of appeal as defined in section 673 may, with leave of that court or a judge thereof, be taken on any ground that involves a question of law alone, against
(a) a decision of a court in respect of an appeal under section 822; or
(b) a decision of an appeal court under section 834, except where that court is the court of appeal.

**Leave to appeal is required and is rarely granted

R v R.(R.) (2008)(ONCA) → ***not all questions of law merit a second appeal***

- Leave should only be granted where:
  - The proposed question of law has significance to the administration of justice beyond the four corners of the case, or
  - There appears to be "clear" error

The leave appeal test should be relaxed when the decision of the summary conviction appeal court is a decision of first-instance (i.e., where the summary conviction appeal court reverses a trial judge's decision and substitutes an acquittal for a conviction)

Appeals to the SCC

Specific practices + procedures → *Supreme Court Act* + *Rules of the Supreme Court of Canada*

- 10% chance that a leave to appeal will be granted and only appeals on questions of law

Criminal Code of Canada

Appeals to the Supreme Court of Canada

Appeal from conviction

691(1) A person who is convicted of an indictable offence and whose conviction is affirmed by the court of appeal may appeal to the Supreme Court of Canada

(a) on any question of law on which a judge of the court of appeal dissents; or

(b) on any question of law, if leave to appeal is granted by the Supreme Court of Canada.

Appeal where acquittal set aside

(2) A person who is acquitted of an indictable offence other than by reason of a verdict of not criminally responsible on account of mental disorder and whose acquittal is set aside by the court of appeal may appeal to the Supreme Court of Canada

(a) on any question of law on which a judge of the court of appeal dissents;

(b) on any question of law, if the Court of Appeal enters a verdict of guilty against the person; or

(c) on any question of law, if leave to appeal is granted by the Supreme Court of Canada.

Appeal against affirmation of verdict of not criminally responsible on account of mental disorder

692(1) A person who has been found not criminally responsible on account of mental disorder and

(a) whose verdict is affirmed on that ground by the court of appeal, or

(b) against whom a verdict of guilty is entered by the court of appeal under subparagraph 686(4)(b)(ii),

may appeal to the Supreme Court of Canada.

Appeal against affirmation of verdict of unfit to stand trial

(2) A person who is found unfit to stand trial and against whom that verdict is affirmed by the court of appeal may appeal to the Supreme Court of Canada.

Grounds of appeal

(3) An appeal under subsection (1) or (2) may be

(a) on any question of law on which a judge of the court of appeal dissents; or

(b) on any question of law, if leave to appeal is granted by the Supreme Court of Canada.

General Principles

Standard of Review

The standard of review undertaken by appellate courts varies depending on whether the issue involves a question of fact or a question of law

Questions of* Fact = *"Palpable and Overriding Error"

Question of* Law = *Correctness

Mixed* Law + Fact = *Correctness

SCC has adopted a somewhat modified test in reviewing a TJ's ruling on the exclusion of evidence under s 24(2) of the *Charter*

- *R v Law* (2002) → "while the decision to exclude must be a reasonable one, a reviewing court will not interfere with a TJ's conclusions on section 24(2) absent an 'apparent error as to the applicable principles or rules of law' or 'unreasonable finding'"

<u>Attacking Findings of Fact</u>

- The finding of fact made by a TJ attracts an almost *impenetrable degree of deference*
- *Housen v Nikolaisen* (2002)
- Findings based on a misapprehension of evidence and findings based on speculation rather than inference are examples of palpable error
    - To meet the overriding standard, an appellant would have to demonstrate that the error "goes to the root of the challenges finding of fact such that the fact cannot safely stand in the fact of that error" – aka it must be shown that the finding affected the result

Ineffective Assistance of Counsel

An accused person who is represented by counsel at trial is entitled to receive effective assistance (at common law and statute)

- S 7 + 11(d) of the *Charter* make this a constitutional right

Appellate claims of incompetent representation tend to centre around two main arguments:

1. By seeking to introduce fresh evidence on appeal, an appellant may advance the argument that although the evidence was available at trial, it was not introduced due to the incompetence of counsel
2. An appellant can assert that counsel's conduct caused a miscarriage of justice

2-prong test for assessing claims of ineffective assistance of counsel (accused must establish):

1. Counsel's acts or omissions constituted incompetence
2. A miscarriage of justice resulted because of this incompetence

B.(G.D.) (2000)

**this is a heavy onus to establish a claim for various reasons

- Incompetence is determined by a reasonableness standard → *did the acts or omissions of trial counsel fall below the standard of reasonable professional judgement?*
- Miscarriages of justice can take many forms
    - Counsel's performance could result in procedural unfairness
    - Counsel's performance could result in the reliability of trial's outcome being compromised
    - Miscarriages of justice are discussed in length in *R v Joanisse* (1996) (ONCA)

Appeal's Rendered Moot by the Accused's Death

Appeals are typically rendered moot in the case of an individual who dies prior to the hearing of their appeal

- An appellate court retains discretion to proceed such an appeal in rare circumstances

R v Smith (2004) → SCC set out a list of non-exhaustive factors for determining whether that are exceptional circumstances warranting adjudication of an appeal rendered moot by the accused's death:

1. The presence of a proper adversarial context;
2. The strength of the grounds of the appeal;
3. The existence of special circumstances that transcend the death of the individual appellant/respondent, including:
    a. A legal issue of general public importance
    b. A systematic issue related to the administration of justice, or
    c. Collateral consequences to the family of the deceased, to other interested persons, or to the public;
4. Whether the nature of the order which could be made by the appellate court justifies the expenditure of limited judicial (or court) resources
5. Whether continuing the appeal would go beyond the judicial function of resolving concrete disputes and involve the court in free-standing legislative-type pronouncements more properly left to the legislature itself.