CRIMINAL LAW

PENNEY

TABLE OF CONTENTS

FRAMEWORKS

HARM: INDECENCY

Objectively proving harmful effect on others in society; pre-disposes people to anti-social conduct

- (1) Nature of Harm – harm to others must be grounded in **formally recognized** fundamental values. Three types of harm:
  - (1) Harm to unsuspecting individuals (autonomy/liberty is restricted)

        - (2) Harm to society by pre-disposing others to anti-social conduct
            - Must show causal link: sexual conduct → negative attitudes → anti-social behavior
        - (3) Physical/psychological harm to individuals participating in conduct
    - (2) Degree of Harm – degree of harm is incompatible with proper functioning of society
        - High threshold due to diversity in Canada, value judgements made objectively based on evidence
        - If no proof of actual harm, Crown must show significant risk
    - CITE *Labaye*

INTRODUCTION

- Definition: any offence enacted under Parliament's Criminal Law Power
- CRIME = Prohibition + Penalty
- CRIMINAL LAW = Purpose + Prohibition + Punishment
    - Purpose: must prevent something harmful (Public Peace, Order, Security, Health, Morality)

CONSTITUTION SECTIONS

- s.1 – Notwithstanding clause. *Charter* 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
- s.7 – Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice
- s.8 – Everyone has the right to be secure against unreasonable search or seizure
- s.9 – Everyone has the right not to be arbitrarily detained or imprisoned
- s.10 a) – Everyone has the right on arrest or detention: a) to be informed promptly of the reason therefor
    - b) to retain and instruct counsel without delay and to be informed of that right
- s.11 – Any person charged with an offence has certain rights – regulatory or criminal
- s.12 – Free from cruel or unusual punishment
- s.13 – Self-incrimination
- s.24 – Enforcement of rights (remedies if rights violated)
- s.52 – Supremacy clause (Constitution is highest law)
- s.91 – Federal Powers
    - Parliament can create regulatory offences
    - s.91(27) – Parliament can create criminal offences
    - Criminal Code, Controlled Drugs and Substances Act, Customs and Excises Act, Copyright Act
- s.92 – Provincial Powers
    - Provincial legislatures can create regulatory offences
    - s.92(13) – Property and Civil Rights
    - s.92(15) – Matters of Local and Private Nature

OFFENCES AND COURTS

CATEGORIES OF OFFENDING

	Indictment	**Summary Conviction**
Procedure	More	Shorter, easier
Crimes	More serious	Less serious
Punishment	Higher	Lower – max 2yrs prison or $5000 fine
Judge/Jury	Judge or Jury	NO jury ever (just judge)

Court Level	Almost always superior	Almost always inferior
Limitation Period	No limitation period	12 months for Crown to charge

- Hybrid offences: option for both proceedings and Crown chooses with route to proceed with
- Provincial offences are not indictable; if provincial offences carry jail time, they are summary convictions

JURISDICTION

- Federal CC sanctions and province regulatory infractions can overlap. When this occurs, accused can be CHARGED AND CONVICTED with BOTH offences but can only be SENTENCED to one offence (the more serious one)

- Police at any level (municipal, provincial or federal) investigate criminal offending
- **Provincial judges (inferior court)**: provincially appointed; less serious CC offences
- **Provincial judges (superior court- QB, CA) and SCC**: federally appointed

- **Provincial prosecutors:** prosecute CC offences and provincial offences
    - Cannot prosecute DRUG offences
- **Federal prosecutors**: prosecute federal regulatory offences (ex. Customs) and ALL drug offences

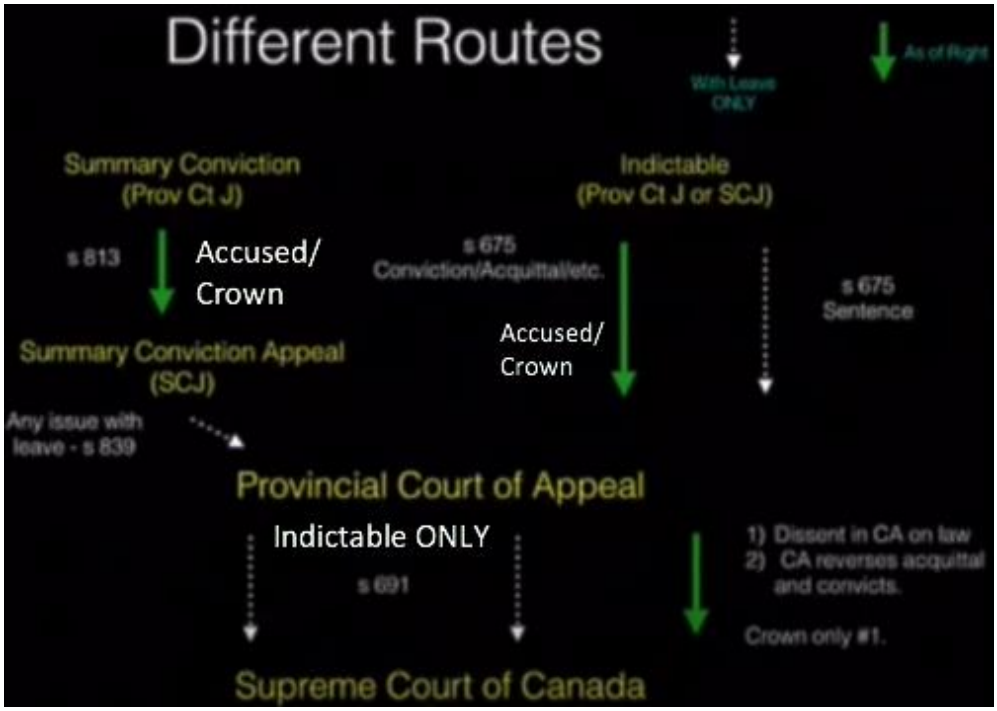
- Major/Minor Agreement
    - **Group that gets to prosecute depends on nature of the crime. Biggest crime = jurisdiction**
    - Ex. Individual charged with 1kg of heroin, 3 illegal weapons and resisting arrest
        - Heroin is most serious and this is drugs so federal prosecutors

CRIMINAL VS REGULATORY OFFENCE

	Criminal Offence	**Regulatory Offence**
Penalties	Usually more serious	Less serious (but imprisonment is possible)
Criminal Record	YES	NO
Morality	Society morality offended	No morality offending
Procedure	Longer, more formal	Shorter, less formal
Judge/Jury	Judge or Jury	Judge only
Charter Rights	Applicable (s.11)	Applicable (s.11)
Mental Elements	Intention required	No intention required; punish acts

ROUTES OF APPEAL

- "As of right" – can appeal w/o further steps; "as of leave" – must convince higher court to hear your case
    - SCC has panel of 3 judges to make decision on which cases are heard
- SCC as of right:
    - (1) Dissent on CA in law – where there is a dissenting opinion in CA on law, this gives legal case enough merit to be heard by SCC given the high stakes of a criminal conviction
    - (2) CA reverses acquittal and convicts – idea is that you always get one appeal on your decision and in this instance the accused never got a chance at appeal on the conviction b/c it originated at CA



- When CAN Appellate Court Allow an Appeal?
  - S. 686 - Sets out CA powers and streamlines procedures for accepting/dismissing appeals
  - 1) Unreasonable Verdict
    - High threshold
    - Verdict conclusion was not reasonable based on the supported evidence
  - 2) Legal Error
    - Related to anything
    - Court unreasonably admitted evidence, didn't apply law correctly, didn't instruct jury properly… (most common)
  - 3) Broader Miscarriage of Justice
    - Not necessarily an unreasonable verdict or legal error but it brings great concern to the court
    - Something has brought taint on the trial
    - Residual "catch-all" category
- When Does Appellate Court DIMISS an Appeal?
  - No errors
  - No substantial wrong or miscarriage of justice (MOST IMPORTANT)
    - Court looks at the error, if the rest of case was overwhelming, the error was not substantial, and there was no miscarriage of justice then appeal dismissed
  - Procedural irregularity
    - Error occurred in trial
    - But the error didn't affect the trial itself, just a procedural error, and will not be appealed
- How do appellate courts deal with appeals? (Remedies)
  - If convicted, they can order a new trial or they can acquit
    - Key to deciding b/w the two depends on nature of error
    - Ex. Unreasonable verdict where the evidence could not have led to a conviction but it did, the appellate court will acquit
    - Ex. When evidence was wrongly admitted and the court is not sure how the jury would have rules without that evidence (could have gone either way) then the court will order a new trial
  - If you take the error out, where does that take us
  - Factors: who is appealing and was the case decided by judge or jury
    - Where the Crown is appealing on a jury trial of acquittal, the bar is a little higher

        - Where accused is appealing, they are slightly more lenient because it is that person's liberty at stake and they want to ensure there is no miscarriage of justice and false convictions
    - CA or SCC can order a new trial but it is RARE for new trial to take place
        - Crown is entitled to a new trial – Crown must then decide whether it is worth it to undertake a new trial
        - Might not take place if:
            - If the person had a short sentence and they served that sentence while they were waiting for their appeal
                - They don't want the offence on their record so they appeal but they served their sentence while waiting so if the appeal is granted the Crown may not go back to trial b/c in terms of sentencing, the person already served what the Crown wanted
            - Might walk away if they just don't want to pursue the matter for whatever reason

BURDEN/QUANTUM OF PROOF – CHARTER SECTION 11

Section 11 of the Charter: Any person charged with an offence has the right:

a. to be informed without unreasonable delay of the specific offence;
b. to be tried within a reasonable time;
c. not to be compelled to be a witness in proceedings against that person in respect of the offence;
d. to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
e. not to be denied reasonable bail without just cause;
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;
g. has the right not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;
h. if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again;
i. if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

AT COMMON LAW (CHARTER 11D)

CROWN – PERSUASIVE BURDEN

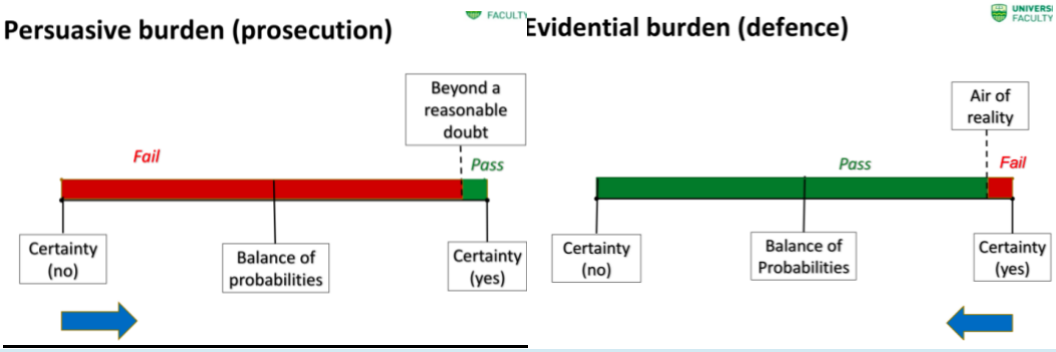
- Functional aspect in trial: sets who has the **burden of proof (Crown)** and what the **standard of the proof is (beyond a reasonable doubt)**

- Standard: Beyond a Reasonable Doubt
    - Compared to "beyond a shadow of a doubt"
    - Compromise has been made: protect as much as possible the interests of the accused while recognizing that the trial process is incapable of achieving absolute certainty
- Applies to **ALL ESSENTIAL ELEMENTS** (not every single piece of evidence) of the offence and **ALL DEFENCES**
    - *R v. Morin* – judge informed jury when referring to individual pieces of evidence that you will give the benefit of the doubt to the accused
    - On appeal SCC held that the judge had made an error – standard of proof is not individual items but the determination of ultimate issues
    - **Defences**: Ex. "It was self-defence", jury must be convinced that it was not SD, beyond a reasonable doubt

- Bad judge instructions can shift onus improperly:
  - *R. v. Wasser* – shifted burden to defence by instructing the jury that the defence had to prove their actions beyond a reasonable doubt (not true)
  - *R. v. Nadeau* - judge told jury that there were two scenarios presented and if one scenario was equally consistent with the other they had to choose between them. The wording should have been to rule for the prosecution only if their scenario was believed beyond a reasonable doubt

ACCUSED – EVIDENTIARY BURDEN

- Applies only to defences. All they have to do is meet the "air of reality" threshold to show that there is some (even minor) possibility of a defence
  - This simply means that an evidentiary burden is placed on accused, no s.11 violation b/c it's not possible to convict despite the presence of a reasonable doubt
- Key phrase: **evidence to the contrary**
  - This is not a reverse onus, this just simply requires accused to meet the "air of reality" threshold
- Defences include:
  - Mistaken belief in consent (mens rea)
  - Self-defence
  - Necessity
  - Duress
- If accused meets air of reality, then Crown has to disprove defence
- If accused doesn't meet air of reality, then Crown does not have to disprove defence

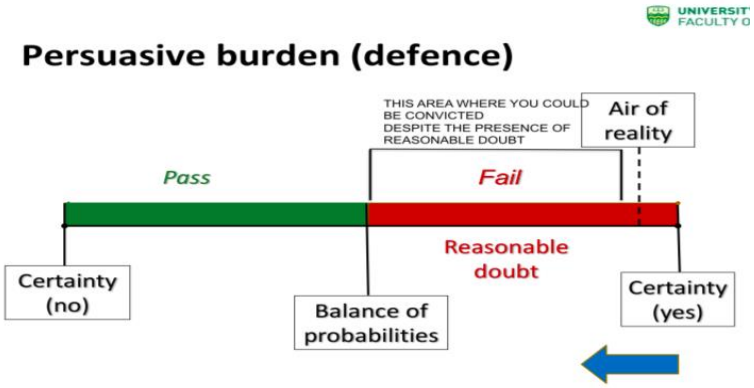


STATUTORY BURDEN SHIFTS (CHARTER 11D)

REVERSE ONUS

- Certain **STATUTORY** provisions can reverse the onus of proof and **require the defence to prove an element of the offence to a balance of probabilities**
  - Statutory provision has to say "when the Crown can prove X then in the **absence of evidence to the contrary**, it will have proved Y"
  - Ex. CC s.258: "accused shall be deemed to have had the care or control of the vehicle unless the accused establishes that they were in the driver's seat for another purpose"
  - Key phrase: **unless the accused establishes**
  - The Crown has proved that you were in the driver's seat and you had the ability to put the vehicle in motion (ex. Had keys, car had gas), so now it is assumed that the Crown has proved that you had intent to drive the vehicle
    - Now up to the defence to prove on BOP that despite being in the driver's seat they did not have intention to drive the vehicle (higher than the "air of reality"
    - It is now possible for there to be a conviction despite not meeting BRD
- Violations of s.11

- This automatically violates s.11 (presumption of innocence and will be struck down **UNLESS it can be saved by s.1** of the Charter (demonstrably justified in a free and democratic society)



OAKES AND MORSION

OAKES

Reverse onus provisions and mandatory presumptions violate s.11 of Charter UNLESS proven fact leads inexorably to presumed fact (from mandatory presumption)

- CASE: Man charged with possession with intention to traffic. s.8 of *Narcotics Control Act* – contained a **reverse onus provision** that said that a person who was charged with possession was automatically charged with trafficking unless they could prove they were not in possession for trafficking purposes
  - Accused had burden of disproving element on **BOP**, possible for conviction despite presence of reasonable doubt
  - *Holding*: violated s.11 and was not saved by s.1. s.8 of *Narcotics Control Act* struck down

MORRISON

Evidentiary burdens (created by mandatory presumptions) violate s.11 b/c the defence has to do something before the Crown has made their case. The proven fact does NOT inexorably lead to the presumed fact so there is a violation

- CASE: Police operating a sting and told the accused that they were underage. CC s.172 contained **mandatory presumption** - evidence that the person was represented to the accused as being underage is in the absence of evidence to the contrary, proof that the accused believed the person was underage
  - Theoretically, this just requires the defence to reach the "air of reality" threshold (evidentiary burden) so this should not be a s.11 violation
  - BUT Court said that anytime there is a proven fact that doesn't INEVITABLY lead to the presumed fact, this is a s.11 violation
  - Court ruled this wrongly?? – but this is still precedent

Summary

- Both reverse onus provisions and evidentiary burdens (created by mandatory presumptions) violate s.11. The former, because possible to convict despite presence of reasonable doubt, and the latter, because this requires the defence to do something before the Crown has made their case. In *Downey*, Court found that evidentiary burdens violated s.11 but was saved under s.1. In *Morrison*, Court found evidentiary burdens violated s.11 but was not saved but s.1

Implication for Common Law Defences

- Recall that defences are at common law
- At statute, mandatory presumptions, which create evidentiary burdens violate s.11 and may or may not be saved by s. 1
- At common law, however, when defence has to provide evidence for a defence (air of reality) court has not held that this is unconstitutional

COMMON LAW CRIMES (CHARTER 11 G)

- Historically, common law crimes were a thing and judge's could make new crimes that offended moral sensibilities
  - Advantages of this: flexibility
- In 1892, Criminal Law was codified but at this point it was parallel to common law, not superior
- In 1955, CC s.9 came into being: "No person shall be convicted of an offence at common law"
  - Common law crimes cannot be convicted anymore
  - Advantages: rule of law, people know what is illegal

R V SAMIR (1994) (AB PROV CT)

Cannot be convicted of a crime that was not a crime when you committed the act

- Facts*:* Accused blocked COM car and proceeded to follow her to gas station and cat-call her and she became scared of COM
  - COM charged under CC s.423: "Intimidation"
- Analysis*:* accused's actions lacked degree of persistence required by code – persistent following involves something more than 4 blocks in 10 minutes
- Holding*:* acquitted

- Point of contention: He cannot be convicted under s.264 (harassment) b/c he was not charged with this
- Common Law principles:
  - (1) cannot be punished for something that was not illegal when you committed the act
  - (2) Principle of restraint – judge's should interpret statute with restraint
- Unconstitutional: **Fundamental fairness** (s.11(a) above) – you have a right to know what you are being accused of
  - s.264 existed at trial but not when he committed the offence

FREY V FEDORUK [1950] (SCC)

Creation of common law crimes abolished. Can't be convicted unless crime is written down

- Facts: Frey peeped into Fedoruk's window and was arrested and convicted for "peeping"
  - Conviction overturned b/c there was no such offence
  - Frey brought suit against Fedoruk for false imprisonment but Fedoruk said he was justified b/c Frey was committing a criminal offence
- Analysis: Court said that no more common law crimes should be recognized b/c it was too vague and they preferred to use CC
  - SCC did not abolish common law crimes, just said not more could be recognized
- Holding: Frey did not commit a crime in CC so Fedoruk was liable
- Common law crimes abolished – 1955 legislation of CC s.9
  - **PRO**: everyone knows the rules, certainty, Parl decides on crimes and not judges
  - **CON**: abhorrent acts can't be convicted if they aren't written down
    - Judges can EXPAND nature of already established crime and interpret it broadly
      - **CRITICS**: Courts indirectly contravening s.9
- EXCEPTIONS:
  - Contempt (CC s.9) – last common law crime (different than civil contempt)
    - Huge array of conduct, judges trying to protect themselves, designed to maintain confidence in judicial process
  - Defences (CC s.8(3)) – have the power to limit extent and applicability of criminal statute
    - Preserves ability to create new defences – society values change over time and defences are mostly value based

R V JOBIDON [1991] (SCC)

Interpretation of consent by the court is so adventurous that it is almost essentially creating a new common law crime – which is against the code. Consent can only exist to trivial bodily harm, not serious harm. Consent to assault vitiated if accused subjectively intended to cause and did cause serious bodily harm

- Facts: Accused charged with manslaughter through offence of assault following fist fight where the other party lost.
  - Trial, not guilty b/c victim's consent to "fair fight" negated assault
  - CA reversed – guilty of manslaughter; no consent for this type of assault possible for policy reasons
  - CC s.265 – Assault – "A person commits an assault when, without the consent of another person, he applies force intentionally to that other person, directly or indirectly"
- Majority*:* Consent is more like a defence
  - Court can restrict consent by relevant "policy considerations"
  - **Any bodily harm is unlawful, and some situations consent cannot be given (any "consent" is vitiated)**
- Dissent*:* majority basically created a common law offence: intentional application of force with consent of the victim.
  - Can't do this b/c this is contrary to CC s.9
  - Rationale for being guilty: victim can't consent after unconscious and Jobidon knew victim was unconscious but still continued to hit him
- Holding*:* appeal upheld, Jobidon guilty of manslaughter

- *R v Paice, [2005] (SCC)*
  - Accused must intend AND cause bodily harm to vitiate consent
  - Winners and losers of fights treated differently
- *R v Mabior [2012] (SCC)*
  - Reaffirmed dissent from Jobidon
  - Only Parliament can create new crimes and not permissible for courts to overrule common law and create new crimes that Parliament never intended
  - Consent only vitiated if there is lying about nature/quality of the sexual act or the identity of the sexual partner

R V BARTON (2017) (ABCA)

Consent vitiated only if the accused subjectively intended the bodily harm that killed the victim

- Facts: Accused charged with 1st degree murder after victim found in hotel room and died from blood loss from perforation of vaginal wall
- Analysis: Where death results from consensual sexual activity, consent only vitiated if the accused subjectively intended the bodily harm that killed the victim (*JOBIDON)*
  - Should consent be vitiated for policy reasons based on objective or subjective foreseeability of the risk of bodily harm in circumstances where death results from sexual activity
  - Policy considerations – morality of the activity?, danger of activity?
- Holding: CA determined Barton should be re-tried for murder. SCC reversed and re-instated Barton's acquittal for murder but ordered he could be re-tried for manslaughter
  - Barton currently being retried for manslaughter now

BAIL (CHARTER 11E)

In relation to Charter s11(e): right not to be denied reasonable bail without just cause

Presumptive rule: release of accused persons should occur, detention is the exception. Court must allow unconditional release of accused and **burden on Crown** to show why a more restrictive form of release is justified

Ladder

- Undertaking
  - Without conditions
  - With conditions
- Recognizance
  - No sureties or deposit
  - Surety but no deposit
  - Deposit but no surety (with Crown's consent?)
  - Outside province or 200km, deposit with or w/o surety (Court option)

Intake Procedures

- No arrest
- Arrest & release
- Arrest & Custody (24 hour OVERHOLDING rule)
- **First appearance ← this is where bail comes into play**

Reverse Onus – CC s. 515(6) and (522) puts a reverse onus on the accused. In these occasions, the default is detention and the accused has to be given a reasonable opportunity to show cause of why their detention in custody is not justified.

- Criminal offences that are subject to reverse onuses under CC s.522 are found in **CC Section 469** – most are irrelevant and archaic or rarely used offences. Only offence that is important under this section is **MURDER**
- Ex. In *Pearson*, CC s515(6)(d) constitutes a denial of bail under s.11(e) b/c it puts the onus on an accused to justify pre-trial release if they are charged with certain offences

Grounds for detention (denying bail) (exhaustive list) – CC s.515(10)

- 10(a) Primary – attendance in Court (will they attend court?)
  - **Factors**: roots in the community, sureties, criminal record (how recent, any charges for breaching court orders?), pre-arrest behavior, strength of the case, seriousness of the offence
- 10(b) Secondary – Public Safety (will they commit a crime while out?)
  - **Factors**: criminal record, on bail when charged?, seriousness of offence, strength of case, mental illness & addiction (if there is a nexus b/w this and criminality and evidence it can't be fixed with medication/supervision)
  - *R. v Morales* – declared earlier portion that said "public interest" to be too vague and unconstitutional
  - Bail denied only for those who pose a "substantial likelihood" of committing an offence or interfering with administration of justice
  - **Substantial likelihood = slightly enhanced BOP**
- 10(c) Tertiary – necessary to maintain confidence in the administration of justice
  - Only relevant when primary and secondary have been examined and there is no justification for detention
  - **Factors** (from *R v St.Cloud*)
    - **(1) Gravity/seriousness of offence** – objectively compared to other offences
    - **(2) strength of prosecution's case**
      - Considering both nature and quantity of evidence (physical evidence more reliable than witness statements)
    - **(3) nature of offence (including firearm) (circumstances surrounding offence)**
      - Maybe if offence is violent or the victim was vulnerable
    - **(4) possibility of lengthy imprisonment**
      - Not limited to offences with potential life sentences
  - *Important, just b/c all 4 are satisfied doesn't weigh in favor of detention b/c that ignores the provision to that the list is non-exhaustive (must consider other relevant factors)

- (From *Hall/St.Cloud*) RP who would be offended= properly informed of Charter values, legislative provisions and doesn't react emotionally or doesn't disagree with society's fundamental values
- *Gladue* principles – Judges take special considerations with FN accused, but this doesn't displace function of primary, secondary, and tertiary grounds

R V ANTIC [2017] SCC

Facts: Judge erred by requiring a cash deposit with a surety (one of the most onerous forms of release). After over a year in pre-trial custody (and three bail reviews), Mr. Antic raised sufficient funds to pose the $100 000 cash deposit and was released

Analysis: Right not to be denied bail without "Just Cause"

- Statutory reverse onus that allows for pre-trial detention of an accused triggers protection of Charter s.11(e)
- A provision may not denial bail w/o "just cause"
  - **Just cause** to deny bail only if denial (1) occurs in a narrow set of circumstances and (2) denial of bail is necessary to promote the proper functioning of the bail system
- Right to "Reasonable Bail"
  - Relates to terms of the bail including amount of money and other restrictions (*Hall)*
  - Both a legislated form of release and the specific terms of release ordered by a judge can be unreasonable, thus unconstitutional
  - Trial judge erred b/c they did not apply ladder properly –fixated on cash deposit despite having the ability to have the accused enter into a recognizance with a surety and made conjecture that the accused believed his surety wouldn't face forfeiture if he didn't show
  - Quantum – unreasonably high (beyond means of the accused), amounted to detention
- Going forwards
  - Unconditional releases on an undertaking is the default position
  - Ladder approach should be followed
  - If Crown proposes alternative form, they must show why it is necessary
  - Recognizance with sureties is one of the most onerous forms, not imposed unless all less onerous forms are rejected
  - Recognizance is functionally equivalent to cash bail (cash should only be relied on in exceptional circumstances where release on recog with sureties is unavailable)
  - Cash bail amount, when set, can't be too high that it amounts to detention
- Holding: Appeal allowed, Trial judge erred b/c the type of bail was unreasonable (didn't follow the ladder) and amount was too high that it became *de facto* prison (inconsistent with the Charter right not to be denied reasonable bail without just cause)

- SCC made more bail specifications: *R v Zora*, 2020 SCC 14
  - B/c release w/o conditions is the default, it must be determined which conditions are necessary
  - The only default bail condition should be to appear in Court
  - Which specific risks might arise if the accused is released w/o conditions (flight risk, risk to public? Or loss of confidence in administration of justice?)
    - Questions to ask: if released without conditions, would the accused pose any specific statutory risks that justify imposing any bail conditions?
    - Is this condition necessary?
    - Is the condition reasonable?
    - Is this condition sufficiently linked to the grounds of detention under s.515(10)(c)?
    - What is the cumulative effect of all the conditions?

TRIAL BY JURY (CHARTER 11F)

- Jury usually reserved for the more serious offences (guaranteed in murder) where the maximum punishment for the offence is imprisonment for five years or a more severe punishment

STEP 1: ASSEMBLING THE JURY

- Not talked about in this course
- Governed by the *Jury Act* of Alberta, sets rules for how to get the pool of juries to ensure representativeness

STEP 2: EMPANELING THE JURY

After we have a pool of juries, this is about selecting 12 juries

Step 1: Pre-screening procedure (exclusion by the judge)

- CC s.632 – Excusing Jurors – judge poses questions and ask whether should be disqualified based on:
  - Personal interest in the matter
  - Relationship with interested person (litigants, lawyers or judge)
  - Personal hardship or reasonable cause
- CC s. 633 - Stand by – where someone might have a reasonable excuse not to serve as a juror but we want to make sure that we have enough people (they go to the back of the line). Usually there are enough people to fill jury but they are there just in case
- *R v Kokopenace* – accused never entitled to a jury roll of any particular composition, as long as reasonable efforts were made to have a diverse pool and the people picked from the pool was random

Step 2: Challenge for Cause

- General Procedure
  - Initial threshold to establish that there is a need for a challenge
  - If this is accepted then the challenge occurs – where each juror is asked a series of Judge approved questions to determine if they are suitable
  - **Not indifferent** – some reason to think that looking at jurors as a whole, there is some significant portion of them that are not indifferent as b/w the accused and her majesty (they are partial)
  - **The test:**
    - (1) Widespread bias in the community
    - (2) Incapable of setting aside
      - Despite all protections in selection and trial process, significant portion of individuals would be incapable of setting aside the bias
  - There are others (respective juror is **an alien** – they are not eligible to serve on jury – but this is rare)
- Applying to Challenge for Cause: Types of Challenges
  - Adverse pre-trial publicity (*Sherratt*)
    - Accused arguing that as a result of extensive and critical publicity, we need to be able to ask jurors of their exposure and attitudes towards publicity and their ability to set aside info they received before trial
    - Difficult to mount this challenge and rarely accepted b/c Court typically looks to various safeguards in trial process to ensure case is decided on law and not pre-trial publicity
    - In order to have a successful challenge, you have to show extensive publicity and that is very controversial and critical of accused (*Zundel, Keegstra*)
      - But if that publicity has died down before beginning of trial then judge usually says that it wont be a problem (*Merz*)
    - Successful = extensive, controversial and critical publicity that extends pretty much up until the start of the trial
      - If successful challenge, questions lawyers are allowed to ask jurors usually focus on: (1) exposure to info, (2) opinions on guilt/innocence on accused, (3) ability to set aside any such opinion and decide the case only on the evidence
  - Racism (*Parks, Williams*)
    - Racial background is stressed more than ethnic background
    - Very common for defence lawyers to ask for and receive permission to challenge respective jurors on racialized bleiefs and stereotypes

        - If you are representing a non-white accused, there is an extremely high probability that if you ask for a challenge it is usually granted and not contested by the Crown
        - Pretty much just based on race – when there is a white accused, even if an immigrant, even with a heavy accent, even if they identify as being Latino but if the Judge looks at them and they look white, then they don't usually get the challenge
        - Courts also reluctant if the accused and victim are the same race. This challenge usually only works if it is a non-white accused and a white victim
        - *R v Koh* – racism was extended to all visible minorities
        - If challenge is successful, lawyers can ask two questions: (1) would your ability to judge the evidence in the case without bias, prejudice, or partiality be affected by the fact that the person charged is [NON-WHITE]?, (2) would your ability to judge the evidence in the case without bias, prejudice or partiality be affected by the fact the person charged is [NON-WHITE] and the complainant is white?
    - Nature of offence (*Find)*
        - Usually involving child abused – offence is so offensive that defense lawyers should be able to ask jurors about this to ensure they are impartial
        - SCC in *Find* destroyed this argument – any adverse feelings or prejudices come from nature of the offence itself and not from the accused person
        - Jurys are capable of being offended by offence but they are able to recognize that it is terrible to be falsely accused by this
        - Basically nature of offence cuts both ways
    - Other types that have been successful: *Cansanay* – specific street gangs, *S (BD)* – Aboriginal street gangs, *Katoch* – anti-police sentiments
- Recent changes: Before June 21 2019 – accused and prosecutor could challenge an equal, limited number of potential jurors peremptorily under the (now repealed) CC s.634
    - These could be exercised w/o cause or explanation
    - Depending on offence, number of challenges was b/w 4-20
    - Challenges based on names, occupations, addresses and general demeanor of potential jurors
    - Argument that this has been used to exclude non-White jurors
- New Bill introduced (Bill C-75) – made judge trier of fact, kept the cause process above in place but also abolished peremptory challenges

LIMITATIONS ON CRIMINAL LAW – CHARTER SECTION 7 AND COMMON LAW

- Rule of Law: citizens will not face arbitrary wrath of government power
- CC s.9: common law cannot provide the basis for offences, conduct cannot be considered criminal unless it is prohibited by statute
- Charter (s.11(g)above) Person cannot be convicted for conduct that is later criminal but wasn't when the act occurred
- S.7: Everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in an accordance with a principle of fundamental justice

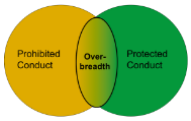
PRINCIPLES OF FUNDAMENTAL JUSTICE

Principles of fundamental justice that could be invoked under s.7. The laws can't be any of the following things.

- Principle of Fundamental Justice
    - **Significant societal consensus** that {principle} is **fundamental** to the way the legal system should operate
    - {Principle} must be identified with **sufficient precision** to yield **manageable standard** against which to measure life, liberty and security deprivations

- **Vagueness (rare):** law must have no ascertainable meaning, does not provide adequate basis for legal debate and analysis

- **Arbitrariness (*Malmo-Levine*):** no rational connection b/w law's purpose and its effect on the *individuals s.7* interests
  - *PHS Community Services Society* – gov't didn't issue license for safe consumption site and arbitrarily affected health of users
- **Overbreadth:** Scope too broad that it includes conduct that bears no relation to purpose (law captures conduct that does not cause the harm that Parliament intended to mitigate)



Heywood – law that people with sex offender crimes cannot set foot in park. Purpose = protect children in parks from sex offenders. This went too far: couldn't go to super remote national park
  - *Bedford*: living off avails provision

- **Gross disproportionality**: law's effects on *individual's* s.7 rights cannot be rationally supported (doesn't look at societal benefits from the enactment of the law)
  - *PHS Community Services Society* – effects on user's rights were grossly disproportionate to its purpose
  - *Bedford*: Bawdy-house provision, communication/advertisement
- **Right not to self-incriminate:** *Hebert*

VAGUENESS

- Vagueness: (1) Principle of fundamental justice and (2) principle of interpretation
- Policy considerations: (1) Rule of law (everyone equal under the law), (2) fair notice to citizens, (3) limitations on law enforcement power
- Successful challenges on vagueness as a PFJ are rare: Courts would rather interpret law strictly than strike it down

CANADIAN FOUNDATION FOR CHILDREN, YOUTH & THE LAW (CFCYL) [?] SCC

Court prefers to interpret laws strictly rather than strike them down if they are vague (as a PFJ)

- CC s. 265: Criminal offence of ANY application of intentional force without consent
  - Children lack legal capacity to consent
  - Therefore, any time parents disciplined children it was considered a criminal offence
- CC s. 43 – Defence for above
  - "Every parent is justified in using force by way of **correction** if the force does not exceed what is **reasonable** in the circumstances"
    - Rule of law: unclear, fair notice: not sure, power: up to the courts
- SCC rejected the challenge that s. 43 was unconstitutional due to vagueness, instead Court made limitations that guided what was "reasonable":
  - No harm, ages 2-12 only, teachers cannot punish, not degrading, no objects, no blows to the head, correction only

THE HARM PRINCIPLE

- J.S. Mill Harm Principle – not a principle of fundamental justice
  - Only reason the state can intervene in one's actions is if they are causing harm to others; rejects paternalism, excludes moral harm

R V MALMO LEVINE; R V CAINE [2003] SCC

CONSTITUTIONAL: Harm principle, unlike vagueness, is not a principle of fundamental justice contrary to s.7 of the Charter. Laws will not be struck down under s.7 unless they are arbitrary, irrationally connected, or grossly disproportionate

- Facts: Malmo-Levine was charged with possession and trafficking of marijuana.
  - He tried to challenge the prohibition's constitutional validity, focusing on using the "harm principle" as his main argument for why the prohibition is contrary to s.7 of the Charter
- Issue: (1) Do all crimes have to adhere to the harm principle?; (2) Are prohibitions against simple possession of marijuana constitutionally valid?: (3) Does s.7 prevent Parl from criminalizing this conduct?
- Analysis: Must show (1) deprivation of life, liberty, or security AND (2) violation of a principle of fundamental justice
  - Imprisonment shows satisfaction of (1); accused claims Mill Harm principle (above) is a principle of fundamental justice
  - Court rules Harm Principle is not a principle of fundamental justice:
    - (1) Not a legal principle – other laws in the *Code* (like beastiality) that don't conform to harm principle
    - (2) No sufficient consensus it is fundamental to society
    - (3) No evidence that paternalistic legislation offends societal notions (protecting people from themselves)
    - (4) No manageable standard to measure interest deprivation
  - Reasonable use of states power to protect vulnerable people from themselves with legislation
  - Even if successfully shown that this law violated s.7, next step of analysis: can it be saved by s. 1
    - Section 1: State must show that infringement is (1) prescribed by law, and (2) constitutes a "reasonable limit" in a "free and democratic society"
- Holding: Harm principle is not a principle of fundamental justice; Parl entitled to use criminal law power to legislate in the protection of state interests (other than harm to others)
  - Effects of law cannot be **arbitrary, overbearing, or grossly disproportionate**
  - **DISSENTING (LeBel and Deschamps):** principle of fundamental justice requires that whenever state resorts to imprisonment, there should be a minimum of harm to others. Law is arbitrary
  - **DISSENTING (Arbor J):** recognized harm principle as PFJ

SEX WORK: HARM PRINCIPLE AND PFJ

- Parliament and Judiciary interaction viewpoints (**counter-majoritarian difficulty)**:
  - (1) Courts should not interfere, leave everything to Parl b/c then unelected judge's are representing will of the people
  - (2) Parl has too much power and Courts help prevent criminalization of conduct that normal people are likely to engage in

R V LABAYE [2005] SCC

COMMON LAW: New two-step harm/indecency test based on nature of harm (accidental people, anti-social conduct and people involved) and degree of harm. Indecency defined as something that causes harm. Disregard for old framework for indecency that took into account community standards

- Facts: Appellant operated a sex club for the purposes of promoting group sex. No one paid for sex, no one forced against will, people interviewed and screened prior to entering club, they knew what they were getting into, everyone gave consent, members paid an annual fee, lots of security to prevent strangers from accidentally walking in the door
  - CC. s. 210 (repealed in 2019) but made it an offence that anyone in a house where indecent acts were performed was guilty
- Analysis: Apply indecency framework above
  - Nature: Type 1 (accidental people): not caused
    - Lots of preventative measures, including security and locked doors
  - Nature: Type 2 (offend society): not caused

        - No one pressured, everyone not consenting, no objectification, no anti-social conduct
    - Nature: Type 3 (people involved): not caused
        - Only danger was catching STD, but that was not causally related
    - Degree: not analyzed b/c nature of harm step failed
- Dissent: Should use old framework that includes question about morality. Societies' values based on values more than preventing harm to others
- Holding: Appellant's conviction removed, activities did not mean new harm/indecency two-step test

- NOTE: Other indecency/obscenity provisions still exist in CC but are rarely used. When the word "indecency" is used, this case can still be cited
- Harm principle renewed to provide clarity, punishment imposed only if it harms others, must be a fundamental type of harm
- **Comparison of Labaye and Malmo**: Court not comfortable using harm principle to strike down constitutional law but allow harm principle to guide common law interpretation to develop legal standards

R V BEDFORD [2013] SCC

- Old prostitution laws: actual exchange of sex for money was not illegal and could only occur in the john's residence
    - But everything else was: "living off avails" – hiring drivers or security guards, communications/advertising, no third party locations
- Laws struck down over due to contrary to Principles of Fundamental Justice
    - Bawdy-house provision: grossly disproportionate. Purpose: deal with public nuisance. But effects on safety of sex workers was grossly disproportionate
    - Solicitation/communication: grossly disproportionate. Sex workers can't screen clients and protect themselves
    - Living off avails provision: overbreadth. Purpose: concerned with worker exploitation and pimps. But too broad and captured drivers/security guards hired by workers

- NOTE: After SCC struck down these rules, Parl enacted "Swedish" model that made the selling of sex legal but the purchase of sex illegal in order to eradicate prostitution from society
- New provisions: (1) soliciting/communication (traffic flow, children) (s. 213), (2) material benefit (non-exploitative exceptions) (s. 286.2), (3) Procuring (s. 286.3), (4) Advertising (s. 286.4 & 286.5)
- ***R v Anwar*, 2020 ONCJ 103**
    - **Advertising**: infringes s 2(b), not saved by s 1
    - **Procuring**: infringes s 7 (arbitrary, overbroad, and grossly disproportionate), not saved by s 1
    - **Material Benefit:** infringes s 7 (grossly disproportionate), not save by s 1

NEED FOR RESTRAINT

What a Crime Cannot be

- Enacted by Provinces
- Any wrongdoing that is not criminalized by statute (CC s.9)
- Any wrongdoing not in statute at time the Act was committed (Charter s.11(g))
- Any law that is unduly vague (s.7 of the Charter)
- Overly restrictive of individual freedoms (religion, expression)
- Discriminatory in impact (ex. Restriction on anal sex)
- Arbitrary
- Overly Broad in its reach
- Grossly disproportionate in terms of effect vs the importance of the objective

There are methods other than the criminal process to reduce harm (such as administrative controls, regulatory penalties) and can be used in a wide variety of areas (such as securities regulation, hard drugs, military misconduct and terrorism)

Crisis of Overcriminalization: Absence of accepted constraints on the criminal law has led to huge incarceration numbers. There are ~8000 crimes and no unifying feature/definition other than they have a different procedure from civil. Virtually all criminal laws burden non-fundamental liberties and the state needs only some conceivable legitimate purpose to enact the great majority of criminal laws (e.g. The liberty to eat pizza is not fundamental and may be criminalized to protect the public from unhealthiness).

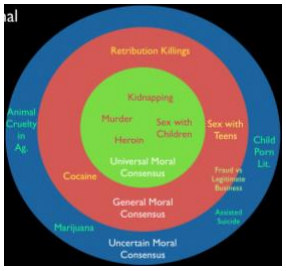
Factors to consider when new offences are going to be created:

1. Behavior is sufficiently serious to warrant intervention by criminal law
2. Mischief could be dealt with under existing legislation or by other remedies
3. Proposed offence is enforceable in practice
4. Proposed offence is tightly drawn and legally sound
5. Proposed penalty is commensurate with the seriousness of the offence

- **Ashworth:** The aim should be to punish a set of criminal wrongdoings that penalize substantial wrongdoing and with full enforcement

Criminal law is at its best and strongest when you apply Ashworth's principles.

- Criminal law is best when prosecuting cases that are at **the universal moral consensus (green circle)** of society. As we work away from universal consensus… criminal law because less legitimate at dealing with issues.



Husak: Primary focus on criminal law should be restraint/costs

- Arrest + punishment – more criminal law, more people's lives affected
- More power to state
- Costs to justice system (tax payer dollars affects all of society)

R V JORDAN [2016??] SCC

Lots of charges dropped after this decision, imposing time limits for "reasonable time" under s.11 of the Charter. Challenged charter under s.11(b) – right to have a trial within a reasonable time. Stay of proceedings imposed for unreasonable delay

R V JACKSON [2018] ONSC

Framework setting out use of various considerations during sentencing. Mitigating factors to consider, especially race. Notes that Aboriginal and Black Canadians are marginalized and overcriminalized. Also shows people impacted at young age are the ones most likely to be in front of the courts later

- Facts of Charges
  - Mr. Jackson made a call to procure a gun that was caught on wiretap by the police (2016)
  - Police followed him and arrested him, where they found a gun in his waistband following the search of his person
  - Mr. Jackson was subject to five separate weapons and ammunition prohibition orders under CC. Three of those orders were for life and two were for five years
- Mr. Jackson Personally
  - Serious criminal record – first charges were from 16 years earlier (2000) – including property crimes and dangerous driving while he was a minor
  - Father was military so they moved around a lot while they were growing up
  - Lots of problems as a child in school- fighting and stealing
  - Mother had mental health issues that led to the deterioration of his parent's relationship (~12 yrs old)
  - Minimally educated – dropped out at 16 years and only attained a Grade 8 level of education
- Racism and Background Factors

    - Mr. Jackson is a Black man
    - Defence presented a report written by the African Canadian Legal Clinic
        - Outlines aspects of anti-Black racism (Black Lives Matter)
        - Historical factors: colonialism, slavery, exclusion and segregation in housing/schooling/employment, systemic and overt racism
- Impact of Race and Cultural Assessment
    - Attempt to articulate issues of anti-Black racism and systemic racism in Canadian society to the court at the sentencing stage of adjudicating African Canadians
    - Fundamental premise is that a person's race and cultural heritage should be considered as a significant factor in considering their sentence in a criminal matter
    - Community where Mr. Jackson grew up has a well-documented history of racial tension and he did illegal activities to "fit in"
    - Father was in military so he was not home much – seeking validation from his male peers
    - Mother had serious mental health issues (symptoms consistent with psychotic disorder) – enduring sensitivity and shame for the family
- Position of the Parties
    - Judge notes disproportionate rates of incarceration of African Canadians due to race and discrimination
    - Rates of incarceration for black individuals, especially Black women has increased while incarceration of White individuals and incarceration in general has decreased
- Systemic Discrimination while in Custody
    - Defence presented materials relating to discrimination against African Canadians while they served their sentences in jail
    - Lots of covert discrimination by inmates and staff in prison
        - Feeling ignored, concerns being dismissed
    - Other instances more overt
        - Labeled as gang members, trouble makers, drug dealers and womanizers
    - Applicable caselaw:
        - *R v Parks* – lots of community members have racist views and our institutions including criminal justice system reflect those negative stereotypes
        - *R v R.D.S* – racism in Nova Scotia is well-documented individually, systematically and institutionally
        - *R v Golden* – Indigenous and Black people over represented in prison. Over-represented on strip searches. New policy needed
        - *R v Grant* – unjustified "low visibility" police interventions
- Applications of the Framework to Mr. Jackson
    - Racism and low income community had an impact on his choices
    - Immediate risk factors for violence involving youth can easily arise from the diminished sense of worth that results from being subject to racism
    - Crown was asking for 10 years, defence was asking for 4 years in prison
        - Judge said that there are some cases where restorative justice can be used but that is not the case in this case. Jail is necessary
        - Judge gave 6 years. Not a "race-based" discount – it was a "fit sentence when all the circumstances are taken into account, including historical and systemic factors"

POLICE QUESTIONING: *HEBERT RULE*

Right to not self-incriminate is a principle of fundamental justice

- Protects right to silence, "right to choose" whether to speak to authorities and right not to self-incriminate
- Detainee tricked into giving self-incriminating statement by talking to a state agent who is undercover or CI – violates s.7
- Requirements for this rule to come in to play:

- Detention – doesn't work in the Mr.Big operation (or any undercover operation in the field). Only works if there is formal detention
- State agency – has to be a state agent or if a private citizen then must use the "but for" test (see common rule questioning notes)
- Active elicitation – even if you have state agent, if they sit back and listen or participate in conversation that doesn't question the it is fine. Conversation must be active and probative
    - Nature of questions- Similar to interrogation – where agents initiate the conversation or ask leading questions
    - Nature of relationship b/w agent and suspect is important – right to silence is more likely to be violated where the agent exploits any of the suspects vulnerabilities

ROLES OF THE CROWN AND DEFENCE COUNSEL

CASE: *R v Boucher*, [1955] SCR 16

- Role of prosecutor is not to convict – it is to present to the jury credible evidence relevant to what is alleged to be a crime, firmly and fairly

Alberta Justice, the Decision to Prosecute

- Prosecutions not well founded in law or fact, or which do not serve the public interest, may needlessly expose citizens to the anxiety, expense, and embarrassment of a trial
- Other hand – failure to prosecute a meritorious case can directly impact public safety
- Both situations undermine confidence of the community in the criminal justice system
- Published criteria helps guide prosecutors in a consistent and transparent way, while fairness and flexibility are achieved through the broad range of factors which are included in the criteria and are tailored to for individual cases
- Prosecution criteria must reflect sufficiency of evidence and public interest

The Decision to Prosecute

- Preliminary Matters
    - In AB, prosecutors not involved prior to initiation of the prosecution by informant (usually peace officer)
    - "Reasonable grounds" for laying charges assessment is made independently of prosecutor so the usual issue for prosecutors is whether to continue or terminate proceedings
- **Governing Criteria**
    - **Two questions if to prosecute: (1) is evidence sufficient to justify proceedings? And (2) if it is, is this in the public's best interest**
- Sufficiency of Evidence
    - Prosecution only occurs if there is a reasonable likelihood of conviction when the known evidence as a whole is considered
    - Following principles inform application of evidential test:
        - Crown has sufficient evidence to believe that a conviction is more likely than not
        - Subjective and objective element – Crown must believe conviction is likely and that belief must be reasonable in the circumstances
        - Evidential threshold applied to each charge and each accused
        - Prosecutors must critically assess evidence and take into consideration reliable defence evidence
- Public Interest
    - If above threshold met, then Crown must consider whether public interest requires prosecution
    - General principles to prosecute (not an exhaustive list):
        - Conduct was serious
            - Weapons used
            - Violence was used/threatened

        - Conduct was premeditated
        - Significant harm
        - Victim was vulnerable
        - Offence involved abuse of position of authority
        - Offence directed at administration of justice
    - Accused's degree of responsibility was significant
    - Offence motivated by discrimination
    - Looking at past history, accused likely to repeat conduct
    - Need exists to denounce conduct and deter others
- General principles not to prosecute (list not exhaustive:
    - Trivial offence
    - Small penalty for conviction
    - Consequences of prosecution unduly harsh or oppressive for accused
    - Accused remedied loss/harm
    - Accused demonstrated genuine remorse and taken rehabilitation steps
    - Desired result could be achieved through alternative prosecution
    - Law that was breached was obsolete/obscure
    - Prosecution could publicize information that could harm CIs, international relations, national security etc…

R v Kaufman, (2001), 151 CCC (3d) 566 (Que CA) – prosecutor shouldn't prejudice jury with own personal opinions, simply present evidence (new trial ordered)

R v S (F) 2000, 144 CCC (3d) 466 (Ont CA) – prosecutor must be moderate and impartial, can't personalize his role in the case, can't equate himself with the jury ("we must find him guilty"), must be professional (new trial ordered)

Duty as Defence Counsel

- Protect client as far as possible from being convicted, except upon legal evidence sufficient to support a conviction for the offence with which the client is charged
- Counsel must not knowingly lie or act as fraudulent towards the court
- Must not present evidence that it knows is fake, or try to present evidence of an alibi when they know their client was not at that alibi
- Lawyer for accused can enter into agreement with prosecutor about a guilty plea if the client understands what they are being charged with, they are willing to voluntarily admit to the elements of the charge, they voluntarily instruct lawyer to enter into guilty plea, and they understand that the court is not bound by the guilty plea submitted by the Crown and defence attorney
- Lawyer must not counsel or participate in the concealment, destruction or alteration of incriminating physical evidence

INVESTIGATIVE POWERS

POLICE QUESTIONING AND THE COMMON LAW

- Law governing police questioning is different than law governing detention and search
    - With very few exceptions, police have NO POWER to question people
    - In detention and search, they can force other people to be detained and to be searched if they follow proper protocol
- Suspects have a right to remain silent
- Due to physical and psychological advantage police have over citizens – law regulates police so that they don't abuse their power over criminal suspects

- Regulates balances state's interest in detecting, deterring and punishing criminals against individual's interests in avoiding cruel questioning practices, unfair self-incrimination and wrongful convictions based on false confessions

- Two interests protected: (1) means police use to extract info can be cruel/harsh, and (2) false confessions (present in ¼ of wrongful conviction cases)

CONFESSIONS RULE (*IBRAHIM AND THE KING)*

Prohibits admissions at trial of statements unless prosecution proves BRD that the confession was voluntary

- Doesn't directly regulate police questioning – look at context and a bunch of factors to see if evidence is admissible.
- From *Ibrahim and the King* – most often cited case for the use of voluntary confessions
  - "It has long been established that no statement by an accused is admissible in evidence against him unless it is **shown by the prosecution** to have been a **voluntary statement**, in the sense that it has not been obtained from him either by **fear of prejudice** or **hope of advantage** exercised or held out by a person in authority."

(1) PERSON IN AUTHORITY

Unless confession is made to a person of authority then voluntary confessions rule doesn't apply. Reasonable belief test from *Hodgson*- suspect believes they are talking to state agent and person is actually a state agent

Step 1: Is the confession made to a person in authority?

- If not, don't need to continue analysis – confession is invalid
- Person in authority HAS to be known to the suspect that they are acting on behalf of the police
- Undercover police – confessions rule DOESN'T apply
- *Hodgson* – "reasonable belief test"
  - If the suspect reasonably believes that the person that they are speaking to is a person in authority then the test is satisfied
  - Option 1 (rejected by SCC): Subjective (Literal interpretation) – simply at whether the suspect honestly AND reasonably believed that they were speaking to a law enforcement agent
    - Possible to have a reasonable belief and be wrong (ex. Person impersonating a cop)
- Option 2: (**use this one)** Subjective + Objective Test
  - More consistent with the entirety of the case law
  - **Two steps: suspect must BELIEVE speaking to a state agent AND receiver must ACTUALLY be a state agent**
  - No room for impersonation in this test
- What is an agent of law enforcement?
  - Usually answer obvious (police officer or someone who has a role in law enforcement – probation officer, RCMP, constable, guard)
  - Use "but for" test if not obvious
    - "But for the relationship between the receiver of the statement AND someone who is part of law enforcement, would the conversation that elicits the confession have taken place in the form and manner that it did"
    - If conversation would've happened anyway – then they ARE NOT a state agent. Convo can only have happened b/c they were state agent

(2) VOLUNTARINESS

Three factors considered to determine voluntariness of confession: operating mind inquiry, inducements and oppression.

(A) Operating mind inquiry

HARD RULE: If they didn't have an operating mind then the confession is not voluntary. But if they did have an operating mind you can still point to mental deficiencies or vulnerabilities why the confession isn't voluntary

- *Whittle*: limited nature to understand in basic linguistic terms what is being said, understanding nature of conversation and that evidence may be used against you
    - Fairly low threshold – fact that someone is inebriated by drugs/alcohol is not necessarily enough
    - Mental illness not necessarily enough – depends on illness manifestation
- In *Whittle* – accused suffered from schizophrenia where he had auditory hallucinations and that there was a voice from God compelling him to confess to police. SCC confirmed he still had operating mind b/c he understood what was happening
- Doesn't matter what the purpose of the confession is – if the confession is made with an operating mind doesn't matter if made "off the record" – can still be used against suspect

(B) Questions of inducements (threats/promises)

Focus on strength, not just mere presence, of *quid pro quo*, examine suspect's "experience" with the police. Examine all characteristics, including subjective characteristics of the accused, their experience, age, sophistication

- Very few clear rules on what inducements lead to inadmissible confessions – context!
- Threats of violence almost always inadmissible
- *Oickle (2000)* – SCC focused on concept of *quid pro quo*
    - Where there is a concrete exchange (we will do something good for you if you tell us what we want to hear OR we will not do something bad to you if you tell us what we want to hear)– those situations identified as often resulting in findings of inducements and involuntariness
- In later decision of *Regina v Spencer* – SCC backed away from that a little
    - *Quid pro quo* by itself is not necessarily enough to render any confession involuntary
    - In this case, the police were dealing with an "experienced criminal" who had interactions with police before and the fact that the police threatened to withhold a visit from his girlfriend was not enough (not a strong enough inducement to render confession involuntary)
    - His interview was more of a negotiation so in that case even though they used a strong inducement (desire to see girlfriend) – this was quid pro quo
- Problem with fuzzy rule: hard to interpret, people's personas may be inaccurate

(C) Oppression

Refers to physical and psychological factors affecting atmosphere or conditions of interrogation

- In some cases, we don't want the police to use these so one way to prevent that is to tell police that if they use certain techniques the confession will be thrown out
- Sometimes people confess to end the hard experience with the police, or if they have cognitive impairment they might actually start to believe that they may have committed the crime
- Two categories
    - Physical Conditions
        - Leading to discomfort or indignity
        - Sheer duration or length of interrogation
        - Access to necessities (food, water, sleep)
        - Harsh lighting
        - Deny access to council
        - Failing to warn about right to silence
    - Trickery/psychological manipulation
        - These tactics are not prohibited outright
        - If police go too far, then confession is involuntary

- Ex. Using completely fabricated evidence might be too far, but exaggerating the evidence (like in a polygraph) may be admissible *(Oickle)*

MR. BIG RULE – FROM R. V HART

Evidence is presumed inadmissible and presumption must be rebutted on BOP by the Crown based on (1) characteristics of organization, (2) characteristics of suspect, and (3) corroboration. If accused shows abuse of process, presumption is not rebutted

- Crown has to prove on a balance of probabilities that the confession was more probative than prejudicial
- The Mr. Big Rule – *R. v Hart* – automatically triggers EXCLUSIONARY PRESUMPTION
  - Fictitious criminal organization designed to recruit a suspected criminal and through rouses and scenarios the person is convinced to make an incriminating statement to the head of the fictitious criminal organization (nicknamed Mr. Big)

Onus and standard of proof

- Confessions presumed inadmissible
- Crown has onus to rebut presumption to establish that probative value outweighs prejudice on BOP

Probative value v prejudicial effect

- **Prejudicial effect** – when the person receives the statement from the accused, they are exposed to other things from the accused. Trier of fact is exposed to evidence that is discreditable towards the accused
  - Ex. Association with criminals, willingness to break the law - may paint the picture that the accused is a disreputable person
- **Probative value** – reliability of the statement
  - Characteristics of operation
    - Duration and complexity of the organization, whether there were coercive methods, psychological manipulation
  - Characters of accused
    - Vulnerable to this kind of manipulation, especially in terms of socioeconomic status, cognitive ability, vulnerability to persuasion from people in positions of authority, need to please
  - Corroboration
    - Corroboration by independent evidence – greater reliability and credibility to statements

Abuse of Process

- After probative value is determined to outweigh prejudicial effect do this step
- But we find that the tactics used by the police to be so distasteful that we don't want to associate the court with that kind of conduct by the state and exclude the evidence on that basis
- In order for this to occur, **ACCCUSED** must make out an abuse of process on BOP
- Ex. Violence or where police have taken advantage of a high state of vulnerability, exploitation

POLICE QUESTIONING AND THE CHARTER

GENERAL – CHARTER S. 10A AND 10B

Strike a balance between suspects' interest in avoiding unfair self-incrimination and the state's need to obtain confession evidence to effectively deter, prosecute and punish crime

- Section 10 of the Charter: 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 (3) to be informed of that right

- Everyone has the right **on arrest or detention**
    - The trigger for these rights is arrest or detention
    - And since arrest is detention, all we have to ask is did detention occur?

CHARTER S.10A

Section 10(a) - to be informed promptly of the reasons therefor

- **Promptly** – courts have interpreted this quite strictly; unless there is an emergency pertaining to an imminent danger to safety. This is the only circumstance not to explain why they are detained
- **Reasons** – SCC practical, police don't have to use technical language, they have to explain in every day language why you are being detained – from *R. v Evans, Latimer* (based on RP)
    - If purpose of detention would be obvious to reasonable person, formal caution may be unnecessary (*Evans)*
- **Change** – possibility that the reason for detention may change over time
    - If police obtain information that changes the circumstances (ex. Pulled over for speeding but then you become a suspect in a murder investigation) then police have to tell you that – **continuous obligation**

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

CHARTER S.10B

S. 10(b) – to retain and instruct counsel without delay AND (3) to be informed of that right

- Very detailed regulatory regime to interpret what the true meaning of this is

(1) PRIOR TO RIGHT TO COUNSEL INVOCATION

Police must inform detainee of their right to counsel immediately, take reasonable steps to make sure they understand, they must have an operating mind, and they must make a positive assertion to invoke right

- **What information must police give to people when they detain them?**
    - Right to counsel: "You have the right to talk to a lawyer without delay" (*Suberu)*
    - Availability of duty counsel: "There are legal aid and free duty counsel services available… this is how they work…" (*Brydges)*
        - Must include phone numbers and meaningful ways that the services may be accessed
    - *R. v Bartle* – theoretically possible for detainees to waive their right to be informed of their right to counsel
        - However, there has to be a reasonable basis for believing that the detainee does in fact know his rights and has waived them – the detainee simply saying "I know my rights" is not enough

- **When must this information be given?**
    - Immediately – from text of s.10(a) and (b)
    - Safety exception – there has to be concrete evidence, objectively reasonable to believe that it would not be safe in the circumstances of why it didn't happen immediately
    - Change – if detainee is at risk of more jeopardy (more serious charge) then the police has to reinform them of the change

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

- Reasonable steps
  - Relates to objective character of what the police have done to ensure that detainees understand their rights
  - If the police did their job properly and promptly then there is an assumption of understanding unless it is reasonably apparent that they did not understand
  - If this is the case, then the police have to take reasonable steps to ensure that they do understand (ex. Wait until they are sober, get an interpreter)
- Operating mind
  - Actual subjective experience of detainee and whether they really did understand – did they have an operating mind?
  - Used in the same way as involuntary confessions
  - If detainee lacked operating mind then there is a violation of 10(b), regardless of whether there was reasonable steps or not
  - Low threshold: Requires basic awareness of language (high cognitive impairment or complicated language then this can prevent this) and basic awareness of consequences
  - If either claim is successful then there is a 10(b) infringement
- "Do you understand": It is not constitutionally required but many police services simply ask detainee if they understood

- **What is required for detainees to invoke their right to talk to counsel?**
  - *Evans* - "I want to talk to a lawyer" – needs to be a positive assertion of the right, silence is not enough
  - *Baig* – police properly convey info required under 10(b), silence means police can continue to question
  - AB – equivocal response or "they might want to in the future", police might have duty to clarify intention before questioning (hasn't gone to SCC)
  - *Culotta-* "do you want to talk to a lawyer", "No, my parents should be here soon. We have a family lawyer" – not enough to invoke right to counsel
  - *Feeney* - Police have to give a reasonable opportunity to invoke by withholding questioning for a brief period

(2) AFTER RIGHT TO COUNSEL INVOCATION

After right invocation, police enter holding off period and must provide private telephone access to contact lawyer and earliest possibility. Detainee must be duly diligent in contacting counsel. If detainee change their mind and are within reasonable opportunity period then *Prosper* warning required. Warning not required if not within reasonable opportunity period and police can question

- **What must police do, and refrain from doing, to facilitate access to counsel after the right is invoked? – biggest question that leads to the most litigation**
  - Assuming that detainee has said in some way that they want a lawyer
  - Once there has been invocation, there are "Police Implementational Duties"
  - Reasonable opportunity
    - Once right invoked police must give detainees reasonable opportunity to talk to lawyer
    - Holding off – cant question or attempts to retrieve self-incriminating statements until the reasonable opportunity expires
      - During entire duration of reasonable opportunity police cannot try to obtain self-incriminating information
      - Once reasonable opportunity expires, then police can question and holding off period ends
    - Telephone access in privacy – have to do at earliest opportunity
      - *Taylor* case
      - Practically speaking, they don't have access to police cell phone but if the environment allows it then it should be ASAP (ex. Using phone in emergency room at hospital)

- As soon as reasonably possible (*Taylor)*
- Lawyer of choice – lawyer of your choosing, reasonable for the detainee to speak to the lawyer who they want to speak to, not just any lawyer that is available
- Seriousness of offence
    - In *R. v Black* and *R v Willier* there is some evidence that the seriousness of the offence might play a role in the length of the reasonable opportunity
    - Ex. Where the charge was first-degree murder, it was reasonable to allow the detainee (who could not reach their lawyer at 1:40am) to wait until the morning to contact their desired lawyer

- Due Diligence – of the detainee
    - Detainee's efforts: Detainee has to be duly diligent in taking advantage or using the reasonable opportunity
    - Temporal factors: Courts have been less than consistent on this matter – very circumstance dependent
    - Detainees have a right to speak to a lawyer of THEIR choosing but they must be diligent in attempting to contact this lawyer – *R. v Smith* and *R. v Ross*
    - Urgency – police have to demonstrate why it was unreasonable for them to wait (preserve evidence – ex. Breathalyzer)
    - Duty Counsel Availability
        - If there are no free duty counsel services and it is not reasonable to expect for them to contact any lawyer (ex. Someone is arrested after business hours and there is no duty counsel), then all things being equal, the duration of reasonable opportunity is much longer
            - Police usually will have to wait til next morning or next business hours
        - If duty counsel services are available then it MAY truncate reasonable opportunity time
            - As time goes on and it is clear YOUR lawyer will not be there then you might have a duty to use duty counsel instead – *R. v Prosper*
    - Seriousness of offence – possibly considered but not weighed heavily
- Waiver – after invocation of right to counsel, holding off period in effect
    - Detainee changes their mind and says that they no longer wish to talk to a lawyer and they waive their right to counsel
        - In these circumstances courts have been very careful to ensure that the waiver is fully informed and fully voluntary and knows the consequences
    - *Prosper* warning
        - After detainee has changed their mind then police have to issue this warning
        - Only occurs if the detainee has been duly diligent, if they have not been duly diligent the police may question without giving *prosper* warning
        - Requires police to remind detainees of their right to a reasonable opportunity to contact lawyer and ensure they understand the consequences of their waiver of that right
        - To establish valid waiver, prosecution must show that detainees (a) indicated clearly and unequivocally that they no longer wished to speak to a lawyer and (b) had full knowledge of their rights and the consequences of foregoing them
    - Due diligence?

- BUT *prosper warning* is NOT required (according to case law) where there is a finding that the suspect has not been duly diligent – *R. v Jones* and *R v. Basko*

(3) CONSULTATION WITH LAWYER

Quality of counsel advice not scrutinized and presumed acceptable unless detainee indicates otherwise. Detainees only allowed further consultation if lack of understanding, unusual procedure, or change in investigation

- Consultation
  - Issues raised by the defence lawyers that the consultation that the detainee received from a lawyer was brief and not in depth enough to fully convey to the detainee the consequences and to fully equip them to withstand pressures from the police
  - No scrutiny
    - Courts have been very clear that they are not going to scrutinize the interactions b/w the detainee and the lawyer b/c it could violate privilege
  - Unless detainee (reasonably) indicates that consultation was inadequate, courts assume that advice was sufficient and conclude that obligation of police to provide reasonable opportunity has been met

- **When are detainees entitled to further consultation?**
  - Assuming right invocation and has actually spoken to lawyer
  - Change in in purpose of investigation – fundamental change such that legal jeopardy is greater or different offence then under 10(a) they have obligation that reason for detention has changed, AND under 10(b) that they have to say rights again, AND under 10(b) must permit detainee to talk to lawyer again (reasonable opportunity)
  - Non-routine procedures
    - Case – *Sinclair* - If police want to do something unusual (polygraph, lie detector, line-up, provide bodily samples) to you then you have to be given opportunity to talk to lawyer
  - Non-understanding – reiteration that if police become aware, even at a later stage that you may not have understood the initial warning or what is going on (issue of operating mind) then under 10(b) they have to facilitate understanding and a renewed opportunity to talk to lawyer

(4) OTHER LIMITATIONS

Police cannot denigrate lawyer, persistent questioning (maybe?) and lawyer must be present for plea bargains. S.10 infringement justified under s.1 only during BRIEF roadside detention

- **What limitations does section 10(b) impose on police questioning after police give detainees a reasonable opportunity to talk to a lawyer?**
  - Different than the US, where once rights are invoked police cannot question suspect until lawyer is present – Prof thinks we should do it the American way
  - In Canada, once detainees have been given a single reasonable opportunity to talk to a lawyer, police may question them, even if they have not actually talked to a lawyer.
  - Police also not required to permit the lawyers to be present during questioning
  - Assuming "Implementational duties" fulfilled, any other limitations?
  - Persistent questioning?
    - Previously under *Burlingham* that badgering, repetitive, lengthy questioning might violated 10(b) but from *Sinclair* and *Sister cases (2010)* that this is questionable.
    - Persistent questioning in and of itself doesn't mean rights violated
    - *Birmingham* rule hasn't been officially overruled but inconsistent with later cases
  - Denigrating lawyer
    - From *Burlingham* – this still holds
    - If police denigrate integrity or competence of one's lawyer that can constitute a 10(b) violation

        - Ex. If police try to persuade detainee not to follow advice from lawyer b/c lawyer was incompetent
    - Plea-bargaining
        - From *Burlingham* – still good
        - Cannot enter plea bargaining without lawyer present, undue influence and is 10(b) violation

- **When can the failure to comply with section 10(b) be justified under s.1?**
    - Prescribed by law and reasonable
        - Any justification under s.1 must meet these requirements
        - Prescribed by law – either statute or common law, not individual discretion
        - Reasonable in a free and democratic society using *Oakes* test
    - Practically speaking, only talking about one circumstance: brief detention of drivers for vehicle offence investigations (at roadside)
        - Roadside sobriety testing, searches at roadside
        - Any BRIEF detention at roadside suspends 10(b) – no right to counsel
            - If detention continues beyond initial brief preliminary screening process, and there is an interview or intervention of excessive length then s.10 triggered

SUMMARY

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

SEARCH & SEIZURE POWERS: CHARTER S. 8 AND COMMON LAW

HISTORY

- Charter s.8 - Everyone has the right to be secure against unreasonable search or seizure
- Example: Payphones (*US v Katz)*
    - Book author used a public payphone to transmit illegal gambling wages and the FBI was using eavesdropping software to hear just his side of the conversation
    - Before now, US 4th amendment used to protect people. Under this case, transformation from physical property and possession notions to personal privacy.
    - Notion of "reasonable expectation to privacy" is born
- *Hunter v Southam* – SCC- brought "reasonable expectation of privacy" to Canada: "The guarantee of security from *unreasonable* search and seizure only protects a *reasonable* expectation"
- Balance of interests b/w personal privacy and collective social concerns of law enforcement (crime control, security)

FRAMEWORK OF S.8 CHALLENGE

Formal elements of any s.8 challenge. Claimant, generally accused in criminal manner has to show:

- (1) State action
    - There has been state action – no new law here that we haven't covered
    - S.32 of Charter – applies only to gov't and gov't actors
- (2) Search or seizure – REP Test
    - Means invasion of a reasonable expectation to privacy (*Hunter)*
    - Based on the "totality of the circumstances" (*Edwards)*
- (3) Unreasonable
    - If the first two are satisfied, then go on to show that the invasion of the reasonable expectation of privacy was unreasonable

- If any of these elements is absent, s. 8 is not infringed

SEARCH & SEIZURE: CHARTER S.8 – STATE ACTION (#1)

Nothing new here. See above in common law questioning

SEARCH & SEIZURE: CHARTER S.8 – REASONABLE EXPECTATION OF PRIVACY (#2)

- **What happens if there is not a reasonable expectation to privacy?**
  - No REP means there is no S&S – equivalent terms
  - If decided that claimants did not have a REP then there is no S&S
  - If no invasion of REP then police are generally free to conduct investigative technique without restriction
  - Should the types of intrusions regulated by statute come from the elected legislature or be court made decisions – different opinions for each

Note: no difference between search and seizure. "Search or seizure" = unitary phrase = violation of REP

ELEMENTS

- (1) Subject matter of the alleged search (ex. Taking a phone is actually an info search not just physical object)
- (2) Claimant's interest in the subject matter – connection b/w claimant and subject matter
- (3) Claimant's subjective expectation of privacy in the subject matter
- (4) Whether this subjective expectation of privacy was objectively reasonable – "totality of circumstances" test

GENERAL PRINCIPLES

- *Ex ante vs ex post* perspective
  - Decision should be made ***ex ante***. Use info that was known to police immediately before they intruded to make decision. *Ex post* – look what we found after the fact to see if there was REP
  - Assume that people are innocent and then ask in **broad and neutral terms** whether a person should or would expect privacy in that circumstance
  - Ex. *Wong* – fact that police were right about illegal gambling should have no bearing on whether police were entitled to install a video camera in the adjoining room to spy on him
    - Broad question to ask**:** *Whether people generally should expect a degree of privacy in renting a hotel room?,* rather than the question of whether "people engaging in illegal activities should expect privacy of a hotel room?"
- Normative v. descriptive perspective *(Wong, Duarte, Spencer)*
  - REP is not wholly descriptive, there is a normative component
  - Descriptive: ask whether the circumstances are such that a person cannot reasonably expect their personal info will remain confidential (*Patrick* – garbage left out for collection so don't' have REP)
    - Description of the amount and type of privacy that actually exists, based on what you have been told by the gov't
  - Normative: imposition of limits on the degree that the gov't can conduct searches and surveillance on private activities
  - Is it "objectively reasonable" to allow police to have free reign on this type of investigative technique
- No Third Party Standing
  - S.8 does not protect third parties directly – they don't have a standing to make a S.8 claim
  - Ex. *Edwards* – boyfriend (accused) stored drugs in girlfriends closet
    - Police raided closet w/o warrant and BF tried to claim REP but he was only occasional visitor and didn't control the space so no REP to closet
    - GF had REP to closet but she was not before the courts – can't make claim on someone's behalf

TOTALITY OF THE CIRCUMSTANCES TEST (INHERENT PRIVACY AND LOSS OF PRIVACY)

Inherent Privacy: Biographical Core Test *(Plant)*

- Extent to which state action intrudes on the "biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from the dissemination of the state". Was the info the police got inherently private?
- Most cases intuitive – high REP about sanctity of the **home**, **interiors of personal belongings** (inside purses, trunks, glove compartments), **personal digital devices** (phones laptops, **bodies themselves**
    - Reveal intimate details we would rather keep secret – sexual, political, religious
- Complications in 2 areas:
    - (1) Police use techniques that only reveal presence of criminal activity, in Canada this is invasion of REP: ex. Dog sniffers that sniff for drugs (*Kang-Brown)*
        - SCC *(Kang- Brown)* - fact that an investigative technique reveals criminal information weighs in favor of **recognizing REP**
        - *Spencer* – online anonymity - users have REP in internet service provider
    - (2) Apply biographical core test to a technique that obtains info from a realm that would normally attract REP (like the home) but the info the technique reveals is fuzzy or indeterminate
        - The technique would be more like a remote sensing device of some kind or IR camera (*Tessling)* that allows police to make inferences about what MAY be going on but does not tell them directly
        - In *Tessling* the areas of higher heat from the IR camera were inferred to be marijuana grow-op – no REP
        - *Plant (no REP); Gomboc (REP)* – police used different methods of determining electricity used to infer that it was possible/probable that the residence was used as a grow-op
- Court has not been clear/consistent in this area:
    - One side: some judges prefer to articulate simple, bright line rules that protect certain inherently private realms, even if the information actually obtained is not that revealing; police will know that can't use this without triggering *Charter* protection and regulation (*Spencer)*
    - Other side: *Plant* stressed the importance of looking at the actual capacity of the investigative technique used in the case at bar, as revealed by the evidentiary record, and judging whether the information revealed penetrates the bio core
        - Dangerous for courts to speculate on future uses or capacities of technique; deal with those cases as they come before courts on proper evidentiary record.

Loss of Privacy

- Info that state obtains that would normally be private and fall within biographical core (attracting REP) but then something changes so that our REP becomes extinguished
- Often results from a **failure of the claimant to store, keep, safeguard the relevant information (subject matter) in a way that prevents it from being obtained by others**
    - Ex. *Edwards* – ordinarily storing things in a closet attracts a REP but the storing drugs in GF's closet extinguishes REP b/c he didn't have control over closet
        - REP focusses on personal privacy but notions of possession and control are also factors
    - Ex. *Belnavis* –Interior of vehicle normally attracts REP, passengers did not have REP b/c they weren't the vehicle owner, weren't driving, didn't have intimate connection with owner of vehicle
    - Ex. *Patrick* - No REP in garbage put in opaque bags put out for collection, even though there was a city by-law preventing interference with garbage and even though the police committed a minor trespass by reaching over property line in order to collect bag
        - Owners voluntary decision to expose waste to the public, extinguished REP that one would normally have
        - Abandonment doctrine

- **Exposing sensitive information to others does not necessarily mean that we extinguish all REP**
    - In some circumstances we might expect to retain some control over the info or we might expect that it might be used only for certain uses and not others
    - Logic here is that if a person imparts confidential information (voluntarily or necessarily) to another for a particular purpose, the state should not be wholly free to conscript that information for other purposes
    - Ex. *Duarte* – Court said that a person's voluntary decision to discloses secrets orally to a friend (who was actually police wearing a wire) did not authorize police to intercept and record conversation
        - We bear risk that if we disclose something to a friend they may tell the police, we don't reasonably expect that the police will be listening in and recording the conversation
        - The former is inevitable in society but the latter is something we don't have to tolerate in a free and liberal society
    - Ex. *Wong* – we expect hotel staff to be cleaning and coming in but we don't expect the police to be listening through the wall of a rented hotel room
    - Ex. *Buhay* – similar to *Wong* where accused rented bus locker at a bus depot and in that case the even though it was temporary and even though security had right to examine lockers, that doesn't give police permission to inspect what's happening in the lockers
    - Ex. *Cole* – where teacher was issued a computer by the school and told that computer was not completely private and school could look at it, but the fact that the teachers could also use it for personal reasons led Court to decide that he retained a REP
    - Ex. *Spencer* – Court said REP attached to the subscriber info (ex. Name, billing address, username) that was held by internet service provider
        - Police attempting to find out who was trading child porn online, knew which IP address was associated with activity but they needed identity of that person
        - Court said disclosure of that identity invaded REP
    - Ex. *Marakah* – court found that sender of electronic message (text) retains REP over that message even after it was received by intended recipient and seized from that recipient's device by police
- **Bodily samples**
    - If you discard something in public, then this is abandonment and you lose REP (ex. Discarding tissue)
    - But police cannot forcibly retrieve the sample (ex. Plucking a hair)
    - *Stillman* – when you are in custody and have no choice but to discard things in garbage in police custody, you still retain REP. Police have to use warrant to get DNA from things discarded in custody

1) CASE: *R V MILLS* [2019] SCC

Mills had REP but failed at step 4 (was not objectively reasonable). Police created fake account and waited for it to be approached, they didn't intercept anything. Adults don't have a REP when communicating with children that they don't know online

Facts and History: Accused, Mills, was charged with child luring after arranging to meet undercover police officer posing as 14 year old girl. Mills sent sexually explicit electronic communications and these were screen captured. Mills applied to exclude evidence as illegally obtained private communications

- Trial judge: should've obtained warrant, S.8 breach identified, but evidence not excluded
- CA reversed trail judge's findings on s.8 (meaning no breach) on the basis that Mills' expectation of privacy was not objectively reasonable

Analysis – Majority (Brown)

- (1) What Was the Subject Matter of the Alleged Search
    - Electronic communications over Facebook chat and email
    - He meant to have one-on-one conversation – this supports REP
- (2) Did Mills Have a Direct Interest in the Subject Matter?
    - As participant and co-author of messages, he did
- (3) Did Mills Have a Subjective Expectation of Privacy in the Subject Matter?
    - Yes – trying to avoid detention, regularly told girl to delete messages, users expect conversations to be private

- (4) Is Mills' Subjective Expectation of Privacy Objectively Reasonable?
    - Totality of circumstance: must investigate (1) nature of investigative techniques used by police, and (2) relationship b/w communicants
    - Nature of techniques used
        - Police created a completely fake girl, meaning they were sure that she was a stranger
        - The relationship b/w communicants may be protected by s.8 in some circumstances when people know each other
            - This does not apply here b/c they were truly strangers
        - Difference b/w this and *Wong* – in this case, police made fake profile and waited for people to message profile
            - Usually police have to obtain warrant before potential breach, but this didn't happen in this case b/c they created the profile and waited. In *Wong* police were interfering with an unknown (to them) relationship, not a relationship what was known to be strangers from the beginning
    - Relationship b/w communicants
        - Mills asserts informational privacy interest, which has 3 understandings: *secrecy, control* and *anonymity*
        - Control – says he wasn't able to control conversation with intended recipient but court disagrees
        - Difference b/w child and adult; and stranger and knowing someone
        - In the interest of protecting children, adults cannot reasonably expect privacy online with children they do not know and that communication online adds extra layer of unpredictability (not privacy)

Analysis – Concurring (Karakatsanis)

Mills had no REP (s.8 not even engaged) b/c texts were read by intended recipient, not intercepted, and screen capture is just a reproduction of a written record, not a recording. Differentiates b/w oral communication that doesn't exist after it is said and text communication that is, by definition, permanent

- Same outcome, different reasons
- Police did not S&S anything under meaning of s.8, not reasonable to expect that your messages will be kept private so s.8 not engaged
- Police conduct was not S&S b/c they did not take anything from accused or intrude on private conversation – they simply received messages sent to them (direct participants, not overhearing or intercepting something else)
    - Conversation with informer or police officer is not S&S, only the recording of such conversation is
- Screen capture technology was a copy of pre-existing written record, not a separate permanent record created by the state
    - Different than when police make a recording of an oral conversation that would not exist otherwise
    - In this case, the suspect is using written medium – by definition this already exists permanently
    - Normally, police are required to obtain a warrant before accessing text message conversations stored by telecommunications providers and are normally protected by s.8 (same as viewing texts b/w two other parties w/o their consent)
        - This case doesn't apply – Mills messages were read by the person he intended to send them to, by sending messages over the internet to strangers, he was opening himself up to the possibility that it might be a police officer. Charter doesn't protect us from poor choices

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

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

- Mills had a REP in the circumstance and the state's surveillance of those private conversations constituted a search
- Using screen recording technology – officer should've had warrant before he did this
- "Participant surveillance" - Court held warrantless electronic participant surveillance infringes s.8
    - *Duarte* - Parliament changed participant electronic state surveillance to require
- Written forms of communication (when participant knows this) does not extinguish REP that state shouldn't read these messages
- Majority said that Mills did not have REP b/c hoping that a complete stranger will keep communications private is a gamble (not objectively reasonable)
    - Difference b/w the risk that one's co-conversant may disclose a private communication does not affect the reasonableness of the expectation that the state, in the absence of such disclosure, will not intrude on the private conversation – they are different things
- Recall *Marakah* – Court said that sender of texts has REP to their content even after sent to their intended recipient and retrieved by the police

Holding: Appeal dismissed, no s.8 breach

- Majority: step 4 was not successful (Mills subjective expectation of privacy was not objectively reasonable)
- Concurring: s.8 was not even engaged b/c there was no S&S
- Dissenting: s.8 was engaged and breached

SEARCH & SEIZURE: CHARTER S.8 – REASONABLENESS OF INVASION (#3)

S&S that takes place **without warrant** is presumptively **unreasonable** so party seeking to justify warrantless search (usually prosecution) bears burden of establishing that it is "reasonable" under s.8

Other hand, where constitutionality of search **with warrant** is challenged, presumption is it is **reasonable** – burden to prove s.8 violation rests on accused

TYPES OF UNREASONABLENESS (*COLLINS*)

- Not authorized by law
    - Statute
    - Common law (Crown can also argue for recognition of new common law search power through ancillary powers doctrine)
    - *Stillman* – common law search incident to arrest but that didn't authorize them to extract bodily substances so evidence was excluded as s.8 violation
    - *Wong* – established there was S&S so there was REP, this was violated, and there was no law at the time that said that police could put video camera in hotel room. Violated s.8
- Law itself is unreasonable
    - ABCA (case?) struck down *Customs Act* provision that allowed customs agent to search any electronic device w/o warrant or RPG. Determined law to be unreasonable
    - *Hunter* – law purporting to authorize warrantless search was unreasonable
    - If police act according to law that is later determined to be unconstitutional, this is violation of s.8 but reasonable reliance on the law counts in favor of not excluding evidence under s.24
    - **Reasonable search will occur when there is prior authorization from a neutral party based on reasonable and probable grounds**
- Reasonable law is applied unreasonably
    - *Collins* – violently grabbing person by the next to make sure they don't swallow drugs that you don't know 100% are there is unreasonable
    - Common challenge: Charter s.487 says police have to have RPG to get a warrant. They go to judge, judge issues warrant, and they conduct search. Defence later says that they didn't have RPG for warrant, therefore the search was conducted unlawfully and this violates s.8

- Information to Obtain (ITO): police go to justice with ITO and make submissions under s.487 to obtain warrant. ITO examination:
  - **Location and evidentiary value:** ITO must show objective reason to believe that you are going to find evidence
  - **Subjective and objective**
    - Subjective: officers themselves have to believe they have RPG
    - Objective: objectively reasonable to believe that a crime was committed and evidence would be found at that location
  - **Basis for belief** (ex. Sources of info, indicators of reliability, reputation of suspect)
  - **Hearsay:** Presumptively: hearsay evidence is inadmissible at trial but can be used to justify ITO
- Assessing whether police have done a good job in justifying their warrant and reaching RPG
  - **Credible:** How credible were people that provided info about crime
  - **Compelling:** Detailed evidence? Internally consistent? Contrary to human experience?
  - **Corroborated**: Key factor. Distinguishes RPG from RS

CASE: *HUNTER V SOUTHAM* [1984] SCC

Problem in this case was that the law itself was not reasonable – it authorized searches without based on subjective determination from the Director, not based on objective reasonable and probable grounds

Facts: *Combines Act* allowed Director of Investigation onto premise if they thought there was relevant evidence, they were able to look at and take anything. In order to exercise search power, Director of Investigation had to get authorization from the Restrictive Trade Practices Commission (RTPC). Director (Hunter) authorized search of Edmonton Journal building (received authorization from RTPC).

Law/Ratio:

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

Framework

- Focus in analysis should be on "reasonable" vs "unreasonable" impact on the subject of the S&S, not on the rationality in furthering some gov't objective of
- **(1) Balance of interests to be assessed**: prevent unjustified searches by requiring prior authorization and having rebuttable presumption for Crown to justify warrantless searches
- **(2) Who grants authorization**: neutral and impartial party that assesses evidence to determine that individual's right to privacy is breached only where appropriate standard is met
  - Common law: judges. Doesn't have to be a judge but they have to be capable of acting judicially
- **(3) What basis must balance of interests be assessed**: Purpose of objective criteria is so that there is consistency to know when the state interest > individual interests
  - *State interest > individual interest only when* ***credibility-based probability replaces suspicion***

Analysis

- (1) Searches under this Act would be unreasonable w/o prior authorization
- (2) The Director has an investigatory and prosecutorial role, and the RTPC has an investigatory and judicial role
  - RTPC cannot be neutral and impartial enough to authorize searches – therefore s.10(3) is inadequate to satisfy the requirement of s.8 so S&S under this act are unreasonable
- (3) *Combines Act* only states that S&S may be made based on opinion of Director

- Balance of these interests cannot depend on subjective appreciation of individuals – needs objective standard
- No evidence of such balance in s.10

Holding: S.10(1) and S.10(3) of Combines Act are unreasonable b/c: (1) No prior authorization, (2) Authorizing party (RTPC) cannot act neutrally and impartially, (3) No objective standard of credibility-based probability to initiate search present

HUNTER STANDARDS AND EXCEPTIONS

Hunter Standards: (1) Prior authorization (warrant) by neutral and impartial third party, (2) Objective justification standard of reasonable and probable grounds. This is the default presumption. In order to invade someone's REP you have to meet these default standards (see exceptions below)

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

Greater than Hunter: privacy interests are so strong that we impose additional conditions

- Searches of lawyers/judges office
- Maybe doctor/counsellor/patient privilege
- Electronic surveillance

Less than Hunter: reasonable search at standards lower than *Hunter*

- Situations where there is a diminished expectation of privacy AND/OR compelling state interest that goes beyond domestic law enforcement
- Ex. Customs case (national safety interest), schools (keeping schools safe) etc..

	Warrant (from statute only)	**Warrantless (ALL common law search powers, some statutory)**
Probable Grounds	• Hunter Standard (default) • Computers (even during regulatory audits) (*Vu*) • Tracking devices carried/worn • S.487.01 – residual warrant. Warrant for anything not specified in CC • S.487.05 – Forensic DNA samples • S.487.051 – DNA databases (also requires conviction) • S.183-185 – wire tapping	• S.320.27 & 28 & 29 – samples of breath or blood to determine precise alcohol concentration (breathalyzer) • S.487.11 – **exigent circumstances** (*Grant)* • SIA (search incident to arrest) • Teachers executing searches in school (*M(MR))*

	• S. 487.014-487.018 – production order (also RS)(*Jarvis* , *Ling)*	
Reasonable Suspicion	• Ss 491.1 &492.2 – tracking warrant; number recorders (metadata associated with telephone communications) (*Wise)* • 487.016 & 17 & 18 – transmission and tracking and financial data • Tracking vehicles and items not carried/worn • S. 487.014-487.018 – production order (also RPG)	• Canine sniff (*Kang-Brown)* • Canine sniff at school by police (*AM*) • SID (search incident to detention)
No suspicion	• N/A	• S.254(2) – ASD and physical coordination tests – roadside screening test • Regulatory audits • Border crossing (*Simmons)* • Prison frisk searches (*Weatherall)*

SEARCH & SEIZURE: COMMON LAW SEARCH POWERS

BY DEFINITION COMMON LAW SEARCH POWERS ARE ALL WARRANTLESS!

ANCILLARY POWERS DOCTRINE

Way to add more common law search powers that don't already exist

FRAMEWORK

1. Does police action fall within scope of police duty? (*rarely contested – protection, safety, law and order)*
2. Is it reasonably necessary for the fulfillment of the duty, considering:
    a. The importance of performing the duty to the public good
    b. The necessity of the interference with the individual liberty
    c. The extent of the interference with the individual liberty

CASE: *FLEMING V ONTARIO* [2019] SCC

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

Facts: Fleming was arrested despite having not committed any crime, he had not broken the law, he was not about to commit an offence, was not about to breach the peace. He was arrested for his "own protection". He was part of a group of protestors and often his group got confrontational with the other group of anti-protesters. Police used justification – "arrest someone who is acting lawfully in order to prevent an apprehended breach of the peace"

Issue: Was Fleming's arrest lawful

Analysis: This case:

- There was no current statutory or common law authority to allow police this kind of arrest power. Police seeking to use ancillary powers doctrine for the courts to recognize a new common law search power
- Step 1: The police power at issue in this case would target individuals who are not suspected of being about to break any law or to initiate any violence themselves but police still believe that arresting them will prevent a breach of the peace from occurring
    - Ex. Provocateurs – their lawful actions might prompt others to respond violently
    - There is also a substantial interference with liberty via this arrest
- Step 2: Yes. Police power falls within general scope of duties of preserving the peace, preventing crime, and protecting life and property

- Step 3: No. Police power to arrest someone who is acting lawfully in order to prevent a breach of the peace is not reasonably necessary for the fulfillment of the relevant duties
    - Factor (1): Yes, duty is very important
    - Factor (2): Yes, necessity of the infringement for the performance of the duty is possible in some exceptional circumstances. Some circumstances interference with liberty is required in order to prevent breach of the peace
        - But if there less invasive measures available, police should use these
    - Factor (3): No. Court doesn't see how a power as drastic as arrest can be reasonably necessary, such that there are no other options at common law or legislation

Holding: Courts don't use ancillary power doctrine to recognize new common law search power, so the arrest was unlawful, infringed on s.9 of the Charter, and was not saved by s.1 of the Charter. The only power to arrest someone to prevent a breach of the peace is found in CC s. 31 and this is the only one necessary

SEARCH INCIDENT TO ARREST (RPG)

In searches incident to arrest, the police have to have had RPG in order to make an arrest. They can search for evidence related to the crime provided the search is plausibly connected to finding evidence of that crime.

Three preconditions for valid search:

- **(1) person searched must have been lawfully arrested**
    - If arrest is unlawful then any search that accompanies it will also be unlawful and thus contrary to s.8
    - This is the only requirement to triggering search power – no other additional grounds required beyond justifying the arrest
    - This is contrary to *Hunter* standards but still upheld by SCC at common law
- **(2) the search must be truly incidental to the arrest in the sense that it is for a valid law enforcement purpose related to the reasons for the arrest**
    - Police must truly be searching for purposes relating to arrest
    - Search can't be abusive and police must *subjectively and reasonably (objective)* believe they are searching for something that may be a threat to the police, the accused or the public
    - Ex. *Caslake* – accused arrested and police officer searched his car for reasons unrelated to the arrest (as part of taking inventory as RCMP policy)
        - There were no statutory or common law powers for this search b/c it was unrelated to arrest
        - **Subjective element**: officer must believe that something related to arrest can be found
        - **Objective element**: that believe must be reasonable in circumstances
- **(3) the search must be conducted reasonably**.

Searches of the Person (Frisks to Genital Swabs)

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

- The person of the individual arrested can be searched incidental to a lawful arrest
    - Ex. *Cloutier v Langlois* – SCC endorsed use of a "frisk" b/c it was relatively non-invasive
- Legislation authorizing police to fingerprint and photograph individuals they arrest – constitutional
- Reluctant to authorize very invasive procedures as part of search incidental to arrest, especially when not preserving destructible evidence
    - Ex. *R v Stillman* – SCC said no to expanding common law powers to authorize dental impressions or bodily samples (too high invasion of privacy)
    - CC amendments now allow body impressions and samples via warrant

Strip Searches

Warrant not required but police must have **RPG** that they are **necessary** to preserve weapon/evidence, must be done at police station (except exigent circumstances) and must be done reasonably and **minimally intrusive**

- More invasive (removal of clothing) and unlike body samples, lots of circumstances where failure to strip search could jeopardize safety of police and others in custody and lead to destruction of valuable and disposable evidence
- *R. v. Golden* – SCC said that strip searches don't always have to be preceded by warrant
    - B/c of high level of invasion, **in addition to grounds for lawful arrest, police have to have RPG to believe that a strip search is necessary to either secure a weapon or preserve evidence**
    - Except for emergency situations, have to be done at police station
        - If done in the field, burden is on police to show why they couldn't wait
- Searches must be carried out in reasonable manner: minimal # of officers, officers of same gender, search authorized by senior officer, no force used, no one else can see search, conducted quickly, only visual inspection w/o physical contact, and if object found was the person given the opportunity to remove it themselves

Penile Swabs

Police need **RPG** to believe they will collect evidence that the accused was arrested for. Must be **necessary** and **minimally intrusive.** Consider timing, allegations of no contact. Must be done reasonably at police station. **Note**: **used for collecting complainants evidence. Warrant and RPG still required to use/collect suspects DNA**

- Ex. *R v Saeed* – penile swabs have significant invasion of privacy and search incident to arrest power includes the authority to administer penile swab subject to some further tailoring to "protect the enhanced privacy interests involved"
    - Police have to have **RPG** that swab will give evidence of the offence **that the accused was arrested for**
    - Timing: if days later, then not granted
    - Allegations of contact: if police have evidence that penis didn't contact victim then no grounds
    - Other evidence: if evidence that the penis evidence was destroyed some other way then no grounds
- Must be done in a reasonable manner: at police station, prior authorization, accused should be informed of procedure, accused has option to do swab himself, same gender, min # of officers, private area with no observers, quickly, records kept
- If police collect accused DNA, they still have to follow holding in *Stillman* and the DNA warrant procedures set out in CC
    - Accused DNA cannot be used w/o warrant

Searches of Digital Devices

Can search digital device incident to arrest (w/o warrant) but there are extra requirements. Police also cannot compel you to give them your passcode

- *R v Fearon* – SCC divided 4-3 on whether power to search electronic devices was incident to arrest power but there are special rules to follow
    - (1) search must be "tailored" to purpose for which it was lawfully conducted, must be incident to arrest so only **recent stuff** can be examined
    - (2) Only justified for **serious offences** (violence/threats of violence, drug trafficking)
    - (3) Not permitted simply for the purpose of finding other evidence – **investigation must be seriously hampered absent the ability to check the phone fast**
    - (4) Must take **detailed notes** as they go
    - If these aren't satisfied, then they have to obtain warrant
- PROF AGREES: Dissenting in this case said they could seize device but not search it w/o warrant
    - Said majority is too complicated and doesn't provide a good template for the police to follow
    - Gives the police too much discretion at the expense of privacy interests
    - This will only come into play when they are challenged at court so basically this is the opposite of what s.8 is trying to do
    - S.8 trying to prevent unreasonable S&S, not justify it after the fact (ex post facto)

SEARCHES INCIDENT TO DETENTION (RS): SAFETY SEARCHES (AND MORE GENERALLY)

Officers can detain someone based on RS and can do a frisk search for weapons only (not evidence), problem is that they need RS to detain but RPG to search. RPG gives them arrest powers so quite confusing.
General safety search power also recognized at common law based on RPG

- *R. v Mann* - SCC applied ancillary powers doctrine to recognize investigative detention power at common law
    - Legal authority to briefly detain (for investigation) where police have reasonable grounds to suspect a clear connection b/w individual detained and recent or ongoing criminal offence
    - Previous cases had given detention powers but were silent on search powers
    - This case placed significant constraints on search power limitations (pre-*Mann* case law on power to search incidental to detention must be applied with caution)
- Person is lawfully detained, officers can search for **weapons only** and only during a **frisk search**
- Police entitled to ask detainee whether they are in possession of anything that might cause the officer harm
- Search power created is not to be an automatic part of every investigative detention; officer must have reasonable grounds *to believe* that an individual is armed
    - Problem here is that "reasonable grounds to believe" gives the same power to officers to arrest and search incident to arrest
        - Prof thinks that it should've been "reasonable grounds to *suspect*" that person is armed
- Later case, *R v MacDonald*, Court had opportunity to change "*believe"* to "*suspect"* but instead adopted a more general safety search power beyond context of investigative detention
    - Ancillary powers doctrine used to recognize police power to conduct safety search as a "reactionary measure" in response to dangerous situations where the officer has to act suddenly
        - Based on safety concerns to eliminate threats, can't be to search for evidence, and once safety concern eliminated then search power ends
    - Suspect holding/hiding handgun, police asked twice what he was holding, didn't answer so police pushed in door and arrested him
        - All judges agreed that the officer's actions were lawful under authority of safety search power
        - Majority upheld reasonable grounds to believe standard
        - Minority (and prof) advocated for reasonable suspicion standard
    - Problem here is that the detention power is based on a reasonable grounds to suspect but the search power is based on a reasonable grounds to believe (this is a higher standard).
        - If the majority's opinion is followed, then the police can detain someone but have no grounds to search them b/c of the different level of standard

USE OF DRUG-SNIFFING DOGS

Drug sniffing dogs are S&S b/c they encroach on REP. But police can use RS w/o warrant. No legislation for drug dogs so fall under common law powers

- *R. v Kang-Brown and R v. M(A)* – drug dogs encroach REP and thus constitution a S&S under s.8, triggering the "reasonableness" requirements of the guarantee, including the need for lawful authority before such searches could be constitutionally undertaken
- No legislation in Canada for police to employ drug dogs
- In *R. v. M.(A.)* - ancillary powers doctrine to have power to use drug dogs based on RS and w/o warrant
    - Use RS standard instead of RPG b/c much less intrusive
    - Warrantless b/c usually involves quick action and on-the-spot observation making prior authorization impractical

SEARCHES FOR NON-CRIMINAL INVESTIGATIVE PURPOSES

- Common outside criminal realm, with common feature: state's interest goes beyond criminal law enforcement, while individual's privacy expectations are diminished
- Regulatory Searches

- *Thomson* – SCC considered legislation empower competition regulators to compel production of documents w/o warrant
- Legislation upheld under s.8 as being administrative/regulatory in nature
- Minimal expectation of privacy in locations or documents subject to regulation
- Regulatory discrepancies are hard to uncover and using *Hunter* standards would frustrate govt's ability to regulate public interest
- Fact that some regulatory offences provide for imprisonment does not in itself demand for prior authorization on RPG

- Border Control and Public Transportation Networks
  - *R v Simmons* – People crossing Canada's borders have diminished expectation of privacy and thus justified "routine" pat-down and luggage searches without warrants or individualized suspicion (preventing entry of undesirable people)
- Prisons, Schools and Workplaces
  - *Weatherall v Canada* - SCC found legislation authorizing suspicionless frisk searches and prison cells does not violate s.8
  - *R v M (M.*R) – school children have diminished expectation of privacy at school
    - Teachers may conduct warrantless searches if there are RPG to believe that a **school rule** is being violated and evidence of violation will be found upon search
  - *R v M (A)* – Court rejected argument that school safety justified use of drug dogs in the absence of RS
    - Students have now lesser expectation of privacy than others in relation searches conducted by police/dogs
    - Difference b/w police search and principal search is of critical importance and the difference b/w these two cases

DETENTION – CHARTER S. 9

GENERAL

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

- Recall s. 9: Everyone has the right not to be arbitrarily detained or imprisoned
- Recall s.10: Everyone has the right on arrest or detention (a) to be informed promptly of the reasons, and (b) to retain and instruct counsel without delay and to be informed of that right
- Detention and arrest have specific legal meanings but you can't be arrested without being detained BUT you can be detained without getting arrested

- If the detention threshold crossed: (1) s.9 violation if police lack requisite legal grounds to detain, (2) Also triggers informational duties under s.10 – s.10a (right to be informed of charge), and s.10b (right to consult counsel)

- Reasons for objective criteria for determining if detention has occurred:
  - (1) Enables the police to know when a detention occurs and therefore allows them to fulfill their obligations under the Charter and afford individual its added protections
  - (2) Ensures rule of law is maintained so that claims of all individuals are subjected to same standard (all individuals treated equally and have same Charter protections regardless of subjective thresholds)
  - (3) Accounts for the reality that some individuals will be incapable of forming subjective perceptions when interacting with the police

Therens – listed the three categories of detention

PHYSICAL RESTRAINT (#1)

- Usually obvious - arrest or where the police takes physical control of the individual then there is restraint
- In *Grant*, SCC mentioned that any prolonged physical contact could trigger psychological restraint without legal compulsion
- Search belongings or put a person in a car or grab a person
- Physical restraint does not usually apply where the police block or prevent a person's movement in a non-physical way
    - Intimidation may be a factor in finding psychological detention but it doesn't count as physical detention

PSYCHOLOGICAL RESTRAINT WITH LEGAL COMPULSION (#2)

If there is legal penalty for not complying then you have a detention under s.9 and s.10

- Whenever a person may be punished for failing to comply with police directives
- From *Therens* – drivers subject to breath demand samples are detained (b/c they are guilty of a criminal offence if they refuse)
    - When there is punishment for failing to comply with police demand then there is detention
- Issue in *Chromiac* as well – this legal holding was from pre-Charter era and has since been overturned
- In any situation where police pull over a vehicle – b/c it is a provincial offence not to pull over your vehicle when the police tell you to
- Anomaly- in some early cases Court held that at border crossings, brief detention at stops for the purposes of questioning and limited searches did not constitute detention under s.10 of Charter
    - Arguably these cases would not be ruled the same today

PSYCHOLOGICAL RESTRAINT WITHOUT LEGAL COMPULSION (#3)

Test for this type of detention: a person is detained where he or she submits or acquiesces in the deprivation of liberty and **reasonably believes** that the choice to do otherwise does not exist (from *Grant)*

- In obiter in *Therens* – Court held that you could take it even one step further and say that even if there was no legal punishment for failing to comply, it would still be detention and there would still be s.9 violations where a reasonable person believed that they had an obligation to comply
- This was confirmed later in a different case by SCC
- RP is misinformed about the law b/c the choice to do otherwise does exist b/c there is no legal compulsion
- Judges have recognized that there is an underlying sociological and psychological feeling when b/w citizens and police interactions
- Most citizens are not aware of the precise legal limits of police authority. They would rather assume the police is acting lawfully and has authority and comply with the demand rather than risk the application of physical force or prosecution from willful obstruction

No firm way to decide this so Court has come up with guidelines instead (*Grant* factors)

GRANT FACTOR 1: CIRCUMSTANCES OF ENCOUNTER (AS RP EXPERIENCES THEM)

- General assistance/inquiry → focused investigation
    - One side: police is just showing up, they are trying to find out what is going on, not really trying to talk to anyone in particular, not looking for evidence
    - Other end: classic example of police identifying someone who they are pretty sure committed the crime and now they are trying to elicit self-incriminating statements or evidence from them

GRANT FACTOR 2: NATURE OF THE POLICE CONDUCT

- Language used by police – friendly, open ended, optional vs angry, direct commands
    - Also body language

- Contact – prolonged physical contact
- Place – open space or confined, darker alley
- Duration

GRANT FACTOR 3: CHARACTERISTICS OF SUSPECT

- Age – minor and inexperienced or someone older
- Physical Stature
- Minority Status - recognizing fraught relationship b/w police and minorities
- Sophistication – general level of capability and level of experience with police
- Subjective mindset of the police is not directly considered

CASE: *R V LE* [2019] SCC

Grant factors used to come to the conclusion that there was a psychological detention without legal compulsion based on a reasonable person of a similar racial background. The detention was arbitrary b/c it was unauthorized by law (*Collins 1)*. Other reasons for arbitrary detention are due to racial profiling, unreasonable law (*Collins 2)*, and reasonable law applied unreasonably (*Collins 3)*

Facts: Three officers entered backyard private property for no reason (they knew it was private b/c there was a fence). Police proceeded to question 5 boys who were on the premises and doing nothing suspicious. Carded two of the individuals and became suspicious when Le would not show them his backpack. When asked about the backpack, he ran, police pursued and he was charged. They found cash, firearms and cocaine in his backpack.
Issue: There was a detention under s.9, but at what point did it occur? And was it arbitrary?

Analysis (majority) - S. 9 of the Charter

- Detention w/o legal compulsion b/c police had no authority to demand ID. Suspects had no compulsion to answer
- Step 1: Whether claimant was detained, if yes then move to step 2
    - *Grant* factor 1: circumstances of encounter
        - No reason for the police to enter the backyard- not called for any reason, not maintaining order
        - Police didn't give warning and obvious to RP they were being interrogated
    - *Grant* factor 2: Nature of the Police Conduct
        - **Police themselves were trespassing** – suggests detention at this point in time
        - **Language**: stern language used, curt commands, clear orders about required conduct
        - **Physical contact**: none but physical proximity and deliberate police positioning to block exits
        - **Location**: private residence where people expect to be left alone (Court distinguished this from another case that involved questioning on a downtown street)
        - **Mode of entry**: police jumping over the fence suggests urgency and force; coercive and intimidating
        - Judge found that the police would be less likely to just enter and ask what people were doing in a more affluent and less racialized community
        - **Presence of others**: each saw what was happening to the other people and repeatedly watching the sequence of police giving orders and people complying gives the sense that the people are not free to leave
        - **Duration of encounter:** not really a factor in this case
    - *Grant* Factor 3: Characteristics of suspect
        - In the analysis important to note that it is a *reasonable person of a similar racial background* and how they would perceive the interaction
        - **Race and timing of detention**: reasonable person word know how relevant race relations would affect police interactions. Lots of studies showing that racial minorities are both treated differently by the police, and that such differential treatment does not go unnoticed by them
        - **Level of sophistication**: Court doesn't agree with trial judge's finding that more frequent police encounters make it less likely that a person feels "detained". Court finds that Mr. Le's level of sophistication suggests detention arose when the police entered the backyard

        - **Mr.Le's Subjective Perception:** detention is an objective analysis and so his subjective perception should not be given priority
        - **Age and Stature**: his lack of maturity means the power imbalance was even more pronounced. His small stature may make it more likely that he felt overpowered and conclude that it was not possible to leave backyard
- Step 2: Whether detention was arbitrary
    - S.9 – objectives above must give rise to RS, otherwise detention is arbitrary. This case, there was no RS so detention was arbitrary
    - No racial profiling in this case, but detention based on racial profiling is arbitrary
    - Recall *Collin* standards: detention must be authorized by law, the authorizing law must not be arbitrary, and the manner in which the detention is carried out must be reasonable
    - Court in this case said that detention was not authorized by law and was therefore arbitrary
        - Police tried to invoke Trespass to Property Act – but that only exists where police have RPG to believe that someone was trespassing and that didn't happen here
        - Police tried to invoke common law power to detain for investigative purposes – only used when there is RPG to suspect a clear nexus b/w individual and a recent/still unfolding crime. This also didn't exist here

Analysis (concurring):

- *Grant* factor 1: Circumstances
    - Police were looking for someone named J.J. and they had an investigative purpose of carding the individuals – they would know whether any of them was named J.J
    - The police also began with a series of general inquiries rather than an attempt by the police to single out any one particular individual
    - Suggests detention was not immediate
- *Grant* factor 2 : Nature of police conduct
    - Police give their account of evidence that they were pursuing a legitimate investigation when they entered the backyard
    - Young men say this interaction was a racially motivated shakedown
    - After considering the evidence, the trial judge accepted the account of the police
    - Meaning there was no racial profiling, or a mere fishing expedition – police were performing legitimate investigation
    - This judge says that Mr. Le could have walked away from the police b/c their questions were not mandatorily answered – could've walked out of the backyard or walked into the house
- *Grant* factor 3: Characteristics of individual
    - Mr. Le testified that he considered himself free to go until the police engaged him directly
    - Mr.Le's subjective perception cannot overwhelm the analysis but the fact that he thought he was free to go until the police engaged him is telling
    - There was nothing about race brought up before the trial judge – he did not examine racial profiling b/c none of the parties brought it up as a factor
- Judge agrees with majority on step 2 – that the detention was arbitrary

Holding: Majority found that there was a psychological detention without legal compulsion and that the detention was arbitrary based on racial profiling and that the police were unauthorized by law (*Collins 1*). Minority agrees that there was an arbitrary detention but disagrees on the conclusion of the majority based on the *Grant* factors

POWERS TO DETAIN AND ARREST IN STATUTE AND COMMON LAW

DETENTION – STATUTE (DETAIN MOTORISTS FOR TRAFFIC SAFETY PURPOSES)

Reactive and Proactive Stops (STATUTORY DETENTION POWER)

- **Proactive**: fixed point safety stops and roving stops
- **Reactive**: police can stop vehicles if they have RS to believe they are impaired or they observe committing a moving violation against provincial traffic legislation

Checkpoint Traffic Safety Stops (STATUTORY DETENTION POWER)

Randomly checking people at fixed points violates s.9 (arbitrary) but is saved under s.1 (*Hufsky)*

- Type of proactive stop, first recognized in *Dedman*, later codified under *Traffic Safety Act*
- Questioning powers: **sobriety, license, registration, vehicle fitness, plain view, dual purpose**
- Challenged as being unconstitutional in *Hufsky* b/c no degree of suspicion needed to check people and they were checking random people

Roving and Random Traffic Safety Stops (STATUTORY DETENTION POWER)

Randomly pulling people over while roving violates s.9 (arbitrary) but is saved under s.1 (*Ladouceur)*

- Type of proactive stop, came from *Ladouceur*
- Same questioning powers as above: **sobriety, license, registration, vehicle fitness, plain view, dual purpose**
- Police have power to pull over whoever they want – allows them to develop grounds for future probing
- SCC in *Ladouceur* found violation justifiable under s.1 of Oakes test b/c it would enhance deterrence of drunk and unlicensed drivers by increasing threat of detention
    - Prof disagrees, thinks risk of abusive roadside detention was downplayed
- Racial bias is also a factor that leads to abuse of power

DETENTION – COMMON LAW

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

Investigative Detention (COMMON LAW DETENTION POWER)

Police are allowed to briefly detain a person when they RS to suspect that person is connected to a recently committed criminal offence and detention is reasonably necessary in all of the circumstances. This power is not "arbitrary" so Court held it didn't violate s.9

- From *Simpson* – Court used APD to recognize power to briefly detain when police have "articulable cause" aka RS to believe the person is involved in criminal activity
- Then in *Mann* – Court applied APD to recognize investigative detention power
- Reasonable Suspicion – individual police's **subjective belief** to be backed by **objectively verifiable** indications
    - Assessment based on grounds in existence when detention initiated, not *ex post facto* basis
    - Based on "totality of circumstances"
        - Ex. From *Mann*- Presence in high crime area, individual is nervous, person asserting Constitutional rights not to talk, or by walking away, or refusing a search or remaining silent are not enough are not enough for detention on their own
        - Ex. From *Mann* – travelling under false name or running away from police is enough to give RS
    - *Chehil* – "drug courier profile" is unhelpful b/c based on stereotyping and discriminatory factors
        - Base rate fallacy – these factors could describe innocent people but it is not known what proportion
    - *MacKenzie* – what extent police training and experience can be considered in assessing whether RS satisfied
        - Court held assessment should be conducted through lens of reasonable person standing in the shoes of a police officer
        - Dissent in this case: experience could too easily legitimize police abuses (prof agrees)

        - Research also suggests that warrantless police powers (like investigative detention) are more likely to be used against innocent persons than powers that require prior judicial approval
- **Powers**:
    - Detain – how long isn't clear, must be brief and preliminary, less intrusive. Usually where detention occurs, not at police station or back of squad car. Reasonable use of force is possible
    - Question – short questioning, s.10a and 10b must be complied with b/c this is a detention
    - Search - search incident to detention. Safety search – public safety concern (search for weapons during frisk search only – cannot look for evidence)

Roadblock Stops (COMMON LAW DETENTION POWER)

- APD used to give the power to authorize police to stop every vehicle leaving a parking lot – from *Clayton*
- Three factors:
    - (1) Initial detention was reasonably necessary to respond to seriousness of offence
    - (2) Temporally related
    - (3) Geographically related

ARREST - STATUTE

Defining Arrest (distinct from investigative detention) (STATUTORY ARREST POWER)

Hallmarks of are a prolonged loss of freedom of movement and a marked reduction in autonomy and personal privacy

- "Arrest" is one of the two events (other is detention) that triggers rights set out in s.10 of Charter
- Failure to use the word "arrest" is not determinative

POWERS: (1) Use of force and restraint, (2) Search incident to arrest, (3) Identification procedures, (4) Custody and the 24 hour ruls for bail hearing

Citizen's Arrest (STATUTORY ARREST POWER)

- CC s 494(1)(a) - "Anyone may arrest without warrant a person whom he finds committing an indictable offence.**" Warrantless arrest during indictable offence in progress**
- CC s 494(1)(b) – "Anyone may arrest without warrant a person who, on reasonable grounds, he believes (i) has committed a criminal offence or (ii) is escaping from and freshly pursued by persons who have lawful authority to arrest that person". **Warrantless based on RPG if they committed any offence or is being pursued by someone who has lawful authority to arrest them**
- CC s 494(2) – **confers warrantless power to arrest on owners of property if they find someone apparently committing any criminal offence in relation to that property**
    - Unlike ss 494(1), this can be exercised at the moment the offence is committed OR within a reasonable time after the offence is committed if the arresting party reasonably believes that it is not feasible in the circumstances for a peace officer to make the arrest
- NOTE: Both lay citizens AND POLICE can use this power

Arrest for Indictable Offences Based on Reasonable Grounds (STATUTORY ARREST POWER)

- CC s 495(1)(a) - Most common arrest power
- **Police may arrest without warrant based on RPG if they believe that person has committed or is about to commit an indictable (or hybrid) offence**
    - Recall RPG grounds has both subjective and objective component and is higher than RS
- Their grounds must usually be supplied as information from someone else (like dispatch telling them something)

Arrests for Summary Offences (STATUTORY ARREST POWER)

- CC s 495(1)(b) – **authorizes warrantless arrests by police if the find a person committing any criminal offence**

- Doesn't allow police to arrest on basis of RPG someone who was committed a purely summary offence
    - If pure summary offence, then police actually have to see you committing offence (similar to Citizens)

ARREST – COMMON LAW

NO SUCH THING IN CANADA – ALL ARREST POWERS MUST COME FROM STATUTE

EXCLUSIONARY REMEDY – CHARTER S. 24

- Original approach to evidence exclusion came from *Stillman* case and that was based on trial fairness. This approach is no longer used because it was overturned by the *Grant* case
- Section 24(2): Where 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**
    - **(1) Obtained in a manner** – not dealt with in this course
        - Basically any meaningful connection b/w (A) the violation of the charter, and (B) acquisition of evidence
    - **(2) Administration of justice into disrepute** – *R v Le*: "overall repute of the justice system, viewed in the long term by a reasonable person informed of all relevant circumstances and of the importance of *Charter* rights"

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

GRANT FACTOR 1: SERIOUSNESS OF CHARTER VIOLATION (STATE MISCONDDUCT)

<u>Scale of culpability – gauge the extent to which we can assign blame to state actors for their conduct</u>

- Ranging from: trivial, inadvertent, minor violation, reasonable → negligent, non-intentional, unreasonable→ deliberate, intentional
- Good faith: conduct that is both **honest AND reasonable**
    - Special meaning of good faith here which excludes unreasonable or negligent errors by the police. If negligent or unreasonable = not good faith
- Reasonable reliance on standards
    - Police relied mistakenly but reasonably on standards that were in place at the time
    - If the law is in a state of uncertainty, then Court permits some leeway to the police to push the envelope and interpret the law in a way that gives them more power or wider scope
    - If the law is clear and the police should've known then their conduct was at a minimum negligent and not in good faith

<u>Isolated or systemic?</u>

- If conduct is found to be systemic or part of a broader part of misconduct this can increase strength of violation
- Fact that violation was isolated doesn't necessarily mitigate seriousness but a finding that it was a product of systemic problem can aggravate misconduct

<u>Grounds for suspicion</u>

- Used to aggravate state misconduct and goes towards evidence exclusion
- Where police could have conducted a search or intrusion legally b/c they had adequate grounds for suspicion (like RPG) and that they could have obtained a warrant but they did not do so
- In some cases this leads to the finding that the violation was more serious

- Logic here is that if police deliberately or negligently fail to take advantage of a lawful way to obtain evidence then Court considers their conduct to be more culpably

Exigency
- IF situation is emergency where they fear loss or destruction of evidence, Courts may find that subsequent Charter violation was less serious than it otherwise would've been

GRANT FACTOR 2: IMPACT OF THE CHARTER VIOLATION ON THE ACCUSED'S CHARTER PROTECTED INTEREST

Section 9 – protection of liberty, freedom to move, freedom to be free from unwanted intrusions from state actors
- Some are more serious based on duration or level of intrusiveness
- Others are less so, intrusion is more limited duration or involves a lesser deprivation of liberty

Section 8 – protecting privacy
- Greater or lesser intrusions
- Even though there must be a REP before s.8 is violated, in looking at whether to exclude evidence under s.24(2), we can look at strength of REP (may be diminished, like in car searches in a heavily regulated environment or, heighted, like interior of house or strip search

Section 10 – protection against self-incrimination
- Informed of our right to council and that we have a right to talk to a lawyer in the hopes that it might induce us to exercise a right to silence and be more reluctant to say things that will be used against us
- In assessing impact of this violation, look at circumstances and ask whether or not the violation actually infringed to a significant extent to the right against-self incrimination

Discoverability (*Côté)*- situations where unconstitutionally obtained evidence could have been obtained by lawful means had the police chosen to adopt them
- **Applies to all types of evidence**
    - Statement that leads to physical evidence or any other situation
    - If we conclude that evidence was discoverable, that will lessen in those the cases the impact of the violation of the Charter protected interests of the accused
    - Not determinative but one factor to consider
- Question asked: Would the evidence have been found despite the violation?
    - If answer is yes then this moderates the impact on the relevant Charter protected interests
    - Ex. In these cases, when police have RS or ability to obtain warrant lawfully, might help to push towards the inclusion of evidence b/c we will conclude the impact on the Charter protected interests of privacy was minimized by the fact that if the police had acted differently they still would've been able to obtain evidence
    - Even if they had complied with Charter and they had not violated it, they still had RPG and would've been able to get warrant and find evidence
- This is not determinative – fact that evidence could've been obtained lawfully does not completely negate the impact of an unconstitutional search on the privacy interest of the accused, merely one factor that tends to lessen the impact
    - Militating in favor of inclusion

GRANT FACTOR 3: SOCIETAL INTEREST IN HAVING AN ADJUDICATION ON MERITS (FAVOR OF INCLUSION OF EVIDENCE)

(1) Reliability of evidence
- Physical evidence is almost always reliable – in favor of admission
- Statements from the accused – usually in favor of exclusion

- Assumed evidence is reliable
- Categorical question, don't necessarily look at whether this particular piece of evidence is reliable b/c of questions about the way it was analyzed
  - This question goes to fact finding question at trial
- Here we look at the type of evidence at issue, is it generally reliable?
  - If so, we are more likely to admit the evidence

(2) Seriousness of offence

- This factor is not considered
- In *Grant*, SCC said that on one hand, the more serious the offence, the greater societies interest in having an adjudication on the merits and that leads to a finding of admitting the evidence
- But on the other hand, the Court said, the more serious the offence, the more important it is to ensure that charter rights are respected and vindicated and the more important it is for the Courts to dissociate themselves from serious misconduct having a significant impact on the accused's Charter protected interests
- Court used the phrase "cuts both ways", and subsequent courts have either ignored this factor or reiterated what the Court said

(3) Importance of evidence to Crown's case

- This factor is considered
- This is only important if the evidence is reliable, if dubious evidence forms the entirety of the prosecution's case it is likely to be excluded
- More important evidence is to obtaining a conviction, more likely it is that we are going to want to admit it
- And the less important, the more likely we are going to exclude
- SCC has stressed that reliability of evidence and the importance to the Crown cant be thought of as overwhelming or dominating the 24(2) analysis
- Many cases where SCC found that the evidence is highly reliable and is absolutely critical to the prosecution of a very serious offence but nevertheless b/c of the seriousness of the violation and the impact on the accused, the decision has been made to exclude