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ARREST

1. Warrants

a. Warrant in first instance - charge is commenced by police "*swearing an information*" before a justice. Unless D. is already in custody, justice needs to "*issue process*" to compel D. to court. This can be done through summons or warrant. Warrant for arrest will be used where there is a risk of evidence destruction, flight risk, public safety risk - similar to RICES criteria.

b. Warrant other than first instance - issued for other reasons, such as failure to attend court, breach of bail, necessity of public interest. May be *endorsed* which indicates that the accused can be released by the police upon arrest.

2. *Rights prior to detention / arrest* - Officer can ask questions or demand identification. Citizen can decline to answer questions or provide identification. If officer attempts to detain citizen without placing under arrest or making a lawful detention, then they exceed their authority.

3. *Charter protections against arbitrary detention* - enshrined in s.9 of the *Charter,* and consists of two overarching principles:

a. *Conferring rights* - Everyone has right to not be arbitrarily detained or imprisoned; not merely referring to physical restraint; entitlement also to make decisions of fundamental importance free from state interference, ergo also prohibits coercive mental incursions. this section does NOT confer power to govn't.

b. *Mechanism for scrutiny* - means for testing legislation authorizing detention or imprisonment. Must meet minimum standards as prescribed by this section. For instance, arbitrary where detention does not require consideration of rational criteria. Absence of such criteria, or too much discretion in exercise power could mean legis. invalid via s.9

4. *Civilian power to arrest* - may arrest without warrant where any of three criteria are met, s.494 *CCC*. Warrants not applicable to civilians, only state agents

a. Someone is found committing an indictable offence.

b. Reasonable grounds that target being freshly pursued for any offence (continuity).

c. Person found committing criminal offence in relation to civilian's own property.

5. Police power to arrest

a. *Warrantless* - **See Chart #3**

i. *May* arrest without warrant where any of three criteria are met, s.495 *CCC*:

1. *Indictable* - Reasonable and probable grounds to believe person has committed or is about to commit *indictable* offence. *Suspicion not sufficient.*

2. *Current* - Finds person committing any criminal offence.

3. *Other warrant* - r&p belief target subject to arrest or committal warrant.

ii. *Shall not* arrest without a warrant where *any* of three criteria are met, s.495(2) *CCC*:

1. *Offence* - If there is a summary, hybrid, or s.553 *CCC* offence.

2. *Public interest* - If the officer has reasonable grounds to believe arrest is not necessary, not in *public interest*. *Suspicion not sufficient.* Police field test for *public interest*:

a. *Repetition* - prevent repetition of offence

b. *Identity* - ensure that identity of target is established

c. *Continuation* - ensure that the offence is not continued

d. *Evidence* - ensure that evidence is claimed, not destroy

e. *Safety* - protect safety of any person (usually victims or witnesses) / not always applied.

3. *Attendance* - if the officer has no reasonable grounds to believe person won't attend court, or this could be satisfied through appearance notice or summons instead.

b. Warranted - governed by s.495(1) *CCC.* See **Chart #4**

i. *R&P* - Police must have *reasonable and probable* grounds before arrest can be effected. To obtain warrant for arrest under s.495(1), must demonstrate to judicial officer r&p grounds that person committed offence. Without protection, f&d society could become abusive police state. {*Storrey*}

1. *Standard* - subjective belief not sufficient; must be objectively established that reasonable grounds exist, that reasonable person in officer's shoes would believe grounds. {*Storrey*}

2. Not conviction - Police don't have to establish case for conviction in order to effect an arrest, r&p grounds that person committed offence is sufficient. {*Storrey*}

3. Mala fides - Must not be anything to indicate that the arrest is being effected for any reason beyond r&p grounds - racial objectives or personal vendetta undermine arrest. {*Storrey*}

DETENTION - s.9

1. *Overview* - detention or arrest must be premised on legal authority. Prior to *R. v. Simpson*, police had no recognized power to detain short of making a formal arrest. While the police certainly *exercised* such a power previous to *Simpson*, it was not formally recognized. , thereafter the Court recognized a common law power to detain individuals. *De facto* into *de jure*; balance between individual liberty and privacy against effective policing; balance essential to f&d society. *Mann*{Soft}

    a. Massive, sweeping changes which require the enactment of accordant regulations should be the realm of the law maker, not the law interpreter. In this case, however, the matter in question relates to the incremental development and refinement of the rule articulated in *Simpson* (eg. articulable cause), a common law rule, therefore best dealt with by the Courts. *Mann*{Soft}

2. *Definition* - restraint of liberty other than arrest, particularly where this involves D. reasonably requiring assistance of counsel, where they might be prevented from doing so but for the constitutional guarantee (due to belief) {*Thomsen*}

3. *Requirements* - police can detain where there is an *articulable cause* for doing so, relating to the involvement of the detainee in criminal activity. This ensures s.9 compatibility {*Simpson}* Restated as *individualized suspicion* in *Mann*{Soft}.

    a. *Assumption of control* - there is a detention where an officer assumes control over the movement of a person by demand or direction, where this has significant legal consequences and prevents or impedes access to counsel. {*Thomsen*}

    b. *Reasonable belief* - compulsion or coercion can stem from criminal liability in case of noncompliance (eg. refusal to blow), or from the reasonable belief that one does not have a choice as to whether one can obey officer's demands. {*Thomsen*}

4. *Test - Waterfield Test* from UKCA articulates two pronged analysis re: *common law* powers of detention by police officers, where prima facie unlawful interference. *Mann*{Soft}

    a. *Lawful* - interference must fall within the general scope of officer's duty granted by statutory or common law authority; if it does, continue to next phase of analysis. If it doesn't, remedy required (s.24(2)). Duties include preservation of peace, protection of life & property. *Mann*{Soft}.

    b. *Justification* - if within general scope of duty, analysis turns to whether conduct was nevertheless unjustifiable use of powers associated w/ duty. If yes, remedy required (s.24 (2)). If no, search rightful. Balance between police duty and liberty interests at stake. *Mann* {Soft}.

5. *Limitations*

    a. *Individualized suspicion – reasonable grounds* to suspect the individual is connected to a particular crime, and that such a detention is necessary instead of *articulable cause*, as

former provides objective view of totality. *Mann*{Soft}.

b. *Advisement* – detention to be valid, detainee must be advised, in clear and simple language, reasons for detention, in accordance with s.10(a) of the *Charter; Mann*{Soft}

c. *Brevity* - Detention must be brief, and there is no obligation on the part of the detainee to answer the questions of the police. Not all questioning is detention, however. *Mann*{Soft}

   i. ALSO, *counsel* - the right to retain counsel is purposive; cannot be used by police to prolong unduly and artificially a detention which must otherwise be brief, *Charter* s.10 (b); *Mann*{Soft}

   ii. ALSO, s.10 of the *Charter* governs a great variety of detentions, and therefore cannot be restricted to only those of such lengthy duration that a writ of habeas corpus would be effective. {*Thomsen*}

d. *High crime area* - Presence of D. in high crime area is not itself means to detention, except for where this can be related to a specific ongoing or recent offence. *Mann*{Soft}

e. *Counsel* – see right to counsel under admissibility of statements. *Sinclair*{Material}

f. *Ex post facto* - eventual investigative detention occurring does not mean that a detention is grounded the moment the police engage an individual for investigation. *Suberu*{LCBO}

6. Forms

a. *Physical restraint* - literal physical detention. *Therens*{Tree}

b. *Legal obligation* - eg. police signal a person to pull over. *Therens*{Tree}

c. *Psychological restraint* - reasonable person in circumstances would conclude that liberty had been deprived. *Therens*{Tree}

7. *Remedy* - s.24(2)

DETENTION: PSYCHOLOGICAL

1. *Overview* - Suspension of liberty interest where ind. has legal obligation to comply with req. (officer pulls over car), or reasonable per. would conclude state conduct amounts to obligation.

2. *Types* - (*1*) physical, (*2*) psychological via legal obligation, or (*3*) psychological via belief that one's liberty has been restrained at directive of police agents. *Therens*{Tree}

3. Test: three factors to consider when determining whether a reasonable person would conclude that liberty interest had been deprived via significant phys/psych restraint: *Grant*{Teen}

    a. *Circumstances* - Whether circumstances imply that police were making general inquiries, maintaining order, etc., vs. singling out indiv. for focused investigation *Grant*{Teen}

    b. *Police conduct* - Nature of conduct to be considered; language, contact, location of interaction, presence of others, duration of encounter. *Grant*{Teen}

        i. Not realistic to regard compliance with the demands of a police officer as truly voluntary, as even absent common law / statutory authority for demand, as the citizen the demand is directed at will not believe that compliance is optional. *Therens*{Tree}

    c. *Individual* - Characteristics of individual, including minority status, stature, age, sophistication. Relates to power imbalance. *Grant*{Teen}

4. *Requirements* - not every interaction with police is psychological detention for *Charter* purposes, even where one is under investigation, is asked questions, or is physically delayed by police. Objective determination is used to understand when a detention has occurred; when reasonable person believes no freedom to not cooperate with police. *Suberu*{LCBO}

    a. Binnie holds that police commands are coercive, Courts underestimate coerciveness to this end. Police mean what they say when they tell police to stay put. If courts limit consideration of facts relevant to encounter only to those facts made relevant to person stopped; this overestimates resilience of general population, and extends too much power to police. Follows *Therens* - reasonable person likely to err on side of caution, assume lawful authority, and comply with the demands of state agents; therefore must ensure that there are safeguards to protect public.

5. See limitations of detention above

DETENTION: VEHICLE STOP (RANDOM)

1. *Overview* - Random stop for spot check does amount to detention, in spite of the fact that this is of a relatively brief duration.Officer assumed control over movement of D., significant legal consequence and penal sanction for noncompliance. {*Hufsky*}

2. *Demonstrably justified* – Spot check occurs within the context of the legal responsibilities of the officer. But, this procedure has no criteria for selection, ergo is definitionally arbitrary. However, demonstrably justified under s.1, with a view to highway safety. {*Hufsky*}

    a. ALSO, with reasonable grounds, can request driver to submit to roadside screening test; raised by admission of recent consumption, odour of alcohol; not necessarily impairment for roadside screening test. Test is similar for drug use. {*CJS*} **See Chart #5**

    b. ALSO, *safety* – random stops are rationally connected and carefully designed to achieve safety on highways; do not trench so severely on right so as to outweigh legis. purpose. Demonstrably justified under s.1, with a view to highway safety. {*Ladouceur*}

    c. ALSO, police have an s.10(b) duty when asking questions of a driver, or when asking driver to perform physical sobriety tests; but, breach of this duty demonstrably justified, s.1 {*Orbanski*} BUT, *not prescribed,* LeBel and Fish held that these tests should not have been considered under s.1, as they were not written, ergo not prescribed by law. However, common law = prescribed. {*Orbanski*}^

    d. BUT, *arbitrary,* allows officers to stop any vehicle, at any time, without any reason to do so. Total negation of freedom from arbitrary detention within meaning of s.9. {*Ladouceur*}^

    e. BUT, *unlimited*, unlimited right fought for in this instance is very different from right to conduct random checks at a checkpoint, due to oversight and accountability. {*Ladouceur*}^

3. *Not a search/seizure* – Request that the operator of a motor vehicle provide licence and insurance information is not search and seizure - no reasonable expectation of privacy. {*Hufsky*}

4. *Limitations* - Officers can stop persons only for legal reasons, to check licence and insurance, sobriety of the driver, fitness of vehicle; only questions justified are those related to driving related offences, and further intrusion requires r&p grounds. {*Ladouceur*}

    a. ALSO, use of check stops *not entirely unlimited*, must be undertaken with a purpose relating to highway safety - sobriety, licencing, registration, car fitness. {*Mellenthin}*

    b. ALSO, *cannot search*; the check stop is not a general search warrant for every vehicle, driver, or passenger that is pulled over. Searches can only be conducted on r&p grounds, established through, for instance, illicit objects being in plain view in vehicle. {*Mellenthin}*

        i. ALSO, It is a serious breach to conduct a search in the absence of r&p grounds, particularly where this search is adjunct to arbitrary (but justifiable) check stop. {*Mellenthin}*

DETENTION: VEHICLE STOP (ROADBLOCK)

1. *Overview* - *Mann* held that specific nexus required for search incidental to detention, and *Dedman* held that random vehicle stops only valid for traffic safety purpose. As both distinct, power to search via police roadblock must exist through another discrete category. *Clayton* {Roadblock}

    a. BUT, the narrow definition provided by Binnie's dissent undermined Mann, in that Binnie held that comprehensive guidance must come from Fed, not Courts. Majority, however, held that there is a common law power for detention, and that this must be read broadly. Effectively, Abella and the majority hold that it is the purview of the Courts to define the extent of this power. *Clayton*{Roadblock}

2. *Requirements - totality of circumstances* – police can act on reliable info concerning serious firearm offences ongoing or recent, limited to premises in info, sufficiently soon so that police have reasonable grounds to believe perps. may be caught. *Clayton*{Roadblock}

3. *Test* - sets out three requirements for satisfying "reasonably necessary" grounds for search absent the clear nexus required by Mann. *Clayton*{Roadblock}

    a. *Seriousness of offence* - the more serious the offence, increased urgency and risk to public safety means greater latitude afforded to the police. *Clayton*{Roadblock}

    b. *Nature of information* - Information known to police about suspect or crime, including reliability and recency of this information. *Clayton*{Roadblock}

    c. *Appropriate response* - degree to which detention is responsive or tailored to the circumstances, including the geographic and temporal scope. *Clayton*{Roadblock}

4. *Roadblock different from random stop* – unlimited right to random stop is very different from right to conduct random checks at a checkpoint, due to oversight and accountability. Therefore, absent roadblock, can only randomly stop for safety / insurance / licence. {*Ladouceur*}^

        i. See random vehicle stops.

5. *Remedy* - s.24(2), exclusion of evidence garnered through search incidental to detention is common under s.24(2) grounds when police exceed this powerful authority. *Clayton* {Roadblock}

SEARCH AND SEIZURE - s.8

1. *Three types of privacy* - this distinction may not always be helpful, as categories may often overlap. *Tessling*{FLIR}. Remember that a search is any inspection by a government agent.

    a. *Territorial* - seven part test concerning *totality of circumstances* to determine effect on the freedom and dignity of individual. {*Edwards}:*

        i. Presence at time of search

        ii. Possession or control of property searched

        *iii.*Ownership of property or place

        *iv.*Historical use of property

        v. Ability to regulate access of others to property

        *vi.*Subjective expectation of privacy

        *vii.*Objective reasonableness of expectation

    b. *Surveilled* - where recorded, necessarily higher standard - more intrusive than merely being overheard. *Wong*{Gambling}

    c. *Informational* - s.8 protects biographical information which individuals in an f&d society would wish to maintain and control from dissemination. Five part test {*Plant*}:

        i. Nature of information

        ii. Nature of relationship between person of interest and party releasing info

        *iii.*Place where info obtained

        *iv.*Manner info obtained

        v. Seriousness of crime under investigation

2. *Search* - examination by an agent of the state which constitutes an intrusion upon an individual's reasonable privacy interest.

    a. *Warrantless searches* - presumed to be unreasonable unless the Crown can demonstrate reasonableness on balance of probabilities through *Collins.* May require, for instance, that Crown show that the officers operating under *reasonable suspicion* of involvement in crime.

b. *Development* - historically, law re: search and seizure based on trespass; purpose of society was to give people means to protect property. In modern times, The right to be secure against unreasonable search and seizure protects one's right to privacy; may go further than this, but it goes at least this far

3. Reasonableness of search

a. *Collins* sets out criteria for whether a *search* (not a search law) is reasonable - differs from *Hunter*{Business} Test balances privacy interests against the needs of law enforcement effectivity {*Patrick*}. Must be:

i. *Authorized by law* - whether by common law or by statute. Common law searches always warrantless, as there are no common law warrants. Police may require reasonable suspicion in order to justify warrantless searches for auth. by law, for instance. {*Collins*}

ii. *Reasonable law* - whether the authorizing law is reasonable. For instance, should not prescribe reasonable suspicion where reasonable and probable grounds a more appropriate test to justify level of intrusion. See *Hunter*'s gold standard. {*Collins*}

iii. *Reasonably executed* - whether the search itself was carried out in a reasonable manner {*Collins*}

b. Three components required for search *law* (gold standard) to be considered reasonable:

i. *Legal authority* - must identify legal authority under which search is carried out; could be common law (dog sniff, search on arrest) or statutory (breath for DUI). Where provisions do not require a warrant, this is usually read-in, except for where circumstances make a warrant impracticable (eg. imminent destruction of evidence) *Hunter*{Business}

ii. *Prior authorization* – assessment must (1) occur *before* search, (2) be weighed by an impartial party, and (3) must involve reasonable suspicion or r&p grounds (standard varies with intrusiveness) re: evidence of an offence to be justified. *Hunter*{Business}

1. *Reasonable suspicion* – more than mere suspicion, less than reasonable and probable grounds. Required for certain warrantless searches. *Subjective* belief backed up by *objectively* verifiable information.

2. *Probable cause* - information leading to search must relate to an offence, must have reasonable probability of producing evidence relating to offence, evidence must be found at the location being searched

3. Warrants often contain invalid information or sources; seems to be almost encouraged, as authorizing officials suffer no consequences, nor will evidence be excluded if they err.

iii. *Reasonable expectation of privacy* – *Collins* applies only if the location being searched involves a reasonable expectation of privacy. Otherwise, the search isn't a "search", and therefore doesn't require justification via *Collins.* Examining a location *w/o* reasonable

expectation of privacy isn't search, therefore criteria don't apply. *Tessling*{FLIR}.

1. *F&D standard* - appropriate means of judging expect. of priv. Whether police bound to requirements of *Charter* when effecting the search, absent prior auth. *Wong*{Gambling}

    a. *Risk analysis* - no longer the appropriate means of judging expectation of privacy; would allow police to justify search/surveillance based on target "courting possibility". *Wong*{Gambling}

        i. Holds that by *courting observation* of other people, the D. has relinquished *any right* to maintain privacy; not only is this invalid analysis given state of technology, it also equates being overheard with far more intrusive video surveillance. *Wong*{Gambling}

2. *Nature of intrusion* - difference between risk of being overheard, and the risk that the government will permanently record activities on videotape. Latter far more intrusive, technology could allow police to annihilate privacy. *Wong*{Gambling}

3. *Abandonment* - Privacy interest abandoned when items placed in location to which any passing member of the public had access. *Patrick*{Garbage}

4. *Profoundness* - meaning garnered by a canine sniff-test is profound; makes certain that an individual possesses drugs. This is a severe intrusion of privacy in comparison to the mundaneness of data collected via FLIR. *Kang-Brown*{Canine}

5. *Broad and neutral terms* - to avoid *ex post facto* analysis / risk analysis, must assess situation using broad terms; "whether one has the right to privacy while engaged in illegal activity behind closed doors", substitute "whether one has a right to privacy behind closed doors." *Wong*{Gambling}

6. *Location* - this is not a determinative factor; further, while some locations may have a reasonable expectation of privacy in some circumstances, may not in others. *Wong* {Gambling}.

    i. *With* expectation of privacy: *Bodily samples (Stillman); Entry into home (Feeney); Business records (Hunter); Closed areas of car, owner (Belnavis, Harrison); Bus depot Locker (Buhay).*

    ii. *Without* expectation of privacy: *Garbage bags (Patrick); Heat pattern of house (Tessling); Regulatory seizure of documents (Thomson Newspaper); Contents of vehicle, passenger (Belnavis); Girlfriend's apartment (Edwards)*; *licence and insurance info while driving on a highway (Hufsky).*

4. *Seizure* - taking of a thing from a person by a public authority without that person's consent; non-consensual, taken in the context of a reasonable expectation of privacy.

SEARCH INCIDENTAL TO ARREST

1. *Overview* - search incidental to arrest represents balance between safety concerns of law enforcement and privacy/liberty concerns of individuals. As minimally intrusive, the balance struck is rightful - however, this requires that the search be limited to a *frisk* search of person; *Cloutier*{Lawyer}. Scope expanded to vehicles and other domains in *Caslake*{Vehicle}

2. *Requirements* - do not need r&p grounds in order to conduct *frisk* search; this is compatible with s.8. These grounds are only necessary for the arrest to which the search is incidental. *Cloutier*{Lawyer}

3. *Limitations* - relating to consideration of interests and authorities concerning frisk search incidental to arrest.

    a. *Discretion* - Power does not impose duty, and therefore police have discretion to not exercise where they deem fit. *Cloutier*{Lawyer}

    b. *Objective* - Search must be for valid CJS objective, such as for weapon which could endanger, allow escape, or for evidence of crime. *Cloutier*{Lawyer}

    c. *Reasonable* - To be compatible with s.8, searches must be authorized by a reasonable law, and must be carried out in a reasonable matter. For instance, delay and distance do not preclude search from being reasonably incident to arrest, but this does create a (rebuttable) negative inference in the Court. *Caslake*{Vehicle} Search must not be abusive in manner, proportionate to objectives sought and other circumstances of situation. *Cloutier*{Lawyer}

    d. *Onus* - warrantless searches are prima facie unreasonable; therefore, absent warrant, onus on police to prove search reasonable on balance of prob. *Caslake*{Vehicle}

    e. *Purpose* - Not sufficient that purpose for search existed; this purpose must be reason for which the search was carried out (eg. can't search someone for profiling reasons). Further, must be prospect of securing evidence related to the offence for which accused is being arrested. *Caslake*{Vehicle}

    f. *Scope* - search incident to arrest includes items seized, place searched, temporal limits. Main idea: justified only if *purpose* of search related to purpose of arrest. Thus, vehicle can also be searched if related to purpose. *Caslake*{Vehicle}

    g. *Strip search* - R&P grounds for carrying out an arrest does not give police the authority to conduct a strip search; must have additional r&p grounds for strip search itself due to inherent humiliation and degredation involved. If strip search performed in field, further r&p grounds must be established as to why this was not done at the police station; urgency, necessity. *Golden*{Strip}

        i. Fed should amend to require warrants in strip searches. Further, if no judicial authorization for strip search, other factors must be considered: Conducted at police station if possible, ensure health and safety,

conducted by supervisor, same gender of target, minimum number of officers involved, minimum force necessary, private area, quickly as possible, not completely undressed at one time, visual inspection of genital/anal areas without contact, target has option of removing found evidence him/herself, proper records kept for reason of search.

h. *Allowable domains for search incidental* – generally limited in scope via purpose; *Caslake* {Vehicle}

i. *Person* - frisk search *Cloutier*{Lawyer}

ii. *Vehicle* - impounded, closed compartments *Caslake*{Vehicle}

iii. *Strip search* - if r&p grounds for strip search itself present *Golden*{Strip}

SEARCH INCIDENTAL TO DETENTION OF PERSON

1. *Overview* - police do not merely have the power to detain, set out in *Simpson* and affirmed in *Mann*, they also have the power to effect a search incidental to this detention.

2. *Test* - officers don't have carte blanche to search on detention. Once *individualized suspicion* is established, can conduct search for *safety* only. *Mann*{Soft}

    1. *Nexus* - Officer must objectively believe that there is a *clear nexus* between detainee and recent or ongoing criminal offence to detain. *Mann*{Soft}

    2. *Totality* - Search incidental to detention must relate to reasonability w/in totality of circ., eg. that D. could threaten safety of public. *Mann*{Soft}

    3. *Action* - Search must itself be carried out in reasonable manner, eg. soft item does not reasonably imply presence of a weapon. *Mann*{Soft}

3. *Limitations*

    1. *Scope* - can progress beyond a mere pat down if *logical possibility* or r&p grounds suggest that the detainee posses a dangerous item which will elude frisk.

        1. ALSO, *logical possibility* (weaker standard) for determining whether detainee poses a risk to safety of officers, self, or public, justify search for safety. *Mann* {Soft}

4. *Remedy* - s.24(2)

STATEMENTS

1. Three sources of law concerning admissibility of statements made by the accused. Common law confession protections work in conjunction with *Charter* protections, with the former effectively extending the latter. *Oickle*{Arson}

a. *Common law confessions rule*, concerns voluntariness; always effective; does not protect against statements made to undercover agents. *Oickle*.

b. *Charter* s.7 - right to silence, right to not self-incriminate. Effective upon detention / arrest; protects against all statements, with test functionally similar to *Oickle*.

c. *Charter* s.10(b) - right to counsel without delay upon detention. Effective upon detention / arrest; protects against all statements.

STATEMENTS: COMMON LAW CONFESSIONS RULE

1. *Common law rule* - No statement by the accused is admissible into evidence, unless the prosecution can show beyond (1) *reasonable doubt* that it was made *voluntarily* (2) to person in *authority* (3) w/o fear of prejudice, hope of advantage *(coercion / inducement)* {*Boudreau*}.

    a. *Overview* - any circumstance which robs confession of the quality described by the word voluntary renders the confession inadmissible; broad approach, protects integrity. *Clarkson* {Drunk}. Rule stems from fact that statement made by coercion or inducement loses credibility; must seek assurance that statement is truthful. {*Boudreau*}

    b. *Voluntariness test* - voluntariness or veracity can be undermined through an *atmosphere of oppression* even in the absence of a hope of advantage, fear of prejudice, or other coercion. At least five relevant requirements which must be considered in totality for determining whether a confession is *voluntary (voluntariness rule). Oickle*{Arson}

        i. *Authority* - Further, for the *voluntariness* precondition to be applicable, must be made to a *subjective* person in authority; ergo, no protection from undercovers (*Rothman).*

        ii. *Threats / promises* - particularly where veiled; must be strong enough to raise reasonable doubt about voluntariness of confession; must *overbear will. Oickle*{Arson}. Inducement or promise can only undermine voluntariness in certain circumstances Central is whether given strength of inducement, accused's *will was overborne*. Seasoned, savvy criminals less likely to be overborne {*Spencer*}

            1. Represents a departure from *Ibrahim v. The King* (1914) / Boudreau re: voluntariness. {*Spencer*}

        iii. *Oppression* - presence of deprivation of necessities, including food, water, clothing, sleep, medical attention, right to counsel, etc. Aggressive and intimidating questioning for a long period. *Oickle*{Arson}

            1. BUT, *presentation* – this can be set aside where the police engage in a slow, methodical presentation of all evidence against the accused. *Singh*{Persist}

                a. BUT, ignorance of D.'s continued resistance is not vindicated by the fact that he eventually broke down; this proves failure, not success of protections. *Singh*{Persist}^

        iv. *Operating mind* - must be able to comprehend own statements, must not be so impaired via mental disturbance or intoxication to preclude this. *Oickle*{Arson} Crown must show not only that accused understood own statements, but also the gravity and consequences of providing these statements to the Crown. Balances the need of the justice system to probe for the facts (*validity*) against the fairness of the process (*integrity*). Operating mind can also restrict the ability of an accused to comprehend consequences of waiving s.10(b) right to counsel. *Clarkson*{Drunk}

1. When dealing with statements made by intoxicated persons; one reason for excluding is that such statements unlikely to be reliable. Not the only explanation, however. Should also include full extent of operating mind; although, it can be argued that the reliability of a statement may in fact increase when a person does not comprehend the gravity of providing this statement. *Clarkson*{Drunk}

v. *Police trickery* - distinct inquiry, requires consideration as to whether the means used by police would *bring the admin. of justice into disrepute*. A discrete inquiry, unlike the other three which work together; protects the CJS rather than the defendant from police conduct. *Oickle*{Arson}

1. In dissent, Arbour holds that the causal connection and proximity of polygraph means that confession gained as a result inadmissible. D. cannot fight evidence gained as result of failed polygraph exam without admitting to having failed exam, and therefore introducing otherwise inadmissible and incriminating evidence to the trial. *Oickle*{Arson}

c. *Remedy*

i. Failure to inform D. that polygraph inadmissible would not have been sufficient to render evidence inadmissible. Three step process for inadmissibility: *Oickle*{Arson}

1. Excluded if deception shocks community. *Oickle*{Arson}

2. Must have been made to subjective person in authority *(Rothman)*

3. Considered in analysis where relevant to voluntariness. *Oickle*{Arson}

4. Common law confessions rule, evidence *automatically* excluded if Crown cannot prove beyond reasonable doubt that statements obtained voluntarily. *Singh*{Persist}

d. *Other limitations*

i. *Warning* - *Miranda*-style warning that accused is not required to make a statement, and any statement made may be recorded and given in evidence is *helpful*, but *not* necessary. {*Boudreau*}

ii. *Absence of Counsel* - Police can question accused in absence of counsel once accused has retained/advised counsel. Presumes counsel informed D. of rights and exercise. *Hebert* {Assert}

iii. *Detention* - Protections re: confessions only apply once the D. is in custody. Previous to this, protection against subterfuge and right to counsel do not apply. *Hebert*{Assert}

iv. *Statements to non-authorities* - Right to silence does not affect voluntary statements made to legit cell mates. Violation only occurs when Crown acts to thwart rights. *Hebert*{Assert}

v. *Eliciting versus observing* – Undercover officers can be used to observe suspect, but not to elicit statements; but *unsolicited* statements are voluntary by definition. *Hebert* {Assert}

e. *Statements made to undercover informants*

i. *Authority* – Self incrimination only protects from statements made to authorities. If declaration made to person not in authority, then automatically admissible. Subjective test for whether person in authority, requires the target to believe, at time of declaration, that the person the declaration made to had degree of power. *Rothman* {Informer}

ii. *Inducement* - Bringing a guilty person to admit through statement is not improper in and of itself, and should only be repressed where shocking to basic values. Statements inadmissible where reasonable doubt can be raised concerning whether person in authority induced person to make possibly untrue statement. *Rothman*{Informer}

iii. *Disrepute* - Statements inadmissible wherever inclusion of these statements would bring the administration of justice into disrepute. Requires clear connection b/w offending conduct and subsequent confession. Must be shocking to values; not dressing up as a drug addict, but rather dressing up as a prison chaplain to elicit religious confession. *Rothman*{Informer}

STATEMENTS: RIGHT TO SILENCE s.7 (PFJ)

1. *Right to silence* – functionally equivalent test to common law confessions rule; s.7 also applies to undercovers (while detained); the common law confession rule does not protect statements made to authority (while detained). Therefore, has to undermine voluntariness; apply *Oickle* (CLCR). *Singh*{Persist} **See Chart #9**

    a. Obligation - police do not have obligation beyond reasonable oppo. for D. to retain counsel to advise on exercise of s.7 rights; no further facilitation is required. *Sinclair*{Material}

    b. Diligence – Detainee must show reasonable diligence; there must some prudence shown on part of D., will not be protected by wilful recklessness concerning rights. *Sinclair*{Material}

    c. Residuary – All protections granted are still subject to residuary protection offered by common law confessions rule; must be voluntarily given. *Sinclair*{Material}

    d. Waiver - must be determined *subjectively*, and is dependent on whether the detainee is aware that he is speaking with authorities, among other things. *Hebert*{Assert}

    e. Remedy - where defendant can show on balance of probabilities that right to silence was breached by the police, Crown cannot meet voluntariness, s.24(2) remedy. *Singh*{Persist}

RIGHT TO COUNSEL s.10(b)

1. *Right to counsel*

a. *Overview* - Underlying purpose of ensuring s.10(b) rights is to rule out the possibility that the D.'s decision concerning cooperation was made unfreely, uninformed manner. *Sinclair* {Material}

b. *Application* - Right to counsel extended to arrest and detention both. Other circ. in which counsel required: restriction of liberty can lead detainee to believe that they are unable to retain counsel, and therefore duty arises in these specific situations. *Therens*{Tree}

c. *Immediate* - Right to counsel without delay is effective immediately once detention is effective. "Without delay" therefore means immediately in this circumstance. Once detention triggered, police have informational (right to obtain and instruct counsel immediately). *Suberu*{LCBO}

i. ALSO, *no obligation to fund,* s.10(b) does not impose duty to fund duty counsel for those arrested or detained after regular business hours; but police have duty to *hold off* until reasonable oppo. for s.10(b) {*Prosper*}

d. Informational - s.10(b) to be provided with legal advice relevant to right to choose whether to make statements to the police. Not an ongoing, *protective* right; merely informational, ensures that D. knows how to exercise their rights. *Sinclair*{Material}

i. ALSO, right to retain counsel means *more than right to hire* an attorney, but right to receive advice from duty counsel regardless of financial status. SCC creates new duty in s.10(b) informational branch: must instruct concerning existence, applicability of legal aid, duty counsel, to foster full understanding. *Brydges*{Afford}

ii. ALSO, *resources*, s.10(b) informational duty requires that all applicable resources be explained; must also include 1-800 number for duty counsel (even though no obligation to have that service). {*Bartle*}

*iii.*BUT, *not ongoing* - detainee does not have right to counsel *throughout* custodial interrogations. Initial warning, reasonable oppo., and *hold off* are sufficient to satisfy. Additional opportunity only needed where developments make it necessary for s.10(b). *Sinclair*{Material}

1. ALSO, *material change* - right to counsel is resurrected again by *material changes* can arise: new procedures (polygraph, lineup), change in jeopardy (charges), or it becomes evident that the detainee did not understand rights/exercise after initial consult. *Sinclair*{Material}

2. BUT, *coercion* - Binnie holds that police may feel that they know that the D. is culpable, and so put to use any tactics and ingenuity required in order to wear down the resistance of an individual. This

is not an approach to interrogations that the SCC should be endorsing; will certainly lead to involuntary or even false confessions. *Sinclair*{Material}^

3. BUT, *persuasion of hopelessness* - Fish holds that confronted by pieces of evidence, whether real or conjectural, the D. may be persuaded, wrongly, that the maintenance of the right to silence is futile; that the advice given by counsel under previous circumstances is now unsound in light of the "body of evidence" that the police have compiled. D.'s understanding of the circumstances have changed, and therefore right to counsel is once again relevant, as the D. needs to understand rights and their exercise in light of the new circumstances. Access to counsel is a part of this. *Sinclair*{Material}^

e. *Implementational* - must provide with reasonable opportunity to do so. *Suberu*{LCBO}

i. ALSO, test: *Manninen*{Mac's}

1. *Police provide opportunity* – must be provided with reasonable oppo. to exercise s.10 (b) rights. Detainee under police control can't provide own oppo, police must do so. Can't expect *detainee* to provide self with opportunity. *Manninen*{Mac's}

a. ALSO, If police appear to ignore the s.10(b) and right to silence assertions, detainee likely to feel that right has no force and therefore obliged to answer. This outcome must be protected against, cannot incentivize police to ignore rights. *Manninen*{Mac's}

2. *Hold off* – police must cease questioning until above has been fulfilled. Purpose of right to allow detainee to obtain advice on how to exercise rights. To allow such questioning would frustrate the right. *Manninen*{Mac's}

a. ALSO, Questioning before reasonable oppo. for counsel may be permitted *only* where there is urgency concerning obtaining information (eg. safety is at stake). *Manninen*{Mac's}

ii. BUT, if counsel not available (eg. at night) - evidence may be disappearing (eg. in an impaired charge), and ergo limits on D.'s rights (eg. must pick different lawyer) *Sinclair* {Material}

f. *Waiver* - s.10(b) rights can be waived explicitly or implicitly. However, in case of implicit waiver, bar is very high; cannot run contrary to explicit assertions either. *Manninen*{Mac's}

i. BUT, *answering questions not a waiver* of one's s.10(b) rights. Otherwise right to not be asked questions would only exist where detainee doesn't answer them, and therefore doesn't need protection of the remedy; renders right meaningless. *Manninen*{Mac's}

ii. BUT, *operating mind*, must be able to consider consequences of waiving rights; can't waive rights which aren't understood *Brydges*{Afford}

1. BUT, Admission of breathalyzer results would not bring administration of justice into disrepute even if D's rights under s.10(b) were violated as too drunk for

operating mind. {*Mohl*}

2. ALSO, for instance, D. mistaken that inability to afford a lawyer prevented exercise of s.10(b) rights. *Brydges*{Afford}

g. *Residuary* - All protections granted are still subject to residuary protection offered by common law confessions rule; must be voluntarily given. *Sinclair*{Material}

h. *Remedy*

i. s.24(2) - use of self-incriminatory evidence obtained following denial of right to counsel generally undermines fairness of trial, bring admin. of justice into disrepute. *Manninen*{Mac's}

1. BUT, court can *read in prescription by law* (such as requirement for roadside screening tests, which is not explicit in the *Criminal Code*) to send the matter to s.1 rather than s.24(2).

a. ALSO, denial of s.10(b) rights to allow for *roadside screening tes*t; is compatible with s.1; *demonstrably justifiable*, necessary in order to serve detection and deterrence interests re: DWI. {*Thomsen*}

i. BUT, where breathalyzer demand is *not immediate (*"forthwith"), but rather requires a thirty minute *delay* in order for another officer to bring equipment, s.10(b) rights apply.

1. ALSO, s.1 does not apply, as the thirty minute delay is not a violation which is prescribed by law, therefore have to go to s.24(2). Evidence excluded as a result. {*Grant2*}

ii. BUT, requirement to provide a sample forthwith did not require immediate demand if a 15-minute *wait required in order to ensure accurate test* (needs time after consumption of alcohol in order to be accurate). D. not entitled to speak with counsel during this period. {*Bernshaw*}

1. ALSO, Restriction of s.10(b) rights in order to allow for accurate administration of roadside alcohol test *already s.1 compatible*, therefore it is only sensible to expand this to cover waiting period of fifteen minutes to ensure that administered tests will be accurate. {*Bernshaw*}

ADMISSIBILITY OF EVIDENCE OBTAINED VIA LAWFUL BREACH

1. *Demonstrable justification* - s.1 of the *Charter*, allows the government the chance to show that rights are limited or breached by prescription of law (common law or statute), but that this is consistent with the principles of a free and democratic society. Requires application of *Oakes* test. If the violation is not prescribed by law, then the remedy is s.24(1) / s.24(2).

2. *Principles of free and democratic society* - among other things, includes the presumption of innocence; necessarily high standard to violate, with the onus of proof on the Crown, in a preponderance of possibilities. Two part test set out in *Oakes*{PPT}:

    a. *Importance* - objective must be of sufficient importance to warrant overriding a constitutionally protected right.

        i. ALSO, *free and democratic* - concerns must be *pressing and substantial* within the context of a free and democratic society. *Oakes*{PPT}

    b. *Proportionality* - means must not be arbitrary or irrational with a view to achieving objective (another *rational connection*). *Oakes*{PPT}

        i. ALSO, must be carefully designed to carry out objectives with minimal restriction to rights and freedoms (*minimal impairment*, key test). *Oakes*{PPT}

        ii. ALSO, must be proportional to the importance of the identified objective. Questions *whether good effects outweigh deleterious* effects. *Oakes*{PPT}

ADMISSIBILITY OF EVIDENCE OBTAINED VIA UNLAWFUL BREACH

1. *Overview* - if evidence obtained through breach, s.24(2) is used to determine whether this is admissible. s.24(1) deals with issues beyond just evidence - other remedies and bases for complaint (eg. stay of proceedings where trial not timely, for instance). Central question posed by s.24(2) is whether the *admission* of the evidence would bring the admin of justice into disrepute.

2. *Charter tension* – the central tension underlying s.24(2) is between the truth, which is best served by the admission of all evidence, regardless of how it has been obtained, and fairness, the protection of the autonomy and rights of the accused. Court attempts to balance these.

3. *Types of evidence*

    i. *Conscriptive evidence* – occurs where the accused is forced to incriminate themselves by providing a statement, sample, or bodily action. Adverse effect on fairness. *Stillman* {Samples}

    ii. *Derivative evidence* – form of conscriptive evidence; occurs where cause of evidence coming to attention of police is conscriptive evidence. Adverse effect on fairness. *Stillman*{Samples}

    iii. *Discoverable evidence* – evidence which would have inevitably have been discovered via means other than conscription. No adverse effect on fairness. *Stillman*{Samples}

4. *Tests* (always use Grant unless otherwise specified).

    a. *Grant Test* - s.24(2) reformulation; the automatic exclusion in first branch of the *Collins* test not compatible with the requirement under s.24(2): all circumstances be considered.

        i. Three part test from *Grant*{Teen}:

            1. *Seriousness of breach* - Seriousness of *Charter* infringing state conduct; was this good faith / technical, or malicious? Inquiry must determine whether the breach was profoundly intrusive, or on the other hand, technical and fleeting. *Grant*{Teen}

                a. Consider discoverable / non discoverable / conscriptive etc.

            2. *Impact of breach* – The impact of the breach on the rights of the accused; extent of intrusion on privacy. Relates to extent of privacy expectation, for instance. Courts must avoid sending the message that citizens' rights count for little. *Grant*{Teen}

                a. Consider discoverable / non discoverable / conscriptive etc. Consider interests engaged, degree to which these were impaired, expectation of privacy.

3. *Public interest* – Society's interest in the adjudication of the case on its merits; truth, rather than fairness. **See Chart #2 re: evidence types under Grant.**

    a. *Reliability* - if breach undermines the reliability of evidence, then it is more likely to be excluded, eg. coerced testimony is highly questionable. Physical evidence highly reliable. *Grant*{Teen}

    b. *Centrality* - more likely to bring disrepute if disputed evidence constitutes the entirety of the Crown's case. *Grant*{Teen}

    c. *Offence* - can be considered, but cuts both ways (eg. importance of avoidance of unfair trial, whether prejudicial to crown or accused, increases with seriousness of offence - stakes are higher). *Grant*{Teen}

ii. Three principles underly *Grant* in view of the reputation of the administration of justice *Grant*{Teen}:

1. *Maintenance* – relates to the long-term maintenance of public confidence and integrity in the justice system.

2. *Prospective* – Charter breach necessarily means that damage has been done, and so the purpose of s.24(2) is to prevent further damage by either excluding or admitting evidence.

3. *Systemic* – Focused on systemic concerns, and therefore compensation to those whose rights were impinged is irrelevant. These are considered in other branches.

b. *Collins Test* – s.24(2) application established by the SCC in 1987. The issue with this test, leading to its displacement by the SCC, is that the first branch of the test automatically excludes evidence without requiring consideration of subsequent branches. This is why the test was reformulated in *Stillman*{Samples} and eventually *Grant*{Teen}

i. *Fairness* – does inclusion adversely affect fairness of trial?

1. Breached where evidence is conscriptive / derivative, and not otherwise discoverable. *Stillman*{Samples}.

ii. *Seriousness* - how serious was the *Charter violation?*

1. Analysis of whether breach was good faith / inadvertent / technical / emergency (admit evidence) *versus* wilful / deliberate / flagrant (exclude evidence). If search is obtrusive, other means available, and target has expectation of privacy, weighs for latter. *Buhay*{Locker}

iii.Disrepute - does the *exclusion* of evidence bring the administration of justice into disrepute? (negative of central question).

1. Weighs whether the exclusion of the evidence will do more to bring the administration of justice into disrepute than the admission of the evidence. However, should not be used to condone unacceptable conduct. *Buhay*{Locker}

RELEASE FROM CUSTODY

1. Will not occur for s.469 offences; only SCC can release on such offences under s.522.

a. Endorsed warrants - justice has pre-authorized release of the accused. Discretionary; may require PTA (promise to appear) with recognizance (no deposit, no surety), or with recognizance and deposit if living > 200km away; may have conditional undertaking requirement under s.499.

b. Unendorsed warrants - justice has not pre-authorized release of the accused. Same as above, however conditions enumerated under s.503(2), s.503(2.1)

2. Judicial Interim Release Hearing - where one is not released (whether on endorsed or unendorsed warrant). Without unreasonable delay, within 24 hours if justice available, or as soon as possible otherwise. Governed by s.515.

3. Bail

a. Underlying principles of the bail system

i. Presumption of innocence s.11(d);

ii. Presumption of release; tied into the presumption of innocence - if at all possible, person should be released, because the person has not been convicted of any crime.

iii. Relates to s.9 (freedom from arbitrary detention) and s.11(e) (no denial of bail absent just cause).

b. Intersection with Charter

i. There are serious implications to bail; restricts one's ability to communicate, one's freedom. Further, may be onerous conditions (eg. no facility for women on Vancouver Island, therefore have to be shipped to Surrey - away from home, etc. Facilities often have terrible conditions.

1. ALSO, bail is relevant to sentencing; will be given credit for time served (although this depends on the reasons for the denial of bail).

2. ALSO, *Charter rights* extended in s.11(e) are twofold.

a. Right to *reasonable bail.* {*Pearson*} Must be attainable; $50k-$100k for murder; will be tailored to the accused. Must be high enough to be sufficient loss for accused, but low enough so as not to be unattainable.

b. Rght to not be denied bail without *just cause*. {*Pearson*}

c. Three orders concerning *pretrial detention* or release; **See Chart #7**

i. <u>*Detention*</u>, with *just cause* to deny bail; must be proved on balance of probabilities {*Bray*}; reflected in *CCC* s.515(5); s.11(e) of the *Charter*. There are two factors critical to denial of bail; (1) narrow set of circumstances, and (2) must be necessary to functioning of bail system - *not* extraneous factors. {*Morales*}

1. *Onus* - Crown must establish *just cause* to deny bail, except for reverse onus circumstances. {*Pugsley*}

a. ALSO, *offences w/ reverse onus for bail;* s.11(e) of the *Charter* does not specifically mention onus requirement, therefore does not automatically invalidate reverse onus offences. {*Bray*} Shifting onus necessary to create functional bail system, sufficiently precise to accord with *just cause*.{*Pearson*}

i. *On bail* for indictable offence, commits *subsequent indictable offence*; s.515(6)

ii. *Murder*, serious indictable offences; s.469. Only an SCC judge can conduct a bail hearing on a murder charge. PCJ or JP must remand accused for these offences (s.515(11)).

iii. *Breach of bail;* s.524(9)

iv. *Breach of conditional sentence;* s.742.6(2)

v. *Firearms, Gang offences,* and *Narcotics offences*. Narco offenders likely to continue criminal activity or abscond from justice. {*Pearson*}

1. BUT, Does not differentiate between large-scale traffickers, likely to abscond and reoffend, and small-scale traffickers, who aren't. Therefore has disproportionate effect on less serious offenders, undermines just cause, infringing s.11(e). {*Pearson*}^

b. ALSO, regardless of whether onus on Crown or on accused, parties must be given reasonable opportunity to prove or disprove (respectively) *just cause* for detention. {*Pearson*}

2. Three grounds: {*Hall*}

a. *Primary ground* - detention necessary to secure the attendance of the accused in Court. {*Pearson*} s.510(10)(a)

i. Possible means to secure attendance in court:

1. Appearance notice - issued at the scene by an officer, gives a court date.

2. *Promise to appear* – issued by an officer, usually at the station, gives a court date; person has made a promise (eg. obligation, to some degree).

3. *Recognizance issued by police* – issued after arrest, at station, gives a court date. Consists of a promise secured by money / promise of money.

4. *Summons* – issued by Court, tell person to attend court on certain day

5. *Arrest warrant* – issued by Court at time charges laid (information sworn)

6. *Court release* – issued after bail hearing

7. *Detention order* – after bail hearing, Court orders accused detained until completion of matter

b. *Secondary ground* - necessary for safety of public re: *substantial* likelihood of committing offence OR interference w/ admin of justice {*Hall*} s.510(10)(b)

   i. ALSO, for the protection or safety of the public"; narrow, in that it requires *substantial likelihood* to commit offence, interfere with admin. justice; must be *necessary*, not just convenient. {*Morales*}

   ii. BUT, *former "necessary public interest"* portion of the *just cause* test is unconstitutionally vague; due to rarity of pretrial detention in Canada, more pressing issue than even vagueness in *CCC* offences. Cannot have settled meaning, cannot be justified under s.1 {*Morales}*

      1. ALSO, Not acceptable that the *just cause* requirement be justified through the fact that it does not authorize powers of enforcement officials, but rather informs judicial discretion. In either case, it serves whims of government agents due to vagueness, unacceptable. {*Morales}*

      2. BUT, Public interest should be considered valid exercise of power, consistent with s.11 (e)'s just cause requirement; protection of accused from self or others, for instance. Gives parliament the ability to deal with circumstances which have not been foreseen, ergo necessary for Fed to provide for social peace and order. {*Morales}*^

c. *Tertiary ground* – any other *just cause* being shown required to maintain confidence in admin justice. Requires consideration of all circumstances. s.510 (10)(c). {*Hall*}

   i. ALSO, relevant considerations: {*Hall*}

      1. Apparent strength of prosecution's case; {*Hall*}

2. Nature / gravity of offence; {*Hall*}

3. Circumstances surrounding commission (eg. involving firearm?); {*Hall*}

4. Potential for lengthy prison term (eg. involving firearm, minimum sentence of three years or more). {*Hall*}

ii. BUT, phrase "any other just cause" *unconstitutionally vague*; cannot confer broad discretion on judges to deny bail, must be narrow and precisely entailed; will also fail s.1 as a result via proportionality test. {*Hall*}

1. ALSO, phrase "without limiting the generality of the foregoing" also void, as it serves only to *confirm unconstitutional generality* of the preceding statement. {*Hall*}

2. BUT, rest of the requirement is able to stand on its own; separate and distinct basis for denial of bail which is not covered by or considered in the other two categories. "*maintaining confidence in administration of justice*" {*Hall*}

a. BUT, *redundant* - only justification for creation of tertiary ground was to cover circumstances outside of the other grounds; however, absent deficiency in system, extends power too far without pragmatic justification. Denies argument for foreseeability. In order for third ground to stand, bail must not be denied on basis relating to first two grounds - must not be for public safety / securing attendance. {*Hall*}^

b. BUT, third category comes to *represent public perceptions*; Courts should be the bulwarks against tides of public opinion, even where this costs courts popularity; a worthy sacrifice in the name of upholding fundamental freedoms. Public perception should only be relevant to the extent that it is used to measure the threat posed by the accused's release, and not just based on subjective fears. {*Hall*}^

ii. *Release via undertaking* - promise, which is not secured by money. Undertaking to appear, similar to promise to appear, found in s.515(1)

iii. *Release via recognizance* - promise to do certain things, to pay monies if these things are not done. May or may not be secured by deposit or *surety* – person who promises to pay recognizance of accused, or ensure other conditions promised by accused will be fulfilled. This is found in s.515(2).

1. ALSO, In Canada, against the law to pay a surety, so there are no bail bondsmen. The important relationship here is the personal relationship, not the financial relationship.

2. ALSO, *ladder / onus*; Crown must establish why a less onerous type of release is not sufficient; effectively, s.515(2) is a ladder, and under s.515(3) the *Crown* must justify

each advancement up the *ladder*.

a. ALSO, types of recognizance in increasing order of severity:

i. UTA with conditions

ii. Recognizance without sureties or deposit

iii. Recognizance with surety, no deposit

iv. Recognizance with deposit, no surety

v. Recognizance with deposit and with (*or* w/o) surety (never without in practice) (supposed to be used only for nonresident of province, someone who lives more than 200km away; but, commonly used by the Court for those who do not fit this criteria)

3. ALSO, *judicial discretion*, judge can impose conditions where reasonable, including reporting to bail supervisor, abstain from communicating with certain people, or going to certain locations. s.515(4)

d. Discrimination in bail

i. For members of racialized groups, bail is far more likely to be denied than for whites. This is often compounded via intersectionality - racialized women are often proportionately the most victimized by this issue.

ii. *Fast decisions* - bail system requires fast decisions, and conscious or unconscious reference to stereotypes makes this easier to make - justice does not have to predict the likely behaviour of the individual.

iii. Recommendations of the *Commission on Systemic Racism in the Ontario CJS*

1. Officers must explain in writing why accused not released;

2. Explain relevance of any reference to accused's demographic variables;

3. Bail interview officers, funded by legal aid, to prepare accused for bail hearing;

4. Repeal of reverse onus for narcotics, which targets low-level dealers disproportionately;

5. Eliminate irrelevant references to immigration / citizenship status;

6. Ensure cash bail is set reasonably, and not accompanied by intrusive conditions;

7. Increase training for JPs and judges concerning bail, avoid discrimination;

8. Make better use of interpreters at bail hearings, counsel meetings;

9. Development of bail supervision programs.

OFFENCES AND PROCEEDINGS

1. Procedures used to classify offences. **See Chart #8**

   a. *Summary* – less serious offences, up to $5k fine and 6 mo. imprisonment (s.787) - unless otherwise specified. Triable by a JP or a provincial Court judge via s.27; appeal is to Supreme/Superiour/High Court, and only thereafter to the provincial CA.

   b. *Hybrid* – medium, crown can elect whether to proceed summarily or through indictment; deemed indictable until Crown makes election, therefore hybrid offences treated as indictable for the purposes of arrest. Sentence is *first* consideration, with a view to expense of proceedings (eg. if the offender will only receive a six month sentence regardless of type of proceedings, then might as well avoid cost of indictment proceedings). Aggravating circumstances (offender's record, seriousness of the offence) considered in the election

   c. *Indictable* – serious offences; special indictable offences as well, including piracy, murder, alarming the queen (s.469). s.553, less serious indictable.

      i. *Absolute jurisdiction* (of provincial court) / *special indictable - s.553* - those which are less serious, only triable by lowest level of criminal court (provincial court judge, provincially appointed). Accused can not elect to be tried by a higher court or by a jury. No preliminary hearing.

      ii. *Serious indictable - s.469* - most serious, those which must be tried by a superiour criminal court with a jury, unless the AG and the accused consent to a trial by judge alone under s.473.

      iii. *Electable (remnants)* – Even if the accused opts for no preliminary hearing and no jury, the judge can force a preliminary hearing under s.555, and the AG my require trial by jury under s.568 for offences punishable by > 5 years imprisonment.

         1. Provincial judge without jury or preliminary hearing

         2. By SC judge without a jury, with a preliminary hearing

         3. By SC judge and jury with preliminary hearing.

   d. BUT, *Law Reform Commission of Canada* holds that system should be simplified; serious crimes, >2 years imprisonment - preliminary hearing/judge/jury all at discretion of accused. Less serious crimes, <2 years imprisonment - tried by judge alone.

2. *Courts*

   a. Provincial court is lowest, judges appointed by the province.

b. County or district court is the next lowest, and sits under the Supreme / Superiour / High Court; both of these Courts are under judges which are Fed appointed.

c. Provincial Court of Appeal

d. Supreme Court of Canada

3. Judicial Interim Release Hearing - where one is not released (whether on endorsed or unendorsed warrant). Without unreasonable delay, within 24 hours if justice available, or as soon as possible otherwise. Governed by s.515. See release from custody.

4. Preliminary Inquiries

a. No longer automatic – must be requested by Crown or defence under s.536(4). Determine if there is justification for putting accused on trial (s.548) - provincial court judge will do so if there is sufficient evidence to do so. Crown must therefore present evidence; defence does not have to, but can if desired; can also cross examine Crown witnesses.

b. Discovery – relates to second function of inquiry, which helps to serve discovery / pretrial disclosure. Evidence in such inquiries is not subject to Charter rights. Can use prelim testimony to impeach credibility of witnesses present conflict.

c. Direct indictment - AG can use direct indictment to bypass the prelim, or proceed with trial in spite of failure to indict at prelim; this endangers Charter s.7 if combined with lack of pretrial disclosure, preventing D. from making full answer and defence at trial. s.577

i. ALSO, Direct indictment can be initiated *at any point* during the proceedings. s.577

ii. ALSO, used in murders, complex drug conspiracies; can allow for trial of all defendants in one proceeding, rather than giving defence counsel opportunity to split proceedings, or to protect vulnerable witnesses.

5. *Disclosure*

a. Fruits of investigation are *not the property of the Crown* to be used in securing conviction, but the property of the public to ensure that justice is done. {*Stinchcombe*}
Crown has positive and continuing duty to provide disclosure, regardless of whether Crown intends to introduce that evidence, or whether it is inculpatory/exculpatory. Further, duty exists regardless of whether defence counsel requests or is negligent. Overwhelming evidence supports the idea that the Crown has a legal duty to disclose *all* relevant information; not reciprocal with defence counsel either; defence has no obligation to assist the prosecution, and can assume an adversarial role in proceedings. {*Stinchcombe*}

i. ALSO, *ad hoc* approach to disclosure means *uncertainty and unfairness*; it is desirable that discretion and subjectivity be minimized in decisions which concern disclosure. Crown has positive and continuing duty to provide disclosure, regardless of whether

Crown intends to introduce that evidence, or whether it is inculpatory/exculpatory.

ii. ALSO, *negligence irrelevant* – duty exists regardless of whether defence counsel requests or is negligent.Lack of standards means that there is significant variation between jurisdictions and prosecutors concerning disclosure. {*Stinchcombe*}

*iii.*ALSO, *efficiency interest* – full disclosure saves time, prevents disputes concerning the fairness of trial, would occasion an increase in guilty pleas, waiver of prelims, dropping erroneous charges, etc. Lack of full disclosure is not compatible with the right to a fair trial which is enshrined as a principle of fundamental justice and protected therefore by s.7 of the *Charter* {*Stinchcombe*}

*iv.*ALSO, *scope* - All statements obtained from persons that have provided statements to authorities must be disclosed, regardless of whether they will be called by the Crown; if statements not available, notes, and if no notes, must provide contact details and info concerning type of evidence that this person may have knowledge of. {*Stinchcombe*}

v. BUT, discretion - Crown has discretion concerning disclosure; must disclose all material, but must also abide by rules of privilege and other prudent interests, such as the protecting of identity of informants *(informer privilege)*. Therefore, has discretion concerning the timing of disclosure. {*Stinchcombe*}

6. *Onus* - onus is on the Crown to prove offence beyond reasonable doubt. This is consistent with the presumption of innocence in s.11(d) of the *Charter*, as well as security guarantee in s.7. *Oakes*{PPT}.

   a. *Reverse onus* - Onus shifts in certain circumstances, such as under s.8 of the *Narcotics Control Act*; requires D. to prove possession of narcotics not for purpose of trafficking. This was found to be inconsistent with s.1 of the *Charter;* even the reduced standard of proof (balance of prob) could not justify. *Oakes*{PPT}.

   b. *Rational connection* - the rational connection test is used to justify reverse onus; however, results of this test do not accord with reasonable doubt standard - basic facts can rationally tend to prove presumed facts, but not beyond a reasonable doubt. *Oakes*{PPT}.

7. *Issues in plea bargaining*

   a. *Innocence* – in the US, valid to accept a plea bargain from an accused who claims to be innocent, if there is a strong factual basis for the plea, represented a voluntary and intelligent choice among the alternatives available. Not necessary allowable in Canada.

   b. *Pressure* – there is pressure to plea early for defence counsel; however, this may not give accused access to full defence to which they are entitled. Must resist pressure, ensure that full import is given to submissions.

c. *Voluntary* - must not plea someone guilty who is not guilty; must understand nature of allegations, effect of plea, and consequences of plea. Must be voluntary, unequivocal. *R. v. T. (R.)* (ONCA 1992)

8. *Role of counsel*

a. *Crown*

i. *Duties* - Duty of the Crown to make every possible investigation into offence, and if conclusion is innocence or lack of reasonable doubt, duty of the Crown to say so or drop charges. {*Boucher*} Must disclose all material, but must also abide by rules of privilege and other prudent interests, such as the protecting of identity of informants *(informer privilege)*. Therefore, has discretion concerning the timing of disclosure.

ii. *Issues*

1. *Purpose* - Purpose of prosecution is not to obtain a conviction, but rather to present credible evidence of alleged crime, fairly and firmly, without a view to winning or losing. {*Boucher*}

iii. *Prosecutorial discretion*

1. Election - can elect summary or indictable for hybrid offences, latter carrying higher maximum sentence. Can also request preliminary hearing.

2. Charges - number and type of charges laid in relation to a particular incident. Numbers indicate that Aboriginal offenders often charged with increased number of offences for a given incident, for instance.

3. Disclosure - Crown has discretion concerning disclosure; must disclose all material, but must also abide by rules of privilege and other prudent interests, such as the protecting of identity of informants. Therefore, has discretion concerning the timing of disclosure. {*Stinchcombe*}

b. Defence counsel

i. Duties - protect the client so far as possible from conviction excepting Court of competent jurisdiction with sufficient evidence. Regardless of counsel's private opinions, can rely on all available evidence or defences not known to be false or fraudulent.

1. ALSO, Defence counsel must raise every issue, every argument, every questions, regardless of how distasteful, regardless of whether this will help his client's case. {*Rondel}*

a. BUT, this must be tempered by duties to the court; must not mislead the court. Must serve truth. {*Rondel}*

ii. Issues

1. *Limitations* - if accused makes statement of guilt, lawyer bound not to present defence which contradicts this statement. Can only use other defences, involving sufficiency or admissibility of evidence, form of indictment, etc; must be consistent w/ D.'s statements

2. *Aboriginals* - Aboriginal offenders spend less time with their counsel than non-Aboriginal offenders. May have serious issues concerning outcomes; restricts info re: case, available defences, resources available, etc.

3. *Deprivation* - regardless of guilt, accused entitled to acquittal absent proof beyond reasonable doubt; counsel cannot abandon defence and deprive D. of its benefits. *Tuckiar v. The King (1934)*

4. *Evidence* - accused has the right to give evidence, counsel has no right to prevent giving of that evidence. *Tuckiar v. The King (1934)* Must attempt to convince potentially perjurious clients to consequences of perjury, of lawyer's remedies to that perjury.

5. *Privilege* - cannot disclose the privileged communication of the client; paramount duty of counsel is to protect the privilege of that communication. *Tuckiar v. The King (1934)*

6. *Integrity* - cannot make cryptic comments or statements which imply impropriety on the part of one's client.

c. Solicitor-client privilege

i. Exceptions

1. Info must be revealed to demonstrate innocence of accused

2. Communications themselves are criminal in nature (eg. blackmail, threats)

3. Public safety reasons relating to clear and serious risk of serious harm to identifiable persons.

WRONGFUL CONVICTION

1. Primary issues in miscarriage of justice / wrongful convictions. **See Chart #6**

a. Tunnel vision, often resulting from racism

b. External pressure to solve the crime

c. Crown failing to act as minister of justice, seeking convictions rather than justice

d. Lack of disclosure

e. Ineffective defence counsel

f. Evidentiary issues

i. Incl. circumstantial evidence, such as motive / means / opportunity.

2. Issues found in the *Marshall* Prosecution by *Royal Commission*

a. Marshall and Seale were not in the process of attempting to rob Ebsary and MacNeil, but rather had simply solicited money - panhandled, basically. Court concludes that it was likely Ebsary's volatility which led to Seale being stabbed. There was no evidence to suggest that Marshall stabbed Seale - other than the conflicting statements given by Chant and Pratico, which were influenced by leading behaviours undertaken by the detective investigating the case (leading questions).

b. Counsel did not disclose important evidence, including the conflicting statements given by Chant and Pratico to the defence. Role of Crown is not to ensure conviction, but rather to see that justice is done - role violated by Crown in Marshall's case. Further, the defence did not request these documents, and in other ways did not provide Marshall with competent defence. Counsel were considered to be competent in the legal community at large, and so it was assumed that Rosenblum and Khattar believed Marshall was guilty, and not worth their efforts due to native ancestry.

c. Judge made errors in law, particularly with a view to evidence. Allowed Marshall's "I hate cops" tattoo to be admitted. This was not relevant to the matters at hand, but was extremely prejudicial to Marshall. Allowed Seale's parents to testify, although their testimony was not required or relevant. When Pratico admitted to Marshall's father that his testimony had been influenced by the investigating detective outside of the Court, this evidence was not admitted until a considerable time had passed.

d. The Court of Appeal did not address the errors in how Marshall's case was handled at trial. They have a duty to do so - as the SCC will rarely, if ever hear an ordinary criminal case, provincial CAs are effectively the highest Court in which such cases will be heard. Therefore, while burdensome, they must address all issues, regardless of whether these have

been brought up by counsel, in order to ensure that justice has been served. When Marshall's conviction was overturned, he was released on bail, and therefore was ironically deprived of support which would have been afforded him had he been guilty.

e. Commission recommends establishment of independent review concerning wrongful convictions, with investigative powers to assist those whose experiences reflect Marshall's. Where necessary, independent judicial inquiry into compensation is also appropriate. Increase representation of Aboriginal and Black people in the legal system and in law enforcement. Alter existing structures to be more accommodating to the needs of Aboriginals, and further establish separate system of justice for Aboriginals which will gradually take over the administration of justice for those people.

f. Holds that FN criminal courts be established to hear summary conviction offences on reserves. Courts would not be bound by the *Charter*; should reflect the fact that justice system should be recognized as a component of self government.

3. Issues relating to inclusiveness

a. Oath - Swearing on a Bible is a Christian practice which is not relevant to members of other groups, or the non-religious. Current measures require that such people declare their "deviation" from the Canadian norm. Should be changed so as to recognize secular promise, or alternately to recognize oaths from all of Canada's cultural groups

b. Exclusion - The pace, technical language, and formality of the Courts can exclude some members (and many citizens, arguably) from the legal process. Requires procedural changes and institution of cultural interpreters. Must also provide language interpreters where required. Court must also change to reflect the diversity of the community it serves, whether speaking to composition of judge, jury, lawyers, etc.

c. Neutrality - Judges can never be neutral, it is accepted and desirable that they will use their own experiences, where relevant, as a part of the decision making process. {*S. (R. D.)*}

i. Stereotyping – Courts critical of stereotyping people into predictable behaviour patterns (eg. prostitution does not constitute consent in sex assault cases) - therefore, not desirable to judge officer's actions by TJ's stereotypes. Error in law, as TJ based her conclusions on such stereotypes rather than on the evidence of the case. {*S. (R. D.)*}

ii. High bar - there is a high bar which must be met to satisfy the reasonable apprehension of bias. {*S. (R. D.)*}

iii.Linking actions – The TJ did not relate the general comments concerning white police officers to the specific actions, if the TJ had done so, this would not have been in error. {*S. (R. D.)*}

d. References to race or national origin common in legal proceedings

i. *Bad apple* - involves references to racial or national origin in an obviously hostile manner, or one which implies that such membership will be met with Court bias.

ii. *Hidden agenda* - comments which do not overtly invoke hostility, but are nevertheless designed to elicit a particular reaction or thought process in judge or jury

iii. *Apparently benign* - comments which are aimed at generating sympathy through reference to racial or national origin.

e. Differentiate between Western and Aboriginal concepts of justice

i. *Western* - controls actions considered harmful to society by punishing wrongdoers, make that person (and others) conform in order to protect members of society. Not guilty, even where act committed, seen as proper response to allegations; not dishonest, as the burden of proof is on the state in order to show that accused committed misconduct.

ii. *Aboriginal* - restore the peace and balance in community, reconcile accused with own conscience and with the people who have been wronged through criminal activity. Denial of a true allegation is seen as dishonest, a repudiation of fundamental and highly valued standards of behaviour. Do not have concepts such as "guilty" or "not guilty".

f. *Capital punishment* {*Rafay}*

i. Error will occur within the context of legal systems. The issue with capital punishment is that it removes the ability to rectify and compensate for error.

ii. Canada abolished the death penalty completely in 1998, in accordance with the idea that miscarriages of justice do occur, and death is not a proven deterrent.

iii. The avoidance of conviction of the innocent is a fundamental principle of the CJS, enshrined in the Charter and in procedural rules concerning trial fairness.

iv. A fair trial alone is not sufficient to ensure that the correct verdict has been reached. Even in such circumstances, miscarriages of justice have occurred.

v. In the US, the problem is exacerbated by fact that fair trials are impossible (public defender woefully unprepared), errors are manifold, system appears to target demographic groups (racially, geographically, socio-economically).

vi. DNA is not a major factor, only occurs in a small number of cases. Issue is that wrongful convictions are being overturned for far more elusive frailties, which may never actually be eradicated from the criminal justice system.

vii. Amendment to the CCC in 2002 holds that once appeals have been exhausted, accused can bring matter before Minister of Justice, who can order new appeal; discretionary, will be carried out where minister believes justice miscarried.

viii. There is only one kind of acquittal in CJS: Crown fails to prove beyond reasonable doubt. No such thing as "factually innocent" - such verdict would cheapen the nature of "not guilty" verdicts.

1. There can be only one class of innocent people in the CJS.

g. Sophonow

i. Key factors leading to miscarriage

1. Police did not test twine to identify with certainty the manufacturer. Such a test could have been performed for a cost of $100, due to the presence of a tracer element placed by manufacturers in twine. The assumption by the police that the twine was made by a manufacturer that sold to BC Hydro led to suspicion of Sophonow's involvement.

2. Officer took notes from interview with Sophonow, but these notes were not verbatim - they paraphrased Sophonow's words. They did not establish that Sophonow had definitely been in donut shop ("could" have been there).

3. Other factors include weakness of eyewitness interrogation, use of jailhouse informants (Sophonow apparently showed an informant how he locked the door of the donut shop, which was compelling evidence). These ultimately frail pieces of evidence were relied heavily upon by the Crown in securing conviction.

ii. Recommendations

1. Interviews must be tape recorded, or videotaped where possible. This is not an onerous requirement, but an easy and inexpensive one to implement. Given the strong likelihood of transcription errors or misunderstanding of statements, it is highly desirable that there be a reliable recording of statements by the accused. Interviews which are not taped should not be admissible, they are too dangerous.

2. In eyewitness identification, there should be an officer present who has no knowledge of the case nor of the presence of the suspect in the lineup. Proceedings should be audiotaped, or if possible videotaped. Witness statements produced as a result of the lineup should be recorded verbatim and signed. Witness should be escorted from the building following lineup to prevent contamination by other officers. Lineup fillers should match the description of the suspect given by the witness (and the actual suspect) insofar as possible. Witnesses should be questioned concerning the level of accuracy they feel is present in their identification. Lineup

should have a minimum of ten people.

3. Photo pack should also have ten subjects, resemble suspect, be recorded, followed by escort from the building, etc. Officer conducting should not know who the suspect is, what he looks like, whether suspect present in photo pack, and make this known to witness. Subjects presented sequentially and not as a package. If possible, witness interviews, lineups should be carried out by a police force other than the one carrying out the investigation itself.

4. At trial, judge should inform concerning frailties of eyewitness identification; confidence of witness does not correlate well with accuracy. People can make honest mistakes, doesn't require lying. Evidence concerning eyewitness identification from experts should be admitted to ensure fairness. Identifications which progress from tentative to certain should be met with caution, and TJ should mention that wrongful identifications have led to wrongful convictions.

5. Police should ensure that they avoid tunnel vision, ensure that they do not falsely eliminate alternate suspects. Can be carried out by presenting training courses and lectures on the subject.

6. Police should give their notebooks to the municipality upon retiring or leaving the force to ensure that they are not lost or destroyed. At time of Sophonow's conviction, notebooks were kept by officers themselves, and in this case led to the unfortunate destruction of critical evidence which would have aided trial.

7. Evidence should be stored for 20 years from date of last appeal to ensure that they are not destroyed within a period of time in which an appeal (eg. through ministerial discretion) could occur.

8. Where possible, tests should be undertaken in order to ascertain the manufacturer and other aspects of material which links a suspect to a crime through geographic location. Duty to perform required test lies with the Crown, and absence of such tests is a serious omission. Causes the location or provenance divined from such material to be ruled inadmissible.

9. Crown has a duty not to raise issues which will be highly prejudicial to suspect where there is little evidence to support these issues. Conviction could be overturned where such misconduct is found. Further, Crown and Defence bar should meet with each other in order to dispel the atmosphere of suspicion separating the two.

10. Alibi defence should be disclosed within a reasonable period of time following Crown disclosure. Police must ensure alibi defence is credible through investigation, take same care with alibi witnesses that they would with suspect. Should not be cross examined or dealt with discourteously. Further interviews of such witnesses should be conducted by someone other than investigating officers.

Should be videotaped or audiotaped where possible.

11. Jailhouse informants should not be able to testify as a general rule; exception in rare cases (eg. kidnapping, where informant knows location of victim). Videotaped or audiotaped, advised of consequences of providing false statements. Must be weighed with a view to whether info could only have been known by the guilty party, detailed, significant and revealing, confirmed by police investigation to be accurate, subject to voir dire for admissibility. Only one informant should be used, jury should be instructed concerning the limitations of such evidence.

12. Create independent entity which can efficiently and quickly review allegations of wrongful conviction.

FUNDAMENTAL PRINCIPLES

1. *Presumption of innocence* - morally innocent should never be convicted, morally guilty must be punished. Carried out via the presumption of innocence. Protection of individual rights more important than the protection of the state from disorder. *Frey*{PeepTom5}.

    a. Canada is a particularly harsh country as it concerns crime; one of highest rates of imprisonment of young people (2x that of US), and YOA led to steep increase in proportion of youth sent to institutions. Canada also has a lower proportion of violent crime than other industrialized nations.

2. *Components* - All criminal offences include both an act and an intention - the *actus reus* and the *mens rea*. Usually overt act, not omission (but not always - failing to care for child).

3. *Parties* - not only person who actually carries out the offence, culpability can spread to other people as well (those who conspire to commit the crime, etc.) - perhaps same level of offence

4. *Components* - test set out in {*Margarine*1}: (1) prohibition, (2) penalty, (3) target of public evil. Affirmed in {*Morgentaler*3}: public order, safety, health, and morals are some grounds re: (3).

5. *Predetermined* - law must be fixed and predetermined to be valid for criminal purpose. This is why common law no longer tenable; underlying principles uncertain. *Frey*{PeepTom5}.

6. *Morality* – crim. law can be used to prohibit activities unrelated to public morality. {*Firearms*4}

7. *Efficacy* - not purview of the Court to deal with efficacy of laws, only validity. {*Firearms*4}

8. *Growth* - crim law is not frozen in time; can expand to accept new offences (via legis) and new defences (via common law and legis). Defences must be allowed if merited for compatibility with the presumption of innocence. {*Amato*6}.

DIVISION OF POWERS

1. *Enumerations* - s.91(27) grants the Fed direct power over criminal law, and POGG used for domain over narcotics (CDSA). s.92(14) gives the PG power to prosecute provincial offences.

2. *Centralization* - criminal law division of power shows theme of centralization; is a plenary power, reflects SJAM's wish to avoid fragmented criminal law from the US. PG law which perceived to be criminal will be struck down as *UV. Switzman*{Communist2}

    a. Lack of coherency between states, can't expect citizens to understand their rights. Also weakens the law - no US federal legislation can stem flow of guns from lax gun control states to states with strong gun control.

3. *Regulatory offences* - non-criminal offences; can be created by the Fed or the PG, under their respective powers. Fed has *Shipping Act*, etc. while the PG covers *Motor Vehicle Act,* etc.

4. *Policing* - Fed responsible for policing national security/national policing. PG responsible for provincial (PQ, ON, NF) municipal forces (every province), often contract this out to RCMP.

5. *Incarceration* - Penitentiaries are Fed responsibilities, two years or greater; also National Parole Board. Prisons are PG, two years or less. Cover probation and parole officers in some provinces

6. *Prosecution* - the Fed has exclusive right to prosecute Fed offences; PG can only prosecute provincial offences, or where the Fed has delegated power to the PG, as done in s.2 of the *CCC.* However, for terrorism or offences committed outside of Canada, concurrent jurisdiction

7. *Courts* - Feds can legislate crim procedure, appoint judges to superiour PG courts, run Fed courts. PG controls asylums, appoints judges to lower courts, control civil procedure.

8. *Punishment* - both Fed and PG can impose imprisonment and fines as punishment.

COMMON LAW OFFENCES & DEFENCES

1. *Common law offences* - Other than contempt of court no longer valid. Recognized in *Charter s. 9*, previously struck down in *Frey*{PeepTom5}.

    a. The uncertainty which underlies common law offences is not appropriate given the stakes involved with crim offences. Must be codified to guide behaviour. *Frey*{PeepTom5}

    b. Codification not required for offence to be constitutionally valid. *Contempt* is mentioned in s.9 of the code, and specifically protected as a result. {*UnitedNursesOfAlberta*8*}*

    c. It is common for the *actus reus* and *mens rea* for an offence to be defined at common law via interpretation / application; unless vague or arbitrary, is valid {*UnitedNursesOfAlberta*8*}*

2. *Common law defences* - as well as excuses, and justifications are still valid via s.8(3) of the Charter. Not just existing defences, s.8(3) allows for creation of new such defences. {Amato6}.

    a. Creation of new defences reflects entitlement of citizens to fair trial; also the fact that certain circumstances too rare to come before courts / contemplation of legis. {Amato6}.

    b. Court must also allow common law to define principles which set out boundaries and explanations for these defences. *Jobidon*{Barfight7}

MORALITY

1. *Overview* - crim. law can be used to prohibit activities unrelated to public morality: morality and the law are not coexhaustive. {Firearms4}

2. *Reasonable apprehension* - Nature of criminal laws, prerequisites for criminal law, based on reasoned apprehension of harm. *Malmo-Levine*{Pot9}

3. *PFJ* - three-part test for determining what is and what is not a principle of fundamental justice *Malmo-Levine*{Pot9}:

    a. *Principle* - the rule must be a legal principle (eg. in this case, the harm principle is not a legal principle, but expression of state interest)

    b. *Consensus* - for which there is significant societal consensus that it is fundamental to the operation of our legal system (there is no consensus in this case - some hold that law is an expression of morality)

    c. *Standard* - Identifiable with sufficient precision to yield a manageable standard (eg. principle does not articulate or elucidate re: degree of harm, target of harm, nature of harm).

4. *Theories*

    a. *Harm principle* - limit for crim law suggested by JS Mill, state only has right to intervene or limit freedom of a citizen where action being limited would have resulted in harm to another. Exception for weak, vulnerable, and young: those requiring care of others must be protected against their own actions AND external injury. Troubled by consideration of cruelty to animals, organizing prostitution; not necessarily cruelty to others.

        i. *Malmo-Levine* re: harm principle: harm is a prerequisite for *crime* (eg. by reasoned apprehension, and where this leads to imprisonment) harm is *not* a principle of fundamental justice in Canada - does not meet PFJ criteria. *Malmo-Levine*{Pot9}

            1. *Simple* - Harm not sufficiently nuanced to deal with challenges required to operate a complex state system. *Malmo-Levine*{Pot9}

            2. *Absence not a barrier* - presence of harm is something to be restricted, this does not mean that the absence of harm is a barrier to legislation in a particular domain. Some crimes rest on *offensiveness*, not harm; bestiality. *Malmo-Levine*{Pot9}

            3. *Paternalism* - principle implies that harm to self should not be legislated other than for the weak / vulnerable - but this is desirable to fulfill paternalistic goals - to save us from ourselves (eg. seatbelts). Critical in a socialist society, individual harms are borne collectively (eg. due to health care). *Malmo-Levine*{Pot9}

4. DISSENT: harm essential whenever the state resorts to imprisonment as a penalty for violating prohibition; this is a key to *Charter* compatibility - the highest form of restriction of liberty (imprisonment) must be reserved for those who, at minimum, infringe on the rights or freedoms of other individuals or otherwise harm society. Self harm with a punishment of imprisonment is not compatible with the *Charter*.

ii. *Labaye* affirms test established in *R. v. Butler* (SCC 1992), and uses harm principle as measure of objectivity (previous test too subjective). Test based on what people would allow others to be exposed to based on harm of exposure. Measures extent to which exposure causes antisocial behaviour (*nature*) incompatible with proper functioning (*degree*), est'd. beyond reasonable doubt. *Labaye*{Bawdy10}.

1. Recognizes 3 types of harm: *Labaye*{Bawdy10}.

   a. *Confrontation* - harm to those whose autonomy and liberty may be restricted by being confronted with inappropriate conduct (eg. affects position of women in society). Must involve a real risk that the way that the affected live will be adversely and significantly affected by conduct. *Labaye*{Bawdy10}.

   b. *Predisposition* - harm to society by predisposing people to act in a manner which is incompatible with proper functioning (eg. if bawdy house conduct trains people to mistreat women). Real risk of this effect must occur - link must be established between conduct -> attitudes -> behaviour. *Labaye*{Bawdy10}.

   c. *Individual* - physical or psychological harm to those participating in the conduct (eg. if women are mistreated in the bawdy house). Must show that *harm* has occurred, and not disgust for conduct involved. *Labaye*{Bawdy10}.

2. The degree of harm required by indecency is necessarily high in order to justify criminality / sanction. *Labaye*{Bawdy10}.

   a. *Tolerance* - Canada is a diverse, vigorous society, and therefore capable of tolerating a high level of conduct before this will be able to interfere with the proper functioning of our society. *Labaye*{Bawdy10}.

   b. *Judicial responsibility* - In consideration of whether an article or conduct is compatible with proper functioning of society, judges must account for danger of prejudice, basis of evidence within full context, and articulate the factors that produce judgments. *Labaye*{Bawdy10}.

   c. *Risk* - the more extreme the harm, the lower the degree of risk required to permit use of criminal law sanctions (eg. imprisonment). Terrorist attack risk is small, but potential impact is tremendous, so criminal law is justified here; same principle of proportionality applies. *Labaye*{Bawdy10}.

3. DISSENT: Bastarache holds that justification for criminal law cannot be reduced to single factor; relies on *Malmo-Levine*{Pot9}. Reflects prohibited acts which are not harmful but offensive. Context must be considered in considering indecency. Each case must be assessed in light of its own

circumstances, and avoid setting bar too high. *Labaye*{Bawdy10}.

b. *Wolfenden* - function of law to preserve public order and decency, protect citizen from offence and injury, and in particular, to prevent the exploitation and corruption of the young, weak, and vulnerable. This is limit of crim law. Homosexual behaviour b/w consenting adults in private should't be considered a criminal offence.

c. *Devlin* - law flows from a moral source, Christianity in English society. Further sources are now required, as citizens are entitled to disbelieve the Christian doctrine, but house would be brought down if pillars built based on Christian blueprint, were removed.

   i. *Social coherence* - Society will fail if there is no agreement about what good and evil is; this is what bonds people together. Laws maintain and strengthen moral principles.

   ii. *Minimum* - laws are minimum obligation. Cannot simply to avoid punishment and be considered worthy, and so the law is a baseline of behaviour. Must exceed compliance.

   iii. *Consent* - one can't consent to illegality being inflicted on oneself, even where offence has no effect on the public. Closed door immorality will lead to societal collapse.

   iv. *Clapham omnibus* - reasonable person used to determine what is criminal; if causes intolerance, indignation, and disgust, then act is wrongful.

   v. *Change* - principles which underly society are unchanging, however the extent to which these generate intolerance/indignation/disgust change over time, so law must change.

d. *Hart* - many actions taken in private will not subvert the moral order, cause societal collapse. Failing to prosecute homosexuality leads to change in law re: homosexuality, nothing more. Devlin's view concerning measurement is incomplete; must also ensure that the feelings elicited by an activity are not rooted in ignorance, superstition, misunderstanding (eg. witchcraft).

e. *Feminist* - individual rights are more often infringed by other individuals than by the state. The legal system must not only be able to protect rights, but also to determine which of two conflicting rights to protect in disputes between individuals. Also, must ensure that in determining what is criminal, scope not so narrow so as to avoid social harm (eg. harm caused by misogyny).

SENTENCING

1. Sentencing guidelines are provided in s.718 of the *CCC:*

   a. *Objectives* - at least one of which should be fulfilled, all considered in sentencing offender. These are *denunciation*, *deterrence* (gen., spec.), *separation* of offender from society (protect public), *rehabilitation*, *reparation*, promotion of *responsibility* / *acknowledgement* of harm done. At Discretion of judge on case by case basis.

      - Deterrence has been shown empirically to be only minimally fulfilled through sentencing guidelines. In fact, where potential offenders are deterred by the criminal justice system, it is the risk of apprehension and not the severity of sanctions associated with an offence that are effective deterrents.

   b. *Fundamental principle* - sentence must be proportionate to the gravity of the offence as well as the responsibility of the offender. s.718.1. Imprisonment for marijuana simple possession would be demonstrably unfit barring extreme circumstance. Must be fact, not mere availability of imprisonment however. *Malmo-Levine*{Pot9}

   c. *Parity* - similar offence under similar circumstances by similar offender requires similar sentence. *s.718.2.(b)*

   d. *Totality* - consecutive sentences should not combine to be unduly long or harsh.s.718.2(c)

   e. *Restraint* - custodial sentences should only be used where less restrictive sanctions would not be appropriate to the severity of the crime. s.718.2.(d)

   f. *Abuse of minors* - deterrence and denunciation will be the primary considerations in cases involving the abuse of a person under 18 years of age. s.718.02

   g. *Aggravating factors* - bias, prejudice or hate towards specific groups, abuse of spouse, minors, abuse by person of authority, terroristic and organized crime are considered factors which aggravate offence, and therefore require stricter sentencing. s.718.2(a)

   h. *Aboriginal* judges must consider all non-custodial sanctions reasonable to circumstances of *Aboriginal* offenders, attempt to find a sentence consistent with restorative justice, and pay attention to background factors when deciding on sentences. s.718.2.(d, e)

2. Theories of punishment, including objectives and means

   a. *Utilitarian* - prevent crime, minimize harm, maximize hedonism through deterrence, incapacitation, and rehabilitation

   b. *Retributive* - objective is to maintain support for the law in the public, achieved by eye for an eye, *lex talionis* style.

c. *Expressive* - or communicative, ensure that public understand social norms through denunciation, censure, and education.

d. *Restorative* - objective is to maintain a peaceful society through reparations, healing, acknowledgement of harm.

3. Length of sentence - mitigating and aggravating factors also relevant. **See Chart #1**

a. *Determination* - via judicial discretion, to great degree - the code does not offer extensive guidance concerning when custodial sentences should or should not be applied, except in the case of aboriginal offenders.

b. *Maximum* – maximum sentences are set for all offences, although these tend to be extremely high so as to be able to account for the "worst case". Certain crimes also have minimum sentences (firearms offences, DUI offences).

4. Sentences applicable to criminal offence

a. *Absolute discharge* - guilty, but no conviction registered, no criminal record and no sentence. s.730

b. *Conditional discharge* - criminal conviction, conditional on completion of a probation warrant, that the offender comply with the requirements of such a warrant for a period of up to three years. s.731(2)

c. *Suspended sentence* - criminal conviction, sentence is suspended due to the probation; conduct during probation will determine whether the sentence applies. Can be re-sentenced if violated, or charged w/ breach probation. s.731(1)

d. *Fine* - maximum of $5k on a summary offence. Cannot be fixed by law unless the offender has the means to pay. s.734

e. *Conditional sentence order* - jail sentence served in the community, accords with the principle that imprisonment should be used as a last resort. Less than two years, no minimum sentence offences allowable. Continually narrowed through legislation (eg. no longer applies to theft over, violent offences, etc.) s.742(1)

f. *Imprisonment* - from one day to life, can be served intermittently (eg. on weekends) - intermittence increasing with minimum sentences. Less than two years, provincial prison, more than two years, federal penitentiary.

g. *Ancillary orders* - driving prohibitions, firearms prohibitions, DNA provision, sex offender registration (sex offender information registration act), restitution, animal cruelty related orders, etc.

5. *Gender* issues in sentencing

   a. *Archetypes* - lenient and chivalrous with those who fit the majority conception of female role (eg. two-parent family, dependent, gentle, compliant). Women who do not fit this mould treated in a manner similar to men. Women are more likely to be detained "for their own protection" for non-criminal administrative offences: judges feel that women cannot protect themselves. Judges want to "fix" misbehaviour, often treat young women in a harsher manner than they would male young offenders.

   b. *Harshness* - same sentences are harsher for women than for men. Women are more likely to be below the poverty line: fines are more onerous. Institutions for women are fewer, and so further from home community, fewer programs and activities; no separation concerning risk of offender. Women more likely to be victims of abuse, so prison more likely to affect psychologically (self injurious behaviour is more common for women). Large proportion of women offenders are single mothers, separated from their children, perhaps declared unfit.

   c. *Addressing social problems* - for serious social problems (eg. violence against women) to be addressed, must be sentencing means available other than imprisonment and fines. Resources allocated for providing counselling and therapy for both offenders and victims.

6. *Poverty* issues in sentencing

   a. For same behaviour, poor more likely to be arrested, convicted, sentenced to custody, and receive longer sentence than middle-class or upper-class offenders. Less likely to receive bail. Not necessarily due to individual evil, but rather law enforcement resources focus on surveilling young men in low income neighbourhoods, thus leading to disproportionate representation of these men in the CJS. By sentencing stage, nearly all will be low income.

7. *Racial/ethnic* issues in sentencing - guided generally by criteria in s.718.2.(d, e) of the *CCC*

   i. *Remedial* - meant to counteract overrepresentation of Aboriginal people inCJS, and applies whether the offender is on-reserve or off-reserve. However, the more serious the crime, the less likely it is to be sentenced differently for Aboriginals v. non-Aboriginals.

   ii. *Mandatory consideration* - Incumbent on judge to use alternate analysis when sentencing Aboriginal offenders. Mandatory, includes background, procedures, restorative justice *Gladue*{Sister11}

   iii.Not arbitrary - s.718.2(e): not automatic reduction of sentences for Aboriginal offenders. Not arbitrary, nor is non-custodial lighter necessarily. More serious crime, less discrepancy between aboriginal and non-aboriginal sentences. *Gladue*{Sister11}

   iv.Aggregate consideration - factors are not to be considered on aggregate, but re: the specific offender, specific offence. Intersectional issues do not automatically mitigate, require proof of contribution to offence in each case. *Hamilton*{Jamaica13}.

v. Not just Aboriginals - ONCA has acknowledged that the systemic and background factors faced by Aboriginals may be analogous to those faced by other groups (eg. black Canadians), particularly since blacks also overrepresented in CJS. *Borde*{Systemic12}

1. This principle was applied by ONSC in *Hamilton*{Jamaica13}.

INTERPRETATION

1. *Vagueness* - Law is *vague* where it is unclear, or does not guide conduct (means not well defined). Clarity required, must be understandable and predictable, delinate area of risk. {*Nova Scotia Pharmaceutical Society}*

    a. *Certainty* - not required to be consistent with vagueness principle; the law can guide conduct by setting up risk zones: guide through approximation. *CFFCYATL*{Spanking}

    b. *Reasonableness* - inclusion of condition of reasonableness does not mean that a law is vague. Law relies on reasonable person extensively, nor does this amount to judicial amendment. *CFFCYATL*{Spanking}

    c. *Prospective* - doctrine is not retrospective. Must guide behaviour in future; previous ineffectiveness due to misinterpretation / misapplication does not mean that law is too vague. *CFFCYATL*{Spanking}

    d. *Marginality* - mere possibility of marginal cases does not undermine the law. Courts may be challenged in applying law, but difficulty inherent to dynamic legal system. *CFFCYATL* {Spanking}

    e. DISSENT: Arbour holds that not within the scope of the Court to undermine legislated defences for offences - this is the purpose of the electorate. SCC should limit itself to *Charter* considerations.

2. *Distinction* – law should not hinge on arbitrary distinctions, but rather meaningful distinctions; if something makes a matter more or less repugnant, it is meaningful. Further, Common sense should not be contravened where reasonable alternatives are available. *Pare*{Indecent}

3. *Intention* - purpose of legislation can help guide the interpretation of language. *Pare*{Indecent}

4. *Fair notice* – public must be made aware of a crime, or must be able to make itself aware of a crime in order for a prohibition to have force. This does not mean formal notice, eg. familiarity with legal text. *{Nova Scotia Pharmaceutical Society}*

5. *Discretion required* – the law must not preclude discretion to extent that conviction is guaranteed. If a law is so broad that it fits this definition, it has no force. *{Nova Scotia Pharmaceutical Society}*

6. *Overbreadth* - law unambiguous in meaning can be *overly broad* in scope; limit activities and restrict freedoms unnecessarily - too sweeping with relation to objective. Test for determining whether legislation is overbroad. obligation to form legislation which restricts rights as little as possible in order to achieve its objectives. *Heywood*{Loiter}

    a. Asks whether means are necessary to achieve objective. If the means applied are not necessary to achieving state objective, the PFJ will have been violated as rights will have

been limited for no reason. *Heywood*{Loiter}

7. *Ordinary meaning* - not sufficient for interpretation purposes. Words take on very different connotations within context of the *CCC*, must be considered in interpretation. *Pare*{Indecent}

8. *Strict construction* – holds that narrow interpretation required wherever rights may be restricted; but case law conflicts, both strict and broad approaches have been used. *Pare*{Indecent}

9. *Ambiguity* - where words support more than one meaning & each meaning is consistent with ambit of the Act: the context of the provision must be understood before it can be interpreted

10. *Police agents* - police assume that the laws are constitutional; if the police act in accordance with the law, then they are acting in good faith, even where the law is ultimately found to be unconstitutional. They are not the arbiters of what is and what is not constitutional.

MISCELLANY

1. *Racial profiling* - where criminal activity is associated with a certain group in society based on their racial identity; race is held as proxy for criminality of entire group. Profiling need not be overt, can occur where racist values are unconsciously or consciously held, regardless

2. *Packer's theory concerning operation of the CJS pre and post Charter*

    a. *Crime control* – represents operation previous to the *Charter*. Effectively, a conveyor-belt operated by the agents of the state (police, prosecutors) which produces guilty pleas. Concerned with efficiency. Misconduct of state agents is not endorsed, but the remedies, rather than coming in the context of the CJS, will be found in civil court; this means that the "fairness" of the CJS will be merely illusory.

    b. *Due process* – represents operation after the *Charter*. An obstacle course in which defence attorneys argue before judges that the prosecution should be rejected due to violation of the defendant's rights. Concerned with quality control.

3. *Packer's theory concerning tension between Fed and SCC re: crime control*

    a. *Pre-Charter* – Conceived that Parliament would be the source of crime control, while this would be tempered by the due process initiatives of the courts. However, previous to and via the Charter, it was parliament which acted to limit the power of police and prosecutors, while the courts, in maintaining the powers of state agents, worked to control crime (eg. discovering truth more important than ensuring fair treatment).

    b. *Post-Charter* – These roles have reversed since the due process revolution brought about by the Charter, with Parliament passing crime control bills, and the Courts striking down laws which violate the Charter.

4. *Writs of assistance* - Now defunct, Draconian writs issued to RCMP officers which granted broad powers to conduct discretionary searches of persons or property with a view to drug and customs enforcement. Would allow an officer to dismantle a house without authorization or subsequent judicial review in such a search - no accountability for actions, effectively.

5. *Presumptions*

    a. Types

        i. *Permissive* - open question as to whether the inference of the presumed fact is drawn following proof of the basic fact (eg. if a, possibly also b).

        ii. *Mandatory* - requires that inference be made (eg. if a, then b).

    b. Means of rebutting

i. Accused raises reasonable doubt as to existence of presumed fact

ii. Accused introduces evidence which brings truth of presumed fact into question

iii. Accused has legal or presumptive burden to prove non-existence of presumed fact on balance of probabilities.

c. Subject matter

i. Law - Presumptions of law involve actual legal rules

ii. Fact - Presumptions of fact involve frequently recurring examples of circumstantial evidence.

6. *Alienation of Aboriginals* in the CJS

a. Crime as against the state – CJS holds that crime is committed against society; however, in FN societies, crime is a violation of one person against another; occurs within the context of victims, perpetrators, families, accomplices.

b. Adversarial nature – PFJ holds that the CJS must be adversarial, accusatorial; based on notion of reaching truth through *combat* - but FN pursue emotional restraint, acting in a manner which minimizes conflict; avoiding public criticism of others. Contrary to the CJS. PFJ also has formal rules concerning admissibility; not meaningful to FN, where open sharing of information, whether relevant, admissible, or prejudicial, is encouraged.

c. Formal written offences – actions codified within CJS, often separated into *actus reus* and *mens rea*. In FN, there is no separation in language, may not even be definition of guilt. Relates to fact that shame and acceptance of responsibility for situations are emphasized.

d. Professional class – only Cherokee have professionals involved with dispute resolution. In other FN, emphasis placed on experience, wisdom, commitment to community over formal education, so professionalism not a key virtue. Advocacy in FN taken by one familiar with the individual, never a stranger, relating to idea that one must find best path for everyone, not oneself. Elders are not judges; idea of an outsider with no knowledge of individual making judgments based on understanding only of one event is frightening.

e. Strangers – jury of one's peers in CJS is not necessarily, or even often FN. However, in FN paradigm, peers are ones who know individual, and this knowledge is what makes peers relevant in generating solutions which are beneficial to all parties.

f. Impartiality – participation valued through knowledge of person, family, clan, history.

g. Punishment – imprisonment and fines are alienating to FN, particularly as paid to society, without reparation due to the victims. Healing wounds, restoring harmony, maintaining balance are the keys. Further, due to the fact that FN not currency based, payment of

monetary sum can be alien and burdensome.

7. *Feminism issues* in the CJS

   a. *Gap* – There is a hidden gender gap in the CJS; lawyers not educated about gender will not be able to adequately represent the differential position of women in our society; women experience crime differently than men, and criminal law itself is subject to the dominant social values of our time. In this circumstance, this means that CJS is by men, for men.

   b. *Collectivity* – In a democracy, this is not rightful - the collective social conscience must be reflected in the CJS, and this must therefore include women as a component in its design. Approaches which construct the CJS in a manner of neutrality actually reflect a male-oriented perspective.

   c. *Rape* – Previous to 1983, rape law in Canada reflected the status of women as sexual and reproductive property of men; rape, therefore, was effectively the attempt to gain sexual access to a woman that one does not have property rights to - it is legally permissible for a man to rape his wife, for instance, because he owns sexual rights. Further, as criminal defences are formulated to reflect male experience, female defendants will either find that their experiences do not fit this formulation, or will have to distort their experiences in order to fit this mould.

   d. *Intersectionality* – The treatment of women under the CJS can not be understood only through a feminist lens, but must also include other components, such as race, class, resources, etc. For instance, the experience of sexual assault for FN women may be different than for other women, as FN women face further consequences of ostracism in community and other stigma.

CASES

- *Switzman v. Elbing (SCC 1957)*

    - Person has house "padlocked" due to suspected activities relating to communistic propagation. SCC finds that this legislation is criminal, and therefore invalid.

    - Provincial legislation deals with criminal activity, ergo invalid

        - SCC holds that the PQ's *Act Respecting Communistic Propaganda*, specifically s.3 which prohibits the use of a house in propagating communism, is, *by its pith and substance*, an act concerning the criminal law. Therefore, it has infringed on the exclusive right of parliament to legislate crime, and is unconstitutional, having no force or effect.

- *Margarine Reference (SCC 1949)*

    - Court sets out three part test pursuant to the power of the Fed to legislate criminal law.

    - Test for criminal v. ultra vires

        - Requires prohibition of activity

        - Requires penalty for offence

        - Must target some evil or injurious activity

- *R. v. Morgentaler (SCC 1993)*

    - *Nova Scotia Medical Services Act* attempts to outlaw abortions outside of hospitals. Found to be legislation of criminal activity, *ultra vires* for province, therefore struck down.

    - Historically, abortion regulated by criminal law

        - SCC found in R. v. Morgentaler (1988) that abortion prohibition was and has historically been a component of criminal law - although after that decision, it was no longer regulated by criminal law. This does substantiate that the issue of abortions falls within the domain of public wrongs.

    - Legislation deals with social wrongs, ergo criminal

        - The objective of the *Act* was to prohibit and sanction socially undesirable conduct - any other concerns (health policy, safety, etc.) were ancillary. Therefore, the *Act* has entered the FedGo's domain - criminal law, and the legislation is

unconstitutional (without need to refer to s.7 as was done in the 1988 decision).

- *Reference re Firearms Act* (SCC 2000)

    - *CC* amended to require firearms holders to become licenced and register their weapons. Challenged by Alberta. Feds hold that firearms fall under federal jurisdiction due to POGG, s.91(27). Alberta holds that law falls under property and civil rights, s.92(13), as gun ownership not immoral, also that legislation expensive and ineffective. Feds win, gun control found to be Fed jurisdiction.

    - Gun control falls under federal criminal law jurisdiction

        - Gun control laws, in pith and substance, directed to enhance public safety by controlling access to firearms through prohibitions and penalties.

    - Morality not necessary for subject to be criminal

        - Misuse of firearms is firmly grounded in morality, and therefore preventing misuse is attempt to control immoral acts. Gun control directed at moral evils. Further, criminal law can be used to prohibit activities which are not related to public morality.

    - Efficacy of legislation not the purview of the court

        - Laws may have been able to be designed better, could represent more thorough consultations with the constituency, etc. However, this is parliament's problem, not the SCC's. Further, parliament is free to enact poorly designed laws under division of powers. Constituents must simply elect more capable legislators to curb this issue.

- *Frey v. Fedoruk* (SCC 1950)

    - Frey was a "peeping tom", caught by Fedoruk, charged with common law offence of "unlawfully acting in a manner likely to cause a breach of the peace by peeping." Conviction overturned, Frey sues Fedoruk for false imprisonment, Fedoruk defends by saying that imprisonment justified due to Frey being convicted at common law. SCC rules that common law offences not allowable.

    - Uncertain principle underlying common law offences untenable; law must cohere with a defined standard.

        - Trial judge held that Frey committed offence by controverting principle that conduct be treated as criminal where it has a natural tendency to provoke violence by way of retribution. This principle is very uncertain, and SCC rules that it should not be relied upon to guide the application of the criminal law - would not follow a defined standard of law, but rather refer to individual view of

judge as to whether act constitutes breach of peace which would reasonably cause physical reprisal. Effectively, protection of individual from oppression more important than protection of state from disorder.

- *Amato v. The Queen* (SCC 1982)

    - Question of common law defence of entrapment to be allowed in criminal justice system. Allowed new common law defences to be formulated and used in criminal courts.

    - Formulation of new common law defences must be allowed

        - The allowance in s.8(3) allows common law defences to enter criminal justice, and this should not limit the ability of the court to recognize new such defences - should not be limited only to those defences which already exist in common law. Law cannot foretell all circumstances which may arise - some will be too rare in occurrence to have come before the courts. Further, code could deprive person of common law defence to which that person is entitled, and therefore find person guilty in spite of the fact that a defence did exist on merits.

- *R. v. Jobidon* (1991)

    - Jobidon kills man in bar fight, accused of manslaughter via unlawful assault. Acquitted at trial, as other man consented to fight. s.265(1)(a) defines unlawful assault as intentional application of force to another person without the consent of the other person. SCC finds that person cannot consent to this kind of assault (other than within the guidelines of sporting events and socially desirable activities).

    - Common law defences are allowed, so therefore must be principles which set out boundaries and explanations for these defences.

        - While offences are codified in the *CCC*, conditions for criminal liability are left to common law where these are not inconsistent with legislation. Since common law defences can be used, so also must the context which surrounds these so that we can understand their boundaries. Therefore, common law can be used to understand circumstances where a person is not allowed to consent.

    - Bar fights are not socially desirable, and therefore not a forum where consent is valid. This is the limitation of common law defence, not creating a new common law offence (which would violate s.9 of the CCC).

        - Bar fights do not serve a socially desirable purpose. So therefore, common law suggests that while consensual assault is permitted in rough sports, this is justified by the fact that the assault must occur within the parameters and rules of the sport, and further, are worthwhile in a consideration of social value. This does not apply to bar fights - one cannot consent to a bar fight, this is outside of

the scope of the consent defence mentioned by common law. Finding in spite of the fact that the code specifically requires that assault be non-consensual, and in this case, was consensual (*to Sopinka's dismay – holds that Gonthier effectively created a new common law offence in violation of s.9 – assault with consent).*

- *United Nurses of Alberta v. A.G. Alberta* (SCC 1992)

  - Union ordered not to strike by court, but strikes anyways in highly publicized manner, fined large amount for contempt of court, fights this in court, arguing that contempt is not codified (s.9 CCC), vague and arbitrary (s.7 Charter). SCC holds that laws need not be codified, and that contempt is neither vague nor arbitrary, finds for A.G. Alberta.

  - Codification not required for offence to be considered constitutionally valid.

    - Not all crimes need to be codified in order to be valid. Contempt is mentioned in s.9 of the code, and specifically protected as a result. While its actus and mens are defined in common law, this is a common characteristic of offences in the *CCC*, as in *R. v. Jobidon* (eg. common law definition of liability in assault, specifically the nature of consent in assault).

  - Criminal contempt not vague or arbitrary; well established in common law, and easily predictable (eg. don't violate court orders).

    - Person can predict in advance whether conduct will lead to conviction. Trial judges able to apply correct test and come to conclusion without difficulty through use of common law principles. Therefore, law valid.

- *R. v Malmo-Levine; R. v. Caine (SCC 2003)*

  - Facts

    - Both cases challenge whether Parliament has the authority to criminalize possession / sale of marijuana, and if so, whether such legislation can be valid with the *Charter*.

  - Rule

    - Dismiss both appeals. Fed has right to legislate marijuana (eg. this falls within the criminal law power), sentencing principles are compatible with charter.

  - Ratio

    - Imprisonment for marijuana simple possession would be demonstrably unfit (barring some extreme circumstance) - imprisonment *in fact*, however, and not *mere availability* of imprisonment.

    - However, the *availability* of imprisonment for marijuana relates to the fact that it is prohibited in a statute which also covers other, far more harmful substances. There is no minimum sentence, and further, sentencing guidelines point to alternatives to imprisonment for simple marijuana possession. While a fit sentence must comply with the *Charter*, and not be "grossly disproportionate" to crime, the availability of a sentence which may not be fit, but yet is not applied (and would be overturned at appeal if applied), does not mean that the statute is inconsistent with the charter.

- Nature of criminal laws, prerequisites for criminal law, based on reasoned apprehension of harm

    - Criminal laws must fulfill a valid criminal law purpose backed with prohibition and penalty. In scope, must deal with public peace, safety, order, health, or other legitimate public purpose. The parliament is entitled to act where there is a reasoned apprehension of harm, even if on some points "the jury is still out" (ie. the full extent and nature of the harm is unknown).

- SCC sets out three-part test for determining what is and what is not a principle of fundamental justice (PFJ)

    - Principle - the rule must be a legal principle (eg. in this case, the harm principle is not a legal principle, but expression of state interest)

    - Consensus - for which there is significant societal consensus that it is fundamental to the operation of our legal system (there is no consensus in this case - some hold that law is an expression of morality)

    - Standard - Identifiable with sufficient precision to yield a manageable standard (eg. principle does not articulate or elucidate re: degree of harm, target of harm, nature of harm).

- However, while harm is a prerequisite for crime (eg. by reasoned apprehension, and where this leads to imprisonment) harm principle is *not* a principle of fundamental justice in Canada - does not meet PFJ criteria

    - Simple - Harm is not sufficiently nuanced to deal with the challenges required to operate a complex state system.

    - Absence not a barrier - Further, while the presence of harm is certainly something to be restricted, this does not mean that the absence of harm is a barrier to legislation in a particular domain (eg. some crimes rest on offensiveness, not harm - such as bestiality).

- Does not address paternalism - Further, while the harm principle implies that harm to self should not be legislated (other than for the weak / vulnerable), this is desirable to fulfill paternalistic goals - to save us from ourselves (eg. seatbelts, motorcycle helmets). This is a critical idea in a socialistic society, in which individual harms are borne collectively (eg. due to health care).

- dissent: Arbour J. - Harm is required as component of actus reus in imprisonable offences

- Harm to others is essential whenever the state resorts to imprisonment as a penalty for violating prohibition; this is a key to *Charter* compatibility - the highest form of restriction of liberty (imprisonment) must be reserved for those who, at minimum, infringe on the rights or freedoms of other individuals or otherwise harm society. Self harm with a punishment of imprisonment is not compatible with the *Charter*.

- *R. v. Labaye (SCC 2005)*

- Facts

- Labaye keeps "common bawdy house" used for practice of "acts of indecency" in Montreal - private club, members only, membership screened for amenability to acts carried out within (group sex, no violence or misogyny). Voluntary acts, no payment for sex, not accessible to public.

- Rule

- New test for indecency established; Labaye's appeal found to have merit, conviction overturned.

- Ratio

- Previous test for indecency / obscenity too subjective, would reflect idiosyncratic views of legal agents and not necessarily an objective criteria

- The previous test had objectivity in ambit, but failed due to formulation - people are far more likely too see themselves as representative members of community than otherwise. Therefore, no one will set aside their own views as intolerant or incompatible with views of greater community. The test is highly subjective, and therefore not appropriate given the weight of criminal sanction attached - people should not be imprisoned for transgressing the rules and beliefs of individuals.

- Test established in *R. v. Butler* (SCC 1992) uses harm principle as measure of objectivity;

    - Tolerance is measured by what people would allow others to be exposed to based on degree of harm that would flow from such exposure. Essentially, this is a measure of the extent to which exposure to material or conduct would predispose people to act in an anti-social manner (*nature)* in a manner which society formally recognizes as incompatible with proper functioning *(degree)*. Both aspects must be satisfied beyond a reasonable doubt. Formal recognition can be found in fundamental laws, and includes concepts such as autonomy, liberty, equality, human dignity, etc.

    - By *nature*, conduct presents risk in at least one of three ways mentioned, and risk is of *degree* incompatible with proper functioning in society.

- Three types of harm are recognized with a view to indecency under the *Butler* test

    - Confrontation - harm to those whose autonomy and liberty may be restricted by being confronted with inappropriate conduct (eg. adversely affects position of women in society). Must involve a real risk that the way that the affected live will be adversely and significantly affected by conduct.

        - Not found in Labaye, as L'Orage not open to public, limited only to those disposed to this sort of sexual activity due to membership selection process.

    - Predisposition - harm to society by predisposing people to act in a manner which is incompatible with proper functioning (eg. if bawdy house conduct trains people to mistreat women). Real risk of conduct having this effect must occur - link must occur between conduct and attitudes, and then between attitudes and behaviour.

        - Not found in Labaye, no evidence of anti-social attitudes towards anyone in consensual sex activities on voluntary and equal basis.

    - Individual - physical or psychological harm to those participating in the conduct (eg. if women are mistreated in the bawdy house). Must show that harm has occurred, and cannot be substituted by disgust for conduct involved.

        - Not found in Labaye, only possible danger relates to STI, but this is conceptually and causally unrelated to indecency.

- The degree of harm required by indecency is necessarily high in order to justify criminality / sanction.

    - Tolerance - Canada is a diverse, vigorous society, and therefore capable of tolerating a high level of conduct before this will be able to interfere with the proper functioning of our society.

    - Judicial responsibility - In consideration of whether an article or conduct is compatible with proper functioning of society, judges must account for danger of prejudice, basis of evidence within full context, and articulate the factors that produce judgments.

    - Risk - the more extreme the harm, the lower the degree of risk required to permit use of criminal law sanctions (eg. imprisonment). Terrorist attack risk is small, but potential impact is tremendous, so criminal law is justified here; same principle of proportionality applies.

- dissent: Bastarache J.

    - Justification for criminal law cannot be reduced to single factor as previously established

        - Quotes R. v. Malmo-Levine, where it was held that the basis for criminal law cannot be reduced to single factor (in that case, harm principle as formulated by JS Mill). This is particularly true in reflection of the fact that certain acts are prohibited even though they are not harmful (eg. where they are socially offensive, such as bestiality).

    - Context must be considered in considering indecency

        - Each case must be assessed in light of its own circumstances, including the extent to which it has caused harm, the community's tolerance for such activities, or the environment in which they arise. The indecent act should not be separated from the context in which it was committed in determining whether or not it is tolerable in society.

    - Bar set too high for indecency

        - The test articulated in *Butler* and refined here by McLachlin CJ. sets the bar too high, removing the possibility of preventing any behaviour unless it can be established that it will cause significant social disorder. This is similar to the requirement made by Devlin, that acts be prohibited where they serve to subvert society itself.

- *R. v. Gladue* (SCC 1999)

    - Facts

        - Aboriginal woman believes common-law husband to be cheating on her with her sister. D. makes remarks concerning his actions leading others to believe that her husband's life in danger. Catches D. and her sister following what she believed to be sexual activity. This leads to a quarrel, in which both parties were inebriated. The D. armed herself with a knife and aggressed against the victim, stabbing him in the arm, chasing him from the house, and killing him. Trial judge found crime to be very serious, did not consider background of D., stated that she was not part of aboriginal community as she lived in an urban area.

    - Rule

        - No new sentencing hearing, as offender had already been released at this point (conditional day parole, and subsequently full parole), and the seriousness of this offence means that it is unlikely that Gladue would have received further sentencing leniency in any case.

    - Ratio

        - Incumbent on judge to use alternate analysis when sentencing Aboriginal offenders

            - This analysis must include systemic or background factors affecting this individual, sentencing procedures which are compatible with Aboriginal heritage, priority given to restorative sentencing. Further, where programs specific to Aboriginal needs are not available, this does not mean that restorative justice need not be considered in sentencing.

        - s.718.2(e) does not recommend an automatic reduction of sentences for Aboriginal offenders

            - The sentence should not be reduced arbitrarily (nor is a sentence "lighter" simply because it does not involve incarceration). Further, as crime increases in violence or seriousness, the difference between Aboriginal sentencing and non-Aboriginal sentencing will decrease.

- *R. v. Borde* (OCA 2003)

    - Facts

        - Borde, young black male convicted of aggravated assault, firearms charges, and non-compliance with court orders. Sentenced to five years imprisonment. Has background of alcohol abuse, family dysfunction, poverty. Argued against

sentence, holding that this background was analogous to the systemic issues faced by Aboriginals, and therefore he sentence should be mitigated in accordance with s.718.

- Rule

    - Denied; crimes of such severity that no leniency would be possible even were background factors to be considered.

- Ratio

    - Court acknowledges that the systemic and background factors faced by black Canadians could be analogous to those faced by Aboriginal Canadians, and therefore could affect criminal sentencing in line with s.718.2(e) of the *CCC*

        - While s.718.2(e) only imposes consideration of the systemic issues faced by Aboriginal offenders, this does not rule out the idea that the systemic issues faced by members of other vulnerable groups could, or should be considered in sentencing by criminal judges. This is particularly relevant in light of the fact that black Canadians, like Aboriginal Canadians, are overrepresented in the criminal justice system.

    - There are meaningful distinctions between black Canadians and Aboriginals with a view to criminal sentencing, but principles sufficiently broad to allow for consideration of systemic factors

        - The extent of the scope in s.718.2(e) may be limited by the fact that in *Gladue*, the SCC found that the differential treatment was not only ameliorative, but also reflected the differential traditions of Aboriginal peoples with a view to restorative justice. That being said, the existing sentencing guidelines are likely broad enough to allow for the consideration of systemic factors in sentencing disadvantaged non-Aboriginal offenders in any case.

- *R. v. Hamilton* (OSC, 2003)

    - Facts

        - Women detained at airport after returning from Jamaica, each found to have swallowed large amounts of cocaine. Each single black mother, three children, on welfare, no prior record.

    - Rule

        - Crime sufficiently severe that sentence should not be reduced, mitigating factors considered automatically rather than in context by trial judge, judge introduced

criteria to sentencing, rather than defendant (inappropriate); sentence increased to reflect severity.

- Ratio

    - Court considers criteria similar to those in s.718.2(e) in sentencing female black Canadian offenders; vulnerability and systemic factors analogous to those faced by Aboriginal offenders.

        - Intersectional approach which considers the systemic disadvantage of being poor, black, female, single parent. Used to reduce sentence for cocaine importation. Crown argues that the criteria in this section relate specifically to historical and traditional attributes of Aboriginal peoples not shared by black Canadians - however, consideration of systemic factors is critical for *Charter* compatibility, particularly with a view to the fact that the SCC recognized the existence of systemic racism affecting black Canadians in *R. v. Parks* (1993), relation between female gender and poverty in *Moge v. Moge* (1992).

    - Systemic factors are not to be considered on aggregate, but rather with a view to the specific offender, specific offence

        - Race, gender, and poverty do not automatically mitigate, but rather require proof on a case by case basis that these factors contributed to the behaviour of the offender in question.

- *R. v. Nova Scotia Pharmaceutical Society* (SCC 1992)

    - Vagueness doctrine - clarity is required of the law; it must guide conduct.

        - SCC affirms that clarity in law a principle of fundamental justice; must be able to be understood, clearly predicted, guide conduct in order to have force. Must provide basis for legal debate, analysis, must delineate area of risk, must be intelligible, and must offer a grasp to judiciary. There must be no crime or punishment except in accordance with law that is certain, unambiguous, and not retroactive.

    - Fair notice - public must be aware (or able to be aware) of crime for it to have force

        - Formal notice: acquaintance of text of statute not critical in vagueness analysis, particularly as ignorance is no defence of the law. However, informal notice - ensuring that enactments are understood; cannot be too general to prevent citizens to be aware of substance, particularly where they do not relate to substratum of values in society.

- Discretion must not be so limited that it guarantees conviction.

    - Law must not be so devoid of discretion that its application alone will guarantee conviction. That is, that the determination of whether or not a person will be convicted is the purview of judges and juries, and should never rest solely with the prosecution. As a result, if a law is too broad and therefore will guarantee a conviction through its application, that law has no force.

- *R. v. Heywood* (SCC 1994)

    - Facts

        - s.179(1)(b) of the *CCC* prohibits violent sexual offenders to loiter near school grounds, public parks, bathing areas. D. is such an offender, and was discovered to have been loitering near such an area, arguably with

    - Rule

        - Court narrowly decides that rule too broad in targets, time, and locations does not provide fair notice to offenders, therefore not Constitutional.

    - Ratio

        - Sets out test for determining whether legislation is overly broad; holds that freedom must be restricted minimally in order to achieve objectives

            - Asks whether means are necessary to achieve objective. If the means applied are not necessary to achieving state objective, the PFJ will have been violated as rights will have been limited for no reason. So, the government has an obligation to form legislation which restricts rights as little as possible in order to achieve its objectives.

- *Canadian Foundation for Children, Youth, and the Law v. Canada* (AG) (SCC 2004)

    - Facts

        - SCC considers where s.43, which authorizes corrective force, reasonable within circumstances to child by teacher / parent, is void due to vagueness and over-breadth.

    - Rule

        - s.43 is not too vague; sets out limitations on application of this defence for assault, however (must accord with consensus concerning corrective action - eg. at present, not applicable to children under two, teenagers, for instance).

- Principles

    - Certainty in law not required to be consistent with vagueness principle; the law can guide conduct by setting up risk zones.

        - The law need not be certain, but can guide conduct through approximation. Effectively, sets up zones of risk, which the prudent person will not approach. These zones will sometimes be narrow, and sometimes be broad, in accordance with governmental objectives and the nature of the behaviour being limited.

    - The inclusion of condition of reasonableness does not mean that a law is vague

        - Entire sections of law (much of the *CCC*, negligence tort) is founded on the presumption that people are able to govern their behaviour in accordance with a standard of what is reasonable. This can also be assisted by social consensus and expert evidence as required (as in the case at hand) - beyond this, there is precedent, and judicial interpretation may also play a role.

    - Vagueness doctrine is prospective, not retrospective

        - The purpose of vagueness doctrine is to provide a means by which we can determine whether a law will be able to meaningfully guide behaviour in the future, not whether it has done so in the past. The misapplication, misinterpretation etc. of a law previously does not mean that it is too vague to be used. In this very case, Court holds that the precedent set will help to form the basis for a more uniform application of the law going forward.

    - The possibility of marginal cases is not fatal to the law

        - While the use of "risk zones" delineated by somewhat uncertain principles (eg. reasonableness) mean that cases may arise which challenge the ability of the Courts to determine whether or not an offence has been committed, this is inherent to the legal system, and is not a valid reason for striking down a law.

    - Interpretation of 'reasonableness' is not judicial amendment, but rather judicial interpretation, and therefore falls within the scope of the Court

        - The Court often interprets what is or is not reasonable, and this cannot possibly be seen as external to the purview of the Court, which in this case provides guidelines for determining this (eg. expert evidence, social consensus, precedent, judicial interpretation) none of which fall outside of the role of the Courts. As the appellate courts can rein in overly elastic

interpretations, they can also define the scope of criminal defences, whether these originate in common law or legislation.

- Policy

- Arbour, in dissent, holds that it is not within the scope of the Court to undermine legislated defences for offences - this is the purpose of the electorate. s.43 can only be altered in its application with a view to its constitutionality (eg. that it fails to protect children under s.7 of the *Charter*). However, as the 'troubling' aspects were read in through the scope of reasonableness, and the Court found means to develop this meaning over time (what is reasonable today may not be reasonable fifty years from now, due to advancements in understanding, social change, etc.)

- *R. v. Pare* (SCC 1987)

- Facts

- Pare murders boy after indecently assaulting him. Found guilty of first degree murder at trial, in accordance with s.215(5) of the *CCC* which holds that any murder which occurs while a person is committing indecent assault is first degree. Appeals, gets to SCC on basis of determining whether "while" means "simultaneous" or rather "part of the same transaction" - effectively, a matter of interpretation.

- Rule

- Murder is temporally and causally related to indecent assault, part of single transaction of illegality, and therefore s.214(5) applies; guilty of first degree murder.

- Principles

- Literal meaning, view espoused by defence, holds that "while" requires simultaneousness of events; however, this principle not sufficient for interpretation

- However, it is not clear that the literal meaning is the rightful interpretation to apply to these circumstances. Words like "while committing", disembodied from the *CCC*, may have very different meanings within the context of the code, and therefore this context must be considered, begging further investigation into the interpretation of this statute.

- Case law is not unanimous; there are both strict, narrow interpretations as well as broader interpretations which intent to capture the law's intent

    - Certain cases have found that sequential murder is not sufficient to meet the risk zone set out in s.214(5). However, others have defined the statute to refer to a "single transaction" rather than a strictly simultaneous event. Case law cannot provide a definitive solution to this issue, and therefore, further investigation is again required.

- Strict construction principle holds that narrow interpretation required wherever rights may be restricted

    - In accordance with Draconian principles in play when strict constructionism rose to prominence, holds that ambiguities must be decided in favour of the person against whom restrictions are to be enforced; the law must be clear and certain where freedom hangs in the balance. However, this doctrine also requires that the context be considered in addition to the apparent meaning of the words of the statute.

- The law should not hinge on arbitrary distinctions, but rather meaningful distinctions

    - In this case, for instance, the D. put his hands on the victim after pulling up pants; does this continued contact constitute a furtherance of the indecent assault? However, this distinction is arbitrary, in that it is not relevant to the seriousness of the crime; the matter is no less repugnant if the D. waits for two minutes with hands on victim's chest or not; it is the assault before and the murder afterwards which constitute the relevant criminal activities, and therefore on the basis of the nature of these activities which should determine the application of the law.

- Common sense should not be contravened where reasonable alternatives are available

    - In accordance with the above, it does not follow that because the D. waited two minutes before murdering the victim, that this crime is somehow less serious than if the D. had murdered the victim simultaneous with the indecent assault. This violates common sense by drawing artificial lines separating the commission and aftermath of an indecent assault, and should be avoided.

- The intention of the legislation can help guide the interpretation of language (eg. Heydon's case)

- For instance, in this case, the organizing principle underlying the legislation can be derived from the types of crime enumerated (ie. indecent assault, hijacking, kidnapping) - all situations in which the offender is already abusing power, illegally dominating the victim when the murder is committed. This is the principle which makes these crimes exceptionally serious.

- *R. v. Oakes* (SCC 1986)

    - Facts

        - D. caught with a small amount of hashish oil, charged with possession under *NCA* (replaced since with *CDSA*). *NCA* s.8 holds that those found guilty beyond reasonable doubt of possession must then prove on balance of probabilities that the possession was not for the purpose of trafficking, otherwise will be found guilty of PPT.

    - Rule

        - *NCA* s.8 violates s.11(d) of the *Charter* which enshrines the presumption of innocence in criminal proceedings; this violation is not justified (F&D society) under s.1 of the *Charter*; therefore, can have no force or effect.

    - Principles

        - *NCA* s.8 shifts the burden of proof for an offence from the Crown to the defendant, and such a shift requires demonstrable justification

            - The presumption of innocence until guilt proved in a fair and impartial trial is guaranteed in s.11(d) of the *Charter*. However, it is also arguably enshrined in s.7, being integral to the protection of life, liberty, and security of the person - given the gravity of criminal sanctions, presumption of evidence is a crucial limitation of government power. As s.8 of the *NCA* requires that the accused prove on balance of probabilities that possession was not for the purpose of trafficking, the onus has shifted; accused is being presumed guilty. Conviction could occur despite the existence of a reasonable doubt. This requires justification via s.1 of the *Charter*, or otherwise the exercise of the notwithstanding clause in s. 33.

        - Lower standard of proof for defendant (balance of probabilities) does not excuse or justify shifting the burden of proof.

            - The issue here is that the accused could still be convicted of the crime even where a reasonable doubt concerning his guilt exists. Effectively, where the accused fails to meet the evidentiary standard required to

disprove the presumed fact, a conviction could result - even if the judge or jury harbour a reasonable doubt.

- The "rational connection test" is used to justify reverse onus positions. However, results of this test do not accord with the reasonable doubt standard required in criminal proceedings.

    - Basic fact may rationally tend to prove a presumed fact; however, this does not prove the presumed fact beyond a reasonable doubt. Rational tendency and reasonable doubt are not the same standard, and the latter is required to justify the weight of criminal sanctions.

- Principles of free and democratic society require the presumption of innocence; necessarily high standard to violate these principles - preponderance of probabilities; onus of proof on Crown

    - Free and democratic principles include respect for dignity of human person, commitment to social justice and equality, and many others. It may become necessary to limit these rights in order to achieve collective goal of fundamental importance, however this must be justified by the party seeking to impose the limit. The onus of proof, therefore, is on the Crown in this circumstance, to prove that the limit is justified on a preponderance of possibilities.

- Establishes a two-part test which must be satisfied in order to justify limit of rights and freedoms under s.1 of the *Charter*

    - 1. *Importance* - Objective must be of sufficient importance to warrant overriding a constitutionally protected right. Concerns must be pressing and substantial within the context of a free and democratic society.

        - In this case, for instance, the curbing of drug trafficking by facilitating the conviction of drug traffickers is seen as an objective of significant importance, thus meeting the standard.

    - 2. *Proportionality*. Means must not be arbitrary or irrational with a view to achieving objective (rational connection), must be carefully designed to carry out objectives with minimal restriction to rights and freedoms (minimal impairment, key test), and must be proportional to the importance of the identified objective.

        - In this case, the means are found to be arbitrary and irrational, in that there is no presumptive "rational connection" between possession of small amount of narcotics and the inference of trafficking.

- *R v. Stillman (SCC 1997)*

    - Facts

        - This case was central in providing guiding principles for determining the first principle of the Collins test, namely whether the evidence will adversely affect the fairness of a trial. In the case, Stillman was a suspect in the death of a girl, and had been taken into custody. There his counsel had provided the RCMP with statements of intent which held that Stillman would not agree to provide any samples, testimony, etc. However, once his counsel left the premises, the RCMP took such samples under threat of force, and interviewed Stillman for an hour. Also blew his nose and threw away tissue, which was then used for DNA testing. Released Stillman, rearrested months later for the purpose of again obtaining tooth impressions without his consent. Trial judge held that the evidence violated Stillman's *Charter* rights, but should still be admitted; convicted at trial of first degree murder. Appeal denied by CANB, but heard by SCC.

    - Issue

        - Can evidence garnered under threat of forced be admitted into a court of law? How should the Collins test be applied?

    - Principles

        - Holds that the first branch of the Collins test, which requires that evidence not adversely affect the fairness of proceedings, is unsatisfied where evidence is conscriptive and not discoverable.

            - Where evidence is conscriptive (or derivative) and not discoverable, the inclusion of the evidence is equivalent to forcing the D. into participating in his or her own prosecution, which runs contrary to the right against self incrimination.

        - Conscriptive evidence occurs where the accused is forced to incriminate themselves by providing a statement, sample, or bodily action.

            - Conscriptive evidence is gathered in a way that compels the accused to participate in creation or discovery - where the accused is compelled through statement, use of body, or body samples, to incriminate self.

        - Derivative evidence is a form of conscriptive evidence, and therefore also adversely affects the fairness of a trial.

            - Where evidence has been conscripted, and this leads to the discovery of an item of real evidence, then the item discovered as a result is equally

inadmissible. This is the case due to the fact that while not conscriptive itself, the *cause* of this evidence coming to the attention of the court was conscriptive (eg. fruit of the poisonous tree).

- Discoverable evidence does not adversely affect the fairness of a trial; it is evidence which would have been discovered even had the accused not been conscripted.

    - If the Crown can prove, on balance of probabilities, that conscriptive/derivative evidence would have been either inevitably discovered anyways, or could have been discovered through an independent source for the evidence, then this evidence is considered discoverable. Discoverable evidence, even though it may meet the test for conscription, does not adversely affect the fairness of a trial. Non-discoverable evidence cannot be admitted under the Collins test. Discoverable may yet be admissible, depending on the other branches of Collins consideration.

- *R. v. Buhay (SCC 2003)*

    - Application of second and third branches of *Collins* criteria.

    - Facts

        - Accused rents locker at bus depot, deposits bag of marijuana in this locker. Guards notice that the locker smells of marijuana, open the locker, discover bag of marijuana. Notify the police, who smell marijuana, open locker, inspect goods, and place items back in locker. When accused returns following day to retrieve goods, arrested by the police. One officer said that the requirement of a warrant never crossed his mind, while the other held that he felt that the accused did not have a reasonable right to privacy in a public locker (hrm - seems as if privacy is exactly what they sought to purchase when renting the locker) and further, there were likely insufficient grounds for a warrant. Trial judge acquitted as the search violated s.8, and the evidence as a result violated s.24, MBCA overturned.

    - Rule

        - SCC restored trial judge's acquittal.

    - Principles

        - Second branch of Collins test - seriousness of *Charter* breach can be determined whether it was committed in good faith, was inadvertent, merely technical, or rather, on the other hand whether it was wilful, deliberate, and flagrant

            - If the former, then the Charter breach will not be considered serious. On the other hand, if wilful, deliberate, or flagrant, then the Charter breach

will be considered serious - this can be intuited from whether the evidence could have been obtained by other means, thus meaning that the actions must have been blatant. These considerations can also be tempered by an understanding of the extent to which the violation was motivated by a situation of urgency or necessity.

- The obtrusiveness of the search, accused's expectation of privacy in the area, the existence of reasonable and probably grounds are all factors which can mitigate or aggravate the *Charter* breach. In this case, the officers could have obtained a search warrant, but chose not to do so; a blatant disregard of the *Charter*. Further, good faith cannot be established on basis of police officer's ignorance as to scope of own authority. Finally, as one officer admitted that there were likely insufficient grounds to obtain a search warrant, the case for good faith is fatally wounded.

- Third branch of Collins test - whether the *exclusion* (not admission) of evidence will bring the administration of justice into disrepute

- Effectively, this sits against the s.24(2) provision; weighs whether the exclusion of the evidence will do more to bring the administration of justice into disrepute than the admission of the evidence. This relates to the seriousness of the offence, and the centrality of the disputed evidence to the Crown's case. This cannot be used as a means of remedying police misconduct, or condonation of unacceptable conduct by investigatory and prosecutorial agencies. Relates to the tension between the truth seeking purpose of the Courts, with the need to ensure compliance with the *Charter*.

- *R. v. Grant (SCC 2009)*

- Facts

- Unmarked police officers patrol area with history of drug, violence, robberies, etc. Confront black man walking down street who was staring and fidgeting. Man admits to having a weapon and marijuana after the officers identify themselves. Man is arrested and charged. Trial found guilty in spite of s.8 (illegal search), s.9 (arbitrary detention), s.10(b) (right to counsel), and s.24(2) (admission of evidence) arguments, appeal found guilty but with certain evidence excluded relating to the fact that the confrontation (involving three police officers) amounted to detention. CA allowed the weapon under s.24(2), however.

- Rule

- Gun admitted into evidence under s.24(2).

- Principles

    - The application of Collins set out in Stillman sets up an automatic exclusionary rule concerning the first branch of the test. This is incompatible with s.24(2) requiring the consideration of all circumstances.

        - The automatic exclusionary rule, by not considering the second and third branches of the Collins test, violates the "all circumstances" - s.24(2) - consideration prescribed by the *Charter*. It is not desirable that the Collins test in certain circumstances fail to consider whether the exclusion of evidence will bring the administration of justice into disrepute, or that a mild (good faith) breach of the *Charter* may not be sufficient to warrant the exclusion of evidence.

    - The focus of s.24(2) can be understood through three principles, which relate to whether evidence would bring the administration of justice into disrepute.

        - 1. Maintenance - relates to the long-term maintenance of public confidence and integrity in the justice system.

        - 2. Prospective - *Charter* breach necessarily means that damage has been done, and so the purpose of s.24(2) is to prevent further damage by either excluding or admitting evidence.

        - 3. Systemic - Focused on systemic concerns, and therefore compensation to those whose rights were impinged is irrelevant.

    - Identifies three policy considerations relevant to the role of the Courts in applying s.24(2). This is the *Grant Test.* **

        - This is effectively a replacement for the latter two branches of the Collins test; the first branch determines whether the evidence was obtained illegally (obtained); these considerations determine whether illegally obtained evidence should be admitted anyways (admitted).

            - 1. Seriousness of breach - Seriousness of *Charter* infringing state conduct;

            - 2. Impact of breach - The impact of the breach on the rights of the accused

            - 3. Public interest - Society's interest in the adjudication of the case on its merits

- Also sets out new test for determining whether suspect has been psychologically detained (circumstances, police conduct, individual).

    - Grant was illegally detained, as there was no r&p grounds for detaining him; goes to s.24(2) analysis, not s.1, as this was not caused by an unreasonable law, but rather an unsanctioned violation of Grant's rights.

- Seriousness of *Charter* infringing state conduct as a principle underlying s.24(2)

    - Equivalent to second branch of the Collins test - the Courts must avoid the condonation of state misconduct concerning the rights of citizens. This is mitigated by circumstances and good faith, but aggravated by bad faith or police ignorance / abuse.

- Impact of the breach on the rights of the accused as a principle underlying s.24 (2)

    - The Courts must avoid sending the message that citizens' rights count for little. Inquiry must determine whether the breach was profoundly intrusive, or on the other hand, technical and fleeting. For instance, intrusion in area involving high expectation of privacy more serious than one that does not.

- Society's interest in the adjudication of the case on its merits as a principle underlying s.24(2)

    - Asks whether the truth seeking function of the Courts would be better served by the inclusion or exclusion of the relevant evidence. Society wants to ensure that transgressors are brought to justice. This is roughly equivalent to the third branch of consideration in the Collin's test, as it involves the impact of failing to admit evidence.

    - Involves the reliability of evidence - if the breach undermines the reliability of evidence, then it is more likely to be excluded (eg. if one coerced to speak, then validity of testimony can be called into question, as opposed to testimony willingly given).

    - Involves the centrality of evidence to the Crown's case - more likely to bring disrepute if disputed evidence constitutes the entirety of the Crown's case.

    - The seriousness of the offence can be considered, but cuts both ways (eg. importance of avoidance of unfair trial, whether prejudicial to crown or accused, increases with seriousness of offence - stakes are higher).

- The three principles identified by the SCC in this case have different effects on different types of evidence.

    - Statements by the accused

        - Seriousness of breach- Negative impact varies with the seriousness of the breach, and the impression that the Courts condone police misconduct is more harmful than the acceptance of minor or inadvertent slips. Preservation of public confidence requires that police conduct in obtaining statements be constrained; *Charter* adherence is critical to this end.

        - Impact of breach - varies with seriousness of impingement, as above. Clear, blatant violation separated from technical violation. Extent to which right interfered with also considered.

        - Public interest - consideration of reliability of evidence, centrality to Crown's case. Lean towards admittance if evidence reliable, central; lean towards exclusion if manner in which evidence collected renders it unreliable, or evidence is auxiliary to Crown's case.

    - Bodily evidence (DNA, breath)

        - Seriousness of breach- where breach involves serious misconduct, this cannot be condoned. However, good faith breach means that evidence should be admitted.

        - Impact of breach - degree to which search or seizure intruded on privacy, bodily integrity, human dignity of the accused. Spectrum of intrusiveness, forcible taking of samples on one hand, iris recognition or fingerprint technology on the other. Greater intrusion, more compelling case for exclusion.

        - Public interest - favours admission concerning bodily samples. Such evidence is as reliable regardless of whether conscripted or willingly gathered.

    - Non-bodily physical evidence

        - Seriousness of breach - Fact specific determination of the seriousness of the breach; whether or not prosecutors / investigators acted in bad faith, for instance.

        - Impact of breach - Extent to which the breach intruded on the privacy of the accused. House has higher expectation of privacy

than automobile, for instance.

- Public interest - Reliability not a primary issue with physical evidence, therefore tends to favour admission. Weighed on case by case basis, however.

- Derivative evidence (type of evidence relevant to this case, evidence not conscriptive itself but found as a result of conscriptive approach - in this case, constructive detention without s.10(b) right to counsel - search produces gun, made on basis of statement)

- Seriousness of breach - did not conform to *Charter* but was not abusive, not racial profiling (region, not individual targeted). Difficult to determine where an encounter becomes a detention. Understandable that officers did not act within technical confines of the law, due to the fact that the Courts have not been able to clearly delineate the detention.

- Impact of breach - Detention not abusive, not physically coercive; could not be considered minimal, but neither could it be considered severe. Failure to inform re: counsel. Evidence was not otherwise discoverable (as without statements, there would have been no grounds to conduct a search). Significant impact, therefore.

- Public interest - gun is reliable evidence, and essential to determination of case on its merits.

- *Hunter v. Southam Inc (SCC 1984)*

- Facts

- *Combine Investigation Act* allows official to enter premises and conduct investigation based on belief that evidence relevant to investigation. D. asserts that this is unconstitutional, does not accord with s.8 concerning freedom from unreasonable search and seizure.

- Issue

- On what basis should searches by government authorities be assessed for compatibility with s.8 protections against unreasonable search and seizure? What is the standard for reasonable search *law*?

- Rule

- Sets out test for determining whether legislation satisfies s.8. The *Combine Investigation Act* is not satisfactory, and therefore has no force or effect.

- Principles

  - *Charter* is a purposive document, guarantees rights by limiting the extent of governmental authority.

    - Does not confer any powers to the government, but rather serves solely to limit the exercise of governmental power.

  - Historical limits on search and seizure based on trespass; purpose of society was to give people means to protect property.

    - One's property or personal rights are sacred, incommunicable, and can only be taken away where this serves the overarching public good. Redress is owed regardless of whether damage is done.

  - The right to be secure against unreasonable search and seizure protects one's right to privacy; may go further than this, but it goes at least this far

    - Assessment is required in order to determine whether government justified in violating privacy; public interest in being left alone weighed against government interest in advancing goals through violation. Protects privacy rights of people, not places,

  - Begs three specific questions concerning the assessment of state goals against the public interest in privacy.

    - 1. When (prior authorization) - *authorization* through assessment must occur prior to search; cannot justify *ex post facto* by finding evidence; for *Charter* to fulfill goal of preventing violation, must be assessment leading to *prior authorization*

    - 2. Who (neutral authority) - prior authorization requirement holds that person assessing the evidence must be neutral and impartial; in a judicial fashion / capacity.

    - 3. What (basis) - *possibility* of finding evidence insufficient, must require a strong reason, *reasonable* ground, or probable cause to justify; evidence of a crime. (offence, evidence, location).

  - It is not sufficient to "read in" the necessary provisions of prior authorization / assessment to existing legislation.

- It is the purpose of the legislature to enact laws which accord with the Constitution's requirements - it is not the purview of the Courts to ensure that this compatibility is satisfied.

- *R. v Wong* (SCC 1990)

  - Facts

    - D. charged with keeping gambling house; charge substantiated with video evidence collected in a hotel room. Held that D. had no reasonable expectation to privacy, as had extended indiscriminate invitations to activity.

  - Issue

    - Does the D. have a reasonable expectation of privacy such that video surveillance would constitute a violation of privacy, in a hotel room in which he had invited people indiscriminately to join him? What is a reasonable expectation of privacy?

  - Rule

    - s.8 rights violated due to lack of warrant / prior authorization. However, will not bring admin of justice into disrepute, police in good faith, therefore still admissible. Fails s.8, passes s.24(2).

  - Principles

    - *Risk analysis* is not an appropriate means for assessing reasonable expectation of privacy.

      - This would hold that if the D. had *courted* the possibility of video surveillance, that the violation of privacy was fair game. However, this is a meaningless standard in an age in which virtually every action or communication can be accessed by the government using technology. Instead, f&d standards of privacy must apply.

    - The appropriate standard for assessing reasonable expectation of privacy in Canada is a determination of f&d standards

      - Effectively, a determination of whether the agents of the state were bound to conform to the requirements of the *Charter* when effecting the intrusion in question; whether the victim of this violation could claim that it should not have been open for the government to take this action absent *prior authorization*.

- There is a difference between the risk of being overheard, and the risk that the government will permanently record activities on videotape.

    - The latter circumstance is considered far more intrusive than the former. This follows from the idea that the novelty of modern surveillance techniques would effectively allow the government to annihilate privacy completely.

- The idea that a person attends an event to which the general public has received invitation can have no privacy is effectively *risk analysis*; invalid.

    - This would hold that by *courting observation* of other people, the D. has relinquished *any right* to maintain privacy; not only is this invalid analysis given state of technology, it also equates being overheard with far more intrusive video surveillance.

- To avoid risk analysis / ex post facto reasoning, one must assess broad and neutral terms.

    - In this case, rather than framing the question as "whether one has the right to privacy while engaged in illegal activity behind closed doors", substitute "whether one has a right to privacy behind closed doors"

- Place where surveillance occurs is relevant to determining whether there is a reasonable expectation of privacy; however, not determinative.

    - Further, while it may be characterized as a private place generally, circumstances can render it public and vice versa.

- *R. v. Plant* (SCC 1993)

    - What is privacy? Informational approach - s.8 protects biographical information which individuals in an f&d society would wish to maintain and control from dissemination. Five part test.

        - Nature of information

        - Nature of relationship between person of interest and party releasing info

        - Place where info obtained

        - Manner info obtained

        - Seriousness of crime under investigation

- *R. v. Edwards* (SCC 1996)

    - Territorial - there is a different test available concerning s.8 limitations for particular territories or spatial privacy claims. Seven part test; totality of circ.

        - Presence at time of search

        - Possession or control of property searched

        - Ownership of property or place

        - Historical use of property

        - Ability to regulate access to property

        - Subjective expectation of privacy

        - Objective reasonableness of expectation

- *R. v. Tessling* (SCC 2004)

    - Facts

        - Police use FLIR (thermal imaging) to take picture of D.'s home from aircraft, infer existence of grow-op therein. Undertake search without warrant; D. contends this is a violation of s.8. Abella concurs (ONCA), appeals to SCC.

    - Issue

        - Does FLIR technology violate the reasonable expectation of privacy of a person in their own home?

    - Rule

        - Admissible; does not violate territorial privacy of the home.

    - Principles

        - Separation between territorial, surveilled, and informational privacy is not always useful; often categories overlap.

            - In this case, the interest is primarily informational, but also arguably territorial.

- Totality of the circumstances test, set out in R. v. Edwards; tends to support the privacy of homeowner, but with one distinction.

    - FLIR images do not record the inside of the house directly, but rather only the heat which is generated and then viewable as it is transmitted to outside surface. It is difficult to determine, due to this limitation, exactly what behaviour is being captured. SCC holds that this means that FLIR does not violate privacy, as effectively no more invasive than a photograph; only difference, records thermal levels rather than photons. Further, FLIR alone cannot be used to obtain a search warrant; meaningless by itself.

- Due to the limitations of FLIR, it does not constitute a serious invasion; has little effect on the freedom and dignity of individual.

    - FLIR must be judged based on current capabilities. While it may be capable of more invasive information gathering in the future, thus requiring that it be readdressed, for time being it gives non-intrusive, mundane data; no reasonable expectation of privacy.

- *R. v. Kang-Brown* (SCC 2008)

    - Drug-sniffing canines do breach reasonable expectation rights; FLIR data meaningless without context, same cannot be said of canine data.

        - Meaning garnered by canines in this capacity is profound, in that makes certain that an individual possesses drugs on person or in belongings. Thus, this is a severe intrusion of privacy, compared with the mundanity of data which is collected via FLIR.

- R. v. Patrick (SCC 2009)

    - Facts

        - Police believe D. to be operating ecstasy lab, obtained evidence from D.'s trash bags to secure warrant to search property.

    - Issue

        - Does D. have reasonable expectation of privacy in trash bags?

    - Rule

        - No.

- Principles

    - Privacy interest abandoned when placed for collection in location in which any passing member of the public had access.

        - Further, in totality of circumstances, while D. had an interest in keeping contents private, this was forfeited, objectively, through the manner in which these contents were disposed of.

    - Court must balance privacy interests of individuals against the needs of effective law enforcement as part of totality of circumstances via Collins.

- *R. v. Storrey* (SCC 1990)

    - Police must have reasonable and probable grounds before arrest can be effected. Without protection, f&d society could become abusive police state.

        - CCC requires that, in attempting to obtain warrant for arrest under s.495(1), that must demonstrate to judicial officer (judge, JP) that they have such grounds to believe that the person to be arrested committed the offence. This subjective belief is not sufficient; must be objectively established that reasonable grounds exist, that reasonable person in officer's shoes would believe that grounds exist.

    - Police do not have to establish a prima facie case for conviction in order to effect an arrest, r&p grounds that person committed offence is sufficient.

    - Must not be anything to indicate that the arrest is being effected for any reason beyond r&p grounds - racial objectives or personal vendetta undermine arrest.

- *Cloutier v. Langlois* (SCC 1990)

    - Facts

        - Lawyer arrested for unpaid parking tickets, verbally abusive, searched incidental to arrest, charges police for assault as result, saying that they have no right to search w/o warrant.

    - Issue

        - Is a frisk search incidental to arrest compatible with s.9 of the *Charter*?

    - Rule

        - Frisk is compatible, due to minimal invasiveness, other reasons given below.

- Principles

    - Frisk search incidental to arrest represents balance between safety concerns of law enforcement and privacy/liberty concerns of individ. As minimally intrusive, the balance struck is rightful.

    - Existence of r&p grounds is not necessary to conduct search - this is only necessary for the *arrest* to which the search is incidental.

    - There are three propositions relating to consideration of interests and authorities concerning frisk search incidental to arrest

        - 1. Power does not impose duty, and therefore police have discretion to *not* exercise where they deem fit.

        - 2. Search must be for valid CJS objective, such as for weapon which could endanger, allow escape, or for evidence of crime.

        - 3. Search must not be abusive in manner, *proportionate* to objectives sought and other circumstances of situation.

    - This does not extend to far more intrusive manners of search, such as the seizure of bodily samples absent statutory authority (see *Stillman*)

- *R. v. Caslake* (SCC 1998)

    - Facts

        - Officer conducts search of impounded car without warrant, finds packages of cocaine.

    - Issue

        - Can officer search an impounded vehicle without warrant or permission, where this search is held by police to be incidental to the arrest of the car's owner?

    - Rule

        - If there are r&p grounds for arrest, there is no r&p requirement for search incidental. However, search must serve police purpose; purpose of search must relate to purpose of arrest; delay and distance create negative inference.

    - Principles

- To be compatible with s.8, searches carried out by the state must be authorized by a reasonable law, and must be carried out in a reasonable matter.

- Warrantless searches are prima facie unreasonable; therefore, absent warrant, onus on police to prove search reasonable on balance of prob.

- Search incident to arrest requires that search serves police purpose / duty (eg. safety). R&P not necessary for search, so long as r&p present for arrest.

- Not sufficient that purpose for search existed; this purpose must be reason for which the search was carried out (eg. can't search someone for profiling reasons)

    - Similar to inapplicable causation defence in torts (*Lumba*); that search could *also* have been carried out lawfully does not justify unlawfulness).

- Scope of search incident to arrest includes items seized, place searched, temporal limits. *Main idea*: justified only if purpose of search related to purpose of arrest.

- Delay and distance do not preclude search from being reasonably incident to arrest, but this does create a (rebuttable) negative inference in the Court.

- Not just that search related to arrest to be incidental; further, must be prospect of securing evidence related to the offence for which accused is being arrested.

    - Search incidental means public safety interest can be secured through search. Further search beyond this would then be unreasonable, unless officers show that search would produce evidence of arresting offence.

- *R. v. Golden* (SCC 2001)

    - Issue

        - Are strip searches conducted incidental to arrest compatible with s.9 of the *Charter*, or are these searches so intrusive so as to require additional justification to be conducted in this manner?

    - Principles

        - Frisking and strip searches do not amount to same level of invasiveness; different concerns arise in latter, infringe upon person, affront to dignity.

            - Strip searches are inherently humiliating and degrading, regardless of the manner in which they are carried out. Therefore, they cannot be carried out as a matter of routine policy. Can be experienced in a manner similar to sexual assault, and victims of previous sex assault find strip searches

particularly traumatic.

- R&P grounds for carrying out an arrest does not give police the authority to conduct a strip search; must have additional r&p grounds for strip search itself.
    - While this is the case in a minimally invasive frisk, in a far more invasive strip search, higher justification is required. Police must establish r&p grounds that strip search is necessary in circumstances of arrest.
- If strip search performed in field, further r&p grounds must be established as to why this was not done at the police station; urgency, necessity.
- Fed should amend to require warrants in strip searches. Further, if no judicial authorization for strip search, other factors must be considered:
    - Conducted at police station if possible, ensure health and safety, conducted by supervisor, same gender of target, minimum number of officers involved, minimum force necessary, private area, quickly as possible, not completely undressed at one time, visual inspection of genital/anal areas without contact, target has option of removing found evidence him/herself, proper records kept for reason of search.

- Policy
    - Dissent holds that there should not be different requirements for different types of search. Further, type of search not always related to invasiveness; certain strip searches will be minimally invasive, certain frisks very invasive. Also, taking hair sample may not be invasive. Finally, controverted *Cloutier* by holding that r&p grounds required to effect strip search incidental, as that decision held that no such grounds actually needed if already established in arrest.

- *R. v. Simpson (ONCA, 1993)*
    - Officer can detain without arrest in order to determine if individual involved in criminal activity under investigation. Req. *articulable cause* (*reasonable* to suspect involvement)
    - Major change, as prior there was no police power to detain short of arrest. This case effectively turned a *de facto* part of policing into a *de jure* part of policing.

- *R. v. Mann (SCC 2004)*
    - Facts
        - D. believed to match description of b&e suspect. Police detain D., conduct pat down search for weapons (believed that may possess b&e tools, which could be used as weapons). Feel soft item, discover marijuana, charge D. (who was not the

person implicated in b&e) with possession.

- Issue

    - Is there a right of search incident to *detention* (obviously there is such a right as it concerns formal arrest)? If so, what are the extents of this right?

- Rule

    - Police do have a right of search incident to detention. However, this right is limited in several important ways. Not reasonable to search pocket based on frisk revealing soft lump, as frisk search was for weapons.

- Ratio

    - Question of search incident to detention involves balance between individual liberty and privacy against effective policing; balance essential to f&d society.

        - Absent law to contrary, individuals can do as they please, whereas police action (state action) must be where endorsed by law.

    - Changes to law which require development of subsidiary rules are better accomplished through legislative debate than judicial decree.

        - Massive, sweeping changes which require the enactment of accordant regulations should be the realm of the law maker, not the law interpreter. In this case, however, the matter in question relates to the incremental development and refinement of the rule articulated in *Simpson* (eg. articulable cause), a common law rule, therefore best dealt with by the Courts. The legislature reserves the right to enact laws which override this rule, of course, but absent such enactment, Courts reign free.

        - Controversial, as Court could have ruled that there was no relevant power, and therefore directed Parliament to address the issue in the *CCC*. Undermines the project of Parliament to create comprehensive legislation; also, seems counterintuitive that the Courts should be creating the laws which they are tasked with scrutinizing under *Charter*.

    - In order for *Simpson* detention to be valid, detainee must be advised, in clear and simple language, reasons for detention, in accordance with s.10(a) of the *Charter*

    - The right to retain counsel is purposive; cannot be used by police to prolong unduly and artificially a detention which must otherwise be brief, *Charter* s.10(b)

- *Waterfield Test* from UKCA articulates two pronged analysis re: common law powers of detention by police officers, where prima facie unlawful interference

    - *Lawful* - police officer's interference must fall within the general scope of officer's duty granted by statutory or common law authority; if it does, continue to next phase of analysis. If it doesn't, remedy required (s.24(2)). Duties include preservation of peace, protection of life & property.

    - *Justification* - if within general scope of duty, analysis turns to whether conduct was nevertheless unjustifiable use of powers associated w/ duty. If yes, remedy required (s.24(2)). If no, search rightful. Balance between police duty and liberty interests at stake.

- Detention must be brief, and there is no obligation on the part of the detainee to answer the questions of the police. Not all questioning is detention, however.

- Can progress beyond a mere pat down if *logical possibility* or r&p grounds suggest that the detainee posses a dangerous item which will elude frisk.

- *Logical possibility* (weaker standard) for determining whether detainee poses a risk to safety of officers, self, or public, justify search for safety

- *Simpson* requirement restated; *Individualized suspicion standard* - Reasonable grounds to suspect the individual is connected to a particular crime, and such a detention is necessary instead of *articulable cause*, as former provides objective view of totality.

- *Mann Test,* officers don't have carte blanche to search on detention. Once *individualized suspicion* is established, can conduct search for *safety only*.

    - *Nexus* - Officer must objectively believe that there is a clear nexus between detainee and recent or ongoing criminal offence to detain.

    - *Totality* - Search incidental to detention must relate to reasonability w/in totality of circ., eg. that D. could threaten safety of public.

    - *Action* - Search must itself be carried out in reasonable manner, eg. soft" item does not reasonably imply presence of a weapon.

        - *Remedy* - if the police actions fail any component of this test, then the admissibility will be considered within the scope of s.24(2) - *Grant*.

- Applying Winfield, there is a police right to search incident to detention relating to protection of life or safety; must reasonably believe that safety at risk.

- Further, search must be carried out reasonably. In this case, the police were justified in carrying out such a search, believing the D. to be in possession of b&e tools, could be used as weapons. However, during the course of this search, touching a "soft" item does not justify the police in carrying this search further (eg. going into pockets) - cannot reasonably infer from "soft" item that there is a weapon.

- Presence of D. in high crime area is not itself means to detention, except for where this can be related to a specific ongoing or recent offence.

- Policy - Court did not consider the relation between race and police detention practices. Important, because this case widens police discretion, which increases the extent to which race and other factors (poverty, for instance) will play a role in police actions. Court later holds that police obligated to inform detainees immediately that they have a right to counsel; only limited where such notification impossible due to public safety concerns, or through an s.1 *Oakes* application.

- *R. v. Clayton* (SCC 2007)

- Facts

- 911 call re: ten black guys outside of strip club, four with handguns. Pull over car in parking lot that did not match description of vehicles described in 911 call. Asks driver to exit vehicle. Officers notice suspicious behaviour in passenger, D., who takes flight. Police catch and subdue D., carry out search, finding loaded, prohibited firearm in pocket.

- Issue

- Do the police have the power to conduct a search incidental to investigation of a crime where the detainees are stopped in their vehicle?

- Rule

- Police do have power to conduct investigative detention using roadblock; sets out specific, discrete police power to this end.

- Principle

- Mann held that specific nexus required for search incidental to detention, and Dedman held that *random* vehicle stops only valid for traffic safety purpose. As both distinct, power must exist through another discrete category.

- *Totality of circumstances* - police can act on reliable info concerning serious firearm offences ongoing or recent, limited to premises in info, sufficiently soon

so that police have reasonable grounds to believe perps. may be caught.

- *Clayton Test* – Sets out three requirements for satisfying "reasonably necessary" grounds for search absent the *clear nexus* required by *Mann*.

    - *Seriousness of offence* - the more serious the offence, increased urgency and risk to public safety means greater latitude afforded to the police.

    - *Nature of information* - Information known to police about suspect or crime, including reliability and recency of this information.

    - *Appropriate response* - degree to which detention is responsive or tailored to the circumstances, including the geographic and temporal scope.

- The narrow definition provided by Binnie's dissent undermined Mann, in that Binnie held that comprehensive guidance must come from Fed, not Courts.

    - Majority, however, held that there is a common law power for detention, and that this must be read broadly. Effectively, Abella and the majority hold that it is the purview of the Courts to define the extent of this power. However, this again undermines the role of the SCC as the body meant to scrutinize legislation against the *Charter*, rather than create new common law powers for police agents.

- Exclusion of evidence garnered through search incidental to detention is common under s.24(2) grounds when police exceed this powerful authority

- *R. v. Suberu* (SCC 2009) informational / implicational duties on popo.

    - Facts

        - Suberu (D.) purchases items using stolen CC east of Toronto. Police catch up to him in liquor store; police focus on Suberu's associate, so Suberu attempts to leave. However, officer tells him not to leave, that he wants to talk to Suberu. Officer has brief conversation with Suberu outside of store, as Suberu sits in minivan driver's seat. Officers match plate to other descriptions received that day concerning use of stolen credit cards. Sees Wal-Mart and LCBO shopping bags in back seat (stores which were targeted), believes himself now to possess r&p to arrest D. for fraud. Officer informs D. of *Charter* rights, including right to counsel.

    - Issue

        - When is detention triggered? At what point during a detention are the police required to inform a detainee of s.10(b) right to counsel?

- Rule

    - Applies Grant detention test; in this case, D. was detained. However, the detention did not start until after the D. was at his vehicle, ergo admissible. However, Court also finds that s.10(b) right is triggered immediately once detention is effected. Onerous for police, but encourages clarity in their actions.

- Principle

    - Not every interaction with police is detention for *Charter* purposes, even where one is under investigation, is asked questions, or is physically delayed by police.

    - Objective determination is used to understand when a detention has occurred; when reasonable person believes no freedom to not cooperate with police.

    - Eventual investigative detention occurring does not mean that a detention is grounded the moment the police engage an individual for investigation.

    - D. was not legally obligated to comply with officer's request to not leave the scene. He argues, however, that reasonable person would have believed otherwise

        - Eg. that when officer told him not to leave, that reasonable person would believe himself to be detained at that point (compelling argument).

    - Application of the *Grant detention test* to these facts (finds that D. was not detained)

        - Circumstances giving rise to encounter (eg. technical, good faith vs. misconduct, bad faith)

            - Initial part of the encounter was of an exploratory, preliminary nature, and this does not support the contention that D. was under detention at this point.

                - Officer was attempting to garner understanding and orientation regarding the situation, and was not intending to deprive D. of liberty

            - It is absurd to suggest that officers must give right to counsel in order to speak with any member of the public.

        - Police conduct (did this give rise to reasonable conclusion that D. was detained?)

            - Officer speech could be construed as order not to leave; however, not physicality, only one officer, brief dialogue; supports idea that

this was preliminary questioning.

- Personal characteristics (would reasonable person in D.'s shoes have believed that detention had occurred?)

- Did not testify, did not provide evidence concerning subjective beliefs, personal circumstances, etc.

- Right to counsel without delay is effective immediately once detention is effective. "Without delay" therefore means immediately in this circumstance.

- Once detention triggered, police have informational (right to obtain and instruct counsel immediately) and implementational duty (must provide with reasonable opportunity to do so.

- Policy

- Binnie holds that police commands are coercive, Courts underestimate coerciveness to this end. Police mean what they say when they tell police to stay put.

- If courts limit consideration of facts relevant to encounter only to those facts made relevant to person stopped; this overestimates resilience of general population, and extends too much power to police.

- Binnie would have found that D. was detained - had no choice but to comply when given order (eg. had D. left scene in spite of commands, would have been pursued and stopped).

- Follows *Therens* - reasonable person likely to err on side of caution, assume lawful authority, and comply with the demands of state agents; therefore must ensure that there are safeguards to protect public.

- *Boudreau v. The King* (SCC 1949)

- No statement is admissible into evidence, unless the prosecution can show beyond (1) reasonable doubt that it was made voluntarily (2) to person in authority (3) w/o fear of prejudice, hope of advantage.

- This is the rule in *Ibrahim v. The King,* 1914.

- *Miranda* style warning, eg. that accused is not required to make a statement, and any statement made may be recorded and given in evidence, helpful, but *not* necessary.

- This rule stems from the fact that any statement made by coercion or in the hope of gaining advantage loses credibility; must seek assurance that statement is truthful.

- *Clarkson v. The Queen* (SCC 1986)

  - Facts

    - D. calls sister, tells her that her husband has been shot. Charged for murder after sister calls police. D. heavily intoxicated (0.21 BAC). En route to police station, makes inculpatory statements, repeated again w/ medical examiner, and again during interrogation, having each time been informed of right to counsel (s.10 (b)). Waives right, saying that there is "no point".

  - Issue

    - Can a heavily intoxicated person understand the gravity of weighing right to counsel? What is the appropriate test for determining admissibility of confession?

  - Rule

    - The "operating mind" component of confession admissibility expanded beyond the mere ability of accused to comprehend own words. Now, reformed, requires not only that the accused understand the statement that they are providing (validity), but also the consequences of providing this statement (integrity).

  - Principles

    - One explanation for the exclusion of statements made by intoxicated persons is that such statements unlikely to be reliable. Not the only explanation, however.

    - Any circumstance which robs confession of the quality described by the word voluntary renders the confession inadmissible; broad approach, protects integrity.

    - Can be argued that the reliability of a statement may in fact increase when a person does not comprehend the gravity of providing this statement.

      - eg. a person who does not understand the stakes is more likely to be truthful, so that they do not lie in order to conceal their misdeeds.

    - However, validity of statements not the only concern in considering confession admissibility; must also consider integrity and fairness of adjudication of justice

    - "Operating mind" must analyze not only ability of accused to understand own statements, but also understand consequences of providing statements to Crown

- For instance, in this case, as the D. was too intoxicated to fulfill the latter portion of the test, there was a responsibility of the police to wait until D. was sufficiently sober to comprehend gravity of providing statements. High degree of intoxication would be required, of course.

- Expansion of the "operating mind" test balances the need of the justice system to probe for the facts (*validity*) against the fairness of the process (*integrity*).

    - However, court later refers to "operating mind" in narrow sense again; still demand contextual approach, but use operating mind only with a view to whether accused understands own statements. Likely due to fact that McIntyre's argument was not the majority.

- Where the D. fails the expanded "operating mind" test, the admissibility of the evidence will be weighed via *Grant Test* relating to s.24(2) of the *Charter*.

- Due to her intoxication, did not understand her right to counsel, nor was she able to understand the consequences of having waived her s.10(b) rights.

- *Rothman v. The Queen* (SCC 1981)

    - Facts

        - D. arrested on PTP, hashish. Put in cell with undercover officer, who elicits incriminating statements. D. argues that these statements were made by authority, therefore involuntary.

    - Issue

        - Can statements elicited through deception be admitted?

    - Rule

        - Yep.

    - Principles

        - Self incrimination only protects from statements made to authorities. If declaration made to person not in authority, then automatically admissible.

        - Subjective test for whether person in authority, requires the target to believe, at time of declaration, that the person the declaration made to had degree of power.

        - Bringing a guilty person to admit through statement is not improper in and of itself, and should only be repressed where shocking to basic values.

- Statements inadmissible where reasonable doubt can be raised concerning whether person in authority induced person to make possibly untrue statement.

- Statements inadmissible wherever inclusion of these statements would bring the administration of justice into disrepute.

- Requires clear connection b/w offending conduct and subsequent confession. Must be shocking to values; not dressing up as a drug addict, but rather dressing up as a prison chaplain to elicit religious confession.

- Policy

- Accused did not intend to make a statement to a person in authority. Therefore, public authority cannot present the resulting statement as voluntary (Remember Mr. Big scams - undercover is not a person in authority, and therefore inducements offered by undercovers do not taint the statements)

- *R. v. Oickle* (SCC 2000)

- Facts

- D. submits to polygraph, informed that results inadmissible, informed statements admissible. Upon learning that he failed, confesses, reenacts crimes for officers. Fights admissibility of evidence on basis of coerced confessions.

- Issue

- Can confessions elicited following administration of failed polygraph test be admitted?

- Rule

- Confession admitted, conviction restored.

- Principles

- Common law confession protections work in conjunction with *Charter* protections, with the former effectively extending the latter.

- Voluntariness or veracity can be undermined through an *atmosphere of oppression* even in the absence of a hope of advantage, fear of prejudice, or other coercion.

- There are at least four relevant requirements which must be considered in totality for determining whether a confession is *voluntary (voluntariness rule)*:

- *Threats / promises* - particularly where veiled; must be strong enough to raise reasonable doubt about voluntariness of confession; *overbear will*.

- *Oppression* - presence of deprivation of necessities, including food, water, clothing, sleep, medical attention, right to counsel, etc.

- Aggressive and intimidating questioning for a long period is also considered an example of oppression. Evidence can be exaggerated, perhaps fabricated.

- *Operating mind* - must be able to comprehend own statements, must not be so impaired via mental disturbance or intoxication to preclude this.

- *Police trickery* - distinct inquiry, requires consideration as to whether the means used by police would *bring the admin. of justice into disrepute*.

- A discrete inquiry, unlike the other three which work together; protects the CJS rather than the defendant from police conduct.

- Further, for the *voluntariness* precondition to be applicable, must be made to a subjective person in authority (*Rothman).*

- Failure to inform D. that polygraph inadmissible would not have been sufficient to render evidence inadmissible. Three step process for inadmissibility:

- Excluded if deception shocks community.

- Must have been made to subjective person in authority *(Rothman)*

- Considered in analysis where relevant to voluntariness.

- Policy - in dissent, Arbour holds that the causal connection and proximity of polygraph means that confession gained as a result inadmissible. D. cannot fight evidence gained as result of failed polygraph exam without admitting to having failed exam, and therefore introducing otherwise inadmissible and incriminating evidence to the trial.

- *R. v. Spencer (SCC 2007)*

- Inducement or promise can only undermine voluntariness in certain circumstances Central is whether given strength of inducement, accused's *will was overborne*.

- However, this test is too restrictive, represents a departure from *Ibrahim v. The King* (1914) according to dissent;

- In this case, a savvy, aggressive defendant was unlikely to have his will overborne by the mere presence of persuasive police interrogation.

- *R. v. Sinclair (SCC 2010)*

    - Facts

        - Advd. of right to counsel, and had a consultation by telephone. Had subsequent police interview, asserted that he did not wish to make statement concerning investigation, wished to speak with lawyer. D. was refused further consultation with lawyer, refused to allow lawyer to be present. D. was implicated, later placed in cell with undercover, and made further implicating statements.

    - Principles

        - s.10(b) to be provided with legal advice relevant to right to choose whether to make statements to the police. Not an ongoing, *protective* right; merely informational, ensures that D. knows how to exercise their rights.

        - Police do not have further obligation beyond reasonable oppo. for D. to retain counsel to advise on exercise of s.7 rights; no further facilitation is required.

        - Detainee must show reasonable diligence; there must some prudence shown on the part of the D., will not be protected by wilful recklessness concerning rights.

            - For instance, if counsel not available overnight - evidence may be disappearing (eg. in an impaired charge), and therefore there must be some limits on the D.'s rights (eg. must pick different lawyer)

        - Detainee does not have right to counsel throughout custodial interrogations. Initial warning, reasonable oppo., and hold off are sufficient to satisfy. Additional opportunity only needed where developments make it necessary for s.10(b).

            - For instance, change in jeopardy faced by detainee (new or expanded charges)

        - Underlying purpose of ensuring s.10(b) rights is to rule out the possibility that the D.'s decision concerning cooperation was made unfreely, uninformed manner
        - Enumerates three potential circumstances in which *material changes* can arise: new procedures (polygraph, lineup), change in jeopardy (charges), or it becomes evident that the detainee did not understand rights/exercise after initial consult.

        - All protections granted are still subject to residuary protection offered by common law confessions rule; must be voluntarily given.

- Dissent

    - Binnie - Police may feel that they know that the D. is culpable, and so put to use any tactics and ingenuity required in order to wear down the resistance of an individual. This is not an approach to interrogations that the SCC should be endorsing; will certainly lead to involuntary or even false confessions.

    - Fish - confronted by pieces of evidence, whether real or conjectural, the D. may be persuaded, wrongly, that the maintenance of the right to silence is futile; that the advice given by counsel under previous circumstances is now unsound in light of the "body of evidence" that the police have compiled. D.'s understanding of the circumstances have changed, and therefore the right to counsel is once again relevant, as the D. needs to understand rights and their exercise in light of the new circumstances. Access to counsel is a part of this.

- *R. v. Manninen (SCC 1987)*

    - Facts

        - Officers approach suspect in convenience store robbery. Upon being confronted, was read card advising of *Charter* rights. suspect says "Prove it. I ain't saying anything until I see my lawyer." Police question suspect in an office containing a telephone, which the police themselves use. Do not offer use to defendant. The D. makes incriminating statements.

    - Issue

        - Do the police have a duty to offer a telephone to the defendant in order to discharge duty under s.10(b)? If they do have a duty, and did not discharge it, what is the appropriate remedy concerning evidence obtained in an interview?

    - Rule

        - Evidence thrown out under s.24(2); would bring admin of justice into disrepute.

    - Principles

        - Determination of whether police accorded with *implementational* requirement of s.10(b). Posits two sub requirements:

            - (1) must be provided with reasonable oppo. to exercise s.10(b) rights. Detainee under police control can't provide own oppo, police must do so.

                - eg. can't expect *detainee* to provide self with opportunity.

- (2) police must cease questioning until (1) has been fulfilled. Purpose of right to allow detainee to obtain advice on how to exercise rights.

- to allow such questioning would frustrate the right.

- Questioning before reasonable oppo. for counsel may be permitted *only* where there is urgency concerning obtaining information (eg. safety is at stake).

- s.10(b) rights can be waived explicitly or implicitly. However, in the case of implicit waiver, bar is very high; cannot run contrary to explicit assertions either.

- If police appear to ignore the s.10(b) and right to silence assertions, detainee likely to feel that right has no force and therefore obliged to answer. This outcome must be protected against, cannot incentivize police to ignore rights.

- Answering questions is not an implicit waiver of one's s.10(b) rights. Otherwise right to not be asked questions would only exist where detainee doesn't answer them, and therefore does not need the protection of the remedy; renders right meaningless.

- Use of self-incriminatory evidence obtained following denial of right to counsel generally undermines fairness of trial, bring admin. of justice into disrepute.

- *R. v. Brydges (SCC 1990)*

- Facts

- D. arrested for second degree murder. Advised of s.10(b) rights. D. expresses concern that he will not be able to afford a lawyer, queries as to whether duty counsel or legal aid are available. Officer responds by asking if D. has any reason to talk to a lawyer, and D. responds by saying "not right now, no". Police question D. absent attorney, and D. gives inculpatory statements.

- Issue

- Was the D. requesting the right to speak with counsel in expressing his concerns over whether he could afford counsel? Did the police have a duty to inform D. that duty counsel was available? Did the D. understand his s.10(b) rights, being misinformed as to whether his right to counsel was moderated by his ability to afford a lawyer?

- Principle

- Can't consider consequences of waiving rights which aren't understood: D. mistaken that inability to afford a lawyer prevented exercise of s.10(b) rights.

    - Further, it was misleading statements by police that led him to this misunderstanding.

- Right to retain counsel means more than the right to hire an attorney, but the right to receive advice from duty counsel regardless of financial status.

- SCC creates new duty in s.10(b) informational branch: must instruct concerning existence, applicability of legal aid, duty counsel, to foster full understanding.

- *R. v. Prosper (SCC 1994)*

    - s.10(b) does not impose duty to fund duty counsel for those arrested or detained after regular business hours; but police have duty to *hold off* until reasonable oppo. for s.10(b)

- *R. v. Bartle (SCC 1994)*

    - s.10(b) informational duty requires that all applicable resources be explained; must also include 1-800 number for duty counsel (even though no obligation to have that service).

- *R. v. Hebert (SCC 1990)*

    - Facts

        - Accused arrested for robbery, apprised of right to counsel. Informed police of wish *not* to make a statement. Put in cell with undercover who engaged D. in conversation, leading to inculpatory, incriminating, implicating statements.

    - Issue

        - Where a D. has been detained, asserts wishes not to make statement, can the police undertake to obtain a statement through the use of undercover officers?

    - Rule

        - D. asserted right not to make statement (s.7), and this was not revoked or undermined when making statement to undercover. Crown thwarted rights by employing trickery, undermined voluntary choice of the D. Inadmissible.

    - Principles

        - Common law *confessions rule* based on the idea that all statements must be made voluntarily, and otherwise will be automatically excluded from admission.

- Canadian approach combines common law with *Charter*, underlying principle holds detainees have right to choose whether to make statements to authorities.

- Waiver must be determined subjectively, and is dependent on whether the detainee is aware that he is speaking with authorities, among other things.

- Essence of the right to silence is that the subject be given a choice, freedom to either choose to speak to authorities or refuse to speak to authorities.

- Four limits concerning the *confessions rule* in Canadian law:

    - (1) *Absence of Counsel* - Police can question accused in absence of counsel once accused has retained/advised counsel. Presumes counsel informed D. of rights and exercise.

        - Information provided to non-undercover police voluntarily in detention, after oppo. re: counsel, is admissible, and cannot constitute a violation.

    - (2) *Detention* - Protections re: confessions only apply once the D. is in custody. Previous to this, protection against subterfuge and right to counsel do not apply.

        - After detention, the state is in control of the person and ensuring that their rights are not violated, so different rules apply.

    - (3) *Statements to non-authorities* - Right to silence does not affect voluntary statements made to legit cell mates . Violation only occurs when Crown acts to thwart rights.

    - (4) *Eliciting versus observing* - Undercover officers can be used to observe suspect, but not to elicit statements. Unsolicited statements are voluntary by definition, however.

- *R. v. Singh (SCC 2007)*

    - Facts

        - D. suspect in homicide. Arrested, taken to station. Retains counsel. Police employed method where they insist on presenting all evidence against D. to him, in order to elicit a confession. The D. repeatedly asserts that he wants to discontinue interrogation, return to his cell. On each occasion, officer states that he has a duty to present evidence. D. eventually makes inculpatory statement. D. has conceded that the statements were made voluntarily.

- Issue

    - Under what circumstances does police persuasion, in this case persistence in presenting case to D. in order to continue interrogation, constitute a violation of the s.7 right to silence? What role do a D.'s repeated assertions of unwillingness to make a statement play in this determination?

- Rule

    - Presenting the Crown's case does not equal an undermining of voluntariness.

- Principle

    - Modern formulation of voluntariness / common law confessions rule relates to *Charter* consideration of whether the D. was denied the right to silence.

    - Where defendant can show on balance of probabilities that right to silence was breached by the police, Crown cannot meet voluntariness, s.24(2) remedy.

    - Common law confessions rule, evidence automatically excluded if Crown cannot prove beyond reasonable doubt that statements obtained voluntarily.

    - In this case, the persuasive nature of the comments made by the police are not sufficient to overcome *voluntariness rule* (as in *Oickle*).

- Dissent

    - Totally under control of police authorities, cannot return himself to his cell, cannot himself cut off the interrogation; police subtly urge D. to forsake advice of counsel. Ignorance of D.'s continued resistance is not vindicated by the fact that he eventually broke down; this proves failure, not success of the protections.

- R. v. Therens (SCC 1985)

- Facts

    - Accused pilots vehicle into collision with tree. Officer demands that D. provide breath sample. D. complied, and blew over the legal limit. Police did not advise D. of s.10(b) rights.

- Issue

    - Was the D. detained? Did the D. have a right to counsel under the circumstances? If this right was violated, is the remedy to be found under s.1 or under s.24(2)?

- Rule

    - The police conduct, and not a law, was found objectionable in breach. Therefore, s.24(2) and not s.1 applies. This would bring the administration of justice into disrepute, and therefore the evidence was thrown out.

- Principles

    - Right to counsel extended to arrest and detention both. Other circ. in which counsel required: restriction of liberty can lead detainee to believe that they are unable to retain counsel, and therefore duty arises in these specific situations.

    - Not realistic to regard compliance with the demands of a police officer as truly voluntary, as even absent common law / statutory authority for demand, as the citizen the demand is directed at will not believe that compliance is optional.

    - This case was later picked up in *Grant* (2009). Recognition of three types of detention; (*1*) physical, (*2*) psychological via legal obligation, or (*3*) psychological via belief that one's liberty has been restrained at directive of police agents.

- R. v. Mohl (SCC 1989)

- Admission of breathalyzer results would not bring administration of justice into disrepute even if D's rights under s.10(b) were violated as too drunk for operating mind.

    - REALLY?

- R. v. Thomsen (SCC 1988)

- Restatement of four principles from *Therens*:

    - *Meaning of detention* - restraint of liberty other than arrest, particularly where this involves D. reasonably requiring assistance of counsel, where they might be prevented from doing so but for the constitutional guarantee (due to belief)

        - Why write an unnecessarily convoluted rule to protect a critical right?

    - *Assumption of control* - there is a detention where an officer assumes control over the movement of a person by demand or direction, where this has significant legal consequences and prevents or impedes access to counsel.

    - *Reasonable belief* - compulsion or coercion can stem from criminal liability in case of noncompliance (eg. refusal to blow), or from the reasonable belief that one does not have a choice as to whether one can obey officer's demands.

- *Temporality* - s.10 of the *Charter* governs a great variety of detentions, and therefore cannot be restricted to only those of such lengthy duration that a writ of habeas corpus would be effective.

- In this case, ordering the D. to accompany an officer to his car and provide a breath sample falls within the above criteria, and therefore constitutes violation of s.10(b). The D. was in fact detained, and should have been informed of right to counsel immediately.

- In this case, Court read in the implication that by requiring roadside screening tests, the restriction of s.10(b) was prescribed by law in the Criminal Code, therefore goes to s.1.

- The denial of s.10(b) rights in a manner applicable to this case (eg. detention, action by police compulsion, situation calls for reasonable counsel req) is compatible with s.1; demonstrably justifiable, necessary in order to serve detection and deterrence interests.

- *R. v. Grant (SCC 1991) // different Grant*

- Where breathalyzer demand is not immediate ("forthwith"), but rather requires a thirty minute delay in order for another officer to bring equipment, s.10(b) rights apply.

- s.1 does not apply, as the thirty minute delay is not a violation which is prescribed by law, therefore have to go to s.24(2). Evidence excluded as a result.

- *R. v. Bernshaw (SCC 1995)*

- Requirement to provide a sample forthwith did not require immediate demand if a 15-minute wait required in order to ensure accurate test (needs time after consumption of alcohol in order to be accurate). D. not entitled to speak with counsel during this period.

- Restriction of s.10(b) rights in order to allow for accurate administration of roadside alcohol test already s.1 compatible, therefore it is only sensible to expand this to cover waiting period of fifteen minutes to ensure that administered tests will be accurate.

- *R. v. Hufsky (SCC 1988)*

- Issue

- Does the random stop of a motor vehicle amount to arbitrary detention under s.9 of the *Charter?*

- Principles

- Random stop for spot check does amount to detention, in spite of the fact that this is of a relatively brief duration. Officer assumed control over movement of D., significant legal consequence and penal sanction for noncompliance.

- Spot check occurs within the context of the legal responsibilities of the officer. But, this procedure has no criteria for selection, ergo is definitionally arbitrary. However, demonstrably justified under s.1, with a view to highway safety.

- Request that the operator of a motor vehicle provide licence and insurance information is not search and seizure - no reasonable expectation of privacy.

- *R. v. Ladouceur (SCC 1990)*

  - Majority

    - Random stops are rationally connected and carefully designed to achieve safety on highways; do not trench so severely on right so as to outweigh legis. purpose. Demonstrably justified under s.1, with a view to highway safety.

    - Officers can stop persons only for legal reasons, to check licence and insurance, sobriety of the driver, fitness of vehicle; only questions justified are those related to driving related offences, and further intrusion requires r&p grounds.

  - Dissent

    - This allows officers to stop any vehicle, at any time, without any reason to do so. Total negation of freedom from arbitrary detention within meaning of s.9.

    - The unlimited right fought for in this instance is very different from the right to conduct random checks at a checkpoint, due to oversight and accountability.

- *R. v. Mellenthin (SCC 1992)*

  - Facts

    - Officer conducts random traffic stop, asks D. what is in duffel bag on front seat, D. opens bag, officer discovers that it contains narcotics.

  - Principles

    - Use of check stops is not entirely unlimited, in that it must be undertaken with a purpose relating to highway safety - sobriety, licencing, registration, car fitness.

    - The check stop is not a general search warrant for every vehicle, driver, or passenger that is pulled over. Searches can only be conducted on r&p grounds, established through, for instance, illicit objects being in plain view in vehicle.

    - It is a serious breach to conduct a search in the absence of r&p grounds, particularly where this search is adjunct to arbitrary (but justifiable) check stop.

- *R. v. Orbanski (SCC 2005)*

    - Do the police have an s.10(b) duty when asking questions at a checkstop re: sobriety, or when asking D. to perform physical sobriety tests?

    - The police do have an s.10(b) when asking questions of a driver, or when asking driver to perform physical sobriety tests; but, breach of this duty demonstrably justified, s.1

        - In dissent, LeBel and Fish held that these tests should not have been considered under s.1, as they were not written, ergo not prescribed by law.

- *R. v. S. (R. D.) (SCC 1997)*

    - Facts

        - Black youth charged with assaulting a police officer. Evidence limited to testimony given by white police officer, which conflicts with the testimony of the D. TJ acquits, and holds that white officers commonly overreact to black citizens, and commonly misrepresent their dealings with such citizens to the Courts. Appealed to SCC on basis of reasonable apprehension of bias on part of the TJ.

    - Issue

        - Do the TJ's comments constitute a reasonable apprehension of bias, or rather are they reflective of the reality of the situation? Further, was the TJ referring to the specific behaviour of the police officer in question, or did this constitute a stereotype of all white police officers generally?

    - Rule

        - The TJ's comments do not meet the high standard required for reasonable apprehension of bias, plurality decision. However, majority does *not* agree that TJ was referring to specific officer's actions, but rather generally actions of white police.

    - Principles

        - Judges can never be neutral, it is accepted and desirable that they will use their own experiences, where relevant, as a part of the decision making process.

        - The TJ did not relate the general comments concerning white police officers to the specific actions, if the TJ had done so, this would not have been in error.

- Cory holds (concurring) that there was no evidence to link officer's actions with the stereotypes, but TJ's remarks don't meet high bar for reason. appr. of bias.

- Dissent (Major)

- Courts critical of stereotyping people into predictable behaviour patterns (eg. prostitution does not constitute consent in sex assault cases) - therefore, not desirable to judge officer's actions by TJ's stereotypes. Error in law, as TJ based her conclusions on such stereotypes rather than on the evidence of the case.

- *United States of America v. Burns and Rafay (SCC 2001)*

- Facts

- US suing for extradition of the D.'s, who are accused of murder in that country. If convicted, the D.'s will face the death penalty.

- Issue

- Is the ability of a Minister to exercise discretion in extradition a violation of the principles of fundamental justice where the extradited persons will face the death penalty? How is this modified through understanding of the frailties of the CJS?

- Principles

- Error will occur within the context of legal systems. The issue with capital punishment is that it removes the ability to rectify and compensate for error.

- Canada abolished the death penalty completely in 1998, in accordance with the idea that miscarriages of justice do occur, and death is not a proven deterrent.

- The avoidance of conviction of the innocent is a fundamental principle of the CJS, enshrined in the *Charter* and in procedural rules concerning trial fairness.

- A fair trial alone is not sufficient to ensure that the correct verdict has been reached. Even in such circumstances, miscarriages of justice have occurred.

- In the US, the problem is exacerbated by fact that fair trials are impossible (public defender woefully unprepared), errors are manifold, system appears to target demographic groups (racially, geographically, socio-economically).

- DNA is not a major factor, only occurs in a small number of cases. Issue is that wrongful convictions are being overturned for far more elusive frailties, which may never actually be eradicated from the criminal justice system.

- Amendment to the *CCC* in 2002 holds that once appeals have been exhausted, accused can bring matter before Minister of Justice, who can order new appeal; discretionary, will be carried out where minister believes justice miscarried.

- There is only one kind of acquittal in CJS: Crown fails to prove beyond reasonable doubt. No such thing as "factually innocent" - such verdict would cheapen the nature of "not guilty" verdicts.

- There can be only one class of innocent people in the CJS.

- *R. v. Pugsley (NSCA 1982)*

- Substantial burden placed on accused person to show that court attendance secured, detention not necessary for public interest or protection and safety of the public.

- Burden too high; onus should be on Crown to accord with the *Charter*, must show just cause for continuance of detention. Cannot be left to D. to disprove this.

- *R. v. Bray (ONCA 1983)*

- *Bail Reform Act* intended to introduce liberal and enlightened system of pretrial release, as was necessary previous to enactment of the *Charter* in 1982.

- Onus is on the prosecution to justify the detention of the accused, except for in a limited number of offences, such as murder, or offences under the *CDSA* (at that time, *NCA*).

- s.11(e) of the *Charter* holds that a person shall not be denied bail without *just cause* (eg. secured attendance / public interest). Does not say anything about onus requirements, therefore cannot be used to automatically invalidate shifting burden to the defendant.

- The reverse onus position would be demonstrably justifiable under s.1 of the *Charter*, but this is not required. Accused must show lack of just cause on balance of probabilities: this is a burden which is rationally in accused's power to discharge.

- *R. v. Pearson (SCC 1992)*

- The rights extended in s.11(e) of the *Charter* are twofold. (1) First, there is the right to *reasonable bail*, and (2) second, the right to not be denied bail without *just cause*.

- Usually, those charged brought before JP; absent a guilty plea, set free on an undertaking without conditions; but Crown to be given reasonable oppo. re: just cause for detention.

- Detention can be shown on primary ground re: securing attendance in court, or second ground re: necessary in public interest, or for protection or safety of the public.

- Onus is reversed under *NCA* (now *CDSA*) offences or conspiracy to commit these offences; *accused* must then be given reasonable oppo. to disprove *just cause* for detention

- The shifting onus in *CDSA* is necessary to create functional bail system, owing to the fact that narcotics offenders likely to continue criminal activity or abscond.

- Scope of shifting onus legislation is narrow, carefully tailored to ensure the proper functioning of the bail system. Deviates from s.11(e), but consistent with just cause.

- Dissent

    - Does not differentiate between large-scale traffickers, likely to abscond and reoffend, and small-scale traffickers, who aren't. Therefore has disproportionate effect on less serious offenders, undermines just cause, infringing s.11(e).

- *R. v. Morales (SCC 1992)*

- *Public interest* branch of the *just cause* test is unconstitutionally vague; due to rarity of pretrial detention in Canada, more pressing issue than even vagueness in *CCC* offences

- Not acceptable that the *just cause* requirement be justified through the fact that it does not authorize powers of enforcement officials, but rather informs judicial discretion. In either case, it serves the whims of government agents due to vagueness, unacceptable.

- Impossible to give something as vague as "necessary in public interest" a constant or settled meaning, particularly as the term is accompanied by no inherent criteria to define application. This ground of just cause cannot be demonstrably justified under s.1 either; invalid.

- There are two factors critical to denial of bail; (1) narrow set of circumstances, and (2) must be necessary to functioning of bail system - *not* extraneous factors.

- Second branch of secondary ground meets this criteria "por the protection or safety of the public"; narrow, in that it requires *substantial likelihood* to commit offence, interfere with admin. justice; must be *necessary*, not just convenient.

- Dissent

    - Public interest should be considered valid exercise of power, consistent with s.11 (e)'s just cause requirement; protection of accused from self or others, for instance. Gives parliament the ability to deal with circumstances which have not been foreseen, ergo necessary for Fed to provide for social peace and order.

- *R. v. Hall* (SCC 2002)

    - s.515(10) holds that bail denied in order to fulfill any of the following grounds:

        - (1) secure attendance in court (*primary*) s.510(10)(a) OR

            - Respect for previous bail orders, criminal record, type of crime at hand.

        - (2) where necessary for safety of public re: *substantial* likelihood of committing offence OR interference w/ admin of justice (*secondary*) s.510(10)(b) OR

            - Respect for previous bail orders, criminal record, type of crime at hand.

        - (3) any other *just cause* being shown required to maintain confidence in admin justice (*tertiary*) s.510(10)(c)

    - The third component, involving any other just cause re: maintaining confidence in admin of justice, requires consideration of all circumstances - invokes four sub criteria;

        - (1) Apparent strength of prosecution's case;

        - (2) Nature / gravity of offence;

        - (3) Circumstances surrounding commission (eg. involving firearm?);

        - (4) Potential for lengthy prison term (eg. involving firearm, minimum sentence of three years or more).

    - Phrase "any other just cause" unconstitutionally vague; cannot confer broad discretion on judges to deny bail, must be narrow and precisely entailed; will also fail s.1 as a result via proportionality test.

    - Phrase "without limiting the generality of the foregoing" also void, as it serves only to confirm unconstitutional generality of the preceding statement.

    - Rest of the requirement is able to stand on its own; separate and distinct basis for denial of bail which is not covered by or considered in the other two categories. "maintaining confidence in administration of justice"

    - Dissent

        - The only justification for creation of tertiary ground was to cover circumstances outside of the other grounds; however, absent deficiency in system, extends power too far without pragmatic justification. Denies argument for

- *Boucher v. the Queen (SCC 1954)*

    - Duty of the Crown to make every possible investigation into offence, and if conclusion is innocence or lack of reasonable doubt, duty of the Crown to say so or drop charges.

    - Purpose of prosecution is not to obtain a conviction, but rather to present credible evidence of alleged crime, fairly and firmly, without a view to winning or losing.

- *R. v. Stinchcombe* (SCC 1991)

    - FACTS: witness who gave exculpatory statements at prelim was not called by the Crown at trial, and Crown decided against providing statements to the defence; TJ denied a motion requesting this disclosure, holding that the D. had no right to it.

    - Overwhelming evidence supports the idea that the Crown has a legal duty to disclose *all* relevant information; not reciprocal with defence counsel either; defence has no obligation to assist the prosecution, and can assume an adversarial role in proceedings.

    - *Fruits of investigation are not the property of the Crown to be used in securing conviction, but the property of the public to ensure that justice is done.*

    - Lack of standards means that there is significant variation between jurisdictions and prosecutors concerning disclosure.

    - Full disclosure saves time, prevents disputes concerning the fairness of trial, would occasion an increase in guilty pleas, waiver of prelims, dropping erroneous charges, etc.

    - Lack of full disclosure is not compatible with the right to a fair trial which is enshrined as a principle of fundamental justice and protected therefore by s.7 of the *Charter*

    - Crown has discretion concerning disclosure; must disclose all material, but must also abide by rules of privilege and other prudent interests, such as the protecting of identity of informants *(informer privilege)*. Therefore, has discretion concerning the timing of disclosure.

    - All statements obtained from persons that have provided statements to authorities must be disclosed, regardless of whether they will be called by the Crown; if statements not available, notes, and if no notes, must provide contact details and info concerning type of evidence that this person may have knowledge of.

- *Rondel v. Worsley* (HL 1963)

    - Defence counsel must raise every issue, every argument, every questions, regardless of how distasteful, regardless of whether this will help his client's case. However, this must be tempered by duties to the court; must not mislead the court. Must serve truth.