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Crim Pro 303 / Allen/Hulme / Spring 2013 / outline by Patrick Dudding

1. Police investigation & powers

a. *Overview* – role is to investigate, recommend charges (at discretion) via RTCC, gather evidence, and manage witness. Should be objective and fair, as tunnel vision contributes to wrongful convictions.

b. *Involvement of Crown counsel in investigation*

i. *Overview* – may offer advice to police re: investigation, powers: potential source of conflict / partiality. Must not *direct* the investigation: must maintain strict line. {Regan}

1. For instance, may have overstepped bounds when Crown (rather than police) conducting pre-charge interviews without police screening charges; depends on circumstances: could be valid, as in BC where Crown approves police charges, and therefore necessary to assess credibility re: SPC, etc. {Regan}

2. For instance, wrongful convictions can be related to close relationship between Crown and police during investigation, causes the former to be blind to gaps in evidence/testimony. {Morin}

c. *Questioning*

i. *Overview* – police *always* have the right to ask questions; however, persons are not generally compelled to answer or even to listen, with some exceptions (eg. *MVA* identification). {Kay}

1. For instance, there is no detention where mere asking of questions to orient to situation; only becomes detention where there is individualized suspicion. {Kay} {Suberu}

ii. *Charter* – engages s. 7 (right to silence, CLC), s. 9 (arbitrary detention), s. 10 (reasons for detention, RTC).

iii. *Detention* – police can conduct investigatory questioning that does not necessarily result in detention.

d. *Detention*

i. *Overview* – police have a right to detain persons without effecting an arrest in certain situations; this engages ss. 10(a) and 10(b) of the *Charter* (informed of reasons, right to counsel)

ii. *Investigative detention*

1. *Overview* – must have RPG that detainee connected to a particular crime, and the detention must be necessary in the circumstances. {Mann} In *Clayton*, clarified that this does *not* require a clear nexus between individual and a recent or ongoing offence; question is really whether detention reasonably necessary in the totality of the circumstances. {Clayton}

2. *Operation* – detention must be brief in duration, imposes no obligation on the detainee to listen to or answer questions of police. {Mann}

iii. *Search incidental to detention* – if RPG concerning safety at risk, officer may engage in protective

pat-down search of detained person, if conducted reasonably - see search incidental to detention below under search and seizure heading, below. {Mann}

e. Arrest

- i. *Overview* - as set out in **s. 495**, police may effect arrest (without warrant) where RPG that person has committed, is committing, or is about to commit a criminal offence; grounds must be objectively reasonable and assessable, officer must subjectively believe them. {Storrey}
- ii. *Limitations on police arrest power* - (1) absent *reasonable concerns* re: identity of the accused, preserving evidence, preventing repetition of offence, or court attendance, there is (2) no arrest required for s. 553/hybrid/summary offences (RICE). **s. 495(2)**
- iii. *Warrantless arrest of mentally disordered persons* - applies to persons subject to disposition order under **s. 672.54**; see mental disorder -> enforcement below.
- iv. *Interrogation* - police are entitled to attempt to obtain a statement from accused; includes right to slowly present evidence to accused, despite protestations/requests to go back to cell. {Singh}
- v. *Procedure* - following arrest, may be subject to conditions (PTA, UTA, bail): see bail and release below.
- vi. *Search incidental to arrest* - see search incidental to arrest, under search and seizure heading, below.
- vii. *Citizen arrest* - suspect must be committing *indictable* offence, or fleeing police having committed any *criminal* offence, or committing offence in relation to arrester's property; must hand over to police forthwith. **s. 494**

f. Commission of offences by police

- i. *Overview* - as set out in **s. 25.1**, public officers are able to commit offences without attracting criminal charges *where authorized to do so*. Consider Mr. Big / entrapment / etc.

g. Sealing of warrant application documents

- i. *Overview* - see also: applications -> procedural -> disclosure -> warrants / ITOs, below.
- ii. *Part VI application* - all documents relating to an application made under Part VI (eg. to intercept private communications) are *automatically* sealed/confidential, subject to procedure for opening/vetting documents (eg. if relevant at trial, **s. 187(1.4)(a)**); see generally, **s. 187**
- iii. *Other orders* - for all other orders, the documents related to warrant application are only sealed in circumstances where an order is made under **s. 487.3**, eg. where disclosure would subvert the ends of justice, be used for improper purpose - for instance, by compromising a CI. **s. 483.3(2)(a)(i)**

h. Search and seizure

- i. *Overview* - s. 8 of the *Charter* protects against unreasonable search and seizure where there is *reasonable expectation of privacy* ("*REP*"); does not confer the power of search on the state, but

rather confers protections on individuals. {Hunter}

ii. Definitions

1. *Search* - examination by agent of the state which constitutes an intrusion upon REP; for instance, knocking at front door to conduct “sniff” examination is a search. {Evans}
2. *Seizure* - acting under public authority, taking a thing covered by REP from a person without that person’s consent; sufficiently broad to cover blood/hair samples, etc. {Dyment}
 - a. For instance, accused provides DNA sample by consent for investigation; police use sample without consent for investigation in another investigation; this violates s. 8. {Borden}
 - b. For instance, where participant records private communications with another person, no prior judicial authorization, this is a breach of s. 8. {Duarte}
3. *Privacy* - right of the individual to determine for himself when, how and to what extent he will release personal information about himself. {Duarte} Categorized as personal, territorial, and informational. {Patrick}
 - a. *Personal* - eg. one’s blood, hair, DNA, contents of mind; always REP. {Stillman}
 - b. *Territorial* - whether REP: dependent on presence at time of search, possession/control (can exclude others / regulate access?), ownership, historical use, subjective & objective expectations. {Belnavis}
 - c. *Informational* - whether REP: dependent on how personal/sensitive info is; whether it is part of “biographical core” incl. intimate details of lifestyle, personal choices; {Plant} identity of the custodian of information (personal or professional?), legislative protections, etc.
 - i. For instance, REP if type of information that society accepts should remain out of the State’s control because of what it would reveal about person, reasons for collection, circumstances of use. {Gomboc}
4. *Reasonable expectation of privacy* - protects *persons*, not places, and only where there is REP. If no REP, then no privacy interests at play to preclude search. {Patrick}

iii. Warranted searches

1. *Overview* - warrantless searches are presumptively unreasonable; only where *unfeasible* to obtain warrant prior to s&s is this allowable; party seeking to justify bears onus to rebut presumption; allows for privacy to be balanced against public interest in law enforcement.
2. *Justification* - (1) must have RPG, and (2) must always be authorized by law, and (3) authorizing law must nonetheless be reasonable.
3. *Search warrants*
 - a. *Overview* - granted by judge or justice of the peace, **s. 2**; for past offences *only*, and where there is RPG under oath that something will be found relating to criminal offence. Made *ex*

parte through affidavit known as an information to obtain (ITO). **s. 487**

4. CDSA search warrants

- a. *Overview* - RPG that drug offence has been committed and that search will reveal evidence concerning CDSA or CC offence; **s. 11(1)**; obtainable *ex parte* and via telewarrant; **s. 11;(2)** allows for seizure as well. **s. 11(6)**; uniquely, authorizes *force*, **s. 12 (CDSA)**

5. Telewarrants

- a. *Overview* - available where RPG that *indictable* offence committed, impracticable for officer to appear personally due to circumstances; source of controversy due to abuse. **s. 487.1**; see also, **s. 592.5** re: telewarrants for *Feeney* approval (below).

6. Feeney warrants

- a. *Overview* - allow peace officers to enter dwelling houses for certain purposes:
 - i. *Effecting an arrest* - with arrest warrant, or without arrest warrant if RPG under **s. 495**, via **s. 529.1**; allowable *if RPG that the person is currently in the house*, **s. 529**; this is subject to terms and conditions, to ensure reasonability of search. **s. 529.2**
 - ii. *Exigent circumstances* - no need for warrant in exigent circumstance, eg. where person about to be harmed, evidence destroyed, etc. **s. 529.3** See also: warrantless -> public safety, below.
 - iii. *Announcement* - certain *Feeney* warrants allow for entry without announcement, where RPG that announcement would lead to realistic risk at time of entry of imminent harm or loss of evidence. **s. 529.4**
 - iv. *Telewarrants* - *Feeney* warrants may be obtained over the telephone via **s. 592.5**

7. General warrants / video warrants

- a. *Overview* - similar to search warrant; however, merely requires RPG that “information” likely to be obtained; applies to past & future offences; “sneak & peek.” **s. 487.01**

8. Production orders

- a. *Overview* - can be wielded in order to obtain documents from third parties, requires RPG that documents will afford evidence respecting commission of offence. **s. 487.012**

9. Warrants to take bodily substances

- a. *Overview* - where police have found bodily substance at scene of offence etc., may obtain warrant to conduct DNA analysis; RPG that person was party, etc. **s. 487.05**

10. Warrants to take blood

- a. *Overview* – where (1) RPG that target has taken drugs/alcohol within four hours preceding accident causing death/bodily harm, (2) medical practitioner says target *incapable* of consenting, and (3) taking does not endanger target’s life. **s. 256**
- b. *Process* – Doctor can refuse to take or supervise the taking of a sample (**s. 257**). Two samples to be taken, one made available to the accused for his own expert analysis (**s. 258**).

11. *Impression warrants*

- a. *Overview* – where police officers have RPG that impression comparison re: handprint, fingerprint, teeth, etc. will reveal info about offence, may order impression taken. **s. 487.092**

12. *Tracking warrants*

- a. *Overview* – where police have RPG and whereabouts of person/etc. relevant, may install/monitor tracking device to collect this information. 60-day limit, renewable. Usually only disclosed if defence specifically ask for it, often used to enter property. **s. 492.1**

13. *Dialed Number Recorder (DNR)*

- a. *Overview* – little brother of the wiretap warrant, dialed-number recorder available where RPG that information assisting with investigation of offence could be obtained. **s. 492.2(1)**

iv. *Warrantless searches / seizures*

- 1. *Overview* – may conduct warrantless searches of person/property incidental to arrest (RPG), pat-down searches incidental to detention, where (1) warrant *unfeasible*, or (2) other power applies. State onus to prove that its interest in truth greater than D.’s privacy interest. {Hunter}

- a. For instance, state interest in detecting/preventing crime supplants individual privacy interest where credibly-based probability replaces mere suspicion: modified in circumstances, {Hunter} (eg. higher for strip searches) {Golden}

2. *Seizure of bodily substances (not abandoned)*

- a. *Overview* – absent means of authorization (either consent, below, or warrant, above, or abandonment if not detained, below), may *not* seize bodily substance without consent of accused.
 - i. For instance, where doctor collects blood from unconscious accused who was in hospital for medical treatment and gives to police for testing, this amounts to a warrantless seizure; violation. {Dyment}

3. *Impracticability/emergency searches*

- a. *Overview* – powers to search under authorization of warrant exercisable without warrant where (1) RPG and (2) exigent circumstances making warrant impracticable exist. **s. 487.11**
- b. *Emergency interception* – may intercept communications where RPG: authorization unobtainable due to urgency, necessary to prevent unlawful act causing serious harm to person/property, and sender or receiver of communication is victim. **s. 184.4, s. 188**

4. Public safety searches

- a. *Overview* – police have a duty to protect life, investigate 911 calls; therefore, may sometimes effect forced, warrantless entry on this basis, only to protect life and safety. {Godoy} Similar to an exigent circumstances *Feeney* entry. **s. 529.3**
- b. For instance, where person calls 911, hangs up, police attend residence; police forcibly enter and find abused spouse following domestic incident; justifiable. {Godoy}

5. Search incidental to arrest

- a. *Overview* – common law power, allows for searching of lawfully arrested person for weapons, evidence, escape tools. {Caslake} If RPG to arrest, then RPG to search. {Cloutier} See arrest power, above.
 - i. For instance, can search the arrestee, the immediate vicinity of that person, entire car (including glove box, trunk); however, cannot search *entire home*. {Caslake}
 - ii. For instance, can search trunk, {Charlton} loose interior panels, {Smellie} a nearby car which the arrestee has recently exited, {Speid} room in which accused arrested, {Conception} or entire hotel suite. {Wong}
 - iii. For instance, counterexample, search for evidence must be based on RPG that this will relate to offence underlying arrest; parking ticket arrest will not authorize search for drugs. {Caslake}

6. Search incidental to detention

- a. *Overview* – common law power, if RPG concerning safety at risk, officer may engage in protective pat-down search of detained person, if conducted reasonably: {Mann}
 - i. *Logical possibility* – if there is a logical possibility that the individual possessed an item that could have been used as a weapon. {Mann}
 1. *Individual suspicion standard not required* – rational connection between steps taken by police and nature of offence under investigation (was the detention reasonable necessary) {Clayton}
 - ii. *Further search* – officer may proceed beyond a pat down if there is some reason to justify this, eg. logical possibility of possession of weapon undetectable by pat-down. {Mann}
 1. For instance, this is not justified where the logical possibility that D. was in possession of B&E tools based solely on presence of “soft item” in pocket. {Mann}

7. Consensual searches

- a. *Overview* – very difficult to uphold in court, despite that this is not truly a seizure, but rather a gathering (no REP) – subject to strict requirements {Wills}
- b. *Requirements* – (1) consent expressly or impliedly provided (2) voluntarily (3) by person with authority to consent (4) aware of nature of police conduct, (5) right to refuse, and (6) potential consequences of consenting. {Borden}
 - i. For instance, accused provides DNA sample by consent for investigation; police use sample without

consent for investigation in another investigation; this violates s. 8. {Borden}

8. *Abandoned property searches*

- a. *Overview* – no REP in something which has been abandoned; therefore, this is not search/seizure, but rather a gathering, and s. 8 inapplicable. {Dyment}
 - i. For instance, police may retrieve items discarded by accused, incl. kleenex, cigarette butts, *so long as suspect not detained*. {Stillman}
 - ii. For instance, may search a suite which has been abandoned by tenants, no warrant required. {Tam} May also collect blood from car seat following accident, {Leblanc} or items thrown out in garbage. {Patrick}

9. *Plain view seizures*

- a. *Overview* – police have the power to seize an item without warrant if it is in plain view. Subject to strict requirements – confers power to *seize, not search*. {Neilsen} Codified. **s. 489**
 - i. *Requirements* – officer must have been lawfully at location, discovered item inadvertently, and the incriminating nature of item must have been immediately apparent. {Neilsen}
 1. For instance, a diary found while executing a search warrant for unrelated evidence is not covered by this exception, since it had to be read for its significance to become apparent. {Doyle}

10. *Firearms seizures*

- a. *Overview* – if RPG that offence committed using firearm or firearm subject of such an offence, may conduct warrantless search/seizure if warrant not practicable. **s. 117.02**
 - i. For instance, note that this may lead to application for firearms prohibition, if in public safety interest, etc (see diversion -> protective -> firearms); if no application made, firearms must be returned.

2. Charge approval by Crown

- a. *Overview* – in BC, Crown approves charges based on *Report to Crown Counsel* prepared by police; in other provinces, police lay charges with *ex post facto* approval from Crown. RPG required at police level, *substantial prospect of conviction* (“SPC” – higher standard) required at Crown level.
 - i. For instance, Fed Crown empowered to approve charges re: *CDSA*, other Fed statutes, while PG Crown in charge of *Criminal Code* charges and PG statutes.

b. *Role of Crown counsel (generally)*

- i. *Overview* – Crown is a “minister of justice.” Purpose of prosecution is not to obtain conviction, but rather to lay credible evidence of crime before TOF; must ensure fairness, an ongoing responsibility on the Crown. {Regan Report} {Boucher} Critical underpinning of justice system {Martin report}
 1. For instance, also held in BC *Professional Code of Conduct*, Crown must not seek conviction, must make disclosure promptly, **s. 2.1-1**; must act fairly, dispassionately. **s. 5.1-3**
 2. For instance, minister of justice concept defined as objectivity, independence from other interests, and a lack of

animus towards accused. {Regan}

3. For instance, Crown who manipulates when charge is laid in order to judge shop, directs police in view of investigation, etc. may have exceeded the role of Crown. {Regan}

ii. Contrast with defence counsel - fearlessly raise every issue, advance every argument, ask every question, regardless how distasteful, if it will advance the case. {Rondel} Must be fair and honorable, consistent with instructions from clients, etc. No rancour, sharp practice, per BC PCC, **s. 2.1-3(f)**

1. For instance, cannot mislead the court, allow for false testimony to be given, etc, otherwise would be inconsistent with officer of the court status.
2. For instance, must advise accused re: jeopardy, best course of action; make police aware re: alternative explanations, influence decision making of police and Crown re: investigation, bail, charges, etc.

iii. Contrast with judge - decide on issues of law, make findings of fact if no jury; fair and efficient proceedings, direct jury re: law, etc. Independent, impartial, fair, neutral. Must give reasons. {Sheppard} Cannot investigate, question witnesses (unless to clarify). Must maintain civility in court. {Marchand} Ensure fair process with *pro se* accused. {McGibbon}

c. Telebail information - where person arrested on weekend and the police wish to detain or impose onerous release conditions, must swear information for justice of the peace over the phone or by video. Exception to general rule in BC that only Crown approves charges; will subsequently be approved/modified by Crown.

d. Reasons underlying Crown charge approval - laying a charge against a person is a very serious matter affecting lives of both victim and accused; best to have person with high level of legal training; ensures only viable charges are laid, based on complete information by person independent of investigation.

e. Contents of Report to Crown Counsel - recommends charges, witness list, accused details, synopsis, narrative, will-says for police and civilian witnesses, police notes, forensic reports, exhibit list, copies of exhibits/photos/crim/other records (medical, surveillance, wiretap), 911 transcripts, release documents, warrants (unless sealed). JUSTIN/CORNET/CPIC added by Crown as well.

f. Selection of appropriate charge - may be difficult for Crown to determine exactly which charges to lay in a given situation; shotgunning may overcomplicate Crown case, therefore assisting defence.

- i.* For instance, consider theft of a vehicle versus taking auto without consent; each applicable to different circumstances, particularly with a view to the owner of the vehicle.

g. Process - timeliness is important where accused in custody or where warrant is requested (eg. public interest). Reasons must be documented, and consultation with colleagues may be apt.

h. Test for charge approval

i. Overview - two part test, which requires both that there be a (1) substantial likelihood of conviction and that (2) prosecution is in the public interest. Ongoing throughout prosecution (eg. post prelim, post-voir dire: at any point where strength of case altered).

1. *Independent consideration* - charge approval must be applied independent of political, police, or

court interference, per *Crown Counsel Act*, **ss. 4-7**. {Krieger}

- a. For instance, short of abuse of process, the supervision of the charge approval process (eg. a litigant's decision to pursue charges) is beyond legitimate reach of course; judicial involvement would erode integrity. {Krieger}
- b. For instance, directions concerning Crown counsel procedures must be made public, via sss. 5-6 of the *Crown Counsel Act*; this was recently done concerning the cameras in the Van riot cases, for instance.

2. *Substantial likelihood of conviction* - must be assessed in light of the admissibility of evidence, the weight/credibility/reliability of evidence, and the viability of potential defences.
3. *Public interest test* - must consider seriousness of offence, harm caused, level of sentence, whether accused/complainant are vulnerable persons, other aggravating or mitigating factors, etc, the need to maintain confidence in justice system.
4. *Exceptional circumstances* - proceed with prosecution even where test not made out, w/ high risk violent offenders/dangerous offenders - regional or deputy regional Crown will approve if RPC as opposed to SLC, and where public safety concerns require.
5. *NCRMD offenders* - see mental disorder -> NCRMD -> charge approval, below.

i. Outcomes of charge assessment decisions

- i. *Overview* - could result in (1) no charge laid, (2) return to police for follow-up, (3) letter of caution, (4) diversion/alternative measures, or (5) approval of charges. Subject to broad discretion.
 1. *Return to police* - occurs where charge not sufficient yet, but appears that a charge would be approved if further investigation carried out (without directing investigation).
 2. *Diversion* - via **s. 717** of the *Criminal Code*, **s. 10** of the *YCJA*. Applicable only where there is SPC; not appropriate where there is no SPC (see diversions and alternative measures, below).

j. Appeals of charge assessment decisions

- i. *Overview* - the police may appeal a Crown charge assessment decision; first to the Crown who made the decision, then to the admin Crown, regional Crown, and finally ADAG.

k. Malicious prosecution

- i. *Overview* - generally, requires that the accused show a demonstrable improper purpose in pursuing the prosecution: for instance, discrimination based on an enumerated ground. {Miazga}
- ii. *Test* - accused must prove that prosecution was initiated and continued in the absence of reasonable and probable cause, and that the prosecutor acted with malice (eg. abuse of office). {Miazga}

3. Diversions and alternative measures

- a. *Overview* - via **s. 717** of the *Criminal Code*, **s. 10** of the *YCJA*. Applicable only where there is SPC; not appropriate where there is no SPC; can be employed at any time during process. (see also: plea negotiation)

b. Process (BC Corrections diversion)

- i. SPC* - determine whether there is SPC; if not, then diversion not appropriate (not a solution for weak Crown case).
- ii. Charges* - determine whether apt to lay charges; necessary where Crown needs to impose protective conditions, or where six-month summary deadline looms; can divert regardless of charges.
- iii. Considerations* - determine whether diversion is appropriate in the circumstances, in view of public danger, criminal record, seriousness of offence, vulnerability of victim, public confidence; *where the most important objective of prosecution can be met by diversion*, then diversion is the apt means.
 - 1. Old Approach*: first time offences of category 4 offences suitable for alt measures; first time and category 3 “not inconsistent with protection of society: category 2 required regional or d/regional approval; category 1 rarely permitted and only with written consent of ADAG, (never murder/manslaughter).
- iv. Referral* - accused referred to community corrections; interview (w/ admission of guilt); victim input on diversion considered; set out contract re: diversion for Crown approval; court dates adjourned beyond contract end date. If contract substantially complied with, charges will be stayed.

c. Preventative and protective orders

- i. Overview* - standalone orders which are not part of sentencing, eg. are not in response to a *specific* criminal offence. May be sought by Crown.
- ii. Recognizance / peace bonds*
 - 1. Overview* - promise to the court secured by a monetary amount; though seldom requiring a deposit or surety. Governed by **s. 810** of the *Code*.
 - 2. Purpose* - preventive, not punitive; not aimed at punishing past transgressions, therefore, focus is the present risk of reoffending.
 - 3. Procedure* - burden is BOP; hearsay evidence is admissible, which allows for corrections records, psychologist reports, etc. to be admissible in **s. 810.1** and **s. 810.2** hearings.
 - 4. Test* - whether informant holds (1) subjective belief of future harm and then (2) objectively whether this belief is founded / reasonably based.
 - 5. Types of recognizance*
 - a. s. 810 / peace bond* - technically peace bond is common law, not statutory; **s. 810** is a similar order, however. Maximum one year, used in spousal or other assault/threatening cases. No conviction, conditions similar to probation, requires accused admission of *reasonable basis to fear*.
 - b. s. 810.01* - recognizance where *fear of certain specified offences* (justice participant intimidation, gangs, terrorism). Requires AG approval, rarely used.

c. s. 810.1 - recognizance where *fear of sexual offence*. In some circumstances, order can be up to two years in length.

d. s. 810.2 - *fear of serious personal injury offence* (same definition as for dangerous offenders - see sentencing -> options -> designations, below). In some circumstances, order can be up to two years in length. Can be contested or by consent.

i. For instance, used where offender refused treatment while serving sentence for serious offence, and was in custody until warrant expiry; need for further supervision.

6. Breaches

a. *Overview* - hybrid offence set out in **s. 811**; indictable max is two years, and is an absolute jurisdiction offence under **s. 553**; 6 months/\$5000 if summary.

iii. Firearms prohibitions

1. Types of prohibition

a. s. 111 - non-criminal firearms prohibition; where PCJ satisfied re: reasonable grounds that it is not desirable re: interests of safety of person against whom the order sought, or any other.

b. s. 117.05 - non-criminal prohibition resulting from seizure of firearms in the interests of public safety carried out under **s. 117.04**; no need to prove that offence was committed or planned.

c. s. 117.011 - on-criminal prohibition order for a co-habitant or associate of a prohibited person.

2. *Seizure* - firearms may be ordered to be surrendered **s. 114** and/or forfeited **s. 115** upon prohibition.

3. Breaches

a. *Overview* - under **s. 117.01**, hybrid offence, indictable with max 10 year sentence, or summary with 6 months/\$5000

d. Other alternative measures

i. *Community groups / service* - some offenders are referred by police to community groups; in this case, noncompliance with the alternative measures is *not* prosecutable. Crown may do the same if there is a memorandum of understanding with a given group;

ii. *Defence resolution* - defence may work out resolution with the Crown, eg. restitution/counselling; this results in Crown stay if satisfied with compliance.

4. Release and bail

- a. *Overview* - persons are presumed innocent (**s. 11(d)**), have the right not to be denied reasonable bail without *just cause* (**s. 11(e)**); work in operation with presumption of non-arrest (see police powers -> arrest, above).
- b. *Persons capable of ordering release* - peace officers, JPs, and judges are authorized to order release of an arrested person.
- c. *Breach of conditions* - justice may issue arrest warrant or police may effect warrantless arrest where RPG exist that accused has or is about to contravene conditions of release (of any type) or has committed other offence, **s. 524**. If Crown establishes *either* at hearing, reverse onus show cause ensues.

d. *Release by police*

- i. *Contents of police release orders* - contents of police appearance notices/PTAs/recogs set out in **s. 501** (include name, offences, court dates) and may include compulsory fingerprinting. **s. 502**

ii. *Modes of release*

1. *Unconditional release*

- a. *Overview* - where a person is arrested without warrant for s. 553/hybrid/summary offences, shall be released as soon as practicable, either with appearance notice or intent to summons, subject to the RICE factors. **s. 497(1)**

b. *Appearance notice*

- i. *Overview* - where officers decide not to effect an arrest pursuant to **s. 495(2)** (see police powers -> arrest, above), may issue appearance notice for s. 553/hybrid/summary offences; less stringent even than summons. **s. 496**

c. *Summons*

- i. *Overview* - when information sworn, JP may issue summons rather than arrest warrant; provides court date. If accused does not attend court on specified date, must attempt service; if that fails, Crown may seek arrest warrant, via **s. 512** (failure to appear).

2. *Conditional release*

- a. *Overview* - if punishable by five years or less, may be released with PTA, recognizance of up to \$500 (no deposit), or w/ deposit where ordinarily live >200km away; subject to RICE. **s. 498** (no warrant), **s. 499** (endorsed warrant), **s. 503** (unendorsed warrant: no **s. 469** offences, however).
- b. *Additional conditions for unendorsed warrant release* - officer may require undertakings to: stay in jurisdiction, notify address changes, surrender passport, abstain from weapons, drugs, alcohol, talking to witnesses, any other necessary condition for safety. **s. 503(2.1)**

e. *Release by JP / judge*

- i. *Overview* – more serious than police release, so only more serious options available: no notice/ summons/PTA. Applies where RICE or seriousness require JIR hearing.
- ii. *Timing* – person not released by police must be taken before a justice within twenty four hours (or as soon as practicable); **s. 503(1)**; however, may be adjourned for three *clear* days without consent, or for any reasonable period by consent of accused. **s. 516**
- iii. *No contact orders* – justice may order that accused not communicate with victims/witnesses/any other persons ordered, pending bail hearing, **s. 516(2)** as part of bail order, **ss. 516(4),(4.2)** or as part of detention order. **s. 515(12), s. 522(2.1)**

iv. *Contested vs. uncontested release*

1. *Consent release*

- a. *Overview* – defence may make a deal with the Crown to obtain release without having to litigate; Crown sets out conditions, both parties signed, order reviewed w/ accused by JP, any required cash deposited, and accused released. Otherwise, release contested, have to litigate.

2. *Contested bail / show cause*

- a. *Section 469 offences* – same considerations as other contested hearings, but heard by superior court rather than provincial court; no review except by CA; reverse onus. **s. 522**
- b. *Process already issued* – if process has already been issued (eg. by police), may be confirmed or replaced by JP, via **s. 508**. Eg. if accused at large, JP may issue arrest warrant (**s. 512**); if accused not at large, requesting modification: JIR hearing (**s. 499(3); s. 503(2.2)-(2.3)**)

c. *Onus to show cause, s. 515(6)(a)*

- i. *Overview* – persons entitled to reasonable bail, **s. 11(e)**; ergo, onus to *show cause* for detention lies with Crown to justify detention.

ii. *Reverse onus* – onus statutorily reversed where:

- 1. *Breach of previous bail* – current offence is indictable (excluding s. 469, see below), and was committed while already on bail (s. 515) or bail pending appeal (s. 679); **s. 515(6)(a)(i)**
- 2. *Failure to appear* – current offence involved failure to appear for court date under ss. 142(2)-(5) while subject to bail (s. 515), bail pending appeal (**s. 679**), or bail pending summary appeal (**s. 816**). **s. 515(6)(c)**
- 3. *Section 469 offences* – subject to reverse onus as per **s. 522(2)**.
- 4. *Breach of conditional sentence* – subject to reverse onus as per **s. 742.6(2)**.

5. *CDSA trafficking / PPT* - current offence is punishable by life imprisonment under ss. 5(3), 6(3), or 7(2) of the *CDSA*, or conspiracy to commit such an offence. **s. 515(6)(d)**
6. *Crim. org.* - current offence is indictable, and is a criminal organization offence under ss. 467.11-13; or serious offence related to/benefitting crim org. ; **s. 515(6)(a)(ii)**
7. *Terrorism* - current offence is indictable, and is a terrorist offence under allegation, or under ss. 83.02-04, ss.83.18-23; **s. 515(6)(a)(iii)**
8. *Security of Information Act offences* - certain indictable offences under this act involve a reverse onus bail situation. ; **s. 515(6)(a)(iv)-(v)**
9. *Firearms* - current offence is indictable, involves weapons trafficking/importing, various other firearms offences; ; **s. 515(6)(a)(vi)-(vii)**
10. *Non-resident* - current offence is indictable (excluding s. 469) and accused is not ordinarily resident in Canada. ; **s. 515(6)(b)**

d. Grounds for detention, s. 515(10)

- i. Primary ground* - where detention is necessary to ensure attendance in court to be dealt with by the law; **s. 515(10)(a)**
- ii. Secondary ground* - where detention is necessary for the protection or safety of the public: protection of witnesses, commission of offences, admin. justice; **s. 515(10)(b)**
- iii. Tertiary ground* - rarely sufficient on its own, applies where detention necessary to maintain confidence in admin. of justice, with regard to strength of Crown case, gravity of the offence, and circumstances (eg. firearm), length of sentence. **s. 515(10)(c)**

e. Proceeding

- i. Submissions* - Crown reads in allegations (eg. synopsis or details from narrative, incl. hearsay etc.), crim record, makes submissions on one or more of the three grounds. Defence challenges, presents release plan that addresses Crown concerns.
- ii. Criminal record* - important elements include similar previous offences, lengthy incarceration, violence, FTC/breaches, addiction, hiatus periods, etc.
- iii. Order rendered* - following the hearing, the justice/judge will issue an order: may affirm previous process (eg. summons) if relevant, may release, or detain (see modes, below).

v. Modes of release

1. *Overview* - if cause is shown for doing so, then it is appropriate to impose more or less onerous conditions on the accused, accordingly. **s. 515(3)**

2. Undertaking to appear

- a. *Overview* – default position under **s. 515(1)**, release on UTA without conditions; theoretically more onerous than PTA.

3. Recognizance

- a. *Overview* – may impose conditions where necessary under **s. 515(2)**; conditions include sureties, recognizance (limited by reasonableness; may require cash deposit for recognizance if Crown consents, or if accused ordinarily resides more than 200km away; other conditions.
- b. See also: misc -> bail conditions chart, below.
- c. For instance, various conditions include reporting / change of address, no contact, no go, red zones / exile, substance/paraphernalia possession, cell phones, curfew, weapons. **ss. 515(4)-(4.2)**, etc.

4. Detention

- a. *Overview* – no release authorized, subject to review/appeal.

f. Bail review following prelim

- i. *Overview* – due to changes in strength of Crown case, results of committal (eg. could be for lesser offences, or not committed on all counts, etc.), may be proper to review bail following prelim. Empowered under **s. 523(2)(b)**.

g. Bail review following guilty verdict

- i. *Overview* – the extent of culpability may be altered by the outcome of a verdict (eg. guilty of lesser included, acquitted on some counts, etc.). Therefore, may be proper to review bail following trial in advance of sentencing. **s. 570**; bail may also be *revoked* upon conviction. **s. 523(2)**

h. Bail review pending appeal

- i. *Overview* – depending on the merit of pending appeal, may be reason to revisit bail or conditions of bail, etc. Usual considerations apply, but as with guilty verdict, jeopardy may have changed, and more time will have passed, etc.
- ii. SC: specifics set out in **Rules 6(26)-6(33)**; release pending appeal is available. **s. 831**
- iii. CA: specifics set out in **Rule 19**; via **s. 679** of the *Code*. Must provide all particulars in affidavit, including criminal convictions. Release is available. Appeal must not be frivolous, detention must not be in public interest, must not be concern re: appearance. Review available through **s. 680**.
{Mapara}

1. For instance, not a bail de novo, but rather a review/appeal proceeding of itself; applicable standard is set out in **s. 679**, must determine whether TJ's decision was unreasonable. Public interest strongly related to the strength of the appeal. Reviewability versus enforceability, essentially. {Mapara}

i. Bail orders under amended indictments / informations

i. Overview - any existing bail or detention order applies to amended informations/indictments. **s. 523(1.1)**

j. Offenders ruled unfit to stand trial

i. Overview - not subject to show cause standard; rather, released on conditional discharge subject to Review Board jurisdiction under **s. 672.54**: see mental disorder -> fitness -> dispositions, below.

5. Disclosure, appearances, and arraignment

a. Disclosure

i. Duty to disclose

1. *Overview* - Crown must disclose all evidence to be used at trial, and any evidence which may assist the accused regardless of whether Crown intends to adduce it; ongoing *Charter* obligation (re: right to fair trial, **s. 11(d)**).

2. *Limitations* - subject only to the following limitations: {Stinchcombe} (see also: applications -> evidentiary -> disclosure applications, below)

a. Clearly irrelevant - the Crown is not under any duty to disclose “clearly irrelevant” evidence, though should err on the side of disclosure to be safe.

b. Privacy - no need to disclose witness addresses, phone numbers, etc. unless there is a clear necessity in interests of trial fairness.

c. Privilege - Crown must observe various forms of privilege (eg. informer privilege) in disclosure; investigative technique / solicitor-client privilege also protected; subject to *innocence at stake exception* (see applications -> evidentiary -> disclosure, below) {O'Connor}

d. Timing - disclosure may be timed in order to protect an ongoing police investigation, witness, or to prevent revealing police techniques.

3. *Specific evidentiary considerations*

a. Expert evidence - under **s. 657.3** Crown must give notice of intention to adduce expert evidence, including will-say / report ahead of time; failure to do so may lead to exclusion through operation of the *Charter* (no remedy in *Code*).

b. Credibility - evidence relating to the credibility of witnesses, including criminal records, outstanding charges of witnesses; Crown decides whether to disclose, not police.

c. Lack of evidence - evidence which indicates lack of evidence, eg. lack of fingerprints, DNA not matching, failed canvassing, failed photo lineups, etc.

4. *Corresponding defence duty*

- a. *Overview* – the defence is subject to a corresponding duty to be diligent in seeking or requesting disclosure; no duty to disclose, subject to exceptions:
 - i. *Alibi* – defence must disclose alibi in a time and manner which permits meaningful investigation; otherwise, may adjourn proceedings to allow for investigation where practicable, or draw adverse inference against accused where not practicable.
 - ii. *Expert evidence* – as with Crown, must comply with notice requirements concerning expert evidence set out in **s. 657.3**; *Charter* remedy may be available for Crown (less likely to succeed).
 - iii. *Charter applications* – duty to notify 30-60 days in advance regarding *Charter* applications; however, not absolute duty, and may only extend so far as to require counsel to raise matter before impugned evidence led.

b. *Case Flow Management*

- i. *Overview* – purpose of rules to provide simple, efficient management of criminal cases to just and timely determination of every case; previously, cases would collapse on trial date (last minute GPs, or accused/witnesses no shows), etc. **Rule 1(1)**. Expedited process for detained accuseds. **Rule 5(7)**

ii. *Initial appearances*

- 1. *Overview* – occurs before JP; disclosure provided, timelines for matter are set (eg. time to retain counsel, to await outstanding disclosure, etc.). Considerations:

a. *General*

- i. *Date/location* – provided to accused on appearance notice / summons / PTA / UTA / recog; detained accuseds simply brought forward by sheriffs.
- ii. *Crowns* – both Federal and Provincial Crown will be present; latter will have bigger list, former dealing primarily with *CDSA* offences;
- iii. *Order* – counsel receive preferential treatment, can appear at 9:00am; videos up at 9:30am; agents/non-reps appear after 9:30am.
- iv. *Disclosure* – package containing information, synopsis/narrative, initial sentencing position (per **Rule 6(1)**); gives discount for early plea, contains position on counts, sentence, ancillary orders

- b. *Reasons for further intake adjournment* – note that early appearances (eg. running on time, within clearance period from first appearance to trial date set) may be adjourned day before by email.

- i. *Retain counsel* – if offence/offender suitable for legal aid, will be referred; if not, referred to law centre; in any case, unless self-rep, adjourn for a few weeks to retain counsel.

ii. Review of particulars – once counsel retained, may adjourn to allow for review of particulars of file to determine appropriate approach to take with file.

iii. Discussion of particulars – once particulars reviewed by counsel, may adjourn for discussion of resolution (GP or diversion), or alternatively for discussions re: timing of trial (eg. arraignment report creation – see below).

iv. Guilty plea – may plead at first appearance with assistance from duty counsel (if not represented); usually traversed before judge for GP and sentencing that day; **Rule 5(5)**. Rarely, Crown seeks adjournment for restitution amount/victim impact statement, prep.

iii. Arraignment hearings (AHR)

1. *Overview* – ensure that both parties ready to set a trial date, have considered reasonable resolution, ensure that trial estimates are reasonable (eg. ensure that CPT has been properly conducted). Rarely done on first appearance. **Rules 7, 8**

2. *Arraignment Reports* – Crown and defence must review file in meaningful way, narrow issues in order to create mutual time estimate in *Arraignment Reports* filed by each counsel.

3. *Proceeding* – generally little happens; form filed.

iv. Setting trial/prelim date (TSD)

1. *Overview* – judicial case manager sets time for trial/prelim or for hearing any pretrial applications concerning the case; JCM determines trial estimate, sets dates for TCH. Unless very serious matter with pre-assigned Crown, only defence counsel attends.

v. Pretrial conference (JPT)

1. *Overview* – held by administrative judge if the trial or prelim estimate exceeds two days of court time. Held in chambers.

vi. Trial readiness hearing (TRH)

1. *Overview* – scheduled at same time as trial/prelim, 30-40 days prior to actual date; meant to recapture court time if the matter not proceeding.

2. *Readiness* – Crown witnesses notified/available, all disclosure provided (see above) and document notice given under s. 30 of the *CEA*; defence retainer secured, all disclosure received.

vii. Trial confirmation hearing (TCH)

1. *Overview* – must be at least 30 days before the trial/prelim date; confirms witnesses and accused likely to show up; accused appears in person unless judicial dispensation; Crown can request personal appearance if sceptical with *some* basis. Oppo. for resolution. **Rule 10**

2. *Requirements* – accused must attend unless judge orders otherwise; if there are outstanding issues, the TCH may be adjourned, or application may be made at TCH to adjourn trial.

Avoided where readiness reports exchanged b/w defence and Crown in advance.

viii. Adjournment

1. *Overview* - can be made with form, as soon as counsel becomes aware of need; hallmark of good counsel. Granted where: no laches, material witness availability affected, etc. See applications->adjournment, below.

c. Appearances

i. Failure to appear

1. *Overview* - where accused/agent fails to attend for court appearance, arrest warrant may be issued pursuant to **s. 512**; also applies to prelims, **s. 544**, absconding from summary trials, **s. 597**, and where indictments are preferred against an accused who is at large. **s. 597**
2. *At prelim* - if accused had elected for jury trial, that right is lost; Crown benefits from statutory adverse inference; accused loses right to be present while evidence is presented. **s. 544**
3. *At trial* - right to jury lost *unless* legitimate excuse, or Crown overrides via **s. 568**; loses right to be present, **s. 475(1)(a)**; trial may continue *ex parte*, **s. 475(b)(i)**, or may issue warrant and adjourn for execution, **s. 475(b)(ii)**, to resume when in interests of justice. Adverse inference drawn, **s. 475(2)**; counsel may continue to act for accused while latter at large. **s. 475(4)**

4. Warrants for FTA

- a. *For breaching release document* - warrant for FTA may be issued via **s. 512** (RPG public interest), **s. 524** (RPG breach summons/recog), **s. 525(6)** (RPG breach recog), **s. 679** (RPG breach bail pending appeal).
- b. *For absconding during prelim*, **s. 544**
- c. *For absconding after indictment preferred*, **s. 597** (superior court)

ii. Remands

1. *Overview* - accused may appear in person, or through counsel/agent on summary matters, or through counsel on indictable files (via designation).

iii. Other proceedings

1. *Overview* - more cost effective to have in-custody appearances by video; accused also prefers, due to lack of food & entertainment at court, disruption; but, difficult to instruct counsel.

2. Accused / counsel

- a. 515(2.2): accused can appear by video for bail hearing, though Crown's consent required if witness will testify;

- b. 537(1)(j): video or counsel appearance by accused with consent where no witnesses;
- c. 537(1)(j.1): on accused's request and on reasonable conditions, accused can be out of court for prelim;
- d. 537(1)(k): in-custody accused can be ordered to appear by video for parts of prelim where no evidence called as long as accused can communicate privately with counsel;
- e. 536.2: election or re-election may be done in writing without personal appearance;
- f. 650: accused to be present for his jury trial except:
 - i. (1.1) Can appear by video or counsel when no evidence called;
 - ii. (1.2) In-custody accused can be ordered to appear by video for part of trial where no evidence called as long as accused can communicate privately with counsel;
 - iii.(2)(a): court orders accused removed because disruptive;
 - iv.(2)(b): court allows accused not to appear and court can impose conditions;
 - v. (2)(c): court orders accused removed so protect accused's mental condition (unusual);
- g. 650.01: "designated counsel" may appear for accused when no oral evidence, no jury selection
- h. 650.02: Crown or defence counsel may appear by technology as long as simultaneous communication possible;
- i. 800: defendant may appear personally or by counsel or agent at trial, but court may require accused's attendance & issue warrant for that purpose;
- j. 848: if accused appears by video from jail, Court must ensure the accused understands the proceedings and decisions made during the proceedings are voluntary;

3. *Crown*

- a. s. 799: dismissal for want of prosecution/ when Crown has been given notice but doesn't appear, the Court may dismiss the information;
- b. 650.02: Crown or defence counsel may appear by technology as long as simultaneous communication possible.

d. *Arraignment*

- i. *Overview* - usually occurs at jury selection, or immediately before pleading guilty, etc. Three parts: accused called to the bar by name; indictment/information read; asks how the accused pleads.

6. Plea negotiation / alternative dispositions

a. Procedure

- i. Timing* - may be entered at any point in the proceedings. Bigger discount generally afforded for earlier guilty pleas (esp. before trial date / court time has been used).
- ii. Representation* - if unrepresented, JP or judge will inquire about whether legal advice has been obtained and recommend consultation, advise accused of duty counsel.
 1. For instance, Crown must exercise caution in undertaking negotiations with an unrepresented accused; arrange for third person to be present. {Policy}
- iii. Jurisdiction* - JP cannot accept guilty plea; therefore, must be traversed before provincial court judge for disposition.
- iv. Adjournment* - if Crown taken by surprise, plea will be accepted but Crown entitled to reasonable adjournment to prepare for sentencing hearing – might only be 15 minutes, or might be days.
- v. Content* - must have sufficient facts to make out every element of offence; usually accept police narrative unless there is a dispute; best to determine this prior to entering plea.
 1. For instance, Crown must ensure that the negotiated plea appropriately reflects provable criminal conduct of the accused and provide an adequate sentencing range given all of the circumstances. {Policy}
- vi. Acceptance* - Crown not required to accept guilty plea whether to lesser or different offence, or agree to facts as proposed by accused; where in public interest, can simply proceed to trial.
 1. For instance, should consider whether this would bring admin justice into disrepute; should refer all such matters to AG approval: also includes matters where offence involves death. {Policy}
- vii. Withdrawal* - guilty plea must be withdrawn where evidentiary basis demonstrates either that plea involuntary, accused didn't understand nature of offence, consequences of plea, didn't intend to plead guilty (and court didn't confirm), ineffective assistance of counsel, etc. {DAS} See appeals -> guilty plea / ineffective assistance of counsel, below.

b. Negotiability of charges

- i. Global charge joinder*
 1. *Overview* - joining several counts into one count (incl. multiple property charges by dropping names of owners), or multiple complainants; make sure you have factual agreement on allegations.
- ii. Charges lacking RPC / PI*
 1. *Overview* - Crown must not accept or seek GP on charges which do not meet the charge approval standard (see above re: charge approval).
- iii. Reducing counts in ongoing offences*

1. *Overview* – for example, *widening the date range*; multiple charges of theft from employer on specified dates are joined into one charge of theft over a range of dates (frauds, failing to report); can also join multiple complainants (if one transaction).

iv. Alternative charges

1. *Overview* – includes non-criminal alternatives such as *Motor Vehicle Act*; pleading to an attempt instead of completed offence; or plea to lesser included offences – assault instead of assault causing bodily harm; the facts must support alternative offence, Crown must consent. **s. 606(4)**

v. Crown stay of proceedings

1. *Overview* – if multiple informations, may stay whole informations. Or if multiple charges on one information, may stay some of the charges. Does not require Court's approval; can be done on the record or off the record; **s. 579(1)**. Charges may be recommenced, **s. 579(2)**
 - a. *Agreement not to proceed* – on other pending matters;
 - b. *Bail conditions* – may keep accused on strict bail conditions for a while, then stay;
 - c. Must file reasons for every stay of proceedings to comply with **s. 15(4)** of *FIPPA*.

c. Negotiability of sentence

- i. *Overview* – includes factors such as custodial versus non-custodial, agreed range or quantum of sentence, not proceeding on notice to seek greater punishment (or only considering some prior convictions to that end), ancillary orders. (see sentencing, below).

ii. Diversion (see diversion, above)

1. *Overview* – see diversion and alternative measures, above;

iii. Peace bonds / protective orders (see diversion -> alternative measures, above)

1. *Overview* – s. 810 recognizance/common law *peace bond*, firearm prohibitions.

d. Negotiability of facts

- i. *Overview* – cannot create or hide facts, cannot mislead the court as to what actually happened. However, where reasonably possible that witness was mistaken, then acceptable not to allege.

e. Joint submissions

- i. *Overview* – term of art; agreement between Crown and defence to urge judge to impose a particular sentence. Judge not bound, but will only rarely depart from submissions. Crown bound by policy to ensure that all relevant information is before the Court. {Policy}
 1. For instance, should agree to joint submissions where this is in the public interest, and will not bring the administration of justice into disrepute. {Policy}

- ii. *Jumping plea* - court should not question joint submissions unless there is good reason to do so; must also provide reasons for any departure: bargain must be contrary to public interest, or bring admin. justice into disrepute. Not sufficient that sentence merely “unfit.” {Bezdan}
- iii. *NCRMD* - most NCRMD verdicts in BC arrived at through agreed verdict; see mental disorder - > NCRMD, below.

f. *Code of Conduct rules on pleas*

- i. *Overview* - should not conduct if client instructs not to discuss plea. **s. 5.1-7**; counsel must advise re: RPC, consequences of plea, particularly re: judicial discretion in sentencing (eg. judge could jump), client will admit necessary factual elements of offence, and client instructs lawyer. **s. 5.1-8**
- ii. *Considerations* - the public interest in the proper administration of justice should not be sacrificed in the interest of expediency.

7. *Offences*

- a. *Offence classifications* - can be determined from the punishment section associated with each offence; eg. “punishable on summary conviction” if summary, “guilty of indictable” if indictable, or both if hybrid. To find punishment section, look at cross-reference or index at back in *Martin’s Code*.

i. *Summary offences*

- 1. *Overview* - tend to be the least serious offences, procedural issues dealt with in **ss. 785-840** of the *Criminal Code*.

2. *Procedural considerations*

a. *Election*

- i. *Overview* - neither Crown nor defence enjoys an election on straight summary offences; the matter is to be heard summarily by a provincial court judge alone. **s. 798**

b. *Information sworn*

- i. *Overview* - information must be laid in order to commence proceedings, under **ss. 788-789**. The following rules govern the swearing and amending of indictments informations:

ii. *Single justice* - can be received by a single justice, no need for more; **s. 788(2)**

iii. *Form* - must be in writing, made under oath; **s. 789(1)(a)**

iv. *Multiple matters* - can include multiple matters (as counts); **s. 789(1)(b)**

v. *Previous convictions* - cannot reference previous convictions; **s. 789(2)**

vi. Timing - must be sworn within six months of the offence, except for by consent of the defence. **s. 786(2)**

1. For instance, where information sworn *after* six months, and no consent of accused, the proceeding is a nullity; however, still open to Crown to proceed indictably, absent abuse of process. {Dudley}

vii. Exceptions / excuses - not required to negative exceptions or excuses in info; **s. 794**

viii. Rules of pleading and joinder - subject to rules applicable to indictment, as per **ss. 581-593**; court may order division **s. 590(3)**, joinder of counts/accused. **s. 591(2), (3)**; see applications -> procedural -> joinder and severance, below.

ix. Amendments - applicable to information or indictment, may be quashed or amended by Court where defective; **s. 601(3)**, if this would not cause injustice etc. **s. 601(4)**; see applications -> procedural -> quash/amend indictment, below.

1. For instance, Crown may apply to amend information, stay counts, or add counts (subject to six-month summary limit); if a substantive new count, may need to have a new bail hearing.

x. Process issued - JP can issue process (eg. make order for arrest or issue summons) to establish jurisdiction) once information is sworn: (see also, release and bail, above)

1. *Summons* - no arrest required, communications made to accused to attend at specific courtroom on specific day to make first appearance. Less serious offences / no record of noncompliance with court orders / no reason to believe that there is a flight risk; similar to RICE factors. **s. 507(4)**

2. *Arrest warrant* - warrant in first instance, where RICE factors indicate that arrest is appropriate (eg. in public interest), regardless of whether summons/PTA already issued or accused already released. **s. 512(1)**; also where accused fails to appear, or evades service of summons **s. 512(2)**

- a. *Endorsement of warrant* - JP may authorize police to release accused upon arrest; efficient, but unless Crown specifies release conditions, risk that none imposed; cannot do this for **s. 469** offences.

c. General rules

i. Compelling appearance - parts XVI, XVIII of the *Code* re: compelling appearance of accused apply to summary offences with any necessary modifications; **s. 795**

ii. Jury trial and mental disorder - provisions of Parts XVIII.1, XX and XX.1 concerning trial by jury and mental disorder also apply with any necessary modifications; **s. 795**

iii. Pleas - pleas must be voluntary **s. 606(1.1)(a)**; admit essential elements of offence **s. 606(1.1)(b)(i)**; may plead to lesser offence, even if not included, and court must find accused not guilty of offence charged, guilty of lesser offence; **s. 606(4)**; see also **s. 606**

d. Sentencing

i. *Overview* - (see sentencing -> summary, below).

ii. *Hybrid offences*

1. *Overview* - offences in which the Crown may elect to proceed either by way of summary conviction or by indictment; applicable procedure determined by the election.

2. *Procedural considerations*

a. *Election (Crown)*

i. *Discretion in Crown election* - queries whether public interest, given circumstances of offence, and record of offender, can be met within the maximum sentence; if so, summary.

1. *Advantages of summary election for Crown* - lower cost, fewer delays or opportunities for matter to “go off the rails” (eg. witness dies or becomes unavailable) easier on witnesses (no jury, only testify once), expeditious proceedings (esp. for youth).

2. *Advantages of indictable election for Crown* - allows for greater sentences to be imposed, allows for assessment of case through prelim.

ii. *Communication of election* - if no election is communicated, Crown is presumed to be proceeding summarily; “by indictment” may appear on information if electing indictably, but this is not legally required.

iii. *Summary election* - if proceeds summarily, the procedure set out above for straight summary offences (above) applies. Provincial judge alone: no *defence* election available.

iv. *Indictable election* - if the Crown elects to proceed by indictment, *defence* has certain options concerning election for mode of trial. See *indictable elections*, below.

b. *Information sworn*

i. *Overview* - information must be laid in order to commence proceedings in *provincial court*. Indictment will be sworn *once matter moves to superior court* (see rules applying to informations under summary offences, above, and indictments, below).

c. *General rules*

i. *Overview* - see general rules applying to summary procedures re: compelling appearance, jury trials, pleas, above.

d. *Sentencing*

i. *Overview* - generally contained in the same section as the offence, but may be defined elsewhere as well; depends on Crown election (see sentencing -> summary/indictable, below).

iii. Indictable offences

1. *Overview* - like straight summary offences, Crown has no election, must proceed by indictment. Includes **s. 469** and other serious offences.

2. *Procedural considerations*

a. Election (defence)

i. *Overview* - no Crown election (for strict indictable); presumptive position is judge and jury, **s. 471**, no prelim **s. 565(2)**; however, certain defence elections may be available (if indictable/hybrid proceeding on indictment):

ii. Limitations on elections

1. *Absolute jurisdiction offences (s. 553)* - limits defence election for certain offences over which a provincial Court judge has absolute jurisdiction; *cannot have superior court trial, jury trial, etc.* **s. 553**

a. For instance, keeping gaming house, betting, lotteries/games of chance, keeping common bawdy house); only tried by provincial court judge alone.

2. *Very serious offences (s. 469)* - limits defence election for certain offences which are considered extremely serious; **s. 469** via **s. 536(4)**. *Cannot have provincial court trial; presumptive position is jury trial, but may re-elect w/ Crown consent; ss. 471-473*

a. For instance, piracy, mutiny, treason, alarming the Queen are offences enumerated under this section; ergo, defence cannot elect for provincial court trial.

b. For instance, Crown will consider whether the case will involve complex jury instructions (eg. mental disorder, mixed-use evidence), efficiency (eg. in jury trial, voir dire evidence heard twice), whether it is desirable to have reasons, etc. May address change of venue concerns. {Policy}

3. *Direct indictment* - at any point during proceedings (even mid-prelim), AG/Court can invoke direct indictment, which prefers indictment and brings matter directly to trial. **s. 577** Presumptively jury trial, may reelect judge alone. **s. 565(3)**

a. For instance, this is a power to override the prelim process; where witnesses threatened, precarious health, etc. no reason to circumscribe AG's discretion. {Charlie}

b. For instance, Crown will consider public interest re: witness viability, delay, complexity; error by PCJ re: committal or no committal granted on count which is in public interest to prosecute, procedural errors, new evidence available after prelim, etc. {Policy}

4. *Deemed elections* - if there are inconsistent elections b/w co-accused, **s. 567** or no election is made; **s. 565** governs, deemed election of judge and jury, no prelim. **s. 565(2)** Rarely, where co-accused elect inconsistently, PCJ may force prelim. **s. 555**

5. *Crown override* - where accused elects PCJ or superior court judge alone, Crown

may overrule defence, force a jury trial (rare) via s. 568.

iii. *Otherwise, defence can elect* – for all other circumstances in which Crown proceeds by indictment, *defence* has right to elect mode of trial: provincial judge alone, superior judge alone, or superior judge and jury, prelim or no prelim. s. 536(2)

1. *Considerations re: level of court* – the following factors should be considered by defence in determining which level of court to elect for trial (PC vs SC):
 - a. *Time and cost* – provincial court speedier, less formal; superior court/jury trials are slow and expensive; important for cost, and for accused in custody.
 - b. *Counsel preference* – comfort in the forum (formality v. informality) or effectiveness in front of jury.
 - c. *Sentencing* – many counsel believe that provincial courts are more lenient in sentencing, therefore will opt for PC trial where possible.
 - d. *Preliminary inquiry* – may be that prelim is desirable; if so, must elect for one of the SC modes of trial; see prelim considerations, below.
2. *Considerations re: mode of trial* – following factors should be considered by defence in determining whether to opt for judge alone vs. jury:
 - a. *BRD defence* – judges may be better on “reasonable doubt” cases where accused not called to give evidence; juries may “fill in the gap.”
 - b. *Type of offence* – would the nature of the offence on its own be likely to inflame a jury? If so, go judge alone; eg. sex assault cases generally better judge alone.
 - c. *Sympathy* – if Crown witnesses sympathetic, judge-alone; if accused or defence witnesses sympathetic, jury; juries believed to be more swayed by sympathies. Thus, if character weighs in favour of accused, go jury; otherwise, judge-alone.
 - d. *Accused testimony* – if the accused is opting not to testify, may want to go judge-alone, b/c jury will draw adverse inference despite contrary instructions.
 - e. *Exclusion* – if there is prejudicial evidence which may be excluded, jury is better as they will not hear statement, not be tainted by it (though some believe that judges can “disabuse” themselves of such evidence). Similarly, if accused w/ crim. record testifying, jury again advantageous (via *Corbett*).
 - f. *Publicity* – where case surrounded with undesirable publicity, may be better to proceed with judge alone to avoid taint (if other measures insufficient, eg. jury instructions or C4C).
 - g. *Technicalities* – if the evidence is overly technical, jury may zone out; further, if the law is overly technical, jury may have difficulty in applying law.

b. Overvaluing testimony - juries may overvalue evidence of expert witnesses or eyewitnesses; therefore, where central to Crown case, judge alone better.

i. Appealability - judge must provide reasons, which may provide grounds for appeal (though, same end may be reached by challenging charge to jury).

iv. Re-election - if not an **s. 469** offence (where elections require Crown permission, see very serious offences, above), defence may re-elect. **s. 561**; see above re: considerations.

1. *Superior to provincial* - at any time with written consent of Crown, **s. 561(1)(a)**; as of right up to 14 days before trial *if no prelim*; **s. 561(2)**;

a. For instance, following prelim, resolution may be bolstered; therefore, may re-elect for the purpose of putting the matter back before PC judge for sentencing.

2. *Provincial to superior* - can be done up to 14 days before trial as of right, and thereafter with consent of the Crown; used to “judge shop.” **s. 561(2)**

3. *Between modes of trial* - as of right up to fourteen days following prelim; **s. 561(1)(b)**, or until fourteen days before trial if no preliam **s. 561(2)**; thereafter, with Crown’s written consent, **s. 561(1)(c)**.

v. Preliminary inquiries - defence (or Crown) may request preliminary inquiry, **s. 536.3** in PC *if* superior court, election **s. 536(4)**, and not direct indictment; presumptive position is judge and jury, **s. 471**, *with no prelim.* **s. 565(2)**. (see also: prelim procedure, below).

1. *Availability* - available when electing for superior court trial (either mode), **s. 536(4)**; deemed elections, and s. 469 offences. Not available for s. 553, PC election, direct indictment, or offences proceeding summarily.

2. *Deemed elections* - if there are inconsistent elections b/w co-accused, **s. 567** or no election is made; **s. 565** governs, deemed election of judge and jury, no prelim. **s. 565(2)** Rarely, where co-accused elect inconsistently, PCJ may force prelim. **s. 555**

3. *Requirements* - after requesting prelim, must provide statement of issues and witness list; **s. 536.3**; may focus issues through special hearing, **s. 536.4**, or by agreement. **s. 536.5**

4. *Co-accused* - if any co-accused requests a prelim, prelim will be held for all; **s. 536(4.2)**

5. *Purpose of prelim*

a. Court - screens out cases where there is not sufficient evidence to commit for trial, per *Skogman*, as well as to facilitate discovery. {Skogman}

b. Crown - provides record to preserve evidence re: questionable or frail witnesses (admissible via **s. 715**), test evidence, provide fuller statements, identifies gaps in evidence, prepare witnesses for the trial proper.

c. *Defence* - discovery, test Crown case, basis for resolution negotiations, pin down witness' version of events, preserve evidence, assist client, get committal on lesser charges, perhaps certain charges not committed.

6. *Defence considerations in opting for preliminary inquiry* - following factors should be considered by *defence* in determining whether to opt for prelim:

a. *Consistency* - is there anything to be gained by having another record on which to cross examine witnesses for inconsistencies?

b. *Resolution* - would having a prelim lead to easier resolution, eg. by demonstrating weaknesses/strengths in Crown's case?

c. *Evidence* - would prelim lay evidentiary foundation for trial applications, eg. production of records, etc?

d. *Cost and time* - prelim will hold the matter back considerably, cost more, therefore may be better just to go to trial - esp. if accused in custody.

7. *Crown considerations in opting for preliminary inquiry* - following factors should be considered by *Crown* in determining whether to opt for prelim:

a. *Grounds* - preserve evidence of a frail/transient/recanting witness: ensure that KGB or earlier trial would not achieve this end. {Policy}

b. *Efficiency* - must ensure efficient conduct, focused inquiry, etc. Discuss focusing issues (as provided under **s. 563.3**) with defence counsel.

b. *Information/indictment sworn*

i. *Overview* - information must be laid in order to commence proceedings by indictment in *provincial court*, **s. 504**; *exception* is direct indictment, filed in registry. **s. 577**

ii. *Laying information* - anyone may lay an information alleging an indictable offence, be received by justice if (1) offence is indictable and (2) geographic jurisdiction met. **s. 504**

1. *Private information* - citizens may swear out information before a JP, who will then issue process (if received) and refer matter to Crown/police, who conduct charge approval (see charge approval, below) and assume conduct if proceeding. **s. 504**

iii. *Form of information* - must be in writing, and must be provided under oath; if provided to judge-alone (**s. 566(1), (2)**), must be on paper and use Form 4. **s. 580**

iv. *Timing* - must be laid as soon as practicable, or at the very least by the date in the release document. **s. 505**

v. *Rules of pleading and joinder* - subject to rules applicable to indictment, as per **ss. 581-593**; court may order division **s. 590(3)**, joinder of counts/accused. **s. 591(2), (3)**; see

applications -> procedural -> joinder and severance, below.

vi. Amendments - applicable to information or indictment, may be quashed or amended by Court where defective; **s. 601(3)**, if this would not cause injustice etc. **s. 601(4)**; see applications -> procedural -> quash/amend indictment, below.

1. For instance, Crown may apply to amend information, stay counts, or add counts (subject to six-month summary limit); if a substantive new count, may need to have a new bail hearing.

vii. Previous convictions - cannot reference previous convictions; **s. 664**

viii. Multiple matters - can include multiple matters (as counts); **s. 581(1)**

ix. Omitting information - there are some things that do not need to be included (**s. 583**).

x. Process issued - JP can issue process (eg. make order for arrest or issue summons) to establish jurisdiction) once information is sworn: (see also, release and bail, above)

1. *Summons* - no arrest required, communications made to accused to attend at specific courtroom on specific day to make first appearance. Less serious offences / no record of noncompliance with court orders / no reason to believe that there is a flight risk; similar to RICE factors. **s. 507(4)**

2. *Arrest warrant* - warrant in first instance, where RICE factors indicate that arrest is appropriate (eg. in public interest), regardless of whether summons/PTA already issued or accused already released. **s. 512(1)**; also where accused fails to appear, or evades service of summons **s. 512(2)**

- a. *Endorsement of warrant* - JP may authorize police to release accused upon arrest; efficient, but unless Crown specifies release conditions, risk that none imposed; cannot do this for **s. 469** offences.

c. General rules

- i. *Overview* - see general rules applying to summary procedures re: compelling appearance, jury trials, pleas, above.

d. Sentencing

- i. *Overview* - generally contained in the same section as the offence, but may be defined elsewhere as well; more severe consequences than summary offences (see sentencing -> indictable, below).

8. Preliminary inquiry procedure

- a. *Overview* - for purpose of prelim, electing for prelim, considerations related to election, see indictable offences -> defence election -> preliminary inquiry, above.

b. Procedure generally

- i. *Order* - once case called, counsel introduced, order for witness exclusions/publication bans imposed, introductory remarks/informal concessions by defence/Crown, formal admissions, documentary evidence, witnesses called (chief/cross), submissions, then committal decision.
- ii. *Similar to trial* - per **s. 540**, procedure at prelim similar to trial; evidence taken under oath, exam in chief and cross, *similar* rules of evidence (though no *Charter* jurisdiction), must create record, can compel attendance of witnesses (eg. arrest/detain, etc.)
- iii. *Different from trial* - usually only partial Crown case led (sufficient for committal, no more required); defence does not usually call evidence, waive **s. 541(2)**; lack of submissions/evidence seen as tantamount to a consent to committal.

1. *Standard of proof* - different than trial; must be merely some evidence on each element of an offence on which a reasonable jury, properly instructed, could convict; no need to weigh evidence, credibility, or draw inferences (other than *necessary* inferences). {Arcuri}

2. *Evidence* - allows for evidence to be admitted in writing/etc. even where otherwise inadmissible if believed credible/trustworthy **s. 540(7)** - can conduct “paper” prelim on legal issues.

c. *Powers of prelim judges*

- i. *Overview* - as conferred by **s. 537**, prelim judges may order change of venue, close courtroom, control dates/adjournments, control presence of the accused (see disclosure/remand/appearances -> appearances, above), remand in custody, and control procedure generally. No *Charter* remedies.
- ii. *Publication bans* - via **s. 539**, publication bans apply to preliminary inquiries; mandatory if made by defence request; includes confessions. **s. 542(2)** Can also be imposed to protect identity of witnesses, **s. 486.4** or complainants, **s. 486.5**.
- iii. *Witness exclusion* - as with trial, discretionary, but supported through **s. 486(1)**, which allows for exclusion of witnesses from “any proceeding” - avoids tainting/influence, etc.
- iv. *Compelling appearance* - see getting evidence on the record -> compelling appearance; same means apply to prelims as to trials. **s. 540**.
- v. *Custody for refusal* - where witness refuses to testify on prelim, may be subject to *Form 20* imprisonment for up to eight days, adjourn during interim; renewable at discretion of court. **s. 545**
- vi. *Prelim witnesses* - witnesses who testified on prelim may be bound by recognizance to appear at trial if PC judge felt they were “material;” **s. 550**; may issue warrant for FTA. **s. 704**
- vii. *Change of venue* - empowered by **s. 537**; rare; see applications -> procedural applications -> change of venue, below.

d. *Defence evidence*

- i. *Overview* - likely only where it amounts to virtual proof of innocence, or in circumstances where defence wishes to hear evidence from witness that Crown has opted not to call. Considerations:

1. *Concessions/admissions* - has defence made other admissions such that the prelim has been efficiently run? Court may be reluctant to allow defence free reign to build record for cross-examination or subsequent *Charter* applications in trial proper.
2. *Fairness* - is the witness statement inadequate?
3. *Resolution* - will calling the witness help Crown assess its case and perhaps result in resolution?
4. *Prolongation* - does calling the witness prolong the hearing?
5. *Affiants* - increasingly, Crown will refuse to call police affiants for wiretap and search warrant applications; often needed to lay foundation for *Charter* applications at trial.

e. *Committal*

- i. *Contested committal* - where standard met (see above) on the offence alleged, or a *different* offence *in respect of the same transaction* (if supported by evidence), via **s. 548(1)**, committed for trial. Standard sufficiently low that there is little charge of the matter not being committed for trial.
 1. For instance, whether there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty. PCJ to discharge the accused if a directed verdict of acquittal would result at trial {Sheppard}. There is some limited “weighing” of the evidence {Arcuri}
- ii. *Consent committal* - where accused and Crown consent, may be committed for trial on any offence, without the need for the taking of evidence. **s. 549(1)** Can be used strategically to focus on creating record concerning issues which will be hotly contested at trial.
- iii. *Wrongful committal* - may bring application for *certiorari* in superior court if counsel feels there are grounds to quash a committal, or there is an error in committal. {Charlie}
 1. For instance, where *pro se* accused not given an opportunity to call witnesses, contrary to express words of **s. 541(4)**; ergo, committal quashed on this basis: matter set again for prelim {Charlie}

f. *Bail amendments*

- i. *Overview* - due to changes in strength of Crown case, results of committal (eg. could be for lesser offences, or not committed on all counts, etc.), may be proper to review bail following prelim. See bail -> prelim, above). **s. 523(2)(b)**

9. *Applications*

a. *Procedure generally*

- i. *Presiding authority* - will usually be heard pre-trial by the trial judge, though other judges have jurisdiction to hear applications for matters they are not seized of. Most heard in absence of jury, with the exception of expert witness qualification applications or minor objections.

ii. *Timing*

1. Pretrial applications

- a. *Prior to jury selection* - may be heard before jury selection in superior court trials via **s. 645(5)**; beneficial, because admissibility of evidence may effect opening statements or other strategic decisions, and also avoids having to continually excuse the jury.
- b. *Recovery time* - may require time scheduled between applications to allow for necessary changes to be imposed, eg. redacting transcripts, changing position on subsequent applications, or for logistical arrangements (eg. video evidence); easier if pre-trial.

2. Applications which occur at trial proper

- a. *Corbett applications* - until the defence elects to call evidence (ie. via the accused), *Corbett* applications are not made (strategic, as defence may not know or may not wish for Crown to know whether defence evidence will be called until Crown's case closed).
- b. *Applications triggered by testimony* - other applications may be triggered by evidence at trial, eg. if defence puts accused's character at issue, or prior consistent statement triggered by accusation of recent fabrication.

iii. Notice of Application

1. *Overview* - per **Rule 2**, Notice of Application must be filed with supporting materials, time estimates, etc; however, certain applications will be made orally on an *ad hoc* basis; depends on importance of issue, whether anticipated by counsel, how the issue arose, etc.

iv. Voir dire

1. *Overview* - trial with in a trial; hearing concerning evidentiary applications. Judge looks (voir) at evidence presented with a view to saying (dire) what may be done with it. Evidence insulated from trial proper / TOF. Procedure determined by trial judge.

2. Procedure

- a. *Vukelich hearing* - held to determine whether *voir dire* on a given issue worthwhile; defence statement must disclose *some* basis for excluding evidence before voir dire held. Generally, issues will be clear by the time pretrial applications are heard, hearings rarely required.
- b. *Issues* - *voir dire* may be held on more than one issue (eg. concerning statements of the accused, both *Charter* and voluntariness can be considered). However, this may cause issues where different onus/standards apply; more common in summary offence trials.
- c. *Exhibits* - can and will be taken by the court, but will be labelled differently and will not be given trial identifiers until trial proper.
- d. *Admissibility of voir dire evidence on trial* - in judge-alone trials (not possible in jury trials, as jury not present for *voir dire*) may admit evidence from *voir dire* at trial *if* parties consent or there is a ruling to that effect; can be done in whole or in part. (see also, trials, below).

- i. For instance, may use evidence on *voir dire* for the sole purpose of attacking credibility where contradictory evidence is given at trial; no ruling required. {Henry}
- ii. For instance, may be admitted for limited purposes where forms part of reasonable grounds for screening device / breathalyzer demand, though not for truth unless both parties consent.

3. Outcome

- a. Crown winning a critical voir dire - make sure the case has gone in and a conviction is properly founded.
- b. Defence losing a critical voir dire - when this arises, Crown must ensure that conviction is properly founded; defence must protect appeal rights by not merely pleading guilty.

b. Procedural applications

- i. *Overview* - see also preliminary inquiry -> powers of prelim judges -> publication bans / witness exclusion, above; similar procedural applications which may also apply in trial proper.

ii. Adjournment

- 1. *Overview* - may be allowed at discretion of trial or prelim; note that adjournment of prelim more difficult to achieve, because issues which might prejudice either side are not as heavily weighted, because the only jeopardy is committal for trial. {Charlie}
 - a. For instance, on prelim for sexual assault of a minor, prelim judge refused application for adjournment arising from accused not being represented; would have adjourned on trial, but not prelim. {Charlie}

iii. Joinder and severance

- 1. *Joinder* - may join separate informations on one indictment (rare). **s. 574** However, cannot join indictable offences with murder unless arising in same transaction, or if accused consents. **s. 589**
- 2. *Severance* - trial judge has discretion, **s. 591**, as with case management judge, **s. 551.3**, to sever counts, or defendants, or both, where this is in the interests of justice. Considerations:
 - a. *Balancing* - judge must balance public interest in proceeding efficiently and effectively balanced against the right of the accused to a fair trial.

i. Severance of counts

- 1. *Testimony on counts* - accused might need to testify on one count, not want to be forced to undergo cross-examination on another.
- 2. *Prejudice* - moral and reasoning prejudice may arise from trying counts together.
 - a. *Different offence types* - might be unfair to mix a group of fraud counts with an unrelated assault, even within same time frame; fraud may cause TOF to disbelieve testimony on assault through prejudice;
 - b. *Similar offence types* - falling short of where the test for similar fact evidence is met, might cause undue prejudice to try multiple counts together.

ii. *Severance of accused* - trying accused together may limit or inhibit ability to make full answer/defence:

1. *Admissibility* - evidence which admissible against one accused (A) but not another (B); evidence implicates B; lack of severance would severely prejudice B at trial. Alternately, if A needs to cross examine B on statement ruled inadmissible at B's trial.
2. *Antagonism* - cutthroat defences; each party blaming the other will lead to both being convicted, more often than not; severance beneficial to defence.
3. *Testimony* - accused A needs to call accused B as exculpatory witness; however, B will not risk testifying in own defence; therefore, severance needed to accommodate.

b. *Procedure* - usually require presentation of affidavit evidence, and are more likely to succeed in a jury trial (because judges claim they are able to disabuse).

iv. *Change of venue*

1. *Overview* - trials are generally held in the jurisdiction where the offence occurred, but may be held elsewhere at the discretion of a judge. **s. 599**; generally brought by defence to avoid publicity or a tainted jury pool.

2. *Procedure*

- a. *Overview* - application can be made at any time, by Crown or defence, to any judge (of sufficient jurisdiction); if Crown application, accused may receive reimbursement of expense. May be ordered for prelim, **s. 537**
- b. *Test* - party must show strong grounds for real probability of prejudice; includes extensive prejudicial publicity, public knowledge of facts, hostility/sympathy for victim/accused, etc.
 - i. For instance, not sufficient to show merely that members of the jury have read or heard about the case previously; this does not amount to real prob. of prejudice. {Glowatski}
- c. *Other remedies* - where test not met, judge may impose other remedies, eg. challenge for cause, jury warnings; alternatively, defence may opt for judge-alone trial.

v. *Quash or amend info/indictment*

1. *Procedure* - before entering a plea, application may be put before court to quash the info/ indictment for defects. **s. 601**; Applicable to information or indictment, may be quashed or amended by Court where defective; **s. 601(3)**, if this would not cause injustice etc. **s. 601(4)**
 - a. For instance, Crown may apply to amend information, stay counts, or add counts (subject to six-month summary limit); if a substantive new count, may need to have a new bail hearing.
 - b. For instance, where info does not disclose an offence, is unsworn, occurred outside of the six-month limitation period, or perhaps informant not named.

2. *Remedies* - court has discretion to quash, or otherwise to amend the indictment/info to fix the defect at any stage of the proceedings - even on appeal.
3. *Bail orders under amended indictments / informations* - any existing bail or detention order applies to amended informations/indictments (known as "C" Informations). **s. 523(1.1)**

vi. Recusal of judge or counsel

1. *Overview* - extreme remedy applied with great caution in circumstances of perceived bias. Crown may apply where conflict might ground appeal, defence where Crown feels bias exists (perhaps worked as defence counsel for client), etc. Do not bring lightly.

vii. Challenges for cause

1. *Overview* - see jury trial -> selection -> challenge for cause, below.

viii. Mistrial applications

1. *Overview* - granted only in the *clearest of cases*, where there has been a fatal wounding to the trial process which cannot be cured by remedial measures; {Patterson} Crown may recommence proceedings (if within time limit, no abuse of process), but this is discretionary.
 - a. For instance, in a jury trial, where matter could have affected the jury to the point that the entire trial was compromised, only a new trial is available. {Pires}
 - b. For instance, publication ban breached, Crown references accused's silence, or where counsel withdraws at time of defence election. {Ruffolo}
2. *Jury trials* - judge will consider whether a warning issued to the jury at the time the issue arose, and again during the final charge, would be sufficient to correct prejudice.
3. *Judge-alone trials* - judge will consider whether he/she can disabuse self of the prejudicial evidence; usually in the affirmative, therefore mistrials rare for judge-alone proceedings.

ix. Witness exclusion

1. *Overview* - as with prelim, discretionary, but supported through **s. 486(1)**, which allows for exclusion of witnesses from "any proceeding" - avoids tainting/influence, etc. (see also: prelim -> powers of prelim judges -> witness exclusion).
2. *Exceptions* - the accused may not be excluded; this is why, generally, accused will normally testify first; experts also excepted where providing opinion based on testimony at trial, with permission.

x. Publication bans

1. *Overview* - see prelim -> powers of prelim judges -> publication ban; note that no application is needed to ban information from jury trial that jury not privy to (see trial -> jury disclosure, below). **s. 648** (note also: publication ban in youth proceedings, below).

2. CA: subject to practice directive; must describe publication bans in force on cover of factum, source of ban, be ready to address such bans in chambers.

xi. Offender designation

1. *Overview* - where Crown seeks to have offender designated as DO/LTO, subject to application to the Court (see sentencing -> options -> designation).

c. Evidentiary applications (see also: admissibility)

- i. *Overview* - see also, admissibility -> alternate means of adducing evidence; most such means require application to the Court.

ii. Disclosure applications

1. *Materials in possession of the Crown / first party* - may bring *Stinchcombe* application for such materials; however, subject to limitations (see disclosure -> evidentiary considerations). Application may be made concerning such limitations or exception.
 - a. For instance, privilege may be overcome where on application, defence shows that the innocence of the accused is at stake, {O'Connor} or where *McNeil* application brought for release of third party records.
 - b. *Procedure* - record should first be produced before judge, who must determine the "likely relevance" - if so satisfied, then court must ask to what extent disclosure must be made based on relevance. {O'Connor}
2. *Materials in possession of third party* - *McNeil* application for production; available where accused is not charged with a sexual offence, or otherwise record does not contain personal information protected by REP. {McNeil}
 - a. For instance, application may be made to release evidence concerning investigations of other potential suspects.
 - b. *Procedure* - record should first be produced before judge, who must determine the "likely relevance" - if so satisfied, then court must ask whether record is "truly relevant," required for accused to make full answer and defence. {McNeil}

c. Types of evidence sought

- i. *Police disciplinary records* - previously required *McNeil* application; now routinely released without application; further, records of serious misconduct (eg. bearing on case) would be considered first party records, covered by *Stinchcombe*. Follows from *McNeil*: where obviously relevant (as this would be), should be immed. disclosed. {McNeil}
- ii. *Investigations of other persons* - generally fall within the third party record rules. {McNeil}

1. For instance, this can be problematic; crossing on investigations because it can allow the police opportunity to testify at length about the precise investigative techniques that were used (including suspicions/rationale for conduct) which can be extremely prejudicial. {Morin}

iii. *Private counselling/sexual offences* - for defence to access private counselling records of complainant in sexual offence, procedures under **ss. 278.1-91** must be followed. {Mills}

iv. *Youth criminal records* - if counsel wishes to have access to youth record of witness, must swear an affidavit that this is necessary for full answer and defence. **s. 119** (YCJA).

1. For instance, counsel may wish to access youth record for the purposes of attacking the credibility of youth witnesses; this is generally allowable.

v. *Wiretap authorizations and ITOs* - wiretap authorizations are automatically sealed (see investigation -> sealed warrants, above); procedure for unsealing set out in **s. 187**; may be obtained by Crown and defence consent. For other sealed ITOs (rare). **s. 487.3** procedure applies.

iii. *Charter applications*

1. *Exclusion of evidence* - **s. 24(2)**; depends on seriousness of state conduct (good faith / bad faith, technical vs. substantive), impact of breach on *Charter* interests (severity, meaningful deprivation), and society's interest in adjudication on merits (eg. seriousness of offence, centrality/reliability of impugned evidence, admin. justice disrepute). {Grant}

2. *Stay of proceedings* - **s. 24(1)**; awarded only in *clearest of cases* (consider recent excessive force/dishonesty by Toronto police, SOP in *R. v. Costain*): severe s. 7 violation leads to judicial stay. Requires 14-day notice to Attorneys General of Canada and specific province.

3. *Constitutional questions* - where remedy other than s. 24(2) sought, eg. seeking stay of proceedings or challenging validity of law, requires 14-day notice to Attorneys General of Canada and specific province (*Constitutional Questions Act*, **s. 3**) and PG AG.

4. *Standing* - can only bring *Charter* claim concerning one's own rights, not those of others. Therefore, evidence may be admissible against one person, but not another, where only the latter's *Charter* rights were violated in obtaining the evidence.

5. *Onus/burden* - applicant must make out *prima facie* breach of *Charter* right on a balance of probabilities, therefore technically must call evidence to this end (though can also be made out through Crown witnesses on cross).

iv. *Statements of accused*

1. *Overview* - where the Crown seeks to adduce statements made by the accused (to a person in authority), it is *mandatory* that an application concerning the voluntariness of those statements be brought, establish that statement not obtained through inducement/coercion. {Oickle}

a. For instance, regardless of whether statements made to person in authority (b/c s. 7 RTS applies) may be adduced; police may use persuasive measures (Reid interrogation, systematic presentation of case against) in order to evoke statement from accused. {Singh}

v. *Cross-examination on prior sexual history*

1. *Overview* - subject to application and specific limitations as governed by **ss. 276-276.5** of the *Criminal Code*.

vi. Qualification of expert witness

1. *Overview* - application which can be heard in front of a jury. Witness will provide *curriculum vitae*, and be examined/crossed on qualifications; must be precise in defining area of expertise.

vii. Evidence of accused's character

1. *Overview* - application must be brought to adduce evidence of accused's bad character, only allowable where the accused has put character in issue.

viii. Hearsay evidence

1. *Overview* - if counsel seeks to adduce hearsay evidence as proof of contents, this is subject to the principled {Khelawon} and traditional exceptions; must bring application, subject to residual discretion to exclude evidence.

ix. Cross examination of own witness

1. *Overview* - where counsel seeks to cross-examine own witness (eg. on prior inconsistent) or treat as adverse, procedures and applications set out under s. 9 of the *Evidence Act*; *Milgard* procedure may apply.

x. Witness accommodations

1. *Overview* - available on application by prosecution in criminal proceedings (see: getting evidence on record -> witness accommodation, below).

xi. Corbett applications

1. *Overview* - per **s. 12** of the *CEA*, accused may be crossed on criminal record if testifying, but only for the purposes of attacking credibility (propensity/character reasoning prohibited). By making *Corbett* application, may excise parts or all of the record if prejudicial.
2. *Timing* - until the defence elects to call evidence (ie. via the accused), *Corbett* applications are not made (strategic, as defence may not know or may not wish for Crown to know whether defence evidence will be called until Crown's case closed). {Underwood}
 - a. For instance, accused is entitled to know the case to be met; the extent to which the record is admissible is part of the case. Defence must provide outline of evidence so that judge can make ruling. {Underwood}
3. *Jury instructions* - wherever accused is cross-examined on criminal record in front of jury, the judge must instruct jury as to proper use of that information/record: *credibility only*.
4. *Factors to consider in Corbett applications:*

- a. *Nature of the previous conviction* - crimes of dishonesty more relevant, because they tell us about credibility.
- b. *Similarity of the previous conviction to the offence charged* - more prejudicial the more similar the charge. May nevertheless tell us about credibility; however, if more probative of propensity than of credibility, must be excluded.
- c. *Temporal considerations* - remoteness or nearness in time: older the conviction, the more likely to be excluded; less the information can be probative of credibility.
- d. *Defence attack upon the credibility of Crown witnesses (or the deceased)* - where credibility is the central issue at the trial due to conduct of defence, this must be considered.
- e. *Effect of excision* - what is the effect of excluding portions of the record? Will it leave erroneous impression of crime-free gap when accused was actually in jail? Will it leave impression that accused had no criminal history? {Charland}

5. *Outcomes of Corbett applications:*

- a. No exclusion of the criminal record;
- b. Complete exclusion of the criminal record;
- c. Partial editing of the criminal record;
- d. Use of a “summary statement” as opposed to the specifics of the convictions.

xii. *Fresh evidence applications*

1. *Overview* - rare applications where new evidence admissible on appeal; generally tendered in affidavit form with leave of the Court, s. 683(d). Includes recantations from witnesses, new evidence, etc. heard at same time as appeal itself. Allowable for sentence appeals. {Levesque}

2. *Requirements*

- a. *Due diligence* - could not have been adduced at trial through mere exercise of due diligence. {Palmer}
- b. *Relevant and material* - evidence is relevant and bears upon a decisive or potentially decisive issue in the trial; {Palmer}
- c. *Credibility* - evidence is reasonably capable of belief; {Palmer}
- d. *Effective* - must be such that, if believed, it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result. {Palmer}

10. Getting evidence on the record / admissibility

- a. *Overview* - generally, to be admissible evidence must be relevant (show that something is more or less

likely to be true) and material (relate to a live issue at trial), presented by a competent and capable witness, not subject to any exclusionary rule, and more probative than prejudicial.

b. Competency & compellability

i. Overview – general rule is that any person who is competent is *also* a compellable witness; {Gosselin} presumption of competency, which is rebuttable through exception. Co-accused are compellable against one another *if being tried separately*. **s. 3, CEA**

ii. Incompetency to take oath or communicate due to youth or mental incapacity

1. *Overview* – to testify, a witness must (1) give some formal indication that he or she will be truthful. Further, must be (2) capable of communicating evidence. Those who are incapable of doing so are not competent to testify. (see also: **s. 5** of the *BCEA* – operates similarly)

2. *Procedure generally*

a. *Temporality* – best gauge of capacity is the witness’s performance *at the time of trial*. Generally, a witness who demonstrates capacity to testify at trial will be allowed testify. {Marquard}

b. *Purpose* – goal is not to ensure that evidence is credible, but only to assure that it meets the minimum threshold of being receivable. Defects in ability to perceive or recollect events at issue to be explored by cross-examination. {Marquard}

c. *Burden* – there is a presumption of capacity to testify (common law); the party challenging capacity carries the burden of proving otherwise. **s.16(5), CEA**

d. *Voir dire* – competence of a proposed witness is independent inquiry: it may not be combined with a *voir dire* on other issues, such as the admissibility of the proposed witness’s out-of-court statements. {DAI}

e. *Questioning* – requires consideration and accommodation for particular needs; questions should be phrased patiently in a clear, simple manner. {DAI}

f. *Evidence* – preferable to hear all available relevant evidence that can be reasonably considered before preventing a witness to testify. A witness should not be found incompetent too hastily. {DAI}

g. *Experts* – may be adduced if it meets the criteria for admissibility, but preference should always be given to expert witnesses who have had personal and regular contact with the proposed witness. {DAI}

3. *Witness over 14-years old when testifying, mental capacity challenged – s. 16 of CEA.*

a. *Inquiry* – upon challenge, inquiry must be conducted to determine whether the person (a) understands the nature of the oath or affirmation, and (b) is able to communicate the evidence. **s. 16(1), CEA**

i. *Understanding of oath/affirmation* - no longer concerns appreciation of spiritual consequences of lying under oath; rather, understanding of solemnity of occasion, and added responsibility to tell truth over and above normal social conduct. {Fletcher}

1. For instance, unnecessary and undesirable to conduct an abstract inquiry into whether witness understands difference between truth and falsity, obligation to give true evidence in court. {DAI}

ii. *Communication of evidence* - requires (1) capacity to observe, including interpretation, (2) recollect, and (3) communicate. *Capacities*: not whether witness actually observed, recollects, etc. {Marquard}

1. For instance, explore can relate concrete events by understanding and responding to questions. It may be useful to ask if can differentiate between true and false everyday factual statements. {DAI}

b. *Outcomes*

i. *Incapable of oath, but not communication* - if the witness is unable to understand the oath/affirmation but is nevertheless capable of communicating the evidence, the witness is able to testify upon promising to tell the truth, under **s. 16(3)**, *CEA*

ii. *Incapable of oath and communication* - where the witness fails to understand the oath *and* cannot communicate the evidence, the testimony will be barred, under **s. 16(4)**, *CEA*

4. *Witness under 14-years old when testifying - governed by s. 16.1 of the CEA.*

a. *Overview* - barred from making oaths or affirmations under **s. 16.1(2)**. Instead, evidence is received if the witness is capable of understanding and responding to questions, **s.16.1(4)** upon a promise to tell the truth, **s. 16.1(6)**, *CEA*

b. *Inquiry* - upon challenge, inquiry must be conducted to determine whether witness is capable of understanding and responding to questions. **s. 16.1(5)** Inquiry does not permit questions concerning the understanding of the promise to tell truth, **s. 16.1(7)**, *CEA*

c. *Burden* - there is a presumption of capacity to testify, **s. 16.1(1)**, and the party challenging capacity carries the burden of proving otherwise. **s. 16.1(4)**, *CEA*

d. *Outcomes* - evidence is only barred if the witness is challenged, and the result of **s. 16.1(5)** inquiry indicate that the witness is incapable of understanding and responding to questions. Otherwise, admissible under promise to tell the truth, **s. 16.1(8)**, *CEA*

iii. *Incompetency of spousal witness*

1. *Overview* - spouses are incompetent to testify *for or against* one another, subject to common law and statutory exceptions. Reflected the loss of legal identity of wife upon marriage, and more recently the need to protect marital harmony. {Salituro}

2. *Marital status key* - where spouses are irreconcilably separated, or divorced there is no marriage bond to protect, and spousal incompetency is inapplicable. Only married persons can avail themselves of the rule. {Salituro}

3. *Temporality* - renders a spouse incapable of testifying in relation to events which occurred both *before* and *during* the marriage. {Hawkins}
4. *Genuineness of marriage* - marriage designed to take advantage of spousal incompetency may nonetheless be a true marriage; court can only inquire where presented with *concrete evidence* that the marriage is a sham, not intended to provide mutual care and support. {Hawkins}
5. *Privilege may avail where competency does not* - while spousal incompetency dies with the marriage, privilege does not; certain communications (though not observations) will nevertheless be inadmissible.

6. *Application*

- a. **s. 4(1)** of the *CEA* holds that the husband or wife of the accused is a competent witness *for the defence*.
- b. **s. 4(2)** holds that the husband or wife of the accused is a competent *and* compellable witness *for the prosecution* for certain serious offences.
- c. **s. 4(3)** holds that spouses are not compellable to disclose communications between the spouses during their marriage. (see spousal privilege)
- d. **s. 4(4)** the husband or wife of the accused is a competent *and* compellable witness *for the prosecution* for certain offences where *the complainant is aged fourteen years or less*.
- e. **s. 4(5)** provides that the common law rule remains in effect; a spouse is competent where the offence involves the person, liberty or health of the witness spouse.
- f. **s. 4(6)** holds that the judge cannot comment on the failure of the accused or the accused's spouse to testify (though read below re: competency of accused).

iv. Incompetency of accused / accused's right to silence (testimonial)

1. *Overview* - the accused is neither competent nor compellable for the prosecution. The presumption of innocence indicates that it is not incumbent on the accused to present any evidence at all, rather it is for the Crown to prove him or her guilty. {Noble}
2. *Co-accused* - however, co-accused persons are both competent and compellable against one another where they are being tried separately. **s. 3, CEA**

c. Means of compelling appearance and testimony

- i. Overview* - via **s. 795**, rules/means of witness compulsion from jury trials are applicable to PCJ trials, SC judge-alone trials via **s. 572**, and to prelims via **s. 540**.

ii. Compelling appearance

1. *Law enforcement notifications (LENS)*

a. *Overview* - no legal authority, but it is a *Police Act* offence to ignore such a notification.

2. Letters

a. *Overview* - no legal authority, but generally results in substantial compliance, esp. from property owners, victims of property crime and Loss Prevention Officers.

3. Subpoenas

a. *Overview* - governed by **ss. 698-702**, direct the witness to attend and remain at place of trial or prelim; may be issued for attendance at location of video link, **s. 700.1**; if under seal, has extra-territorial effect; may be quashed through certiorari application.

b. *Witness in custody* - if the required witness is in jail, the calling party must apply for a judicial order under **s. 527** and a subpoena in order to compel attendance at Court.

4. Warrants

a. *Accused* - special rules apply if accused fails to appear (see: disclosure & appearances -> appearances -> failure to appear, above)

b. *Trial witnesses* - warrant instead of subpoena proof of evasion or intention not to attend; or if witness with subpoena does not attend. This proof may be established by: affidavit, *viva voce* evidence or submissions of counsel; or witness simply not attending. **s. 705**

c. *Execution* - once warrant is executed, the witness can either be detained or released on recognizance, subject to certain timeframes. **ss. 706-708**; or charged with contempt, **s. 708**

d. *Prelim witnesses* - witnesses who testified on prelim may be bound by recognizance to appear at trial if PC judge felt they were "material;" **s. 550**; may issue warrant for FTA. **s. 704**

iii. Compelling testimony

1. *Prelim* - where witness refuses to testify on prelim, may be subject to *Form 20* imprisonment for up to eight days, adjourn during interim; renewable at discretion of court. **s. 545**; (see also prelims -> powers of prelim judge, above)

2. *Trial* - where witness refuses to testify at trial, subject to summary conviction of offence; fine of \$100/prison term up to ninety days, or both.

d. Alternate means of adducing evidence

i. *Overview* - generally, any alternate means of adducing evidence must be subject of an application made to Court. See generally applications -> evidentiary.

ii. Virtual presence (*viva voce*)

1. *Overview* - witnesses may be able to testify *viva voce* by video or other technology; allowable

where both parties consent **s. 714.8** or where:

- a. *Video* – allowable for witness in Canada if appropriate in all the circumstances; **s. 714.1**; presumptive if witness is not in Canada: unless shown contrary to principles of fundamental justice. **s. 714.2**
- b. *Audio* – allowable for witnesses in **s. 714.3** or out of Canada **s. 714.4** where appropriate in all the circumstances.

iii. Video statements of vulnerable witnesses

1. *Overview* – witnesses under the age of 18 **s. 715.1** or suffering from disability **s. 715.2**, may be allowed to avoid testimony in chief by adducing recording of video statement, where this is adopted by witness at trial, and the witness is able to be cross-examined at trial.

iv. Evidence from previous proceedings

1. *Overview* – where witness refuses to be sworn or to give evidence, is deceased, has become incompetent, is too ill to attend, is outside of Canada, previous evidence may be adduced where it was taken in presence of the accused with full opportunity to cross-examine. **s. 715**
2. *Prelim* – see also prelims -> powers of prelim judges -> custody for refusal for remedy at prelim.

v. Hearsay statements

1. *Overview* – admissible via principled/traditional exceptions to rule against hearsay. {Khelawon} Subject to application/*voir dire*: see applications -> evidentiary -> hearsay.

vi. Property ownership affidavits

1. *Overview* – solemn declaration/affidavit of lawful owners of property which is the subject matter of offence may be admitted as evidence; **s. 657.1**

vii. Conviction of co-accused

1. *Overview* – evidence of the conviction of another person for property offence may be taken as proof of the fact that the property was in fact stolen. **s. 657.2**

viii. Agreed statements of fact

1. *Overview* – counsel may admit any fact alleged against the accused for the purpose of dispensing with proof thereof. **s. 655**

ix. Commissioner evidence

1. *Overview* – where witness is not likely to be able to attend trial due to physical disability / illness, some other sufficient and good cause, or is out of Canada, evidence may be taken by commissioner for oaths. **s. 709**; admissible there is reasonable notice, and accused had full opportunity to cross examine. **s. 711**

x. Expert witness reports

1. *Overview* – may be provided by means of a report (affidavit/solemn declaration); however, must nevertheless appear for the purposes of cross-examination. **s. 657.3**

e. Witness accommodations

- i. *Overview* – on application (by Crown or by Witness), certain assistance can be made to help vulnerable witnesses to give a full and candid account when testifying.

ii. Intelligibility

1. *Overview* – if physical or mental disability makes communicating evidence difficult, Court may authorize the use of “any means that enables the evidence to be intelligible.” **s. 6, CEA**

iii. Support persons

1. *Overview* – allows for non-witness (unless necessary for admin. justice) **s. 486.1(4)** support person of witness’ choice to be present and close during testimony where application brought.
2. *Communication* – judge may order that the support person and the witness may not communicate with one another during testimony. **s. 486.1(5)**
3. *Inference* – no adverse inference may be drawn from the fact that an order has been or has not been made under this section. **s. 486.1(6)**
4. *Two means*:
 - a. *Administration of justice* – court *compelled* to allow for support person on Crown application if witness disabled or under 18 years of age, where this would *not* interfere with admin. justice; **s. 486.1(1)**
 - b. *Full and candid account* – court *may* allow for support person Crown or witness application where necessary for full and candid account; **s. 486.1(2)** Must consider witness age, disability, offence, and any other relevant circumstance. **s. 486.1(3)**

iv. Testifying outside of courtroom or behind screen

1. *Overview* – witnesses may testify remotely by CCTV or by other device which prevents witness from seeing the accused, in certain circumstances. **s. 486.2**
2. *Appropriateness* – in BC, Crown decides what the appropriate accommodation is for person under 18. {SBT}

v. Accused may not cross-examine

1. *Overview* – accused is restricted from personally cross-examining certain persons, though this may be effected through counsel.

2. *Restrictions* - accused may not cross persons under age 18 unless necessary re: admin. justice, **s. 486.3(1)**; accused barred from crossing any other person if necessary to obtain a full and candid account, **s. 486.3(2)**; on crim. harassment charge unless necessary re: admin. justice, **s. 486.3(3)**

11. *Jury selection and discharge*

- a. *Overview* - governed by provisions in the *Criminal Code*, eg. **s. 626**, which holds that anyone who meets provincial qualifications (eg. *Jury Act*) may serve as a juror; looking for 12 persons. **s. 631(2.2)**
- b. *Latitude* - significant latitude granted; failure to comply does not affect validity of proceeding, **s. 643(3)**, or provide grounds for stay/reversal following rendering of verdict (*functus*); **s. 670**
- c. *Investigation* - no allowance for intensive background investigation of jurors; even where minor investigation takes place (eg. crim. record check), must be disclosed to defence. {Davey}
- d. *Publication ban* - on application by the Crown or by the court itself, may order ban on publication of juror identity, limit access to any identifying information. **s. 631(6)** (see also: trials -> duty of nondisclosure -> publication ban)
- e. *Creating array of jurors*
 - i. *Determination of procedure* - following from **Part 1(8)** of *Jury Act*, Sheriffs determine procedures for selecting jurors, with regard to basic notion that persons have the right and duty to serve.
 1. *Summons* - sheriffs responsible for empanelling jurors in sufficient numbers; *Jury Act*, **s. 10**. Sheriffs must send summons to potential jurors, attendance not optional. *Jury Act*, **s. 11**
 2. *Challenging panel* - rare; can challenge manner in which panel compiled in writing, must allege partiality, fraud, wilful misconduct (eg. deliberate exclusion of potential jurors for demographic reasons). **s. 629** Judge will determine whether new empanelment is warranted. **s. 630**
 3. *Insufficient numbers* - if there are not enough persons in the array to empanel a jury (eg. due to challenges or response to summons), sheriffs can collect persons from public (talesman). **s. 642**
- f. *Process for selecting individual jurors*
 - i. *Right to challenge* - court clerk will read to accused instructions on right to challenge potential jurors, as set out in common law.
 - ii. *List of witnesses* - Crown will be called upon to read list of witnesses for prosecution; jurors must declare, upon being called forward, whether they know accused/witnesses/judge/counsel.
 - iii. *Pool* - subgroup from the array is created by random selection (could be five, ten, fifteen, depends); these persons are then called forward individually and in order of selection **s. 631**
 - iv. *Call forward* - when called forward, the following may occur:
 1. *Excusal* - under **s. 632**, juror may be excused (eg. for one of the reasons set out in **Part 1** of the

Jury Act); juror is no longer part of the array, and may leave the courthouse. Reasons:

- a. *Specific disqualifications* - non-Canadians/non-BCers, lawyers/court officials, MPs/MLAs, persons convicted of an offence liable to more than 1 year in jail / > \$2000 fine. *Jury Act*, **Part 1(3)**
 - b. *Linguistic requirements* - disqualified if unable to understand, speak or read the language of the trial, *Jury Act*, **Part 1(4)** unless will receive assistance considered adequate by the Court. *Jury Act*, **Part 1(5)**
 - c. *Hardship* - may apply to Sheriff for exemption on hardship or religious grounds; failing that, may also apply to the Court. *Jury Act*, **Part 1(6)**
 - d. *Elderly persons* - upon request, persons over the age of 65 may be exempted by the Court from serving as jurors. *Jury Act*, **Part 1(7)**
 - e. *Personal interest* - eg. as noted above, Crown will read witness list; if jurors know the accused/witnesses/judge/counsel, will be excused. **s. 632**
 - f. *Already served on jury* - a person who has served on a jury is not required to serve again for two years thereafter, may be excused on that basis. *Jury Act*, **s. 13**
 - g. *Other reasonable cause* - any other reasonable cause considered by the Court as grounds for excusal. **s. 632**
2. *Stood aside* - under **s. 633**, juror's request for excusal may be denied, but juror may be stood aside; juror is still part of the array, and can be sworn *if numbers require*. **s. 641**
 3. *Challenge* - for cause, **s. 638**, or peremptory, **s. 635**; see challenge procedures, below.
 4. *Alternate* - under **s. 631(2.2)**, prudent to select 13 or 14 rather than the usual 12 jurors, particularly if lengthy trial/frail health etc: cannot proceed with fewer than 10. If more than 12 sworn, all hear evidence; extras excused by draw when time to deliberate. **s. 643**
 5. *Swearing in* - under **s. 631**, if no request for excusal is granted, the juror is not challenged peremptorily or for cause, and is not selected as alternate, then juror will be sworn in.
 6. *Jury in-charge* - following arraignment, the jury is put in charge of the accused; duty to determine whether accused is guilty, hearken to the evidence, etc.

v. *Challenges for cause, s. 638*

1. *Overview* - under **s. 638**, if the selection is following a challenge for cause procedure, then triers unsatisfied with juror's answer may remove juror from array. *Before* peremptory.
2. *Application* - must bring motion giving reason for challenge; judge will determine whether justified (unless Crown consents). *Individual* challenges may need to be put in writing. **s. 639**; Must be filed/delivered 30 days before jury selection. **Rule 2, Supreme Court Rules**.

3. *Number* - each party has an unlimited number of challenges for cause; different from peremptory challenges on this basis. **s. 638(1)**
4. *Bases for challenge* - if juror's name is not on the panel, **s. 638(1)(a)**; if juror is not qualified (eg. under *Jury Act*, see excusal above), **s. 638(1)(a)**; or, if juror *is not indifferent* between Crown and accused (due to racism/sexism/publicity); **s. 638(1)(b)**;

5. *Procedure*

a. Juror name not on panel - if the basis for the challenge is that the juror's name is not on the panel, then the challenge is to be decided by judge on a *voir dire*. **s. 640(1)**

b. Other ground for challenge

i. Exclusion - judge may order exclusion of jurors from the courtroom until challenge is tried, if accused's application shows necessary to preserve impartiality. **s. 640(2.1)**

1. *Impact on triers* - mode of triers determined by exclusion order: if no exclusion order requested by defence, triers *rotate*; if exclusion order requested by defence, *static* triers.

2. For instance, where judge used static triers instead of rotating triers, first degree murder conviction overturned, as no request for exclusion made. {Swite}

a. Triers - jurors who determine whether the challenge has merit (eg. whether the challenged juror is indifferent on the basis of racial bias); sworn in.

i. Rotating triers - last two sworn jurors try challenge; if there are no jurors sworn yet, two persons appointed until at least two jurors are sworn; thereafter, most recent two sworn jurors will try the challenge.

ii. Static triers - two unsworn jurors or other persons present are appointed to try the challenge, and do so until the jury is empanelled. **s. 640(2.2)**

b. Question posed - potential juror is asked *Parks* question (eg. will your judgment be affected by the fact that the accused is a black man?). {Parks}

c. Determination - triers deliberate, determine whether ground for challenge is true. If not true, juror sworn; if true, juror excused. **s. 640(3)** Judge may dismiss/replace triers if unable to come to a decision.

vi. Peremptory challenges, s. 635

1. *Overview* - most common challenge; under **s. 635**, the Crown and each defendant receive a number of peremptory challenges, which may be used to remove juror from array.

2. *Information* - as in-depth investigation not authorized, parties generally only have names/addresses/occupation, plus age/gender once seen in courtroom.

3. *Number* - unlike C4Cs, which are unlimited, peremptory challenges are limited based on offence type and number of co-accused. **s. 634**
 - a. *Crown* - receives a number of challenges equal to the sum of challenges received by all co-accused. **s. 634(4)**
 - b. *Defence* - each co-accused receives 20 challenges for first degree murder charges; 12 challenges where the maximum sentence exceeds five years, or 4 challenges otherwise. **s. 634(2)**
 - c. *Alternates* - if alternate jurors being selected, each co-accused receives one additional challenge for each additional juror; if 13 jurors selected, one additional challenge, etc. **s. 634(2.01)**
4. *Order of challenging* - defence starts, then Crown; alternates back and forth with each juror. If co-accused, goes according to order in indictment. **s. 635**
5. *Communication* - the first counsel will say “content” or “challenge,” going through all counsel in appropriate order until challenge exercised, or all parties content.

g. *Discharge of jurors during trial*

- i. *Overview* - judge may discharge (sworn) jurors for illness or any other reasonable cause; **s. 644(1)** and the trial may continue as long as there are ten or more jurors. **s. 644(2)**
 1. For instance, only for serious reasons, not trivial complaints about one another; hearing held if regarding impartiality; CAs troubled where judge does not make enquiry when this issue arises.
- ii. *Replacing discharged jurors* - if jury has not heard evidence, can be replaced with panelist or talesman (eg. person brought by sheriff under **s. 642**, via **s. 644(1.1)**); one additional peremptory challenge awarded. **s. 634(2.2)**

12. *Trials*

- a. *Overview* - for election of mode of trial, see offences -> indictable -> election.
- b. *Cross-applicability of rules*
 - i. *Overview* - many jury trial rules apply to SC judge alone proceedings, **s. 572** (Part 16 re: compelling appearance, Part 18 re: prelims, Part 20 re: jury trials, Part 23 re: sentencing); and to summary conviction / PC judge alone proceedings. **s. 795** (Parts 16 and 18 re: compelling appearance, Part 18.1 re: case management judge, Part 20 re: jury trials, Part 20.1 re: NCRMD).
- c. *Sequence of events*
 - i. *Introductions / housekeeping*
 1. *Overview* - matter is called, counsel introduce themselves, indicate who they represent) interpreter sworn if accused does not speak English; any administrative matters dealt with (eg.

scheduling, etc.)

ii. Arraignment

1. *Overview* - for jury trials, will be done at time of jury selection; for PC trials, already done informally; for SC judge-alone, will be done formally at trial outset (see also: disclosure, appearances, and arraignment -> arraignment, above)

iii. Applications

1. *Overview* - any outstanding pretrial applications handled at this stage; for instance, bans on publication, witness exclusion, requesting that witness sit-in during testimony, anticipated evidentiary objections, etc. (see also: applications, above).

iv. Judge's opening remarks

1. *Overview* - duty of jurors, instructs as to proof BRD, presumption of innocence, warns not to draw conclusions before hearing all evidence, and not to investigate/discuss on internet, etc.

v. Witnesses generally

1. *Overview* - subject to exclusion order (see applications -> procedural -> exclusion, above), called from outside courtroom, sworn/affirmed; sit or stand in box, give testimony to Court.

vi. Presentation of Crown case

1. *Overview* - procedure essentially follows that for prelim (**ss. 646, 557**) which is set out in **ss. 540-541**.
2. *Crown opening* - summary of anticipated evidence. Not argument, but a "roadmap" to assist the jury when hearing the evidence. No mention of law.
3. *Occasionally, defence opening* - as an exception, defence may be allowed to open case following Crown's opening, particularly where long/complex case, or defence not apparent. If calling evidence, will be able to open again at close of Crown case. {Queen of the North}
4. *Crown evidence* - Crown calls its witnesses conducts examinations in chief; witnesses under oath/affirmation/promise. Defence has right to cross-examine all witnesses following in-chief. **s. 541** Crown may re-examine where an unanticipated matter brought up in cross-examination.
 - a. *Partial case* - no need for Crown to call *all* witnesses; matter of ethics and fairness, but left largely to Crown discretion. {Cook} Failure to call may lead to defence calling witness, treating as adverse (see applications -> evidentiary -> cross examine own witness, above)
 - b. *Admissions* - if there are any defence admissions upon which the Crown seeks to rely, these will be entered at this point.
 - c. *Order of cross w/ multiple co-accused* - the order in which defence will cross is determined by the order in which names appear on the indictment.

- d. *Hearsay* - the special rules governing hearsay which are applicable at a prelim are not applicable at trial, must be admitted via hearsay exception; via **s. 646** (SC) or **s. 557** (PC)
- e. *Leading questions* - when conducting in-chief examination, leading questions are not permitted except for introductory/non-contentious matters matters, etc. Crown can seek leave/consent to lead, perhaps by implication where defence does not object.
- f. *Cross examination* - do not undertake cross unless there is something harmful to defence case; determine whether other party is biased, honest but mistaken, or exaggerating (eg. self-aggrandizing or pathological); take a different tack with each (or with children, etc.)
- g. *Reexamination* - generally, reexamination only for unanticipated matters brought to light in cross; however, may be granted reexamination on matter omitted through oversight. Rare.
 - i. For instance, where context of prior inconsistent statement not put to witness on cross, or where a denial unsubstantiated (eg. could be bolstered in re-exam by evidence of an entry in police notes to that effect).

5. *Crown closes case* - after all witnesses called, examined, cross-examined, and if necessary, reexamined, Crown closes case.

6. *Crown application to re-open* - can happen anytime after Crown close, if *not* prejudicial to defence. Later in process, more prejudicial; but could be allowed even after jury address. {MBP}

vii. *Motion for directed verdict / insufficient evidence*

- 1. *Directed verdict* - in jury trial, accused may bring motion re: *no* evidence on one or more elements (*Arcuri* standard). If successful, would risky to put matter to jury, ergo must enter acquittal. Can be for one or more counts, could result in lesser included replacing offence.
- 2. *Insufficient evidence* - in provincial or superior court judge alone trial accused holds that evidence, *once weighed*, insufficient to establish conviction: assess case on Crown evidence only. Does not require election not to call evidence by the defence. {Mackinnon}
- 3. re: the above, per Martin's article, may have blended into the same thing; no meaningful distinction between no-evidence vs. insufficient evidence motion. In any case, "*open to defence counsel to make an "insufficient evidence" motion before electing whether or not to call evidence.*" {Mackinnon}

viii. *Corbett application*

- 1. *Overview* - see applications -> evidentiary -> Corbett, above. Timing prevents prejudice to accused.

ix. *Defence case*

- 1. *Overview* - grants substantive right to make full answer and defence following the closure of the Crown case. **s. 650(3)**

2. *Election put to accused* – as to whether to call evidence. **s. 651** If self-rep, judge will explain what this means, mention that accused not compelled to call evidence, should not do so as a result of threat or inducement. **s. 541** *No onus, presumed innocent*. If defence calling evidence:

- a. *Order of election w/ multiple co-accused* – the order of election in a case with co-accused is determined by the order in which names appear on indictment.
- b. *Defence opening* – generally only if calling evidence, will be allowed to present a roadmap of anticipated evidence, etc. **s. 651(1)**
- c. *Defence evidence* – calls witnesses, conducts direct, cross-examination follows by Crown, defence may reexamine in certain circumstances. **s. 651(2)**
- d. *Ordering of witnesses* – trial judge cannot order the sequence of witnesses. {Smuk} However, usually an accused will testify first for the defence.

x. *Crown rebuttal, defence surrebuttal evidence*

1. *Overview* – once defence case is closed, Crown can call rebuttal evidence where evidence is relevant, but only became so during the defence case (and was unanticipated); cannot split its case. Defence may rarely be allowed to call evidence in surrebuttal concerning rebuttal issues.

xi. *Precharge conference*

1. *Overview* – held in absence of the jury, and optional; consultation with counsel concerning the contents of the jury charge. **s. 650.1**
2. *Contents* – includes modifications / focus, limiting instructions for certain evidence (eg. criminal record); defences to be left to jury, verdict sheet, weighing of evidence. {Ramanathan – mistrial due to Crown subsequent closing address}

xii. *Closing addresses*

1. *Overview* – addresses to the jury, drawing their attention to specific evidence or elements of the offence which support the case presented. **s. 646**; same procedure as in prelims, **s. 540**; may involve replaying of evidence or review of documentary exhibits, but *no new evidence allowable*.
2. *Order* – if the defence did not call evidence, the Crown will close first, and then the defence. **s. 651(3)** If defence called evidence (eg. even if only one of multiple co-accused called a witness), the ordering is switched; defence will close first. **s. 651(4)**

xiii. *Charging the jury*

1. *Contents* – summation of evidence, pertinent law / elements of offences and defences, summary of theories; must instruct AOR defences, BRD/burden, unanimous verdict, *Vetrovec* warning for unsavoury witnesses.
2. *Procedure* – once charge given, the jury is not to begin deliberation; rather, judge instructs them to wait in back room, determines first whether counsel have objections to charge, which must

be remedied before deliberations begin.

xiv. Jury deliberations

1. *If jury greater than 12 members, reduce to 12* - juror number cards put in a box. Cards drawn and juror discharged. Repeated until only 12 jurors. **s. 652.1**
2. *Foreperson* - responsible for communicating on behalf of the jury and facilitating jury deliberations. Selected by the jurors, usually in first few days of trial.
3. *Jury room* - usually have all exhibits and technology required to play them. Exhibit list.
 - a. For instance, note that this can be problematic for defence, eg. when jurors discover evidence in exhibits which Crown/police missed; esp. with technology. {E}
4. *Sequestering* - jury almost never sequestered before deliberations, but power is available, **s. 647(1)** Once deliberations begin, kept under charge of jury officer who prevents communication between jurors and other persons.
5. *Questions/playbacks* - to be read in open court, counsel should be given opportunity to make submissions on appropriate answer; may seek legal clarification or request evidence playback.
 - a. For instance, can indicate which way a jury is leaning - not that anything could be done once they are deliberating. Question may reveal which points are contentious, for instance. {E}
 - b. For instance, where jury asks question, counsel offering submissions on answer when jury returns with verdict, judge should not receive verdict until answer to question provided, further deliberation undertaken. {Ellis}
6. *Exhortations* - judge encourages jurors to reason together, due to reasons re: cost, hardship, inconvenience; may introduce pressures irrelevant to judge's duties.

xv. Verdicts & reasons for judgment

1. Jury verdicts

- a. *Overview* - if jury cannot agree, discharged, and *mistrial* will be declared, **s. 653**; verdict must be unanimous in result (though not in how result reached). See also, applications -> procedural -> mistrial, above.
- b. *Procedure* - court clerk will first ask for greatest offence, then for lesser/included offences. No reasons provided. Outcomes:
 - i. Guilty or not guilty of the offence charged;
 - ii. Guilty of an *attempt* of the offence charged, **s. 660, 661**; however, if charged with attempt, judge could direct for new trial on the full offence instead.
 - iii. Guilty or not guilty of other offences if included within the offence charged, **s. 662**;
 1. For instance, if charged with first degree, second degree and attempt are considered lesser included

offences.

2. For instance, where charged with infanticide, could instead be convicted of s. 243, disposal of infant's body for concealment, though this is not technically a lesser included offence.
3. For instance, where charged with crim neg causing death or BH, dangerous operation of motor vehicle could be substituted.

iv. Not criminally responsible on account of mental disorder (NCRMD).

c. *Polling of juries* – where there is doubt concerning the unanimity of verdict, the jury may be polled *by judge* to confirm. {Head}

d. *Parole recommendations re: 2nd degree murder*

- i.* *Parole eligibility* – if convicted of 2nd degree murder, judge must ask whether jury recommends for ten-year parole eligibility to be increased to 25 years; only applicable if accused 18 years or older; only on evidence heard, no submissions. **s. 745.2**
- ii.* *Subsequent conviction* – if convicted for a subsequent murder, jury given the opportunity to make recommendation re: whether parole eligibility periods should be consecutive. **s. 745.21**

2. Judge alone verdict / reasons

- a.* *Overview* – if judge alone, judge will provide reasons; mechanism for transparency and accountability; must provide reasons sufficient for appellate review. Caselaw suggests that judges cannot merely adopt written submissions from counsel, unchanged, as reasons.

xvi. Excusal of jury

- 1. Overview* – once jury has rendered verdict / parole recommendations, excused by judge. Judge is now *functus*. While parties could, by consent, have second trial with same jury, not utilized. **s. 643(2)**

xvii. Sentencing

- 1. Overview* – follows once judge/jury has returned verdict; could be immed., or adjourned. Bail may be revisited; sentence is prerogative of the judge that presided over the trial. **s. 570**; see sentencing, below.

xviii. Special considerations in trials

1. Mid-trial instructions to jury

- a.* *Overview* – during either Crown or defence case, inadmissible or limited purpose evidence may be led; this may require immediate instructions to be given to the jury (will be repeated during charge, see below).
 - i.* For instance, where Crown leads evidence concerning accused's character, judge must immediately warn

jury that this is only to be used to assess credibility, not propensity.

- ii. For instance, apt where a juror is discharged, where statement of co-accused is led (eg. *Vetrovec* and other considerations), speculation re: evidentiary motions, etc.

2. *Juries and publication/disclosure of information*

- a. *Publication ban* - where jurors *not* sequestered, offence to publish *information* (broad; evidence, submissions, orders, etc.) from trial to which the jury was not privy; **s. 648**
- b. *Polling of juries* - where there is doubt concerning the unanimity of verdict, the jury may be polled *by judge* to confirm. {Head}
- c. *Duty of non-disclosure* - except for obstruct justice investigation or trial – jury must not disclose jury proceedings when not in courtroom. **s. 649**
 - i. For instance, consider trial where juror, Guess, becomes romantically involved with murder defendant *during* trial; other jurors called during Guess' trial for obstruct justice. {Guess}

13. Sentencing

a. *Procedure*

- i. *Adjournment* - court must conduct sentencing as soon as practicable after guilty plea/finding of guilt; adjournment must be reasonable, to allow for prep. of sentencing materials (eg. risk assessment, letters of reference, victim impact statements, case law). **s. 720**
- ii. *Submissions* - both Crown and defence must be able to make submissions on aggravating/mitigating factors, *stare decisis*, disputed facts, **s. 723(1)** and present evidence (if necessary). **s. 732(2)**
- iii. *Adjudication/facts* - sentence is imposed by TJ, not jury (though jury may recommend re: parole: see ancillary orders -> parole eligibility -> jury, below). Judge may find facts disclosed at trial, or hear further evidence, **s. 724(2)** but bound by express/implied factual implications of verdict. {Ferguson}
 - 1. For instance, if jury convicts of manslaughter rather than first degree murder; defence argued provocation/drunkenness; therefore, necessary implication: jury found no intent. Judge may make findings of facts to sentence.
 - 2. For instance, counsel may make submissions or submit evidence concerning any relevant fact, so long as this is not inconsistent with findings of fact made at trial proper. {Ewanchuk}
 - 3. *Guilty pleas* - defence may only admit sufficient facts to meet elements of offence; further facts (eg. aggravating/mitigating) therefore need to be proven by the Crown; so long as elements of offence made out, Crown must accept plea and call evidence.
 - 4. *Burden/standard* - party wishing to rely on a fact (unproven at trial) must prove it. Not good enough to just rely on submissions, **s. 724(3)**; Crown must prove BRD, defence BOP.
 - a. For instance, if Crown does not prove aggravating factors/version of events BRD, then accused's version must be accepted unless manifest reason re: contrivance/error. {Ewanchuk}
 - b. For instance, defence should be careful when disputing facts. Do not want to emphasize things you do not

want to. Can lose points like remorse/taking responsibility by denying obvious facts. Look at the big picture.

iv. Imposition of sentence

1. *Overview* – upon consideration of any relevant information, **s. 726.1**, sentence passed, reasons given and terms stated, **s. 726.2**; inadequate reasons could lead to appeal; considerable latitude in imposing sentence. **s. 718.(1)**

b. Adducing evidence for sentencing

- i. *Overview* – any relevant information put before court, including submissions by counsel. **s. 726.1**; more info better than less to ensure that sentence is apt. {Levesque}

ii. Hearsay

1. *Overview* – hearsay evidence admissible at sentencing (unless contrary to interests of justice); ensures maximum information available. **s. 723(5)**.

iii. Presentence reports

1. *Overview* – prepared by probation officer, requested by either party, includes info on age/maturity/character/behaviour/attitude/remorse of offender. **s. 721(3)** Prepared by PO; not a person defence can control, therefore should be requested with caution.
2. *Process* – interview conducted by PO with client; should be prepared by defence ahead of time, particularly re: discussions of the offence. Will canvass sentencing options, but recommendations are not appropriate.

iv. Psychological assessments

1. *Overview* – may order a PSR with a psychiatric component under *Forensic Psychiatric Act*; no consent *required*, but of little help without consent. Any prior psych assessments (eg. from older proceedings) admissible. Accused cannot be compelled to participate. {Blackwell}

v. Victim impact statements

1. *Overview* – court compelled to consider statements of victims describing the offence: **s. 722(1)** emotional, physical, financial impact. Must adhere to procedural requirements, **s. 722(2)** presented in any matter considered apt. **s. 722(2.1)**. Crown may edit for appropriateness.
2. *Definition of victim* – person to whom harm was done; or where that person is dead/ill/incapable of making statement, extends to spouses, dependents, etc. **s. 722(4)**
3. *Contents* – describe harm/loss arising from offence. Should not contain criticisms of offender, assertions as to facts, or recommendations on the severity of punishment. {Bremner}

vi. Accused's criminal record

1. *Overview* – point out significant sentences, or lack thereof; patterns, esp. significant gaps;

differentiate between youth and adult offences; best to sum up in numbers; look for story that the record tells (eg. new addict to crystal meth).

vii. Offender speech

1. *Overview* - under **s. 726**, court must ask offender if they have anything to say before passing sentence; defence must prepare accused (contrition/remorse only: no minimizing).

c. Kienapple principle

- i. *Overview* - also known as the rule of multiple convictions; form of *res judicata*. Plays out as both a strict rule and a generous rule; effects charge approval, Crown can pile on charges as leverage.

ii. Strict rule

1. *Overview* - separate and distinct “element” contained in one offence will defeat the application of the *Kienapple* principle in respect of another offence; test can be seen as “could a reasonable jury, properly instructed, convict on one offence and acquit on the other;” *Kienapple’d* if not.
 - a. For instance, theft and fraud *Kienapple’d* if same money, same victim, same time; impaired and over .08 *Kienapple’d* if same factual matrix.
 - b. For instance, every element of assault is contained in more serious offence of robbery; if convicted of robbery, *Kienapple* operates to cause acquittal on assault.
 - c. For instance, counterexamples, sex assault and sexual interference; theft and PSP (if separated in time); robbery and use of a firearm in indictable offence; impaired causing and over .08; assault with a weapon, a knife and assault with a weapon, a baseball bat.

iii. Generous rule / quasi Kienapple

1. *Overview* - if in the same transaction and one or more elements in common, though not precisely subject to *Kienapple*, nevertheless should be judicial or more commonly Crown stay.
 - a. For instance, theft and PSP separated by only a short period of time; ACBH and AWW; mischief to property and dangerous use of firearm (where someone discharges firearm into air in city).

d. Sentencing options

i. Diversion / alternative measures

1. *Overview* - see diversion / alternative measures, above.

ii. Probation

1. *Overview* - not a “sentencing option” itself, but rather conditions to which accused may be subject while on probationary period, eg. during conditional discharge period, suspended sentence, or following a term of incarceration.
2. *Purpose* - conditions must be at least tenuously connected to rehabilitation and protection of society; cannot be punitive; should be restorative and rehabilitative, reasonable. {Shoker}

3. *Subsequent to incarceration* - probation can only be imposed subsequent to incarceration where the sentence was *two years or less* (eg. not for two years plus a day). **s. 731(1)(b)**

4. *Conditions*

a. *Changes via bill C-10* - expands the list of specified conditions that can be added to probation/recognizance orders (no contact with persons under 16, use of internet/digital network).

b. *Variation of conditions* - court can vary the terms or decrease the period for which the probation order remains in effect; **s. 732.2(3)**; can be done in chambers. **s. 732.2(4)**

c. *Available conditions*

i. *Mandatory*

1. *Overview* - keep peace/good behaviour, appear before court, and notify probation officer of change: name, address, employment, or occupation. **s. 732.1(2)**

ii. *Optional*

1. *Overview* - stay in jurisdiction, abstain drugs/alcohol/weapons (provide samples at regular intervals or if RPG breach: NYIF), care for dependents, comm. service (18 mos. & 240 hrs max), treatment program (w/ consent), any other reasonable conditions. **s. 732.1(3)**

5. *Timing*

a. *Coming into effect* - probation orders come into effect at different times depending on the circumstances of the offender: **s. 732.2(1)**

i. *Probation imposed with custodial sentence* - probation order comes into effect once accused released from prison;

ii. *Accused serving custodial sentence when probation imposed* - probation order comes into effect once accused released from prison;

iii. *Accused serving conditional sentence when probation imposed* - probation order comes into effect once the conditional sentence has expired.

iv. *In custody accused released early on parole* - probation order comes into effect upon warrant expiry (eg. after parole period is over).

v. *Else* - on date of order.

b. *Length* - terms of probation can last no longer than three years from the day that they come into effect. **s. 732.2(2)(b)**;

- c. *No interruption* - once a probation order has come into effect, it does not stop; even if accused goes back to jail on a subsequent offence, probation order keeps ticking.

6. Breaching probation

- a. *Charge* - it is an offence to breach probation, hybrid; punishable by two years imprisonment (max) if proceeding by indictment. **s. 733.1**

- b. *Revocation*

- i. *Conditional discharge* - if convicted of an offence during conditional period, court may revoke discharge, impose any sentence it could have originally imposed, in addition to imposing sentence for new offence. **s. 730(4)**
- ii. *Suspended sentence* - if convicted of an offence during suspension period, court may revoke suspension, impose any sentence it could have originally imposed in addition to sentence for new offence; or, can vary conditions, extend by up to 12 mos. **s. 732.2(5)**

- iii. *Absolute discharge*

- 1. *Overview* - offender has been found guilty, but deemed not convicted, ergo no criminal record. **s. 730(3)** Applied to less serious offences, persons with minor records, where conviction would have disproportionate impact for out of character offence. Unlikely in “aggravated” offences.

- 2. *Requirements*

- a. Accused is not an organization;
- b. No minimum sentence for offence;
- c. Maximum not 14 years/life;
- d. Best interests of accused served by discharge without conditions;
- e. Not contrary to public interest.

- iv. *Fine*

- 1. *Overview* - may be imposed in addition to any minimum penalty associated with offence; may also be combined with probationary period. **s. 731(1)(b)**, if apt with regard to age/character of offender, nature/circumstances of offence. Terms of payment in **s. 734.1**

- v. *Conditional discharge*

- 1. *Overview* - offender has been found guilty, not convicted: period of probation w/ conditions imposed. If satisfies conditions, offence is discharged, no criminal record. **s. 731(2)** If accused breaches conditions of probation, discharge may be revoked. Focus on rehab / restitution.
- 2. *Requirements* - same as absolute discharge (above)

vi. Suspended sentence (probationary sentence)

1. *Overview* - offender has been convicted, but sentence is not imposed for up to three years, to monitor accused's behaviour in community; *probation w/ conditions*. Imposed with regard to age/character of offender, the circumstances and nature of the offence. **s.731(1)(a)**
2. *Requirements* - no minimum sentence for offence.

vii. Conditional sentences

1. *Overview* - sentence served in the community; has both punitive and rehabilitative aspects (unlike probation, which is rehab / restitution only, no punitive). Breach of CS does not lead to new offence (unlike probation) but rather leads to resumption of sentence (eg. in custody).
2. *Onus* - no formal onus attributed to either party; generally, will be the offender who is best situated to convince the judge that a CSO is indeed appropriate. {Proulx}
3. *Increased use* - tied to the increase in maximums for some summary offences; 6 months may have been appropriate for a custodial sentence, but not sufficient for a conditional sentence.
4. *Changes via bill C-10*
 - a. *Overview* - most significant changes re: serious property offences, incl. b&e to dwelling house, or theft over \$5,000, etc. Little effect on serious violent offence.
 - b. *Maximum sentence less than 14 years* - only if the maximum sentence is less than 14 years (or life) is a conditional sentence appropriate. **s. 742.1(c)**
 - c. *Offences generally prohibited* - no CSOs for offences prosecuted indictably which carry max sentence of 10 years or greater and either resulted in bodily harm, or involved import/export/traffic/production of drugs, or use of weapon. **s. 742.1(e)**
 - d. *Offences specifically prohibited* - no CSOs for offences prosecuted indictably under **ss. 144, 264, 271, 279, 279.02, 281, 333.1, 334(a), 348(1)(e), 349, 435.**

5. Conditions

- a. *Overview* - should include punitive conditions, unlike probation; house arrest / curfew etc. should be the norm. This is a jail sentence, so punitiveness apt. {Proulx}
- b. *Mandatory*
 - i. *Overview* - keep peace/good behaviour, appear before court, and notify probation officer of change: name, address, employment; stay in jurisdiction, report to supervisor. **s. 742.3(1)**
- c. *Optional*

- i. Overview* - abstain drugs/alcohol, weapons, care for dependents, (provide samples at regular intervals or if RPG breach: NYIF), comm. service (18 mos. & 240 hrs max), treatment program (w/ consent), any other reasonable conditions. **s. 742.3(2)**

6. Requirements

- a. No serious personal injury offences* - CSOs exclude certain offences with maximum punishments in excess of ten years, and either: (see also, bill C-10 changes, above)
 - 1. **s. 752(a)**: (attempted) use of violence, or conduct (likely) endangering safety or life, or conduct likely to inflict severe psychological damage; indictable;
 - 2. **s. 752(b)**: (attempted) sexual assault simpliciter, or with a weapon, or (likely) causing bodily harm, or aggravated sexual assault; proceeded by indictment
- b. No terrorism/crim org. offences* - no CSOs for terrorism or crim org. offences prosecuted by indictment, maximum punishment of ten years or more; **s. 742.1(d)**
- c. No minimum sentence offences* - no CSOs for offences associated with minimum jail sentence. **s. 742.1(b)**
- d. Sentence less than two years* - CSOs only appropriate where sentence for this offender on the specific facts of this offence would two years or less. Do not deduct dead time. {Fice}
- e. Safety of community not endangered* - only if safety of community not endangered by serving sentence in the community; consider danger of reoffending/level of harm should this occur.
- f. Consistent with sentencing principles* - CSO apt only if sentence would be inconsistent with the fundamental purposes and principles of sentencing. **s. 742.1(a)**

7. Breaching conditional sentence

- a. Overview* - not a new offence; no information or indictment; rather, triggers continuation of original sentence. **s. 742.6**; but, new bail (reverse onus) applies. **s. 742.6(2)**
- b. Procedure*
 - i. Timing* - must hold hearing on whether breach occurred within thirty days of arrest/appearance, or as soon as practicable thereafter. **s. 742.6(3)**
 - ii. Standard of proof* - Crown bears the burden of proving a breach on a balance of probabilities standard (allowable, as not an offence). **s. 742.6(9)**
 - iii. Adjournment* - court has discretion to adjourn hearing proceedings for reasonable period where necessary. **s. 742.6(3.3)**
 - iv. Paper case* - Crown usually relies on paper case; signed statements of witnesses admissible as report with notice, though still subject to cross-exam (ergo author is compellable). **s. 742.6(5),(8)**

- v. *Outcome* - court may take no action, vary conditions, revert to custody/incarceration for portion or entire remainder of sentence; **s. 742.6(9)**

viii. *Incarceration*

1. *Provincial prison sentence*

- a. *Overview* - tend to be local; programming not as good, may be adequate for basic rehab. needs;
- b. *Eligibility* - if two years or less, custodial sentence to be served in provincial prison. **s. 743.1(3)**; such penalties can be combined with probation. **s. 731(1)(b)**

2. *Federal penitentiary sentence*

- a. *Overview* - not local, may be out of province. Better programs for rehabilitation, particularly with violent/sexual offences. Serious bidniss: younger offenders at high risk.
- b. *Eligibility* - if sentenced to life, two years or more, or sentenced to multiple sentences running consecutive and total greater than 2 years. **s. 743.1**; can be combined with probation, but *only* if sentence of *exactly* two years (not plus a day). **s. 731(1)(b)**
- c. *Parole* - eligibility/ineligibility re: life sentences set out in **s. 745**.

ix. *Intermittent sentences*

1. *Overview* - “weekend” sentence; go in on Friday night, come out Monday morning, counts as four days. Sentence must have been 90 days or less. Apt where accused has employment; will increase in usage with mandatory minimums. New charges apply if accused fails to show. **s. 732**
2. *Considerations* - can apply for conversion to straight time; if sentenced to jail for a subsequent offence, will serve remainder consecutive to original sentence.

x. *Consecutive and concurrent sentences*

1. *Overview* - empowered under **s. 718.3(4)**; presumptive position is concurrent unless specifically stated as being consecutive; cannot impose sentence consecutive to life;
2. *Consecutive* - subject to the *totality principle*, combined sentence should not be unduly long or unduly harsh. **s. 718.2(c)**, apt where:
- a. *Statutory requirement* - certain offences carry mandatory consecutive sentences (eg. s. 85(4), 1 year for firearm in commission of offence).
- b. *Principled approach* - there is no temporary/factual connection between offence (eg. not a spree), or where denunciation/deterrence require separate and additional punishment.
- i. For instance, apt where there is a breach of a no contact order while committing an assault; breach of “no

driver's seat" condition while driving impaired; fleeing scene where impaired driving causing death.

3. *Concurrent* - applicable where there is a close factual/temporal connection between offences, a "spree," or where necessary to comply with *totality principle*.

a. For instance, apt where theft from multiple autos in a single night; assault on multiple individuals during same fight; kicking in 6 windows along the same street one night.

xi. Ancillary orders

1. Probation

a. *Overview - integral* when imposed in suspended sentence or conditional discharge, *ancillary* when imposed subsequent to incarceration (see probation, above). *Ancillary* probation only applicable where incarceration for two years or less. **s. 731(1)(b) Rehabilitative, preventive.**

2. Firearms prohibitions

a. *Overview* - can be mandatory or discretionary, depending on the offence. Firearms may be ordered to be surrendered **s. 114** and/or forfeited **s. 115** upon prohibition.

i. *Mandatory* - convictions of certain offences including: indictable violent offence with maximum of 10 years or greater; specified firearms offences; criminal harassment; serious drug offences; if already prohibited and offence involved firearm, cross-bow. **s. 109**

ii. *Discretionary* - not covered in 109 and violence was used, threatened or attempted; offence involved a firearm. **s. 110**

b. *Breach* - under **s. 117.01**, hybrid offence, indictable with max 10 year sentence, or summary with 6 months/\$5000

3. Driving prohibitions

a. *Mandatory* - for impaired, over .08, or refuse to provide sample charges; **s. 259(1)**; street racing (CBH, death). **s. 259(3.1)-(3.4)**

b. *Discretionary* - other motor vehicle offences: criminal negligence, manslaughter, dangerous driving, failure to remain at scene, etc. **s. 259(2)**

c. *Breach* - constitutes an offence, punishment set out in **s. 259(4)**

4. DNA orders

a. *Overview - DNA Identification Act* seeks to establish national DNA databank to assist with law enforcement; has crime scene index and convicted offenders index. May be imposed even after sentencing via **s. 487.053** or on offenders already incarcerated, **s. 487.055**

b. *Types of DNA order* - types of offences which fit into the categories below are set out in **s. 487.04**

- i. Mandatory primary* – court shall order taking of DNA; **s. 487.051(1)**
- ii. Presumptive primary* – rebuttable if shown that invasion of privacy would be grossly disproportionate to public interest re: admin justice, law enforcement. **s. 487.051(2)**
- iii. Discretionary secondary* – on application of prosecutor, if satisfied in interest of justice, may be ordered. **s. 487.051(3)**

5. *Sex offender registry*

- a. Overview* – *Sex Offender Information Registry Act* seeks to keep track of sex offenders after sentence completed; provide police with whereabouts. Set out under **ss. 490.11-490.032**; apply to both listed sexual offences or for other non-sexual offences with sexual context.
- b. Conditions* – reporting in person, name or address change, and before leaving Canada.

6. *Prohibitions involving minors*

- a. Overview* – where victim under 14 years old, sex offenders can be prohibited from public parks, swimming areas, daycare centres, schools, playgrounds & community centres, s. **161(1)(a)**; employment/volunteer involving position of trust or authority towards person under 14 years, **s. 161(1)(b)**

7. *Prohibitions involving animals*

- a. Overview* – for certain animal cruelty offences, court may, impose prohibition on owning, possessing or co-habiting with any animal or bird, **s. 447.1(1)(a)**; see also, restitution, below.

8. *Prohibition involving contact*

- a. Overview* – court may order no contact between accused and victim/witness/other person during custodial sentence. **s. 743.21**

9. *Restitution*

- a. Generally* – may be ordered where loss suffered is readily ascertainable; ability to pay must be considered, not “general damages;” sign of remorse. To owner of property, **s. 738**; to bona fide purchaser for value, **s. 739**; may be paid from money found on offender, **s. 741(2)**
- b. Caretaking of animal* – readily ascertainable, reasonable costs for caretaking animal as a result of specified animal cruelty offence. **s. 447.1(1)(b)**

10. *Forfeiture (other than firearms)*

- a. Overview* – court may order forfeiture of weapons or other items in possession of the accused, **s. 490(9)**; includes weapons used in commission of offence, etc. **s. 491**

11. Parole ineligibility

a. Overview - court has jurisdiction to set the period before which offender may not be considered for parole. **s. 743.6** may order offender serve one half of the sentence or ten years (whichever is less) before he may be released on full parole where: **s. 743.6(1)**

i. Requirements

1. Sentenced to two years or more jail, (unless life was minimum);
2. Conviction for an offence set out in Schedule I or II to Corrections and Conditional Release Act;
3. Prosecuted by way of indictment;
4. Crim. org. **s. 743.6(1.1)** or terrorist offences. **s. 743.6(1.2)**

ii. Considerations

1. Circumstances of the commission of the offence;
2. Character and circumstances of the offender;
3. Expression of society's denunciation of the offence;
4. Specific or general deterrence; paramount under this section. **s. 743.6(2)**

iii. Jury recommendations re: parole eligibility in 2nd degree murder

1. *Parole eligibility* - if convicted of 2nd degree murder, judge must ask whether jury recommends for ten-year parole eligibility to be increased to 25 years; only applicable if accused 18 years or older; only on evidence heard, no submissions. **s. 745.2**
2. *Subsequent conviction* - if convicted for a subsequent murder, jury given the opportunity to make recommendation re: whether parole eligibility periods should be consecutive. **s. 745.21**

12. Victim fine surcharge

a. Overview - imposed unless expressly waived, but this is routinely waived where accused unemployed, going to jail. Amounts to 15% of any fine, or \$50 (summary) / \$100 (indictable), more if necessary. **s. 737**

xii. Offender designations

1. Procedure

a. Crown flags file internally - at charge approval, upon conviction or plea, or through PSR

when background information comes to light.

- b. *Offender convicted of a “predicate” offence* - offender must be convicted of or plead guilty to a predicate offence. (see requirements, below)
- c. *Internal approval* - policy requires Crown to obtain consent of Regional/Deputy Regional Crown prior to applying for an assessment remand. Not a requirement under the *Code*.
- d. *Assessment order* - same test as at hearing; except the Court orders an assessment if there are reasonable grounds to believe offender *might* be a dangerous/long-term offender. **s. 752.1** Evidence may need to be called; remand for no longer than 60 days, report to follow w/i 30.
- e. *Consent of Deputy AG* - AG must consent to the making of the application **s. 754(1)(a)**, thus Crown handling the file must prepare memo & documentation outlining circumstances.
- f. *Notice* - **s. 754(1)**, defence must have at least 7 days of notice, filed at registry (eg. court needs notice also), must amount to a “statement of the allegations”
- g. *Hearing* - heard without jury, **s. 754(2)**, assessment filed as exhibit, character evidence acceptable; **s. 757**; no presumption of innocence, widest evidentiary net, incl. hearsay if credible. {Jones} Accused must be present, **s. 758(1)** subject to exceptions. **s. 758(2)**
- h. *Ruling of the court* - see outcomes, below.
- i. *Corrections* - all reports and expert testimony given to corrections for use in supervision; **s. 760**; conditions of DOs to be reviewed after seven years, every two years thereafter, clock begins ticking when custody begins, not when sentence imposed. **s. 761**
- j. *Amendments* - offender who is found to be a long term offender can apply to reduce term of supervision, or terminate it under **s. 753.2(3)**

2. *Dangerous offender designation*

- a. *Overview* - special designation focused on risk the offender presents to public and degree of control needed over that person; **s. 753**; not punitively focused: rather *specific deterrence*.
- b. *Historically* - used to refer to sentence itself, which would be one of indeterminate length, reviewable after seven years and every two years thereafter.
- c. *Requirements*
 - i. *Offence* - **s. 753** requires that offender must have been convicted of a predicate offence as defined under **s. 752**: (CSO also ruled out, see conditional sentences, above). No DOs on murder, as life sentence already applicable.
 1. **s. 752(a)**: (attempted) use of violence, or conduct (likely) endangering safety or life, or conduct likely to inflict severe psychological damage; indictable;
 2. **s. 752(b)**: (attempted) sexual assault simpliciter, or with a weapon, or (likely) causing

bodily harm, or aggravated sexual assault; proceeded by indictment.

ii. Dangerousness

1. *Presumptively dangerous offenders* - offender may be presumed dangerous if notice given under **s. 752.01**, and:

a. Requirements - present conviction for primary designated offence w/ sentence > two years apt, and offender has twice previously been convicted of such an offence, received sentence > two years. **s. 753(1.1)**

b. Rebuttable - if accused can show BOP that not a DO, then presumption is rebutted.

2. *Otherwise* - Crown must prove that the accused is either a dangerous violent offender or a dangerous sexual offender, BRD:

a. Dangerous violent offender - repetitive behaviour and failure to restrain, likely to cause severe harm again; *or*, persistent aggressive behaviour w/ indifference to consequences; *or*, so brutal that offender won't behave normally. **s. 753(1)(a)**

b. Dangerous sexual offender - conduct in any sexual matter shows failure to control sexual impulses and likelihood to cause injury, pain or other evil through future failure to control sexual impulses. **s. 753(1)(b)**

iii. Assessment - offender must have been assessed; **s. 752.1**

iv. Consent - application can only be brought with consent of deputy AG; **s. 754(1)(a)**

v. Notice - defence **s. 754(1)(b)** and court **s. 754(1)(c)** must have received notice of application.

d. Procedure - application brought by Crown after conviction, prior to sentencing; may exceptionally be made after sentencing if notice of application given before sentencing, and new information arose thereafter. **s. 753(2)** (see procedure, above)

e. Outcome - leads to indeterminate sentence, **s. 753(4)(a)**, unless reasonable expectation that lesser measure is adequate; such as: finite sentence (> 2 years) with long-term supervision order, **s. 753(4)(b)** or in some circumstances, a conventional sentence. **s. 753(4)(c)**.

f. Reoffending - if a dangerous offender who receives lesser sentence than that imposed by **s. 753(4)(a)** reoffends, subject to presumptive indeterminate sentence. **s. 753.01**

3. *Long-term offender designation*

a. Overview - application can be made independent of dangerous offender application, though often sought/imposed as alternative to DO designation. **s. 753.1(1)**; may be found to be LTO at DO hearing, or LTO hearing held after failed DO hearing. **s. 745(5)(a)**

b. Requirements

- i. Offence* - **s. 753** requires that offender must have been convicted of an index/predicate offence as defined under **s. 752**: (CSO also ruled out, see conditional sentences, above), or **s. 753.1(2)(a)** offence, or any offence involving serious sexual conduct.
 1. **s. 752(a)**: (attempted) use of violence, or conduct (likely) endangering safety or life, or conduct likely to inflict severe psychological damage; indictable;
 2. **s. 752(b)**: (attempted) sexual assault simpliciter, or with a weapon, or (likely) causing bodily harm, or aggravated sexual assault; proceeded by indictment.
- ii. Risk of reoffending* - Crown must prove that the accused is a long-term offender, BRD. Crown must show: (1) apt sentence > two years, (2) substantial risk of recidivism, (3) reasonable possibility of eventual control of risk in community. **s. 753.1(1)**; substantial risk of recidivism presumed, **s. 753.1(2)**
- iii. Judicial discretion* - court not compelled to apply LTO designation even where **s. 753.1(1)** met.
- iv. Assessment* - offender must have been assessed; **s. 752.1**
- v. Consent* - application can only be brought with consent of deputy AG; **s. 754(1)(a)**
- vi. Notice* - defence **s. 754(1)(b)** and court **s. 754(1)(c)** must have received notice of application.
- c. Outcome* - sentence of at least two years, up to ten years of supervision. **s. 753.1(3)**.
- d. Reoffending* - indictable offence to breach LTO, imprisonment up to ten years. **s. 753.3(1)**
Supervision is interrupted by subsequent sentences; doesn't keep running. **s. 753.4**

e. Sentencing ranges

- i. Overview* - governed by the maximums (and minimums, where apt) for the offence; generally broad, must also consider sentencing principles, **s. 718**; offence, offender circumstances, caselaw.
- ii. Notice to seek greater punishment*
 1. *Overview* - where Crown seeks to impose higher punishment for accused if previously convicted of same or similar offence, must provide notice of intention to invoke that punishment. **s. 727(1)** (similarly, see: principles -> fundamental -> step principle, below)
 2. *Form of notice* - usually served by police. Gets awkward if counsel become involved as don't want to become witness to the service. Crown must prove notice to rely on greater punishment. Crown can provide notice for some or all offences (depending on punishment sought).

iii. Dead time consideration

1. *Overview* - court *may* account for time spent in custody by the person as a result of offence; **s. 719(3)**; used to be deducted from sentence on a 2:1 basis (recognition of lost remission, lack of programming, etc.) Following *TISA*, maxed at 1.5:1 only if “circumstances justify.” **s. 719(3.1)**

- a. For instance, certain courts interpreted *TISA* as requiring “exceptional” circumstances; loss of remission/programming not exceptional, because every offender eligible. Recent ONCA decision overturns this position: “circumstances justify” not exceptional, includes lost remission, etc, available to most offenders. {Summers}
- b. For instance, where D. being sentenced for prison break (was in custody on other charges), no enhanced credit granted because that time not *because* of offence charged, but *in spite* of it. {Preddy}

iv. Maximum sentences

1. *Summary offences*

- a. *Overview* - unless otherwise specified (there are no *strict*-summary offences with a non-standard sentence, only *hybrids*), maximum is 6 months imprisonment, \$5000 fine for individual; **s. 787**; up to \$100,000 fine for organization. **s. 735(1)(b)**
- b. *Increased penalty* - can increase penalty up to 18 mos (maximum) for certain offences, a growing trend seen in offences such as ACBH/ABH, **s. 267**; sex assault, **s. 271(b)**, etc. Generally, Part VIII offences (against the person). Can go to 2 years less a day.

2. *Indictable offences*

- a. *Overview* - defined in the punishment section for each offence; price pointed at life, 14, 10, 5, 2, etc. If no punishment is specifically provided, there is a five year max. **s. 743**

v. Minimum sentences

1. *Overview* - may apply to all offenders on any conviction (eg. with firearms, or child pornography); or to offenders with prior conviction on same/related offence (eg. motor vehicle theft, s. 333.1) or both (eg. s. 255, impaired operation).
2. *Exemptions* - there is no availability for exemptions on individual level; cannot go below that threshold (except for perhaps where member of identifiable group). {Chief} To do otherwise would reinstate judicial discretion despite clear parliamentary intent to contrary. {Ferguson}
 - a. For instance, where RCMP officer convicted of manslaughter with firearm of suspect in cells, constitutional exemption to mandatory minimum granted by TJ overturned by SCC. {Ferguson}
 - b. For instance, constitutional exemption is not a remedy for violation of *Charter* s. 12 re cruel/unusual punishment; rather, must strike down the provision itself for being grossly disproportionate. {Ferguson}
 - c. For instance, where imposition of mandatory minimum does violate s. 12, remedy under s. 52(1), no force or effect, rather than s. 24(1); used to strike down at least one firearm minimum. {Smickle}

vi. Sentencing for attempts, accessories after the fact, s. 463

1. *Indictable / up to life sentence max* - max sentence for attempt/aatf is fourteen years.

2. *Indictable / up to 14 year max* - max sentence for attempt/aatf is half the max.

3. *Hybrid* - if indictable, half the max; otherwise, same as summary max.

4. *Summary* - same as summary max.

f. Principles of sentencing

i. Purposes - general purpose of sentencing is to contribute to respect for the law by imposing just sanctions; maintenance of a just, peaceful and safe society, fulfill one or more of: **s. 718:**

1. *Denunciation* - to denounce unlawful conduct; primary where offence involves person under 18 years of age. **s. 718.01** or against police officer/justice system participant. **s. 718.02**

2. *Deterrence* - to deter offender and other persons from committing offences; primary where offence involves person under 18 years of age. **s. 718.01** or against police officer/justice system participant. **s. 718.02**

3. *Protection of public* - to separate offenders from society, where necessary;

4. *Rehabilitation* - to assist in rehabilitating offenders; applicable with youthful offenders or those with few offences. {Lougheed}

5. *Reparations* - to provide reparations for harm done to victims or to the community;

6. *Responsibility* - to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

ii. First penitentiary sentence for youthful offenders

1. *Overview* - such sentences should only rarely be determined solely by denunciation and general deterrence. Where offender has not prev. been to pen. or served long sentence, shortest possible sentence needed to achieve objectives should be imposed. {Borde}

iii. Fundamental principles

1. *Proportionality* - **s. 718.1**, sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender

2. *Parity* - **s. 718.2(b)**, a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

3. *Totality* - **s. 718.2(c)**, where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh.

4. *Restraint* - an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances, **s. 718(d)**.

5. *Step principle* - sentences should increase in *moderate* steps; unduly large increase could

discourage offenders' efforts to rehabilitate. Only applicable where rehabilitation is a significant factor in sentencing: {Robitaille} youth, offenders with few offences. {Lougheed}

- a. For instance, of limited application where judge determines that the offence in question calls for a sentence in which the primary goals are denunciation and deterrence. {Bush} Though often misstated as a principle requiring substantial increases in sentencing.
- b. For instance, not relevant where there has been a significant escalation in the seriousness of the offence. {Hiscock}

6. *Last resort* - all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders, **s. 718(e)**

- a. *Purpose* - to respond to disproportionate incarceration of aboriginal offenders, and over-incarceration of all offenders generally, particularly by reference to principles of restorative justice (eg. sentencing circles). {Gladue}
- b. *Applicability* - applies to all aboriginal offenders, regardless of whether they reside on-reserve, off-reserve, rurally or urban, etc. {Gladue}
- c. *Factors* - must consider unique systemic or background factors which may have played a role in bringing the offender before the courts. These factors are to be balanced against the community interest in the purposes of sentencing (see above). Factors include: {Gladue}
 - i. Poverty and unemployment;
 - ii. Reduced educational opportunities;
 - iii. Family dysfunction and instability;
 - iv. Sexual abuse;
 - v. Alcoholism;
 - vi. Racial discrimination;
 - vii. Sentences that are more culturally appropriate & meaningful; and
 - viii. The more violent the offence, more convergent with non-restorative sentencing.

iv. Aggravating and mitigating factors

1. *Overview* - **s. 718.2(a)**, sentence should be increased or decreased in considering the presence of aggravating or mitigating circumstances of the offender or the offence.
2. *Factors in organizational sentencing* - see **s. 718.21** for mitigating/aggravating factors to be considered when sentencing an organization.
3. *Aggravating factors*

a. Statutory

- i.* Motivated by hate or bias, **s. 718.2(a)(i)**;
- ii.* Domestic violence (abused spouse or common-law), **s. 718.2(a)(ii)**;
- iii.* Child abuse (abused person under 18 years), **s. 718.2(a)(ii.1)**
- iv.* Abuse of trust or authority, **s. 718.2(a)(iii)**;
- v.* Gang benefit, **s. 718.2(a)(iv)**;
- vi.* Terrorism, **s. 718.2(a)(v)**;
- vii.* Excessive alcohol; over 160 mg % deemed aggravating for sentencing, **s. 255.1**;
- viii.* Home invasion; dwelling house occupied at time and accused knew or was reckless, and used violence or threats of violence, **s. 348.1**.

b. Common law

i. Victim characteristics

1. Conduct, character, lifestyle & vulnerability;
2. Elderly victims of theft or violence;
3. Spouses & children;
4. Isolated & vulnerable persons: taxi drivers, convenience store clerks, sex trade workers;
5. Mentally or physically challenged persons.

ii. Offence characteristics

1. Breaches of trust: theft from employer, welfare fraud, theft from trust account;
2. Brutality or cruelty: sex assault particularly humiliating;
3. Premeditation, sophisticated & planned offence v. impulsive: sophisticated more dangerous & more time to reflect prior to commission;
4. Deliberate risk-taking;
5. Longer time crime continues: sex abuse of child; history of spousal assaults, drug trafficking: more danger & more time for reflection;

- a. Number of victims;
- b. Number of incidents;
- c. Consequences / impact on victim: tragic consequences should not distort considerations. Both foreseen & unforeseen consequences are relevant.
- d. Substantial economic loss;
- e. Attempts to conceal the offence;
- f. Impeding victim's access to justice;
- g. Use of weapon;
- h. Use of or threatened violence;
- i. Group violence;
- j. Alcohol & drugs: sometimes mitigating, sometimes aggravating;
- k. Prevalence in community: can only be a factor; real question is sentence for this offender for this offence;
- l. Near school or playground for drug trafficking offences.

iii. Offender characteristics

- 1. Age;
- 2. Background & character;
- 3. Criminal history: similar (cognate) convictions; prior sentences received (usually increased upon further convictions);
- 4. Breach of court order – on bail or probation at time;
- 5. Motivation;
- 6. Attitude: can be mitigating or aggravating;
- 7. Mental illness: sometimes mitigating, less culpable; sometimes aggravating, increased dangerousness.

iv. Prohibited aggravating factors

- 1. Lack of guilty plea;
- 2. Manner defence conducted (accused lied in his testimony, or manner of cross-

examination of complainant) though may be reflective of lack of remorse;

3. Failure to co-operate with authorities.

c. Mitigating factors

i. Remorse / Apology;

ii. Guilty plea: guilty plea, especially early one, will be a mitigating factor. Can not penalize a person for insisting on right to trial.

1. For instance, plea saves victims from having to testify; saves public need to pay to try case; indicative of remorse, responsibility; ergo, deserving of credit. {Tince}

iii. Test case scenario: fact that matter has been “hanging over” accused so that test case can be conducted

iv. Willingness to make reparations/compensation;

v. Assisting police or prosecution on other investigations – not giving of statement on this offence except as indicator of remorse;

vi. Age: crime-free life by person of good character is highly mitigating; advanced age or youthfulness (particularly if “youthful” crime);

vii. Time spent in custody: but see below – is actually not a “mitigating” factor but part of the sentence;

viii. Criminal History: none, or previously of good character (first-time offender);

1. Gap in criminal record;

2. No prior jail sentences, no prior adult sentences;

3. Good character, aberration in usual behaviour.

ix. Disadvantaged background;

x. Impairment (sometimes): if impairment played role in an out-of-character offence, and impairment is out-of-character. May assist court in determining specific deterrence is not of concern (if alcohol is not a problem for the individual);

xi. Provocation & Duress;

xii. Treatment for addiction or condition that led to the commission of the offence;

xiii. Health problems (sometimes);

xiv. Employed; Supporting spouse or children;

xv. Behaviour on bail;

xvi. Use of excessive force by the police in effecting arrest. {Nasogaluak}

g. Provincial sentencing

i. Victim surcharge levy - imposed under the *Offence Act* as well as under the *Victims of Crime Act*, **s. 8.1.**

ii. Penalties - general penalty scheme in *Offence Act* applies unless a specific penalty prescribed in legislation; fine up to \$2,000, 6 months in jail, or both. **s. 4, Offence Act**; may have minimum penalties (eg. drive while prohibited: \$500 fine for first, 14 days for second, etc.)

iii. Means of prosecution - if offence is prosecuted by way of an enforcement ticket (as opposed to an information), the fine is specified in the regulations to the offence.

14. Mental disorder

a. Overview - reformed following finding of unconstitutionality in *R. v. Swain*. Now governed by **s. 16** of the *Code*, two separate designations and processes: fitness to stand trial and NCRMD.

b. Myths - all counsel must keep in mind that the mentally ill are not always legally insane (mentally disordered) and do commit culpable offences. {Hillaby}

c. Presumption / burden / standard - every person is presumed not mentally disordered; **s. 16(2)** (NCRMD) and **s. 672.22** (fitness); burden of proof that accused is suffering from mental disorder is on the party raising the issue; **s. 16(3)** (NCRMD) and **s. 672.22** (fitness); standard of proof is BOP.

d. Evidence - very common in BC for counsel to rely on the extraordinary resource which is the court's own body of psychiatric experts: the Forensic Psychiatric Services Commission. {Hillaby}

e. Definitions of mental disorder

i. Certifiability - under **s. 22** of the *Mental Health Act*, offender could be shown to be of immediate dangerousness to self or others; separate consideration from fitness or NCRMD.

ii. Mental condition - under **s. 672.54** of the *Code*, may impose order on mentally ill offender, even though not ill at time of hearing, with a view to long-term fluctuating mental health.

iii. Unfitness - under **s. 2** of the *Code*, unable to understand or communicate during proceedings; not at time of offence, but at any stage during the court proceedings related to an offence.

iv. NCRMD - under **s. 16** of the *Code*, suffered illness, particularly psychotic illness, at time of offence commission; also includes organic brain damage, etc.

v. Death of newborn - if accused female person charged with offence arising out of death of newborn child, whether the balance of accused's mind was disturbed at time of offence. **s. 672.11(c)**

f. Review Board

- i. Composition* - three member panels; chairperson who is a lawyer having the stature of a Supreme Court Justice; **s. 672.4(1)**, and a practicing psychiatrist. **s. 672.39**
- ii. Nature of proceedings* - open to public; informal procedure, evidence rules. **s. 672.5**; AG is a party upon application, **s. 672.5(3)** as are other parties. **s. 672.5(4)**. Accused represented by counsel. *Stare decisis applies*; reasons provided, may be appealed to CA.

g. Criminal record

- i. Overview* - not a conviction, therefore no criminal record incurred; **ss. 672.35-36**; record kept in CPIC, etc. but no conviction.

h. Enforcement

- i. Overview* - orders implemented by Forensic Psychiatric Service, not corrections/etc. No offence for violating order, though any new standalone offence committed is prosecutable separately.
- ii. Arrest without warrant* - persons breaching Board dispositions arrestable without warrant, **s. 672.91**, if order and letter from treatment facility with particulars of breach are supplied as grounds for arrest. Leads to new disposition by JP, reviewable within a week by Board. **s. 672.92-93**
- iii. Reoffending* - where new charges laid, presumptions of innocence, fitness, and sanity apply despite existing Review Board case; such issues will be addressed only as they may arise in new proceeding.
 - 1. Dual status offenders* - if new charges laid, may be subject both to disposition and court order (eg. re: bail or custodial sentence); Review Board determines whether prison or hospital apt.

i. Fitness to stand trial

- i. Overview* - unable, due to mental disorder, to conduct defence at stage before verdict rendered: instruct counsel, understand nature/consequence of proceedings, or communicate w/ counsel. **s. 2**
 - 1.* For instance, accused need only have *limited cognitive capacity* to communicate/instruct counsel for to conduct defence; need not have analytic capacity to make decisions which are in best interests. {Taylor}

ii. Process

1. Initial appearances / assessment

- a. Overview* - issue of fitness and competency to plead may arise in such appearances, as may the need for psychiatric care. This may lead to assessment under bail authority, **s. 516** before proceeding with formal fitness assessment.
- b. Considerations* - not merely eccentric behaviour, particularly with unrepresented accused; only genuine concerns re: ability to conduct defence / understand proceedings should lead to assessment. If likely unfit, *accused must be provided w/ counsel*. **s. 672.24**

- c. *Formal assessment* - following **s. 516** assessment or on application of counsel, court may order assessment of fitness; presumptive out of custody, may be in custody. If accused represented, *should* only be brought by defence. **s. 672.11(a)**; also determine apt disposition.

2. *Trial of fitness*

- a. *Overview* - court must try matter of fitness, can do so regardless of whether assessment has been conducted. Heard by the TOF (eg. jury or judge, depending on elections). Evidence may be brought through psych report, but should be *viva voce* in serious cases.

3. *Result of unfitness verdict*

a. *Disposition*

- i. *Overview* - court or board may order (1) detention in hospital *or* (2) conditional discharge. Release w/ conditions available if not a “significant threat to safety of the public.” **s. 672.54** (compare to show cause); No absolute discharge available yet.
 - 1. For instance, see below under NCRMD dispositions for specific purposes/considerations appropriate for each disposition type.
 - ii. *Review of dispositions* - court may make disposition or defer this to Board; either way, reviewed by Board within 45 (no court disposition) **s. 672.46(1)** or 90 (court disposition ordered) days. **s. 672.47(3)**;
 - 1. Can order retrial for fitness, if believed fit following review, **s. 672.48** or redispense under **s. 672.54**.
 - iii. *Length* - generally last for one year, and may be renewed indefinitely so long as **s. 672.33** re: sufficient evidence to try accused is available for trial.
- b. *Treatment orders* - Crown may apply for treatment order; rarely resorted to in BC due to “deemed consent” provisions of the *Mental Health Act*. **s. 672.58**
 - c. *Verdict stands until retried* - accused will be considered unfit until the matter is retried before the court; **s. 672.23**; once verdict overturned, prosecution continues as if the issued had never arisen. **s. 672.28**

j. *NCRMD*

- i. *Overview* - persons are not criminally responsible for offences committed while suffering from mental disorder if they were incapable of knowing act was wrong (legally, morally) or appreciating the nature and quality of the act.
- ii. *Process*

1. *Charge approval*

- a. *Overview* - where police report indicates that accused might have been NCRMD, charge

approval Crown will have to consider this factor.

b. Considerations

- i. Seriousness of offence* - Crown has no interest in criminalizing mentally ill persons; therefore, will only charge for serious offences if NCRMD suspected; less serious offences will only be charged if other agencies unable to address behaviour.
- ii. Violence in offence* - non-violent offences are likely to end with an absolute discharge following NCRMD verdict; therefore, no prospect of conviction, no prosecution warranted.
- iii. Nature of illness* - if suffering from psych disorder, may benefit from treatment; however, persons with brain damage etc. not likely to benefit from treatment, therefore less likely to prosecute in such circumstances.

2. Initial appearances / assessment

- a. Overview* - NCRMD should not be dealt with at early court appearances unless raised by defence; nor is it good practice to deal with fitness and NCRMD at the same time.
- b. Plea negotiations* - if seeking plea, PSR with psych component should be ordered; counsel will discuss whether agreed verdict of NCRMD should be pursued (90% reached this way).
- c. Formal assessment* - court may order NCRMD assessment on application of counsel; presumptive out of custody, may be in custody. If accused represented, *should* only be brought by defence. **s. 672.11(a)**; will also determine apt disposition.

3. Trial of NCRMD

- a. Overview* - defence must call evidence, including *viva voce* testimony of mental disorder; accused will often testify. {Abbey}
- b. Legal finding* - not a medical fact; rather, finding made by the court and evidence of a psychotic state is merely a potential clinical foundation for the court's ruling.
- c. Evidentiary basis* - court should make findings of fact/accept agreements of fact which lay a foundation for unassailable verdict, and basis for Review Board risk assessment.
- d. Agreed verdict* - if both parties agree, may set out in agreed statement of fact, and agree upon method of adducing sufficient evidence to make out NCRMD; 90% brought this way. {Hillaby}

4. Dispositions following NCRMD verdict

- a. Overview* - once found NCRMD, Court makes initial disposition: detention in hospital, conditional discharge, or absolute discharge pursuant to **s. 672.54**
- b. Considerations* - balance need to protect the public from dangerous persons, the mental

condition of the accused, the reintegration of the accused into society and the other needs of the accused. **s. 672.54**

- c. *Review of dispositions* – court may make disposition or defer this to Board; either way, reviewed by Board within 45 (no court disposition) **s. 672.46(1)** or 90 (court disposition ordered) days. **s. 672.47(3)**;
- d. *Treatment* – the imposition of treatment/medicine is specifically prohibited through operation of **s. 672.55** of the *Code*. Treatment “encouraged” through the following:
 - i. *Detention* – accused detained and medicated by “deemed consent” provisions of the *Mental Health Act* (not constitutionally challenged yet);
 - ii. *Governing terms* – conditional discharge order with term which permits outpatient counsellors to return accused to hospital where reemerging illness of concern.
- e. *Types of disposition*
 - i. *Absolute discharge* – applicable if offender a threat but not a *significant* threat to public safety; if only risk posed to property, not persons; or if risk is of offensive, rather than criminal behaviour. **s. 672.54(a)**
 - ii. *Conditional discharge* – applicable if the above is not made out, but detention in hospital nevertheless inapt. **s. 672.54(b)**
 - iii. *Hospital detention* – applicable if conditions available upon discharge not sufficient to make out the objectives of the section. **s. 672.54(c)**

15. Appeals

a. *Types of appeal / jurisdictional considerations*

i. *Summary offence appeals (Part XXVII)*

1. *Criminal convictions* – go to SC first; unsuccessful SC appeals then go to CA. **s. 839(1)**. However, *if file to be proceeded with on indictment, then it would go directly to CA*, even if only summary offence/sentence appealed. **s. 675(1.1)** SC appeals to CA are *only on questions of law*.
2. *Regulatory convictions* – appeals from decision of a summary conviction appeal judge on provincial/regulatory matters are brought to CA, under **s. 124** of the *Offence Act*: *only on questions of law*.

ii. *Indictable offence appeals (Part XXI)*

1. *Overview* – go directly to the CA, regardless of mode of trial (eg. appeal of s. 553 offence in which Crown proceeded indictably would go to CA, despite that trial was held in PC).

iii. *Sentence appeals*

1. *Overview* - jurisdiction dependent on whether the court proceeded summarily (SC) or indictably (CA).

a. SC: per **s. 785**, includes forfeitures, discharges, probation, modifications, other ancillary orders, etc: sentence appeal is broad.

b. CA: subject to practice directive, must provide statement and authorities two weeks before hearing, including range of sentence, grounds of appeal, position taken by parties at trial; R. must reply within one week, including apt sentence. Not to exceed two pages.

iv. Designation appeals

1. *Jurisdiction* - appeal from DO or LTO designations or sentence subsequent to such designations are heard by CA. **s. 759**; AG may only appeal designations on ground of law. Presumably, DO/LTO designation *usually* made by SC, therefore would go to CA (*not* always).

v. Appeals of Review Board dispositions / NCR/Unfit verdicts

1. *Jurisdiction* - appeal from disposition of Review Board (re: NCRMD/unfit offenders) - or presumably court dispositions (though these are reviewable by the Board in any case) may be brought directly to the CA. {Hillaby}

a. CA: subject to practice directive concerning expedited process, which will ensure that the appeal is concluded within 90 days of the rendering of the NCR/unfit decision. NOA must be filed within 15 days of disposition. 10 page maximum written arg for A., 20 for respondent. Usual procedures apply by consent.

b. Grounds for appeal

i. *Overview* - ask trial counsel, review transcripts; decision based on principle/identifiable errors that are demonstrable upon appeal and bring validity of conviction/acquittal into question. Relevant, could arise at *any* stage.

ii. Errors of law vs. error of fact

1. *Overview* - questions of law concern the correct legal test; questions of fact concern what took place between the parties. {Southam} Direction concerning the proper use of evidence is a question of law. {B.(G.)}

2. *Legal effect of undisputed facts* - unless all the necessary facts are found or settled, or unless the facts are not in dispute, the question is not one of law. {Morin}

3. *Misdirection as to evidence* - failure to *appreciate* evidence is not an error of law unless the failure is based on a misapprehension of a legal principle. {Morin}

4. *Totality (of the evidence)* - unless the reasons of the trial judge demonstrate that all the evidence relevant to the ultimate issue was not considered, the failure to record the fact of having considered all the evidence is not an error of law. {Morin}

iii. Failure to raise issue at trial

1. *Overview* – D. precluded from raising new ground not dealt with at trial unless in the interests of justice, due to lack of evidentiary foundation, requirement that defence be raised at trial, etc. Lower court did not err unless matter brought before it.
2. For instance, this will generally not be allowed, unless the matter was not raised due to lack of evidence which *only became available* during the trial. {MacKay}

iv. Failure of accused to testify

1. *Overview* – cannot be held against the accused at trial level, due to presumption of innocence / right to silence under the *charter*. However, on appeal, may be relevant to determine whether verdict was reasonable. {Noble}

v. Ineffective counsel

1. *Overview* – procedural appeal: accused entitled to effective but not perfect representation. Miscarriage of justice where counsel was incompetent (reasonableness, broad range of conduct), and this led to prejudice of the accused. {G.D.B}
2. For instance, tough to second guess instructions b/w client and counsel (needs waiver of privilege), question trial strategy; focus is on trial itself, not counsel's peculiarities. {Dunbar}
3. CA: subject to practice directive; may assign case management judge; requires factum and notice of the allegation. Must be delivered to trial counsel.

vi. Appeal from guilty plea

1. *Overview* – apply to have plea struck: must show that plea involuntary or uninformed. Usually foreclosed; accused must establish that the plea was invalid, or induced by mistake of law, wrongful ruling on a question of law, or material irregularity at trial. {Ewaschuk}

c. Procedure

i. Leave to appeal

1. SC: for D. not required, per s. **813(a)**; appeal *by right*. Ditto for Crown, under **813(b)**; either can appeal order, conviction, sentence, or other verdict (eg. NCR): most common. Alternately, under **830(1)** where (a) erroneous in law, (b) exceeds jurisdiction, or (c) is a failure to exercise jurisdiction. Must pick one: if **830**, then **813** rights deemed abandoned, **836**
 - a. For instance, **813** does not allow for appeal by Crown other than where there is a stay, dismissal, NRC/unfit verdict; ergo, declaration of information being a nullity not captured, **830** required. {Kapoor}
 - b. *Paper appeal* – where initiated under **830(1)**, appeal will be based on transcript evidence unless agreed statement of facts is filed. **830(2)**; appeals under **813** not limited in this way.
2. CA: Crown can only appeal on question of law. **676**; D. can appeal on order, questions of law, questions of fact or mixed law and fact, any other ground of appeal with leave, any order

(NCRMD, parole, etc.) or against sentence unless it is fixed by law. **s. 675(1)**.

- a. For instance, evidentiary sufficiency is a question of fact, not a question of law; not open to Crown to appeal on such findings as a result. {Warner}
- b. For instance, questions that arise from sentencing re: proportionality, fitness, or quantum, do not generally raise a question of law, unless the sentence itself was illegal: unconstitutional, or violates min/max. {Thomas}
- c. *Application for leave* - necessary (even if appealing SC appellate decision). Must show that issue exists (1) re: important question of law (or other relevant issue, if defence) (2) w/ reasonable possibility of success. {Hunt} Leave always given to *defence*: broad discretion.

ii. *Details required to conduct appeal (applicant)*

1. *Overview* - need courthouse file number, /judge (important for transcripts), name/details from counsel (eg. opinion on appealable issues), funding info (cash / LA), *all* offences, sentencing, etc. Transcripts. Checklist apt. For respondents, this info provided by the appellant party.

iii. *Funding and representation*

1. *Overview* - if D. privately funded, no problem. If LA, make application to LSS with letter from trial counsel; if that fails, can make chambers application: costs paid by AG, where accused can't pay, representation desirable in interests of justice. **s. 684** Else: self-rep (*pro se!*)
 - a. CA: Subject to practice directive: provides sample affidavit, with requirements (eg. why impecunious, sophistication of D., proof that material sent to LA/refusal, why case too complex, why case may succeed, etc. Also sets out number of copies, where/how to file, etc.

iv. *Powers of court on appeal*

1. SC: court of inherent jurisdiction, may make whatever order (procedurally or otherwise) that it deems necessary in the interest of justice.
2. CA: court with powers strictly defined in statute. May make or give any additional order that it considers just; **s. 9(1)(c)**, *CAA*; full division (three, **s. 13**) may overturn any ruling of any single justice in Chambers. **s. 9(6)**

v. *Extensions*

1. *Overview* - if exceeded, can make application for extension of time to file. May require affidavit evidence re: intention to appeal if NOA: must provide reasonable justification, and evidence (affidavit?) that intention was present.
 - a. SC: extension applications heard in chambers. Court has broad discretion to extend time limits (inherent jurisdiction). **Rule 6(25)**.
 - b. CA: heard with appeal. Discretionary. **s. 10(1)**; Crown has no provision for additional time, unlike accused. **Rule 4**

vi. *Notice*

1. *Overview* – NOA must be given within 30 days of sentencing or from the order being appealed. In practice, express *intention* rather than notice is sufficient; NOA can come later.
 - a. SC: must file six copies of NOA within the 30-day limitation period. **Rule 6(2)**, SC *Criminal Rules*.
 - b. CA: must file five copies of NOA within 30-day limitation period. **Rule 3**, CA *Criminal Rules*.

vii. Hearing dates

1. SC: hearing date fixed when NOA filed. **Rules 6(9), 6(10)**, must be within six months of NOA filing. **Rule 6(11)**
2. CA: thirty day limit. **s. 14**

viii. Transcripts

1. SC: applicant must file transcripts within deadline in **Rule 6(7)** (though at mercy of court reporters). If *Crown* appeal, Crown must order transcripts and file proof within 14 days, unless appeal is to be a trial *de novo*. **Rule 6(5), 6(6)**.
2. CA: must deliver four copies with statement of argument, and one to Crown, within 60 days after NOA. **Rule 7**

ix. Prehearing conferences

1. *Overview* – ostensibly to narrow issues, etc. Appears rare, as Martin has never done one.
 - a. SC: governed by **Rules 6(12) and 6(13)**

x. Bail

1. *Overview* – may be cause to review bail: see bail -> review pending appeal, above. Note also that additional funding may be available/desirable if counsel is going to revisit bail for D.

xi. Transcripts

1. *Overview* – must consider re: costs, time how one will approach ordering transcripts: whether one wants submissions or evidence only; exhibits, whether they need to be expedited. Most importantly, can you get the Crown to just order extras for you?
 - a. SC: exhibits already in court file.
 - b. CA: must request exhibits if wanted for inclusion in appeal books. **Rule 8(9)**

xii. Trials de novo

1. *Overview* - virtually never used in criminal matters, because of rules against double jeopardy - used more in small claims matters and reviews of administrative tribunals.

a. *Mode of trial de novo as remedy* - if CA orders *de novo* trial as a remedy, presumed to be a jury trial if that was mode of original trial; however, can do judge alone with Crown consent. If original trial was judge alone, presumptively judge alone, can elect for jury. **s. 686(5), (5.1)**

b. SC: governed by **Rule 6(8)**; no need for written submissions in *pro se* trials *de novo*. **Rule 6(19)**.

i. *Discretion* - can be ordered if in interests of justice, **s. 822(4)** this is broad discretion {Winters} and extends to regulatory offences as well. **s. 109(3)**, *Offence Act*.

ii. *Evidence* - court may allow evidence of witnesses to be read in with consent of parties, attendance not reasonably obtained, and this would not prejudice trial. **s. 822(5)**

iii. *Sentence* - may have *de novo* proceeding for sentence: if *de novo* trial leads to different outcome than proceeding which was appealed from, new sentence may be apt. **s. 822(6)**

c. CA: subject to practice directive; not to be released from custody until bail pending new trial has been dealt with.

xiii. *Cross-appeals*

1. *Overview* - if respondent wishes to appeal on grounds other than those brought to light by applicant, must file cross-appeal, subject to same notice requirements as applicant: unless sentencing appeal.

a. CA: **s. 15** of the *Court of Appeal Act*, within 15 days of NOA receipt *or* granting of leave, whichever is later. Treated as an appeal under the Act.

2. *Sentencing* - no need to file cross-appeal on sentence (eg. where applicant says sentence too high, respondent too low); Court may vary sentence regardless of the position of the appellant. Court may increase or decrease, {Hill} though Crown should give notice to that end.

xiv. *Statements of argument*

1. *Overview* - must be filed within certain time limits, and must adhere to certain form requirements.

a. SC: must file two copies of statement of argument thirty (defence) or fourteen days in advance of hearing (Crown). **Rule 6(14)**. Not necessary for *pro se* applicants. **Rule 6(19)**

b. CA: CA: must deliver four copies with transcripts, and one to Crown, within 60 days after NOA. **Rule 7**; must respond within 30 days, though can agree otherwise. **Rule 10**

xv. *Want of prosecution and abandonment*

1. *Overview* - governed by **Rules 6(20)-6(23)** (want of prosecution) and **Rule 6(24)** (abandonment);

a. SC: if appellant abandons (or fails to appear), may be dismissed. **s. 825**

xvi. Factum

1. *Overview* - brief outline, fair and brief statement of facts (no argument here, though set as favourably as possible), focus on *best* issues, make strong and clear legal argument in application.
2. CA: subject to practice directive: electronic copy filed, Arial 12 point font, no longer than 30 pages (20 in SC). Filed via CDROM, Word/Wordperfect format, file name structure, etc. Citation also covered, use neutrals first, then a parallel to a reported series.

xvii. Fresh evidence

1. *Overview* - see applications -> fresh evidence, above.

xviii. Hearing process

1. *Overview* - do not restate factum; reframe, focus, and explain issues. Anticipate issues, etc. Answer questions. Not stuck to position at trial: can alter position as necessary on appeal, even if defending the result of the trial decision. {Mallen}

a. SC: single judge. Introduce, "my lord" etc.

b. CA: three (or five if revisiting/asked to overturn own jurisprudence).

- i. Subject to practice directive: sets out reasons for why accused wants five justices rather than three, forward to chief justice, etc.

xix. Judgments

1. SC: may affirm, reverse, modify conviction, judgment, verdict, order, etc, or remit matter back to PC with declaration, or make any other order (eg. costs, etc.) deemed proper. **s. 834**
2. CA: remedies on sentence governed by **s. 687**. Otherwise, under **ss. 683-689**. See also, **Rule 21, CAA** -delivered in open Court; may reserve judgment w/ notice.

a. *Conviction (see also, trial de novo above)*

- i. *Allow* - can allow appeal on unreasonableness of verdict, hold that wrong on point of law, or any other grounds to avoid miscarriage of justice. **s. 686(1)(a)**; leads to either verdict of dismissal, or ordering of *new trial* at discretion. **s. 686(2)** Could also find NCRMD, make disposition. **s. 686(1)(d)**

- ii. *Dismiss* - can dismiss appeal on ground that accused was properly convicted, or substitute conviction on different count/charge, hold that error of law did not lead to miscarriage of justice, or that procedural irregularity did not lead to prejudice. **s. 686(3)**,

s. 686(1)(b).

- b. Acquittal* - could dismiss appeal, allow appeal (set aside verdict, order new trial or enter a conviction -> impose sentence, or remit for sentencing to TJ). **s. 686(4)** (see also, trial *de novo* above)
- c. Sentence* - unless fixed by law, CA can consider fitness of sentence, fresh evidence, and may vary under **s. 687**. Deferential, however, to TJ's discretion. Unless error in principle (eg. didn't consider *Gladue*) unlikely to be altered. Test is *demonstrable unfitness*. Modified sentences are as if ordered by trial court, **s. 687(2)**;
- d. Extraordinary remedies* - include *certiorari*, *mandamus*, etc.: if lower court failed to exercise jurisdiction (*mandamus*) or exceeded jurisdiction (*certiorari*). Discretionary remedies, deferential standard to lower courts. Leave to appeal not required, however. **Part XXVI**

xx. Appeal to SCC

- 1. *Summary conviction, leave required* - under **s. 40** of the *SCC Act*, leave of BCCA required to appeal to SCC. Must be important question of law, appeal with merit.
- 2. *Indictable conviction* - D. can appeal conviction by right if there is a dissent on question of law, **s. 691(1)(a)**, or with leave of the SCC if no dissent. **s. 691(1)(b)** If an acquittal is overturned, can appeal by right if conviction entered or if dissent; otherwise, leave required. **s. 691(2)**. Crown can appeal with leave, or if there is a dissent. **s. 693**
- 3. *Leave to appeal* - per **s. 40** of the *SCC Act*, must establish that the issue is one of national importance re: new development fundamental to crim law, or no prior pronouncements by SCC on this point, or disagreement b/w CAs or in SCC jurisprudence. Rarely given on sentence (unless error re: principle): CA final arbiter of fitness of sentence.
- 4. *Powers* - may make any order that is available to provincial CA (see judgments, above), per **s. 695**;

d. Grounds for allowing an appeal

i. Unreasonable verdict

- 1. *Overview* - where *Arcuri* not met, eg. properly instructed jury could not have convicted when taking evidence at its highest. {Biniaris} Broad deference; easier with judge-alone trials, b/c reasons available. Requires *articulable basis* on totality of evidence (discomfort insufficient).

ii. Question of law

- 1. *Overview* - TJ committed legal error, such as wrong standard, burden, misdirecting self or TOF on operation of law, incorrect interpretation of the *CC*. Must be sufficient to have had negative impact on outcome: if minor error in face of overwhelming evidence, appeal likely dismissed.

iii. Miscarriage of justice

1. *Overview* – catch-all for errors both procedural and substantive that are not specifically enumerated under **s. 686(1)(a)(i)-(ii)**. Includes ineffective assistance of counsel, inapt cross, or raising character when accused did not put this in issue.

e. *Practice directives*

i. *Overview* – non-binding opinions provided by the BCCA which assist counsel with adherence to procedure; project extended to January 31, 2013. Imposes time limits for all appeal documents, setting hearing dates ASAP, and setting compliance hearing (mandatory) 29 weeks following NOA to ensure deadline compliance.

16. *Youth proceedings*

a. *Overview* – criminal code for persons between ages of 12 and 18 at the time that the offence was committed; as per **s. 2**, only a YCJ (or other Court declared to be a YCJ) may impose sentence on a young person (see also, **s. 13**)

b. *Contempt* – same power to punish contempt as SC justices; however, exclusive jurisdiction over young persons, except for contempt “in the face of the court” where there is concurrent jurisdiction. **s. 15**; however, punishment still under **s. 42(2)**

c. *Incorporation* – incorporates most of the CC via **s. 140**, including NCRMD/fitness, **s. 141**, but excluding sentencing principles (s. 718) under **s. 50**, though *Gladue* principle under s. 718.2(e) is incorporated. *YCJA* prevails where there is conflict concerning a young person.

d. *Procedure*

i. *Overview* – generally, more collaborative with defence, Crown, POs, social workers; relationships developed, etc. As much social work as law.

ii. *Rules* – subject to CC *summary* procedure rules, even where indictable offence / hybrid proceeding indictably; however, appeals similar to adult proceedings, goes to SC if summary, or to CA if indictable / proceeding indictably. **s. 142-143** Accused can elect *only* if Crown seeks adult sentence. **s. 67**

iii. *Bail* – detainable if charged with serious offence, or where pattern of criminality **s. 29(2)(a)**; the three grounds from adult are also expressed under **s. 29(2)(b)** (primary-secondary-tertiary, see bail, above). Must also be satisfied BOP other means would not meet these objectives. **s. 29(2)(c)**. May be released to supervision of responsible adult if the alternative is detention. **s. 31** *Reviews* under **s. 515**.

iv. *Pleas* – notice must be given before plea entered, or with leave of YCJ before commencement. **s. 64(2)**

v. *Statements of accused* – where made to person in authority, very likely inadmissible. **s. 146**; common law requirements imported along with additional statutory requirements, different to meet. Confession is more often investigatory/bargaining tool, than evidence of guilt.

vi. *Privacy/publication* – pre-verdict, *always* a ban on publication re: accused and witnesses (though the

courtroom itself is open to the public) **ss. 110-111**; exceptions:

1. *Consent* – ban removable on consent if accused over 18.
2. *Adult sentence or recidivism* – post-verdict, ban continues unless adult sentence imposed, **s.110(2)(a)**, or there is a **s.75** order re: a violent offence and there is a significant risk of violent recidivism. Crown bears burden.
 - i. *Sealed records* – the young person fails to stay out of trouble long enough to have the records sealed under **s. 119**; admissible at subsequent sentencing (in adult court).
 - ii. *Witness* – the young person winds up as a witness and a court orders the record disclosed to counsel for purpose of cross examination

e. *Sentencing*

- i. *Principles of sentencing* – YCJA previously did without deterrence/denunciation, due to diminished moral blameworthiness; however, reenacted in 2012, via **s. 38(2)(f)(i)-(ii)**; protection of the public is the first and foremost principle. **s. 38(1)(a)**
- ii. *Adult sentence* – Crown can only seek an adult sentence if the offence is one for which an adult would be liable to a sentence of 2 years or more and the young person is 14 or older (16 or older if the province, chooses to designate the higher age). **s. 64(1), (1.2)**; Crown *must* consider if “serious violent offence” though this is no longer defined. **s. 64(1.1)**.
- iii. *Limitation* – Most sentences cannot exceed two years – **ss. 42(2)(n), 42(14)** Some run to three years (cumulative consecutive sentences – **s. 42(14)-(16)**; attempted murder, manslaughter, aggravated sexual assault – **s. 42(2)(o)**; intensive rehabilitative custody – **s. 42(2)(r)**; an offence punishable by a life sentence – **s. 42(2)(n)**. Sentence for 1st degree murder can go to 10 years, 2nd degree to 7.
- iv. *Portions* – in most cases the first portion (custodial) must be twice the length of the second portion (non-custodial) – (2/3:1/3 rule). **s. 42(2)(n)** For most serious offences, complete judicial discretion as to the length of custodial length; Crown can apply for no non-custodial portion. **s. 98**
- v. *Parole* – set out in the CC, not the YCJA: see **s. 745.1**; b/w 5 and 7 years if under 16 at time of offence, 10 years for 1st degree murder if over 16 at time of offence; 7 years for 2nd if over 16 at time of offence.
- vi. *Conditional discharge* – no probation or mandatory program with a conditional discharge **s. 42(11)**
- vii. *Conditional sentences* – “Deferred Custody and Supervision Orders.” Unavailable if longer than 6 months, or the offence is “one in the commission of which a young person causes or attempts to cause serious bodily harm.”
- viii. *Review* – non-custodial dispositions reviewable after six months or at any time with leave of the Court. **s. 58** Custodial dispositions greater than one year must be reviewed annually, reviewable after six months with leave of the court; less than one year, reviewable after the greater of 30 days or 1/3 of the sentence. **s. 94** Can confirm/release, or convert disposition.

17. *Court appearances by students*

a. *Overview* - governed by the *Law Society Rules*, **2-32.01** (articled students) and **2-43** (temporary articled students). See miscellaneous: *law society rules regarding student appearances* for more info.

i. *Articled students*

1. *Overview* - subject to any other prohibitions (eg. in the *Criminal Code*) may provide all legal services, subject to limitations; eg. principal must ensure student is capable, student must not act as counsel in jury trial, any indictable proceeding (other than s. 533), CA or SCC unless under direct supervision of principal.

ii. *Temporary articled students*

1. *Overview* - cannot appear as counsel except in chambers on uncontested matters or contested procedural matters; in provincial court on a summary; procedural applications; cannot represent party at pretrial conferences; must have direct supervision if acting as counsel; can appear on YCJA indictable, but only for set-dates, etc.

18. *Jurisdiction / levels of court*

a. *General / irregularities*

i. *Overview* - via **s. 485**, jurisdiction can survive irregularities, failure to comply with act re: adjournments, new process may be issued within three months.

b. *Bail*

i. *Overview* - provincial courts have jurisdiction over intake and bail (eg. JIR) for all matters *other* than offences under s. 469, via **s. 522**; these offences, and bail *reviews* via **s. 515** are exclusive jurisdiction of superior courts. See bail and release, below.

c. *Preliminary inquiry*

i. *Overview* - provincial courts have jurisdiction over preliminary inquiries for all matters; however, prelim judges do not have jurisdiction to consider *Charter* claims.

d. *Trial*

i. *Overview* - provincial courts can hear trials on summary matters, or on hybrid/indictables where the defence elects for provincial judge-alone trial, or absolute jurisdiction offence under **s. 553**; provincial cannot try **s. 469** offences however. **s. 522** Superior courts can try any indictable offence. **s. 468**

1. *Generally only the summary conviction court (provincial court under s. 785) may try the accused (s. 798) but because SC judges have inherent jurisdiction they could theoretically try anything.*

ii. *Charging documents* - in provincial court, charging document will always be an *information*, regardless of whether matter includes summary offences, etc. In superior court, *indictment*.

e. *Charter*

- i. *Overview* – both provincial and superior courts have jurisdiction to apply the *Charter* and issue *Charter* remedies, except for where provincial court judge sitting as prelim magistrate.

f. *Procedural rules*

- i. *Overview* – provincial courts can create procedural rules if consistent with Fed statutory regime, and LGIC approves, under **s. 482(2)**. PC powers limited by statute; Superior courts enjoy inherent jurisdiction, may take any necessary measure to ensure that justice is done; but similarly limited in consistency, via **s. 482(1)**.
- ii. For instance, procedural rules come from Criminal Code, YCJA, Federal Statutes. Note s. 34(2) of the Interpretation Act states that the procedural provisions in the Code apply to prosecutions under federal statutes.

g. *Appeals*

- i. *Overview* – Supreme Court can here summary conviction appeals, Court of Appeal hears supreme and youth court appeals. SCC hears appeals from all CA and Fed CA (Federal Court jurisdiction (tax, immigration, environmental, aboriginal)).

19. Miscellaneous

- *Law society rules regarding student appearances*

- 2-32.01 (1) Subject to any prohibition in law, an *articled student* may provide all legal services that a lawyer is permitted to provide, but the student's principal or another practising lawyer supervising the student must ensure that the student is:
 - (a) competent to provide the services offered,
 - (b) supervised to the extent necessary in the circumstances, and
 - (c) properly prepared before acting in any proceeding or other matter.
- (2) An *articled student* must not
 - (a) appear as counsel without the student's principal or another practising lawyer in attendance and directly supervising the student in the following proceedings:
 - (i) an appeal in the Court of Appeal, ... or the Supreme Court of Canada;
 - (ii) a ... criminal jury trial;
 - (iii) a proceeding on an indictable offence, unless the offence is within the absolute jurisdiction of a provincial court judge,
- 2-43 (1) Despite Rule 2-32.01 [Legal services by articled students], a person enrolled in *temporary articles* must not appear as counsel before a tribunal except ...
 - (b) in the Supreme Court of British Columbia in Chambers on any
 - (i) uncontested matter, or
 - (ii) contested application for

- (A) time to plead,...
- (C) discovery and production of documents, or
- (iii) other procedural application relating to the conduct of a cause or matter,
- (c) before a registrar or other officer exercising the power of a registrar of the Supreme Court of British Columbia or Court of Appeal for British Columbia,
- (d) in the Provincial Court of British Columbia
 - (i) on any summary conviction offence or proceeding,
 - (iii) when the Crown is proceeding by indictment or under the Youth Criminal Justice Act (Canada) in respect of an indictable offence, for the purposes only of
 - (A) speaking to an application for an adjournment,
 - (B) setting a date for preliminary inquiry or trial,
 - (C) speaking to an application for judicial interim release or an application to vacate a release or detention order and to make a different order, or
 - (D) an election or entry of a plea of Not Guilty on a date before the trial date,
- (2) A person enrolled in *temporary articles* must not do the following:
 - (c) represent a party at a pre-trial conference.
- (3) A person enrolled in *temporary articles* under Rule 2-42(2)(c) ... [qualified in other Commonwealth country] may appear in court only on a summary conviction matter and under the direct supervision of a practising lawyer.

- *Bail conditions chart*

- *Keep the peace* - 100 - You shall keep the peace and be of good behaviour.
- *Report immediately and as directed* - 101 - Reporting Condition - As soon as you are released from custody you shall report in person to the Bail Supervisor's office, at 836 Courtney St., Victoria, B.C., and after that you shall report as and when directed by the Bail Supervisor (and in any event not less than _ times per day/week/ month).
- *Inform Supervisor of Address/Ph#* - 103 - Residence and Occupation - when first reporting to the Bail Supervisor you shall inform him or her of your residential address and phone number.
- *Notice to Supervisor for change of address/Ph#* - 104 - You shall not change your address or phone number at any time without first notifying (obtaining the written consent of) the Bail Supervisor.
- *Reside at specific location* - 105 - You shall commence the term of this Order by residing at _, and you shall not change your residence at any time without first obtaining the written consent of the Bail Supervisor.
- *Obey rules of residence* - 106 - You shall obey all rules and regulations of your residence.

- Remain in BC - 107 - You shall remain in the Province of British Columbia unless you have received the written consent of the Bail Supervisor to go elsewhere.
- Curfew - 108 - You shall obey a curfew by being inside your residence between the hours of ___ pm and ___ am each day, except as follows:
 - a). with the written consent of the Bail Supervisor. Such consent is to be given only for compelling personal, family or employment reasons; or
 - b). when travelling directly to, or returning directly from, your place of employment, or while in the course of your employment. You shall provide the Bail Supervisor with written details of employment if requested to do so; or
 - c). when travelling directly to, or returning directly from, an educational institution at which you are enrolled, or while in the course of classes or extracurricular activities approved in advance by the Bail Supervisor.
- House Arrest - 109 - You are to remain within your residence at all times, except as follows:
 - a). between the hours of ___ am and ___ pm each day, in order to attend to personal matters; or
 - b). at any time with the written consent of the Bail Supervisor. Such consent is to be given only for compelling personal, family or employment reasons; or
 - c). while in the company of _; or
 - d). when travelling directly to, or returning directly from, your place of employment, or while in the course of your employment. You shall provide the Bail Supervisor with written details of your employment if requested to do so; or
 - e). when travelling directly to, or returning directly from, an educational institution at which you are enrolled, or while in the course of classes or extra- curricular activities approved in advance by the Bail Supervisor.
- Curfew/House Arrest checks in person - 111 - You shall present yourself at the door to your residence when any Peace Officer or Bail Supervisor attends there for the purpose of determining your compliance with the curfew/house arrest condition of this Order.
- Curfew/House Arrest checks by phone - 112 - You shall respond personally and immediately to the phone when any Peace Officer or Bail Supervisor makes a phone call to your residence for the purpose of determining your compliance with the curfew/house arrest condition of this Order.
- School or work - 113 - You shall:
 - a). attend school regularly and not be absent except in accordance with either a medical certificate or the advance written consent of the Bail Supervisor; or

- b). make reasonable efforts to seek and maintain employment approved by the Bail Supervisor.
- Financial Support - 114 -You shall provide adequate financial support to your dependant(s) ___. (names)
- No Contact
 - No Contact or Limited Contact with Others - 115 - You shall have no contact or communication, directly or indirectly, with ___, except as follows:
 - a). with his/her express consent; or
 - b). with the advance written consent of the Bail Supervisor; or
 - c). through a third party approved in advance by the Bail Supervisor; or
 - d). for the purpose of arranging, facilitating or exercising access to your child(ren) in accordance with a Family Court Order or written separation agreement, dated after the date of this Order; or
 - e). through legal counsel; or
 - f). while in attendance at court; or
 - g). incidental contact while at the school in which you are both enrolled; or
 - h). incidental contact while in the course of your employment.
 - Contact only when initiated by other person - 116 - You shall have no contact or communication, directly or indirectly, with ___, unless such contact or communication is initiated by that person. Such contact or communication shall end immediately upon the request of that person.
 - Leave the presence of other person - 117 - You shall immediately leave the presence of ___ at his / her request and after that you shall have no contact or communication, directly or indirectly, with ___, without further Order of this Court.
 - No contact if drinking - 118 - You shall not be in the presence of _ if you are consuming alcohol or if you have consumed alcohol within the preceding _ hours.
 - Non- attendance at home, school or work - 119 -You shall not attend at (or be within ___ metres of) any place which you know to be the residence, school or workplace of ___, except as follows:
 - a). with his/her express consent; or
 - b). one attendance, in the company of a Peace officer, for the purpose of retrieving your personal belongings; or
 - c). while on a highway in a moving motor vehicle.
 - Non- attendance generally - 120 - You shall not attend at the premises of ___ (or be within _ metres of that place.) (eg. retail outlet, location of alleged crime, etc.)
- Drugs and Alcohol

- No Alcohol or Drugs - 121 - You shall not possess or consume any alcohol or any controlled substance as defined in Section 2 of the Controlled Drugs and Substances Act, except as prescribed for you by a physician.
- No go liquor outlets - 122 - You shall not enter any liquor store, beer and wine store, bar, pub, lounge, or nightclub.
- No drug paraphernalia - 123 - You shall not possess any pipes, syringes or other drug paraphernalia.
- No cell phone - 124 - You shall not possess any cell phone, pager or portable telecommunication device, except for purposes directly and immediately related to your employment.
- Red Zone - 125 - You shall not enter into the area bounded by the following streets: ____, ____, ____; (as shown on the map appended to this Order) except as follows:
 - a). with the advance written consent of the Bail Supervisor, in which case the written consent shall be carried on your person while you are in the Red Zone; or
 - b). for purposes of attending pre-scheduled appointments with your ____. (eg. physician, lawyer, counsellor, etc.)
- Extended Red Zone - 126 - You shall not be in the City of __, BC after __, 20__, except as follows:
 - a). with the advance written consent of the Bail Supervisor, in which case the written consent shall be carried on your person while you are in the city; or
 - b). for purposes of attending court appearances; or
 - c). for purposes of attending pre-scheduled appointments with your ____. (eg. physician, lawyer, counsellor, etc.)
- Violence
 - No weapons - 127 - You shall not possess any weapon as defined in section 2 of the Criminal Code.
 - Surrender weapons - 128 - You shall forthwith surrender for safekeeping to the __ (police dept.) any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance in your possession, together with any authorization or registration certificate for any such item. Except for purposes of making such delivery to the __ (police dept.) in accordance with this condition, you shall not possess any of the listed items.
 - No knives - 129 - You shall not possess any knife outside your residence except for the purpose of preparing or eating food, or for purposes directly and immediately related to your employment.

- Pornography, Sexual Offences and Offences Against Children

- No contact with minors - 130 - You shall have no contact or communication, directly or indirectly with, nor be alone in the presence of, any person you know to be, or who reasonably appears to be of the age of ___ years or less, except as follows:
 - a). with the advance written consent of the Bail Supervisor; or
 - b). in the presence of an adult third party approved in writing in advance by the Bail Supervisor; or
 - c). in the presence of a third party who has knowledge of the reason(s) for your Bail Order.
- Non- attendance at certain locations - 131 - You shall not attend at any public park, school-ground, daycare centre, swimming pool, play-ground, skating rink, community centre or recreational centre where persons of the age of _ years or less are present or might reasonably be expected to be present, except as follows:
 - a). with the advance written consent of the Bail Supervisor; or
 - b). in the presence of an adult third party approved in writing in advance by the Bail Supervisor; or
 - c). in the presence of a third party who has knowledge of the reason(s) for your Bail Order.
- No internet - 132 - You shall not have a functioning internet connection in your home, nor exercise access to the internet anywhere, except as follows:
 - a). for purposes directly and immediately related to your employment; or
 - b). with the advance written consent of the Bail Supervisor, and, upon request, you shall provide the Bail Supervisor with a letter of authorization to allow the Bail Supervisor to obtain information from any internet provider concerning your internet usage.
- No pornography - 133 - You shall not possess any pornographic material nor access any pornographic material by electronic means.

- Counselling and Mental Illness

- Limited Rogers Order - 135 - By consent, you shall take reasonable steps to maintain your mental health such that you will not likely conduct yourself in a manner dangerous to yourself or anyone else.
 - At the direction of the Bail Supervisor, you will attend from time to time at Forensic Psychiatric Services (or upon a licensed medical practitioner) for the purpose of

receiving such medical counselling or treatment as may be recommended, except that you are not required to submit to any treatment or medication to which you do not consent.

- If you do not consent to any form of medical treatment or medication prescribed or recommended, you shall so notify the Bail Supervisor.
- You shall provide your treating physician (or counsellor) with a copy of this Order, and the name, address and telephone number of the Bail Supervisor. You shall instruct the treating physician (or counsellor) that if you fail to take medication as prescribed by him or her, or fail to keep appointments with him or her, that he or she shall so advise the Bail Supervisor immediately.

- Driving Offences

- No be in drivers' seat - 136 - You shall not occupy the drivers' seat of any motor vehicle.
- Not to drive, except for work - 137 - You shall not drive a motor vehicle at any time, except as follows:
 - a). when travelling directly from your residence to your place of work in order to attend work; or
 - b). when travelling directly from your place of work to your residence at the end of your working day; or
 - c). in the necessary course of your employment, during working hours.
- Not be in motor vehicle without owner present - 138 - You shall not enter any motor vehicle, other than public transportation, unless the registered owner of the vehicle is also present in the vehicle.

- Commercial Offences

- No possession of credit cards or ID of others - 139 - You shall not possess any credit card, bank card, cheque or identification document bearing anyone's name other than your own.