

CRIMINAL LAW  
C. SMITH  
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JAMIE MYRAH

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Introduction	3
Criminal Law & the Constitution	3
Cases: Validity of Criminal Law Power	6
Limits on the Criminal Law - Historical Approaches	10
<i>Utilitarian-Liberal View</i>	<b>10</b>
<i>Conservative View</i>	<b>11</b>
<i>Feminist View</i>	<b>12</b>
Cases: Limits on the Criminal Law	13
<i>R. v. Malmo-Levine; R. v. Caine</i>	<b>13</b>
<i>2003, SCC</i>	<b>13</b>
<i>Summary re: Limitations</i>	<b>17</b>
Objectives of Criminal Law & Sentencing	18
Gladue & the Sentencing of Aboriginal Offenders	21

Interpretation of Criminal Laws	25
<b>Criminal Law &amp; the Charter</b>	<b>29</b>
Summary of Cases by Charter Section	29
Oakes Test Re: Charter Violation	45
<b><i>R. v. Oakes</i></b>	<b>45</b>
Section 24: Exclusion of Evidence	46
<b><i>R. v. Grant</i></b>	<b>49</b>
Investigation & Prosecution of Crime	52
Search & Seizure	53
Arrest & Detention	56
<b>Confessions</b>	<b>60</b>
Voluntariness & the Common Law Confessions Rule	60
Traffic Stops	62
The Charter & Admissibility of Confessions	63
<b>Trial Process</b>	<b>65</b>
Issues in Wrongful Convictions	65
Pre-Trial Release	65
Classification of Offenses	68

# Introduction

## Criminal Law & the Constitution

### Federal -

- Criminal Law & Procedure - s. 91(27)
- Penitentiaries - s. 91(28)
- Power to appoint superior court judges (BCSC, BCCA, SCC) - s. 96
- Creation of regulatory offenses in relation to its other powers such as fisheries, taxation, etc. - s. 91  
\*can create offenses to enforce other areas of jurisdiction

### Provincial -

- Administration of Justice - s. 92(14)
- Reformatory prisons - s. 92(6)
- "Asylums" - s. 92(7)
- Fines, penalties, or imprisonment to enforce provincial laws - s. 92(15)  
\*can create non-criminal offenses and offenses to enforce them - i.e. motor vehicle act

\*Distribution of Powers - s. 91/92 - see handout

	Federal Parliament s. 91 & 96	Provincial Legislature s. 92
I. Law-Making Powers		
Creation of "crimes"	"crimes" - <b>s. 91(27)</b>	no crimes
Creation of offenses	regulatory offenses under federal statutes (e.g. <i>Shipping Act</i> , <i>Fishing Act</i> , etc.)	regulatory offenses under provincial statutes (e.g. <i>Motor Vehicles Act</i> , <i>Liquor Control Act</i> - <b>s. 92(14)</b> [P&CR] or <b>s. 92(16)</b> [locals matters])

	<b>Federal Parliament s. 91 &amp; 96</b>	<b>Provincial Legislature s. 92</b>
II. Administration of Justice		
Appointment & supervision of judges	appointment of judges to SCC, provincial Court of Appeal & provincial Superior Court - <b>s. 96</b>	appointment of provincial court judges & JJP - <b>s. 92(14)</b> [administration of justice in the province]
Appointment of prosecutors	prosecute all offenses under federal statutes including drug offenses under the <i>Controlled Drug &amp; Substances Act</i>	prosecutes all <i>Criminal Code</i> offenses (delegated to the provinces by the feds); prosecutes all offense under provincial statutes - <b>s. 92(14)</b>
Appointment & supervision of police	RCMP (national security & national policing issues) - <b>s. 91 - POGG</b> RCMP also hired by provinces/cities for policing	provincial & municipal police forces - <b>s. 92(14)</b> ; Que., Ont., Nfld. have provincial police forces; various municipal forces; others contract RCMP
Corrections	<u>penitentiaries</u> for imprisonment of <u>2 years or more</u> - <b>s. 91(28)</b> ; National Patrol Board for penitentiary inmates	provincial <u>jails and prisons</u> for all prisoners in <u>pre-trial custody</u> & offenders sentenced for <u>less than 2 years</u> - <b>s. 92(6)</b> ; probation officers (and some provincial probation officers)
Courthouses & courthouse staff	Federal Court (primarily administrative), Federal Court of Appeal & SCC	Provincial Courts where criminal cases are heard by provincial/superior court judges; provincial court staff - i.e. Clerks, sheriffs, etc.

	<b>Federal Parliament s. 91 &amp; 96</b>	<b>Provincial Legislature s. 92</b>
Lawyers		all lawyers - federal/provincial prosecutors & defense counsel - are subject to the regulation of the provincial Law Society where they practice
Mental Health Facilities		"asylums" - <b>s. 92.7</b>

Scope of the Federal Criminal Law Power:

- Restrictive approach - "the subject matter... by it's very nature belongs to the domain of criminal jurisprudence" (Board of Commerce, 1922)
- Broad approach - "is the act prohibited with penal consequences?" (P.A.T.A., 1931)

Three elements to a criminal law for the purpose of section 91(27):

1. Prohibition
2. Penalty
3. Criminal law purpose aimed at some evil or injurious effect
  - Margarine Reference (1949)
  - Firearms Reference (2000)

\*Basic Principles of Criminal Liability - see handout

Cases: Validity of Criminal Law Power

Case	Issue & Decision	Legal Principles
<p><i>Frey v. Fedoruk</i> 1950, SCC</p> <p>*codification</p>	<p><u>Re</u>: Conduct of “peeping” as a criminal offense?</p> <p><u>Answer</u>: no - no such offense in the <i>Criminal Code</i></p> <p>Court rejected the decision of the lower court that Frey acted unlawfully under the Common Law because he had acted "in a manner likely to cause a breach of the peace by peeping at night"</p> <p>1953: Parliament abolishes all but the common law offence of contempt of court; introduces offence of trespassing at night</p>	<p>Rejection of the principle that conduct may be treated as criminal (even if not found in statute) if it has a natural tendency to provoke a violent response as retribution</p> <ul style="list-style-type: none"> <li>- creates uncertainty</li> <li>- not safe to declare an act criminal if it hasn't previously been held to be criminal</li> <li>- leaves it to individual judges to decide what constitutes a crime</li> <li>- no defined standard in the code or in reported decisions</li> </ul> <p>John Willis: this decision places "the protection of the individual from the risk of oppression" above "the protection of the state from the risk of disorder"</p>

Case	Issue & Decision	Legal Principles
<p><i>Switzman v. Ebbing</i> 1957, SCC</p> <p>*division of powers</p>	<p><u>Re:</u> constitutional validity of Quebec's <i>Act Respecting Communistic Propaganda?</i></p> <p><u>Answer:</u> unconstitutional</p> <p>Pith &amp; substance of the Act is to prevent propagation of communism &amp; punish those that do</p> <p>Distinguishable from <i>Bedard v. Dawson</i> (1923) where the SCC upheld law aimed at closing disorderly houses where criminal activity was taking place</p>	<p>"The <i>Act</i> is legislation in relation to the criminal law one which, by virtue of... [the BNA Act], the government of Canada has exclusive legislative authority." (Kerwin C.J.C.)</p> <p>Criminal law is the exclusive domain of the feds; once the pith &amp; substance of provincial legislation is determined to be in relation to the criminal law it must be deemed unconstitutional</p> <p><u>Dissent:</u> provinces have the power to legislate to prevent crimes such as treason &amp; sedition (<i>Bedard v. Dawson</i>)</p>
<p><i>Amato v. The Queen</i> 1982, SCC</p> <p>*codification - common law defenses</p>	<p><u>Re:</u> Authority to adopt defenses - i.e. entrapment - in criminal proceedings?</p> <p><u>Answer:</u> yes - e.g. entrapment, duress, necessity, due diligence, etc.</p> <p>Not practicable to foresee all possible combinations of circumstances; infrequent occurrence means lack of judicial consideration</p>	<p><i>Criminal Code</i> s. 8(3) allows for the development of defenses not inconsistent with the provisions of the <i>Code</i> (arising through the common law) if "the construction adopted was prospective" (Estey J.)</p> <p>Appropriate if the defense alters the quality of the crime</p>

Case	Issue & Decision	Legal Principles
<p><i>R. v. Jobidon</i></p> <p>*codification - consent</p>	<p><u>Re:</u> Criminally liable for manslaughter when the victim consented to the fight?</p> <p><u>Answer:</u> yes - the court excludes the absence of consent as an element required by the offence</p> <p>Limitation demanded by s. 265 (re: manslaughter) impairs the quality of consent in this case on the basis of public interest (must be determined on a case-to-case basis with exceptions - i.e. sporting activities)</p> <p>If the common law allows for new defenses (<b>s. 8</b>), then it can also give meaning to the boundaries of a defense/justification (providing the common law hasn't been displaced by the <i>Code</i>)</p>	<p>Common law rules and principles regarding the limitations of consent can be applied to establishing criminal responsibility when they are not inconsistent with the <i>Code</i> (or other legislation) (Gonthier J.)</p> <p>Common law illuminates the definitions/ gives content to the principles found in the <i>Code</i></p> <p>Common law may provide situations/forms of conduct that the law will not allow a person to consent to</p> <p>Common law rules/policy considerations also restrict the extent to which consent can be nullified</p> <p><u>Dissent:</u> use of the common law to eliminate an element of the offence that is required by the statute is more than interpretation - essentially adds a new offence; contrary to the spirit and the letter of <b>s. 9(a)</b> - no person shall be convicted of an offence at common law (notwithstanding the Act or other Acts) (Sopinka J.)</p>

Case	Issue & Decision	Legal Principles
<p><i>R. v. Morgentaler</i> 1993, SCC</p> <p>*division of powers</p>	<p><u>Re:</u> constitutional validity of Nova Scotia's <i>Medical Services Act</i> &amp; regulation making it an Offense to perform an abortion outside a hospital?</p> <p><u>Answer:</u> unconstitutional</p> <p>Primary objective of the legislation is to prohibit socially undesirable conduct; regulates where an abortion can take place from the viewpoint of public wrongs or crimes (not health care policy - those are secondary issues)</p>	<p>Court reaffirmed that Criminal Code provisions re: abortion were a valid exercise of the federal criminal law power (1988)</p> <p>So although abortion is no longer regulated by the criminal law, historically it is considered part of the criminal law</p>
<p><i>Reference re: Firearms Act</i> 2000, SCC</p> <p>*division of powers</p>	<p>Re: Parliament's power to pass gun control law?</p> <p>Answer: yes</p> <p>Pith &amp; substance of the law is directed to enhancing public safety/primary criminal law purpose</p> <p>Regulatory aspects are secondary</p> <p>Problems associated with the misuse of firearms (not the possession) are firmly grounded in morality - prevention is an attempt to curb immoral acts</p>	<p>Parliament can also use the criminal law to prohibit acts not relating to public morality</p> <p>Effectiveness of the law or concerns re: consultation, costs, etc. are not relevant to Parliament's ability to enact it under the division of power analysis (violations re: treaty rights/Charter can be brought in a separate action)</p>

## Limits on the Criminal Law - Historical Approaches

### Utilitarian-Liberal View

- harm to others is a precondition for criminalizing conduct
- conduct that is regarded as sinful or morally wrong should not be criminalized if there is no harm to others
- private morality is not the law's business

### Jeremy Bentham (1790-1830):

- scope of criminal law - criminalize only "harm to others"
- rationale for punishment - deterrence (utilitarian purpose); to deter the offender & others from committing crime

### J.S. Mill (1860's):

- argued government power ought to be used as sparingly as possible; leave room for each individual to exercise personal liberty of thought, expression, action ("On Liberty")
- sole end for interference with the liberty of action is self protection; only purpose for exercising power over others in a civilized community is to prevent harm to others (p. 46)
- individual has sovereignty over own mind and body
- 'harm principle': opposes use of government power for moral ends; only permissible use of the coercive power of the government is to prevent harm to others

### Wolfenden Committee (1950-60's):

- report re: decriminalization of homosexuality using a harm principle approach
- sets out what it considers the function of law to be - preserve public order and decency; protect citizens (including the vulnerable)
- it is not the function of the criminal law to intervene in the private lives of citizens or enforce particular pattern of behaviour

### H.L.A. Hart:

- "Immorality and Treason" (London, 1959) - response to Devlin's thesis (see below)
- Mill's view may be too simple but it is better than Devlin - at least it stresses that thought is needed before we turn popular morality into criminal law

- obvious that a consensus of moral opinion on certain matters (i.e. murder, theft) is essential for a society worth living in but it does not follow that everything is of equal importance or that morality is a seamless web
- must ask two questions:
  - is the morally offence practice harmful independent of its repercussion on the moral code?
  - will failure to translate this item of morality into criminal law really jeopardize the whole fabric of morality and therefore society?
- listen to the promptings of logic and common sense - there is a sphere of private morality and immorality (i.e. private sexual practice)
- should summon our resources of reason/sympathetic understanding/critical intelligence before general moral feeling is turned into criminal law
  - legislator needs to consider ignorance, superstition, misunderstanding, false conceptions of danger, consequences of punishment, etc...
- special risk on democracy that the majority may dictate how all should live (p. 55)

#### Conservative View

- criminal law should be used to enforce “essential, common morality” even when there is no harm to other individuals
- conduct which every “right-minded” person considers immoral should be criminalized because it threatens society’s moral fabric

#### James Fitzjames Stephen (1860-1890):

- scope of criminal law - main purpose is to enforce “morality”
- rationale for punishment - retribution (revenge purpose); main reason for imposing punishment is to satisfy the victim and society’s “legitimate” desire to see wrongdoers punished
- it is a normal human trait to hate/despise criminal behaviour - the courts should satisfy that desire by imposing retribution in accordance with the law

#### Lord Devlin:

- "The Enforcement of Morals" (London, 1959) - responding to the 'Wolfenden Report'
- repudiation of the liberal point of view (Mill) based on the notion that the moral judgments found in law are to be ascertained by the standards of the reasonable man (based on feelings of intolerance, indignation, disgust)
  - society may use the law to preserve morality because morality is essential to society
- rules are often designed to achieve uniformity and convenience; rarely a choice between good & evil (i.e. speeding)

- criminal law in England has always concerned itself with moral principles - i.e. consent of the victim is not an acceptable defense - not only an offence against the victim but an offence against society; threatens the "sanctity of human life" - one of the great moral principles society is based upon
- basis of criminal law - there are certain standards of behaviour or moral principles that society requires to be observed; to breach is an offence against society as a whole
- authority to enforce a moral principle is a matter of history - derived from Christian teaching; can no longer rely on doctrines people are entitled to disbelieve
- structure of society is made up of politics and morals
  - e.g. marriage - Christian ideal is the basis of family life; got here because it's Christian; remains because it is "built into the house in which we live and could not be removed without bringing it down" (p. 49)
- society cannot tolerate rebellion or agreement about the rightness of cause
  - society is a community of ideas - without shared ideas on politics, morals, ethics society cannot exist
  - without agreement/common morality society will disintegrate
- therefore we cannot set theoretical limits to the power of the State to legislate against morality
  - society is justified in taking steps to preserve its moral code just as it preserves other essential institutions (i.e. government)
- majority agreement not required; moral code is determined by the "reasonable man/right-minded man" - the man on the "Clapham omnibus" or in the jury box
  - "morals are those standards of conduct which the reasonable man approves" (p. 51)
  - judgment may be largely a matter of feeling (need not reason like the rational man)
  - not enough for a majority to dislike a practice - must be a real feeling of reprobation/disgust
  - society requires intolerance, indignation, disgust - forces behind moral law
    - if not present then the feelings of society cannot deprive the individual of freedom of choice
- the limits of tolerance shift - departures from moral standards varies from generation to generation
  - pressure of the human mind seeking freedom of thought forces gradual relaxation
  - but law based on morals are less easily moved - in any matter of morals the law should be slow to act
- morality is necessary for society - requires maintenance through the instruments of teaching (doctrine) and enforcement (the law)

#### Feminist View

- "harm" for criminal law purposes should extend beyond individual harm to include physiological and social harms such as inequality, degradation, and violations of human dignity

### Fraser Committee - Special Committee on Pornography & Prostitution (1985):

- feminist response to Mill's liberalism - bankruptcy of the narrow characterization of the harm principle; need to redefine the notions of rights in liberal theory
  - "As long as rights in the liberal glossary mean liberty in the sense of being free to act without restraint, they have little value in a society in which fundamental inequalities exist." (p. 82)
  - advocate a broader notion of harm that includes social harm
  - see this as distinct from conservative theories (i.e. Devlin) which assume an ideal society is one where women are subordinate/submissive
- found a spectrum of approaches re: the use of the criminal law to regulate prostitution ranging from extreme conservatism (state law as moral law) to extreme libertarianism (intrusion only when there's physical harm)
- conclude that the role of the criminal law lies "mid-way between these extremes" - criminal law is in part a reflection of the values of society
- recommendations:
  - pornography - revise the Criminal Code prohibitions to create offences based not on concepts of sexual immorality but rather on offences to equality, dignity, and physical integrity
  - prostitution - withdraw sanctions against simple soliciting; allow small prostitution establishments in non-residential areas; cut back the prohibitions re: procuring/living off the avails of prostitution unless by means of coercion/threats
  - establish strong protection against exploitation (especially for children)
  - don't criminalize the behaviour of the young person (unless they're exploiting other young persons)

### Cases: Limits on the Criminal Law

R. v. Malmo-Levine; R. v. Caine  
2003, SCC

Question (Malmo-Levine): Does Parliament have legislative authority to criminalize simple possession of marijuana? Is it legal to smoke pot?

Answer: criminalization of possession of marijuana - simple or for trafficking - falls properly within the criminal law authority of Parliament to legislate

Question (Caine): Does the threat of imprisonment in the absence of harm to other people violate the principle of fundamental justice (Charter s. 7)? Is the exercised authority of Parliament unconstitutional?

Answer: absence of harm isn't a reason to negate criminal activity; harm is an important but not decisive factor

Majority (Gonthier and Binnie JJ.):

- harm re: marijuana:
  - less serious/permanent effects than once claimed but psychoactive/health effects can still be harmful, especially in the case of members of vulnerable groups (chronic users, pregnant women, adolescents, etc.)
- division of powers:
  - criminal law has three prerequisites: valid criminal law purpose; prohibition; penalty
  - laws designed to promote public peace, safety/security, order, health, morality...
  - provisions aim to protect vulnerable groups therefore use of marijuana is a proper subject for the exercise of the criminal law power
- Charter section 7:
  - what are the principles of fundamental justice (PFJ)?
    - PFJ criteria:
      - the rule/principle must be a legal principle
      - for which there is significant societal consensus that it is fundamental to how our legal system ought fairly to operate
      - and be identified with sufficient precision to yield a manageable standard
  - is the harm principle a principle of fundamental justice?
    - description of an important state interest - not a normative legal principle
    - no consensus that the harm principle is vital/fundamental to our societal notion of criminal justice
      - state may be justified in criminalizing conduct that is not harmful or may only harm the accused (i.e. cannibalism, bestiality)
    - no consensus that the distinction between harm to others and harm to self is of controlling importance
      - Canada has paternalistic laws - to "save people from themselves" (i.e. seat belts)
      - harm to oneself is often borne collectively
    - the harm principle is not a measurable standard against which to measure deprivation of life, liberty, security of person
      - no agreed definition of harm so allegations/counter-allegations of non-trivial harm can be marshaled on every side of almost every issue
      - harm can take many forms - economic, social, physical, etc.

- harm principle does not provide a manageable standard under which to review criminal laws or other laws under s. 7 of the Charter

Dissent (Arbour J. re: Caine):

- s. 7 requires that some minimal mental element be an essential element of any offence punishable by imprisonment and that the prohibited act be harmful or pose a risk of harm to others
  - Lamer (1985): convicting someone who hasn't done anything wrong offends the principles of fundamental justice; imprisonment as penalty violates right to liberty (s. 7)
  - a person who hasn't done anything wrong is someone whose conduct caused little/no reasoned risk of harm (or whose harmful conduct isn't their fault)
  - constitutional minimum standard - imprisonment reserved for those whose conduct causes a reasoned risk of harm to others
    - courts must assess the interest of society in prohibiting/sanctioning conduct that is seen to cause harm to collective interests
    - harm caused by prohibiting conduct must outweigh harm that may come from enforcement
    - re: use of marijuana... harm to self does not satisfy the constitutional requirement re: imprisonment
- crime = actus reus (guilty act) + mens rea (mental component of criminal liability - i.e. intent, recklessness)
- conclusion: prohibition of possession of marijuana for personal use under threat of imprisonment violates right to liberty (in accordance with the harm principle, which is a fundamental principle of justice) and is therefore contrary to s. 7

LeBel J. (dissent): harm principle is not a principle of fundamental justice but the legislation is disproportionate to the societal problems and therefore arbitrary and in breach of s. 7 (Deschamps... similar dissent)

R. v. Labaye  
2005, SCC

Question: Are acts of consensual group sex in a commercial establishment acts of indecency within the meaning of the criminal law? (re: charge of "keeping a bawdy house" for the "practice of acts of indecency")

Answer: no

Majority (McLachlin C.J.):

- legal test for criminal indecency:

- history of subjective tests; evolution towards greater objectivity
- shift from community standards test to harm based test - *Towne Cinema Theatres Ltd. v. The Queen* (1985)
- harm based test: community standard of tolerance is determined by reference to risk of harm entailed by the conduct - *R. v. Butler* (1992) & *Little Sisters...* (2000)
  - stronger the inference of a risk of harm the lesser the likelihood of tolerance
  - not always clear how the harm test for indecency applies
- analysis re: harm has two requirements:
  - the nature of the conduct causes harm or presents significant risk of harm to individuals/society in a way that undermines/threatens a value endorsed through the Constitution or similar fundamental laws (i.e. interference with autonomy/liberty; predisposing others to anti-social behaviour; physically/psychologically harming those involved in the conduct)
    - requirement of formal recognition makes the test objective; inspires confidence that judges are upholding Canadian values... autonomy, liberty, equality, human dignity, etc.
    - ensures people will not be convicted/imprisoned for transgressing the beliefs of particular individuals/groups
  - the harm or risk of harm is of a degree that is incompatible with the proper functioning of society
    - threshold is high - value judgments are unavoidable but the decision making process should not be subjective/arbitrary
      - based in awareness of the impact of value judgments, established by relevant evidence, etc.
    - where actual harm is not established the Crown must establish significant risk of incompatibility with the proper functioning of society
      - the more extreme the nature of harm, the lower the degree of risk - i.e. terrorism
- application of the test:
  - evidence provides no basis for concluding that the sexual conduct at issue harmed individuals or society
    - including: the steps taken to exclude the general public; lack of anti-social attitudes towards women/men; no actual harm to participants
  - Court of Appeal erred in applying an essentially subjective community standard of tolerance test - should have used a harm-based test (re: *Butler*)

Dissent (Bastarache and LeBel JJ.):

- favours the community standard of tolerance test
  - based in case law
  - focusses on a contextual analysis
  - incorporates harm as significant but not determinative

- harm is but one indicator of the community standard of tolerance
  - social morality must still be allowed to play a role in all situation of relevance (i.e. sexual practices)
- existence of harm isn't a prerequisite for exercising state power to criminalize; fundamental social/ethical considerations are sufficient - R. v. Malmo-Levine (2003)
  - offences under the Criminal Code are based on principles/values other than harm
  - certain acts are considered harmful in themselves - e.g. child pornography, incest, polygamy, bestiality, etc.
- determining the level of harm re: indecency is too demanding and abstract; the need to prove societal dysfunction to a degree approaching disorder to restrictive
- advocate a community standard of tolerance test based on two factors: nature of the acts and their context... place; audience/participants; nature/purpose of acts; measures to limit access; commercial enterprise; conduct of/harm suffered by participants; etc.
- conclusion: impugned acts were explicit, took place in a commercial establishment, easily accessible to the general public - caused a certain form of social harm resulting from the failure to meet minimum standards of public morality

#### Summary re: Limitations

- Charter does not prevent Parliament from enacting criminal laws in most situations
- absence of harm isn't a reason to negate criminal activity; harm is an important but not decisive factor (Malmo-Levine; Caine)
- harm principle is not a PFJ (Malmo-Levine; Caine)
  - PFJ criteria:
    - the rule/principle must be a legal principle
    - for which there is significant societal consensus that it is fundamental to how our legal system ought fairly to operate
    - and be identified with sufficient precision to yield a manageable standard
- application of more objective harm based test (Labaye re: Butler; Little Sisters)
  - two requirements:
    - the nature of the conduct causes harm or presents significant risk of harm to individuals/society in a way that undermines/threatens a value endorsed through the Constitution or similar fundamental laws
    - the harm or risk of harm is of a degree that is incompatible with the proper functioning of society

## Objectives of Criminal Law & Sentencing

### Criminal Code Section 718:

"The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives..."

- Denunciation - to denounce unlawful conduct
- General & Specific Deterrence - to deter the offender & others from committing offenses
- Protection of the Public - to separate offenders from society, where necessary
- Rehabilitation - to assist in rehabilitating offenders
- Reparations - to provide reparations for harm done to victims or the community
- Promote Responsibility - to promote a sense of responsibility in offenders & acknowledgement of the harm done to victims & the community

Note: primary consideration is given to denunciation & deterrence where an offense involves abuse of a person under 18 years (s. 718.1) or where an offense is against a police officer or other justice system participant (s. 718.2)

### Theories of Punishment:

<b>Utilitarian</b>	<b>Retributive</b>	<b>Expressive/ Communicative</b>	<b>Restorative</b>
prevent crime	maintain public support for the law	communication social norms and maintain respect for the law	maintain a peaceful society
deter incapacitate rehabilitate	retribution (vengeance) "just deserts"	denunciation censure educate	reparation healing acknowledgment of harm

### Fundamental Principles:

1. proportionality - s. 718(1): a sentence must be proportionate to the gravity of the offence & 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 (must be understandable when compared together)
3. totality - s. 718.2(c): where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh
4. restraint/last resort - s. 718.2(d)(e): an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; 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
5. aggravating/mitigating factors - s. 718.2(a): a court shall increase or reduce a sentence to account for any relevant aggravating or mitigating factors relating to the offence or the offender (see handout)
  - aggravating factors found both in the Criminal Code (s. 718.2...) and in case law
  - incorporates principles of restraint & parity
  - acknowledges over-representation of Aboriginal peoples in prisons

### Challenges in Sentencing:

- objectives aren't prioritized (except re: abuse of young persons - s. 718.1)
- evidence re: effectiveness of some of the objectives (especially deterrence & rehabilitation)
- little/no guidance re: custodial vs. non-custodial sentences or adequate guidance re: appropriate length of sentences
- mandatory minimum sentences are too inflexible to deal with exceptional circumstances - actual length of confinement isn't determined by sentencing judges anyway (i.e. parole)

Creates disparities in sentencing; disparities can be heightened based on personal characteristics - i.e. age, gender, race, class, etc.

## Sentencing Options:

- absolute discharge (s. 730) - finding of guilt without a criminal conviction; no criminal record (uncommon)
- conditional discharge (s. 731.2) - discharge conditional on conditions of probation order (e.g. counseling, staying away from someone, etc.); can be revoked if breached
- suspended sentence with probation (s. 731.1(a)) - criminal conviction; passing of sentence is suspended for up to three years to monitor behaviour in community; conduct on probation determines outcome; breach of probation can result in new charges/re-sentencing on original charges
- fine (s. 734) - max. \$500 for individual on summary offence; larger fines for federal offences (i.e. taxes)
  - recent SCC decision - offenders shouldn't be fined unless they have the means to pay
  - Can be combined with probation (s. 731.1(b))
- conditional sentence order - CSO (s. 742.1) - prison sentence served in community (different from probation); punitive in addition to rehabilitative conditions; breach will not result in a new charge but will trigger continuation of sentence with at least a portion of it in custody
  - new omnibus bill continues to narrow/restrict use of CSOs
- imprisonment - one day to life; can be served intermittently (i.e. weekends)
  - less than 2 years - provincial jail
  - 2 years or more - federal penitentiary
- ancillary orders:
  - driving prohibitions
  - firearms prohibitions
  - probation order following jail sentence
  - order to provide DNA (i.e. murder charge)
  - sex offender registry (SOIRA)
  - restitution
  - animal cruelty-related orders

## Gladue & the Sentencing of Aboriginal Offenders

### Aboriginal Offenders:

- 2% of adult population - 14% of offenders in federal penitentiaries (also overrepresented provincially)
- 1995: addition of 718.2(e) re: paying "particular attention to the circumstances of Aboriginal offenders" in sentencing - vague...
- Gladue - considers s. 718.2(e) in the context of conditional sentencing (also Wells)
  - concludes the purpose of the section is remedial - to alleviate overrepresentation; to encourage restorative justice approaches to sentencing
  - judges should take into consideration two things:
    - unique systemic/background factors that may have contributed to the offender being brought before the court
    - what types of sentencing/sanctions are appropriate to the offender's (Aboriginal) heritage/community
  - emphasis on the particular offence and the circumstances of the offender (i.e. low socio-economic status; availability of customary law)
  - factors to be considered in determining a "just sentence" may include:
    - poverty and employment
    - reduced educational opportunities
    - family dysfunction and instability
    - sexual abuse
    - alcoholism
    - racial discrimination
  - not to be construed as an assumption of shorter sentences or that non-custodial approaches are necessarily more lenient
  - notion of community (re: non-custodial options) must be defined broadly - applies on/off reserve; rural/urban - principles apply irrespective of residence
- recognition that "to achieve real equality sometimes different people must be treated differently" - Manitoba Court of Appeal (Pangman)
- unclear what impact s. 718.2(e) will have on the sentencing of Aboriginal offenders
  - Turpell-Lafond: "in ensuring that the objectives addressed by s. 718.2(e) are met, procedural implications are a matter of immediate concern as experience suggests there may be little understanding of the approach to Aboriginal offenders required by Gladue"

R. v. Gladue  
1999, SCC

Headnote Summary:

- Gladue stabbed common law husband while intoxicated; was provoked by his infidelity and insulting behaviour; plead guilty to manslaughter
- sentenced to three years imprisonment; sentencing judge considered mitigating & aggravating factors; concluded a suspended/conditional sentence was not appropriate
  - no special circumstances arising from the Aboriginal status of the accused/victim; both were living off reserve in an urban community - not "within an Aboriginal community as such"
  - offence was a serious one - sentence was appropriate
  - relied on denunciation, general (not specific) deterrence & rehabilitation
- appeal dismissed by BC Court of Appeal; appeal dismissed by SCC
  - SCC concluded the sentencing judge erred in limiting the scope of s. 718.2(e) to on reserve/rural; did not consider circumstances of the Aboriginal offender (listed principles summarized above)
  - such errors may justify new sentencing hearing but under the circumstances wasn't in the interests of justice
    - sentence was not unreasonable given the seriousness of the offence
    - sentencing conditions resulted in day parole in six months/full parole after a year
    - results were in the interests of the offender & society

Section 718.2(e) and Other Racialized Groups:

R. v. Borde & R. v. Hamilton (2003, OCA) - potentially broaden the scope of the section to include other racialized disadvantaged groups

- Borde-
  - offender - young, black male with record of violent crimes from poor neighbourhood (Regent Park); convicted of a violent crime
  - on appeal - argued sentence should be reduced due to systemic/background factors; applied to present fresh evidence (reports re: racial discrimination and systemic racism in the justice system)
    - court denied presentation of fresh evidence but acknowledged that systemic racism/background factors of young, black males from Toronto could affect sentencing in other case
    - held that sentencing judge didn't give proper consideration to age (18 years old) - reduced sentence by a year

- re: applicability of approach to 718.2(e) taken in Gladue and Wells:
  - agreed there are some similarities re: systemic/background factors affecting Aboriginals and African-Canadians and where they have shown to play a part in the offence they should be given consideration in sentencing
    - should be addressed at trial where the evidence can be tested
  - 718.2(e) places an affirmative duty on judges explicitly re: Aboriginal offenders but doesn't preclude a similar inquiry for other disadvantaged offenders
    - there is still a unique consideration for Aboriginal offenders re: restorative justice due to uniqueness of Aboriginal communities (uniqueness of African-Canadian communities not provided by the fresh evidence)
  - overall the principles applied to sentencing generally (i.e. mitigating factors, offender responsibility) are broad/flexible enough to consider the systemic/background factors relevant to the offender/offence and the values of the community of the offender
  
- Hamilton-
  - offenders (Hamilton & Mason) - black, single-mothers, no criminal records; convicted of non-violent offence re: importation of cocaine
  - sentencing judge (Hill J.) recognized mitigating factors re: gender/race/poverty (from his own research) and granted two year conditional sentences
  - on appeal (by the Crown) Doherty J.A. criticized Justice Hill for taking on the role of "advocate" in sentencing (the parties had not raised the issue of racial bias in sentencing); criticized for:
    - introducing information/statistics not subject to witness testimony, cross-examination, etc.
    - suggesting mitigating factors of gender/race/poverty were automatic rather than to be considered on a case-by-case basis
      - Court of Appeal did agree that where such factors were proven to be relevant they should be considered as mitigating factors
      - Doherty J.A. held that a "fit sentence" for drug couriers - even when preyed upon as Hamilton and Mason were - was two years imprisonment
        - decision provoked strong academic criticism for taking an unsympathetic approach to the consideration of evidence of the impact of race/gender/class on determining a fit sentence

### Note re: Gender & Poverty:

- National Council of Welfare, Justice and the Poor Report...
- Re: women:
  - concluded that Aboriginal and Black women are most overrepresented in the Ontario prison population
  - judges (and police) tend to be more lenient with women that fit a traditional (Western) female stereotype
  - discrimination in sentencing is particularly common for young women - attempts to "fix" social problems, "protect them from themselves"
  - impact of sentences is harsher on women - poverty related offences, harsher prisons, separation from children
- Re: the poor:
  - staggering degree of discrimination against the poor at all levels of the criminal justice system (especially poor young men)
  - practices that most impact the criminalization of the poor - police deployment and police discretion
    - concentration of surveillance on young men in low income neighbourhoods
  - low income offenders are less likely to be released on bail, less likely to have legal representation, etc.
    - by sentencing almost all the offenders that remain before the court come from low income backgrounds

### Bevan Report:

Review of Vic PD Jail and Use of Force Trends, Vince Bevan (2010) - re: treatment of female prisoners:

- no women's remand facility on Vancouver Island means women stay too long in Vic PD
- PD not designed for stays longer than 24 hours - no showers, exercise, etc.
- several recommendations are made...

## Interpretation of Criminal Laws

"There must be no crime or punishment except in accordance with fixed, predetermined law." (p. 26)

- law that is certain, unambiguous & not retroactive
- law that people have notice of beforehand

### Interpretation Act:

"Every enactment is deemed remedial and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects." (p. 42)

Justice Iacobucci reconciles the issue of strict and remedial construction (Bell ExpressVu limited Partnership v. Rex, et al.)

- contextual and purposive approach to statutory interpretation - Driedger: "... words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." (p. 43)
- preferred approach of the court; buttressed by the Interpretation Act
  - recognizes the important role of context in construing written words of a statute
- other principles of interpretation - strict construction of penal statutes ("Charter values" presumption) - only receive application where there is ambiguity as to the meaning of the provision
  - ambiguity must be real; words must be reasonably capable of more than one meaning
  - must consider the entire context to determine if multiple interpretations of meanings are reasonable
- first comes the contextual and purposive approach and thereafter if the words are ambiguous should you look to other principles of interpretation - i.e. strict construction of penal statutes

A generous, purposive & contextual approach is applied to interpretation of Charter rights...

- purposive - Charter right is to be interpreted in a manner consistent with its purpose (dominant concern)
- generous - furthers the purpose of the right without overshooting

Case	Application of the Legal Principles
<p><b>R. v. Pare</b> 1987, SCC</p> <p><u>Question:</u> Re: interpretation of "while committing" in relation to distinction between first and second degree murder</p> <p><u>Answer:</u> "while committing" refers to a sequence of events, temporally and causally related, part of the same transaction (<i>Stevens</i>)</p> <p>- reversed the decision of the Court of Appeal for Quebec which adopted a narrow, restricted interpretation (simultaneous acts)</p>	<p><u>Doctrine of Strict Construction:</u></p> <ul style="list-style-type: none"> <li>- strict construction of criminal statutes requires the court to adopt the interpretation most favourable to the accused; measure against Draconian penal provisions (i.e. Death penalty)</li> <li>- seriousness of imposing criminal penalties demands reasonable doubts be resolved in favour of the accused</li> <li>- applying the doctrine of strict construction depends on whether the narrow interpretation is reasonable given the scheme and purpose of the legislation <ul style="list-style-type: none"> <li>- narrow interpretation runs counter to common sense</li> <li>- difficulty of defining the beginning/end of an indecent assault</li> <li>- leads to distinctions that are arbitrary and irrational</li> </ul> </li> <li>- therefore would adopt Martin J.A.'s "single transactional" analysis (<i>Stevens</i>)</li> <li>- best expresses the policy considerations of the statute re: the principle that when someone commits a murder while already abusing power by illegally dominating another (rape, indecent assault, etc.) then the murder should be treated as exceptionally serious (and therefore be treated as first degree murder)</li> </ul>
<p><b>R. v. Nova Scotia Pharmaceutical Society</b> 1992, SCC</p> <p><u>Re:</u> vagueness of s. 32(1)(c) of the <i>Combines Investigations Act</i> (1970)</p> <p><u>Answer:</u> offense to "lessen, unduly, competition not impermissibly vague"</p>	<p><u>Doctrine of Vagueness:</u></p> <ul style="list-style-type: none"> <li>- PFJ that laws may not be too vague</li> <li>- limitations on <i>Charter</i> rights must be prescribed by law</li> <li>- founded on the rule of law; two dominating principles: <i>fair notice to citizens</i> (ignorance is not an excuse; formal notice is not a central concern in a vagueness analysis); <i>limitation of law enforcement discretion</i> (a law must not be so devoid of precision that a conviction will automatically flow from the decision to prosecute)</li> </ul>

Case	Application of the Legal Principles
<p><b><i>R. v. Heywood</i></b> 1994, SCC</p> <p><u>Re:</u> over-breadth/vagueness of CC s. 179(1)(b) (offence re: loitering for person with a past sexual violence conviction - "vagrancy")</p> <p><u>Answer:</u> section is overly broad to the extent that it violates the right to liberty proclaimed by s. 7 of the <i>Charter</i> (Cory J.)</p> <p><u>Dissent:</u> the restriction is directly related to preventing reoffending - not objectionable or overly-broad; absence of notice is not a violation of PFJ - basic tenet that ignorance of the law is not an excuse for breaking the law (Gonthier J.)</p> <p><i>Is the standard... "persons of common intelligence" or "jurists of unusual diligence"?</i></p>	<p><u>Vagueness</u> - means are not clearly defined or precise enough</p> <ul style="list-style-type: none"> <li>- meaning is unambiguous and therefore law is not vague... but the law may still be overly broad</li> <li>- does the law sufficiently delineate areas of risk?</li> <li>- is the law precise enough to constrain the action of the offender or does it create a standard less sweep?</li> <li>- does the law provide an adequate basis for legal debate and analysis?</li> </ul> <p><u>Over-breadth</u> - means are too sweeping in relation to the objective</p> <ul style="list-style-type: none"> <li>- ambit of the application of the law is difficult to define</li> <li>- the two concepts are distinct but related (may/may not coincide) - result is a lack of precision by a legislature in the means used to accomplish an objective</li> <li>- means are broader than is necessary to accomplish the objective - violates the principles of fundamental justice because individual rights will have been limited for no reason; some applications of the law will be arbitrary or disproportionate</li> <li>- may violate the <i>Charter</i>: <ul style="list-style-type: none"> <li>- s. 7 (liberty) - law that restricts freedom more than necessary is fundamentally unjust</li> <li>- s. 1 (reasonable limitations on rights/freedoms) - limitation on freedom which is broader than reasonably necessary to accomplish the state's objectives is not reasonable</li> </ul> </li> <li>- four ways to be overly broad: <ul style="list-style-type: none"> <li>geographically</li> <li>temporally</li> <li>the number of persons affected</li> <li>the absence of any notice to affected person</li> </ul> </li> </ul>

Case	Application of the Legal Principles
<p><b><i>Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)</i></b> 2004, SCC</p> <p><u>Question:</u> Should s. 43 of the Criminal Code (re: authorizing use of force by teachers/parents) be voided due to vagueness or over-breadth</p> <ul style="list-style-type: none"> <li>plaintiff argued it was overly broad by including people who shouldn't be included (children under two; children over twelve - due to empirical evidence that corporal punishment is ineffective/harmful, respectively)</li> </ul> <p><u>Answer:</u> no - strict interpretation ensured that the section was not overly broad (McLachlin C.J.)</p> <ul style="list-style-type: none"> <li>this interpretation is an appropriate exercise of judicial interpretation, not judicial amendment</li> </ul>	<p>Law must set an intelligible standard for both the citizens it governs and the officials who enforce it - people are governed by the rule of law not the rule of persons</p> <ul style="list-style-type: none"> <li>people must be able to assess when conduct approaches boundaries of criminal sanction</li> <li>words must be considered in context, in their grammatical and ordinary sense, and with a view to the legislative scheme's purpose and the intention of Parliament (<i>Rizzo</i>)</li> <li>s. 43 precisely identifies who may access it's sphere - schoolteachers; parents</li> <li>s. 43 less precisely defines what conduct falls within its sphere, but... <ul style="list-style-type: none"> <li>uses "reasonableness" - long used in law/criminal law to delineate areas of risk without the dangers of vagueness</li> <li>It is reasonable for people to know that if their conduct raises the apprehension of bodily harm they cannot rely on s. 43</li> <li>reasonableness is further defined as being based on compliance with international commitments, current social consensus, judicial interpretation (even when inconsistent - inconsistent does not mean unconstitutional)</li> <li>taken together a meaning of "reasonable under the circumstances" emerges that is sufficient to determine when conduct risks criminal sanction</li> </ul> </li> </ul> <p><u>Dissent (Arbour J.):</u></p> <ul style="list-style-type: none"> <li>appropriate for the courts to interpret provisions in a manner that least restricts liberty, consistent with the wording of the statute/intent of Parliament</li> <li>phrase "reasonable under the circumstances" is unconstitutionally vague and therefore violates children's security of person interest</li> <li>section does not give adequate notice of what is permissible in a criminal context</li> <li>section does not adequately guide decision makers/law enforcers - considerable disparity in application of judicial interpretation</li> <li>at some point interpretation (to provide precision) ends and an "entirely new provision is drafted"</li> </ul>

# Criminal Law & the Charter

## Summary of Cases by Charter Section

Charter Section/Test	Cases
<p><b>Section 1:</b> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it <b>subject only to such reasonable limits as prescribed by law as can be demonstrably justified</b> in a free and democratic society.</p> <p><b>Re: Justification:</b></p> <ul style="list-style-type: none"> <li>- the objective must be of sufficient importance to warrant an override/ substantial concern</li> <li>- the means chosen must be reasonable/ proportionate</li> </ul> <p><b>Re: Proportionality:</b></p> <ol style="list-style-type: none"> <li>1. measure is rationally connected to the objective; carefully designed - not arbitrary or unfair</li> <li>2. rational measure impairs the right/ freedom as little as possible</li> <li>3. proportionality between the effects of the measure and the sufficiently important objective - more severe the effect --&gt; more important the objective</li> </ol>	<p><b><i>Therens</i> [1985]</b></p> <ul style="list-style-type: none"> <li>- limits may be <b>prescribed by law</b> - expressly or by necessary implication</li> <li>- may result from application of a common law rule</li> </ul> <p><b><i>Oakes</i> [1986]</b></p> <ul style="list-style-type: none"> <li>- <b>proportionality test</b></li> <li>- onus of proof is on the person seeking to uphold the limit - test must be rigorous... evidence persuasive enough? availability of alternate measures?</li> </ul> <p><b><i>Elias; Orbanski</i> [2005]</b></p> <ul style="list-style-type: none"> <li>- limit may fall within scope of reasonable police authority; necessary implication of operational requirements of legislative provisions (i.e. traffic stops)</li> </ul>

Charter Section/Test	Cases
<p><b>Section 7:</b> Everyone has the right to life, liberty and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.</p> <p><b>Re: PFJ:</b> - qualifies the rights/provides context for the section (procedural &amp; non-procedural)</p> <p><u>Sections 8-14</u> - describe specific deprivations in breach of PFJ</p> <p>Whether a principle is one of fundamental justice depends on the essential role played by the principle as the legal system evolves (s. 94(2), <i>Motor Vehicle Act</i>)</p> <p>Vagueness not always detrimental - term may be given a sensible meaning by the courts (ss. 193 &amp; 195.1(1)(c) <i>CC</i>)</p>	<p><b>Hebert [1990]</b></p> <ul style="list-style-type: none"> <li>- <b>right to remain</b> silent is a PFJ - broader than <b>common law confession rule &amp; rule against self incrimination</b></li> <li>- when liberty is at stake one is not required to give evidence against oneself; there is a choice to speak or remain silent</li> <li>- if a detained suspect (subjectively) possesses an operating mind then the issue becomes whether the authorities (objectively) effectively/unfairly deprived suspect of choice to speak to authorities</li> <li>- elicitation is improper if they use subterfuge after an accused has said they don't wish to speak to them - must be eliciting behaviour</li> <li>- only applies to detainees (not undercover officers prior to detention)</li> </ul> <p><b>Nova Scotia Pharmaceutical Society [1992]</b></p> <ul style="list-style-type: none"> <li>- <b>doctrine of vagueness</b> is a PFJ - law must be "prescribed by law"; concepts of fair notice/certainty, precision/limitation of enforcement discretion, delineation of risk - must be able to provide an adequate basis for legal debate/reasoned analysis (while not impeding valid state action)</li> </ul> <p><b>USA v. Burns [2001]</b></p> <ul style="list-style-type: none"> <li>- failure of the Minister of Justice to request an assurance that the death penalty would not be imposed (as a condition of extradition) violated fugitive's rights</li> <li>- in death penalty cases assurances are constitutionally required (unless there are exceptional circumstances)</li> </ul>

Charter Section/Test	Cases
Section 7 cont.	<p><b><i>Malmo-Levine; Caine [2003]</i></b></p> <ul style="list-style-type: none"> <li>- <b>harm principle</b> is not a PFJ; state may be justified in criminalizing conduct not harmful to others</li> <li>- PFJ is that the state may not be grossly disproportionate in protecting its interests</li> </ul> <p><b><i>Singh [2007]</i></b></p> <ul style="list-style-type: none"> <li>- re: interplay between <b>confessions rule</b> &amp; s. 7 - is there an obligation to cease questioning a detainee who has asserted the <b>right to silence</b>?</li> <li>- if detainee knows they are speaking to an authority then confessions rule &amp; right to silence are functionally equivalent</li> <li>- finding of voluntariness precludes s. 7 violation (and vice versa)</li> <li>- there is no obligation to stop questioning when the right to silence is asserted but the detainee's rights must continue to be protected including the freedom not to speak to police</li> <li>- legitimate means of persuasion are permitted (except ignoring the freedom to choose to not speak)</li> <li>- persistence in the face of repeated assertions to remain silent may raise a strong argument that any subsequent statement was not a product of free will</li> </ul>

Charter Section/Test	Cases
<p><b>Section 8:</b> Everyone has the right to be secure against unreasonable search or seizure.</p> <p><b>Purpose:</b> limits whatever powers the state possesses; does not confer any powers; goes beyond mere protection of property; goes at least to <b>reasonable expectations of privacy</b></p> <p>Focus is on <b>reasonable/unreasonable impact</b> on the subject not simply the rationality of furthering a valid state objective</p> <p>Public interest in being left alone vs. state (law enforcement) action in intruding to advance its goals</p>	<p><b>Hunter v. Southam [1984]</b></p> <ul style="list-style-type: none"> <li>- protection from unjustified state intrusions upon privacy requires <i>preventing</i> unjustified intrusions</li> <li>- <b>prior authorization</b> is a pre-condition for a valid search/seizure (to assess conflicting interests)</li> <li>- authorization must be made by someone in a <b>judicial capacity</b> - neutral &amp; impartial</li> <li>- standard is <b>reasonable &amp; probable grounds</b> that an <b>offense</b> has taken place &amp; that there is <b>evidence</b> to found at the place searched</li> <li>- <b>warrantless search</b> = presumption of unreasonableness; can be rebutted</li> <li>- less stringent standards of reasonableness for seizures in administrative/regulatory contexts; distinct from criminal-quasi-criminal context (<i>Thompson Newspapers - Combines Investigation Act, McKinlay Transport - Income Tax Act</i>)</li> </ul> <p><b>Collins [1987]</b></p> <ul style="list-style-type: none"> <li>- accused bears <b>burden of proof</b> re: rights being denied/infringed</li> <li>- if accused demonstrates the search was warrantless then the Crown bears the burden of showing the search was reasonable (BOP)</li> <li>- <b>reasonable search criteria</b> - <u>authorized by law; law is reasonable; search is carried out in a reasonable manner</u></li> <li>- Crown seeking to show a warrantless search is reasonable based on</li> <li>- officer having reasonable grounds the accused was in possession of narcotics - evidence that the officer's belief/reasonable grounds for belief was based on third party information is admissible</li> <li>- no application of <b>hearsay rule</b> - truthfulness of evidence isn't being adduced - trying to establish officer's belief/grounds for belief</li> </ul>

Charter Section/Test	Cases
Section 8 cont.	<p><b>Hufsky [1988]</b></p> <ul style="list-style-type: none"> <li>- officer may demand license/insurance for inspection (i.e. <b>traffic stops</b>)</li> <li>- no REP (therefore no intrusion) re: producing license/permit/compliance with some legal requirement that is a lawful condition of exercising a right/privilege</li> </ul> <p><b>Debot [1989]</b></p> <ul style="list-style-type: none"> <li>- standard of proof = <b>RPG</b> (rather than beyond a reasonable doubt)</li> <li>- belief must be held by the person who orders the search</li> <li>- court may consider the <b>totality of circumstances</b>: whether the info predicting the offence was sufficiently compelling; credibility of the <b>tip's</b> source; whether info was corroborated by police investigation</li> <li>- police may consider the accused's past record/reputation provided it's related to the reasons for the search (reputation can't be based on hearsay)</li> <li>- level of verification relative to credibility of informer/amount of details (risk of innocent coincidence)</li> </ul> <p><b>Cloutier v. Langlois [1990]</b></p> <ul style="list-style-type: none"> <li>- power to <b>search incident to lawful arrest</b>: <u>guarantee safety of police; prevent accused's escape; acquire evidence</u></li> <li>- <b>RPG</b> of weapons/evidence is <b>not required</b> but search must have a valid objective &amp; be related to the proper administration of justice</li> <li>- search must not be conducted in an abusive fashion; use of physical/psychological constraints should be proportionate to objectives/circumstances</li> </ul>

Charter Section/Test	Cases
Section 8 cont.	<p><b>Kokesch [1990]</b></p> <ul style="list-style-type: none"> <li>- <b>perimeter search</b> (trespassing on private property/peering in windows to confirm suspicion of cultivating marijuana) = search</li> <li>- section <b>protects people not places</b> (applying <i>Hunter</i>) - not to inhibit REP re: activities on private property; REP not confined to situations involving enjoyment of property</li> <li>- warrantless search on suspicion only not authorized by <i>NCA</i> = violation</li> </ul> <p><b>Duarte [1990]</b></p> <ul style="list-style-type: none"> <li>- surreptitious <b>electronic surveillance</b> of an individual by the state generally constitutes an unreasonable search/seizure</li> <li>- no distinction between third party surveillance where neither party consent and surveillance where one party consents</li> <li>- protects against unfettered state discretion to record/transmit our words; unacceptable for the state to use this technology at their sole discretion</li> <li>- Part IV of CC requires <b>prior authorization</b> to intercept private communications; high standards must be met - other investigative methods would fail; authorization is in the best interests of administration of justice; <b>RPG</b> that an offence has been/is being committed &amp; that the surveillance will afford evidence of the offense</li> </ul> <p><b>Wong [1990]</b></p> <ul style="list-style-type: none"> <li>- surreptitious <b>video surveillance</b> of an individual with a REP by the state can constitute a search/seizure</li> <li>- test for REP is whether the person can legitimately claim that under the circumstances it should not have been open to the state to act as they did without previous authorization - question should be framed broadly &amp; in neutral terms</li> <li>- REP in a <b>hotel room</b> - even when strangers are invited in and the accused is carrying on illegal activities (gambling)</li> </ul>

Charter Section/Test	Cases
Section 8 cont.	<p><b><i>Mellenthin</i> [1992]</b></p> <ul style="list-style-type: none"> <li>- <b>vehicle search</b> - violation of rights when stopped at a police check stop &amp; questioning re: contents of a bag resulted in accused producing a bag containing narcotics</li> <li>- check stop only authorized detecting impaired drivers/unsafe vehicles; not a means to conduct unfounded general inquiries</li> <li>- no suspicion of contraband upon questioning; could be assumed the accused felt compelled to respond; no evidence of informed consent</li> </ul> <p><b><i>Belnavis</i> [1997]</b></p> <ul style="list-style-type: none"> <li>- <b>vehicle search</b> - all facts surrounding a passenger's presence must be considered to determine if passenger has <b>REP</b> - i.e. ownership/control of vehicle; relationship with owner/driver</li> <li>- officer was entitled to search for ownership docs and to look in the backseat (safety; to question other passenger)</li> <li>- officer had RPG to believe the bags contained stolen property</li> </ul> <p><b><i>Grant</i> [1993]</b></p> <ul style="list-style-type: none"> <li>- re: <b>validity of search warrant</b> - facts obtained as a result of unreasonable search must be excised</li> <li>- court must determine is warrant would have been issued otherwise</li> </ul> <p><b><i>Borden</i> [1994]</b></p> <ul style="list-style-type: none"> <li>- <b>consent search</b> - in order to waive one's right the person purporting consent must be possessed of the requisite informational foundation for true relinquishment; must have sufficient information to make one choice over another</li> <li>- re: blood sample for use in a sexual assault investigation - consent form must make clear the <b>scope of the investigation</b> (i.e. two assaults not just the one the suspect was arrest for)</li> </ul>

Charter Section/Test	Cases
Section 8 cont.	<p><b>Edwards [1996]</b> Principles to consider re: s. 8:</p> <ul style="list-style-type: none"> <li>- claim for relief under <b>s. 24(2)</b> - can only be made by the person violated</li> <li>- personal right (like all <i>Charter</i> rights) - <b>protects people not places</b></li> <li>- must establish violation in order to challenge the legality of a search</li> <li>- two distinct inquiries: <u>reasonable expectation of accused's privacy (REP)</u>; <u>reasonableness of search conducted by the police</u></li> <li>- <b>REP</b> based on <b>totality of circumstances</b>, including: presence at time of search; possession/control of property/place searched; ownership of property/item; ability to regulate access to the place; subjective expectation of privacy; objective reasonableness of the expectation</li> </ul> <p><b>Feeney [1997]</b></p> <ul style="list-style-type: none"> <li>- <b>warrantless entry of dwelling house to effect arrest</b> = violation when police not in hot pursuit; court left open the general exception to warrant requirement for exigent circumstances (now see ss. 529; 529.5)</li> </ul> <p><b>Golden [2001]</b></p> <ul style="list-style-type: none"> <li>- no automatic grounds to conduct a <b>strip search</b> even when incident to lawful arrest</li> <li>- must also have <b>RPG</b> to search for weapons in order to ensure safety of police; discover/preserve evidence</li> <li>- should generally be conducted at the <b>police station</b> unless there are exigent circumstances (RPG) requiring search prior to being transported</li> </ul> <p><b>Buhay [2003]</b></p> <ul style="list-style-type: none"> <li>- <b>rental locker</b> = REP; reasonable to expect to be free from unauthorized search by security guards/police unless there was an emergency/exigent circumstances</li> <li>- security guards are not state actors - not subject to <i>Charter</i> scrutiny</li> </ul>

Charter Section/Test	Cases
Section 8 cont.	<p><b>Mann [2004]</b></p> <ul style="list-style-type: none"> <li>- <b>limited power to detain for investigation</b> (not a hunch; not a de facto arrest); RG to detain based on objective view of totality of circumstances; reasonable suspicion the the individual is implicated in the criminal activity under investigation</li> <li>- reasonableness assessed against the extent interference with liberty is necessary for police to perform duties; nature/extent of interference</li> <li>- <b>search incident to lawful detention</b> - may conduct a <b>protective pat down</b> for safety; search must be reasonable/scope of intrusion confined to reasonably local weapons</li> </ul> <p><b>Tessling [2004]</b></p> <ul style="list-style-type: none"> <li>- use of <b>infrared camera</b> re: patterns of heat distribution on external surfaces of house ≠ a search within meaning of s. 8</li> <li>- info gathered via this technology by itself is not sufficient grounds for a search warrant</li> <li>- technology was non-intrusive/did not disclose biological core info/ intimate details - no REP to this information</li> </ul> <p><b>Kang-Brown [2008]</b></p> <ul style="list-style-type: none"> <li>- <b>sniffer dogs</b> = search (because of significance/quality of information obtained about concealed contents)</li> <li>- apply standard of RPG (in absence of statutory provisions)</li> </ul> <p><b>Patrick [2009]</b></p> <ul style="list-style-type: none"> <li>- <b>abandonment of garbage bags</b> - no REP in totality of circumstances</li> <li>- court considered: nature of evidence gathered; accused's direct interest in contents; subjective EOP/reasonableness; location of search; trespass by police/intrusiveness; evidence in public view; abandonment; third party obligation of confidentiality; exposure of intimate/biological info</li> </ul>

Charter Section/Test	Cases
<p>Section 9: Everyone has the right not to be arbitrarily detained or imprisoned.</p>	<p><b><i>Therens [1985]; Hufsky [1988]</i></b></p> <ul style="list-style-type: none"> <li>- random stopping of a motorist for the purpose of <b>spot check procedures</b> (driver's license/proof of insurance; sobriety) = detention</li> <li>- officer assumes control over movement of the motorist by demand/direction that may have significant legal consequences</li> <li>- this detention is arbitrary where provincial legislation empowers officer but leaves the choice of drivers to be stopped to the <b>discretion</b> of the officer - discretion is arbitrary when there is no governing criteria</li> <li>- right not to be arbitrarily detained may be subject to reasonable limits (s. 1) - could be found in provincial motor vehicle legislation (i.e. s. 189a(1), <i>Highway Traffic Act</i>)</li> </ul> <p><b><i>Ladouceur [1990]</i></b></p> <ul style="list-style-type: none"> <li>- same as above</li> <li>- once stopped the only <b>questions</b> that may justifiably be asked are those related to driving offences</li> <li>- more intrusive procedures may only be undertaken based on RPG</li> </ul> <p><b><i>Mann [2004] (also Simpson [1993])</i></b></p> <ul style="list-style-type: none"> <li>- <b>limited power to detain for investigation</b> (not a hunch; not a de facto arrest); <b>RG</b> to detain based on objective view of totality of circumstances; reasonable suspicion the the individual is implicated in the criminal activity under investigation</li> <li>- reasonableness assessed against the extent interference with liberty is necessary for police to perform duties; nature/extent of interference</li> <li>- <b>search incident to lawful detention</b> - may conduct a <b>protective pat down</b> for safety; search must be reasonable/scope of intrusion confined to reasonably local weapons</li> </ul>

Charter Section/Test	Cases
<p>Section 9 cont.</p>	<p><b>Clayton [2007]</b></p> <ul style="list-style-type: none"> <li>- re: 911 call - black males with guns in parking lot; within minutes police block exits/stop accused's vehicle; upon receiving evasive answers to questions they ask him to exit vehicle; police locate weapons</li> <li>- police were <b>acting in the course of their duty</b> to investigate/prevent crime when they stopped/detained the accused</li> <li>- initial &amp; continuing detentions were justified: based on information available to police; nature of reported offense; timing/location of detention</li> <li>- police actions were temporally, geographically, logistically responsive to circumstances; reasonably necessary to respond to seriousness of offense &amp; threat to police/public safety</li> <li>- information received prior/during course of investigation constituted <b>reasonable suspicion</b></li> <li>- safety concerns justified searches incidental to arrest</li> </ul>
<p><u>Section 10:</u> Everyone has the right on arrest or detention</p> <p>(a) to be informed promptly of the reasons therefor;</p> <p>(b) to retain and instruct counsel without delay and to be informed of that right; and</p> <p>(c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention was not lawful.</p>	<p><b>Therens [1985]</b></p> <ul style="list-style-type: none"> <li>- <b>meaning of detention</b> - restraint of liberty other than arrest in which a person may reasonably require the assistance of counsel but may be prevented/impeded from retaining/instructing counsel without delay</li> <li>- police/agent of the state assumes control over the movement of a person by demand/direction which may have <b>significant legal consequence</b> and which prevents/impedes access to counsel</li> <li>- there must be <b>compulsion/coercion</b> which amounts to detention within this meaning; does not need to be physical compulsion</li> <li>- detention may be effected without application/threat of physical restraint if the person submits to the deprivation of liberty and reasonably believes the choice to do otherwise doesn't exist</li> </ul>

Charter Section/Test	Cases
Section 10 cont.	<p><b><i>Thomsen [1988]</i></b></p> <ul style="list-style-type: none"> <li>- motorist is required to comply with the demand to provide samples for analysis in a <b>roadside screening device</b> (RSD)</li> <li>- there is detention; compulsion is due to possible criminal liability from non-compliance &amp; from reasonable belief one does not have a choice not to comply</li> <li>- motorist is <b>not entitled to retain/instruct counsel</b> and to be informed of that right - provisions constitute a <b>reasonable limit</b> under s. 1</li> </ul> <p><b><i>Elias; Orbanski [2005]</i></b></p> <ul style="list-style-type: none"> <li>- provincial legislation didn't contain an express limit on right to counsel at the time (see above) re: roadside screening techniques (testing/questioning re: prior alcohol consumption)</li> <li>- limitation was implied by statutory right to stop vehicles/duty to enforce</li> </ul> <p><b><i>Manninen [1987]</i></b></p> <ul style="list-style-type: none"> <li>- <b>right to counsel</b> - imposes at least two duties on police in addition to the duty to inform detainees of their rights:</li> <li>- police must give accused/detained person a <b>reasonable opportunity to exercise the right</b> to retain/instruct counsel without delay</li> <li>- police must <b>refrain from attempting to elicit evidence</b> from the detainee until they have had a reasonable opportunity to retain/instruct counsel</li> </ul>

Charter Section/Test	Cases
Section 10 cont.	<p><b><i>Moran [1987]; Voss [1989]</i></b></p> <ul style="list-style-type: none"> <li>- re: determining whether a person who is subsequently an accused was <b>detained at the time of questioning - relevant factors</b> (non-exhaustive):</li> <li>- precise language used by officer in requesting the person come to the police station; was there a choice or an expressed preference?</li> <li>- was the accused escorted or came in response to a police request?</li> <li>- did the accused leave or were they arrested upon conclusion of the interview?</li> <li>- stage of the investigation - general questioning or for the purposes of obtaining an incriminating statement?</li> <li>- RPG to believe the accused had committed the offense?</li> <li>- nature of the questions - general or confronting accused with evidence pointing to their guilt?</li> <li>- subjective belief of detainment is relevant but not decisive - issue is whether the accused reasonably believed they were detained</li> <li>- re: subjective belief - consideration given to personal circumstances (i.e. low intelligence, emotional disturbance, youth, lack of sophistication)</li> </ul> <p><b><i>Brydges [1990]; Pozniak [1994]</i></b></p> <ul style="list-style-type: none"> <li>- re: <b>10(b)</b> - as a matter of routine detainees <b>must be informed of existence/availability of duty counsel/legal aid</b>; advised of system for free, immediate preliminary legal advice and how to access it</li> <li>- consistent with one of the main purposes underlying 10(b) - to facilitate contact with counsel</li> <li>- this additional duty may effect what constitutes due diligence in the exercise of the right to counsel</li> </ul>

Charter Section/Test	Cases
Section 10 cont.	<p><b>Evans [1991]</b></p> <ul style="list-style-type: none"> <li>- re: <b>10(a)</b> - governed by the reasonable understanding of the detainee (rather than the formalism of the precise words used) under the circumstances of the case</li> <li>- re: <b>10(b)</b> - police must restate accused's right to counsel when there is a fundamental/discrete change in the purpose of the investigation (i.e. different/unrelated/more serious offense than contemplated at the time of the original warning)</li> </ul> <p><b>Prosper [1994]</b></p> <ul style="list-style-type: none"> <li>- 10(b) does not create a constitutional obligation on governments to ensure free/immediate legal advice is available to all detainees (<b>Matheson</b>)</li> <li>- where a detainee indicates a desire to exercise right to counsel the state is required to provide a reasonable opportunity to do so</li> <li>- must refrain from eliciting incriminating evidence from the detainee in the meantime</li> <li>- what constitutes a "reasonable opportunity" will depend on the circumstances (including the availability of duty counsel); might extend to when legal aid office opens, a private lawyer willing to provide free summary advice is reached, or when the detainee is brought before a JP for bail purposes</li> <li>- during this time the accused remains detained (in accordance with s. 7)</li> <li>- if they have trouble reaching counsel and change their mind police are still required to advise re: rights/refrain from take statements, etc.</li> <li>- once a detainee asserts their right to counsel there must be clear indication they have changed their mind; the burden of establishing an unequivocal waiver will be on the Crown - waiver must be free &amp; voluntary/not the product of direct/indirect compulsion</li> </ul>

Charter Section/Test	Cases
Section 10 cont.	<p><b>Grant [2009]</b></p> <ul style="list-style-type: none"> <li>- re: <b>psychological detention</b> - court should consider the following:</li> <li>- if police were providing <b>general assistance</b>/maintaining general order/ making general inquiries or signaling out the individual for <b>focused investigation</b></li> <li>- nature of the <b>police conduct</b> - language used, physical contact, place the interaction occurred, presence of others, duration of encounter</li> <li>- particular <b>characteristics/circumstances of the individual</b> where relevant - age, physical stature, minority status, level of sophistication</li> <li>- if police are concerned their conduct may have a coercive effect they may inform the subject that they are under no obligation to answer questions &amp; are free to go</li> </ul> <p><b>Suberu [2009]</b></p> <ul style="list-style-type: none"> <li>- "without delay" means "immediately" - immediacy of the obligation is subject to concerns for officer/public safety or reasonable limits prescribed by law &amp; justified under s. 1</li> <li>- detention occurs when police conduct would cause a reasonable person to conclude they are <b>no longer free to chose whether to cooperate</b></li> <li>- cannot assume there was detention from the beginning of the interaction (even if it ultimately results in detention)</li> </ul> <p><b>Sinclair [2010]; McCrimmon [2010]</b></p> <ul style="list-style-type: none"> <li>- <b>right to counsel generally only requires a single consultation upon request except when there is a change in circumstances</b></li> <li>- there is no general right to repeated consultations/presence of counsel in the interrogation room (re: custodial interrogation)</li> <li>- changes may include: new procedures, change in jeopardy, reason to question detainee's understanding of their 10(b) right</li> <li>- change must be objectively observable to trigger new duties</li> </ul>

Charter Section/Test	Cases
<p><u>Section 11:</u> (re: proceedings) Any person charged with an offense has the right</p> <ul style="list-style-type: none"> <li>(a) to be informed without reasonable delay of the specific offense;</li> <li>(b) to be tried within a reasonable time;</li> <li>(c) not to be compelled to be a witness in proceedings against that person in respect of the offense;</li> <li>(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;</li> <li>(e) not to be denied reasonable bail without just cause;</li> <li>(f) except in the case of an offense under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or more severe punishment;</li> <li>(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offense under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;</li> <li>(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried and punished again; and</li> <li>(i) if found guilty of the offense and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.</li> </ul>	<p><b>Oakes [1986]</b></p> <ul style="list-style-type: none"> <li>- <b>presumption of innocence</b> [11(d)] - requires the accused be proven guilty beyond a reasonable doubt; the state must bear the burden of proof</li> <li>- criminal prosecutions must be carried out in accordance with lawful procedures &amp; fairness</li> <li>- statutory provisions requiring the accused to disprove on a BOP the existence of a presumed fact which is an important element of the offence is a violation of s. 11(d)</li> <li>- for a reverse onus provision to pass the rational connection part of the s. 1 analysis there is no general requirement that the provision be internally rational/that there is a logical connection between the presumed fact and the fact substituted by the presumption</li> <li>- but... lack of a rational connection is a factor to be considered in applying the third stage of the <i>Oakes</i> test</li> </ul>

## Oakes Test Re: Charter Violation

### **R. v. Oakes 1986, SCC**

Question: Does s. 8 of the Narcotics Control Act violate s. 11(d) Charter right re: presumption of innocence by imposing a burden on the accused to prove they weren't in possession of narcotics for the purpose of trafficking?

Answer: yes - provision is unconstitutional - as per s. 11 and s. 1 (Dickson C.J.C.)

#### Legal Principles:

- s. 11 - violates presumption of innocence by requiring an accused to disprove on a balance of probabilities the existence of a presumed fact (that possession was for the purposes of trafficking) that is an important element of the offence in question
  - an accused person could therefore be convicted despite the presence of reasonable doubt, which violates the presumption of innocence
  - appropriate stage for invoking the "rational connection test" (a basic fact may rationally tend to prove a presumed fact) is s. 1 of the Charter
- s. 1 - possession of a small/negligible quantity of narcotics does not support the inference of trafficking - fails the "rational connection test" of the "proportionality test" ...
  - stringent standard of justification for curtailing Charter rights
    - standard of proof is the civil standard - proof beyond preponderance of reasonability (vs. criminal standard - proof beyond a reasonable doubt - this would be unduly onerous on the party seeking to limit the right)
  - two criteria:
    - the objective being met by the limitation must be high enough to warrant overriding constitutionally protected rights and freedoms
    - if the objective is significantly sufficient then the means to achieve the objective must be reasonable and demonstrably justified - determined using a "proportionality test"
  - proportionality test criteria:
    - measures must not be arbitrary, unfair, or based on irrational considerations; must be carefully designed to meet the objective ("rational connection")
    - if rationally connected then the measures should impair the right/freedom as little as possible
    - there must be proportionality between the effects of the measure and the sufficiently important objective

- applying the test to Oakes:
  - legislative objective of "curbing drug trafficking by facilitating the conviction of traffickers" is sufficient for overriding a constitutional right
  - but... the over inclusiveness of the measure could lead to results that defy rationality and fairness

## Section 24: Exclusion of Evidence

Charter section 24: provides remedy in the case of infringement of Charter rights in the process of law enforcement

- 24.1 - whatever the court deems appropriate and just
- 24.2 - "evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceeding would bring the administration of justice into disrepute"
- re: breach - must distinguish between a law and state action (see handout)
  - "good faith" - police are entitled to presume the law they are following is constitutional
    - but... it cannot be claimed if the violation is committed on the basis of an officer's unreasonable error or ignorance of scope of authority
- highly controversial - sacrifice of "truth seeking" in favour of "legalistic interpretation of rights"

Collins Test: (original test)

1. impact of admission of the evidence on the fairness of the trial?
2. seriousness of the Charter violation?
3. impact of the inclusion/exclusion of the evidence on the administration of justice?

Stillman Test: (describes the types of evidence; basic principle)

- guiding case on how to determine the first question (re: fairness) in the Collins test
- case: 17 year old male is arrested for murder; lawyers informed the police he was not to consent to bodily samples or be interviewed without his lawyers; police proceed to obtain evidence (bodily samples) by threat of force and interrogate him without counsel/parents present
  - trial judge found the samples had been obtained in a manner that violated his rights but allowed them anyway; allowed DNA sample from a discarded tissue; found guilty of first degree murder by a jury
  - New Brunswick Court of Appeal (1995) - majority dismisses appeal; dissent would have ordered new trial on the grounds that the evidence should have been excluded (s. 24.2)
  - appeals to SCC - fairness of a trial will be adversely affected if the evidence is conscriptive and not discoverable

- admission of such evidence essentially compels the accused to participate in their own prosecution; contrary to principle against self-incrimination
- conscriptive evidence - the accused is compelled, in violation of their Charter rights, to incriminate them self by way of a statement, the use of the body or the production of bodily samples
- derivative evidence - involves a Charter violation where the accused is conscripted against them self - usually by an inculpatory statement - leading to the discovery of the real evidence
  - may be considered conscriptive evidence also because the accused's statement is the cause of the discovery of the evidence
- conscriptive evidence (including derivative evidence that is also conscripted) will likely render a trial unfair; non-conscriptive evidence rarely does
- discoverable evidence - evidence that would have discovered in the absence in the unlawful conscription of the accused; Crown must demonstrate one of these two conditions on a balance of probabilities:
  - there was an independent source for the evidence
  - that the lawful discovery of the evidence was inevitable
- Collins test augmented by Stillman (see attached):
  - step 1 - re: trial fairness - is the evidence conscriptive?
    - yes - was is otherwise discoverable?
      - yes - go to step 2...
      - no - exclude - inclusion will generally render the trial unfair ("automatic exclusion rule")
    - no - go to step 2...
  - step 2 - seriousness of the breach?
  - step 3 - impact of exclusion/inclusion?

**R. v. Buhay  
2003, SCC**

Summary: (application of Stillman test)

- marijuana confiscated from rented locker at a bus depot without a warrant
- trial judge - found a Charter breach (re: search and seizure); evidence excluded; accused acquitted
- Crown appealed & got a conviction
- SCC - appeal held; acquittal restored
- Arbour J. (majority):

- step 1 - evidence was non-conscriptive (concept of discoverability only relevant if conscriptive) so didn't affect trial fairness
- step 2 - seriousness of the breach; evaluation of police conduct?
  - was police conduct done in good faith/inadvertently/merely a technical error or was it a deliberate/gratuitous/blatant disregard for Charter rights?
  - what's the level of obtrusiveness?
  - what's the expectation of privacy?
  - existence of reasonable/probable grounds?
    - conclusion: violation on a whole was serious
      - officers demonstrated disregard for the accused's rights (didn't cross one's mind to get a warrant; the other considered a warrant but thought they lacked sufficient grounds) - aggravating
      - no situation of urgency or necessity - aggravating
      - availability of other investigative techniques; evidence could have been obtained without the violation - aggravating
      - search was not obtrusive - mitigating
      - accused had a lower expectation of privacy - mitigating
- step 3 - the effect of exclusion of the reputation of the administration of justice?
  - conviction turned on the admissibility of the evidence; charge is for serious offences
  - but... trial judge concluded these factors were outweighed by the officers' disregard for the accused's rights and the longer term effects of their attitude
    - admitting the evidence may encourage similar police conduct in the future
    - acceptable for a court to protect the reputation of the administration of justice at a local level (does not have to have national effect)
- constitutional question: will the admission of the evidence bring the administration of justice into disrepute?
- answer: yes - it was within the trial judge's discretion to conclude that the admission of the marijuana would cause greater disrepute than excluding it; decision is reasonable

#### Principles of the Collins/Stillman Test:

- permitting conscripted evidence amounts to compelling an accused to participate in their own prosecution
- such compulsion violates the principle against self-incrimination
- to admit conscripted evidence that could otherwise not be admitted (because it was not otherwise discoverable) creates an unfair trial
- courts must not create unfair trials as it would bring the administration of justice into disrepute

But... Collins/Stillman test was criticized for seeming to set up an automatic exclusion at the first stage (fairness)

- could result in the exclusion of valuable evidence even in the case of a comparatively minor breach of rights
- Laskin J.A. - R. v. Grant - rejected the "automatic exclusion rule"; said s. 24(2) requires the court to consider all the circumstances and that a degree of fairness be assessed in determining whether evidence should be excluded
  - admission of conscripted, non-discoverable evidence will not always bring the administration of justice into greater disrepute than its exclusion
  - criteria: reliability of the evidence; nature of the infringing conduct

R. v. Grant  
2009, SCC

Summary: (currant test - balances all three factors)

- young black man is stopped while walking down the street by three police officers; surround him & question him; accused reveals he's carrying marijuana and a firearm; he is arrested, searched, etc.
- trial - accused alleged violations of rights - s. 8, 9, 10(b); judge found no breach of Charter rights; admitted firearm; convicted of five firearm offences
- appeal - concluded that a detention had crystallized prior to the accused making incriminating statements and that the detention was arbitrary and in breach of s. 9; held that the gun should be admitted; upheld the convictions
- SCC - gun should be admitted under s. 24(2); appeal dismissed
- McLachlin C.J. & Charron J. (majority):
- question: whether evidence was obtained in breach of rights; whether the evidence should be excluded under s. 24(2)
  - requires: interpretation of "detention" (Charter s. 9-10); test for excluding evidence (s. 24(2))
- answer:
  - yes - there was a breach re: s. 9 and s. 10(b) (see below)
  - no - firearm is admissible
- test for exclusion:
  - Stillman test has been read as creating an all-but-automatic exclusion for non-discoverable conscripted evidence; s. 24(2) requires consideration of "all the circumstances"
    - trial fairness should be viewed as an overarching goal that satisfies the public interest in the truth while preserving basic procedural fairness to the accused (as per R. v. Harrar)
  - purpose of s. 24(2) is to "maintain the good repute of the administration of justice"
    - embraces maintaining the rule of law and upholding the Charter

- concerned with systemic issues - broad impact of the long-term maintenance of the integrity/public trust in the justice system ("reasonable person" standard)
- focus is prospective - breach has already occurred; looks to prevent further damage to the reputations of the system
- three avenues of assessing/balancing the effect of admission of evidence:
  - seriousness of the Charter-infringing state conduct
    - main concern is to preserve public confidence in the rule of law and its processes
    - spectrum from inadvertent/minor violations to willful/reckless disregard for rights
    - negligence/willful blindness does not equal good faith
  - impact of the breach on the Charter-protected interests of the accused
    - the extent to which breach undermined the interests protected by the right infringed
    - range from fleeting/technical to profoundly intrusive
  - society's interest in the adjudication of the case on its merits
    - would the truth seeking function of the criminal trial process be better served by the inclusion or exclusion of the evidence
    - "balancing the interests of truth with the integrity of the justice system" (para. 82)
    - importance of the evidence to the prosecution's case
    - seriousness of the offence - can cut both ways
      - interest in having a justice system above reproach, especially in penal matters
- types of evidence:
  - statements of the accused (engages the principle against self-incrimination) - tend to be excluded (not automatic)
    - concern with proper police conduct
    - centrality of the interests protected
    - may be affected by lack of reliability
  - bodily evidence - requires a flexible test based on all the circumstances
    - general exclusion - intrusion is deliberate; impact on privacy, bodily integrity, dignity is high (notwithstanding relevance/reliability)
    - general inclusion - violation is less egregious; intrusion is less severe (evidence is reliable)
  - non-bodily physical evidence - depends on the extent to which the conduct was deliberate or egregious
    - privacy is the principle interest; dignity
    - reliability of evidence will tend to weigh in favour of inclusion
  - derivative evidence - apply all three levels of inquiry - consider self-incriminating origins & status as real evidence
    - general exclusion - deliberate, egregious state conduct; severe impact on protected interests
    - general inclusion - good faith infringement; did not greatly undermine protected interests

- discoverability of the evidence may be a factor
- application of the test to the case:
  - gun is derivative evidence (found due to self-incriminating statements)
  - step 1 - police conduct did not conform with the Charter but was not abusive
    - went too far; mistaken view that they had not detained the accused - understandable
    - conclusion: breach was not deliberate or egregious
  - step 2 - casual conversation subtly turned into a coercive situation
    - deprived the accused of his freedom to make an informed choice as to how to respond
    - engaged his liberty interests through arbitrary detention - more than minimally; not severely
    - engaged his right to counsel (s. 10(b)) - had no opportunity to seek legal advice
      - the evidence (the gun) was non-discoverable - aggravates the breach
    - conclusion: impact of infringement of rights was significant (but not at the most serious end of the scale)
  - step 3 - the gun is reliable; essential to the case; offence is serious
    - but... seriousness of the offence makes it all the more important for rights to be respected (not considered to be of much assistance)
    - conclusion: value of evidence is considerable
  - weighing/balancing the factors - this is a "close case"
    - significant impact of the breach favours exclusion
    - public interest in adjudicating the case on its merits favours inclusion
    - the police officers were operating in an area of legal uncertainty - tips the balance in favour of admission (distinguishable from R. v. Harrison, 2009, SCC)
      - decision released concurrently with Grant - OPP begins to pull over an SUV for not having front plates; discovers it's a rental from YVR; decides to pull the vehicle over anyways to avoid affecting the integrity of the police in the eyes of observers (by abandoning the detention)
      - suspicions are aroused; driver has no licence; runs computer checks on driver and occupant; arrests driver for driving while suspended; proceeds to search the vehicle "incident to arrest" though the missing driver's license is irrelevant to the charge; cocaine is discovered; charges ensue...
      - trial judge - admitted the cocaine; accused was convicted of trafficking; appeal was dismissed
      - McLachlin C.J. (majority):
        - violation of ss. 8 & 9 re: detention and search
          - officer should not have made the initial stop
          - search of the vehicle was not incidental to the arrest for driving while suspended
        - evidence excluded

## Investigation & Prosecution of Crime

### Crime Control vs. Due Process (Herbert Packer):

	<b>Crime Control</b>	<b>Due Process</b>
Metaphor	The Assembly Line	The Obstacle Course
Goal	Conviction of the Guilty	The Protection of Rights
Core Value	Truth	Fairness

### Aboriginal Perspectives - Key Structural Differences:

- crime is against the state
  - system is adversarial
  - inability to translate some legal concepts
  - role of institutional actors
  - nature of penalties
- \*Aboriginal Concepts of Justice, M.E. Turpel

### Gender & Criminal Law - Key Areas of Feminist Critiques:

- the myths of neutrality
- critique of what is criminal
- critique of doctrines of criminal responsibility
- critique of focus on liberty, not victims
- critique of penal practices

## Search & Seizure

### Search:

- an examination...
- by an agent of the state...
- that constitutes an intrusion...
- upon an individual's reasonable privacy interests (Evans, 1996, SCC)

### Seizure:

- the taking of a thing from a person by a public authority without the person's consent (Dyment 1988, SCC)
- the non-consensual taking by state officials of an item in which the citizen has a reasonable expectation of privacy (Borden 1994, SCC)

### Collins - Section 8 Framework:

Re: reasonable search - what is "reasonable" depends on context...

- authorized by law
  - by statute or common law that sets out scope; indicates whether may be warranted or warrantless (see warrants)
- the authorizing law is reasonable
  - Hunter v. Southam - re: search provisions in Combines Investigation Act - sets out general criteria (see chart above)
    - Section 8...
      - protects reasonable expectations of privacy
      - protects people, not places
      - does not confer power upon the state; confers protections upon the individual
- the authorized search is conducted reasonably
  - Hunter v. Southam standard for reasonable search
    - prior authorization
    - by someone in a judicial capacity - independent, impartial
    - on reasonable and probable grounds - demonstrates that the state's interests trump the individual's right to privacy
      - an offence has taken place
      - evidence will be found
      - evidence will be found in the place searched

Privacy:

- right to be let alone (Hunter quoting Katz v. US)
- right to control dissemination of biological core of personal information
  - including information tending to reveal intimate details of lifestyle and personal choices (Plant)
- personal; territorial; informational

Reasonable Expectation of Privacy (REP):

Reasonable Expectation	No Reasonable Expectation
Your bodily samples ( <i>Stillman</i> )	Garbage bags at edge of property ( <i>Patrick</i> ) *left at edge of property
Entry into your home ( <i>Feeney</i> )	Exterior heat pattern of your house ( <i>Tessling</i> )
Business records in your place of business ( <i>Hunter v. Southam</i> )	Regulatory seizure of documents ( <i>Thompson Newspaper</i> )
Closed areas of your car when you are owner/operator ( <i>Belnavis; Harrison</i> )	Contents of vehicle when you're a passenger ( <i>Belnavis</i> )
Rented bus depot locker ( <i>Buhay</i> )	Girlfriend's apartment ( <i>Edwards</i> )

High Expectation of Privacy -----

- home
- bodily samples
- things within the body (i.e. ingested)
- strip search
- trunk of your car
- files on computer (password protected?)

Lower Expectation of Privacy

- open area of your property/common areas
- things on the body (i.e. pockets, purse)
- frisk/pat down
- open area of your car
- bus/school locker
- online activities

## Assessing Police Conduct:

Whenever you come across an exercise of police power (search, arrest, use of force, etc.) ask these three questions...

1. By what authority did the officer act?
2. Did the officer comply with the legal authority?
3. Is the legal authority constitutional?

## Reasonable Grounds (RPG):

- Wong - gaming house in hotel; videotape; excluded (s. 8) & 24(2)
  - Ont. CA - no expectation of privacy; invited public
  - SCC - expectation of privacy against the state (**videotape or undercover police officer?**); but included the evidence under 24(2) - appeal dismissed
- Tessling - heat patterns/grow-op - evidence admitted (no breach)
  - difference between personal privacy & territorial privacy
  - heat pattern not enough for a warrant - can't determine specific person (vs. sniffer dog)
- Kang-Brown - bag searched by cops/sniffer dog in bus station; A.M. - sniffer dog in high school
  - similarities - sniffer dogs, backpacks, search for drugs
  - s. 8 violation - expectation of privacy in bags
  - common law - police entitled to do sniffer dog searches of bags under reasonable grounds
  - no reasonable grounds to search (both cases); evidence excluded under 24(2)
  - sniffer dogs can be used in some situations - court creates a new standard - **what standard - i.e. airports?**
- Patrick - garbage bags
  - gave up right to privacy when put bags at curb/edge of property where anyone could access them

## Warrants:

- Information on oath required: reasonable grounds; sworn to be true
  - reasonable grounds
    - specific "seizable" thing/information
    - related to a specific offense that has/will be committed
    - in or from a specific person/place
- issued by a "judicial officer"; judges have discretion; limited powers of review
  - gives authority while placing limits

## Arrest & Detention

### Types of Offences:

- summary - least serious offences
- hybrid - medium serious (considered indictable until the Crown decides to pursue as an indictable or summary offence)
- indictable - serious offences
  - "special" indictable offences: section 469 - the big ones (murder, etc.); section 553 - less serious indictable

### Civilian Arrest Powers - Section 494:

Civilian may arrest a person without warrant when...

- finds someone committing an indictable offence
- reasonable grounds that the person is being pursued for lawful arrest for any offence
- finds someone committing any criminal offence in relation to his/her property

### Police Arrest Powers- Section 495:

Police may arrest a person a person without a warrant (authorized by common law or statute) when...

- has reasonable grounds to believe person has committed or is about to commit an indictable offence
- finds committing any offence
- has reasonable grounds to believe the person is subject to an arrest or committal warrant

BUT a police officer shall not arrest without a warrants if...

- a summary, hybrid, or s. 553 offence;
- the officer has reasonable grounds to believe arrest is not necessary in the public interest, AND
- the officer has no reasonable grounds to believe the person won't attend court

### Necessary in Public Interest:

- R - repetition
- I - identity
- C - continuation
- E - evidence
- S - safety of any person (sometimes)

### Reasonable & Probable Grounds (RPG) - R v. Storrey:

- subjective & objective grounds required
- "a reasonable person, standing in the shoes of the police officer" would have believe RPG existed
- bias/prejudice will undermine reasonableness

### Arrest Without a Warrant:

- see chart -
  - citizen arrest
  - release by police
  - getting an accused to court
    - appearance notice - issued at the scene by police officer; gives a court date
    - promise to appear - issued by police officer after arrest; usually at the station; gives a court date
    - recognizance (bond) - issued by police officer after arrest; usually at the station; gives a court date
    - summons - issued by the court; telling person to attend court on a specific date
    - arrest warrant - issued by court at the time charges laid (information sworn)
    - court release - after bail hearing
    - detention order - after a bail hearing; court orders the accused detained custody until completion of matter

### Search Incidental to Arrest:

- basic principles:
  - power not a duty
  - must be a valid objective in pursuit of criminal justice
  - must not be conducted in an abusive fashion
- Cloutier - RPG not required beyond lawful arrest; pat down (silly lawyer arrested for parking tickets; verbally abusive; frisked); must be a reasonable basis for the search/objectives of criminal justice
- Caslake - RPG not required but there must be a reasonable basis - safety, preventing escape, discovery of evidence of the crime they're being arrest for
- Golden - strip search; requirements:
  - only constitutional under the common law when the search is conducted upon lawful arrest (RPG)
  - for purpose of finding weapons/evidence re: arrest
  - RPG to conduct a strip search
  - search is conducted reasonably - i.e. at the station; additional RPG required for conducting a search in the field
  - gendered issue - Arbour Report (Kingston Women's Prison)

### Arrest with Warrant:

- see chart

### Detention:

- pre-Simpson (1993) - debate whether there was the police power to detain for investigative purposes
- Simpson - recognition of common law police power of investigatory detention
  - justified if officer has "articulable cause" to suspect a person is criminally implicated in the activity under investigation
- Mann - detention for investigative purposes: RG to suspect (over "articulable cause") individual is connected to particular crime & such detention is necessary
  - individualized suspicion standard - "clear nexus between the individual to be detained and a recent/on-going criminal offense"
  - brief detention; not all questioning equals detention
  - no duty on person to answer questions
  - re: search incidental to investigative detention
    - protective pat down search allowed - can proceed beyond pat down if logically possible/reason to believe person possesses item that can't be detected in a pat down
    - RG to believe safety of self or others is at risk = "logical possibility" person has a weapon
    - search for weapons only
    - must be conducted reasonably
- Clayton & Farmer - investigative detention lawful where "reasonably necessary" to fulfill police duties
  - based on an objective assessment of totality of circumstances
  - confirms Mann - search incidental to detention is on permitted for for safety reasons/search for weapons
  - "reasonably necessary" - factors include:
    - nature of situation - i.e. seriousness of offense
    - information known to police re: suspect/crime
    - degree to which detention is reasonably responsive/tailored to circumstances - i.e. geographical/temporal scope
    - means "individualized suspicion" not required depending on the situation
    - greater urgency for police response + higher risk of bodily harm = greater latitude afforded police
- Brown - increased risk of racial profiling

### Defining Detention:

- Grant (2009) - "suspension of the individual's liberty interest by a significant physical or psychological restraint"
  - physical restraint

- psychological restraint from legal obligation
- psychological restraint where a reasonable person in the person's circumstances would conclude the person was not free to go & must comply with direction or demand
- considerations re: detainment (see chart of cases above):
  - circumstances giving rise to the encounter as reasonably perceived by the individual
    - i.e. general assistance vs. singling out the individual
  - nature of police conduct
    - i.e. language; physical contact; location; presence of others; duration of encounter
  - particular characteristics/circumstances of the individual
    - age; physical stature; minority status; level of sophistication
- in Grant - psychological detainment when uniformed officers told him to keep his hands in front of him; no legal right to detain = s. 9 violation; violation not caused by law - no s. 1 analysis; evidence admitted under s. 24(2) ("new" test)
- Therens (1985) - most citizens not aware of precise legal limits of police authority; rather than risk application of physical force or persecution for willful obstruction the reasonable person will likely err on the side of caution, assume lawful authority & comply with demands
- Suberu (2009) - no detainment/no obstruction; brief preliminary questions; goes straight to arrest
  - "Once engaged, s. 10(b) imposes both informational and implementational duties on the police. The informational duty requires that the detainee be informed of the **right to retain and instruct counsel without delay**. The implementational obligation imposed on the police under s. 10(b), requires the police to provide the detainee with a reasonable opportunity to retain and instruct counsel. This obligation also requires the police to refrain from eliciting incriminatory evidence from the detainee until he or she has had a reasonable opportunity to reach a lawyer, or the detainee has unequivocally waived the right to do so." (para. 38)
  - "A situation of vulnerability relative to the state is created at the outset of a detention. Thus, the concerns about self-incrimination and the interference with liberty that s. 10(b) seeks to address are present as soon as a detention is effected. In order to **protect against the risk of self-incrimination** that results from the individuals being deprived of their liberty by the state, and in order to assist them in regaining their liberty, it is only logical that the phrase "without delay" must be interpreted as "immediately". If the s. 10(b) right to counsel is to serve its intended purpose to mitigate the legal disadvantage and legal jeopardy faced by detainees, and to assist them in regaining their liberty, the police must immediately inform them of the right to counsel as soon as the detention arises." (para. 41)

# Confessions

## Admissibility of Statements - Main Areas of Concern:

- Common Law Confessions Rule - "Voluntariness"
- Right to Silence - *Charter*, s. 7
- Right to Counsel - *Charter*, s. 10(b)

## **Voluntariness & the Common Law Confessions Rule**

### Boudreau (1949, SCC adopting Ibrahim):

- prosecution must prove beyond a reasonable doubt that a statement by an accused to a person in authority was voluntarily made
- voluntarily = not obtained either by fear of prejudice or hope of advantage exercised or held out by a person in authority
- "police warning" is helpful to prosecution in establishing voluntariness but not a necessary prerequisite to voluntariness
- primary rationale = truth/reliability not fairness

### Rothman:

- "person in authority" (PIA) test is subjective vis-a-vis the accused - whether the accused reasonably believes the person is a police officer/agent

### Clarkson:

- "operating mind" - two possible standards of comprehension:
  - comprehension of what is being said (the words spoken)
  - comprehension of consequences of making a statement

### Post-Boudreau Developments:

- subjective PIA test
- operating mind test
- oppressive circumstances

Oickle:

- confessions rule is concerned with voluntariness - broadly defined
- analysis under the confessions rule must be contextual
- twin goals of protecting the rights of the accused without unduly limiting society's need to investigate/solve crimes
- voluntariness considerations:
  - **threats or promises** operating as inducements
    - voluntariness requires an absence of threats/promises operating as inducements strong enough to raise doubt about whether the will of the suspect has been overborne by the questioner
    - was there inducement?
    - what was the strength of the inducement?
    - was there a quid pro quo offer by the interrogators?
    - was the inducement a factor in the suspect confessing?
  - atmosphere of **oppression**
    - deprivation of food, clothing, water, sleep, medical attention
    - denying access to counsel
    - excessively aggressive, intimidating questioning for long periods of time
    - fabrication of evidence in combination with other factors
  - lack of **operating mind**
    - the doctrine requires an accused to have knowledge of what they are saying and that they are saying it to police officers who can use it to their detriment
  - appalling **police trickery**
    - voluntariness = absence of police trickery so appalling it would shock the community

Spencer:

- a promise renders a statement involuntary only if the *quid pro quo* provides a strong enough inducement to raise a reasonable doubt about whether the will of the suspect was overborne

## Traffic Stops

### *Therens*

- hit a tree; was asked to return to the station for a breathalyzer; claim re: violation of 10(b); wasn't a detention; voluntarily came to the station
- issue was revised in *Grant* - re: forms of detention
  - psychological detention; circumstances re: the encounter; nature of police conduct; characteristics/circumstances of the individual
- SCC decides he was detained; violation under 10(b); violation wasn't by a law - caused by police conduct; no save
  - remedy - majority excludes breathalyzer results under section 24(2) - "flagrant and overt" denial of rights
  - dissent - police acted in good faith - relied on SCC decision re: *Bill of Rights* that he was not detained under the circumstances

### *Thomsen*

- traffic stop; roadside screening device used (ASD - Approved Screening Device - used roadside only for reasonable suspicion of alcohol in the body; to be provided "forthwith"; failure provides RPG of offence and allows police to detain for a full/more reliable breath sample; usually back at the station; admissible at trial; ASD is screening only for RPG - not admissible in court)
- defined as a detention; 10(b) violation; saved under section 1 - prescribed by law that the office can screen without advising about counsel: necessary limitation; seriousness of the offence
- no breach - no remedy

### *Grant* (different Grant)

- traffic stop; reasonable suspicion of alcohol on the body; radios for a roadside screening device - 30 minute wait
- violation of 10(b); cause of violation is police conduct - Criminal Code requires action be "forthwith"
  - section 1 can't save a *Charter* violation that is the result of a state actor; acquittal

### *Burnshaw*

- traffic stop; 15 minute wait until the test can be administered to be reliable; 10(b) violation; saved under section 1
- "forthwith" must take into consideration the circumstances of the screening test

### *Hufsky & Ladouceur*

- spot checks - re: section 9 (see *Charter* chart)

## The *Charter* & Admissibility of Confessions

### Section 7 - right to silence

- *Hebert* (jailhouse confession/police trickery) - **essence** of the right to silence is that the suspect be given a **choice**... the freedom to choose... the freedom to speak to the authorities on one hand and the freedom to refuse to make a statement to them on the other hand
  - right to silence limits:
    - police may question & persuade accused after they have retained counsel
    - right applies only after detention
    - right does not effect voluntary statements made to cell-mates
    - undercover officer (UCO) may observe in cells but can't use subterfuge & actively elicit so as to undermine the accused's choice
      - only applies to persons in detention who have told police they wish to remain silent
- *Singh* - considerable overlap between right to silence & post-*Charter* (broader) voluntariness rule
  - tests are functionally equivalent where the detainee is in custody & knows they are speaking to a police officer (PIA)
  - right to be silent - not a right not to be spoken to --> importance of police questioning in investigation of crime
  - ultimate question is whether the accused exercised free will by choosing to make a statement
  - situation - police were polite but persistent in the face of repeated assertions of wish to remain silent (18 times); no inducements or oppressive circumstances (has been academically criticized)

### Section 10(b) - right to counsel:

- **purpose of 10(b)** - to provide the detainee with legal advice relevant to their right to choose to cooperate with the police investigation or not (*Sinclair*)
  - majority rejects the view that the right is not so much informational as protective
- **components of 10(b)** - informational (to be advised of right to counsel); implementational (to be given the opportunity to exercise right to counsel)
- duties on police:
  - advise detainee of right
  - provide reasonable opportunity to exercise right
  - cease questioning eliciting evidence until reasonable opportunity to exercise right
- obligations on detainee: reasonable diligence

- *Clarkson* - obligation to delay taking statement until reasonably sober to properly exercise her right to counsel where there is no urgency; standard for waiver is very high - must be clear & unequivocal (her waiver was not valid; confession excluded)
- *Brydges* - advise of availability of free, immediate duty counsel & of legal aid
- *Prosper* - consequences of no 24-hour legal aid - must provide reasonable opportunity/refrain from eliciting
- *Sinclair* - limitation of scope - no general right to repeated consultations/presence of counsel during a custodial interview

G.F. Note:

*Sinclair* (reduced right to counsel) + *Spencer* (higher legal test for establishing that a statement was involuntary) & *Singh* (limiting the effectiveness of the right to silence) = indication of SCC titling in favour of enhancing police powers of interrogation at the expense of due process/individual rights of accused persons

# Trial Process

## Issues in Wrongful Convictions

1. Tunnel vision, often caused by inaccurate stereotypes sometimes based on gender, race or class bias
2. External pressure to “solve” the crime
3. Crown failing to act as “Minister of Justice”
4. Lack of disclosure to defense
5. Ineffectiveness of defense counsel
6. Evidentiary Issues (see chart)

See **G.F. Notes** re: wrongful convictions & discrimination in the criminal justice system

## Pre-Trial Release

Question: Will the accused be in custody while the system determines guilt? - see s. 515(10) & cases...

### Basic Principles:

- presumption of innocence
- presumption of release - if it all possible an accused should be released; punishment shouldn't precede a determination of guilt; underlies system of bail
  - comparison of results before/after *Bail Reform Act* - increases in number of people released; results not experienced equally; favoured white people
- section 9 & 11(e) of the *Charter*
  - 11(e) - *any person charged with an offence has the right... not to be denied reasonable bail without just cause*
- serious consequences of detention - denies presumption of release
  - impairs ability of accused to defend themselves - i.e. meet with counsel, make money to pay for counsel, etc.
  - affects sentencing - no opportunity to prove ability to not reoffend
  - may end up serving sentence (for smaller offences) before the matter is even decided
  - note re: women: no remand centre on the Island; shipped to Surrey or kept in Victoria city cells (see previous readings)

## Criteria for Release & Detention:

### Section 515(10) -

- Primary Ground (a) - detention is necessary to ensure the accused attends court
  - past conduct; ties to community; job/family; drug/alcohol additions/capacity to commit to court dates; people in the community willing to stand for them
- Secondary Ground (b) - detention is necessary for the protection/safety of the public... substantial likelihood the accused will commit an offence/interfere with administration of justice
  - past conduct/criminal record; past respect for bail/court orders; nature of offence (i.e. trafficking); membership in a criminal organization/gang; relationship to victim/potential to re-offend
- Tertiary Ground (c) - detention is necessary to maintain confidence in the administration of justice (relatively new - late '90's & highly controversial)
  - strength of prosecution's case
  - gravity of the offence
  - circumstances of the offence (firearms)
  - potential for lengthy term of imprisonment

### Definitions:

- undertaking - a promise (not secured by money)
- recognizance - promise to the court to do certain acts and to pay money if one fails to do the promised acts (like attend court); may or may not be secured by deposit or sureties
- surety - person who promises to pay money if the accused doesn't do as promised ("community jailer")

### Orders that can be made:

- detention - s. 515(5)
- release on UTA (undertaking to appear) without conditions - s. 515(1)
- release upon conditions - s. 515(2)
  - (a) UTA with conditions (may also see "PTA - promise to appear")
  - (b) recognizance without sureties or deposit
  - (c) recognizance with surety, but no deposit
  - (d) recognizance with deposit, but no surety
  - (e) recognizance with deposit & with or without surety (non-resident)
- "The Ladder" - s. 515(3) - the Crown must show cause why less onerous type of release is not sufficient

#### Reverse Onus - Burden on the Accused:

- s. 515(6) - see list
- s. 469 offences (i.e. murder, etc.)
- s. 524(9) - breach of bail
- s. 742.6(2) - breach of conditional sentence

#### Conditions - s. 515(4):

- judge can impose reasonable conditions:
- report to a bail supervisor
- abstain from communicating with named persons
- refrain from going to named persons

#### Section 469 Offences - Key Points:

- only a Supreme Court judge can conduct a bail hearing on murder charges
- PCJ or JP must remand accused - s. 515(11)
- reverse onus
- tertiary ground becomes more significant
- accused can get bail on a murder charge (no offence that denies the possibility of bail)

#### Hall:

- murder; women found dead in her home; multiple lacerations, etc.
- issue: addition of tertiary ground - "any other just cause... to maintain confidence in the administration of justice" - is it constitutional?
  - was there a *Charter* violation? - yes; too broad
  - re: section 1? - failed the proportionality test; not saved
  - remedy? - section 52 - no force or effect; "any other just cause" section severed from the tertiary ground provision
- re: "administration of justice"
  - was there a violation? - no; not a catch-all; not too vague or overly broad
  - dissent: ripe for misuse - opportunity for public perception to rise above rights of the accused
- result: detained upon the tertiary ground

## **Classification of Offenses**

Summary - least serious; number of offences are decreasing (becoming hybrid); tried by Provincial Court Judge

- max. 6 months/\$5,000 unless otherwise specified - i.e. sexual assault (see specific offence section)

Hybrid - Crown decides how to proceed - summary/indictable; big difference is sentencing (see chart)

Indictable - most serious; preliminary hearing - presentation of evidence to determine if it meets the (low) threshold for proceeding

- defence election of mode of trial for all but certain special exceptions
  - s. 553 - Absolute Jurisdiction Offence (similar to the summary conviction process)
  - s. 469 - "Big Ones" - no defence election of trial mode but there may be a prelim
  - Direct Indictment (s. 577) - proceeding with requires the consent of the AG (or D.AG); Crown can by-pass preliminary proceedings and go straight to indictment in Supreme Court
    - delays; vulnerable witnesses; common for serious/complex matters with straightforward evidence (i.e. wiretap)  
- see notes on Moodle
- note: obscurities - s. 555; Crown over-riding accused's selection of mode of trial