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Criminal Law Process

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Overview of the Criminal Law

Principles of the Criminal Law

- **Purposes of Sentencing** (see *CC* s. 718 – **M** 1386)
  - **Denounce** unlawful conduct
  - **Deter** offender and other persons from committing offences
  - **Separate** offenders from society
  - Assist in **rehabilitating** offenders
  - Provide **reparations** for harm done to victims or community
  - Promote a sense of **responsibility** in the offenders
- *CC* s. 718.1 requires that the sentence must fit the crime
- *CC* s. 718.2 outlines the mandatory circumstances that have to be considered
  - s. 718.2(e) says that imprisonment should be the last resort, especially for Aboriginals
    - This is relevant both on- and off-reserve; applies to all Aboriginals. (*Gladue*)
    - The same reticence applies to other marginalized racial groups, e.g. blacks (*Borde*)
    - It is not enough to merely be a member of an marginalized group; have to show that this membership informed your criminal actions (*Hamilton*)

Morality and the Criminal Law

- **The Harm Principle**: To be a criminal offence, an act must result in harm to someone.
  - Not a principle of fundamental justice (*Malmo-Levine*)

	Wolfenden (1957)	Devlin (1959)	Fraser (1985)	*Malmo-Levine* (maj. Gonthier & Binnie)	*Malmo-Levine* (dissent – Arbour)
Should harm be the exclusive rationale for the use of the criminal law?	Yes – morality is no business of the state.	No – morality is an acceptable field of the criminal law.	Maybe – criminal law "must reflect… values of society"	No – "morality is a legitimate concern of the criminal law… [encompassing]… values beyond the simply prurient or prudish" [77]	Yes
Nature of legitimately prohibited harm			Broad notion of harm (societal fabric)	Can include self-inflicted harm, and harm to broader society	Includes harm to others and society at large, societal costs must be more than negligible
Is harm a s. 7 principle of fundamental justice?				No – PFJs require social consensus, and must be manageable	Yes – "imprisonment must be reserved for those whose conduct causes… harm"

The Constitution and the Criminal Law

- *CC* s. 8(3) allows the courts to create new common law defences (*Amato*)
- No new common law offences may be created (even prior to the *CC* – now codified in s. 9)(*Frey*)
- Common law principles applied to the *CC* s. 265 to conclude that consent is no defence to a charge of assault, despite exception for consent being explicitly included. (*Jobidon*)
  - Is this a creation of a new offence (i.e. expanding on an old one)?
- The common law offence of **contempt of court** is not unconstitutionally vague, nor is codification of offences a principle of fundamental justice (*United Nurses*)

Interpretation of Criminal Laws

- **Void for vagueness** doctrine: an overvague law is unconstitutional (*NS Pharmaceutical*)
  - This is founded on the following principles (informed by *Charter* ss. 1 and 7):
    - **Fairness to citizens**: Citizens should readily be able to determine which acts are prohibited upon reading an enactment.
    - **Limitation of law enforcement discretion**: If prosecution ensures conviction, the discretionary powers of law enforcement (police & counsel) are unconstitutionally broad. "Standardless sweeps" are impermissible!
- If the State uses means which are broader than necessary to accomplish a legitimate objective, the principles of fundamental justice (and thus s. 7) are violated. (*Heywood*)
  - E.g. making it an offence for a person with sexual violence convictions to be "found loitering in or near a… playground" is overbroad for 4 reasons:
    - Too geographically broad (which places are "near"?)
    - Too temporally broad (e.g. applying for life without review)
    - Includes too many people (what if they aren't pedophiles)?
    - May be enforced without notice
- "Reasonableness" is a magic word – it lets courts limit otherwise overbroad legislation (*CFCYL*)
  - The dissent does not approve of this; amounts to a reading down.
- Strict construction does not always apply; rules such as associated meaning can take precedence (e.g. "conceal" being coloured by adjacent "remove" to imply positive act) (*Goulis*)
- Literal meaning is not always authoritative; only contextual meaning is. Invoking Parliament's intent can allow for avoidance of ambiguity in the text. (*Paré*)

The *Charter* and the Criminal Law

- The **Oakes Test**: If a section of the *Charter* (that can be saved by s. 1) has been infringed, the onus is on the Crown to show that it is saved by s. 1. They must show the following on the balance of probabilities: (*Oakes*)
  - The **objective** must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom"
  - The **means** chosen must be reasonable and demonstrably justified, which requires:
    - **Rational Connection**: Carefully designed to achieve objective (not arbitrary, unfair, or irrational)
    - **Minimal Impairment**: must impair the infringed right "as little as possible"
    - **Proportionality**: Proportionality between the deleterious effects of impugned measures and the objectives sought.
- ***Charter* s. 8**: "Everyone has the right to be secure against unreasonable search or seizure"(**M** 1746)
- ***Charter* s. 9**: "Everyone has the right not to be arbitrarily detained or imprisoned" (**M** 1757)
- ***Charter* s. 10**: "Everyone has the right on arrest or detention (**M** 1760)
  (a) to be informed promptly of the reasons therefore;
  (b) to retain and instruct counsel without delay and to be informed of that right; and
  (c) to have the validity of the detention determined by way of *habeus corpus* and to be released if the detention is not lawful."
- ***Charter* s. 11**: "Any person charged with an offence has the right … (**M** 1765)
  (e) not to be denied reasonable bail without just cause;"

- Good faith on the part of the police can result in the admission of evidence obtained in contravention of a person's s. 8 (search & seizure) rights (*Wong*, *Duarte*)
- The test for (in)admissibility of evidence under **s. 24(2)** is the *Grant* test: (*Grant*)
  - Three avenues of inquiry:
    - **Seriousness of Charter-infringing state conduct** (similar to second arm of *Collins*)
    - **Impact of breach on Charter protected interests of accused**
      - (considers factors relating to nature of the evidence formerly relevant to first arm of *Collins* i.e. trial fairness; also nature of the Charter right infringed]
    - **Society's interests in an adjudication on the merits**
      - (somewhat akin to third arm of *Collins*, but also new factors including notion of preference for "trial on merits" and "reliability" of the evidence)
  - "No overarching rule governs how balance is to be struck" between these factors.
  - The overarching concern under s. 24(2) is "**administration of justice**" – protecting integrity and public confidence in the justice system
    - Courts should take an objective, prospective, long-term, societal approach
  - Note that this indicates a substantial change for admissibility of bodily evidence, non-bodily physical evidence, and derivative evidence. Not so much for statements.
- **Old law**:
  - *Collins* (1987): Three factors in excluding evidence:
    1. Would admitting evidence affect trial fairness?
       - *Stillman* (1997) refined this arm of the test (see below)
    2. How serious was the *Charter* breach?
       - E.g. seizing someone's bags from a locker in a bus depot without a warrant (when there is no exigency) is a serious breach. (*Buhay*)
    3. Would the exclusion of evidence bring the administration of justice into disrepute?
       - E.g. admitting a bag of marijuana obtained in an illegal search would do more damage than good to the administration of justice (*Buhay*)
  - *Stillman* (1997): Refines the first arm of the *Collins* test.
    - Distinguish between **conscriptive** and **non-conscriptive** evidence:
      Conscriptive: evidence that accused is forced (*contra* the *Charter*) to provide
      - Includes statements, use of body, or bodily substances.
      - Can include derivative evidence; usually where an accused is forced (*contra* the *Charter*) to give a statement that leads to discovery of "real evidence"
    - Conscriptive evidence is automatically excluded if it is not otherwise discoverable. To prove **discoverability**, Crown must establish on balance of probabilities either:
      - That there was an **independent source** for the evidence, *or*
      - That lawful discovery of the evidence was **inevitable**.
    - Non-conscriptive evidence, or conscriptive evidence that is discoverable, proceed on to the second step of the *Collins* analysis.

The Investigation of Crime

Social Policy and Inequity

- **"Due Process and Victims' Rights" – Kent Roach**
  - Discusses the balance between crime control vs. due process
  - **Crime Control (Conveyor Belt)**
    - Aim is to process max number of criminals
    - Precedence was placed on discovering truth of factually guilty before fair treatment
    - Prevalent theory in pre-Charter era
  - **Due Process (Obstacle Course)**
    - Allows for greater protection of the accused's rights through fairer trial process
  - Before s. 24(2), many rights of the accused were violated
  - **Effect of the Charter**
    - Recognized rights of the accused
    - Caused many new delays
    - Allows for verdicts such as in *R v. Stinchcombe*, making the trial process more fair
- **Turpel-Lafond's Aboriginal Critique of Criminal Justice**
  - Outlines the incompatibility between Aboriginal justice and Euro-Canadian justice
  - Adversarial system is the element that is most out of line with Aboriginal values
  - Concept of legal counsel is also at odds
    - In Aboriginal community, accused should defend themselves
  - Aboriginal system focuses on a community developed resolution
    - Accused should be repaying debt to their victim, not society as a whole
    - Monetary compensation does not make sense in this scheme
  - Lafond also discusses the over-representation of Aboriginals as criminals, coupled with their under-representation on the jury
  - Fortunately, there are more Aboriginals entering decision-making roles now.
  - The **Royal Commission on Aboriginal Peoples** proposes possible means with which to alleviate some of the concerns and incompatibilities raised above
- **Gender Issues**
  - Gender does matter in criminal law
  - Many aspects of the CJS overlook that unique needs of women as citizens
    - Many of these oversights centre around domestic abuse situations
    - These oversights are particularly detrimental for Aboriginal women

Search and Seizure

Warrants

- *Charter* s. 8 applies to "people, not places". (*Hunter*)
- Warrants must be: (*Hunter*)
  1. Based on prior authorization (no *post facto* justification!)
  2. Granted by an independent officer (e.g. a judge).
  3. Based on reasonable and probable grounds that an offence has been committed and that a nexus exists between the offence and the location to be searched (for evidence).

    - This is stronger than a mere belief that evidence may be found.
- Warrantless searches of homes and offices are presumptively unreasonable, and thus contrary to s. 8. (*Hunter*)
    - This presumption can be rebutted (by the Crown) if: (*Hunter*)
        1. The search/seizure was authorized by law
        2. The law is reasonable
        3. The manner of the search was reasonable.
- A warrantless seizure without a search (i.e. a subpoena) is less invasive than one accompanying a search, and thus is not contrary to s. 8. (*Thomson*)

Reasonable Expectation of Privacy

- **Types of privacy**: (*Tessling*)
    - **Personal**: "Bodily integrity; and right not to disclose objects or matters we wish to conceal". The most jealously guarded form of privacy. (*Tessling*)
        - Bodily samples
    - **Territorial**: Protects a "hierarchy" of places; home > office > car, *etc*. (*Tessling*)
        - A (very strong) R.E.P. exists in one's dwelling. (*Feeney*)
        - A R.E.P. exists in a hotel room. (*Wong*)
        - No R.E.P. in a public washroom, although there may be in a private stall, provided your acts cannot be seen from the public area. (*LeBeau*)
        - No R.E.P. in your girlfriend's apartment. (*Edwards*)
        - No R.E.P. for bags in a vehicle in which you are a passenger. (*Belnavis*)
    - **Informational**: Protects the "biographical core", including information that reveals "intimate details of lifestyle and personal choices". A "thorny issue". (*Tessling*)
        - A crude IR image of one's house is a search of non-biographical information that is not protected. (*Tessling*)
- No R.E.P. in **discarded property** (e.g. garbage bags on lawn). (*Patrick*)
- Whether a person had a reasonable expectation of privacy cannot be determined on a *post facto* basis – the fact that one's acts are illegal does not impact expectation of privacy! (*Wong*)
- **Electronic Surveillance**: See *CC* ss. 184.1–184.6. (**M** 350-354)
    - **Old Law**: Prior to these amendments, "surreptitious electronic surveillance of the individual by an agency of the state constitutes an unreasonable search or seizure under s. 8", unless approved by a Sup. Ct. judge, no other methods are likely to succeed, *and* it is in the best interests of the administration of justice. (*Duarte*)
- **Sniffer Dogs**: A search by sniffer dog requires only "reasonable grounds to suspect" the presence of contraband, and there is no presumption that it's *contra* s. 8. (*Kang-Brown*)
    - This is a common-law right (of police) justified on grounds of minimal intrusion, contraband-specific nature, and high accuracy of sniff searches.

Arrest

Statutory Provisions

- ***CC* s. 495(1)** grants police officers the right to arrest without a warrant in some circumstances (**M** 970)
    - ***CC* s. 495(2)** expressly disallows it in other circumstances. (**M** 970)
    - ***CC* s. 507(4)** allows a court to issue summons and arrest warrants. (**M** 991)

Searches Incident to Arrest

- **Frisk Searches**: Authorized under the common law, with 3 rules: (*Cloutier*)
  1. Frisking is **discretionary**; no obligation to perform.
  2. Must be for a **valid objective** (e.g. safety, preventing escape, preserving evidence).
  3. Must **not be abusive** in the circumstances.
  - **Note**: Does not require reasonable and probable grounds.
- **Strip Searches**: Do not follow *Cloutier* rule. Several requirements and factors: (*Golden*)
  - **Requires**: reasonable and probable grounds, only valid if incident to lawful arrest, must be for the purpose of discovering weapons or evidence.
  - **Factors**: In police station, health and safety ensured, authorized by supervisor, officers same gender as person searched, fewest officers possible, minimum force used, takes place in private area, quick, person never fully undressed, genitals and anus are only visually inspected, person given option to remove items, proper records kept.
    - These may only be overturned on reasonable and probable grounds of necessity.
- Police cannot seize **bodily samples** without a warrant. (*Stillman*)
- Warrantless arrests in **dwelling houses** are generally prohibited. Thus, any evidence obtained incident to such an arrest is inadmissible under *Charter* s. 24(2). (*Feeney*)
  - Warrants for arrests in dwellings are governed by *CC* ss. 529.1–529.4 (**M** 1037)
  - At post-*Charter* common law, an arrest in a dwelling house must be made with: (*Feeney*)
    - A judicial warrant.
    - Reasonable and probable grounds that the suspect is on the premises.
    - Proper announcement.
  - **Exceptions**: Hot pursuit (*Feeney*). Exigent circumstances (*CC* s. 529.3) (**M** 1039)

Detention

Can the Police Detain?

- Police have a common-law power to detain for investigative purposes. (*Simpson*)
  - This power is justified if, in the totality of the circumstances, the detention was "reasonably necessary". This is a very broad power. (*Clayton*)
  - The detention should be brief, the accused should be informed of the reasons for detention, and the accused is under no obligation to answer questions. (*Mann*)
  - The police may conduct protective pat-down **search incident to detention** if there are reasonable grounds to believe that the safety of the public or the officer is at risk. (*Mann*)
  - **Old Law**: This broad common-law power arose very quickly (to Tollefson's distress):
    - Police have no power of detention at common law. (Pre-*Simpson*)
    - Detention requires "articulable cause" (more than mere suspicion, less than reasonable and probable grounds) (*Simpson*, 1993)
    - Detention requires "reasonable grounds to suspect … that the accused is connected to a particular crime, and that detention is necessary" for investigative purposes.(*Mann*, 2004)

When Does Detention Begin?

- **Detention** is the suspension of the accused's liberty interest by a significant physical or psychological restraint. (*Grant*)
  - Psychological detention occurs where there is a legal compulsion to cooperate, or where a reasonable person would conclude they have no choice but to cooperate. (*Grant*)
- Factors to consider when determining whether there was **psychological detention**: (*Grant*)
  - What are the circumstances surrounding the encounter, as would be perceived by a reasonable person?
    - General assistance by police, maintaining order vs. focusing on an individual. (*Grant*)
    - Gathering information (general inquiries) by police doesn't amount to detention.(*Suberu*)
  - What was the nature of the police conduct?
    - Considerations: language, place, duration, physical contact, *etc*. (*Grant*)
  - What are the circumstances of the individual?
    - Considerations: Age, size, ethnicity, "sophistication", *etc*. (*Grant*)
    - Was the conversation "strained"? (*Suberu*)
- Upon detention, a person's **s. 10(b) right to counsel** is triggered **immediately**. (*Suberu*)
- **Dissents**: Binnie J. objects to the *Grant* test, claiming that it is a "claimant-centred" approach that ignores notable objective features of police-accused interactions. (*Grant*, *Suberu*)
  - Warns of unjustified "low visibility" police interventions in the lives of minorities.
  - The *Grant* test makes the court "underestimate the coercive power of police commands, overestimate the resilience of the Canadian population in the face of such commands, …"
  - "Generally speaking, police mean what they say when they direct a citizen to stay put…"

Racial Profiling

- **Definition**: "Racial profiling involves the targeting of individual members of a particular racial group, on the basis of the supposed criminal propensity of the entire group" (*Brown*)
- **Test**: "To succeed on the application before the trial judge, the [accused] had to prove that it was more probable than not that there was no articulable cause for the stop" (*Brown*)

Confessions

Voluntariness and Reliability in the Common Law

- The court attempts to balance concerns for reliability of evidence with due process. The jurisprudence is not uniform, but currently courts take the narrower reliability approach.
- The common law confessions rules apply to statements made to a person in authority. Whether someone is a person in authority is determined with the subjective test. (*Boudreau*)
- Factors in determining admissibility (consider both voluntariness and reliability): (*Oickle*)
  1. **Threats or promises**: Must be strong enough to raise reasonable doubt re: voluntariness.
     - To be an inducement, must have "overborne" the will of the Δ (i.e. no choice) (*Spencer*)
       - Fish J. dissents that this is conflating "promises" with "operating mind" (*Spencer*)
  2. **Oppression**: e.g. deprivation of food, water, clothing, sleep, medical attention, or legal counsel; aggressive, prolonged questioning; being confronted with false evidence.
  3. **Operating Mind**: Δ must know what he is saying and that it can be used to his detriment.
  4. **Police Trickery**: Must "shock the community"; undermine integrity of justice system.
     - This can apply even if rights to counsel or silence were not breached.

- **Old Law**:
  - A confession is only admissible if it is **voluntary**. (*Boudreau*, 1949)
  - Confessions must be made without inducement by a person in authority (reliability)(*Ibrahim*)
  - Expands test for admissibility into two tests: (*Rothman*, 1981)
    - Voluntariness: Is there is anything in the surrounding circumstances that would suggest that the accused might be induced to lie (reliability)?
    - Oppression: Was there police action that would bring the administration of justice into disrepute (due process)?
  - Combine "operating mind" (reliability) test and "awareness of circumstances" (due process) tests: Did Δ have **full knowledge** of the effect of his statements? (*Clarkson*, 1986)

The *Charter* and Confessions

The Right to Counsel: s. 10(b)

- **Waiving**: To waive the right to counsel, the accused must understand that right and the consequences of waiving it. The waiver must be "clear and unequivocal". (*Clarkson*)
- *Charter* s. 10(b) imposes two duties on police (in addition to reading Δ his rights): (*Manninen*)
  - To **provide** the accused with a reasonable opportunity to obtain counsel (except in urgent circumstances).
  - To **cease** questioning the accused until such a reasonable opportunity has been had.
- **Legal Aid**: The accused has the right to be informed of the availability of legal aid, and the right to retain it (if eligible). Also has a right to (temporary) advice of duty counsel. (*Brydges*)
  - There is no constitutional obligation on provinces to supply legal aid. (*Prosper*)
  - If counsel is unavailable, police must "**hold off**" until the accused has had a reasonable opportunity to retain counsel (even if evidence will be lost, e.g. a breath sample). (*Prosper*)
  - The accused has a right to **effective** retention of counsel; a 2-minute consultation on the *Brydges* line may not adequately fulfill his s. 10(b) right. (*Osmond*)

The Right to Silence: s. 7

- The right to counsel and the right to silence are integrated; the right to counsel exists so that the right to silence may be meaningfully exercised. (*Osmond*)
- *Charter* s. 7 grants the accused the right to choose when (or if) to talk to police. (*Hebert*)
  - This is an **objective** test – applies even if Δ isn't aware he's talking to police. (*Hebert*)
- **Limits on the Right to Silence**: (*Hebert*)
  1. Once the accused has **retained counsel** and been informed of the right to silence, he may be questioned with or without counsel (but may remain silent).
     - The police may attempt to persuade the accused to make a statement, so long as they do not deprive him of an effective choice or his operating mind (as with confessions).
     - Police are not obliged to stop questioning, even if the accused requests they stop. (*Singh*)
  2. Only applies **after detention** (no right to silence in pre-detention undercover operations)
  3. Does not affect **voluntary statements to cellmates** (unless they're being used to subvert the right to silence by the Crown)
  4. Undercover agents of the Crown may **observe**, but **not elicit**, information.
- Proof of voluntariness under the common law confessions rule precludes evidence from being excluded under s. 7 of the *Charter* as a violation of the right to silence. (*Singh*)

Chart: Common Law Confessions Rule vs. *Charter* Rights

	Common Law Confessions	Rights to Counsel and Silence, ss. 10(b) & 7	Search and Seizure, s. 8
Who is bound?	"Person in authority" (subjectively determined)	"Agent of the state" (objectively determined)	"Agent of the state" (objectively determined)
When is it triggered?	Any time a person in authority questions a suspect.	During arrest or detention	Whenever there is a reasonable expectation of privacy
Protects involuntary statements?	Yes	Yes (s. 7)	Yes (*Duarte*, *CC* ss. 184.1–6)
Protects right to counsel (and right to be informed of this)?	No	Yes (s. 10(b))	N/A
Protects post-detention right to silence?	No	Yes (s. 7)	N/A
Burden and standard of proof	Crown, beyond reasonable doubt	Claimant, balance of probabilities	Claimant, balance of probabilities
Effect of breach	Automatic exclusion	s. 24(2) analysis	s. 24(2) analysis

Case Study: Traffic Stops

- *Criminal Code* provisions related to impaired driving:
  - *CC* s. 253: Impaired operation of a motor vehicle
  - *CC* s. 253: Driving with a blood alcohol level over .08
  - *CC* s. 254(5): Refusing to provide a breath sample
  - *CC* s. 254: Police powers to demand samples (See s. 256 for warrants for blood samples)
- **See notes** for Nov 12 for facts particular to each case, if necessary.
- A roadside breathalyzer demand is a detention, within the meaning of *Charter* s. 9 (*Therens*)
- Providing an "official" breath sample at the station without being read s. 10(b) rights will lead to the certificate being inadmissible. (*Therens*)
- There is an **implied statutory power** for police to stop cars, ask questions and perform tests. It offends s. 10(b) but is justified under s. 1. (*Orbanski*)
- Legislation allowing police to demand roadside breath test "forthwith" offends s. 10(b), but is saved by s. 1. (*Thomsen*)
  - Note that "forthwith" implies no right to counsel, hence offending s. 10(b).
  - Saved by s. 1 in part because counsel will be available at station, where the "official" test is done (roadside test is already inadmissible, but may be used as grounds for official test)
- Legislation allowing arbitrary detention (stopping without grounds as part of advertised anti-DUI program) offends s. 9, but is saved by s. 1. Doesn't offend s. 8. (*Hufsky*)
  - Legislation allowing totally random stops, *not* linked to an anti-DUI program, is saved by s. 1 as well. Sopinka J. calls this "the last straw". (*Ladoceur*)
  - Evidence obtained under such legislation may still be excluded under s. 24(2), if obtained unlawfully. (*Ladoceur*)
- The police *only* have the right to ask driving offence-related questions during arbitrary traffic stops. Can't ask about bags on seats, *etc*.; plain view doctrine doesn't apply. (*Mellenthin*)

Prosecution and the Trial Process

Problems with the Trial Process

- There are many reasons for **wrongful convictions**. Some from the *Marshall* cases:
  1. **Investigating police officers jump to a conclusion or theory** of who committed the crime too soon, without any real evidence.
     - Marshall was a "native troublemaker" – not worthy of belief.
  2. **Tunnel vision**: Police exclude other evidence which is not consistent with their initial theory or conclusion.
  3. **Oppressive police tactics** to obtain statements from persons the police believe may have some information about the crime.
     - Practico and Chant were coerced into making statements which fit the police theory that Marshall was the murderer. This also occurred in the Milgaard case.
  4. **Jailhouse Confessions**: inmates who testify that the accused confessed to them. Actively sought out by the Crown in *Milgaard*, *Morin* and *Sophonow*.
  5. **False or mistaken eyewitness identification**: Also occurred in *Sophonow*.
  6. **Crown tunnel vision** – Failure of Crown counsel to investigate inconsistencies in the evidence. Failure of the Crown to act as "fair and impartial minister of justice"
     - e.g. Chant and Pratico's earlier statements in *Marshall*
  7. **Failure to disclose** (by police and/or prosecutor) evidence which may cast doubt on the accused's guilt.
     - e.g. the Crown and police failed to disclose that Practico and Chant had made inconsistent statements, and that there were other possible witnesses (e.g. McNeil) who might support Marshall's claim of innocence.
  8. **Inadequate legal defence**
  9. **Cultural or racial bias** in accepting/rejecting the evidence of certain witnesses/accused.
     - Marshall was not articulate in expressing himself in English, and that fact, along with other cultural differences, led the judge and jury to doubt his reliability.
  10. **Undue reliance on (faulty) expert evidence**. For example, experts on hair and fibre comparisons have often been called to testify that hair found on the victim is similar to the accused's hair.
      - A review of 39 homicide cases in Manitoba has revealed, through recent DNA testing, that in 4 of these cases, the hair fibres which were admitted at trial as being similar to the accused's hair, did not in fact belong to the accused. James Driscoll was one of these wrongfully convicted persons.
      - Inaccurate expert evidence on stomach contents of the deceased, by Lynne Harper, was a key piece of evidence in the conviction of Steven Truscott.
      - Dr. Charles Smith was Ontario's chief child forensic pathologist until 2005. A review of 20 of his 44 cases (between 1991 and 2005) demonstrated mistaken and exaggerated claims of child "homicides" where in fact those deaths were by accident. At least 12 (and probably more) wrongful convictions resulted.
- Canadian courts won't **extradite** to stand trial for a capital crime, due to the possibility of a wrongful conviction and the impossibility of correcting the mistake afterwards. (*Burns & Rafay*)

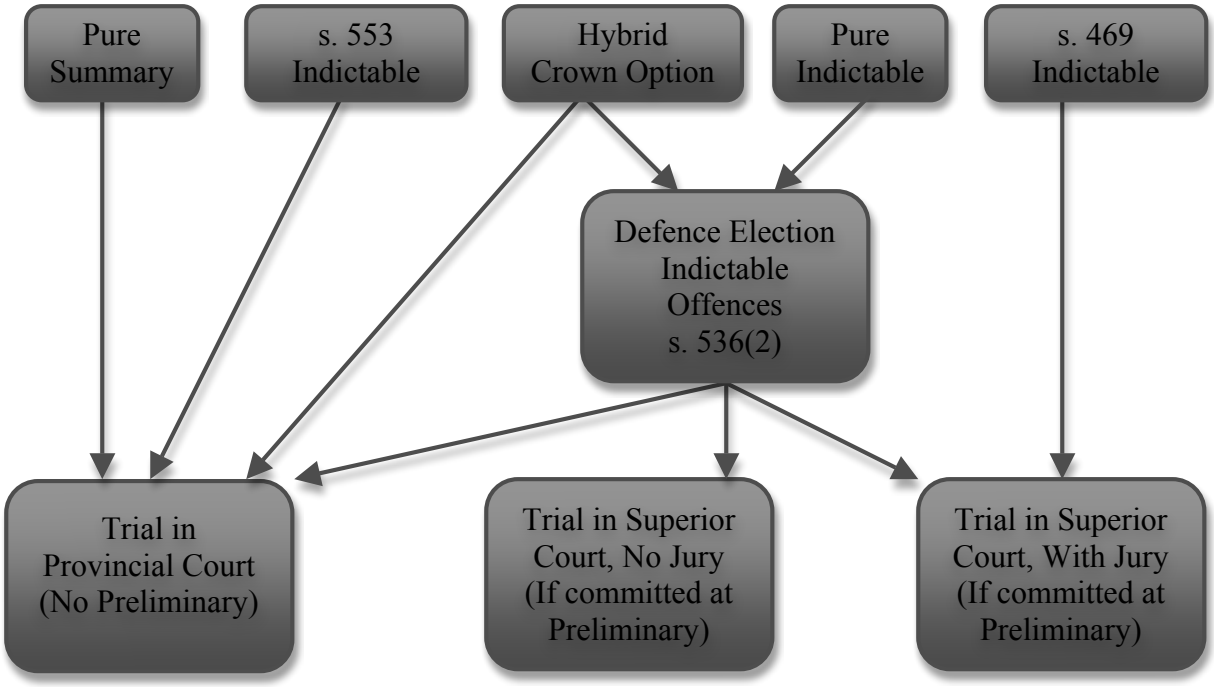
- **Reasonable Apprehension of Bias**: (*R.D.S.*)
  - Trial judges must strive to appear to be fair in eyes of reasonable and informed observer; must be especially sensitive to visible and vulnerable minorities.
    - Trial Judges may draw on their experiences and the social reality in decisions.
    - TJ's must avoid commenting in ways that gives rise to impression that they are employing stereotypes in assessing credibility
- The court is unclear on what sorts of comments are acceptable or not. (*R.D.S.*)
  - E.g. the court has split 4-2-3 on whether the statement that "police officers have been known to overreact to non-white groups" was over the line.
    4 – not close to the line, 2 – close to the line, 3 – over the line.

Pre-Trial Release

- Bail ("Judicial Interim Release") is governed by *CC* s. 515. (**M** 1002)
  - s. 515(1) – Onus is on the Crown to show cause for anything but unconditional release.
    - **Exceptions**: s. 469 (**M** 835) offences and offences listed in s. 515(6).
      - These offences place the onus on the accused ("reverse onus") to show cause why they should be granted bail (see s. 515(11) for s. 469 offences).
  - **Ladder of Conditions**: Pursuant to s. 515(3), a subsection of s. 515(2) may only be applied if each of the previous subsections is inadequate.
  - s. 515(4) – possible conditions that may be imposed on a s. 515(2) bail order.
  - s. 515(10) – the three classes of grounds on which detention may be justified:
    - **Primary**: Necessary to ensure attendance
    - **Secondary**: Necessary to protect the public, witnesses, or victims
    - **Tertiary**: Necessary to maintain confidence in the justice system (taking into account several factors – see **M** 1006)
      - This class has been upheld by the courts (in *Hall*), although a similar "public interest" branch of the secondary ground was struck down (*Morales*)
- **History**:
  - *Bray* (OCA 1983): Upholds reverse onus for s. 469 offences; no contravention of s. 11(e).
  - *Pugsley* (NSCA 1983): Strikes down reverse onus for s. 469 offences as offending s. 11(e), not saved by s. 1.
    - *Sanchez* (NSCA 1999): Overturns this decision.
  - *Pearson* (SCC 1992): Upholds reverse onus for drugs charges under s. 515(6)(d). The nature of drug offences and concerns about absconding accused provide "just cause" for imposing reverse onus requirement, so s. 11(e) is not offended.
    - McLachlin J. dissents that there is no distinction between little/big dealers.
  - *Morales* (SCC 1992): Allowing detention for "the public interest" is unconstitutionally vague (violates a principle of fundamental justice). "Public safety" is OK, though.
  - *Hall* (SCC 2002): Maintaining confidence in the justice system is not an unconstitutionally vague ground for allowing detention, but "any other ground" is.
    - Dissent: Shouldn't allow community fears to decide detention decisions.

Classification of Offences and Preliminary Inquiries

- An offence may be punishable by summary conviction, indictable, or both (a "hybrid" offence). Additionally, it may be listed under *CC* s. 469 (**M** 835) or *CC* s. 553 (**M** 1082).
  - Summary convictions and s. 553 indictable offences may be tried only by a provincial court judge (without a preliminary inquiry).
  - An offence that is both punishable by summary conviction and indictable presents an option to the Crown; they may select either method for any given charge.
    - Once selected, the charge proceeds normally; summary convictions go before a provincial court judge, and indictable offences go to defence election.
  - Pursuant to *CC* s. 536(2) (**M** 1052), an indictable offence (not under s. 469) allows the defence to elect one of the following methods of trial:
    - Trial in a provincial court without a preliminary inquiry (and no jury)
    - Trial in a superior court without a jury (Δ or Crown may request preliminary inquiry)
    - Trial in a superior court with a jury (Δ or Crown may request preliminary inquiry)
  - An offence listed under s. 469 will be tried in a superior court with a jury (Δ or Crown may request preliminary inquiry).
    - Pursuant to s. 473(1) (**M** 837), the accused and the A.G. may agree to proceed without a jury.
- Process for determining how the offence will be prosecuted:
  1. What section of the Criminal Code applies here?
     - Use the Code's index!
  2. Is the offence is a pure summary, pure indictable or a hybrid (Crown option)?
  3. If the offence is indictable (or a hybrid where the Crown is proceeding by indictment), does it fall within s. 553?
  4. If it is a pure indictable offence, does it fall within s. 469?



The Role of Counsel

- Duty to Court: as officers of the administration of justice; must not knowingly mislead court; must cite to court all applicable authorities; must not misstate evidence or law.
- Duty to Peers: honour undertakings; civility and collegiality
- The **Crown** prosecutor's role is to present the facts to the jury and to ensure that justice is fairly served, *not* to obtain a conviction. (*Boucher*)
- The **Crown** has a duty to disclose all information that is not "clearly irrelevant" (provided that it does not violate privilege). Arises from *Charter* ss. 7 and 11(d) (*Stinchcombe*)
  - This is triggered on the request of the defence and is ongoing. However, it binds only the Crown (and not police).
- **Defence** has a duty to the client "fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which will help client's case" – Law Society of Upper Canada
  - Must do so fairly and honourably; without illegality and in a manner consistent with the lawyer's duty to treat the court with candour, fairness, courtesy and respect.
- **Withdrawl**: "If the client wishes to adopt a course that would involve a breach of this Rule, the lawyer must refuse and do everything reasonably possible to prevent it. If the client persists in such a course the lawyer should, subject to the Rule relating to withdrawal, withdraw or seek leave of the court to do so."
  - Very rare to withdraw; may only do so if it will no seriously prejudice your client.
  - In BC, there are no obligations to give reasons for withdrawl (*Leask v. Cronin*)

Juries

- Jurors are the triers of fact (not law). Optional for most indictable offences; not an option for s. 553 offences, mandatory for s. 469 offences.
- There is no constitutional guarantee of a racially representative array of potential jurors, or of a selected jury. Doesn't violate *Charter* ss. 7, 15, 25, or 27. (*Kent*)
  - Deliberately excluding jurors of a particular race is grounds for dismissal of the jury (*Butler*)
- Allowing only Canadian citizens to sit on a jury does not violate *Charter* s. 15. (*Laws*)
- Both Crown and Defence may make finite preemptory challenges (excluding potential jurors without stated reason) under *CC* s. 634 (**M** 1170).
  - Crown formerly had the right to issue unlimited "stand-asides", putting a potential juror at the back of the queue without reason. This generally amounted to an exclusion, allowing the Crown to stack the jury in its favour.
- A jury that *appears* to be non-impartial may result in a retrial (e.g. Crown using stand-asides to exclude all men, because they might not favour the charge) (*Pizzacalla*)
- A challenge for cause should be permitted when there's a "realistic potential" of partiality. Requires two things: (*Find*)
  1. Widespread bias against the group (not mere stereotyping; must affect fairness)
  2. Some jurors must be incapable of setting aside this bias, despite judicial instruction
  - e.g. The accused's race (e.g. black – *Parks*, or Aboriginal – *Williams*) is a valid ground
  - Asking whether an accused's involvement with drugs prejudices a juror is improper (*Parks*)
  - The nature of the charge (e.g. sexual assault on children) is not valid ground (*Find*)

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R is the Roach textbook **C** is the course package

M is the 2010 Martin's *Annual Criminal Code* (Student Edition)