

(1) Criminal Law and the Charter

Case	Facts	Rules
<p><u>R. v. Oakes</u> SCC 1986</p> <p>S.1: "This section requires the courts to attempt to achieve a proper balance between the fundamental rights of an individual and the legal restrictions which may be placed on those rights for the benefit of society as a whole." <i>R. v. Ladouceur</i>, 1990 SCC → random stops by roving P.O.s</p>	<p>Impugned law put onus of proof on D to prove they had no intent to traffic upon finding possession. Law fails on 3(a): law deemed too broad, no rational cnxn between small amt of narcotics and trafficking</p>	<ul style="list-style-type: none"> ➤ If Charter violation → government must prove, on BoP, violation is a reasonable limit, prescribed by law, and can be demonstrably justified in a free & dem. society: ➤ 1. Was the violation "prescribed by law"? ➤ 2. Does the offending law pursue a pressing and substantial objective? ➤ 3. Is the law proportional? <ul style="list-style-type: none"> (a) Is there a rational connection between the impugned law and the objective? (b) Is the impugned law minimally impairing of the right in question? (c) Do the good effects of the impugned law outweigh the bad effects of breaching the right? <p>IF YES to ALL → Violation justified under s.1 of <i>Charter</i></p>

(2) Exclusion of Evidence: If evidence obtained in a manner that infringed/denied any *Charter* rights or freedoms → excluded if its admission would bring the administration of justice into disrepute. **(S.24(2))**

Case	Facts	Rules
<p><u>R. v. Collins</u> SCC 1987</p> <p>First major 24(2) case</p>	<p>Test used for considering whether evidence is admissible at trial.</p>	<ul style="list-style-type: none"> ➤ In order to determine whether the admission of evidence could bring the administration of justice into disrepute: <ul style="list-style-type: none"> (1) TRIAL FAIRNESS Would admitting the evidence adversely affect the fairness of trial? (2) SERIOUSNESS How serious was the Charter violation? (3) EXCLUSION versus INCLUSION Whether excl would cause more disrepute than incl.
<p><u>R. v. Stillman</u> SCC 1997</p>	<p>Elaborates on part 1 of Collins Test — Trial fairness.</p> <p>7 teens do LSD.</p>	<ul style="list-style-type: none"> ➤ With respect to Collins (1. TRIAL FAIRNESS): ➤ (1) Was the evidence CONSCRIPTIVE? — <i>evidence in which the accused was compelled to participate in the creation or discovery of in violation of Charter rights. (e.g. statements, use of body, e.g. police lineup, bodily sample, derivative)</i> ➤ (2) If evidence = conscriptive → was it otherwise DISCOVERABLE? — <i>Crown has burden on BoP it was discoverable. It can do so in two ways: (1) an independent source of that evidence existed; (2) discovery inevitable.</i> ➤ Automatic Exclusion Rule: Evidence automatically excluded if conscriptive and non-discoverable. ➤ Protects against self-incrimination.

<p>R. v. Buhay SCC 2003</p> <p>“The decision to exclude evidence always represents a balance between the interests of truth on one side and the integrity of the judicial system on the other.”</p>	<p>Accused’s locker in bus depot searched w/o warrant by P.O.</p>	<ul style="list-style-type: none"> ➤ With respect to Collins (2. SERIOUSNESS): <ul style="list-style-type: none"> (1) Was the breach in good faith, inadvertently or merely technical? Or deliberate, willful, flagrat? (2) Was it motivated by urgency/ necessity? (3) Were alternative means available, rendering the violation blatant? Ex. getting a warrant, staking out (4) Was there an expectation of privacy and high obtrusiveness? ➤ With respect to Collins (3. EXCLUSION v. INCLUSION): <ul style="list-style-type: none"> (1) Seriousness of the offence (2) Importance of the offence ➤ Held: S.8 violated. Evidence excluded under 24(2).
<p>R. v. Elias; R. v. Orbanski SCC 2005</p> <p>Lead up to the new Grant test</p>	<p>Roadside sobriety Qing, arrested for impaired driving before being informed of s. 10(b), court held justifiable under s. 1</p>	<ul style="list-style-type: none"> ➤ Although admission of conscriptive non-discoverable evidence will adversely affect trial fairness, its admission will not always bring the administration of justice into disrepute. ➤ Degree of trial fairness should be assessed. ➤ Assessing degree of trial fairness: (a) reliability of conscripted evidence; (b) nature of infringing conduct ➤ Thus, even if Collins (1) fails: proceed to Collins (2) & (3).
<p>R. v. Grant SCC 2009</p>	<p>3 P.O.’s approach black male. – Rights breached: Arbitrarily detained; not informed of right to counsel. Led to physical evidence being obtained. → 24(2) analysis.</p>	<ul style="list-style-type: none"> ➤ Evidence admissible under modified test: 24(2) <ul style="list-style-type: none"> (1) The seriousness of the Charter infringing state conduct. — <i>Inadvertent/minor? Deliberate disregard? Good faith? Ext. circumstances? Pattern of abuse?</i> (2) The impact of the breach on the Charter protected interests of the accused. — <i>Determine with respect to the degree to which the interests were violated.</i> <ul style="list-style-type: none"> • Ex. denial of counsel, illegal search in area with high exp of privacy and conscrip / non-discov evid. taken seriously (3) Society’s interests in the adjudicating of the case on its merits — <i>Impact on the failure to admit the evidence on the truth-seeking function of crim. law.</i> <ul style="list-style-type: none"> (i) <i>Is evidence reliable?;</i> (ii) <i>Important to the case?</i> <p>IN THIS CASE 1. Good faith. 2. Serious impact 3. Evid. reliable; important. Therefore ADMITTED despite being conscripted/ non discv</p>
<p>Applying Grant</p>	<p>Statements</p> <p>Bodily evid.</p> <p>Nonphys bodily evid</p> <p>Derivative evid.</p>	<ul style="list-style-type: none"> ➤ Often excluded <i>unless breach minor/technical</i> Reason: unreliable ➤ Often admitted <i>unless deliberate breach/high-impact</i> Reason: reliable ➤ Depends on extent of interference with privacy. ➤ Depends on extent to which <i>Charter</i> breach affected informed choice to speak with authorities.
<p>R. v. Cote SCC 2011</p>	<p>“The police had violated virtually every <i>Charter</i> right accorded to a suspect in a criminal investigation.”</p>	<ul style="list-style-type: none"> ➤ Discoverability is a relevant factor under the current s. 24(2) analysis but not determinative. A finding of discoverability does not necessarily lead to admission of evidence. In appropriate cases, discoverability may be relevant to the first two branches of the <i>Grant</i> analysis.

(3) **SEARCH** : Everyone has the right to be secure against unreasonable search or seizure (S.8). S.8 is only triggered when you have a reasonable expectation of privacy

Case	Facts	Rules				
<p><u>R. v. Collins</u> SCC 1987</p>		<p>➤ A reasonable search is:</p> <p>(1) Authorized by law (statute or common law)</p> <table border="1" data-bbox="740 359 1528 1079"> <thead> <tr> <th data-bbox="740 359 1138 401">Statutory</th> <th data-bbox="1138 359 1528 401">Common Law</th> </tr> </thead> <tbody> <tr> <td data-bbox="740 401 1138 1079"> <ul style="list-style-type: none"> • CC: s. 487/488/489 – search with a warrant or telewarrant: prior authorization from a JP who is satisfied by reasonable grounds for the search • Warrant must include: place, thing to be searched for, name of owner, suspected offence and the reasonable grounds </td> <td data-bbox="1138 401 1528 1079"> <ul style="list-style-type: none"> • Search incidental to arrest (Cloutier) based on RPG • Frisk incidental to invest. det (Mann) based on reas. susp • Enter a dwelling in lawful hot pursuit or based on an arrest warrant/ to preserve life or prevent injury • Sniffer dog search in a public place based on reasonable suspicion (Kang Brown and AM) </td> </tr> </tbody> </table> <p>(2) Law itself must be reasonable (see HunterSoutham)</p> <p>(3) The search is conducted reasonably</p> <ul style="list-style-type: none"> • If with a warrant <ul style="list-style-type: none"> • Police must have the warrant with her/ produce it upon request • Executed by day unless otherwise auth • If common law <ul style="list-style-type: none"> • Knock and announce presence, ID herself • Give reason, request entry (unless dangerous) 	Statutory	Common Law	<ul style="list-style-type: none"> • CC: s. 487/488/489 – search with a warrant or telewarrant: prior authorization from a JP who is satisfied by reasonable grounds for the search • Warrant must include: place, thing to be searched for, name of owner, suspected offence and the reasonable grounds 	<ul style="list-style-type: none"> • Search incidental to arrest (Cloutier) based on RPG • Frisk incidental to invest. det (Mann) based on reas. susp • Enter a dwelling in lawful hot pursuit or based on an arrest warrant/ to preserve life or prevent injury • Sniffer dog search in a public place based on reasonable suspicion (Kang Brown and AM)
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<p><u>Hunter v. Southam</u> SCC 1984</p> <p>GOLD STANDARD</p>	<p>Reasonableness of search pursuant to C.I.A. challenged under s.8 of Charter.</p>	<p>➤ Expanding on (2) of Collins Framework of s.8</p> <p>➤ A reasonable law for search requires:</p> <p>(1) Prior Authorization (prevents Charter breach)</p> <ul style="list-style-type: none"> • All warrantless searches are prima facie unconstitutional, unless unreasonable to obtain one <p>(2) That is Objective and Neutral (in judicial fashion)</p> <p>(3) Based on Reasonable and Probable Grounds that: <i>“evidence of the offence will be found at the location of the search”</i></p> <p>➤ Section 8 protects a reasonable expectation of privacy. Thus, case applies only if ∃ reasonable expect. of privacy.</p> <p>➤ Section 8 does not confer powers upon state, but protects the rights of the individual.</p>				

But there can be exceptions:

reasonable grounds to suspect (as opposed to reasonable grounds to believe)		<ul style="list-style-type: none"> ➤ Does not apply to border searches, school searches, reasonable suspicion sufficient for pat-downs, sniffer-dogs. Arrest/detentions subject to different rules. ➤ Generally speaking, warrantless searches are only lawful where reasonable and probable grounds for a warrant exist but it is not feasible at that time to obtain a warrant or telewarrant.
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When is there a Reasonable Expectation of Privacy?

R. v. Wong SCC 1990	Hotel gambling ring. Reasonable expectation of privacy in a hotel room.	<ul style="list-style-type: none"> ➤ The expectation of privacy in a location is independent of any suspicion of illegal activity going on.
R. v. Edwards SCC 1996	No reasonable expectation of privacy in girlfriend's apt.	<ul style="list-style-type: none"> ➤ Was expectation violated? Look at the totality of Circumstances: Presence at time of search; possession or control of property/place; ownership of property/place; historical use; ability to regulate access; existence of a subjective expectation of privacy; objective reasonableness; intrusiveness (<i>Wong, Buhay</i>)
R. v. Tessling SCC 2004	s.8 does not apply to heat pattern of house.	<ul style="list-style-type: none"> ➤ Personal privacy > territorial privacy > informational priv ➤ S.8 protects a biographical core of personal info – FLIR looked at the house but not in the house ➤ Technology ought to be evaluated only according to its current capability <ul style="list-style-type: none"> • FLIR: lack of intrusiveness, v. general info, only as helpful as the inferences it can support ➤ References George Orwell's <i>1984</i>.
R. v. Kang-Brown; R. v. A.M.; R. v. Patrick		<ul style="list-style-type: none"> ➤ Power to conduct a warrantless sniffer dog search in a public place based on a reasonable suspicion.

Reasonable Expectation	No Reasonable Expectation
PERSONAL: Your bodily samples (<i>Stillman</i>)	Garbage bags at edge of property (<i>Patrick</i>)
HOUSE: Entry into your home (<i>Feeney</i>)	Exterior heat pattern of your house (<i>Tessling</i>)
Information on electricity usage in your home (<i>Gomboc</i>)	Girlfriend's apartment (<i>Edwards</i>)
BUSINESS PLACE: Business records in office (<i>Hunter v. Southam</i>)	Regulatory seizure of documents – an order to produce documents, not entering (<i>Thomson Newsp.</i>)
CAR: Closed areas of car if owner/driver (<i>Harrison</i>)	Contents of vehicle if you are passenger (<i>Belnavis</i>)
PUBLIC: Rented bus depot locker (<i>Buhay</i>)	Lower for students, school officials can search based on reas. Susp (<i>R v. M</i>)
	Lower for sniffer dog, in a public place can search based on reas. Susp (<i>Kang-Brown, A.M.</i>)
SURVEILLANCE: Hotel Room (<i>Wong</i>)	
COMM: Private conversation aka wiretap (<i>Duarte</i>)	

Criminal Code provisions: s.487, 488, 489—search with a warrant.

(4) ARREST AND DETENTION

Case	Facts	Rules
<i>Cloutier v. Langlois</i> SCC 1990	Lawyer charged P.O. for assault, he frisked for unpaid parking tickets. Courts claim that search justified because of safety.	<ul style="list-style-type: none"> ➤ Frisk Search Incidental to Arrest (1) A power not a duty (discretionary) (2) Must be valid in pursuit of criminal justice <i>Safety, prevent escape, evidence (protect/discover, must be for the crime they're arrested for)</i> (3) Must not be conducted in abusive fashion. <i>Use of physical/psychological constraints must be proportional to crime</i> ➤ If arrest → RPG not necessary for search.
<i>R. v. Caslake</i> SCC		<ul style="list-style-type: none"> ➤ If arrest → can search a car if it's reasonably connected to the offence ➤ While RPG not required for search incidental to arrest → ∃ reasonable basis for search. ➤ If the search is for evidence, there must be some reasonable prospect of securing evidence of the offence for which the accused is being arrested.
<i>R. v. Golden</i>		<ul style="list-style-type: none"> ➤ Strip Search is only reasonable when: (1) Follows a <u>lawful arrest</u>. <ul style="list-style-type: none"> a. A warrant or RPG for arrest. (2) For <u>purpose</u> of finding weapons or evidence relating to arrest only <ul style="list-style-type: none"> a. ∃ RPG that <i>strip search is necessary</i> b. 2nd RPG, above arrest itself. (3) Conducted reasonably <ul style="list-style-type: none"> a. <u>At police station by a p.o. of the same gender unless exigent circumstances</u> b. 3rd layer of RPG. c. "Field" strip search requires RPG that necessary to conduct the search in field. <p>See RBHS 189 for 11 point framework</p>
The New Power of Investigative Detention		
<i>R. v. Simpson</i>	Simpson found leaving what was thought to be a crack house. Vehicle stopped, frisked, found hard lump (cocaine). Stop unlawful (no articulable cause – based on a hunch)	<ul style="list-style-type: none"> ➤ "Recognized" CL power of investigative detention ➤ Detention may be justified if officer has "articulable cause" (an objective "reasonable suspicion") to suspect person is criminally implicated in the activity under investigation. ➤ A middle ground between RPG and mere suspicion. <ul style="list-style-type: none"> ○ <i>Similarly, detention is middle ground between arrest and free to go</i>

<p><u>R. v. Mann</u></p> <p>Search incidental to investigative detention</p> <p>Ferguson: gives very little guidance on when an invest. Det. and pat down is “necessary”</p>	<p>Police usually err on allowing the police to pat-down for weapons.</p> <p>Reasonable grounds to detain (matched description), reasonable grounds for search, unreasonable to reach into pocket for something soft (mj), evid excluded</p>	<ul style="list-style-type: none"> ➤ Detention Powers: Individualized Suspicion Standard <ul style="list-style-type: none"> ⊃ “A clear nexus between the individual to be detained and a recent or ongoing criminal offence.” 3 STEPS: <ol style="list-style-type: none"> (1) Reasonable grounds to suspect (2) Individual connected to crime (3) Necessary to detain person ➤ Search Powers Pursuant to an Investigative Detention ➤ Protective pat-down search (frisk) allowed: <ol style="list-style-type: none"> (a) where reasonable grounds to suspect (“logical possibility”) that safety of officer or others at risk. (b) must be conducted reasonably. (c) not allowed to search for evidence. ➤ Can proceed beyond a pat-down if logical possibility / reasonable grounds to believe suspect has items that cannot be detected by pat-down.
<p><u>R. v. Clayton</u></p> <p>Widens the scope for man (recognizes a broad C/L police power to stop)</p>	<p>Description of vehicle did not match description they had been given. No individualized suspicion.</p>	<ul style="list-style-type: none"> ➤ Investigative detention lawful where it is “reasonably necessary” to fulfill police duties based on an objective assessment of the “totality of the circumstances”: <ol style="list-style-type: none"> (1) Nature of the situation (incl. seriousness of the offence) (2) Info known to police re: the crime/ suspect (3) Whether the detention (geographic, temporal scope) is reasonably tailored to the offence (4) Balancing the risk to the public v. liberty of citizens (stop is no more intrusive than reasonably necessary) ➤ Courts find that a road block stopping everyone coming out of a parking lot is justified.
Meaning of Detention under the Charter		
<p><u>R. v. Grant</u></p> <p>2009</p> <p>Leading Case For Psychological Detention</p>	<p>Accused detained when uniformed officers told him to keep his hands in front of him. Officers had no legal right to detain accused, thus s.9 violation. Violation not “caused” by a law, so no s.1.</p> <p><i>BUT</i></p> <p>Evidence admitted pursuant to new Grant section 24(2) analysis.</p>	<ul style="list-style-type: none"> ➤ Detention is “...a suspension of the individual’s liberty interest by a significant physical or psychological restraint...” (1) physical; (2) psychological by law; (3) ... ➤ Psychological restraint where a reasonable person in the person’s circumstances would conclude that s/he was not free to go & must comply with demand. ➤ “Claimant-centered” test: <ol style="list-style-type: none"> (1) The circumstances giving rise to the encounter as reasonably perceived by the individual. <ul style="list-style-type: none"> <i>Providing general assistance; maintaining general order; making general inquiries; OR</i> <i>Singling out the individual for focused investigation.</i> (2) The nature of the police conduct <ul style="list-style-type: none"> <i>Language used/use of physical contact/place where the interaction occurred/presence of others/duration of encounter.</i> (3) Particular characteristics/ circumstances of individ <ul style="list-style-type: none"> <i>Only if relevant: age/physical stature/minority status/level of sophistication; relate to power imbalance.</i>

<p>R. v. Suberu SCC 2009</p>	<p>Stolen credit card shopping spree.</p> <p>Right to 10(b) is engaged immediately upon detention; but Suberu was not detained, so 10(b) not engaged.</p>	<ul style="list-style-type: none"> ➤ S.10(b)—right to instruction of counsel and detention ➤ ➤ “Situation of vulnerability” created upon detention/41 <ul style="list-style-type: none"> ▪ Thus “without delay” = “immediately” ➤ <i>Informational and Implementational Duty:</i> (para 38) <ul style="list-style-type: none"> Informational: Detainee be informed of the right to retain and instruct counsel without delay. Implementational: provide detainee with a reasonable opportunity to retain and instruct counsel. ➤ Binne’s criticizes “claimant-centered” <i>Grant</i> reasonable standard: underestimates force of police’s commands; overestimates resilience of Canadians; ignores anything <i>not in the mind</i> of the detainee by limiting court’s consideration to only those facts made evident to the person stopped. Binne argues mind of the police officer is relevant.
<p>R. v. Therens SCC 1985</p>	<p>Counterargument to <i>Grant</i> test for investigative detention.</p>	<ul style="list-style-type: none"> ➤ “...Most citizens are not aware of the precise legal limits of police authority. Rather than risk the application of physical force or prosecution for willful obstructions, <i>the reasonable person is likely to err on the side of caution, assume lawful authority, and comply with the demand.</i>” ➤ Do the courts still follow this? Or has the reasonable person in <i>Grant</i> become so robust and assertive as to make the test contrary to <i>Therens</i>? ➤ Artificially robust reasonable person.

(5a) CONFESSIONS

IS IT C/L VOLUNTARY PER OICKLE/SPENCER?

- a. No – THROWN OUT
- b. Yes – IS IT ADMISSIBLE UNDER CHARTER s. 7 and 10(b) (statutory)?
 - i. DOES IT BRING ADMIN OF JUSTICE INTO DISREPUTE?
 - 1. Yes – THROWN OUT 2. No – Accepted

Admissibility: Boudreau/Ibrahim (Old Common Law Rule)

Case	Facts	Rules
Boudreau SCC 1949 Confirms Ibrahim v. The Queen HoL 1914	Cited in <i>R. v. Wray</i> (S.C.C. 1971): confession involuntary since obtained by threat/inducement	1. Confession must be VOLUNTARY: <ul style="list-style-type: none"> - Not obtained by THREATS, PROMISES, <ul style="list-style-type: none"> o Taken very srsly by SCC o Fear of prejudice; hope of advantage - Or INDUCED (by person in authority) <ul style="list-style-type: none"> o Formally engaged in enforcement of law (1) “Police warning” — i.e. right to silence — Helpful to Crown in establishing voluntariness, but not necessary. (2) ONUS: Crown must prove beyond a reasonable doubt that statement to a person in authority was voluntarily made . ➤ POLICY: Truth (reliability); balancing coercive power of authority. Not yet about fairness.
AS MODIFIED BY:		
Rothman SCC 1981	Defines person in authority	2. Confession must not be so shocking that it brings admin of justice into disrepute <ul style="list-style-type: none"> ➤ Test for “person in authority” is subjective: does accused think the person is in authority? ➤ Right to remain silent begins at trial <ul style="list-style-type: none"> o Can refuse to speak to PO, but PO can plant undercover PO in cell o OVERTURNED BY <i>Herbert</i>—1990—PO can passively receive information but cannot actively elicit it.
Grandinetti SCC 2005		Confession rule only applies to pers in auth; undercover PO not pers in auth, so confession admitted even though induced
Prager HL 1972 Hobbins SCC 1982 Hoilett OCA 1999	“Atmosphere of Oppression”	Even w/o specific inducement, oppressive conduct by police officer can render confession involuntary
Clarkson SCC 1986	Intoxication suggested accused was not fully aware of the consequences of her confession	<ul style="list-style-type: none"> ➤ Accused must have an operating mind ➤ Possible Standards of Comprehension (<i>Operating Mind</i>) <ul style="list-style-type: none"> i. Understanding words coming out of her mouth (<i>reliability/truth</i>) ii. Understanding consequences of her words (<i>fairness</i>)
Whittle SCC 1994		<ul style="list-style-type: none"> ➤ Operating mind = comprehension of what is being said and that the evidence CAN be used against ➤ NOT to understand consequences

NEW RULE: OICKLE/SPENCER/SINGH — OLD RULE + MODIFICATIONS

<p><u>Oickle</u> SCC 2000</p>	<p>The twin goals of the confessions rule is (1) protecting rights of accused without (2) without unduly limiting society’s need to investigate & solve crimes.</p> <p>Confession Involuntary If: <i>*(a+b+c) can add together to the threshold of involuntariness.</i></p> <p>a. Threats or promises operating as inducements</p> <p>i. Voluntariness requires an absence of threats or promises <u>operating as inducements</u> strong enough to raise a reasonable doubt about whether the will of the suspect has been overborne by the questioner. <i>Oickle Test:</i></p> <ol style="list-style-type: none"> 1. Was there an inducement? 2. What was the strength of that inducement? (<i>Spencer</i>) 3. Was there a <i>quid pro quo</i> offer by interrogators? Was the inducement a factor in A’s confessing? <p>b. Atmosphere of oppression</p> <ol style="list-style-type: none"> 1. Deprivation of food/clothing/water/sleep/medical 2. Denying access to <u>counsel</u> 3. Excessively aggressive, intimidating <u>questioning</u> for a prolonged period of time 4. <u>Fabrication of evidence</u> in combo with other factors. <p>ii. <i>Some evidence of trickery is allowed...</i></p> <p>c. Lack of Operating Mind</p> <p>d. Police trickery so appalling so as to shock the community</p> <ol style="list-style-type: none"> i. Mainly concerned with criminal justice system ii. A discrete inquiry iii. E.g. impersonating a priest or legal counsel <p>2. Analysis under the confessions rule must be a contextual one (71)</p>
<p><u>Spencer</u> SCC 2007</p>	<p>➤ “Overborne” means such great pressure that the accused loses ALL capacity to make decisions</p> <p>➤ Policy: A movement away of maximizing rights of the accused in favour of police powers.</p>

(5b) RIGHT TO COUNSEL

Case	Facts	Rules
Charter 10(b)	Policy: Adjudicative fairness: knowing rights before waving them	<ul style="list-style-type: none"> ➤ Upon ARREST or DETENTION, everyone has <ul style="list-style-type: none"> ○ 1. RIGHT TO COUNSEL W/O DELAY ○ 2. RIGHT TO BE INFORMED OF THAT
Spencer SCC 2007	Drunk woman shoots husband, denies counsel, despite insistence from aunt. Waiver found not legally valid under 10(b), since not of operating mind.	<ul style="list-style-type: none"> ➤ To waive right to counsel, must be of OPERATIVE MIND ➤ Accused must understand CONSEQUENCES of choices
Manninen SCC 1987	Mac store robbery, police found gun and asked about knife, asked for a lawyer but then incriminated self. A violation of 1&2 found, s. 10(b) breached, and confession inadmissible	<p>Detainees must be</p> <ul style="list-style-type: none"> ➤ 1. ADVISED ON HOW TO EXERCISE RIGHT TO COUNSEL <ul style="list-style-type: none"> ○ PO must give reasonable opportunity AND private space to obtain counsel ➤ 2. HAVE ACCESS TO ADVICE BEFORE QUESTIONED (PO must hold-off asking Qs)
Bridges SCC 1990	2 nd deg. Murder charge, accused stated couldn't afford counsel, police did not inform of legal aid. S. 10(b) violated, confession inadmissible under s. 24(2)	<ul style="list-style-type: none"> ➤ Detainees must be ADVISED OF FREE COUNSEL via LEGAL AID and have ACCESS TO IT ➤ Right to counsel regardless of ability to pay
Prosper SCC 1994	Breath sample, police allowed accused to contact lawyer but none available at night, breach of s. 10(b)	<ul style="list-style-type: none"> ➤ If province doesn't have 24 hour legal aid, state must hold off questioning until accused given reasonable opportunity to obtain counsel
Osmond BCCA 2007	Unsophisticated man, charged with murder (serious), advised to stay silent but not on HOW to	<ul style="list-style-type: none"> ➤ ACCESS to counsel must be ADEQUATE ➤ 2 min phone call not enough in this serious case with minimal advice
Sinclair SCC 2010	Arrested for murder, consulted counsel, during interview requested counsel, denied. SCC held admissible. Case restricts right to counsel. Movement away from maximizing individual rights in favour of police powers.	<ul style="list-style-type: none"> ➤ One consultation enough to satisfy right to counsel, unless a material change: <ol style="list-style-type: none"> 1. <i>New procedures proposed (ex. police-lineup, polygraph)</i> 2. <i>New charges laid</i> 3. <i>Legal info provided in first consultation insufficient</i> <p>MAJ: purpose of right to counsel is INFORMATIONAL (s.7 right), to allow detainee to make a free/ informed choice whether or not to cooperate with the police.</p> <p>DISS: purpose of right to counsel is PROTECTIVE, to manage power imbalance</p>
Tremblay SCC 1987		<ul style="list-style-type: none"> ➤ <i>Manninen</i> rights only applicable if detainee is "reasonably diligent" in exercising them
Ross and Leclair SCC 1989		<ul style="list-style-type: none"> ➤ Detainee can select lawyer; ➤ Detainee gets "reasonable opportunity" to retain counsel ➤ Definition of reasonable opportunity depends on situation.
Borden SCC 1994		<ul style="list-style-type: none"> ➤ Re: lawful search incident to arrest, police don't have to hold off for reasonable opportunity to retain counsel
Burlingham SCC 1995		<ul style="list-style-type: none"> ➤ PO can't attempt to dissuade accused seeking legal counsel

(5c) RIGHT TO SILENCE

Case	Facts	Rules
<p>Hebert SCC 1990</p>	<p>Accused arrested for robberies and advised of right to retain counsel, talks to undercover PO in jail after refusing to speak to PO, found to violate s.7 right to silence; inadmissible under s.24(2)</p>	<ul style="list-style-type: none"> ➤ Accused has right to remain silence pre-trial and at trial-s.7 ➤ AFTER DETENTION and IF ACCUSED INVOKED RIGHT TO REMAIN SILENT, police officer cannot employ tricks. ➤ But can <ul style="list-style-type: none"> ○ Question without counsel after accused has retained counsel to try to change accused's mind ○ Use statements made to fellow cell mates <ul style="list-style-type: none"> ▪ Questionable reliability ○ Go undercover to observe/listen (but not prompt) ➤ THEREFORE CHARTER TRUMPS C/L <i>ROTHMAN</i> (pre charter) which said right to silence begins only at trial
<p>Grandinetti SCC 2005</p>	<p>Undercover police in sting op, joining a gang.</p>	<ul style="list-style-type: none"> ➤ Pre police custody, police officers can elicit confessions
<p>Singh SCC 2007</p>	<p>Asserts right to silence 18 times. Never confesses. Police pull out photo and <i>Singh</i> says, "There I am."</p>	<ul style="list-style-type: none"> ➤ Police can persistently question accused, even after accused has invoked right to remain silent ➤ When in police custody and it is obvious questioning by authority, C/L and s.7 rule = the same ➤ THEREFORE C/L rule (not overborne) trumps s.7 rule (right to remain silent) ➤ Must amount to oppression; still voluntary for Mr. Singh.
<p>Cote</p>		<ul style="list-style-type: none"> ➤ Found oppressive and involuntary; evidence excluded.

(6) TRAFFIC STOPS

Case	Facts	Rules
R. v. Therens	Therens demanded to accompany a police station for breath test. Therens complied, but had right to retain counsel and was not informed. Breathalyzer rules inadmissible	➤ Right to retain counsel and to be informed of that right begins when accused is taken to the police station for a breathalyzer test
R. v. Thomsen	“Assisted Roadside Screening Device”— not admissible at trial ; Police need only a reasonable suspicion for an ASD.	<ul style="list-style-type: none"> ➤ If the police have a reasonable suspicion of drinking and driving within the past 3 hours → ASD justified. ➤ ASD amounts to a detention ➤ Reasonable to deny the right to counsel (under s. 1) at this stage if the ASD is conducted “forthwith” since only provides RPG of a person driving impaired.
R. v. Grant (1991)	Grant is pulled over over. PO radios another to “bring me ASD.” Waited 30 minutes before arrival.	<ul style="list-style-type: none"> ➤ The 30 minutes it took to conduct an ASD at the road side is not “forthwith”. As a result, Grant had a right to counsel. ➤ So s(1) does not apply. You cannot save a violation that is not prescribed by law. ➤ Evidence excluded under 24(2). Acquitted.
R. v. Bernshaw		<ul style="list-style-type: none"> ➤ Waiting 15 minutes for an accurate ASD test still constitutes conducting the ASD “forthwith” ➤ Therefore no right to counsel during this time
R. v. Hufsky	Roadside spot checks challenged: s.9 breach.	➤ Random traffic stops (roadblocks) constitute an arbitrary detention (s. 9). But saved under s.1.
R. v. Ladoucer SCC 1990	Distinguished from above. Completely random stop as part of a routine check.	<ul style="list-style-type: none"> ➤ Maj: arbitrary detention, justified by s. 1 ➤ Diss: “Last straw: If sanctioned, we will be agreeing that a P.O. can stop any vehicle, at any time, in any place, without having any reason to do so.” ➤ A total negation of s.9 Charter detections for motorists.
R. v. Mellenthin	Random traffic stop. P.O.’s asked what was in gym bag in front seat. Accused’s s.8 rights violated	<ul style="list-style-type: none"> ➤ At random traffic stops, RPG for a search, or evidence in plain view, any attempt to conduct a search is illegal under s. 8 (can only ask Qs related to driving offences) ➤ Evid excluded
Orbanski and Elias	Roadside sobriety questioning, arrested for impaired driving before being informed of s. 10(b), court held it was justifiable under s1	<ul style="list-style-type: none"> ➤ Questions and sobriety tests conducted without opportunity to retain counsel violates s. 10(b) but justifiable under 1 ➤ However, only to be used as an investigative tool to confirm suspicion – not as direct evidence to incriminate at trial

(7) PRINCIPLES OF THE TRIAL PROCESS

Case	Facts	Rules
Royal Commission on the Donald Marshall Jr. Prosecution	Wrongful conviction → poor investigation; insufficient evidence; Crown did not fully disclose conflicting statements; defence counsel was not thorough; judge made critical errors in law	<ul style="list-style-type: none"> ➤ “In order for an accused to be committed for trial following a preliminary inquiry, the judge must be satisfied on the basis of what or she has heard that there is admissible evidence which could, if it were believed, result in a conviction” (214). ➤ If Crown counsel is aware of evidence that could be helpful to the accused, they must disclose its existence to the accused, or the accused’s counsel, before the trial.
R.D.S. v. The Queen SCC 1997	Crown appeals acquittal due biased comments on part of black judge.	<ul style="list-style-type: none"> ➤ Test: whether a reasonable, informed person, aware of all the circumstances, would conclude that comments give rise to a reasonable apprehension of bias.
Report of the Aboriginal Justice Inquiry of Manitoba	Addressing systematic discrimination of aboriginals.	<ul style="list-style-type: none"> ➤ Recommendation: Aboriginals living in their communities should be able to maintain their own culturally appropriate systems of justice. <i>E.g.</i> adversarial nature of CL; crimes against “State”; juries=strangers; impartiality; punishment. ➤ For those outside a community, the existing justice system should be sensitive and informed: incarceration should only be used as a last resort; more aboriginal POs.
U.S.A. v. Burns and Rafay		<ul style="list-style-type: none"> ➤ Principle of Fundamental Justice: (1) a legal principle for which (2) there is significant <i>social consensus</i> as to how our legal system ought to operate; (3) <i>significant precision</i>. ➤ Death penalty inevitably deprives the legal system of the possibility of redress to wrongfully convicted persons.
Reference re Mullins-Johnson		<ul style="list-style-type: none"> ➤
Morin		<ul style="list-style-type: none"> ➤
Report on the Prevention of the Miscarriages of Justice		<ul style="list-style-type: none"> ○ Tunnel vision, often resulting from racism ○ External pressure to “solve” the crime ○ Crown failing to act as “Minister of Justice” ○ Lack of disclosure ○ Ineffectiveness of defence counsel

(8) PRE-TRIAL RELEASE

Case	Facts	Rules
<i>Charter 11(e)</i> the right not to be denied reasonable bail without just cause		
R. v. Bray OCA 1983	Reverse onus for certain offences in <i>Code</i> → accused must prove on BoP detention is not justified.	<ul style="list-style-type: none"> ➤ Reverse onus does not infringe on 11(e) ➤ Even if it did, it is a reasonable limitation (under s.1).
R. v. Pugsley NSCA 1982	Same. But found to violate 11(e). Provision in <i>Code</i> rendered to be of no force or effect.	<ul style="list-style-type: none"> ➤ Unconstitutional for accused to prove (1) attendance in court is ensured; (2) detention not necessary in the public interest or for the protection and safety of the public.
R. v. Pearson SCC 1992	Challenges constitutionality of 515(6)(d) — onus requirement for traffickers.	<ul style="list-style-type: none"> ➤ Majority (LAMER C.J.): Offence is such that criminal activity will continue after arrest and bail; offenders abscond trial. ➤ Dissent (McLACHLIN J): 515(6)(d) is overbroad and disproportionate; does not distinguish between large-scale or small-scale drug traffickers.
R. v. Morales SCC 1992	Constitutionality of old <i>Code</i> “public interest” criterion for denial of bail.	<ul style="list-style-type: none"> ➤ “Just Cause”: (1) denial of bail must occur only in a narrow set of circumstances; (2) must be necessary to promote the proper functioning of the bail system (and may not be undertaken for any extraneous purpose) ➤ “Public interest” criterion vague and imprecise → violates s.11(e) of Charter. ➤ Parliament then amended <i>Code</i>:
R. v. Hall SCC 2002	<p>CRITERIA FOR RELEASE & DETENTION SECTION 515(10)(a)(b)(c)</p> <p>(a) Primary: Detention necessary to ensure attendance in court Ties to community (job/home/family/children); past failure to attend; addiction; sureties.</p> <p>(b) Secondary: Detention necessary for the protection or safety of the public A <i>substantial</i> likelihood the accused will commit further offences if they are released. Detention has to be necessary to prevent this substantial likelihood. <i>E.g. drug trafficking, alleged membership in gang, prior record</i>—if relevant. Or a substantial likelihood the accused will interfere with the administration of justice</p> <ol style="list-style-type: none"> i. Tamper with evidence ii. Intimidate witnesses: common in spousal abuse cases / gang-related offences <p>(c) Tertiary: Detention necessary to maintain confidence in the administration of justice.</p> <ol style="list-style-type: none"> b. The apparent strength of the prosecution’s case c. The gravity of the offence d. The circumstances surrounding the commission of the offence, including whether a firearm was used, etc... <ul style="list-style-type: none"> ➤ Dissent (IACOBUCCI J.): Goals of bail already sufficiently captured in 515(10) (a) and (b). 515(10)(c) is “ripe for misuse”; irrational public fears may be elevated above Charter rights of accused; presumption of innocence threatened by (c). As bail can be denied on (a), (b), or (c) individually, subjective fears can form sole basis for denial of bail. 	

(9) THE ROLE OF COUNSEL

Case	Facts	Rules
<i>Boucher v. The Queen</i> SCC 1954	A leading authority on the role of Crown counsel in a criminal trial.	<ul style="list-style-type: none">➤ Purpose of a criminal prosecution is not to obtain a conviction; but to lay before a jury what Crown considers to be credible evidence relevant to alleged crime.➤ Role of Crown excludes any notion of winning or losing.
<i>R. v. Stinchcombe</i> SCC 1991	Disclosure protects the right of the accused to make full answer and defence. Protected under s.7.	<ul style="list-style-type: none">➤ Case constitutionalizes a broad right to disclosure under s.7 of the Charter.➤ All relevant information must be disclosed. However, obligation not absolute.➤ Crown has discretion with respect to (1) withholding of information and (b) the timing of disclosure.
<i>Law Society of Upper Canada, "Defending a Criminal Case"</i>		<ul style="list-style-type: none">➤
<i>"Martin Report"</i>		<ul style="list-style-type: none">➤