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I. POLICE POWERS

SOURCES OF POLICE POWER

OVERVIEW:

- **Power through the common law**:
  - Through judicial interpretation of statutes or the Constitution.
  - Through the acceptance of engrained principles (express or otherwise).
  - Through the use of accepted modes of legal reasoning to **fill in gaps where Parliament has not yet bestowed** a power or seems unwilling to do so.
- Police **do not have** inherent jurisdiction; **they have the powers because of legislatures and courts have granted them** (interface with the rule of law).
  - Every individual **is free to be left alone** to do whatever he or she want unless there's a law (statute or common law) to say that we cannot.
  - And any interference is legitimate **only** to the extent that it is authorized by that law.
- The **statutory powers** are mainly contained within the CC (police services act does not grant power- it grants duties which are not the same as powers)
  - There are many statute driven powers that the duties hold
- The **common law powers** are mainly contained within two broad categories:
  - (1) historical common law powers, categorical in nature;
  - (2) the ancillary powers doctrine, allowing courts to create and authorize new common law powers (principled approach)
  - Most used common law power is search incident to arrest
- **Policy**:
  - Courts have not acted slowly and incrementally as they said they would – since the advent of the *Charter*, the SCC and ONCA have authorized tremendous investigative police powers that previously did not exist in the common law

***Absent statutory authority, the police must be able to find authority for their actions at common law.**

ANCILLARY/COMMON LAW POLICE POWERS DOCTRINE: CASE LAW

R v Waterfield (1963), CCA (UK) [Origin of Ancillary Police Powers Test]:

- **Facts:** Suspecting that a crime had taken place, police officers block the car from leaving. Waterfield tells his friend to drive the car; the police will get out of the way. The friend speeds up and the police officer jumps out of his way. Waterfield was charged with assaulting a police officer in the execution of his duties. Accused say they were not under arrest- police had no right to detain their car so the police were not acting in execution of their duty.
- **Issue:** Did the police have the authority to detain the car?
- **Held:** The authority does not exist; the police's interference was unlawful.
- **Analysis/Ratio (rational for the decision):**

- Police conduct **interfering with liberty** for which there is no lawful authority via statute is *prima facie* unlawful.
- **TEST for ancillary powers doctrine via common law: A new police power may be recognized on a case-by-case basis. Depends on two pre-conditions:**
  - a) Whether the police officer was acting within the general scope of their duties under statute or at common law, i.e. to preserve the peace, prevent and investigate crime and to protect life and property, and
  - b) Did the officer's actions represent an unjustifiable interference with individual liberty/property?
    - In other words, was the officer's conduct reasonably necessary, bearing in mind the liberty interfered with and the importance of the public purpose served by the interference? Essentially a cost benefit analysis.

- **In the case at bar (now before the court)**, the court found the test to fail at the first step: failing to find any statutory basis for a duty that the police were acting in furtherance of, the Court was not willing to institute one here.

When applying Waterfield Test (Ancillary Power Doctrine):

Consider what the police constable was actually doing and in particular whether such conduct was *prima facie* an unlawful interference with a person's liberty or property.

If so, it is then relevant to consider whether

(1) Such conduct falls within the general scope of any duty imposed by statute or recognized at common law AND

-Part 1 is usually answered yes, police have duty to preserve the peace, prevent and investigate crime and to protect life and property

(2) Whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty (burned lies with Crown to show it was justifiable)

- Duty being performed→ what police are doing
- Extent to which interference with liberty necessary to perform duty;
- importance of performance of duty to public good;
- nature of liberty interfered with; and,
- nature and extent of interference
  - » **Subjective and objective determination at second stage.**

***These factors have been taken from R v Simpson (1993) - Waterfield did not provide a lot of guidance on them**

R v Dedman (1995), SCC [Imports Waterfield into Canada, Ancillary Power to Conduct Driver Sobriety Checkpoints]:

- **Facts**: Police had set up roadblocks under the RIDE program. These are random stops and Dedman was pulled over. The officer asked the accused for his license, while they were speaking the officer smelled the odor of alcohol and formed a reasonable suspicion that he was in the care and control of a vehicle with alcohol in his body. Prior to smelling the alcohol, he had no reason to suspect the accused was impaired. Dedman refused to comply with the breathalyzer and was charged for failing to comply with a roadside demand.
- **Issue**: The offence is failing to provide a breath sample without a reasonable excuse (ex: lung condition). Dedman argues he has a reasonable excuse, that the police had no authority to stop him and it was entirely within his rights to refuse as the demand itself was unlawful. **Was the RIDE checkpoint justified by an ancillary police power?**
- **Held**: The checkpoint is justified; therefore, Dedman had no excuse to refuse the officer's request for a breath sample.
- **Ratio/Analysis**: Court uses the ***Waterfield*** test
    - The SCC in Dedman does not note that ***Waterfield*** was acquitted; they just take the 2-part test to decide whether the officer has the power to do the act in question.
    - ***The test morphs from deciding whether an officer was acting in execution of his duty to a means of deciding whether a police officer should have a particular power.**
    - The power sought is *prima facie* unlawful because s. 9 protects against arbitrary detention (which means that you cannot just stop people): Involves interference with freedom of movement on public highways, not authorized by statute. However, it is justifiable under s. 1 because the program tries to prevent drunk driving.
    - Application of the **test** laid in ***Waterfield*** (**pass**):
        - **Action falls within the scope of a duty** (**pass**): Police were acting within the scope of their duty to prevent crime, safeguard life and property by the control of traffic.
        - **Using the powers in a way that is not unjustifiable in terms of <u>reasonableness</u> and <u>necessity</u>** (**pass**):
            - <u>Necessary</u>: Only checkpoints allow for effective detection of intoxicated drivers.
            - <u>Reasonable</u>: The importance of deterring/catching intoxicated drivers, the fact that driving is already subject to extensive regulation/licensing and the minor inconvenience to innocent drivers make the RIDE checkpoint reasonable.

*The court recognizes a gap in this law and stated that there is a need for outlining how the courts apply the second prong of the Waterfield test – in Part (b) you should consider reasonableness, regard nature of liberty interfered, and importance of public nature interfered with.
*The court does turn their mind to the objectionable aspect of this- they understand that people feel violated or unsettled when stopped and having to blow

R v Clayton (2007), SCC [Tweaking Waterfield, factors going to Necessity and Reasonableness]:

- **Facts:** A 911 call reported some "black guys" waving guns in a strip club parking lot. Four vehicles were identified. Police quickly set up a roadblock at one of the exits to the parking lot. Police stopped a car, which wasn't one of the four that were mentioned, and began to investigate all the black drivers.

Clayton was suspicious -- avoided eye contact and was wearing gloves on a warm day. Clayton got out of car and ran. Police caught him and his fellow occupant and they found Clayton with a gun and a 2nd gun in the car, for which they were charged.

- **Issue:** Was the roadblock, and resulting detention, justified by an ancillary police power?
- **Held:** The power exists. Police were reasonable.
- **Analysis/Ratio:**
    - A detention justified under common law is necessarily not arbitrary for the purposes of s.9 of the *Charter*.
    - **Modern Ancillary Powers Test:**
        - If the police were interfering with liberty without statutory authority, the conduct is *prima facie* unlawful.
        - Saved by common law if:
            - Step 1 →The conduct was in furtherance of a common law or statutory police duty.
            - Step 2 →The conduct, being within the scope of the duty, is *justifiable* on grounds of reasonableness and necessity. (ie. Conduct is justified if it is reasonably necessary)
                - The factors considered under this part are tied to the **totality of circumstances,** including:
                    - The nature of the situation, including the seriousness of the offence,
                    - The information known to the police about the suspect or the crime, and
                    - The extent to which the detention was reasonably responsive or tailored to these circumstances, including its geographic and temporal scope.
            - All of which involves balancing the seriousness of the risk to public or individual safety with the liberty interests of members of the public to determine whether the nature of the stop is no more intrusive than is reasonably necessary. –REMEMBER *MANN* REQUIREMENT: ONLY WHEN OFFICER BELIEVES SAFETY IS AT STAKE.

In the case at bar, the roadblock and detention of Clayton et al. was found to be lawful via common law:

- Acting in furtherance of a duty: *Police Services Act*, RSO 1990 -- police have duty to protect the public.
- Justifiability of the conduct:
    - The seriousness of firearms offenses and the threat to safety, combined with the temporal and geographical circumstances of the roadblock, meant that the conduct was tailored enough to the circumstances to be both reasonable and necessary.
- **Greene:** Had the police had more time to think through the situation, this may have been an unjustifiable use of police powers. However, because they had to act quickly to ensure public safety and not lose the suspects, it was justified. Every case will be different – difference in police testimony, differences in evidence, differences in police training and experiences – these are all factors that judges will consider in the totality of the circumstances.

- ONCA said that there was a violation because the police were just stopping everyone and did not turn their minds to why they were stopping people – if they had followed the description given then they would have had a reason for stopping people and likely no violation- just another view to think about! – this was overturned by SCC

INVESTIGATIVE DETENTION AKA DETENTION SHORT OF ARREST (R V CLAYTON)

Question in *R v Clayton* : whether or not police power to detain extended to this case? Straight application of Mann, said no, because police did not have right to detain all these people. They did have the right to suspect a crime (guns in parking lot) but not the right to suspect these individuals

- Court applies ancillary powers test from *Waterfield* and found that police action was appropriate and lawful
- Not every investigative detention is going to meet the Mann test so we need to be flexible. Mann is a good starting point to assess an investigative detention but it is not the only one

WATERFIELD OR MANN?

- If you are a defence lawyer and you have an investigative detention case you want rights to be found to have been violated so you apply Mann and show that rights were violated.

OR

- If you are the crown, you would say that this may breach Mann, but this is more complex scenario and therefore apply Waterfield and show that it police's actions were justified.

ANCILLARY POWER OF DETENTION

OVERVIEW:

S. 9 of the Charter

- *- "Everyone has the right not to be arbitrarily detained or imprisoned."*
  - ***R v Grant*:** The purpose of s. 9 is to protect individual liberty from unjustified state interference.
    - Any unlawful interference with liberty is arbitrary.
  - It is through the course of litigation on s. 9 that have helped courts determine the general police powers.
- **S. 10 of the *Charter*:**
  - Also triggered by detention
  - *"Everyone has the right on arrest or detention*
    a. *to be informed promptly of the reasons therefor;*
    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 habeas corpus and to be released if the detention is not lawful."*

- **Meaning of "detained" (*Grant, Mann, Suberu*):**

- **A person is detained** when their choice to continue on their way has been removed by **significant physical or psychological compulsion** (the feeling of not moving).
  - **Two kinds of psychological compulsion (*Grant, Suberu)***
    - Subject legally required to comply with direction or demand (ie. Required to give breathalyser- criminal offence not to)
    - Person submits or acquiesces in deprivation of liberty and reasonably believes that choice to do otherwise does not exist (*Therens)*

- **General Test of Detention:**
  1. Was the individual detained?
  2. If yes, was the detention arbitrary?
  3. If yes, should the evidence, which was obtained through the search be excluded?

- The police power of detention has been cited as an essential crime-fighting tool despite opposition from civil libertarians.
  - Police need the power to detain individuals to properly investigate crimes and detect criminals.
  - Depends on the situation, but power to search has nothing to do with power of detention.

- **Detention** is a police power to detain for which the reasons for the police action are of great importance, **but the first task in a legal analysis is *always* to ask whether detention ever occurred** (as mentioned above)
  - The power has been held to exist and although it is not for investigative purposes, it does include a protective search power.

- Once a finding of detention is made, the next issue is whether or not that detention was arbitrary.
  - ***Grant*:** Detention is not arbitrary if
    - **(i)** law authorizes it (common law or statute) and
    - **(ii)** the law authorizing the detention is not, itself, arbitrary.

- **Psychological compulsion** (the feeling of not moving or having no other choice) is determined **objectively** based on all of the circumstances (once you have shown subjectively that person felt one of the two types of psychological compulsion listed above). Focus is on the police conduct in the legal and factual context, and how that conduct would be perceived by a reasonable person

- ***R v Mann*: There is no general power of detention for investigative purposes**. That being said, police officers may detain an individual if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that the detention is reasonably necessary on an objective view of the circumstances. When police do detain for investigative purpose, they have to be very clearly advised of the reasons for the detention, and the detention should be brief in duration.
- Relevant factors for detention might include (*Grant & Moran)*:
  - Circumstances giving rise to encounter as they would reasonably be perceived by individual;
  - Nature of police conduct;
  - Particular circumstances and characteristics of individual
  - Stage of investigation;
  - Nature of questions asked.

Whether police acting within common law power to detain is determined by application of ***Waterfield*** test:

CASE LAW:

R v Grant (2009), SCC [When a Detention takes place; Definition of Detention; test of exclusion of evidence]:

- **Facts:** Grant was walking down a sidewalk in Toronto. He was walking funnily (looking around) and kept fiddling with his jacket. The police decided to stop and investigate him. After telling Grant to keep his hands in view, they surrounded him. After investigating and subjecting Grant to questioning, he confessed to police that he had drugs and a handgun. However, at no point did they inform Grant that he was being detained. Grant sought exclusion of evidence on the grounds that he was arbitrarily detained.
- **Issue:** Had a detention taken place?
    - The key issue on appeal was at what point Mr. Grant was detained.
- **Held:** Grant was detained w/o reasonable grounds, and therefore **it violated his s. 9 rights**; the evidence of drug possession is excluded, but not the handgun evidence (s. 24(2) *Charter* – applied here because handgun is more harmful to the society)
- **Analysis/Ratio:**
    - Grant was detained when he was told to "keep his hands in front of him"; therefore, before incriminating himself.
    - *Mann* tells us that a detention in the absence of at least reasonable suspicion is unlawful and therefore arbitrary within s.9
    - **A detention results whenever there is a significant deprivation of liberty through:**
        - **Physical compulsion or;**
        - **Psychological compulsion:**
            - Subject is legally required to comply with a direction or demand or;
            - A reasonable person would conclude by reason of the state's conduct that he or she had no choice but to comply.
                - **Factor**s in support of reasonableness arise from the entirety of the situation, including: the purpose of the interaction (general policing v. focused on the claimant (whether the police were providing general assistance; maintaining general order, etc.); the nature of the police conduct (the language used, ; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter, etc.), the nature of the claimant (age, size, minority status, sophistication, etc.).
    - **In the case at bar,** a detention was arbitrary on the basis of claimant's reasonable belief that no alternative exists:
        - Factors supporting the finding: particularized suspicion against Grant, police conduct taking on the nature of an investigation, Grant's youth/inexperience, three larger policemen in adversarial positions.

Imprisoned= total or near-total loss of liberty

R v Simpson (1993), ONCA [Recognizing a Power of Investigative Detention; Requirements; Created "articulable cause" Test; Profound change to Canadian law]:

- **Facts:** The police had a memo about a drug house. One police officer was investigating the area and stopped a car that had previously visited the house. Something was seen in Simpson's pocket. Drugs were recovered and Simpson was charged. No *Criminal Code* or *Highway Traffic Act* provisions served to authorize the stop.
- **Issue:** Was the detention authorized by common law?

- **Held:** The detention violates s. 9 of the *Charter* as it is not authorized by common law and is thus arbitrary.
- **Analysis/Ratio:**
    - A police power to detain for investigative purposes, which exists separately from police arrest powers, can be justified through the *Waterfield/Dedman* analysis.
    - **The use of power is only justified when the police have articulable cause (grounds not as high as arrest) to suspect that the detainee has committed an offense (goes to reasonableness under *Waterfield*).**
        - ONCA found that the police had no articulable cause to detain Simpson here (visiting a drug house isn't enough).
        - In this case, articulable cause test was used instead of reasonable grounds used in *Mann*!!
    - Above and beyond the articulable cause requirement, the actions of the detaining police officer **must also** be demonstrated to be necessary: ONCA found that investigative detention is not necessary to enforce drug laws.
    - **Need some basis to believe that the detainee involved in the crime before interference with liberty is justified**

R v Mann (2004), SCC [Clarifying the Power of Investigative Detention; Whether it includes incidental Search Power; Court relied on Waterfield to create "investigative detention" for protective measure]:

- **Facts:** Police investigating B&E; found Mann walking at scene, who met the subject description. Police approached and conducted a pat down search. After noting a soft object, police proceeded further, finding marijuana.
- **Issue:** Was Mann unlawfully detained in contravention of s. 9? Was he unlawfully searched in contravention of s. 8? Does power at common law exist to detain individuals for investigative purposes?
- **Held:** Mann was lawfully detained, as there were reasonable grounds for a protective search of Mann. However, while there is some power to search detainees, the search went beyond the scope of what was reasonable in this case, and therefore, seizure of marijuana was unlawful; evidence excluded under s. 24(2) of the *Charter*. **Power to detain for investigative purposes does exist but only as a protective measure.- cannot look for evidence.**
- **Analysis/Ratio:**
    - **Application of *Waterfield* to investigative detention:**
        - Police *may* have a power of investigative detention when acting in furtherance of their duties.
        - The use of that power is only justifiable when:
            - **The police have *reasonable suspicion* (a subjective belief that is objectively reasonable, but falls short of reasonable grounds) *on the totality of circumstances* that the detainee has committed an offense- they are connected to the crime AND**
            - **The detention must be necessary to carry out the duty**. It must be brief and there is no duty to answer questions of police.
                - As supposed to articulable cause.
    - **There is NO investigative searches incidental to detention:**
        - **Exception:** It must be a **protective search**, meaning:
            - a) Only a pat down search
            - b) Must be a search for weapons in order to protect office or public safety

- c) Only permissible when there are reasonable grounds to believe that safety at risk
- d) Must be done reasonably.

- **Reasonable Suspicion:**
  - More than a hunch or a mere suspicion.
  - However, it is less than reasonable and probable grounds (standard needed for arrest).
  - The assessment is made on the totality of the circumstances,
  - From an objective perspective.
- **In the case at bar:**
  - The physical proximity of the accused to the scene and a match to the suspect description **provided the reasonable suspicion** to justify an investigative detention.
  - There was also authority to conduct a search (There was a logical possibility that Mann, suspected of the crime, had B&E tools that might endanger officer safety)--however, moving beyond a pat down to investigate a soft object felt at the first instance pushed the search into unlawful territory.
  - in determining whether the detention was reasonable overall when assess against all circumstances:
    - duty being performed
    - extent to which infererence with liberty is necessary to perform duty
    - importance of performance of duty to public good
    - nature of liberty interefered with

In exam, YOU DO NOT NEED to apply the *Waterfield* test, you would just apply the *Mann* test for investigative detention. If a police power does not fit into *Mann*, then you would apply the *Waterfield* test. BUT, there has to be a reason to apply *Waterfield*, i.e. the increased security concerns in *Clayton* and the fact that the gun could be found by stopping all of the people in the parking lot for a short period of time. If it is clearly a failure of *Mann* and there is nothing to point to it not fitting in *Mann*, then you should not attempt to apply *Waterfield*.

Mann→ Police must have a reasonable suspicion in order to investigatively detain

R v Suberu (2009), SCC [Questioning Does not, by itself, mean Detention; Triggering 10(b) Right to Counsel]:

- **Facts:** Suberu tried to leave the officer's presence. In the midst of telling him to wait and questioning him, Constable Roughley received information via dispatch that gave him the reasonable and probable grounds to arrest Suberu. Suberu was then arrested and later charged with offenses. Suberu was not informed of, nor given access to, counsel until Roughley decided to arrest him.
- **Issue:** Was Suberu detained arbitrarily? If so, were his **s. 10 (b) rights (to counsel and information) breached?**
- **Held:** Suberu was not detained until he was told of his right to counsel, so no *Charter* breach exists.
- **Analysis/Ratio:**
  - A police officer can ask exploratory questions of an individual without there being a detention.
  - **S10 (b) *Charter* right to counsel analyzed:**
    - The right is **triggered only upon arrest or detention**.
    - Includes immediate **informational** and **implementational** components:
      - **Informational**: The detainee must be informed of the right to counsel.

- **Implementational**: The detainee must be given access to counsel (before interrogation).
- Immediacy requirements can be relaxed for cases where delay is required in the interests of safety.

- *Grant* analysis for detention was applied to the facts of the case to find against detention:
  - **No reasonable perception that Suberu was not free to leave (that means he was not restricted):** In the present case, Suberu was only momentarily "delayed" when the police asked to speak to him; he was not subjected to physical or psychological restraint so as to ground a detention within the meaning of the *Charter*.
  - It was only later, after the officer received additional information indicating that Suberu was probably involved in the commission of an offence and determined that he could not let him leave, that the detention crystallized and Suberu's rights under s. 10 were engaged. Upon arresting S, the police officer promptly and properly informed him of his right to counsel and, therefore, there was no violation of s. 10(*b*) of the *Charter*.
  - So court said that absence of objective evidence (police behavior did not appear to be detention) and the absence of subjective evidence (individual did not say he felt detained and we could not infer he felt that way based on circumstances) there was no detention
  - **Test for Detention**
    - **Subjective element** → must show that individual felt that he was being detained – they can either express this when testifying or it can be inferred that they felt detained based on the circumstances of situation
    - **Objective element**→ ther reasonable person in that situation must also believe that the person looked detained or appeared to have been detained – look at police conduct

OVERVIEW OF POWERS OF DETENTION:

- Statutory→ Highway Traffic Act (s. 216)
- Common Law/Ancillary Power to detain (*Waterfield/Dedman)*
  - Investigative detention *(Mann & Clayton)*
- Powers of Arrest → Criminal Code

ANCILLARY AND STATUTORY POWERS TO SEARCH

OVERVIEW:

S. 8 of the Charter

- *"Everyone has the right to be secure against unreasonable search or seizure."*
- Under s. 8 of the Charter, Canadians have protection from "unreasonable" search and seizure, which protects them in police encounters.
- S. 487 – allows the issuance of a warrant for the search of a building, receptacle, or place; and of the gathering of DNA/bodily samples
- S. 488 – warrant must be executed by day unless reasonable grounds for executing it at night are provided and the warrant authorizes execution at night.

- **GENERAL TEST FOR SEARCH:**

1. **Did the person have a reasonable expectation of privacy in the thing searched?**
   IF NO, police search was lawful. IF YES, move on to #2.
2. **Did the person who was searched consent to the search? Remember, to establish consent, must fulfill 6 conditions (outlined below)?**
   IF YES, police search was lawful (go to #6). IF NO, move on to #3.
3. **Was there a search warrant in place during the arrest?**
   IF YES, move on to question #4. IF NO, search is *presumptively inadmissible* (go to #5
4. IF YES SEARCH WARRANT → **Was the law in place authorizing the warrant valid/constitutional?**
   IF NO, police search was unlawful. IF YES, police search was lawful (go to #6).
5. IF NO SEARCH WARRANT → **Was the warrantless search reasonable (*R v Collins*)? A search is only reasonable where: (a) it is authorized by law; (b) the law itself is reasonable; and (c) the manner in which the search or seizure was carried out is reasonable. If one of three conditions are not met, then a search is unreasonable (*R v Collins*). Crown bears the burden of proving on a balance of probabilities that the warrantless search was authorized by a reasonable law and carried out in a reasonable manner. If one of three criteria are not met, search is unreasonable.**
   IF YES, search was lawful. IF NO, search was unlawful. END
6. **Was the manner in which the search was conducted abusive, excessive, or otherwise unlawful?**
   IF YES, search was unlawful. IF NO, search was lawful. END

- The police can search anyone they are authorized to search by a **warrant or for whom they have "reasonable and probable grounds" to suspect poses a risk to public safety** (this authority may run concurrently to detention).
  - **Note:** Certain circumstances, like 911 hang-up calls also provide police with a limited search power.
- The scope of this right and the grounds under which it will protect, however, are uncertain.
- We know from ***Mann*** that there is a power to do a protective pat down search in the case of a detention (on a reasonable suspicion of a safety threat), but what about arrest? Are there more powerful search powers for police as far as arrests go?
- Some of the sections of the *Criminal Code* that authorize police to search by warrant or in exigent circumstances:
  - 117.02, 184, 184.1-184.6, 186, 186.1, 199, 395, 462.32, 477.3, 487, 487.01, 487.1, 487.11, 488
- Kinds of **warrantless searches**:
  - Protective pat down incidental to investigative detention.
  - Safety search.

Search incidental to arrest.

CASE LAW:

Hunter v Southam (1984), SCC [Sets the gold standard for Reasonable Search under s. 8 Charter, exigent circumstances]:

- **Facts:** Southam, a publishing company, was subject to an order mandating a search, issued by the Government of Albert pursuant s. 10 (1) of the *Combines Investigation Act*. Southam challenged the law on the grounds that it contravened s. 8 of the *Charter* -- allowed for a search after the Director demonstrates to the Combines Investigation Committee that he/she was conducting an investigation against the party sought to be searched.

- **Issue:** Did the search contravene s8 of the *Charter*?
- **Held:** The search under *Combines Investigation Act* violates s. 8 of *Charter* b/c it does NOT meet standard for administering warrants.
- **Analysis/Ratio:**
  - *Charter* rights do not give the State power, but limit that power.
  - **Section 8 of the *Charter*** is triggered when an individual has a reasonable expectation of privacy.
  - The purpose of s. 8 of the *Charter* is to protect against searches, which are unreasonable in their **effect**, **not** in the **purpose** the State has in searching you.
    - So they are unreasonable in way they are carried out, rather than the purpose of the search.
  - **REASONABLE SEARCH REQUIREMENTS**:
    - **Prior judicial authorization:** Have prior judicial authorization before an impartial arbiter (i.e. a warrant) where feasible -- *without this, the search will be presumptively unreasonable and in contravention of s.8 until proven otherwise by crown*. (every other charter breach must be proven by accused)
      - Doesn't require a judge, but does require a neutral and impartial arbiter- can be a JP for example – wiretap must be authorized by SCJ
      - Protects privacy interests that cannot be assuaged by excluding evidence ex post facto.
      - ****You cannot protect privacy that has already been lost**
      - it may not be feasible to get warrant when someone's life is in jeopardy, there is no time, immediate danger to public, police hear someone cry for help etc
    - **Reasonable/probable grounds:** There must be reasonable grounds ***on the balance of probabilities*** to believe that an offense has been committed and that the location to be searched will yield evidence of that offense. (Objective standard)
      - Compare to *reasonable suspicion*: Objective standard that falls short of probability.
    - **The search must be conducted reasonably/pursuant to warrant.**
    - **Note:** The requirements may yield in cases of exigent circumstances.
  - **In the case at bar,** the search under the *Combines Act* was found to be unlawful because:
    - No reasonable grounds to search.
    - The investigatory powers bestowed upon the Commission precluded it as an impartial arbiter.

Cloutier v Langlois (1990), SCC [Origin of Search Power Incident to Arrest]:

- **Facts:** After a stop for a traffic violation, the police arrested Cloutier on account of a warrant for unpaid traffic tickets. After arrest, he was subjected to a frisk search upon arrest for which he laid information against the arresting officers for assault on the grounds that they had no power at statute or common law to search him.
- **Issue:** Is there an ancillary search power incident to arrest?
- **Held:** Yes, such a power to search exists (within limits), including frisk searches, upon lawful arrests.
- **Analysis/Ratio:**
  - Through ***Waterfield***, **a police officer, who lawfully arrests someone through reasonable grounds, has an incidental search power** subject to the following qualifications:
    - (1) It is **power** to search **NOT** a duty to search.
    - (2) The search must be **conducted for a valid objective** in pursuit of the ends of criminal justice.

            - E.g. safety, reducing the risk of escape, obtaining evidence.
        - (3) The manner of the search **must not be abusive**.
            - Physical and psychological constraint must be proportionate to the objectives of the search and the circumstances of the situation.
    - **Applied to the case at bar,** the Court found that the search was lawful:
        - The arrest was valid.
        - Valid purpose of officer safety given Cloutier's agitated and abusive demeanour.
        - The manner of the search was not abusive given that a frisk is not very invasive.

R v Caslake (1998), SCC [Clarifying Cloutier -- The Scope of Search Power Incidental to Arrest; Subjective/Objective Component to Reasonable Grounds/Suspicion]:

- **Facts:** Guy is relieving himself (peeing) on the side of the road. The police pull up and the guy drives away. Marijuana is found on the side of the road, so the police pursue and find the car and arrest the occupant. Six hours after the arrest, the police went to the RCMP garage and searched the car w/o warrant and found cash and some more drugs. The sole reason for the search was because it was required by RCMP policy.
- **Issue:** What is the scope of the search power incidental to arrest?
- **Held:** The scope of the search could have included Caslake's car, but it was rendered unreasonable by its purpose.
- **Analysis/Ratio:**
    - FOR A SEARCH TO BE REASONABLE UNDER S. 8 OF THE *CHARTER*:
        - Authorization by law.
        - The law must be reasonable.
        - The search must be carried out in a reasonable manner.
    - ***Cloutier*** **affirmed** (power not a duty; for a valid purpose connected to arrest; not abusive) **and applied in terms of incidental search power**.
        - **Scope is clarified:** While there is a search power incidental to arrest, it must be ***truly incidental in temporal and physical scope*.**
            - No hard and fast rules on scope are given -- will evolve on a case-by-case basis dependent on the context.
            - **Delays in searching do not automatically preclude a search from being incidental to arrest,** but may give rise to rebuttable inference that the search was not incidental.
                - Time and distance are flexible, but what is important is PURPOSE of search.
        - **Purpose is clarified:** The police must be acting on the basis of a valid incidental criminal justice purpose that is reasonable in the circumstances.
            - Creates both **subjective and objective** requirements for purpose, but **does not** amount to reasonable grounds, just needs reasonable basis
            - **Subjective** –may conduct search for police/public safety and preserving evidence, finding evidence
            - **Objective** - that belief by the officer that one of the underlying purposes to search incident to arrest will be served by the search must also be **objectively** reasonable.
    - **In the case at bar,** the search was unlawful due to a lack of valid purpose: the officer searched Caslake's car because of RCMP policy, not because of subjective purpose incidental to the arrest (which would have been objectively reasonable here).

        - Therefore**,** for example, when the arrest is for traffic violations, once the police have ensured their own safety, there is nothing that could properly justify searching any further.
        - Here, the purpose of the search was to inventory the contents of the vehicle which falls outside the bounds of the legitimate purposes of search incident to arrest. – Majority found that purpose of search was not met because the officer did not pursue the specific objective of obtaining evidence
- *This case also said that there is no bar at common law to search a car incident to an lawful arrest – you can do this even 6 hours after the person has been arrest- without a warrant. This is contradictory to *Hunter*, which would suggest holding on to car but then waiting to get a warrant.
- **DNA→**Police cannot seize bodily substances as there is no risk to loosing or not having evidence once you get a warrant – taking DNA is very invasive
- Can search knapsack, briefcase or suitcase arrestee holding (see *R. v. Martens* [2004] B.C.J. ; *R. v. Mohamad* [2004] *R. v. Kang-Brown* [2008]

R v Macdonald (2014), SCC [Ancillary Safety Search Power Without Detention]:

- **Facts:** Police investigated reports of an overly loud house party. When the homeowner opens the door, police spot something shiny in the owner's hand. The police knock open the door to see whether it's a weapon.
- **Issue:** Do police have an ancillary power to conduct **safety** searches?
- **Held:** The power to conduct search for safety reasons exists.
- **Analysis/Ratio:**
    - The police have a common law power to search for safety reasons to deal with threats to officers or the public.
    - **Safety searches are authorized by law through the application of the *Dedman/Waterfield* test.**
    - **The power to conduct a safety search *limited* to (Dedman Test)**:
        - **Reasonable grounds to believe (more likely than not)** that the officer's or the public's safety is at **stake** /a threat exists- (the importance of the performance of the duty to the public good)
            - Not enough to justify search if person is just suspicious, need more
            - Cannot be based on vague concern for safety
            - "reasonable and specific inferences drawn from the known facts of the situation"- *Mann*
        - It is **necessary** to *conduct* a search to deal with that threat (ie. If person is handcuffed in car, they aren't really a threat anymore)
        - The ***extent*** of the search is **necessary** to deal with the threat. (This is where the limitation comes in)- once safety is not longer at stake, infringement must end
    - Therefore, if these three factors, weighed together, lead to the conclusion that the police action was reasonably necessary, then the safety search will not constitute an unjustifiable use of police power.
    - **In the case at bar**, the police had reasonable grounds to suspect that there was a threat to safety and that a search was necessary. The extent of the search (opening the door) was limited to what was necessary.
    - **DISSENT (Moldaver):**
        - The dissent in this case part ways with majority when it comes to the proper way to interpret Mann – Majority was actually right though

R v Aucoin (2012), SCC [Pre-MacDonald, Dependent Validity of Incidental Powers]:

- This case was rendered mostly irrelevant by *MacDonald* (above) -- it turns out that there is a safety search power without detention (comes with the higher standard of reasonable grounds).
    - The problem is created by *MacDonald* because the court in *Aucoin* says that when a suspect is put in the car, he can be searched, because that search is incident to investigative detention. However, ***McDonald* is binding and is the law and its test allows safety searches to be conducted without an investigative detention.**
- However, this case is still important for holding that **when relying on incidental search power (*arrest or detention*) its validity will rise or fall on the basis of the validity of the underlying arrest or detention.**
    - Where an investigative detention is unlawful, a search incident that detention will also be unreasonable and will constitute a breach of section 8 of the Charter

R v Peterkin (2015), ONCA [Change language for test for safety search-"stake"]

- **Facts:** 911 call and no one on the line. Police are sent to location and no answer at the house. Police call security company to come unlock house, while they are waiting Mr. Peterkin walks by and into backyard of home. Police Q him – he said he was waiting for a ride. Police think he is suspicious. Police tell him he is under investigative detention for trespassing. Police ask for ID and he makes weird movements- police suspect he is armed and do a safety search and find loaded gun
- **Issue:** was the safety search lawful?
- **Analysis/Ratio:**
    - Court considered *Waterfield Test* as applied in MacDonald.
    - Majority of the court found that safety searches are authorized by law only if the **officer believes on reasonable grounds that his/her safety is at stake** and that, as a result, it was necessary to conduct the search.
    - WATT: in this case changes the language from "risk" to "stake" because he quotes *Mann* as saying "stake" → this pulls the rug out from Moldavor in *MacDonald* and completely changes the landscape and takes away Moldavor's reasoning

***Keep in mind that once police are at the point that there is reasonable and probable grounds that the person is armed (ie. They you have reasonable and probable grounds to believe that they have committed an offence -possession of firearms) you can arrest them and because you have lawfully arrested them -you could then search them- but the point is that it may not always be like this.

*R v Golden (2001), SCC [*Strip Searches Incidental to Arrest, subject to special requirements]*

ANY REMOVAL OF CLOTHING THAT IS SIGNIFICANT WOULD = STRIP SEARCH

- **Facts:** Golden was spotted by police dealing drugs in a subway. Drugs were found on his hand and on the floor around him. He was strip searched for more drugs in a stairwell, where a piece of plastic wrap was found poking out of his bum. Golden kicked the officer down the stairs. Golden was caught and then put in a public booth and strip-searched again using dirty plastic gloves.
- **Issue:** Is there a strip search power incidental to arrest?
- **Held:** Yes, subject to limitations. However, the strip search was not lawful in this case.
- **Analysis/Ratio:**
    - **In order for a strip search incidental to an arrest be constitutional, the following must be established:**

- 1) That the arrest was lawful – i.e. the police possessed the requisite grounds and that those grounds were objectively reasonable;
- 2) The strip search must be undertaken for purposes related to the arrest, i.e. officer safety or to locate and preserve evidence
    - Example: cannot just conduct a strip search because the guy is a prick and you want to embarrass him); must relate to safety or location of evidence not just impulsive reasons.
- 3) Due to the intrusiveness, strip search cannot be undertaken as a matter of routine. It is above and beyond the requirements for a lawful search incidental to arrest and police **must have additional reasonable and probable grounds** to believe that a strip search is necessary to ensure safety or locate/preserve evidence related to the offence for which the detainee was arrested.
    - Mere possibility they may be concealing a weapon is not enough to justify strip search
    - Burden lies with crown to justify search on BOP
- 4) Generally, strip-searches may only be conducted at the station-house, unless there are exigent circumstances necessitating such a search in the field
- 5) The search must be carried out in a reasonable manner. This will depend on factors such as:
    - Respects health and safety of participants.
    - The presence/absence of a supervisor's authorization.
    - Whether the searchers are of the same gender.
    - Whether as few officers are present as necessary.
    - Whether minimum force was used.
    - Whether it was conducted in private.
    - Whether it was conducted as quickly as possible.
    - Whether the arrestee was ever in a state of complete undress.
    - Whether there was any physical contact.
    - Whether the arrestee was given the option to remove any confiscated objects his/herself.

- **In the case at bar,** the strip search was not conducted reasonably owing to many factors.
- **The more intrusive the search, the more justification and constitutional protection should be provided (par 88)**
- **Strip Search in Custodial Setting→** The SCC accepted that a strip search may be necessary when integrating a detainee into a prison population to prevent the individual from bringing contraband or weapons into prison. (at paragraphs 96-97).
    - Cannot be done as a matter of routine
    - Must consider if really going into prison population
        - See *R. v. Flintoff* (1998)
        - *R. v. Muthuthamby*, [2010]
        - *R. v. McGee* [2012]

DOES S. 8 OF THE *CHARTER* APPLY? REASONABLE EXPECTATION OF PRIVACY

OVERVIEW:

- **S. 8** guards against unreasonable search and seizure only in those objects over which they have a reasonable expectation of privacy.
- In some cases, an expectation of privacy is obvious.
- In many cases, it's difficult to ascertain whether s. 8 protections apply to a searched object: largely when there's a privacy interest, but no ownership rights.
- Generally, **abandoning your items** constitutes a waiver of a reasonable expectation of privacy over that property.
- However, ***Stillman*** ([1997] SCR 607]) found that there was a violation of *Charter* rights when police used a tissue discarded by a prisoner to gain a DNA sample.- accused had made it very clear that he was not going to give the police anything- he also had no choice but to leave tissue there. So using his tissue was a clear violation in that he had no other choice and made it clear he was not giving them anything

Sniffer dogs:

- The ancillary police doctrine has been used to create a new drug sniffing dog police power.
- Sniff dogs can be used on the basis of **reasonable suspicion** that the search will lead to evidence of an offense - because it's less intrusive than other searches.
- *Kang-brown* [2008] and *R. v. M.(A.)* [2008]

Plain view doctrine:

- Police are not required to ignore evidence that they happen upon: e.g. finding pot plants in a complainant's house.
- **Limitations:**
  - Police must be in the place lawfully (*Buhay*).
  - The contraband must be in plain view, not needing further inspection (*Law)*
- The following cases provide a rubric for resolving these issues.

CASE LAW:

R v Buhay (2003) SCC [Determining Reasonable Expectation of Privacy (REP), Expectation of Privacy in Bus Station Locker]:

- **Facts:** Buhay had rented a locker in a Winnipeg bus station in which he stored a duffel bag of marijuana. The smell from the bag attracted the attention of the security guards who had a station attendant open it for them. They confirmed their suspicion of the contents of the bag, then locked it back into the locker, and called the police. When the police arrived they had the attendant open the locker again. They took the bag without a warrant.
- **Issue:** Did Buhay have a reasonable expectation of privacy in the locker that was violated by the police search?
- **Held:** Yes he had the reasonable expectation of privacy.
- **Analysis/Ratio:**
  - **Determining a reasonable expectation of privacy:**
    - A reasonable expectation of privacy is a precondition for s. 8 engagement.
    - It is to be **determined on the entirety of the circumstances**, including:
      - The accused's presence at the time of the search.

- Possession or control of the property or place searched.
- Ownership of the property or place.
- Historical use of the property or item.
- Ability to regulate access.
- Existence of a subjective expectation of privacy (by respondent).
- The objective reasonableness of the expectation.

▪ The reasonable expectation is **not all or nothing** -- the expectation may be present in a weaker form even without ownership rights or exclusive access.

- **And when a reasonable expectation of privacy is present**, police need a warrant to search the area unless it is impracticable to get one.

- **In the case at bar,** there was a reasonable expectation of privacy over the locker (accused had control over access through a key, paid the required fee to have (temporary) exclusive use, no mention that staff would open locker) that was not vitiated by the original entry by station security.
  - **Further,** the search by police was unreasonable -- they had no warrant and no reason for not seeking one.

R v Mock→ person was in prison cell to sober up and was filmed while going to the bathroom- S.8 rights were in play and there was a breach of the mans rights. Police policy has been changed and they do not tape bathrooms anymore. They can still tape cells for safety reasons. So you do have a reasonable expectation of privacy in the jail.

CONSENT SEARCH CASE LAW:

R v Wills (1992), ONCA [Six point test for Consent to Search; waiver of Charter Right]

- **Facts**: A man crashed a car. The police suspected intoxication, but they lacked the grounds to demand a breath sample. Upon asking Wills about it, Wills admitted to the police that he had been drinking. The police then demanded a roadside breath sample. Wills passed the roadside test, police then suggest that he go to station and take a more precise test which would help him if he is sued. They told him that he wouldn't be charged because the police were under the impression that his BAC was too low to attract a criminal charge. Wills agrees, police find out later that people in accident had died and now charged against Wills are more severe.
- **Issue:** Did Wills effectively waive his rights against unreasonable search and seizure and give consent such that the Charter wasn't violated?
- **Held:** Wills did not effectively waive his rights because his consent was not informed as to the consequences.
  - Wills could not have provided constructive consent because he wasn't aware of the legal ramifications of giving his consent.
- **Analysis/Ratio:**
  - Complying with an action that would otherwise breach a *Charter* right is not conclusive evidence of a waiver (so not every compliance is evidence of waiver); attention must be paid to a coercive context, which would vitiate the significance of any consent given or implied.
    - **Requirements for waiving a *Charter* right:**

- A) There was a consent, express or implied
- B) The giver of the consent had the authority to give the consent in question.- parents cant give consent for their child
- C) The consent was voluntary and was not the product of police oppression, coercion or other external conduct which negated the freedom to choose whether or not to allow the police to pursue the course of conduct requested
- D) The giver of the consent was aware of the nature of the police conduct to which he or she was being asked to consent
- E) The giver of the consent was aware of his or her right to refuse to permit the police to engage in the conduct requested; and,
- F) The giver of the consent was aware of the potential consequences of giving the consent – understand jeopardy

  - (2) This is a stringent test. Crown must prove consent on a balance of probabilities.
- **In the case at bar,** Wills did not effectively waive his rights because he was not aware of the consequences of consent. So he met the first 5 conditions, but not the last
- **Once you waive consent, you are no longer entitled to the privacy right.**

- **ON EXAM:** If the facts say the individual gave the police permission to search their car, you need to do the analysis on whether the consent was informed or not. If there are facts missing, identify those facts and how they would affect your analysis

COMMON AREAS

R v White (2015), ONCA [Right to privacy in common area of condo]

- **Facts**: Police know of a drug trafficker visiting a condo and suspect that condo is being used to stash drugs. Detectives enter condo 3 times before getting a warrant (Front door entrance always locked, back door was left open, he also followed mail man in on other occasion)
- **Issue:** Did the respondent have a reasonable expectation of privacy in the common areas of his condo building?
- **Held:** Respondent does have a reasonable expectation of privacy in the common areas of his condo
- **Ratio/Analysis:**
  - The right to be secure from unreasonable search or seizure protects *reasonable* expectations of privacy, and the reasonableness of an expectation is determined having regard to all of the relevant circumstances in a particular case. Justice Cory enumerated several relevant considerations in *Edwards,* at para. 45:
    - (i) presence at the time of the search;
    - (ii) possession or control of the property or place searched;
    - (iii) ownership of the property or place;
    - (iv) historical use of the property or item;
    - (v) the ability to regulate access, including the right to admit or exclude others from the place;
    - (vi) the existence of a subjective expectation of privacy; and
    - (vii) the objective reasonableness of the expectation.

- Justice Cory emphasized that these considerations are a guide to the question. There is no requirement that each of the *Edwards* factors be considered in a mechanical fashion in order to render a valid decision.
- I analyze whether the trial judge erred in finding that the three searches conducted by Detective Hill violated the respondent's right to be secure against unreasonable search and seizure under s.8 of charter
- To be constitutionally compliant, a search must be authorized by law; the law authorizing the search must be reasonable; and the search must be carried out in a reasonable manner: *R. v. Stillman,*
- The three searches by Detective Hill were conducted without a warrant and so are *prima facie* unreasonable: *R. v. Caslake,*→ Detective breached defendants S.8 charter rights

SEARCH WARRANTS

OVERVIEW:

- Search warrants are based on **ex parte** hearings: only one party is present.
  - This creates a duty on the part of the police to be full and frank in their disclosure to the Court.
  - To obtain the warrant, the police must demonstrate reasonable and probable grounds to believe that an offense was committed and that evidence of the offense will be found in the location.
  - This is initiated through an **Information To Obtain** (ITO), a kind of affidavit.
- The defense is not present when the warrant is issued, but the defense can later apply to have the warrant quashed (even after it has been executed).
- Application is made to trial judge to have the warrant set aside – have to convince them rights have been violated

Two ways to attack a warrant:

- Facial validity: On the face of the ITO, could the warrant have been issued?
  - This is easy (given the evidence required), but not often successful.
  - I.e. was the location specific and did the police search that actual location?
- **Sub-facial validity**: Goes beyond the ITO and challenges the reliability of its contents. On the record, as advised by the review process (removing fraudulent/misleading info), is there a basis on which the issuing justice could have issued the warrant.
  - This is difficult because all one often has is the ITO.
  - I.e. officer lied, information was misleading, information was unreliable, etc.

Confidential informants (CI) and privilege:

- Challenging the ITO's sub-facial validity is often difficult because the identity of confidential informants is subject to privilege (you can think of the policy reasons behind this).
- In fact, the Court cannot even give any information about the CI, which would narrow the field of possible informants.

Cross examination of the affiant

- (Valuable during a sub-facial challenge):
  - There is no right to cross-examine the affiant (see next point)

        - Guilt v. innocence not at stake.
        - Avoids fishing expeditions.
        - Often, the warrant is so heavily redacted, that there's not much to cross -examine on anything.
    - **Defense must show a basis** for the view that cross-examination will elicit testimony that will discredit the existence of one of the pre-conditions such as 'reasonable and probable grounds' for relief.
        - The test is whether there is a "**reasonable likelihood**" that the cross examination will elicit evidence which undermines the basis for the search warrant.

Judicial summaries

- (from ***Garofoli***)**:** When there's a heavily redacted ITO (such that it would fail, in its redacted form, to justify review of a warrant), the judge can use the complete ITO and have a judicial summary made that will allow the defense to challenge the warrant.
    - To be used when the redacted ITO is insufficient to authorize the search
    - …

CASE LAW:

R v. Godoy (1999), SCC [Emergency Search Power, intrusion must be limited to the protection of life and safety]

- **Facts:** A 911 call that is hung-up. Police attend house and force their way into the entrance after the doorman refuses entry. A woman is found suffering from injuries and the man is charged with assault.
- **Issue:** Do police have the common law power to forcibly enter a dwelling house when they receive a 911 hang-up call?
- **Held:** The entry is valid.
- **Ratio:**
    - Police have a common law power (via ***Waterfield*** test) to enter a residence to perform a welfare check in the event of a 911 hang-up call.- see long summary for reasoning under each branch of *Waterfield Test*
    - The scope of the search extends only to checking welfare, not to searching the premise or intruding beyond what is necessary to maintain welfare.
- **Note: The Court does not say that police have to ignore what they find inside**, just that the scope of their trespass is limited to securing the welfare of occupants. (Once they are inside they could make an arrest)
- If police attended house and injured woman came outside, police would then need warrant to go inside- unless accused was inside and could tamper with evidence.

R v. Debot (1989), SCC [Search on the basis of Confidential Informant]

- **Facts:** Police get confidential tip from a "reliable" informant, who they had previous experience with and that was successful. He told the police that Debot and Carpenter were getting 4 oz of drugs and

meeting at Carpenter's house. Police see the car coming to Carpenter's house; the car drives off. Police confirm that car is registered to Debot; they catch up to them, pull them over car and search the car. Debot is in passenger seat. Police officer asked if he had drugs – denies it. Officer tells him that he has RPG to search for drugs. Find approx. 1 oz. of drugs in glove compartment. Upon arrest, he was advised of his right to counsel, but was not given the opportunity to contact counsel until after the search was completed.

- **Issue:** Was s. 10 breached? If so, did the breach of s. 10(b) give rise to a breach of s. 8?
- **Held:** The search was lawful. Exigent circumstances existed to search and so there is no breach of ss. 8 or 10 (b).
- **Analysis/Ratio:**
    - Police are required to instruct detainees about the right to counsel "without delay", but they don't need to suspend a search to do it: **the right to search is an independent duty from instructing about right to counsel.**
        - **Denial of the right to counsel will result in a search's being unreasonable contrary to s. 8 of the Charter in only exceptional circumstances**. A search is reasonable if it is:
            - (a) authorized by law,
            - (b) if the law itself is reasonable and
            - (c) if the manner in which the search was carried out is reasonable.
        - **The denial of the right to counsel does not affect the "manner" in which the search is conducted.**
    - Therefore, the absence of the right to counsel is not always a factor in determining whether s.8 of the *Charter* has been breached.
    - **Assessing the existence of reasonable and probable grounds to search**
        - The standard to use in assessing whether a search is lawful is when police have **reasonable and probable** grounds (also described as '*reasonable belief*') to believe that an offense has been committed and that the search will produce evidence of that crime [Application of ***Hunter v Southam***]
            - The decision about whether this standard has been met relies on looking at the **totality of the circumstances,** including: **compelling information, a credible informant and corroborating information**.
                - However, "bald accusatory statements" or "mere rumor" will not suffice.
                - **Three C's for CIs- apply whenever a CI is used- whether its wiretap or search or whatever**
                    - 1. Information is **compelling** (Rumour or gossip will NEVER suffice)
                        - look at totality of factors
                        - can consider persons reputation
                        - if something is vague and lacking detail- probably not compelling
                    - 2. Source is **Credible**
                        - relates to the truthfulness of person giving info

- not the same as reliability (which relates to accuracy)
- a person can be credible but not reliable

- 3. How the evidence has been independently **corroborated** by a police investigation? (More necessary in some circumstances (e.g., crime stopper tips) than in others).
  - We need a police investigation to ensure that either the info is just not true or could be true
  - Corroborate the criminality of the tip

- ***** Weaknesses in one of the three areas can be compensated for by strength in the other two areas, but must be strength in both areas no just one**
  - 3 C's are to prevent mere coincidences.
- There is no magical ingredient; it is a heavily fact-driven inquiry.
- **An informant tip, alone, is unlikely to generate reasonable and probable grounds**

- **In the case at bar**, the search was lawful by the police because there existed exigent circumstances to do search of Debot, and informing of right to counsel (s. 10 (b)] was done upon arrest, hence no violation.

GROUNDS FOR CHALLENGING A SEARCH WARRANT: CASE LAW

- Fraud, material non-disclosure, lack of reasonable and probable grounds.
- ***Garofoli*** **Application:**
  - Complex police investigations often lead to searches requiring judicial authorization (wiretaps, search warrants, production orders, etc.)
  - A ***Garofoli*** application is the process by which the defence counsel challenges the judicial authorization in one forum before the trial judge on a voir dire, where the ultimate goal is s. 24(2) (exclusion of evidence) remedy.
    - There is a cross-examination of the affiant- appellant has to show a basis for cross examination- some basis for fraud or material non disclosure, or warrant should not have been issued→ low threshold. Appellant must show proof of deliberate falsehood or reckless disregard for the truth- but they cant do this unless he can cross-examine** problem
  - Burden of proof to invalidate a search warrant on prior judicial authorization (i.e. by a JP/issuing judge) pursuant to s. 8 of the *Charter* lies on the applicant on the balance of probabilities.
- ***Garofoli*** was a wiretap case, however, **<u>the rules are the same for review of search warrants</u>** – ***Grant***, etc.

R v. Garofoli (1990), SCC [Wiretap Warrant, Challenging a search warrant, Upholds Debot]

- **Facts:** Appellant was charged with conspiring to import a narcotic. The evidence against him was derived largely from private communications intercepted pursuant to wiretap authorizations. He

wanted access to the sealed packet containing the application (affidavit from police officer swearing that he has grounds for search), but the habit at the time was to have it sealed (because want to keep identity of the informant a secret). The **ONCA** found that appellant was entitled to have access to the sealed packets. The affidavits were edited to protect confidential informants and then released to him. The ONCA further found that the editing did not impair counsel's ability to determine the facial validity of the affidavits, and so he was not allowed to further cross-examine the affiant.

- **Issue:** How can a search warrant be challenged for lack of reasonable and probable grounds?
- **Analysis/Ratio:**
    - The defense needs to be granted access to the packet to make a full defense.
    - On review, the test for the trial judge is not whether he/she would issue the warrant in the circumstances, but **whether there are sufficient grounds, in the circumstances, on which the JP/issuing judge <u>could have</u> issued the warrant.**
        - In making the assessment, the factors from ***Debot*** (see above) apply.
    - **Regarding the opening of the Packet/Editing Contents (known as the 'Garofoli' Application)**
        i. The packet is released and the Crown will edit it before it is given to the accused.
            1. To protect informants, current investigations, etc.
        ii. If the defense has a problem, counsel can apply to have the Court view an edited copy.
        iii. After hearing counsel for the accused and reply from the Crown, the trial judge should make a final determination as to editing, bearing in mind that editing is to be kept to a minimum and applying the factors listed above.
        iv. After the determination has been made about the extent of acceptable editing, the packet material should be provided to the accused.
        v. If the Crown can support the authorization on the basis of the material as edited, the authorization is confirmed.
        vi. If, however, the editing renders the authorization insupportable, then the Crown may apply to have the trial judge consider so much of the excised material as is necessary to support the authorization. The trial judge should accede to such a request only if satisfied that the accused is sufficiently aware of the nature of the excised material to challenge it in argument or by evidence.
            1. In this regard, a judicial summary of the excised material should be provided to the defense if it will fulfill that function.
    - Wiretap authorization can only be granted by SCJ judges.
    - Min Constitutional requirements for a valid warrant→ reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search (*Hunter v Southam Inc.)*
    - if trial judge finds that there was no basis upon which the authorizing judge could have granted the warrant, the trail judge is required to find that the search or seizure contravened S. 8

ELECTRONIC TYPE SEARCHES/ CYBER SEARCHING: CASE LAW

- We know that there is a power to search incidental to arrest, but does this extend to the electronic contents of, say, a **<u>cell phone</u>** found in someone's pocket? **No it does not. Need another warrant**.
    - *Morelli* (SCC): think about computers -- information that is largely permanent (difficult to

eradicate), contains a wealth of data about a person and their interests.

R v. Morelli (2010), SCC [Computer Searches]

- **Facts:** Accused was visited by an internet service provider technician at his home. Technician looked at Morelli's computer and noticed several things that made him suspicious – he saw links to child porn sites. Computer background was pornography, there was also a video camera pointed at a child's play area in the home. Technician came back next day and indicators were gone, place had been cleaned up. Technician reported Morelli to child welfare agency who got police. Police applied to JP for search warrant to search home and computer.
- **Issue:** Was the search lawful?
- **Held:** Search unreasonable and evidence used to convict Morelli must be excised
- **Analysis/Ratio:**
    - The test to determine when a search and seizure is a reasonable limitation on privacy is called "reasonable and probable grounds." Before a search warrant can be issued, the police must provide "reasonable and probable grounds, established upon oath, to believe that an offence has been committed and there is evidence to be found in the place of the search.
    - A judge or JOP determines whether there are "reasonable and probable grounds" based on the facts provided by the police. Thus, the police must make a "full and frank disclosure" of the facts. They have to be careful not to "pick and choose" amongst the facts, but to present "all material facts
    - Justice Fish (Majority) found that some of the information provided by police to the justice of the peace was misleading. The result was an impression that was more sinister than necessary- Fish determined that the review of reasonableness of the decision to issue warrant must begin by removing these exaggerated elements from the police application for warrant
    - With the misleading passages and unsubstantiated suspicions removed, the basis for the search warrant "is reduced to scrutiny of two internet links," which does not amount to reasonable and probable grounds
    - In considering whether to exclude the evidence under s. 24(2) Fish considered (*R v Grant*) the seriousness of the breach→ because police did not willfully or even negligently breach the charter the breach was not that bad. He looked at the impact of the breach on the accused→ this had a huge impact. "he has difficulty imaging a greater breach of privacy than this"- computers hold so much of our information
    - Cops in this case also wrote warrant for possession of child porn- court said you cant do this because Morelli did not necessarily have possession, all we saw was a link- could just be accessing

R v. Fearon (2014), SCC [cell phone search- Must be "Truly Incident" to Arrest]

- **Facts:** Fearon's unlocked phone was searched after he and a co-accused were caught after robbing a store. In the cell phone log police found a drafted text about jewellery and a picture of the handgun later found by the police. The cursory search was conducted again at the police station.

- **Issue:** (i) Was the belief of the police that an examination of the cell phone would yield evidence of the robbery reasonable? (ii) Did the search of the contents of the cell phone go beyond the permissible limits of a search incident to arrest?
- **Held:** The search was lawful and so the original search of the cell phone did not fall outside the ambit of the common law doctrine of search incidence to arrest.
- **Analysis/Ratio:**
    - *Manley* is upheld.
    - Comments are also made about **locked v. unlocked phones:**
        - Locked phones require consent or a warrant: Since there is no real way to enter a password-protected phone on a cursory search.
    - Locking a phone creates an expectation of privacy, which is reasonable given the information it holds.

    - **In the case at bar**, the police officers' search was lawful as they had **a reasonable belief** that they might find photographs and text messages relevant to the robbery. The initial search at the time of the arrest involved a cursory look through the contents of the cell phone to ascertain if it contained such evidence.
    - Search of cell phone was incidental to arrest – as it was done to locate the handgun, thus ensuring public safety, to locating the stolen jewelry thus avoiding loss of evidence and to obtain evidence about the crime and any accomplices
    - Majority held that search was conducted reasonably as it was brief and cursory
    - SCC declines to carve out exceptions to search incident to arrest power for cell phones
    - **SCC didn't establish a reasonable grounds to search cell phone test- but they beefed up the "truly incidental" requirement**
    - Because police had reasonable and probably grounds to arrest Fearon- search was fine

R v. Vu (2013), SCC [Search of Computer requires another warrant, computer has a wealth of information and so high expectation of privacy attached]

- **Facts:** Police have a search warrant for Vu's house that says nothing about computers. A computer was discovered and police searched it, discovering evidence of an offense.
- **Issue:** Did the police search warrant to search the house authorize a search of the computer?
- **Held:** A residential search warrant is not sufficient. To search a computer contained in a residence, the warrant must specifically grant permission to search computers. This should only be given when there is a reasonable basis to search its contents. **If police find an unexpected computer, they can seize it and secure it and then apply for a warrant subsequently to search it.**
- **Analysis/Ratio:**
    - A computer contains a wealth of information that is difficult to eradicate, because information may not have been stored with the knowledge of the user (cookies, RAM, etc.) and is sourced from outside of the residence.
        - **Individuals rightly have a high expectation of privacy when it comes to the contents of their computers.**
        - **This warrants a greater deal of protection under s8.**
        - **must satisfy issuing justice that officers have rble grounds to believe that any computer they will discover will contain things they are looking for.**

BUT

- **They need not establish that they have rble grounds to believe that computers will be found in the place.**
- **If find computer but not specified in warrant can search computer officers may seize it and secure it (if they reasonably believe it contains the sort of things that the warrant authorizes) and apply for warrant to search data.**

R v. Telus Communications (2013) – SCC [intercepting incoming text messages]

- **Facts:** police obtain a general warrant requiring telus to provide them with copies of any store text messages sent or received by two telus subscribers. They wanted both saved messaged as well as any incoming messages
- **Issue:** Can a general warrant be used to intercept incoming private communications?
- **Held:** No, general warrant can be used to search phone and saved messages on phone. Wiretap warrant must be issued in order to intercept messages
- **Analysis/Ratio**
    - Text messaging is, in essence, an electronic conversation. The only practical difference between text messaging and the traditional voice communications is the transmission process. This distinction should not take text messages outside the protection of private communications to which they are entitled in Part VI.
    - To get a wiretap authorization (is called a part 6) there are a bunch of other requirements
    - **CC s. 186(1) – must be investigatively necessary**
    - Court split 3 ways in this case- shows how hard it is to take new technologies and fit them in new contexts
    - Ultimately **majority** said that this was either an interception (like a wiretap) and you would need the warrant under part VI. You need wiretap authorization and this was an unreasonable use of general warrant

R v. Spencer (2014) – SCC [Subscriber Info & IP Addresses, TEST FOR REASONABLE EXPECTATION OF PRIVACY]

- **Facts:** Police identify IP address of a computer someone has been using to access and store child porn. They obtain – without prior judicial authorization- the internet service provider (ISP) -Shaw Communications and got the subscriber information associated with IP address. This led them to the accused who had downloaded child porn into a folder that was accessible to other internet users. Mr. Spencer claimed that the police had conducted an unconstitutional search by obtaining subscriber information matching the IP address and that the evidence obtained as a result should be excluded
- **Issue:** Did the police obtaining subscriber info matching the IP address constitute a search? Was the search authorized by law? Was S. 8 engaged- Did person have reasonable expectation of privacy?
- **Held:** It was a search and the search was not authorized
- **Analysis/Ratio**
    - The identity of a person linked to their use of the Internet must be recognized as giving rise to a privacy interest beyond that inherent in the person's name, address and telephone number found in the subscriber information.

- Subscriber information, by tending to link particular kinds of information to identifiable individuals, may implicate privacy interests relating to an individual's identity as the source, possessor or user of that information.
- Some degree of anonymity is a feature of much Internet activity and depending on the totality of the circumstances, anonymity may be the foundation of a privacy interest that engages constitutional protection against unreasonable search and seizure.
- **In the totality of the circumstances of this case, there is a reasonable expectation of privacy in the subscriber information**. Therefore, the request by the police that the ISP voluntarily disclose such information amounts to a search.
- The police did not have power to conduct a search for subscriber info and this search thus violated the charter – however the police were acting by what they reasonably though were lawful means and the nature of their conduct will not bring the administration of justice into disrepute. Because the charges are serious- the admission of the evidence will be upheld

Court said there are 4 factors to consider in identifying whether there is a **reasonable expectation of privacy**:

1. Subject matter of the alleged search
2. Claimants interest in subject matter
3. The claimants subjective expectation of privacy in the subject matter
4. Whether subjective expectation of privacy was objectively reasonable having regard to the totality of the circumstances

Marco Viscomi v A-G (Ont) (2015)- ONCA- IP Addresses

- Viscomi going to be extradited to USA on charges of child luring
- Law at time was that you don't need a warrant
- Issue in this case was what you could infer from IP address
- Court said that you couldn't draw the inference
- Case illustrates that one problem in this area Is that yes you have an IP address and you can find subscriber, but it does not tell you all that much. It doesn't tell you that the person was in fact on skype taking part in the acts
- **You have to be careful what you draw from the IP address**.
- There is a danger that this kind of surveillance will draw you to things that you weren't actually looking for- you have to pay attention to what does and does not flow from the use of a particular IP address
- **You cannot assume that because your IP address was used that you are legitimate target. – police usually need something beyond the fact that you are the subscriber of the IP address to point to that person as the target. Usually they have another detail about the person that they can use to confirm.**

ARREST AND SECTIONS 494-495, 529-530 CRIMINAL CODE

OVERVIEW:

- An arrest consists either of: (a) the actual seizure or touching of a person's body with a view to his detention, or; (b) the pronouncing of "words of arrest" to a person who submits to the arresting officer
- When someone is under arrest: Conduct, through words and/or actions, which, from an objective standpoint, would give rise to the perception that someone has been arrested.
- **Reasonable and probable grounds to arrest:** whether a reasonable person in the same position as the officer would come to the conclusion that the target is more likely than not to have been involved in the crime alleged.
    - A reasonable person becomes placed into the position of a police officer.
- Warrant/Warrantless Search (**s. 495**):
    - Police **may arrest without a warrant** when:
        - A person who committed an indictable offense, or when an officer has reasonable and probable grounds to believe that someone is about to commit an indictable offense**.**
        - A person found committing a criminal offense**.**
        - A person for whom grounds to believe that a warrant, valid in the jurisdiction, authorizes an arrest.
    - A police officer **shall not arrest without a warrant** when:
        - A person is suspected of certain indictable offenses (s. 553).
        - Hybrid offenses.
        - Summary conviction offenses.
        - …in any case where, the police officer believes on reasonable and probable grounds that the public interest will be protected, including RICE:
            - **R**: No repetition of crime.
            - **I:** Confident of identity.
            - **C**: The person will attend court.
            - **E**: Evidence will not be destroyed.

EXAMPLE → If police see the prof smoking a joint and take the joint from him, are satisfied that he has no more joints, that he wont smoke another the next day, knows who the prof is, knows what he does, knows he is likely to appear in court, then the police cannot arrest him then and there- they must get a warrant

- Criminal Code (s. 31): A peace officer may arrest for a breach of the peace (**not necessarily** an offense) – there is no offence for breaching the peace (*Khatchatorian)*
- **Citizens have an arrest power too (s. 494)**:
    - Anyone can arrest someone when they find him or her committing an indictable offense.
        - Or within a *reasonable* amount of time of committing that offense.
    - A person **who is reasonably believed to have committed an offense** and is being pursued by those with authority to arrest.

Some courts have said that the citizen can search the person incident to arrest just like police can, but they must also comply with charter (Search must be truly incident to arrest)

- **Feeney warrants – warrant for entering dwelling-houses to make arrests (s. 529)**
    - ***R v. Feeney***- post-Charter, the privacy interest in a dwelling house now outweighs the interests of the police and warrantless searches are generally prohibited (contrary to s.8). Only allowed in **Hot Pursuit** cases
        - **In response to the case**, parliament enacted s. 529, through which judges/justices may authorize the police to enter dwelling-houses to make an arrest as long as the judge/justice is satisfied that there are **reasonable grounds to believe the person will be in the house, and there is already a valid warrant out for their arrest, or there are reasonable grounds for a warrantless arrest**.
- **Note:** Police can charge without arresting.
    - Police can issue a promise to appear in court, which allows them to be released without being

held.
- Police can issue a recognizance.
  - With or without a deposit.

CASE LAW:

R v. Latimer (1997), SCC [Are you under arrest analysis?]

- **Facts:** The father of a severely disabled girl euthanized his daughter by poisoning her with carbon monoxide gas and saying that she had died peacefully in her sleep; the autopsy showed signs of the gas, and two police officers attended at his residence. They did not tell him he was under arrest using those words, but told him he was being detained and investigated about the matter. They repeatedly informed him of his rights to counsel and silence (10 (b) rights), and that anything he might say could be used against him.
- **Issue:** Was there a violation of s. 9? Did the fact that the officers didn't explicitly tell him he was under arrest violate his s. 10(a) rights?
  - Therefore, does a lawful arrest require notification that one is "under arrest"?
- **Held**: There was no violation of s. 9; there was no violation of s. 10 (a) right; and a lawful arrest does not require notification of being "under arrest"
- **Analysis/Ratio**:
  - **Are you under arrest analysis (more important for us)**:
    - Words of arrest are sufficient --- doesn't require an officer to declare that someone is under arrest.
    - On the basis of all the circumstances, we look to whether the reasonable person would understand themselves to be under arrest.
  - Defence of Necessity is not invoked (not important): Three requirements for the defense of necessity:
    - 1. It must be an urgent situation of clear an imminent peril or danger
      - Disaster imminent or harm unavoidable and near; It is not enough that the peril is foreseeable or likely - it must be on the verge of transpiring and virtually certain to occur.
        - This is a modified objective standard
    - 2. There must be no reasonable legal alternative to disobeying/breaking the law
      - If there was a reasonable legal alternative to breaking the law, then there is no necessity.
        - This is a modified objective standard
    - 3. There must be proportionality between the harm inflicted and the harm avoided
      - Where this can be quickly dismissed, it makes sense for a trial judge to do so and rule out the defense of necessity before considering the other requirements for necessity; but most situations fall into a grey area.
        - This is evaluated on an objective standard

R v. Storrey, (1990), SCC [After Arrest (investigation allowed; produce arrestee to court within 24 hours of arrest), Reasonable Grounds Definition]

- **Facts:** Three Americans were assaulted in their car by a knife-wielding man. The victims picked out a face from 800 photographs and described the car that the accused was driving. The man in the fingered photograph turned out to have an alibi, so police proceeded to investigate on the basis of the car identified. Police found out that Storrey was an owner of the type of car fingered and looked similar to the man in the photograph fingered by the complainants. Storrey was arrested and held for eighteen hours so that the police could get the Americans back again to put him in a police line-up. The Americans identified him as the one who assaulted them.
- **Issues:**
    - Were there reasonable and probable grounds for arresting Storrey?
    - Did the intention of the police to continue investigating Storrey after arresting him render the arrest arbitrary?
    - Did holding Storrey for eighteen hours before bringing him to bail court make the detention arbitrary?
- **Held:** The arrest was not rendered unlawful by any of these factors
- **Analysis/Ratio:**
    - Arrests without a warrant, just as those with one, require the **Crown to demonstrate reasonable and probable grounds to believe that an offense has been committed** (*Note: Code precludes arrest on the basis of some offenses)*:
        - **(1) For an arrest to not contravene s. 9, the arresting officer must**:
            - (a) Subjectively have believed there were reasonable probable grounds for the arrest, and
            - (b) Those grounds must be objectively reasonable (reasonable observer in place of police would feel the same way)
        - this is outlined in S. 450(1) of CC
    - So long as **reasonable and probable grounds** to affect an arrest exist, **police are free to continue their investigation after an arrest is made**.
    - **Police** are bound by the *Criminal Code* to **bring an arrestee before a JP/justice without reasonable delay and within twenty-four hours of arrest** in any event (unless released prior to this point). However, a delay within that twenty-four hour time limit to locate witnesses who are outside of the jurisdiction is not unreasonable.

    - **In the case at bar**, The police had subjective probable grounds, which were reasonable in the circumstances, on the basis of the following factors: a) the car that Storrey drove; b) Storrey's history of violence; c) the fact that Storrey had been stopped in this car before; d) the fact that the person in the picture so closely resembled Storrey and; e) the fact that Storrey was selected in the police line-up.
- **Note:** The degree to which the Court's analysis of issues 1 & 3 depend on a deep contextual analysis of the facts.

R v. Feeney (1997), SCC [Feeney Warrant needed to enter a dwelling house even if RPG to arrest exists, except hot pursuit cases]

- **Facts:** Police suspected Feeney was the culprit in a homicide. After receiving some tips, they pointed the finger at Feeney and suspected him of being in a trailer. Police entered the trailer, found Feeney

without permission, arrested him, read him his rights, searched his clothes, asked him some questions, and took him to the police station.

- **Issue:** Does the police power to arrest authorize entry to a dwelling house to apprehend that person without warrant or is a warrant required?
- **Held: A warrant is generally required to enter a dwelling house to arrest an occupant**, **even if there are reasonable grounds to justify arresting that occupant**. In this case, there was held not even be reasonable grounds to justify an arrest.
- **Analysis/Ratio:**
    - Police **will generally need a warrant** to enter a dwelling house for the purpose of arresting an occupant, even if there are reasonable grounds to justify the arrest.
        - The case of a **hot pursuit** will justify police entering a dwelling house to arrest someone without a warrant provided that the officer adequately notifies the occupants that he/she attempts to enter.
    - **S. 529**- Warrant for entering residence for purpose of arrest is only issued where there are grounds for arrest and where it is believed person is in the house
    - Exigent Circumstances- circumstances where it would be impractical to obtain warrant (S. 529.3(2)) → officer must still have reasonable grounds to believe that an offence is being committed – need not have proof beyond a reasonable doubt or on a BOP
    - Any warrant that is given is much like other warrants
        - Police must announce their presence and identify themselves as police
        - They must notify occupants why they are there
        - And only if they request admission and it is denied, can they force to enter

Burden is on accused in any charter challenge on a balance of probabilities to show that there was an infringement of their rights (ie. Unlawful arrest)→ Onus shifts to crown when there is a warrantless search – They have to justify the infringement.

INTERROGATIONS/CONFESSIONS AND SECTION 10 (B) OF THE *CHARTER*

OVERVIEW:

- It is an extremely important power conferred onto the police that they are able to interrogate a detainee. That being said there are competing interests at stake in an interrogation – the detainee's right to silence, and the police's ability to exercise their duties. The main theme from the courts seems to focus on a person's ability to make an informed, free choice.
- The law of interrogations is about reliability, fairness and allowing police to investigate.
- Detained individuals may be forced to listen to police questions, but they have **no obligation to respond.**
- Police interrogations involve any type of Q upon detention

Right to Counsel under S. 10 of the Charter

- ***R v Sinclair*** comprehensively clarifies a detainee's right to counsel under 10b of the Charter. The purpose of the right to speak with counsel is to allow the detainee not only to be informed of his rights and obligations under the law, but also to obtain advice as to how to exercise those rights. A detainee does not have the right to have counsel present during an interrogation. Further, a detainee has the right to re-consult with counsel if there has been an objectively observable change of circumstances such that the initial legal advice would no longer be adequate (e.g., new non-routine

procedures, like a polygraph or a photo lineup; a change in jeopardy (i.e., new charges); reason to believe the detainee did not understand his right to counsel, etc.). If a detainee invokes his right to counsel, the police have a duty to refrain from eliciting evidence until the detainee has been given a "reasonable opportunity" to talk to his lawyer for advice

- Detainee may waive their right to counsel – crown would have to show this
  - Detainee indicated clearly that they no longer wished to talk to a lawyer and
  - Made this decision with full knowledge of their rights and the consequences
- **10(a) is right on arrest or detention to be informed of reasons**
- **police must use clear and simple language**

Common law confessions rule

- The common law confessions rule is not the end of the story because the Charter has an impact.
  - Before interrogating suspects, police typically inform detainees of:
    - The right to counsel.
    - The right to remain silent.
    - The fact that their statements may be used against them.
  - A failure to caution now constitutes a factor weighing against voluntariness, but does not lead to an automatic exclusion.
- According to the **common law confessions rule:**
  - (1) The confession must have been made to a person in authority
    - Test: did the accused have a ***reasonable belief*** that the person he was confessing to as a person of authority? This test has two parts:
      - (a) suspect believed the questioner was an agent of law enforcement, and
      - (b) the questioner actually was an agent of law enforcement
    - If the accused doesn't know that the state agent works for the state, s. 7 of the Charter could come into play (principle against self incrimination).
  - (2) An accused person's statement made to a person in authority is not admissible in the Crown's case unless the Crown proves Beyond Reasonable Doubt (BRD) **that the statement was voluntarily**
    - **Voluntariness**, for the purpose of this rule, is defined as a statement that is made without "fear or prejudice or hope of advantage"
      - **Purpose of Voluntariness Rule: "**it is based upon two fundamentally important concepts: the need to ensure reliability of the statement and the need to ensure fairness by guarding against improper coercion by the state."
      - **Involuntariness arises from (*Oickle) see case*:**
        - Diminished capacity
        - Threats or promises
        - Oppressive interrogation conditions
        - Methods that would shock the conscience of the community
- When the voluntariness of a confession is challenged, **the Court must hold a voir dire**:
  - Allegations of involuntariness and the breach of charter rights (particularly s7-right to silence and 10(b)) are heard together.
  - Courts can conduct a blended voir dire procedure but the voluntariness inquiry must be kept analytically distinct from the Charter claim because the voluntariness rule exists independently of the Charter **(i.e. it is a common law principle)**
  - **If the defence does not request a voir dire, the judge needs to inquire and hold one to determine admissibility**
  - Defence can waive voir dire
  - Crown will either be proving that the receiver was not a person in authority or that the statement was voluntary

CASE LAW:

R v. Sinclair, (2010), SCC [Scope of 10 (b) rights to counsel]

- **Facts:** Sinclair was arrested in relation to a murder. Upon arrest and being advised of the reason for his arrest, Sinclair was given his rights to counsel. Sinclair indicated he wanted to speak to a specific lawyer. The police placed a call to that lawyer and allowed Sinclair to speak to him privately. After Sinclair completed his call, the police asked if he was satisfied and he said yes. Three hours later, police called lawyer to see him he was coming. Lawyer said he was not retained. Police let Sinclair talk again to the lawyer, and again Sinclair said to the police upon completion of the call that he was again satisfied. Over the five hours he was questioned throughout the day, he was told he had the right to remain silent. Sinclair wanted his lawyer present – police informed him that he did not have this right. Eventually, he decided to confess to the murder for which he was being investigated.
- **Issue:** When does the right to counsel through 10(b) allow for a further opportunity to consultation? Were Sinclair's rights violated?
- **Held:** There was no violation and right to counsel for further consultation is a one-time matter, with a few exceptions.
- **Analysis/Ratio:**
    - There is no right to have counsel present during an interrogation.
    - **The right to counsel is a one-time matter with few exceptions.**
    - **What is required to retrigger the right is a material change in circumstances such that the initial advice is no longer adequate**:
        - Change in jeopardy.
        - Change in procedure.
        - Reason to question the detainee's understanding of his/her rights.
    - However, this is about the scope of the 10(b) right**; police and the Crown can allow further consultations or for counsel to be present during an interrogation.**
    - **In the case at bar**, the Court found that because the statements of the accused demonstrated that he understood his rights, but merely wanted to have counsel present during questioning, there was no material change sufficient to retrigger the right to counsel; **seen merely as seeking advice from lawyer about the strength of the case against him, as opposed to knowledge about his legal rights**.

THE THREE "TRUMP CARDS"

- Binnie J. (not in the majority) in *Sinclair* says police now have 3 trump cards stemming from the interrogation trilogy:
    1) *Oickle* – affords police great latitude in extracting a confession without offending the confession rules respecting voluntariness;
    2) *Singh* – allows the police to continue the endurance contest between the detainee and interrogator despite repeated assertions of right to silence

3) *Sinclair* – permits the police to deny a second consultation with counsel regardless of the length (time they have been in interrogation room) unless there is a significant change in circumstances.

R v. Oickle (2000), SCC [Extension of Common law Confessions Rule; Interrogations can include inducements- False Confessions]

- **Facts:** Oickle was a suspect in an arson investigation (8 fires in a small town). The police gave many people polygraph tests (lie detector tests) in order to exclude them from the suspect list. It was Oickle's finance and dad's vehicles that had been torched. Oickle voluntarily decided to take the polygraph test failed and stayed during an interrogation despite repeated reminders that he was free to leave. After admitting to being the arsonist, Oickle was arrested and taken for further interrogation. Oickle was given an opportunity to sleep and then he made more detailed confessions.
- **Issue:** Were Oickle's statements made inadmissible due to involuntariness?
- **Held:** The confession statements were voluntary given and hence admissible.
- **Analysis/Ratio:**
    - The Court explained **how the confessions rule has evolved from threat/promises to include other categories as well:**
        - **(1) <u>Operating mind-</u> (not a very high standard)**
            - The accused needs to have "<u>sufficient cognitive capacity to understand what he is saying and what is said</u>", including the ability to understand a caution that the evidence can be used against the accused.
            - Courts have held that <u>drunks, mentally ill</u>, etc. **may** still have an operating mind sufficient to testify.
        - **(2) <u>Threats or promises (inducements).</u>**
            - The critical factor, suggested in this case, is that an **inducement** (incentive) means a quid pro quo offered in exchange for the confession.
            - Not all threats or promises will be improper, but the threat of violence always will be.
                - Focus on the strength of the inducement given the specific context.
                - The will of the accused must be overborne by the threat or inducement
                - **Ask: Has the will of the subject been overborne given the unique context of the case?**
        - **(3) <u>Oppression.</u>**
            - **Factors include:** "Inhumane conditions" may be created by depriving suspects of the necessities such as food, clothing, water, sleep, medical attention, denying them access to counsel, aggressive or prolonged questioning, confronting them with inadmissible or fabricated evidence".
                - None of the above factors are determinative and a contextual analysis is required.

Even if the confession is not found to be voluntary, it may still be excluded if it involved trickery so appalling so as to "shock the community".

        - Tricks and appeals to conscience are okay, but there comes a point where the trickery is so egregious (shocking) as to make a confession worthy of exclusion.
    - **In the case at bar**, the confession was found to be voluntary: there were no inducements extended and no context of oppression, but particularly regarding operating mind, there was no evidence that Oickle was deprived of food, sleep or drink.

R v. Singh (2007), SCC [Police need not stop questioning if detainee engages his right to silence-S. 7, Common law rule of Voluntariness]

- **Facts:** Singh got into a bar fight, bullets flew and someone was killed by a stray bullet. Singh was arrested and interrogated by police. Singh repeatedly stated that he did not want to talk to the police, but police continued to question him, while pointing out that he was, indeed, free to be quiet. Singh did not confess to the crime, but made statements which incriminated him indirectly.
- **Issue:** Does Singh have an enhanced protection under section 7 for (a) right to silence, and (b) stop questioning unless detainee signs waiver? Were the statements admissible despite Singh's repeated desire to be quiet?
- **Held:** Singh does not have enhanced protection and hence the statements were admissible.
- **Analysis/Ratio:**
    - The right to remain silent under s.7 **does not entail** a right to be free from having police try to elicit answers from you.
        - The right does not mean the police have to stop asking questions.
    - In the **context of a police detention and a confession**, **the common law rule regarding the voluntariness** of a confession and **the s7 right to silence** are **functionally equivalent** - the violation of one *usually* (but not always) entails the violation of the other.
        - **The common law rule is different, however, with regards to these respects:**
            - **First**, **it goes further than s. 7 by protecting**, not just the right to remain silent, but also the right to have a confession excluded when it is delivered in circumstances suggesting involuntariness.
            - **Secondly**, **the right to silence under s7 extends to situations where the voluntariness rule doesn't apply** (due to a lack of knowledge about the witness' state agency): e.g. confessions to undercover officers.
            - **Thirdly**, **it is easier to assert a claim under the voluntariness rule**: as opposed to proof on a balance of probabilities (s7), the claimant must only raise a reasonable basis for seeing a violation of the common law rule before the onus shifts to the crown to disprove involuntariness beyond a reasonable doubt.
    - **In the case at bar**, the Court agreed with the trial judge in seeing that there was nothing in the interrogation to raise the suspicion that the declarations were made involuntarily.
    - Defendant has burden to show that their S. 7 rights were violated

R v. Hart (2014), SCC [Separate from Confessions Rule; Mr. Big Operation]

- **Facts:** Hart confessed to killing his two daughters at the end of a lengthy Mr. Big operation, which he said, made him feel threatened.

- **Issue:** Is the evidence from the Mr. Big operation a breach of Hart's s7 rights?
- **Held**: Unlawful confession, and therefore, violation of s. 7
- **Analysis/Ratio:**
    - **Mr. Big confessions are presumptively inadmissible.**
        (1) Onus is on the Crown to demonstrate on a balance of probabilities that the probative value outweighs the prejudicial effect from character inferences of a willingness to join a crime syndicate, etc..
        (2) The confession will also be excluded if the accused shows that the police conduct amounted to an abuse of process.
    - **In the case at bar**, the confession cannot be admitted:
        - Hart's mental health problems and overwhelming desire to join the fake organization irritably tainted the reliability of the information to be gained from the evidence.
        - Moreover, the confession was not even internally consistent in the facts it presented.
        - *Abuse of process:* The operation continued despite serious evidence of health problems - a seizure.

REVIEW OF POLICE

- Anytime you see "reasonable" in the case law or in the Code, it is "reasonable and probable grounds" unless otherwise stated.
- **Reasonable and probable grounds v reasonable suspicion**:
    - *Simpson* (ONCA) - reasonable suspicion: Not a hunch, but an objectively reasonable suspicion based on an officer's observation of a constellation of factors.
    - *Hunter* (SCC) - reasonable and probable grounds: **Where credibility-based probability replaces suspicion.**
    - **At any rate, remember to split analysis into the subjective and objective components:** there must be a subjective belief and it must be objectively reasonable.

2. INTRODUCTION TO COURTS; PRE-TRIAL PROCEDURES

GETTING SOMEONE TO COURT WHEN NOT HELD FOR BAIL

- **Initiating process:**
  - (1) S. 496: **Appearance notice (Form 9)**: a notice that tells the accused to come to Court on a specific date.- same effect as if someone has been released on bail
  - (2) **Promise to appear (Form 10)**: to be released from police custody on an undertaking to attend court on a specific date.
  - (3) **Issue a summons**: to be a witness in a case.
  - (4) **Enter into a recognizance (Form 11.1)**: person will lose money if he or she does not appear
  - (5) **Enter into an undertaking**: where conditions will be imposed on the person who is being released.
  - S. 497**: Release from custody by peace officer**: how to release someone who is arrested without warrant, and when not to release someone
  - S. 498**: Release from custody by officer in charge**: Releasing persons charged with an offence under 496 (a) (b) or (c).
  - S. 499: **Release from custody by officer in charge where arrest made with warrant**
  - S. 500: **Money or other valuable security to be deposited with justice:** Where detainee is not an ordinary resident in the province in which the person was in custody, or does not ordinarily reside within 200 km of where the person was in custody, has to give $500 recognizance under 498 and 499.
    - This section deals with what to do with this money
- **Appearance notice:**
  - S. 501 outlines the content of appearance notice:
    - Name of the defendant.
    - Substance of the offence charged.
    - Date, time and address of court date.
    - Date, time and location for prints.
  - S. 502 establishes that a warrant can be issued for those who fail to appear.
- S 503: If the accused is not released from police custody, they must be taken before a justice without delay, and within **twenty-four hours** at any rate (**exceptions exist for otherwise impracticable situations**).- if justice not available then as soon as practicable – WASH court
- All of these can be vacated through judicial review and substituted with bail.
- Most severe situation when someone has been arrested is to hold them in custody until appearance for a bail hearing
- As soon as you are arrested, prints are taken
- If someone is released on a promise to appear- the set date court will be the first time they go to court – unless they want to review the conditions of their release
- **Form 9 & 10 in CC**

CHARGING DOCUMENTS: THE INFORMATION AND INDICTMENT

The Information (S. 504-507)

- The information is the sworn **charging document in the OCJ.**

    - It is the document that commences the prosecution.
- It is drafted by the police, sometimes with the assistance of the Crown, and then issued by a justice.
    - The Court has extremely little discretion to refuse the laying of the information.

It is also the document upon which either a preliminary inquiry will be based or a summary conviction trial will be held. **The time at which an information is laid marks an important point in the process – it is the time where a suspect officially becomes an accused/they are charged.** The information is originally sworn by a police officer in front of a JP. Further, the information can be used at a preliminary hearing for a case being tried at the Superior Court.

- It includes key aspects of allegations, including:
    - (i) Name of person charged,
    - (ii) Date,
    - (iii) Jurisdiction of offence, and
    - (iv) names of alleged victims.
- These are basic requirements; the information can be particularized (ie. Drug charges need to have specifics because they are different charges depending on amounts)
- Cannot have more than one offence on one line
- **S. 505**: The information **must be laid as soon as practicable** and before first appearance date: typically, six weeks before the court date.
    - **That first court date is in the set date court**: the JP will handle the issuance of disclosure, charge screening forms and synopsis -- if so, a trial date may be set.

The Indictment

- Once the preliminary inquiry is held and the accused is committed to stand trial, the information is cast aside and the Crown drafts a new document, called an "indictment", which follows them throughout the SCJ process.
- **Preferring/Perfecting an indictment:** On the consent of the Attorney General, the Crown may skip the preliminary inquiry or the finding of the preliminary inquiry judge and proceed straight to trial in the SCJ.
- **Becomes the new charging document in SCJ**
- **Indictment s. 566 of CC**

Elements of Information and Indictment: Criminal Code

- **S. 581:**
    - A single transaction per count: The information cannot cover more than one offense per count.
        - E.g.:
            - Count One: Possession of a weapon.
            - Count Two: Armed robbery.
        - Sometimes, the offense has embedded offenses, and so this does not offend the rule.
    - No specific language required.
    - Needs to give notice to the defendant of the charge he/she is facing.
    - Needs to have sufficient information so that the defendant can identify the transaction.
    - **Legal Sufficiency→** has to contain enough info to know what you are charged with
    - **Factual Sufficiency→** identify items used (ie. Assault weapon)
- **S. 587:** If the information/indictment is not particular enough, the defendant can move to have more **particulars** provided.
- **S 601:**
    - If there's a mistake, the Crown can move to have the information/indictment **amended.**
        - The Crown requests the bench for permission to change the information, and the

defence is asked whether or not they consent. The defence usually consents, but if not the Crown can just go and re-draft a brand new information
- Under the same section, the defense can move to have the information/indictment quashed when it gives rise to prejudice – it is rare that this happens.

CLASSIFICATION OF OFFENCES

You can look to the Code to determine whether or not an offence is an indictable, summary, or hybrid offence. There is a grid in the back of the code that helps in finding this information. Also look to sentencing provision to see what type of offence.

- Though there are two types of offences under the Criminal Code, they are classified into 3 types:

1. **Indictable** (Offences triable only on indictment) → **more serious crimes; murder; robbery; break and enter**; **carry a higher/severe penalty.**
    - Tried in Superior Court of Justice- can be tried in OCJ (except those under S. 469, 553)
    - S. 598- if you abscond, you lose your right to a jury trial – trial will continue w/o you
    - S. 577- Direct indictment → write to trial. No prelim
    - **Absolute Jurisdiction Offences (S. 553)**
        i. All indictable offences but they are in absolute jurisdiction of the OCJ – accused does not get election despite fact that crown is proceeding by indictment.
        ii. No preliminary inquiry and no jury
        iii. If someone is charged with an absolute jurisdiction and another regular indictable offence then both just go to SCJ –OCJ forfeit jurisdiction

2. **Summary conviction** → **of a less serious nature and carry a lesser penalty.**
    - **May be federal or provincial** – all provincial offences are summary (traffic; securities)
    - **Are tried by justices or provincial court judges**, and are generally quicker than a trial by judge and jury which is the most common form of trial for serious indictable offences.
    - **S. 787(1) defines max sentence for all summary convictions – 5000$ fine and max 6 months jail**
    - **Super Summary**:
        i. A maximum of eighteen months imprisonment.
        ii. example. S. 267
3. **Hybrid (dual procedure)** → an offence where the **Crown has a choice** as to **whether it proceeds** by way of alleging that the accused committed an **indictable offence or** an offence punishable on **summary conviction**
    - Only when the Crown elects to proceed by indictment does the accused have the choice under s. 536.
    - s. 34(1)(a) *Interpretation Act* deems hybrid offences to be indictable until the Crown elects to proceed summarily
    - Some hybrid offences include sexual assault (s. 271); possession of cocaine (s. 4(3)) *Controlled Drugs*

WHAT IS TRIED WHERE? (IN WHICH COURT)

- **S. 468**: SCJ of criminal jurisdiction has jurisdiction to try any indictable offense.

- S. 469: Every court of criminal jurisdiction (SCJ and OCJ) can try an indictable offense except those listed in the section.
    - A **469 offence** is an offence which is heinous in nature and which always proceeds with a preliminary inquiry and with a jury trial. The only way one of these offences can proceed by way of a judge-alone trial is if the accused asks for it and the Crown consents.
- S. 471: Unless otherwise stated, all indictable cases are jury trials.
    - So, an indictable offense will be tried by jury except where the *Code* says it doesn't.
    - And the OCJ has no jury trials.
- **11(f) of the *Charter***: A jury trial is a right whenever the maximum penalty is five years or more severe imprisonment.
- S. 553: Establishes offenses of **absolute jurisdiction**:
    - **Overrides 468** -- certain indictable offences, when tried alone, must be tried in the OCJ. So what about s. 471?
    - An **absolute jurisdiction** offence is a smaller subset of indictable offences for which the accused does not have the right to elect his or her mode of trial. For these offences, the trial will be held in provincial court, with no preliminary inquiry and no jury.
- S. 554: An OCJ judge may try an indictable offense that is not covered in ss. 469 or 553, if the defense so elects.
- S. 536(2): Judge/Justice must put defendant to his/her election.
    - If there is a co accused involved, if one elects jury trial and the other doesn't, jury trial prevails
- **For everything else, other than 469 or 553, where the Crown proceeds by indictment, the defense may select whether to be tried in the OCJ or the SCJ (judge alone or by judge and jury).**
- **Note: If the trial is to be held in the SCJ, a preliminary inquiry must be held prior to the trial (in OCJ).**
    - **PRELIMINARY INQUIRY:** The Crown must show that the evidence it has is such that a properly instructed jury *could* rule a finding of guilt. Must show there is evidence for each element of the offence.
    - **Preferring/Perfecting an indictment:** On the consent of the Attorney General, the Crown may skip the preliminary inquiry or the finding of the preliminary inquiry judge and proceed straight to trial in the SCJ
    - **Prelim is not automatic, it must be requested by either party**

TIMING OF ELECTION

- Statute of limitation, if a summary offense, is six months: Therefore, **the Crown cannot proceed on a summary conviction** matter if the crime occurred more than six months ago; can give rise to a need to proceed by indictment.
- **The defendant** can waive the limitation period to allow the Crown to proceed summarily.
- S. 536 considers the election of the defense, but doesn't give a timeline; in practice, it depends on the jurisdiction, but everyone should know by the trial date.
- S. 558: Unless the indictable offence is **an absolute jurisdiction offence (553)** or is a **469 offence**, the accused may **elect** to have his or her indictable offence dealt with in provincial court of justice or superior court and may elect to have his or her trial conducted by jury or by judge alone.
- **The Crown can always re-elect by redrafting the information.**
- S. 561: After an accused has elected to have his or her trial conducted in provincial/superior by mode of jury/judge alone, he or she may re-elect, changing his or her election.
    - With consent of the Crown, one can re-elect at any time;

- The defence **can re-elect as of right** within fourteen days of the start of the trial.
- **S. 565:** If the defense does not elect, there is a deemed election of a judge and jury.
- **S. 568:** In addition, the Crown has the power to overrule the accused's election and to force trial by jury
- **S. 577*: Direct indictment:**
  - The Crown can skip the preliminary inquiry and head straight to trial in the SCJ if the Attorney General signs off on it.
  - The section also allows the Crown to continue proceeding to trial in the SCJ despite a finding by the judge in a preliminary inquiry that there is insufficient evidence that could lead a Trier of Fact to making a conviction.
- **Once the preliminary inquiry is held and the accused is committed to stand trial, the information is cast aside and the Crown drafts a new document, called an "indictment", which follows them throughout the process.**

BAIL HEARING AND BAIL REVIEW

OVERVIEW:

- This is a more statute driven area of criminal procedure.
- Bail, or judicial interim release, is the release of the accused from detainment pending trial or in some cases appeal
- The Court said in ***R v Villotta*** that bail is not a privilege. Instead, judicial interim release should occur in every situation unless it is necessary to detain.
- Unlike at trial, where some people can be tried together, bail hearing is always conducted individually.
  - So no co-accused.
- Onus is on crown to bring show cause as to why person should be detained
- Whether or not someone gets bail greatly influences the final outcome of the case
- Cannot have bail hearing until information has been sworn
- Bail usually conducted by JP – judge can also do it

Charter

- **S 11(e):** Any person charged with an offence has the right not to be denied reasonable bail without just cause.

Criminal Code:

Getting to a bail hearing:

- **SS. 496-499** and **503(2)** allow officer to release those charged from the station without a bail hearing.
  - **S. 497(1.1)**: However, the police will not release when there are concerns about failure to appear, they're not content with the identity, the severity of the offense, etc.
- **S. 503(1):** Where an individual is not released at station, then that person must be brought before a justice within 24 hours of arrest or if Justice not available, then as soon as possible.
- **S. 516**: a bail hearing can be adjourned – max of 3 clear days without consent of accused (usually done in cases where there are concerns about the whereabouts of the victim, the need to gather more evidence, etc.).

The Bail Hearing (s. 515)

- **(1):** where accused taken before justice and does not enter a plea of guilty or is not a 469 (those for which the SCJ has exclusive jurisdiction) offence, the burden will be on the Crown to show that bail should not be given.
  - 469 offences start in OCJ but there is no bail hearing – person is presumptively detained – if they want bail hearing they have to bring application to have one in the SCJ
- **(2):** where justice may release with conditions or with sureties (as long as prosecutor shows cause why those conditions are justified):
  - On one's own recognizance with/without conditions. (ind. Pays own $ if they breach)
  - Surety with/without conditions.
  - Cash bail: For those not ordinarily residing in the province (if you are resident, must have crown consent)
  - **(2.1): Can name sureties** (who can withdraw at any time w/o a reason- need not be present at court)
- **(4):** allows justice to impose conditions of release, including:
  - i. Reporting
  - ii.. Remain in province
  - iii. No communication
  - iv. Deposit passport
  - v. Any other condition that justice deems necessary for safety of victim and/or public
  - **(4.1)** Weapons condition mandatory with certain offences
  - **(4.2)** Non communication clause term with specific offences

*conditions can be anything that relate to the offence

- **(5)** Where prosecutor shows cause, then the accused will remain detained pending trial
- **(6): Sets out list of reverse onus offences** (thus placing the burden on the defense to justify bail).
  - **E.g.** indictable offense and already out on bail for indictable offence, drug trafficking, case involving a prohibited/restricted weapon while subject to a prohibition order.
  - **In reverse onus bail hearing**, the defense will proceed to argue in support of bail once the information has been read in or the Crown's witnesses called.
- **(10)* - Grounds for detention (no bail):** Detention is justified only if one of three grounds are met (must not fail any of them in order to be released)
  - (a) **(10) (a) Primary ground** – fears that the accused will not attend at court.
    - **Must consider**: nature of offence, potential penalty, strength of case against accused, ties to the community (if they have ties why would they flee), employment, prior convictions for flight, etc.
  - (b) **(10) (b) Secondary ground** – fears that release will endanger the public by committing further offenses.
    - **Must consider**: Criminal record of the accused, whether the accused is already on bail or probation (did they follow it), the nature of the offence, the strength of the crown's case, the presence/absence of a good surety/plan of release.
  - (c) **(10) (c): Tertiary ground** – fears that detainment is necessary to maintain public confidence in the administration of justice.
    - **Factors to consider are outlined in this section:**
      - A) the apparent strength of the Crown's case
      - B) the gravity and nature of the offence;

        - C) the circumstances of the offence;
        - D) the potential for a lengthy term of imprisonment
    - **Note:** No factor is determinative by itself; **all four must be examined together- consider the combined effect.**
    - In considering the tertiary ground the court must take the pulse of the reasonably informed member of the community (*R v Gale*)
    - *Hall* addressed the constitutionality of this section. Detaining an accused solely on s. 515 (10) (c) is constitutionally valid, but should only be considered in rare circumstances. The case also mentioned that this part of the section should be used rarely, exceptionally and only in rare circumstances.
    - *St. Cloud* overturns conclusion in *Hall* – not necessarily only for most heinous crimes, balance 4 factors and look at totality of circumstances
  - **(11)**: if 469 offence, then order detention until dealt with by a hearing in the SCJ where the onus will be on the accused to justify bail.
  - **(12)**: Where the accused is ordered to remain detained pending trial, the justice may still impose a 'no communication' order with a victim, witness, or other person.
- **S. 517: Publication Ban:** The evidence at a bail hearing is subject to a publication ban.
- **S. 518: lists types of evidence can lead at bail hearing:**
  - Justice can ask questions of witnesses
  - **518(10)(b)**: Cannot cross-ex accused on offence unless he wants to be a witness
  - Can use prior convictions
  - Can receive any evidence that is credible or trustworthy (hearsay admissible)
    - Usually includes reading in synopsis (police summary) and other background facts
    - Can call in experts

- **S. 524 – Revoking bail**:
  - Police may arrest anyone who the officer believes on reasonable grounds:
    - a) Has contravened or is about to contravene release terms, or;
    - b) Has committed and indictable offense after his original release.
  - **Note:** These are analyzed on the basis of **reasonable grounds**.
  - Must have hearing to determine if did breach term of release or if reasonable grounds to believe did commit indictable offence while on release
  - If so find – then must revoke bail unless – having been given reasonable opportunity – accused can show cause why detention not justified within the meaning of **515(10).**
  - If accused meets onus justice may release on new recognizance with appropriate terms.
- **If bail is refused**, the JP will sign a warrant of committal, which will be attached to the information.
- **If bail is awarded**, the JP will sign a judicial interim release order, also attached to the information.

Bail Review:

- If an accused is detained at a bail hearing, he may apply to a higher court for a review of the detention order. It can take a week or longer to convene a bail review as the detainee nearly always has to first obtain a copy of the transcript of proceedings from the bail hearing. The Crown can apply to a higher court for review of an order releasing the accused.
- A bail review may be ordered by the accused after 90 days of detention if indictable offence, or 30 days if summary offence. The documents/rules for bail review are contained in *Rule 20 of the SCJ rules*.
- **2 basis for review:**
  - **New evidence/ change in circumstance**
  - **Error in law- leads to bail de novo**

- These will always be held in the SCJ or ONCA (depending on what court set the bail).

- **S. 520**: governs accused's application for review.
- **S. 521**: governs prosecutor's application for review.
- **S. 523**: More bail reviews:
  - **(2)(a)** – at trial
  - **(2)(b)** – on completion of preliminary inquiry
  - **(2)(c)** – can review at any time with consent of Crown
- **S. 525:** Administrative review is required after 90 days if indictable offense and after 30 days if summarily.- more of a just a check in to make sure case is moving forward
  - If accused wants actual review, they bring application under S. 520

- **SCJ Rules, Rule 20 – documents required for bail review**
  - Documents required under this rule include:
    - i. Notice of application (must state if accused is attending)
    - ii. Need judges order
    - iii. Service of application 2 clear days prior to the date fixed for the hearing
    - iv. Affidavit of applicant
      - IF APPLICANT = accused, affidavit MUST include:
        - Particulars of charge and dates for hearings
        - Where applicant lived for past 3 years
        - Where he is going to live upon release
        - Applicant's employment over the past 3 years
        - Where applicant proposes to work if released
        - Form of release proposed
        - Terms of release applicant seeks
      - IF APPLICANT = Crown, can file additional material by affidavit
  - v. Affidavit of proposed surety
  - vi. Transcripts
  - vii. Copy of all exhibits from original hearing

Bail Pending Appeal:

- Offenders can get bail while appending their appeal
- Established in **S. 679.**
- Single ONCA judge hears the application.
- Burden on the applicant to establish on a balance of probabilities that:
  a. The appeal isn`t frivolous.
  b. Applicant will surrender according to the terms of the order.
  c. Detention not necessary given the public interest.
- Bail pending appeal on summary conviction is heard in SCJ
- Bail pending appeal on indictable matter- whether conviction happens in OCJ or SCJ they all go to ONCA

Bail in Different Courts

- **Ontario Court of Justice (Provincial)**
  a. 90% of Bail Hearing
  b. JP conducts bail.
  c. If accused not happy with JP's decision, then appeal SCJ for Bail Review.

- **Superior Court of Justice**
  a. 469 offences
     - When these offences, you skip OCJ and come to SCJ for Bail. All other offences, OCJ
  b. Bail Reviews from OCJ
- **Court of Appeal**
  a. Appeal of bail review from SCJ

Sureties:

- They pledge money on behalf of accused
- They promise the court that the bailee make sure follow bail conditions
- If accused breaches bail or does not attend court, the Crown can apply for forfeiture of funds (S. 771):
  - Due diligence will not necessarily be a defense to a forfeiture effort.
- The surety can withdraw.
- Recent concerns expressed about over reliance on sureties.

Forms for Bail Hearings

Form 6 → Summons
A summons requiring the person to whom it is issued to appear in court on a particular time and date. The court issues it during a bail hearing.

Form 9 → Appearance Notice
By a peace officer to a person **not yet charged (no information)** with an offence AND **not taken into custody (when officer decides not to arrest).** At some point after issuing appearance notice, must go and lay an information. No conditions for appearance notice. If the person does not appear then he or she is guilty of a "fail to appear" which is its own offence and court can issue warrant for arrest.

Form 10 → Promise to appear
Taken into custody and there **may or may not be information** laid before the court already. No conditions for appearance notice. If the person does not appear than he or she is guilty of a "fail to appear" which is its own offence and court can issue warrant for arrest.

Form 11 →Recognizance (bond)
Taken into custody and there **may or may not be information** and to be released you have to acknowledge that you will **owe money if you do not appear** in court on a specified day. In addition to losing money, if the person does not appear than he or she is guilty of a "fail to appear" which is its own offence and court can issue warrant for arrest. Not other conditions.

Form 11.1 → Undertaking
Taken into custody – released by either a promise to appear or a recognizance HOWEVER this undertaking imposes additional conditions upon release. This form can be attached to either Form 10 or Form 11.

***Variation of Undertaking or Recognizance → S. 515.1 of CC**

CASE LAW:

R v. Hudson, 2011 (ON SCJ) [Bail Review]

Facts: Hudson was charged with numerous offenses and remanded into custody by police. When taken for a bail hearing at the OCJ, Hudson declined to have a bail hearing, resulting in his consent to a detention order (i.e. he was given the choice between bail hearing now or detention order, and he chose detention, because he was not prepared for the bail hearing). The accused later sought bail and was told to apply to the Superior Court of Justice under the *Criminal Code* provisions entitling one to a bail review.

Issue: Is the accused entitled to use the bail review process in Superior Court **despite consenting a detention order in the OCJ**? Is the accused, at any rate, entitled to bail?

Held: Bail is justified under the secondary ground of **s. 515(10)(b)**. Moreover, the application should have gone to the OCJ and not to the Superior Court.

Analysis/Ratio:

- Accused in the OCJ should not have to decide between proceeding with a bail hearing and consenting to a detention order.
- There are scheduling requirements, which have inspired the institution of this practice, but they do not legitimize actions, which severely curtail Charter rights to reasonable bail.
- **The accused should be** able to postpone/apply for the adjournment of a bail hearing and the OCJ should operate in such a way as to allow this process to occur.
- **Aside Note:** In Toronto, the practice is that the accused does not receive disclosure and may not set a date for a preliminary hearing or trial until the issue of release or detention is resolved. It is also the practice to require an accused who is not yet prepared for a bail hearing to consent to a detention order and then apply to the Superior Court for "review" of that order when the accused is ready. This practice is inappropriate. There is no justification for delaying the accused's right neither to disclosure nor to set a date until after a bail or detention order is made. The justice of the peace or judge of the Ontario Court of Justice should adjourn the hearing sine die and allow the accused's case to move forward in the normal course. If, in the future, the accused wishes to have a bail hearing, he or she may serve notice on the Crown and the court, requesting that the case be brought forward for that purpose.

R v. Hall (2002), SCC [Denying bail on Tertiary Ground (very rare) violated s. 11(e) of the Charter]

- **Facts:** Hall was accused of killing a woman. The woman was found with numerous stab wounds and was almost decapitated. Hall had applied for bail, but the Crown was able to successfully advocate for a detention order **on the basis of the tertiary ground** (bail would compromise public confidence in the judicial system). There was also a lot of publicity involving this case.
    - At the time, the tertiary ground also allowed the Court to deny bail in cases where there was just **"any other just cause being shown."**
- **Issue:** Did the tertiary ground, as it then was, offend 11(e) of the *Charter*?
- **Held:** The tertiary ground back then violated s. 11(e) of the *Charter*. However, the removing/deleting the part "any other just cause being shown" can save that section of the *Criminal Code*.
- **Analysis/Ratio:**

- Parliament cannot give judges broad discretion to deny bail, as the offending element in the tertiary ground does.
- However, there is discretion to constitutionally deny bail in cases where providing bail would compromise public confidence in the judicial system.
    - **This ground is exceptional and should be used rarely. All factors in the section must be considered in their entirety.**
- As always, bail should only be denied **when necessary** to satisfy a ground.
- **Judge can only deny bail if satisfied that, in view of the four specified factors and related circumstances, a reasonable member of the community would be satisfied that denial of bail is necessary to maintain confidence in the administration of justice**

R v. St. Cloud (2015), SCC- Application for Review under S. 520

- **Facts:** S was charged with aggravated assault. JP found that detention of the accused was necessary on the basis of 515(10)(b) and (c) – because the detention was necessary for the protection and safety of the public and to maintain confidence in the administration of justice. The justice who heard the second application for release on completion of the preliminary inquiry found that the detention of S was still justified under S. 515(10)(c). S then applied under s. 520 for a review by a SCJ judge, who determined that the detention of S was not necessary under s. 515(10)(c) and ordered his release.
- **Issue:** Was detention of S proper?
- **Held:** Detention order restored
- **Analysis/Ratio:**
    - **The circumstances listed in s. 515(10)(*c*) are not exhaustive. The court must consider all the circumstances of each case, paying particular attention to the four listed circumstances.**
    - At the end of this balancing exercise, the ultimate question to be asked by the court is whether detention is necessary to maintain confidence in the administration of justice. Thus, the court must not order detention automatically even where the four listed circumstances support such a result
    - **The justice's balancing of all the circumstances under s. 515(10)(*c*) must always be guided by the perspective of the "public", that is, of a reasonable person who is properly informed about the philosophy of the legislative provisions, the values of the *Canadian Charter of Rights and Freedoms*, and the actual circumstances of the case.**
    - **<u>In Bringing an application for review under S. 520 of CC</u>**
        - The judge must determine whether it is appropriate to exercise his or her power of review. Exercising this power will be appropriate in only three situations: (1) where there is admissible new evidence if that evidence shows a material and relevant change in the circumstances of the case; (2) where the impugned decision contains an error of law; or (3) where the decision is clearly inappropriate.

R v. Villota (2002), ON SCJ [Court erred by not hearing from Crown]

- **Facts:** Two bail hearings for individuals charged with offenses, which, for the purposes of a bail were reverse onus. During the hearings, defense counsel made submissions and then the Crown wished to reply. However, the courts held at those points that the decision to award bail had already been made. The Crown appealed both cases to the Superior Court, not under the bail review process, but for the

issuance of a writ certiorari that the OCJ had committed a jurisdictional error by refusing to hear from Crown counsel.

- **Issue:** Should a writ of certiorari (quashes a conviction) be issued?
- **Held:** No certiorari shall be issued.
    - Bail hearings, like other adversarial proceedings, are governed by the principle ***audi alteram patrem***: the Court is bound to hear from both sides.
    - When a failure to hear the other side takes place, the court offends natural justice and commits a jurisdictional error.
    - The OCJ had committed jurisdictional errors in both of these cases by refusing to hear from Crown Counsel before arriving at a decision.

    - **Why court denied Certiorari?** Because certiorari is a discretional remedy, the SCJ refuses to issue one here given the amount of time that has passed since the bail hearing.
    - **Instead, the proper avenue in a case like this is to make an application for a bail review**.

SET DATE COURT

- Before a justice; disclosure is handed out and elections are made.
    - Things you might get:
        - Information to obtain.
        - *McNeil* disclosure (later): reports about police with legal troubles.
        - 911 recordings, etc.
- All appearances will be marked in the information.

If it's predicted that the trial will take more than a day, the justice will tell you go to the clerk's office to book a trial date and then come back to set a judicial pre-trial (JPT)

COUNSEL/CROWN PRE-TRIAL (CPT)

- The Crown will rarely meet directly with a defendant to discuss their case; in fact they encourage representation by a criminal defence lawyer and the CPT is not done on record
- The Crown pre-trial takes place amongst counsels after the disclosure package has been carefully reviewed by the defence's lawyer, for strengths and weaknesses.

The purpose of the meeting is to discuss and negotiate a number of matters including: how long they expect the trial to last, names of witnesses that may be called, possible violations of a defendant's constitutional rights, and the sentence the Crown would seek if a guilty plea is entered

MUST HAVE CPT

Done in OCJ and before the Prelim

JUDICIAL PRE-TRIAL (JPT)

- The judicial pre-trial plays a pivotal role in the Canadian criminal justice system. It involves a closed-door discussions between a judge, the Crown attorney and defence attorney(s).
- **During a judicial pre-trial** the facts of the case are discussed, the admissibility of certain evidence

and the strengths and weaknesses of the case are analyzed. Further disclosure might be elicited. Notice of things like Charter challenges will be given. Future pre-trial appearance dates could be set:
    - Necessary for things like elections, which have to be delivered in writing to the Court (and stapled to the information).
- The judge will give his or her opinion on the merits of the case. A judge may also give their opinion on an appropriate sentence after a judicial pre-trial is complete.
- The judicial pre-trial also is an opportunity to resolve the case before going to trial by negotiating a plea bargain.
- When a judicial pre-trial is complete and the Crown attorney has decided to proceed with prosecution, the accused faces a difficult decision, whether to go to trial or enter a guilty plea.
- A defendant, himself, is **not present** at the JPT.
- Judge, Crown, Defence and Charging officer (sometimes) are at JPT

- **OCJ**: A JPT is held in the OCJ, when it is decided in Set-Date Court that the **case needs more than 1 day for a trial**
- **SCJ**: No matter how many days are set for trial in SCJ, **every case will have a JPT.**
- The issues for preliminary inquiries and trials are set through negotiation.
- **S. 625.1 (Pre-hearing conference)**: authority for ordering a JPT for the OCJ and SCJ
    - **(2)**: Mandatory pre-trial hearing for jury trials
- If you have a preliminary hearing (which occurs in OCJ) and then you get indictment and go to SCJ you have to go through JPT process again in SCJ and the set trial date

*You may not always have a JPT

***See JPT Form Example**

Criminal Proceedings Rules

Pre-trial Conference Report: Rule 28, Form 17

- **Topics covered in the form**
    - Chronology, Form of judicial interim release; Preliminary inquiry; Disclosure; Mode of trial; Pre-trial motions for indictment; Crown pre-trial applications; Statements of the accused; Other disreputable conduct evidence, including similar fact; Hearsay evidence; Positions of the parties; Time estimates; etc.
    - Most important page is the last page **(This page is to be removed before the form is provided to the trial judge)**

3. PRELIMINARY INQUIRY (PI)

PURPOSE AND GENERAL SCOPE OF A PRELIMINARY INQUIRY

OVERVIEW:

- A preliminary inquiry is a hearing conducted in accordance with Part XVIII (18) of the *Criminal Code*, before an accused is placed on trial for an indictable offence. An accused either can be committed for trial or discharged at the end of the preliminary inquiry.
- **Originally**, a preliminary inquiry was presumptively required in the case of all indictable offences,

although it could be waived, and its purpose was investigatory.

- However, in its **current form** the preliminary inquiry is held on request and might be restricted to particular issues. It has **evolved into a safeguard against unnecessary trials.**

- **THE PRELIMINARY INQUIRY SERVES SEVERAL PURPOSES:**
  - (1) Compels the prosecution to adduce sufficient evidence to justify sending the matter to trial; (see whether there is sufficient evidence to send the accused to trial)
  - (2) Enables accused to discover prosecution's case and pin down its witnesses; and
  - (3) Enables parties, especially prosecution, to preserve evidence for trial, which might otherwise have been lost.

- **In Ontario,** an OCJ judge usually holds the inquiry.
- No such thing as **reverse disclosure** (i.e. defence does not need to provide any witness list to the Crown.
- **When you might want one:**
  - When there's a possibility that the witness might change their story by the time the case reaches the trial.
  - To perform a quasi-investigative role (defense).
  - When the police didn't ask questions that the defense wants to be asked.
  - Defence can cross examine witness
  - Check reliability of witness
  - Set ground work about whether or not a third party record holder has an expectation of privacy
  - **Crown:** To call co-accused against each other.
- **When you might <u>not</u> want one:**
  - If accused is pleading guilty, they don't get a prelim
  - When accused wants to go straight to trail in OCJ and catch crown off guard
  - When there are difficult-to-locate witnesses, the preliminary inquiry might give the Crown extra time to get a hold of witnesses.
  - When there's a fear that a witness' (favourable) testimony at the preliminary inquiry will differ from that on trial.
- It used to be that the accused's request for a preliminary inquiry was automatic, that the Crown had to lead evidence on every element of the offense
  - **Parliament and the courts responded to tighten things up:**
    - ***Dawson*** (SCC): Preliminary inquiries have the same limits on the scope of cross-examination that ***Garofoli*** established for affiants to a warrant.
- Accused does not have to testify, but defence counsel can cross examine all witnesses that come to the stand

- ***Criminal Code* amendments*:***
  - **S. 536(4):** The accused must request a preliminary inquiry, as opposed to getting one automatically.
  - **S. 536.3:** The prosecution or counsel for accused shall, provide the court and the other party with a statement that identifies, (a) the issues to be assessed and (b) the witnesses from which the party wants to hear.
  - **S 536.4(1):** The justice before whom a preliminary inquiry is to be held may order to: (a) assist the parties to identify the issues on which evidence will be given at the inquiry; (b) assist the parties to identify the witnesses to be heard at the inquiry; and (c) encourage the parties to consider any other matters that would promote a fair and expeditious inquiry.
  - **S. 536.5:** the prosecutor and the accused may agree to limit the scope of the preliminary

inquiry to specific issues.
    - **S. 577:** The Crown is permitted to bypass the preliminary inquiry process or bypass a preliminary inquiry ruling in favour of the defense -- *preferring an indictment* -- if the personal consent of the Attorney General is obtained.

- **The powers of a judge on preliminary inquiry:**
    - JP or OCJ judge shall hear the prelim
    - **The powers of PI judge are creatures of statute** - exclusively grounded in Pt. 18 of the *Criminal Code*. (they have no inherent power)
        - Therefore, a Preliminary Inquiry judge cannot rule on a **non**-Criminal Code issue
            - **E.g.:** he cannot rule on a charter application because that is not covered in the *Criminal Code* (only trial courts can do this- SCJ)
        - However, basic rules of evidence do apply, even though it is not part of *Criminal Code*
            - **So he can exclude evidence** just on *Charter* grounds.
            - Can exclude involuntary statement made by accused if crown has failed to prove voluntariness
        - **Cannot order disclosure**
        - Can grant adjournments
    - **S. 537: A laundry list of powers:**
        - Adjournment or change of venue of preliminary inquiry.
        - Order that the accused be brought before the court from a jail.
        - Grant/refuse the power to allow counsel open/reply.
        - To receive evidence.
        - Issue a publication ban.
        - Regulate the courtroom in accordance with the Act, the needs of justice.
        - Allow the accused to appear via CCTV.
        - Permit counsel to attend without the accused.
    - **S. 539 (1): (publication bans) The power to ban the publication of evidence called at a preliminary inquiry:**
        - **Permissive** in the case of a request from the Crown; but **mandatory** when the defense requests it.
    - **S. 540: Taking evidence in a preliminary inquiry**:
        - **(1):** Evidence is taken under oath and counsels are permitted to cross-examine them.
            - This is not restricted by the fact that the preliminary inquiry judge cannot make rulings on Charter issues, defenses.
        - **(7):** Evidence can be brought before the preliminary inquiry that would not be admissible at trial so long as the judge considers it credible or trustworthy in the case (including hearsay).- judge has to approve it
            - If accused wants to cross examine hearsay evidence, they must show why they want to do so – this will be satisfied where there is dispute or real necessity to test the evidence the crown has relied on
        - **Two important considerations under the taking of evidence**
            - **Right to cross examine**
            - **Right to make full answer and defence**

- **Test for Committal:**
    - **S. 548: directs the justice or judge at the preliminary inquiry to commit the accused for trial on any indictable offence if the evidence in support of that charge is**

sufficient. OR Discharge accused if insufficient

- In ***United States v Shephard***, the SCC stated that the test for sufficiency as the preliminary inquiry is whether a reasonable jury, properly instructed, could return a finding of guilty.
  - Test becomes more difficult for prelim judges when there is no direct evidence
- In ***R v Acuri***, the SCC applied ***United States v Shepphard***, giving further details as to what type of evidence renders a charge "sufficient".
  - Specifically, where the Crown adduces **direct evidence** on all the elements of the offence, the case must proceed to trial, regardless of the existence of defence evidence, as by definition the only conclusion that needs to be reached is whether the evidence is true.
  - However, where the Crown's evidence consists of, or includes, **circumstantial evidence**, the judge must engage in a **limited weighing** of the whole of the evidence (i.e., including any defence evidence) to determine whether a reasonable jury properly instructed could return a verdict of guilty.
  - **Reasonableness of the Inferences:** in performing the task of limited weighing, the preliminary inquiry judge **does not draw inferences** from facts. **Nor does she assess credibility**. Rather, the judge's task is to determine whether, if the Crown's evidence is believed, it would be reasonable for a properly instructed jury to infer guilt.

- **DIRECT EVIDENCE:** does not require any reasoning or inference to arrive at the conclusion to be drawn from the evidence.
  - **E.g.:** Did it rain? If a person testified that he or she looked outside a window, and saw rain falling, that is direct evidence that it rained.
  - Things that you actually see, feel, hear, etc and know to be true

- **CIRCUMSTANTIAL EVIDENCE:** also called indirect evidence, requires that an inference be made between the evidence and the conclusion to be drawn from it.
  - **E.g.:** Did it rain? A witness testified that he or she heard distant pitter patter, and later walked outside and saw that the ground was wet, smelled freshness in the air and felt that the air was moist, those sensations would be circumstantial evidence that it had rained.

CASE LAW:

R v. Arcuri, (2001), SCC [Test for Committal when Crown's evidence is entirely circumstantial]

- **Facts:** Crown's case against accused was entirely circumstantial (body found in trunk of his car). Accused is implicated b\c of DNA evidence found in bag of cloths left on the side of the road near murder scene (i.e. sweat on shirt collar & blood on shirt match the accused). In addition, the shirt, pants & shoes were all the same size as the accused (found in bag). There were questions about the accused's opportunity to commit the crime.
- **Issue:** Did the justice commit an error in ordering the accused to stand trial?
- **Held:** No he did not.
- **Analysis/Ratio:**

- 1) Under the "Test for committal" [s. 548(1)], the nature of the judge's task varies according to the type of evidence that the Crown has advanced.
  - (i) Where the Crown adduces **direct evidence** on all the elements of the offence, the judge need not engage in limiting weighing of the case and must proceed to trial, regardless of the existence of defence evidence, as by definition **the only conclusion that needs to be reached is whether the evidence is true.**
  - ii) However, where the Crown's evidence consists of, or includes, **circumstantial evidence**, the judge must engage in a **limited weighing of the whole of the evidence** (i.e., including any defence evidence) to determine whether a reasonable jury properly instructed could return a verdict of guilty.
- (2) **In performing the task of limited weighing**, the preliminary inquiry judge:
  - DOES NOT draw inferences from facts,
  - NOR does she assess credibility.
  - Rather, the judge's task is to determine whether, if the Crown's evidence is believed, it would be reasonable for a properly instructed jury to infer guilt (reasonableness of the inferences).

R v. Munoz, (2006), ON SC [Drawing Inferences]

- **Facts:** accused was charged with conspiring to commit murder and counseling to commit an indictable offence. Offences were allegedly committed while he was incarcerated with other alleged conspirators. It was the Crown's theory that F conspired with others to have his wife murdered. The sole witness called at the prelim was I. I testified that he had a convo with the accused about I giving money to accused's lawyer upon release from jail. Accused was committed to stand trail on both charges and brought a motion to quash the committal.
- **Issue:** Should the application be allowed or should the accused be committed to stand trial?
- **Held:** the application should be allowed
- **Analysis/Ratio:** there was no evidence that the accused knew of the conspiracy or that he did anything to further it. Even if one inferred that the payment was for some illicit activity, there was a significant gap between that conclusion and the further inference that the payment was made in exchange for the accused's knowing participation in the conspiracy. Such an inferential gap can only be bridged by evidence. As there was no such evidence before the preliminary inquiry judge, he exceeded his jurisdiction in drawing an inference which, considering all of the evidence before him, necessarily required impermissible speculation. There was no evidence that supported an inference of counselling. There was no evidence available that would support the reasonable inference that the accused was a party to either the conspiracy to murder F.'s wife or to the murder itself. Thus, there was no basis to infer that the payment of $1,000 to the applicant was, in itself, a criminal offence. Therefore, while one could reasonably infer that the accused intended that I. make the payment, as this would not be a criminal offence, neither the AR nor the MR of counseling could be made out

3. DISCLOSURES AND THIRD PARTY RECORDS

DISCLOSURES FROM THE CROWN

OVERVIEW:

- Anything that the police or Crown has that is "relevant" to the prosecution of the accused.
    - The provision of disclosure to the accused **is a legal duty** and **not** a matter of Crown discretion.
    - The obligation to disclose is an ongoing responsibility.
    - The only thing that the Crown need not disclose is something, which is clearly irrelevant to the prosecution of the accused.
    - **Relevant**= if there is a reasonable possibility of the info being useful to the accused in making full answer and defence (*Chaplin, Girimonte, Dixon, Taillefer)*
- Crown has the **duty to obtain information** from the police and the **police has the duty to disclose information**.
- Disclosure allows accused to make full answer and defence
- ***Grimonte***: "Full answer from the Crown and defense encompasses the right to meet the case presented by the prosecution, advance a case for the defence, and make informed decisions on procedural and other matters which affect the conduct of the defense."
- **Exceptions to the duty to provide disclosure:**
    - Privileged information (e.g. police informants, conversations between prosecution officials, etc.)
    - Information beyond crowns control
    - Information held by other Crown agencies.
    - When the information is clearly irrelevant.
    - Information falling under the *Mills* regime
        - Disclosure of records containing personal information about complainants and witnesses in proceedings for sexual offences governed by ss.278.1-278.91 of *Code*

*Crowns exercise of discretion in fulfilling obligation is reviewable by court (*McNeil)*

- **Timing:**
    - The obligation to disclose is triggered by the defense request any time after the charge. *(Stinchcombe)*
    - Crown must make sufficient disclosure for accused to decide whether to take any step that may affect full answer and defense, including an election or a plea.
        - And this obligation continues before, during and after trial. (*Stinchcombe)*
    - **Disclosure may be delayed out of necessity to protect witnesses or complete an investigation** (*Egger, Chaplin*).

- **Defence Obligations:**
    - The defense must act responsibly in requests for disclosure, and not simply act in a fishing expedition (*Grimonte*).
    - Defense must bring to the trial judge's attention, at the earliest opportunity, any failure to disclose (***Stinchcombe***).

- **Jurisdiction to Determine Disclosure Issues**
    - Only judge presiding over trial, or SCJ judge may review Crown's disclosure decisions
    - Prelim inquiry judge cannot determine disclosure application
- Disclosure Disputes
    - Where the Defence contends that identified and existing material ought to have been

produced:
    - Crown must justify non disclosure by bringing itself within an exception to general rule
  - Where the defence contends that material whose existence is in dispute ought to have been produced:
    - Defence must establish a basis which could enable the judge to conclude there is in existence further material which is "potentially relevant"
    - If defence established this, then crown must justify continuing refusal to disclose

- **When there's a breach of the right to make full answer and defense** (via a lack of disclosure)**:**
  - Right is to make full answer and defence – not disclosure
  - Applicant must show on BOP that:
    - Right to make full answer and defence was infringed
    - We see whether the lack of disclosure affected the verdict
    - Applicant must show "actual prejudice" (*O'Connor; Bielland*)
  - **If no,** we can also proceed by seeing whether the fairness of the trial procedure was affected.

  - **Remedies for Breach [via s. 24(1)]:**
    - Order of disclosure (most common).
    - Recalling witnesses or allowing defence to re open case
    - Re-election.
    - Adjournment- also common
    - Mistrial.
    - Exclusion of evidence (clearest of cases) - rare
      - Exclusion is necessary to maintain integrity of justice system.
    - Stay of proceedings – no more proceedings (very rare).
  - **Factors in selecting an appropriate remedy:**
    - Remedy will be fashioned to remediate prejudice to accused, and to safeguard integrity of justice system. (*Bielland*)
    - The court should consider (*O'Connor)*:
      - The seriousness of the violation.
      - Individual and societal determination of the charges on their merits (which increases with seriousness of charge)
      - The conduct and intention of the Crown.
      - The number of adjournments necessitated by the breach/non-disclosure.

CASE LAW:

R v. Stinchcomb, (1991), SCC [Crown's duty to disclose of evidence]*-LEADING CASE

- **Facts:** William Stinchcombe was a lawyer who was charged with theft and fraud. One of the Crown's witnesses was a former secretary of Stinchcombe's who had given evidence at the preliminary inquiry that supported the defence's position. Later an RCMP officer took a statement from her, however, at trial the defence was denied access to the contents of the statement. The Crown refused to give potentially exculpatory information about that potential witness on the grounds that they weren't planning to call that witness.

- **Issue:** Does the Crown have a legal obligation to hand over all relevant information to the defense?
- **Held:** Subject to a few exceptions, all relevant information must be disclosed.
- **Analysis/Ratio:**
    - The Crown has a role as a minister of justice -- not merely a partisan seeking to win.
        - When exculpatory information is withheld, justice goes out the window.
    - The Crown has a duty to disclose all information whether or not the Crown intends to introduce it in evidence. The only "isn't [caught as] clearly irrelevant".
        - **This is an ongoing obligation as the Crown encounters further information, even after a conviction is secured.**
    - This creates a corresponding right for the accused to have disclosure from the Crown:
        - **It is grounded in s. 7 of the *Charter* -- a principle of fundamental justice is the right to make a full answer and defense to criminal charges.**
    - **If the information is of no use, then it is irrelevant** and will be excluded by Crown counsel in the exercise of the Crown's discretion, which is reviewable by the trial judge.
        - **Privileged information, however, may be withheld by the Crown.**
    - In making disclosure, no distinction is to be made between material which is inculpatory or exculpatory or material which the Crown intends or does not intend to adduce at trial.
    - The decision to withhold information or delay disclosure is reviewable by the trial judge. This type of a review will typically occur in a *voir dire*. On a review the trial judge should be guided by the general principle that, unless the non-disclosure is justified by the law of privilege, information ought not to be withheld if there is a reasonable possibility that it will be useful to defence in making full answer and defence.

***Crown's duty to disclose is ongoing and reasonable inquiries throughout the process must be made by both parties**

R v. Dixon, (1998), SCC [Defence must be diligent in asking for disclosure]

- **Facts:** An assault case. Various witness statements were not disclosed -- the defense had some awareness of the statements, however, they did not make any attempt to procure them.
- **Issue:** What are the duties of defense counsel concerning disclosure? Were they violated in this case?
- **Held:** The defense does have duties. **In the case at bar**, the lack of relevance to the information and the defense counsel's agreement means that the right to make full answer and defense was not breached.
- **Analysis/Ratio:**
    - The defense must act responsibly in terms of asking disclosure.
    - **When the defense does not show due diligence in seeking out disclosure,** this will constitute a factor against providing relief for breach of disclosure rights.
    - The SCC ended with a 'caution' to defence counsel that they are not entitled to assume at any point that all relevant information has been disclosed to defence. Just as the Crown has an ongoing duty to disclose, so too does defence counsel have an ongoing obligation to be duly diligent in pursuing disclosure.

THIRD PARTY DISCLOSURE: SS. 278.1-278.91

OVERVIEW:

- The Crown is not bound to actively seek out information on behalf of the defense.
    - **However,** once the Crown becomes aware of relevant information, their position as a minister of justice mandates investigation.
- Determines when State should use power to compel production from "strangers to the litigation"
- ***O'Connor*** **(SCC): Third party disclosure is governed by a two part test:**
    - 1. Is the information likely to be relevant to the defense's case?
        - Onus is on the accused.
    - 2. If so, the court may examine it and decide whether/to what degree access will be provided to the defense.
        - **The key:** Do the salutary effects of ordering production outweigh harmful effects of the same?
        - ***McNeil*** **- If the record is relevant, the accused's right to make full answer and defense will, "with few exceptions," tip the balance in favour of production.**
    - **Note:** In addition to redacting certain parts, the Court can also protect privacy through the use of things like publication bans, judicial summaries, barring the public from the courtroom during review of sensitive evidence.
- **Basically it is an application to disclose documents from third parties about a party with privacy interest, because it is relevant to the case.**

- Meanwhile, Parliament has stepped in to govern third party disclosure in sexual assault cases (*Criminal Code*, **ss. 278.1-278.91**) – gov't passed Bill C-46 which became S. 278
    - A comprehensive regime that micromanaged the process.
    - The amendments to the *Code* were made to protect the high privacy interests of sexual assaults victims and the recognition that the court process can lead to revictimization.
    - The provisions govern virtually any kind of third party record, except for those made by the police or the Crown.
        - **If the Crown has it, but didn't author it, they will disclose the existence of the document/information to the defense, but not the contents.**
    - The record is obtained by means of an application to the trial judge:
        - Contents:
            - Particulars identifying the record that the accused seeks to have and the name of the person who has it.
            - The grounds that the accused will rely on to show relevance.
                - **Insufficient grounds:**
                    - That the record exists.
                    - That the record may disclose a prior inconsistent statement.
                    - That the record may relate to the credibility of the complainant or witness.
                    - That the record relates to the complainant's sexual reputation.
                - **Note**: The SCC held in ***Mills*** that the accused may rely on a listed factor where there is evidentiary or informational foundation to suggest that they may be related to likely relevance to issue at trial or competence of witness to testify.

S. 278.1 "record"= any form of record that contains personal info for which there is a reasonable expectation of privacy and includes….anything unless it is a document made by the people responsible for arguing or investigating the offence

- **The hearing:**
  - The judge shall hold a hearing in camera to determine whether the third party has the document.
  - If the trial judge feels that the third party has the document, they may order the third party to produce it for the court to review.
  - The trial judge will then review it in private (with additional hearings in camera, if necessary) to determine whether it is relevant and should be reviewed (factors in **S. 278.5(2)**).
  - If the trial judge believes that it is relevant to an issue or the competence of a witness AND that its production is necessary in the interests of justice, the trial judge may order disclosure to the defense:
    - **Factors:**
      - Extent to which record is necessary for making full answer and defense.
      - Probative value of the record.
      - The extent of a reasonable expectation of privacy over the record.
      - Whether the desire for disclosure is based on bias or discriminatory belief.
      - Potential prejudice to personal dignity and right to privacy.
      - Social interest in the reporting of sexual offenses.
      - The integrity of the trial process.
    - **Possible limits on disclosure:**
      - That the record is edited.
      - That a copy, rather than an original is disclosed.
      - That the accused and counsel for the accused not disclose the information to anyone else.
      - That the record only be viewed at the offices of the court.
      - That no copies be made or that restrictions be imposed on the number of copies.
      - That identifying information be removed from the record.

- **For sexual assaults- the third party record application is governed by s. 278.2 → special rules**

  - **IN SHORT, Steps in *O'Connor* Process: (1)** Accused obtains *subpoena duces tecum* (ss. 698(1), 700(1)); **(2)** Accused serves and files application (with affidavit), showing "likely relevance": Notice must be given to: Crown + Party in possession of document + Party with privacy interest in document. **(3)** *O'Connor* application brought before trial judge **(**application may be heard prior to trial); **(4)** Claims of privilege considered: if privilege established, no production, **unless privilege unreasonably limits full answer and defense**; **(5)** *O'Connor* analysis: **(a)** Applicant must demonstrate "likely relevance". If test met, records may be produced to court for inspection; **(b)** Judge determines whether, and to what extent, records to be produced to accused

CASE LAW:

R v. McNeil (2009), SCC [Investigating Officer was also under investigation for misconduct. Does the defence need to use Third Party disclosure test?]

- **Facts:** McNeil was charged with drug offenses. One of the arresting officers was under investigation himself for drug offenses (charges under *Criminal Code* and *Police Services Act*). He was also the Crown's main witness. The defense sought disclosure.
- **Issue:** Must the defense use the third party (*O'Connor*) disclosure test to gain access to these records?
- **Held:** No, because the disclosure of these records, if relevant, comes from the first hand Crown disclosure process.
- **Analysis/Ratio:**
    - **O'Connor/3rd party production regime is not how to deal with police disciplinary records. They are only used where records require a reasonable expectation of privacy.**
    - The police are under a duty to aid the Crown's prosecution by disclosing all relevant information, including disciplinary information.
    - **The police are separate and distinct from the Crown entities prosecuting a case.**
    - **However, though the police do not owe a duty to disclose to the accused, they do owe to the Crown** (in the case of Ontario, through the *Police Services Act*), **and have a duty to participate in the disclosure process.**
        - They act on the same first party footing as the Crown.
    - ***Stinchombe***: The Crown, in turn, has a duty to disclose all relevant information to the accused (minus "irrelevant" information).
    - **However,** not all disciplinary records will be relevant such that they will need to be disclosed.
        - Examples of non-relevant records:
            - The officer played a small role in the investigation.
            - The officer's misconduct had no impact on the credibility of the officer as a witness or in their role as an investigator: e.g. a *PSA* charge of disobeying orders for not removing one's hat.
    - Officers misconduct that is related to investigation at hand or where the finding of misconduct could reasonably impact the case against the accused will be deemed relevant/first party disclosure obligation.
    - **In the case at bar**, the drug convictions of the arresting officer was held to be something that ought to be disclosed because that misconduct is related to the investigation of the accused.
- **Note:** If the Crown decides not to disclose a police disciplinary record, you need to proceed through the third party analysis established by *O'Connor*.
- **Ferguson 5 →1st party disclosure**
    - any conviction or finding of guilt under CC or under controlled drugs and substances act
    - any outstanding charges under the CC or the controlled drugs and substances Act
    - any conviction or finding of guilt under any other federal or provincial statute
    - any finding of guilt for misconduct under police service act
    - any current charge of misconduct under police service act for which a notice of hearing has been issued
- If there is a record that you want that does not fall under ferguson 5 then you bring an O'Connor application

R v. Quesnelle, (2014), SCC [Third Party Records and Disclosure]- most recent case

- **Facts:** Quesnelle was charged with numerous offenses arising out of a sexual assault. The defense sought to adduce the complainant's incidence report to police made on an unrelated incident.
- **Issue:** Does the s. 278 third party disclosure regime for sexual assaults apply to documents related to the complainant, but not to the charges before the courts?
- **Holding:**
    - The s. 278 regime governs the disclosure of certain records in trials related to sexual offenses, but the Crown continues to have an obligation to seek out records, when brought to their attention, that disclose information relevant to the case.
    - However, the s. 278 regime does not cover documents made in the process of dealing with unrelated investigations; in such cases, the information, if it is not disclosed by the Crown, must be obtained by the defense through the *O'Connor* regime.
- **Analysis/Ratio:**
    - (Par 16) → What if police get stuff and give to crown that really should be a third party disclosure but are given to crown anyway→ the crown obtains record and determines that it is covered by Mills regime it must give notice to defence and give an assessment of likely relevance of record in their possession. Crown should advise if it plans on using anything from record.
    - There is duty on crown to make reasonable inquiries and duty on police to provide the information to crown
    - In context of Mills and 278.1 → There is still a duty on crown part, instead of duty to disclose and produce records it is now a duty to give notice of the records existence.

4. SPECIALTY COURTS

OVERVIEW

- **Comparison between <u>problem solving courts</u> to <u>specialized courts</u>:**
    - **Specialized Courts**: Providing specialized process/personnel that continue to seek prosecution and trials as answers to the problems at bar. Do not offer alternative bail or sentencing arrangements.
        - E.g. child abuse court, integrated family-domestic court.
    - **Problem Solving Courts:** Providing specialized resolutions that deal with the underlying cause of the criminality in the case at bar. (all problem solving courts are specialty courts)
        - E.g. mental health court, drug treatment court, *Glaude* court.

- **Specialty Courts:**
    - DIVERSION PROGRAM: form of sentencing; enable offenders of criminal law to avoid criminal charges/ a criminal record. Problem-solving courts typically include a **diversion component** as part of their program.
        - The purposes of diversion are generally thought to include relief to the courts, police department and probation office, better outcomes compared to direct involvement of the court system, and an opportunity for the offender to avoid prosecution by completing various requirements for the program
        - Diversion involves resolving the matter outside of the formal court process, no finding of guilt imposed at all (charge withdrawn or stayed as long as person seeks help or satisfy some condition)

- **Note:** The Crown has the ultimate say on diversion (however, mental health workers, defense counsel and victims can make submissions to the Crown).

- **How diversion works:**
  - Approval is first.
  - Once approved, a plan is created.
  - The person is monitored for a period of time.
  - Once the accused is stable and in programs, the Crown stays the charges pursuant to s579 of the *Code*.

MENTAL HEALTH COURT

- Brought in1990s to deal due to an increase in mentally ill people.
- Sought to deal with an increase in the institutionalization, criminalization of people with mental illnesses.
- **Mental health courts have no set process/procedure in Ontario: it is dependent upon the resources of the community in which the court is located.**
- Person cannot be forced to take medication (it is a charter right) so crown can say that this case is divertible and make an offer – if this person goes on their meds then it can be diverted- defendant can always say no.

- **Objective:**
  - To address fitness and related pretrial issues expeditiously.
  - To better address the needs of the mentally ill -- i.e. to stop the revolving door.
  - Address many preliminary issues that bog down courts

- **REQUIREMENTS FOR ADMISSION:**
  - The accused suffers from a mental disorder or developmental delay that ***contributed*** to the defense (**Note:** This does not mean that the mental illness had to be the cause; more lenient than the NCR test of cause- illness just had to play some part)
  - There are no public safety concerns.
  - There is a reasonable prospect of conviction (otherwise the accused shouldn't be before the Courts at all).
- **Certain offenses are always ineligible for mental health diversion**: e.g. murder, impaired driving, child porn offenses, any offense causing serious bodily harm.
  - **murder, manslaughter, infanticide, criminal negligence causing death;**
  - **causing death or bodily harm by dangerous or impaired driving;**
  - **any offence causing serious bodily harm;**
  - **simple impaired driving or driving with a prohibited blood alcohol concentration;**
  - **offences involving firearms;**
  - **criminal organization offences;**
  - **kidnapping;**
  - **spouse/partner offences**
  - **child abuse;**
  - **offences involving child pornography**
  - **sexual offences including sexual assault, interference and exploitation, invitation to sexual touching and incest;**
  - **specific hate offences**
  - **home invasions;**

        - **perjury;**
    - **Others are presumptively eligible:** e.g. joyriding, theft and possession under $5000, mischief under $5000, causing a disturbance, fraud and false pretences under $5000, food, travel and accommodations frauds
    - **Vast majority of offences wont fit into either of the two above categories and it will be up to crown discretion.** Crown must consider:
        - Circumstances of the offence
        - Circumstances of the accused and
        - The needs of the community, including the victim

- **OTHER FUNCTIONS OF MENTAL HEALTH COURTS:**
    - **Fitness to stand trial/assessment orders**.
        - MHC moves pre trial issues expeditiously because psychiatrist is on site to test fitness! As oppose to non MHC where they have to send accused to hospital to see a psychiatrist and be assessed over a number of days
        - Everyone is presumed to be fit until someone says otherwise – whoever raises fitness, the burden lies with them to establish it (unless it is judge who inquires)
        - **Taylor test**- test where you make basic decisions about fitness (know your name, what you are charged with, know what judge, crown and defence jobs are and understand consequences of a finding of guilt)- it can be casual and simply involve judge asking the person these Q, it is not drawn out process. → this is a benefit of a mental health court
            - **Sometimes fitness issue is so obvious that if police realize or whoever, the person can go right to MHC and have a fitness test**
        - Sometimes fitness is not that noticeable and an assessment has to be conducted
        - With SCJ- if there was a suspicion about fitness, they would postpone hearings and order an assessment (which could take time) and person may already be in custody so their liberty is at stake

    - **Bail hearings.**
        - The Courts have resources right there to help work out a plan of release with the team of social workers, mental health workers, access to housing/counseling/treatment facilities, special bail program, trained duty counsel, judge with special MH knowledge, crowns specially trained, etc.
    - **Guilty pleas.**
        - If accused pleads guilty, the MHC judge will help come up with a sentence that makes sense
    - **Short NCR (Not Criminally Responsible) hearings.**
        - MHC does not do trials; but some small NCR hearings. Only when accused has admitted commission of offence and the only issue is whether or not the person should be found guilty or NCR.
        - Unlike a fitness assessment, which is concerned with finding out what a person's current mental state is, an NCR assessment is done to determine the person's mental state at the time they committed an offence
- **3 Possible Findings**:
    - Finding of guilty
    - Not guilty
    - Finding of NCR
        - Can have MR or may not have MR and don't appreciate that their actions were wrong or morally inappropriate

* Diversion is not a substitution for NCR- because there are many people who may commit an act that are not quite at the NCR level, but can be diverted out of the system

- **Personnel at Old City Hall MHC:**
  - Two Crowns.
  - Two-duty counsel.
  - Nine mental health workers.
  - A psychiatrist for assessments.
  - A psychiatrist for diversion assessments.
  - Specially trained clerks.

*See Assessment order template on pg 145 of long summary

CASE LAW:

R v. Swain (1991) SCC [

- **Facts**: In October 1983, Owen Swain was arrested for attacking his wife and children in a bizarre manner, and was charged with assault and aggravated assault. Later at the trial for the charges, Swain's wife testified that Swain was "fighting the air" and talking about spirits. Swain testified that at the time of the incident, he believed that his wife and children were being attacked by devils, and that he had to protect them. On November 1, 1983, Swain was transferred from jail to a mental health centre, where he was observed to be acting in a bizarre manner. He was prescribed with antipsychotic medications, and his condition improved rapidly. Swain was granted bail, released into the community, and continued to take his medication and see a psychiatrist. Swain remained out of custody until the conclusion of his trial. At the end of his trial, Swain was found not guilty by reason of insanity. As a result of the court's finding, the Criminal Code of Canada at the time required that the person be held in custody until the Lieutenant Governor of the Province (i.e. the executive branch of the provincial government) decides to release him. There was no criteria governing how/when the LG would discharge the person.
- **Issue**: Was the provision requiring a person to be held in custody until the Lieutenant Governor released him constitutionally valid?
- **Held:** No, it was not unnecessary detention and therefore a violation of s. 9 of the *Charter*
- Ratio/Analysis:
  - (1) **Struck down the LG warrant system**, as it was arbitrarily detaining individuals, contrary to section 9 of the Charter
  - (2) **Minimal intrusiveness on the freedom of the offenders** required that a person be held no longer than necessary to determine their mental state

GLADUE/ ABORIGINAL OFFENDERS COURT

- Aboriginals are overrepresented in our criminal justice system. The court in *R v Gladue* attempted to identify why overrepresentation exists, which includes: colonialism, years of dislocation, loneliness, community fragmentation, discrimination, stolen land, poverty, substance abuse issues, and institutional bias against aboriginal persons.
- A Gladue court is a **court for Aboriginal offenders** that deals with bail, guilty pleas, diversion and sentencing. It does not deal with trials.
- There is no set model for a Gladue court. Where the crime is relatively minor, the court should consider Aboriginal-based sentencing principles such as restorative justice.
    - This is called the **Gladue Principle**.
- **The Gladue principles**, applied in the context of aboriginal offenders, take into consideration the defendants' difficult life circumstances due to their native background.
- A court may request a **Gladue Report**, which is a type of pre-sentencing and bail hearing that considers an offender's Aboriginal background.
- Gladue after care workers- people who work in aboriginal community who know where to get access to programs, and can access culturally appropriate counseling and assistance in the community
- Gladue has **aboriginal bail program** (because many times aboriginal people do not have sureties)
- **S. 718(2)(e)** mandated that all forms of sentencing, other than imprisonment, must be considered by sentencing judges, especially for Aboriginal offenders.
    - **Allows judges to sentence aboriginal offenders differently to achieve a truly fit sentence**
    - May not lead to different sentence – but it requires a different method
    - Purpose of section is to respond to the problem of over incarcerating aboriginal people
    - Is remedial in nature
    - Is an expression of the principle of restraint
- **Background factors that can be considered**:
    - Years of dislocation
    - Discrimination
    - Aboriginal persons are more adversely affected by incarceration and less likely to be rehabilitated
    - Restorative justice – very important for interpreting S. 218.2(e)
        - Restorative justice circles
- *R v Ipeelee* (2012, SCC): The Court noted that ***Gladue*** isn't being applied as intended since Aboriginal prisoners continue to climb despite a decline in the number of inmates.
    - The Court was clear: Sentencing judges **must** take into account systemic factors affecting individual Aboriginals and the Aboriginal community as a whole.
    - Sentencing judges need not see a specific link between Aboriginal heritage and criminality of the offender.

CASE LAW:

R v. Gladue (1999), SCC [interpreting S. 718(2)(e)]

- **Facts:** aboriginal woman pleaded guilty to manslaughter for killing common law husband. She was sentenced to 3 years. On the night of the murder she was celebrating her bday and had some drinks. She suspected the victim was cheating on her and they started fighting. She stabbed victim in chest and in the arm.

- **Issue:** How is the Aboriginal sentencing provision to be interpreted?
- **Ratio:**
    - The purpose of the section is to respond to the problem of over-incarcerating Aboriginal people.
    - Does not mandate a sentence other than imprisonment, but does require a particular method.
        - **The method:**
            - To institute a prison of restraint for sentencing Aboriginals.
            - **To consider not just the individual circumstances of the accused, but also the broader social forces affecting the Aboriginal community as a whole:**
                - Years of dislocation -- leading to high unemployment, lack of opportunities, lack of education, substance abuse, loneliness and community fragmentation.
                - Discrimination.
                - The adverse effects on Aboriginals of the above factors and **the fact that Aboriginals are less likely to be rehabilitated by incarceration.**
            - **To consider, in appropriate circumstances, sentences other incarceration that are appropriate for the offender and the community and aid in the rehabilitation of the offender and the victim.**
- **Analysis:** In this case, the judge considered a variety of factors to determine sentence. Accused was a young mother, her family was supportive, didn't have a record, sought counselling for drinking, upgraded her education, had thyroid problem that caused anger issues. The lower court judge noted that there were no special circumstances arising from the aboriginal status of the accused and the victim that he should take into consideration- they were living off the reserve and not within the aboriginal community.
    - **SCC**
        - SCC says that it was wrong of the judge and court of appeal to not take the aboriginal sentencing provision into consideration and they should not have just dismissed it simply because the accused and victim lived off reserve.
        - However, because the offence is a serious one, there is no need to order a new hearing. 3 years is reasonable

DRUG TREATMENT COURT

- The drug treatment court **applies to drug addicts exclusively**, and applies to drug offences and *Criminal Code* offences (non violent offences, possession, small trafficking amounts, prostitution, property related offences, etc.).
- Crown decides on whether to admit people to this intense program (there is a committee that also discusses with crown)
- There are only a certain number of judges that sit in this court b/c continuity is key
- **Application by the accused requires:**
    - A questionnaire,
    - Assessment, and

- Interview by Drug Traffic court judge.
- A guilty plea to the offenses etc.
- Released on bail with certain conditions that relate to program involvement

- **The program:**
  - Individual and group counselling.
  - Random urine testing.
  - Weekly court attendances.
- **Graduation comes at the end of the program:**
  - Takes about one year.
  - You need to be conviction free for three months.
  - Need to be responding to treatment (abstinent for at least 3 months)
  - Need stable housing.
  - Need work/school/volunteer/training in place.
- **The effect of graduating:** Imprisonment will not be used and often a conditional/absolute discharge will be employed.

****Drug treatment court is really busy now because of minimum sentences associated with the drug offences (ie. Trafficking even a small amount you could 1 year and the only way to bypass this sentence is drug treatment court)**

RULES OF THE COURT

- S. 482: **Courts may make rules governing criminal procedure within the bounds of the *Criminal Code*.**
  - (2): **Since inferior courts are statutory courts, rules governing procedure in these courts must be approved by the Lieutenant Governor in council for the applicable province.**
  - These rules establish things like notice requirements for motions, formal requirements for legal documents,
  - Helps to speed up trial time, standardize proceedings, focus lawyers on the issues before the court, manage trial resources, procedural fairness and encourages resolution (by making the outcome more predictable).
    - Many of these, as you can guess, are interrelated rationalia.
- **Note:** The fundamental objective of these rules, as they tell you, **is to ensure that criminal matters are dealt with efficiently and fairly.**
  - Servant v. master metaphor.
  - Retaining jurisdiction to dispense with compliance in the interests of justice.
- **Note:** The one ground for a court refusing a motion -- **irreparable prejudice** to the opposing party (usually prejudice to the defense when the Crown switches strategies in the middle of a trial).

CASE LAW:

R v. Blom (2002), ONCA [Flexibility should be given by the Court in Applying Rules of Court]

- **Facts:** Blom crashed his car into someone's yard. When police came, they formed suspicion that Blom was drunk. He went to the station and an officer confirmed that he was over the limit. Blom brought a notice for a Charter application. It was factually bare and contained little in the way of argument. **The trial judge excluded it under the rules of the court** -- it didn't come with enough notice, detail, no affidavit was filed etc. Must give 30 days notice to crown when brining any applications. **The rules, however, allow for flexibility in dealing with litigants who do not meet the standards set by the rules.**
- **Issue:** How should the trial judge have dealt with Blom's deficient notice of application?
- **Held:** The trial judge had options before him such that it should not have been excluded in light of the circumstances.
- **Analysis/Ratio:**
    - **Judges have discretion in applying the rules of court regarding criminal matters (rules being the *Ontario Court of Justice in Criminal Proceedings)***
    - However, it is **reviewable when the trial judge makes an error in principle.**
    - When one party claims inadequate notice, the trial judge must consider the issue of prejudice – **does the failure to provide adequate notice put the opposite party at some unfair disadvantage in meeting the case that is being presented?**
        - If the inadequate notice does put the opposing party at some unfair disadvantage, the court must consider whether something less drastic than refusing to consider the charter argument can be done to alleviate the prejudice
    - **The purpose of the rules are to foster fairness, efficiency:**
        - **In the case at bar,** there was little evidence of prejudice to the Crown (given that the trial had dealt with similar issues to the *Charter* application) and the motion dealt with a very recent SCC case -- at any rate, any prejudice could easily be cured with a short adjournment.
    - **The procedural rules are meant to serve the trial process/assist, not to be masters of the court -- they can be relaxed when it doesn't result in unfairness.**

5. JURY SELECTION

OVERVIEW:

- A jury is the trier of fact in some criminal trials. In criminal law juries normally consist of 12 individuals and 6 in civil trials drawn form the community where the trial takes place, selected after a process involving challenge for cause and preemptory challenges.
- **S. 11(f) of the *Charter*** guarantees the right to a jury trial if the accused is facing a penalty of five years or more (except for courts martial).
    - This is about the right to a jury.
    - The *Criminal Code* will give the accused to some offenses the option of opting into a jury trial.
- Murders are automatic jury trial – accused has to say they don't want jury trial
- **The value of a jury trial:**
    - The virtue of common sense.
    - The possibility of jury nullification.
    - If fact driven case, you may want jury

- **Drawbacks:**
  - Raises the possibility of wrongful convictions.
  - No reasoning given like a judge does. – makes a jury trial harder to appeal
  - If lots of emotion, you may want a judge alone
  - If it is more technical case, you may want judge
- **The *Criminal Code* gives jurisdiction to juries, but provincial legislation governs the selection of jurors:**
  - *Juries Act*, RSO: sets statutory requirements for jurors.

Note: The *Code* gives other reasons for someone to be excluded from the process.

EMPANELLING (GETTING JURORS):

OVERVIEW:

- Crucial distinction:
  - **Empanelling the array**:
    - Using the criteria of the **provincial *Juries Act*** to establish a **jury roll from municipal data**
      - Questionnaires sent out, those returned who are eligible are put on a list whi is the Jury Roll
      - Jury Roll includes name, address and occupation
      - Each court estimates the number of jury members they need for upcoming trials, etc they send in their # estimates/requests to the Provincial Jury Centre.
      - The Jury centre uses a computer program to randomly select Jury panels from the jury role
      - A jury panel usually consists of 50-300 people who are summoned to a specific courthouse
      - Jury panel members go to the court location and on the date they were summoned to. They are divided into groups for each trial that day
      - Panel members are then called into the courtroom so that all the parties can see the prospective jurors
      - Prospective jurors who are not selected may be assigned to another panel on the same day or asked to return the next day
  - **Empanelling the jury**:
    - Creating **a jury from the array** using the **federal *Criminal Code*.**
      - Each panel member is assigned a # which appears on a ballot card
      - Court staff randomly select ballot cards – chosen lottery style (s. 631)
      - S. 632- Pre Screening by judge for hardships → Panel members chosen are then given the chance to let the judge know of any difficulties they may experience in attending court on the date of their summons because of employment, schooling, vacation, single mom, etc Will also read out witness list and ask you to stand up if know any of the witnesses
        - Judge may excuse panel member
        - Defer their service to later date
        - Or require them to serve on the jury
      - 12 people sit on a criminal trial (can have 2 alternatives- s. 631)

        - can have 14 sit and hear evidence- but ONLY 12 DELIBERATE
        - so names of 14 must be mixed up and 12 be selected to deliberate
        - Need a Min of 10 to deliberate
    - Prospective juror then goes to the front of the courtroom and faces the accused – at that point they are either accepted by both lawyers or rejected by one of the lawyers
        - the crown and counsel can reject a limited number of prospective jurors without giving a reason→ **peremptory challenge**
        - in some cases, counsel pose a few pre determined Q to each prospective juror to ensure that they will be able to decide the case free of prejudice or bias → **Challenge for Cause** (See challenge for cause process below)
- S. 626.1- judge in jury trial need not be judge who selected jury
- S. 631(6) – Judge can order publication ban on ID of jurors
- The **array** must be representative of the local community and randomly selected:
    - By "representative," what is meant is **not that the array is representative of Canadian society as a whole, but that it is generally representative of the community and not exclusionary of a distinctive group.**
    - ***R v Kokopenace*** **(ONCoA)** dealt with **representativeness** -- the unique perspective of Aboriginals on reserve is necessary for proper representation of Native-heavy communities.
        - The state needed to reach out and focus particularly on the participation of Aboriginals in juries because of the special relationship between Natives and the Crown.
        - The failure of the province to do so is based in the *Juries Act* -- which was held to violate ss. 11(d)-(f) of the *Charter*.
        - **The Act establishes no protocol for reaching out to Aboriginals living on reserve through questionnaires.**
            - And this is in the context of **a known problem of underrepresentation in Northern Ontario's juries.**

- **EMPANELLING VIA THE *CRIMINAL CODE*:**
    - In addition to provincial legislation, **s. 632** of the *Code* allows for judges to exclude jurors for reasons like hardship, personal interest, relationship with the parties or any other reason the judge sees fit.
    - Requirements:
        - Twelve jurors are required, but sinking below ten during a mistrial will lead to a mistrial.
        - Two Alternates may be selected.
            - If one is excused, the alternative can be brought in.
        - If the array does not yield twelve jurors, the power of 'talisman' allows for random people to be grabbed off of the street.
    - **Stand aside:** The judge has jurisdiction to stand aside a potential juror until the entire array is examined.
        - So use him, if needed.

    - **CHALLENGE FOR CAUSE**
        - Challenge for cause is the process where the Crown or the accused can challenge a potential juror in order to suggest that the person should not serve on the jury.
        - The most common basis for challenge is that the jurors will not act impartially.
    - **(SS. 635-640): a two stage process**

- 1: Establish air of reality to need to challenge the partiality of the juror.
    - Show that there is a widespread bias in community AND that some jurors may be incapable of setting aside the bias
- 2: Ask questions to potential jurors as permitted by the trial judge.

- **Note:** This is **not a fishing expedition**, but it is not limited to exceptional circumstances because it is an important step in ensuring a fair trial.
- Jurors are presumed to be unbiased
- **Note:** While the judge decides whether the line of questioning is permitted, <u>two designated jurors, triers, decide whether the impugned juror can be excluded for cause.</u>
- **Note:** The questions allowed are focused, not on whether there is bias, but so much as there is bias which the juror won't be able to set aside in arriving at a decision based only on the evidence before the Court.
    - So the content of the case will be such that the potential juror will be bias and will not reach an impartial decision.
- **Note:** The defense can apply, via the *Code*, to have all potential jurors, except Triers, not currently being examined until the jury is selected
- Q don't just have to be about racial bias, can be about pre-trial publicity as well
    - Racial Bias (*Parks)*

- Requirements for **establishing an air of reality** (including pre-trial publicity):
    - You must show that a widespread bias exists in the community.
    - You must also show that some jurors will be incapable of setting aside the bias.
    - Strategy:
        - Look to pre-trial publicity, showing biased reporting, reporting on defendant's bad character, and media speculation on guilt/innocence of defendant.
            - have you seen, heard or read anything about this case or this accused on television, radio, or in the news or through discussion with others ?"
                - if yes,
            - "from what you have seen heard or read about this case or the accused on tv, radio or in the news or in discussion with others, have you formed any opinion about the guilt or innocence of the accused?"
            - "despite any opinion you may have formed about the guilt or innocence of the accused, would you be able to set that opinion aside and decide this case only on the evidence that you see and hear given in this courtroom and in accordance with the instruction given by the trial judge?"
                - Answer will be yes or no and that is it
- **S. 640→** allows for jurors to be chosen in the presence of static sworn triers (same 2 chosen at beginning stay throughout)

- **<u>Peremptory challenge</u>** (S. 634): Allows counsel to have certain array members excluded without demonstrating cause.
    - Unless there's an abuse of process, this is done on the basis of demeanour in court as well as the name and occupation of array members supplied to counsel.
        - The counsels look at the way the array members are behaving, their background, etc.

        - Only limited amount provided to each side:
            - Murder -- 20 provided.
            - Offence where maximum penalty is more than five years -- 12 provided.
            - Any other offence -- 4 provided.
        - If co-accused, the Crown gets that amount for each accused (e.g. 4 each)
        - S. 635 – defendants go first and then alternate
    - ***R v Gayle* (2001),** ONCA -- A black male was tried for murdering a police officer by ten white jurors (plus two black jurors).
        - ONCA placed emphasis on the fact that defense counsel did not object to this at the trial level.
        - ONCA refused to intervene because there was no basis to assess whether the right to a fair and impartial jury was compromised regardless of how bad this stinks.

Removal/Replacing Jurors

- If doing so before trial use S. 632
- If doing so after trial use S. 644
- Once they have heard evidence they cannot be replaced
- jurors can be removed b/c sick, hardship, partiality or other reasonable cause

CASE LAW:

R v. Parks (1993), ONCA [Challenge for Cause was race related]

- **Facts:** P, a drug dealer, is convicted of manslaughter. The Trial Judge refused to let the accused put 2 challenge for cause questions to the jurors, one about drugs and the other about race
- **Issue:** Did the trial judge err in not allowing these challenges for cause questions?
- **Held:** Yes (for race); and No (for drugs)
- **Analysis/Ratio:**
    - A significant portion of the population operates on explicit or implicit racial bias.
    - **In cases where the accused is of racial minority**, the fact of bias is *enough* to bring an air of reality to challenge the partiality of the jury.
    - **However**, the question must still be vetted by the judge; not about whether there is bias, but whether it can be put aside during trial.
        - **In practice, look at the bias and then ask whether, if that bias exists, can the juror set it aside to judge the case only on the evidence.**

6. MOTIONS

- Can either have jury selection and then pre trial motions, or pre trial motions and then jury selection – depends on what the parties want

Motions are brought to decide matters of importance to the trial

- **Timelines:**
  - Discussed, but not held, at JPT.
  - Some are held before trial date.
  - Others are held at the start of the trial.
  - Some are held during a trial.

- **How to bring a motion:**
  - There are guidelines in the rules.
    - Different for provincial and superior court
  - The rules establish what you need to file and when.
  - *R v Blom* (ONCA): Requirement with the rules can be relaxed in the interests of justice.
    - Hence replies to a motion cannot stop at alleging mere failure to comply with the rules.
    - Rules can be broken if there is no undue prejudice that will be suffered to either side by breaking the rule.

- **Motions heard before a trial:**
  - **S. 11(b)** -- right to trial in reasonable time:
    - OCJ -- 60 days.
    - SCJ -- no set timeline; see r27.
  - Disclosure.
  - Third party records.
  - Severance (**SS. 589-590**).
    - Reasons to apply for it:
      - Antagonistic defenses -- finger-pointing.
      - Evidence is admissible against one, but not another.
  - More particulars (**S. 587**) -- since ***Stinchcombe's*** disclosure obligation, this doesn't happen so often anymore.
    - Can apply to disclosure of particulars in a charging document or disclosure of documents from the Crown.
  - Amending/quashing an information (S. 601)
    - Can bring application to quash information if it violates legal or factual sufficiency
    - Can also bring application to amend information if it contains an error – this is usually non contentious
  - Quashing committal to stand trial.
    - Always done long before a trial

        - Once judge has determined that person is to stand trial after conducting the preliminary inquiry, the crown drafts the indictment and it goes to the SCJ
        - If it is believed that prelim judge erred then they can bring an application to quash committal to stand trial → but an err in law is not sufficient to quash committal to stand trial
    - ***Garofoli*** -- cross examination of an affiant.
    - Change of venue.
        - Often invoked when there's pre-trial publicity, which has the potential to give rise to bias.

Procedural orders done right before trial with pre trial motions

- Unshackling of accused
- Exclusion of witnesses.
- Publication bans.
    - Scope:
        - Evidence.
        - Identity of witnesses- if sexual assault charge most often have publication ban
        - Identity of a young person- automatic publication ban

*for many of these it is just a matter of requesting to judge and judge grants it

- **Motions at the start of trial (*particularly during a jury trial*):**
    - Most *Charter* motions- some charter issues are addressed after trial (ie. Lost evidence)
    - Voluntariness.
    - Similar fact.
    - Other suspect.- if you want as a defendant to call evidence of another suspect, you have to get leave of the court
    - Scopelitti.- leading bad character evidence of a dead person
    - Some hearsay issues.- Khelawon application is dealt with before trial
    - **S. 276** – application to cross examine complainant on prior sexual history ; getting an exception under rape shield bars to cross-examination.
    - **Note:** Some motions are decided at the end of the case despite being moved at the start of the trial.
    - **Note: In a judge alone trial, these motions can be heard during trial in a *blended voir dire*.**
        - This makes the use for which evidence is adduced very confusing, but it often happens when the evidence to be used in one substantially overlaps with the other.
        - It cannot be done in a jury trial because, in that case, the jury might gain access to inadmissible evidence.

- **Mid-trial motions:**
    - A witness starts giving hearsay spontaneously.
    - Prejudicial vs. probative weighing.

- Expert evidence.
    - This is because **the very process of calling an expert requires a motion-like process --** the expert must be qualified and the field of study must be qualified, too.
    - **Note:** This does not replace the notice requirements on both the Crown and defense prior to adducing expert evidence (must give notice 30 days before trial that you are calling an expert)
    - **Note:** Can be based on whether the expert evidence as such or whether the particular evidence thing that the witness just said is admissible.
- Admissions – usually done ahead of time but can be done at trial
- Something that took counsel by surprise.
- **Note:** In a jury trial, **one must be particularly tactful about when to make a mid-trial motion** -- you might not want to draw the jury's attention to a piece of evidence that you find particularly problematic.

- **Voir dire:**
    - When you bring a motion there are legal issues and evidentiary issues raised- when there are evidentiary issues raised you do into a voir dire → mini trial within a trial
    - The evidence on a *voir dire* is **not evidence at trial** -- **unless the trial judge says so** (although this is not possible in a jury trial).
    - Rules of evidence for a trial apply.
    - **The party bringing the application calls the evidence.**
    - If in OCJ or in SCJ and there's no jury, the voir dire will often be blended and with trial
    - Can hold a voir dire mid trial – if it is a jury trial, the jury will be removed during it
    - After evidence is called, legal arguments are claimed- this may lead the judge to call some evidence going in and some not going in

7. TRIAL PROCESS

- Trial process is mostly governed by CC
- Trial judges have overriding responsibility that trial is fair to both sides
- Juries are triers of ultimate facts in determining guilt/innocence- trial judges remain the triers of law
- Burden of proof – presumption of innocence "golden thread of our system" – until crown has proven guilt beyond a reasonable doubt, accused is innocent. This stays with accused from moment of arrest until crown proves accused guilt – they remain presumptively innocent

- **Reasonable doubt:**
    - *Lifchus*: Reasonable doubt is not an imaginary or frivolous doubt. It is based on reason and common sense, derived from the evidence or the lack thereof.
    - *Starr*: Proof beyond a reasonable doubt is much closer to absolute certainty than the civil standard.

- **Compelling witnesses:**
    - The only way to compel witness to give evidence or get them to bring anything with them to court is to issue a judicial order -- usually a "subpoena" in the case of production.
    - **SS. 697-708 -**cover the issuance of these orders.
    - At common law, trial judges have the power to exclude witnesses from the courtroom -- in order to prevent collusion, subtle influences.

- **S. 486.1** -- support persons:
  - The Court can allow a witness to testify with someone else present.
- **S. 486.3** -- the accused is not allowed to personally cross examine a witness under eighteen unless the trial judge is convinced that the proper administration of justice requires it.
  - If necessary, the Court will permit an *amicus curiae* (impartial advisor) lawyer to do so.
- **S. 591** -- the accused may bring a motion to sever the counts.
  - Rationale: The accused might be concerned that the Trier of Fact could be prejudiced by hearing compelling evidence for one count in the same trial as another count.
  - Meanwhile, the Crown might want to oppose severance to use similar fact evidence when identity is in issue.

- **Joinder and Severance of Counts (S. 591)**
  - This includes severance and joinder of counts and severance and joinder of accused
  - Indictment (created by crown) or information (created by crown and police) (which lists charges and is different depending on what court you are in) – you can have more than one count/charge on one information – if the charges involve the same day, same witnesses, same arrest incident then they should be tried together – you don't want to waste time. So they can be joined
    - However if it is two charges that happened on different dates but lets say with same complainant, then defence may want to sever the counts because they don't want the court to hear all the bad evidence relating to the other charge (that would allow bad character to be admitted)
    - However, remember exception to bad character rule → if there is similar fact evidence between two charges then the evidence can be brought in
  - These joint and severance motions are pre trial motions
    - However it is not fatal if a joinder or severance motion is brought on day of trial – its not encouraged and will prolong process but is not detrimental
  - **Joining Complainants/Offences on same Information**
    - Where prosecution can convince judge that charges in question are so similar in nature that the evidence would be admissible anyways against accused then you can join several complainants on one information
    - For example → man accused of sexual assault, but 3 other women come forward also claiming sexual assault by this man and their accounts are almost the same as the first charge- all 4 complainants could be put on one information
  - CANNOT HAVE MURDER AND OTHER COUNTS ON SAME INFORMATION

- **Summary Conviction Trials:**
  - **S. 786**→ on straight summary offences, the information must be sworn within 6 months of the alleged offence date
  - **S. 800 (2)** -- in a summary proceeding, a defendant may appear by agent.
  - **S. 802** -- the right to make full answer and defense in a criminal trial.

- **Adjournments:**
  - People get sick and don't show up
  - Trial judge can adjourn the trial
  - **S. 803** -- the power of a summary conviction court to adjourn:
  - *R v Dargo*
    - Held that exercise of jurisdiction, the exercise of trial judges discretion to grant adjournment has to be governed by 3 factors (for example if witness is no longer

present) judge must consider before granting adjournment:
    - Does the witness have material evidence to give?
    - Is it likely witness will attend on next occasion?
    - Is the moving party guilty of latches (is the moving party responsible for absence of witness)? Did they even try to get the witness present in court? Or did they do nothing?

**These are not exhaustive; these are just the main factors that judges will consider → overriding concern of judge will be whether or not one party is being prejudiced

- **Shackles & Accused Sitting at Counsel Table:**
    - **Sitting at Counsel Table→** matter is in the discretion of the trial judge "to be determined in the interest of a fair trial and court security"
        - It doesn't matter if both parties consent with the person sitting at table, it is all up to judge (*R v G.C.*)
        - Defence must prove by accused should sit at table
    - **Shackling →** onus is on crown to show why shackling is necessary in courtroom- this is different from sitting at counsel table which is proven by defence
        - Crown must show why the person should be shackled in the courtroom, onus to show reasonable grounds that person is violent or may try to escape (*R v McNeill)*
        - If crown wants to bring application to have person fettered then onus is on them to prove on reasonable probable grounds that accused will be violent or attempt to escape courtroom – you have to show on evidence that it is more likely then not they will be violent or try and escape if outside box and not handcuffed (it is presumed that they not be shackled) → but this isn't followed, almost always accused come in shackled and handcuffed *(R v Brown)*

- **Arraignment:**
    - If jury trial – trial is about to start and jury has been chosen
    - **For non-jury trials, this is straight forward**:
        - The accused will stand, the charges are read and the accused is asked how they plead.
    - **In a jury trial, things are more complicated:**
        - Following a plea, certain traditional words are said by the clerk to the jury to drive home what they are about to do.
    - After arraignment, trial starts

OPENING STATEMENT

- After jury sworn & charges/plea recorded, TJ makes introductory remarks for jury
- Opening starts by Crown outlining position & evidence it expects to lead (**But no argument permitted**)
- At conclusion of its opening, the crown then calls its first witness (sometimes accused also opens first, then the witnesses are called by crown)
    - Some judges still refuse to permit accused to open immediately after crown
    - Others permit accused to do so only if undertakes to call evidence (other than cross-x crown witnesses)
    - **In judge-alone trials, common for accused to advise court of its position at the outset w/o objection**
- At conclusion of crown's case, **accused may move for a non-suit/directed verdict for acquittal** (must be decided immediately, and even though not mentioned in the Code, its common knowledge that the test to be applied is the same as in s. 548(1)) (*Fatima*)→ essentially saying crown has brought no evidence. This doesn't happen often in SCJ because of prelim – most often successful when

accused has been charged with more than one offence and you get acquittal on one of the offences.

- If motion denied, accused opens to jury (outline evidence) & calls witnesses, following same procedure as crown.
- **If the defence calls no evidence, it so indicates in the presence of the jury.**
- Upon **completion of defence evidence,** crown has **a limited right to call reply evidence**

WAY OF QUESTIONING

- Generally **not allowed to lead own witnesses except on non-contentious matters.**
  - Need to ask open-ended questions to your own witness.
  - You want the witness to tell the story.
- Other side may then **cross-examine witnesses at large, using leading/suggestive questions.**
  - You want the cross-examiner to be in control, rather than the witness.
- May then **re-examine own witness on matters which arose during cross-examination.**
- TJ may, **within reason**, intervene to ask clarifying questions.

CLOSING STATEMENT

- **S. 651(3): When defence calls no evidence.** it is entitled to **address the jury last**, otherwise defence goes fist & crown last in closing.
  - **S 651(4): If multiple accused**, all of them must **address jury before crown if ANY of them have called evidence.**
  - No party is entitled to a reply (though generally this is permitted in cases without jury)
  - There can be no objections during the closing; jury has to be excused, and then the judge will hear objections.

CHARGE TO THE JURY

- After the closing addresses are completed, TJ provides instructions to jury known as the charge including:
  - The law relating to all criminal trials including BOP, BRD, presumption of innocence, unanimity;
  - The approach to be taken considering credibility issues;
  - The law relating to specific charges including the elements of the offence;
  - Any defences which fairly arise on the evidence & their legal defence (i.e., self-defence);
  - The positions of the crown & the defence & the principal evidence in support thereof; and
  - Special instructions regarding limited use of certain evidence (i.e. prior inconsistent to impeach, not for truth)
  - ***Vetrovec*** warning for untrustworthy witness – clear and sharp (i.e., jailhouse informants, co-accused).
  - That they may ask TJ questions.
- **S 650.1**: TJ may **invite counsel to provide assistance** with respect to the contents of the charge prior to its delivery

JURY DELIBERATIONS

- After the charge, jurors retire to consider their verdict.
- They are sequestered (separated) until they reach a verdict or record their inability to do so.
- In Canada, jurors are rarely sequestered during trial itself (but can be S.647 CC)
- **S. 648:** Where they are not, it is an offence to publish information with respect to portions of the trial during which jurors are not present (i.e. voir dire evidence) until they retire to consider their verdict
- Once jurors retire, counsel records any objections to the charge. If TJ agrees with any of them, jurors are recalled & recharged on all or some of the objections (failure to object may be considered on appeal)
- Jury takes all exhibits and & dummy indictment with it (in which original information contains prejudicial inadmissible information)
- When TJ is of view that jury is experiencing difficulty in arriving at a verdict (which may be indicated by a note or an inordinate period of deliberations) he may exhort the jury to reach a verdict.
- **S. 653:** If further deliberations would be useless, TJ may discharged the jury & direct a new jury to be empanelled at that time or may adjourn the trial.
- If jury decides it is unable to reach a verdict ("hung"), it is announced in open court (may be polled)
- **S. 649:** Where accused found guilty, may be remanded with or without bail to a date fixed for sentencing. Jurors prohibited from revealing content of deliberations, subject to limited exceptions.

CASE LAW

R v G.C. (2013)- SCJ [Application by accused to sit at counsel table]

- GC was charged with sexual assault, was granted bail but still in custody (as terms of release were not yet met)
- There were no specific security concerns related to him
- **Issue:** absent specific security concerns, should an accused person be permitted, on application, to sit at counsel table?
- Onus is on defence to show why the accused should sit outside the prisoners box
- **The matter is in the discretion of the trial judge "to be determined in the interest of a fair trial and court security". (Par 7)**
- **Held** – application denied
- Judge said that juries are instructed early and often about the presumption of innocence and the burden of proof in criminal cases. I do not accept that the position of the accused in the dock during the trial undermines these fundamental principles in any way. It is critically important that we trust in the integrity and ability of jurors to follow these instructions as well as more complex ones related to limited use of evidence
- **This case shows the divergence in the law- SCJ all sitting on the bench can come to such opposite conclusions**
- It doesn't matter if both parties consent with the person sitting at table, also doesn't matter what court security situation is, it is all up to the judge

R v Brown (1998)- OCJ- [Stay of Proceedings]

- Accused being brought into court in handcuffs and shackles
- Accused's in this case apply for a stay of the criminal proceedings against them as they claim that the essential fairness and legitimacy of the administration of justice had been irreparably prejudiced in their case
- accused's claim that one of the reasons admin of justice was called into Q is because of the use of restraints on them

- Although judge dismisses application they do note that restraints on one accused was due to cultural insensitivity towards accused on the part of the officer, the use of leg irons, belly chains and handcuffs was unlawful and contrary to s. 7, 9, 10 of charter- however improper use of restraints on accused was terminated at the beginning of the trial.

R v McNeill (1996)- ONCA- [application to have handcuffs removed during prelim]

- McNeill was an enforcer of London Bike gang
- He cut off someone's toe when they failed ot pay off debt
- London police were so threatened by him that they created a separate cell for him and had face mask (like silence of the lambs)
- Defence counsel submits that accused is sitting in court room during prelim with handcuffs and leg shackles- defence seeks to have handcuffs removed
    - Defence says that he understands having leg shackles as accused is sitting in box and it does not really affect him, but handcuffs are a bit much
    - Defence says that it's completely unnecessary for him to remain in handcuffs during the course of a lengthy day's proceedings, which is scheduled actually to proceed over the next three days in addition to today.
- Judge asks crown if he supports the application, crown says no, so judge says that handcuffs stay on
- I think for purposes of a preliminary hearing the matters are different than the purposes of a trial. The rights of a fair trial of course are preserved and become parts of the Charter of Rights. Therefore I think circumstances are significantly different between a trial and a preliminary hearing.
- Appeal is allowed and matter is to be revisited – trial judge had erred.
- **When it comes to why the person should be shackled in courtroom onus is on crown (pg. 4-5) – they must show reasonable grounds that person is violent or may try to escape**

In both Brown and McNeill → Law had to be created on how to deal with applications to have cuffs and shackles removed

Trial judges and preliminary inquiry judges have absolute jurisdiction to determine if accused can be shackled or fettered in the court-room in any way

R v Fatima (2006)- ONSC [Defence making opening statement right after crown]

Facts:

- Man marries sponsor who was also immigrant to Canada
- Daughter is murdered by father and his wife/sponsor
- Two individuals are accused of first degree murder
- At their trial they put in applications to justice to open their case at trial - so jury wasn't wondering during months and months of evidence what the defense was going to say or what it was going to be
- Defence wanted to tell jury what was going to be at issue and what was not going to be at issue during trial- because crown case was going to be really long
- Crown resisted application and said no, they shouldn't be opening now, they have their time later to open

Issue: Should the defence be able to open their case to the jury right after crowns opening?

Held: Defence allowed to make opening after crown at outset

Ratio/Analysis:

- Par 41 and 42- Justice Watt says:
  - Crown stands up and makes opening and then defence makes opening and then crown makes case
- Par 64→ judge says jury will be better informed and make a better decision if they learn at the outset what is not in issue and what is not contested- they wont be as overwhelmed by shear amount of detail

The jurors would be better informed to try the case if they learned at the outset, as the evidence was about to begin, what was in issue, and more importantly, what was not contested

8. SENTENCING: INCLUDING GUILTY PLEAS AND DANGEROUS OFFENDERS

OVERVIEW:

- The vast majority of cases end in a finding of guilt -- leading to sentencing procedures.
- Two theories of punishment:
  - Utilitarian: punishment as a means of rehabilitating and deterring.
  - Retributive: sentencing to punish the offender.
- **Sentence Imposed Must Be Proportionate To Gravity Of Offence And Moral Culpability Of The Offender** (*R. v Ipeelee)*
- **Probation, fine or jail – Can give two NOT three**

- **S. 718: The general purposes of sentencing**
  - To denounce unlawful conduct;
  - To deter the offender and other persons from committing offences;
  - To separate offenders from society when necessary to protect public;
  - To assist in rehabilitating offenders;
  - To provide reparations for harm done to victims or to the community; and
  - To promote acknowledgement and responsibility
  - **SS. 718.01 &: 718.02:**
    - Crimes against police or children call for lengthier offenses; the primary consideration will be deterrence and denunciation of the conduct.
- **S. 718.1: The *Code's* overarching principle on sentencing:** the sentence should be proportionate to the gravity of the offense and the circumstances of the offender.
  - Generates questions about what "proportionality" means.
  - **One guess:** the punishment should never be greater than the crime.

- **S. 718.2:** list of aggravating and mitigating circumstances in establishing a sentence.
  - Other principles which are codifications of common law:
    - **GAP PRINCIPLE**: A very large time between the commission of offenses means that prior conviction isn't very relevant.
    - **JUMP PRINCIPLE**: Sentences are increased incrementally from one conviction to another.
      - E.g.: last time the offender was sentenced to 3 months, and so for the same offence his sentence will be increased incrementally **(not by much though)**

        - **PARITY**: Like individuals must be considered equally in terms of punishments.
            - E.g.: A co-accused that has committed the same crime should be considered differently.
        - **TOTALITY**: The least restrictive option, while still keeping in line with the sentencing principles, must be selected; essentially, a recognition that the individual won't be crushed, as it were, for the sake of general deterrence.
    - **Important Note**: All possible sentences, other than imprisonment, must be considered which are reasonable in the circumstances, particularly for individuals.
- **Principle of Restraint→** "As such, the restraint principle requires that the sentencing judge consider all sanctions apart from incarceration and where, as here, incarceration must be imposed, the term should be as short as possible and tailored to the individual circumstances of the accused" see *R. v. Priest*

- **S. 723 (1):** The Court has a wide degree of latitude in setting sentencing procedure, even going so far as to sanction the use of hearsay evidence.
- **S. 724(3):** Codification of *Gardiner* -- In the case of disputed facts during sentencing, the Court will require the party relying upon it to adduce evidence proving it on a balance of probabilities.
- **S. 725:** The sentencing judge may accept guilty pleas for other offenses over which that court has jurisdiction to give a sentence

- **The evidence that can be used at a sentencing hearing includes:**
    - Pre-sentence report (written by probation officer with an aim to inform the court about the offender; his/her needs and ability and willingness to comply with court orders)
    - Letters/reports (can get Gladue Report for info about persons aboriginal history)
    - **S. 722** victim impact statements,
    - Criminal record, and
    - Any other relevant evidence (community service, etc.)
    - ***R v Gardiner*:** The strict evidentiary rules, which governs at trial **do not apply at a sentencing hearing**

- **Types of punishments (**CAN ONLY GIVE TWO OF THREE CATEGORIES OF SENTENCE!! E.g., fine and jail time; or probation and fine; or jail and probation; cannot give jail, fine and probation**):**
    - **S. 730: Discharge**: no criminal record:
        - (a) Absolute discharge: no record and no conditions.
        - (b)Conditional discharge: no record, but there are conditions (usually make the condition a precursor to getting the discharge- ie completing probation)
        - Not available if max sentence by statute is 14 years or more
        - Not available if there is a min sentence
        - Automatic pardon after set period of time
        - When giving discharge you cannot also fine someone
        - Consider:
            - Would discharge be in best interest of accused
            - Would granting discharge be contrary to public interest

    - **S. 731: Suspended Sentence and Probation:** There is a sentence of imprisonment, but it is suspended in favour of probation.
        - Probation cannot be given if sentence is for more than 2 years.
        - No jail
        - If breach probation, the person is resentenced and sentenced and charged for breach

        - This usually does not happen – offender is normally charged with failure to comply and goes through whole process again
    - Probation can be assigned along with fee and custodial incarceration for no more than 2 years

- **Probation (S. 732.1(2)- Factors that MUST be included in probation order**
    - Must be for rehab purposes
    - Must be connected to offence
    - Cannot impose treatment terms – without consent of accused
    - Cannot for accused to take medication (unless person is not of sound mind)
    - Common terms:
        - Reside at
        - No contact
        - Attend counselling
        - Sign releases
        - Boundary restrictions
- **S. 734: Fines**
- **SS. 738 and 739: Restitution:**
    - The act of restoration
- **Imprisonment**:
    - **S. 742: Conditional sentence**
        - Not in jail!! Reformatory sentence served in the community
        - Harsh sentences with a significant deprivation of liberty
        - Normally house arrest
        - Presumption is house arrest at least for 1/3 or more so ½ of the time. But at least you can still interact with your family
        - Sentence must be less than two years
        - See CC section for offences that don't qualify
        - Cannot have minimum sentence
        - S. 742.1 lists 6 criteria to consider when imposing conditional sentence
        - **See pg 179 of long summary for additional factors & for Breach of conditional sentence**
    - **S. 732: Intermittent sentence**
        - Jail sentence, but not served consecutively
        - Because of full time job or child care responsibilities, sentence is served intermittently on the days you are not working
        - Only eligible for intermittent sentence if sentence is 90 days or less
            - If two sentences and they add to more than 90 days it becomes straight time
    - **Reformatory**
        - Person can go to reformatory if sentence less than 2 years
        - Can also give probation or fine with reformatory sentence
        - Reformatories are all max security except for speciality ones like:
            - Ontario Correctional Institute – dorm style, sex offenders
            - St. Lawrence Valley- mental health
            - Algoma – mental health
        - Judge can recommend people go to speciality center- cannot guarantee they get in. Prisoner has to apply
        - Provincially funded/ran prisons

- **Penitentiary**
  - 2 years or more
  - If Give 2 Year Sentence Can Give Probation But Not If Give 2 Years Plus A Day
  - Different Security Levels
  - Federally funded
  - Max security, Med security, Min Security
  - Can get family visits
  - More programming in pen then compared to reformatory

*judge has no control over which exact prison the person goes to, once they give sentence they are done. They can only make recommendations

- **Concurrent & Consecutive Sentences**
  - Concurrent →if you are charged with more than one offence, judge can order that the time you serve goes towards both
  - Consecutive → or you can serve one sentence and then the other starts upon completion of first sentence
  - In assessing intermittent sentences they look at entirety of the sentence, if there is more than one sentence being served consecutively and it is total over 90 days then even if one judge ordered intermittent sentence it does not happen and will be served straight jail time.
  - If person gets 18 months and then gets another 9 months, 6 months later on, they are automatically going to the pen even though no judge ordered to go to pen (cause its now 2 years total)
  - S. 719(1) of CC
- **Peace Bond**
  - Not a finding of guilt
  - Offender takes some type of responsibility
  - Not a super serious situation – crown looks at brief and sees person is of good character, complainant does not want to testify crown doesn't want a trial, doesn't want to give person a record so they offer a peace bond
    - There are two types
      - Common law peace bond – judge has jurisdiction to impose
      - 810 Peace Bond (statutory) → Information is laid under 810 of CC and has a 6 month limitation and has to be waived in 6 months which is done
  - burden lies with defendant to show cause why they shouldn't enter into a peace bond- not proof beyond a reasonable doubt – show why the person doesn't have a reason to fear them
- **Diversion**
  - Person can also be diverted out of the system – Gladue, Mental Health Court, DTC

- **Amount of Punishment:**
  - All offences have maximum sentences which are reserved for worst offence **and** worst offender
  - Cannot go lower than minimum sentence
  - **Pre Trial Custody → What about the time that the offender may have spent in custody prior to being found guilty at trial?**
    - In the past, the court always gave **2:1** time for this (i.e., for every day a person spends in jail, it will be considered 2 days). However, the **Truth and Sentencing Act** limits pretrial sentencing to a **1:1 ratio** and, if circumstances allow, **max 1.5:1.**

- ***R v. Summers* (2014), SCC –**
  - Two ways to look at exceptional circumstances under the Act:
    - Qualitative: How long is the sentence? Are you losing any time towards parole?
    - Quantitative: What is the quality of your time in custody?

Mitigating factors for sentencing	**Aggravating factors for sentencing**
Gladue – aboriginal offenders	Offence = crime against child **(718.01)**
Lack of criminal record	Offence = crime against police officer **(718.02)**
Youthful offender (even if not under the age of 18)	Hate crime, or motivated by hate **(718.2(a))**
** Both lack of criminal record and youthful offender will be very convincing to a judge!!	Offender abused a position of trust or authority in relation to the victim **(718.2(a))**
	Offence = domestic assault **(718.2(a))**
Person taking steps during bail to rehabilitate themselves, seeking help or volunteering etc	Significant impact on the victim (including health and financial) **(718.2(a))**
	Offence committed on behalf/on direction of a criminal organization **(718.2(a))**
	Criminal record (EXCEPT gap principle)
Unknown factors – may be mitigating or may not	
Support system (mitigating if it is a good support; aggravating if support is also involved in criminal activity)	
Lack of resources (mitigating if rehabilitation and support would stop the crimes; aggravating if there is no chance of improving the person's circumstances)	

DANGEROUS/LONG TERM OFFENDER DESIGNATION:

- DANGEROUS OFFENDER: A designation as a dangerous offender allows for someone to be **imprisoned indefinitely (although they don't have to be)**:
  - **S. 753(1):** The Court must be satisfied **beyond a reasonable doubt** that the offender will commit an offense causing death, serious bodily harm or inflicting severe psychological damaging, in the future.

- LONG TERM OFFENDER (LTO): **S. 753.1**
  - Designation was created in 1997, primarily targeting sexual offenders. The LTO designation is given to individuals convicted of a "serious personal injury offence" who, on the evidence, are likely to re-offend. Offenders who can be managed through a regular sentence, along with a specific period of federal supervision in the community, can be designated a LTO that can result in a term of supervision of up to 10 years after an offender's release.
  - The test for LTOs:
    - Is the court satisfied beyond a reasonable doubt that:
      - (a) It is appropriate to impose sentence of imprisonment of two years or more;
      - (b) Substantial risk that offender will reoffend;

(c) Reasonable possibility of eventual control of the risk in the community.

GUILTY PLEAS:

OVERVIEW:

- **YOU CAN PLEAD GUILTY AT ANY TIME BEFORE A VERDICT IS DELIVERED**
- Before any guilty plea is accepted, there needs to be a pre plea inquiry –S. 606
- Stages to discuss plea→ bail stage, in plea court, at crown pre trial, at JPT, day of trial or prelim, halfway through the trial
- **S. 606(1.1):** Whenever someone pleads guilty, the Court must be satisfied that it is **made voluntarily** and that **the accused understands the nature and consequences of the plea:**
    - Some judges **conduct a step-by-step plea inquiry to make sure that the accused understands this.**
    - **Plea Inquiry:**
        - You want to plead guilty?
        - You understand the charges against you?
        - Your decision to plead guilty is free & voluntary? No improper threats or promises? You are not being improperly pressured to plead guilty?
        - You understand that by pleading guilty you are giving up your right to a trial?
        - You understand that a guilty plea is an admission of the essential elements of the offence(s) with which you are charged?
        - Are you aware of the Crown position on sentence?
        - You understand that I am not bound by the positions taken by counsel with respect to your sentence?
        - You understand that upon conviction for this offence there is [mandatory minimum sentence, driving prohibition, driving suspension, firearm prohibition, DNA order, sex offender registry order, immigration consequences etc.]?
        - I am satisfied that the accused understands the nature & consequences of the plea & can be arraigned.
- **Note:** Even if the accused pleads guilty, the Court must still be satisfied that the evidence before the Court (usually read-in) establishes an offense known at law.
- Someone may strike plea once they learn of all the consequences
- **Less included offences→** 662 of CC is not a section for guilty pleas but provides that certain offences are included in other offences (assault causing bodily harm includes lesser included offence of assault)
    - So many people will not plead guilty to offence claimed but to the lesser included offence
    - Someone charged with murder and uses S. 606(4) to plead guilty to accessory after the fact – for example if the person said they didn't commit murder but they say they were an accessory after the fact
- 606 and 662 lets you plead guilty to any offence you want as long as crown consents
- crown may also draw up a new indictment so it is fresh
- **Crown during GP**
    - Put in photos of injuries
    - Put in criminal record
    - If related offences, point them out
    - Victim impact statements
    - Know range of sentences
    - Articulate which objective of sentencing are at play and why

- **Joint Submission**
  - Trial judge should only override joint submission if:
    - Outside range
    - Wrong in law
    - Would be contrary to public interest
- **Other Specialty Plea Courts**
  - Guilty plea court
  - Mental health court
  - Gladue court
  - DTC
  - Domestic Violent Court

- **The Sentencing Hearing**
  - If guilty plea- then read in synopsis or a statement of facts
  - If after trial- use findings of fact made by judge
  - If guilty plea and facts in issue- have Gardiner hearing

GARDINER PLEA:

- I admit pushing you on the ground, but I do not admit kicking you, punching you after you fell on the ground.
- Then the Crown says okay, and he will have to prove all those other things that happened after he fell on the ground beyond reasonable doubt in the Gardner hearing.
- He has to prove those external aggravating factors.

CASE LAW:

R v. Gardiner (1982), SCC [Gardiner Application; Apart from the guilty plea, other facts must established by the crown, beyond reasonable doubt]

- **Facts**: Gardiner pleaded guilty to a charge of assault causing bodily harm to his wife. At the sentencing hearing, Gardiner's testimony conflicted with that of the victim as to the circumstances of the offence. The trial judge accepted the evidence of the victim and held that the standard of proof was that of a balance of probabilities.
- **Issue:** What is the Crown's burden of proof in advancing aggravating facts for sentencing purposes?
- **Held**: Proof Beyond a Reasonable Doubt (BRD)
- **Analysis/Ratio:**
  - (1) The strict evidentiary rules which governs at trial do not apply at a sentencing hearing
    - Yet the obtaining and weighing of such evidence should be fair
  - (2) A guilty plea is only an admission of the essential elements of the offence – nothing more! Any facts to be used in aggravation must be established by the Crown. If these facts are contested, they should be resolved by ordinary legal principles including resolving relevant doubt in favor of the offender

Any aggravating factors that are being used to increase sentence must be proven beyond a reasonable doubt -724(3)(e)

ANCILLARY ORDERS

- Whole host of orders a judge can impose
- They are orders that are apart of the sentence but they are added on as a sepeprate piece
- They are no punishment but added on for public protection
- Most common is a DNA order
- A judge in some cases MUST order a DNA order and MAY order one in other cases
    - Police prick finger and put DNA in data bank – so that if you commit further crimes, they can know if it was you
- MUST orders= primary designated offences (there are a bunch of them)
    - Murder, break and enter, robbery
- Secondary designated offence – judge has some discretion whether to make order (ie. Assault)
    - **TEST:** has the crown established it is in the best interest of justice to make order
    - **Must balance the Privacy interest of accused with protection to the public** – they are not a huge privacy interest concern because it is kept in police data bank, in the future if there is a hit and your DNA matches, that match is only used in order to get a warrant to take a further DNA sample – the DNA in police bank is not used as evidence at trial
- A few offences where the order is not available at all (ie. Theft)
- **Mandatory Weapons Prohibition - S. 109** (mandatory weapons prohibition for 5 years, 10 years or life and is mandatory for a number of offences
- **S. 110- discretionary weapons prohibition** →court can determined whether it is in the best interest of the public to order the weapons prohibition and they can choose as to how long the prohibition is on for
- **Soira Order**- sex offender registry- when someone is convicted of a sex offence it is mandatory. When crown proceeds summarily it is 10 years, if its indictment it is 20 years
    - They keep track of name and residence of those who have committed sex offences
- **Free Standing Restitution**- offences like fraud, theft, etc where there is a monetary loss to victim the court can order **restitution order** as part of a probation order or conditional sentence order, but often the amount to be paid back is a lot higher than can be paid in a short period of time, so court can order **free standing restitution order** where order exists for life until money is paid off
- **Forfeiture Orders**→ if drugs are seized or property that was purchased using crime money.
- **Victim Fine Surcharge**→ used to be at judges discretion- judge could order that this be waived because defendant had no money (ie. Homeless person). Judge no longer has discretion- fed gov't took this away. – the fact that someone doesn't pay, does not automatically mean they go to jail- person must come to court and explain why they haven't paid and have their finances addressed – we aren't going to put someone in jail just because they cant pay.
    - Summary Conviction 100$ and Indictable Conviction 200$
    - Can give someone fine and suspended sentence
    - **Cant give fine when discharge is given -**

GENERAL (CRIMINAL SYSTEM, OFFENCES, RULES OF THE COURT)

OVERVIEW OF CRIMINAL JUSTICE PROCESS

- Investigative Stage:
    - Much of criminal procedure concerns how police must behave at the investigative stage
    - S. 9 of Charter protects against arbitrary detention
    - S. 10(b) provides right to counsel on detention
    - Evidence can be excluded if obtained in violation of the *Charter* or charge stayed
    - Search and seizure:
        - May be with or without a warrant
        - Warrant – document signed by JP or judge that authorizes a search and based on a sworn document called an information that sets out the grounds for the search
        - Wiretapping – held to be a form of search and seizure because it interferes with reasonable expectation of privacy
        - S. 8 protects against unreasonable search and seizure

- Arrest:
    - May occur with or without a warrant
    - Need reasonable and probable grounds to arrest someone
- Bail:
    - CC sets out obligation for police to take a person to court in a short time
    - Police have limited power to release individual after arrest with conditions
    - Bail hearing is known as show cause hearing or judicial interim release hearing
    - No bail bondsmen in Canada – surety bail where someone pledges money if accused does not comply with bail
    - Bail can also take the form of the accused's recognizance
    - Conducted by JP, sometimes by provincial court judges and by superior court judges in cases of murder and conspiracy to commit murder
- Courts:
    - Justice of the Peace – try only provincial offences, bail hearings, issue search warrants, referred to as "your worship"
    - Ontario Court of Justice – provincial court, conducts majority of criminal cases, no jury trials, referred to as "your honour"
    - Superior Court of Justice – federally appointed judges, conduct serious criminal trials with or without a jury, serious bail hearings, bail review, summary conviction appeals, referred to as "your honour"
    - Ontario Court of Appeal – judges are now justices and addressed as "Justice X"
    - Supreme Court of Canada – addressed as "Justice X"
- First Court Appearance:
    - Court determines whether an accused is represented, disclosure process begins
    - Case is adjourned to allow for disclosure or to allow accused to get counsel
    - Police first provide disclosure to the Crown and Crown prepares disclosure package for defence
    - Pre-trial – defence and Crown will meet to discuss case
    - Judicial pre-trial – discussions including a member of the judiciary
    - Date is set for preliminary hearing or trial
- Trial:
    - Accused must plead either guilty or not guilty – this is ultimately the accused's decision but lawyer must take an active role, examine the facts objectively and make a recommendation (other decisions made by accused are whether or not to testify and election of mode of trial)
    - Preliminary inquiry – before a provincial court judge
    - Crown has low threshold to send a matter to trial – whether there is some evidence that, if believed, could result in a conviction
    - Judge can't asses credibility
    - If threshold met, committal for trial
    - Crown will prepare an indictment from the charging information
    - Same process begins (1st appearance, judicial pre-trial)
    - At trial, preliminary motions are decided before jury is selected
    - Crown makes opening statement, presents its case (chief, cross, re-examination)
    - Defence can bring application for directed verdict
    - Defence opening statement, evidence
    - Crown can call reply evidence re new matters raised by the defence
    - If defence called evidence, defence will make closing address first
    - Judge will instruct the jury as to the law

IF DEFENCE WHAT DO

- Interview Your Client
- Interview Secondary Sources
- Get Psy Work Up
- Get Treatment Information
- Reference Letters

- Know Range Of Sentence Normally Imposed
- Justify The Sentence You Want
- Highlight Weakness In Crown's Case At Trial

CLASSIFICATION OF OFFENCES

1. **Indictable** (Offences triable only on indictment) → more serious crimes; murder; robbery; break and enter, tried in Superior Court

2. **Summary conviction** → of a less serious nature and carry a lesser penalty

   → may be federal or provincial – all prov offences are summary (traffic; securities)

   → are tried by justices or prov court judges, and are generally quicker than a trial by judge and jury which is the most common form of trial for serious indictable offences

3. **Hybrid (dual procedure)** → an offence where the prosecution has a choice as to whether it proceeds by way of alleging that the accused committed an indictable offence or an offence punishable on summary conviction
   - Only when the Crown elects to proceed by indictment does the accused have the choice under s. 536
   - s. 34(1)(a) *Interpretation Act* deems hybrid offences to be indictable until the Crown elects to proceed summarily
   - Some hybrid offences include sexual assault (s. 271); possession of cocaine (s. 4(3)) *Controlled Drugs*

RULES OF THE COURT

- S. 482: Courts may make rules governing criminal procedure within the bounds of the *Criminal Code*.
  - (2): Since inferior courts are statutory courts, rules governing procedure in these courts must be approved by the Lieutenant Governor in council for the applicable province.
  - These rules establish things like notice requirements for motions, formal requirements for legal documents,
  - Helps to speed up trial time, standardize proceedings, focus lawyers on the issues before the court, manage trial resources, procedural fairness and encourages resolution (by making the outcome more predictable).
    - Many of these, as you can guess, are interrelated rationalia.
- **Note:** The fundamental objective of these rules, as they tell you, is to ensure that criminal matters are dealt with efficiently and fairly.
  - Servant v master metaphor.
  - Retaining jurisdiction to dispense with compliance in the interests of justice.
- **Note:** The one ground for a court refusing a motion -- **irreparable prejudice** to the opposing party (usually prejudice to the defense when the Crown switches strategies in the middle of a trial).