[Intro 4](#_Toc353797315)

[Sources of Crim Proc 4](#_Toc353797316)

[Charge Approval 5](#_Toc353797317)

[R v Beaudry (2007) SCC 5](#_Toc353797318)

[Prosecutorial Discretion 5](#_Toc353797319)

[Krieger v Law Soc Alta. (2002) SCC 5](#_Toc353797320)

[R v Violette (2008) BCSC 6](#_Toc353797321)

[R v Felderhof (2003) ONCA 6](#_Toc353797322)

[The Indictment 6](#_Toc353797323)

[R v Stinchcombe (1991) SCC 6](#_Toc353797324)

[s 7 of Ch 6](#_Toc353797325)

[Single transaction Rule 7](#_Toc353797326)

[CC s 581. 7](#_Toc353797327)

[CC s 581 (2) 7](#_Toc353797328)

[CC s. 581 (3) 7](#_Toc353797329)

[CC s 583 7](#_Toc353797330)

[Brodie v The King (1936) SCC 7](#_Toc353797331)

[CC s 601(1)- 8](#_Toc353797332)

[CC Ss. 602-606 8](#_Toc353797333)

[R v Wis Developments (1984) SCC 8](#_Toc353797334)

[R v Saunders (1990) SCC 8](#_Toc353797335)

[R V Nowtash – ( BC? Del Bigio case) and R v Vezina SCC 8](#_Toc353797336)

[R v B.G. (1990) SCC 9](#_Toc353797337)

[R v Violette (2008) BCSC 9](#_Toc353797338)

[Bail 9](#_Toc353797339)

[CC S 515 9](#_Toc353797340)

[R v Morales 1992 SCC 10](#_Toc353797341)

[R v Hall (2002) SCC 10](#_Toc353797342)

[R v Bhullar (2005) SCC 11](#_Toc353797343)

[- Disclosure 11](#_Toc353797344)

[R v Stinchcombe 1991 SCC 11](#_Toc353797345)

[R v Baxter (1997) BCCA 12](#_Toc353797346)

[R v Dixon (1998) SCC 12](#_Toc353797347)

[R v O’ Connor/ Crim Code s 278.1-.9 12](#_Toc353797348)

[R v O Connor (1995) SCC (paras 36-167) LHD Dissent 13](#_Toc353797349)

[Charter Applications 13](#_Toc353797350)

[Stinchcombe (1991) SCC 13](#_Toc353797351)

[R v Lising 2005 SCC 13](#_Toc353797352)

[R v Felderhoff (2003) ONCA 15](#_Toc353797353)

[R v Violette (2008) BCSC 15](#_Toc353797354)

[R v Price (2010) NBCA 15](#_Toc353797355)

[R v Campbell (2010) ABPC 15](#_Toc353797356)

[Police Search Powers 15](#_Toc353797357)

[s. 495 CC. 15](#_Toc353797358)

[s. 8 Ch 15](#_Toc353797359)

[S. 9 Ch 15](#_Toc353797360)

[Hunter v Southam (1984) SCC 16](#_Toc353797361)

[R v Mann (2004) SCC 16](#_Toc353797362)

[R v Waterfield EW CA case 16](#_Toc353797363)

[Standing 17](#_Toc353797364)

[R v Edwards (1996) SCC 17](#_Toc353797365)

[Trial by Jury 17](#_Toc353797366)

[Jury Selection 18](#_Toc353797367)

[Role of judge vs that of jury 18](#_Toc353797368)

[R v Gunning (2005) SCC 18](#_Toc353797369)

[R v Brouillard (1985) SCC 18](#_Toc353797370)

[Voir Dires 18](#_Toc353797371)

[Trial by judge alone 18](#_Toc353797372)

[Summarizing Evidence 19](#_Toc353797373)

[R v Le (1998) BCCA 19](#_Toc353797374)

[written instructions. 19](#_Toc353797375)

[R v Henry 19](#_Toc353797376)

[Closing Addresses 19](#_Toc353797377)

[R v Rose (1998) SCC 19](#_Toc353797378)

[Inflammatory Addresses 19](#_Toc353797379)

[R v Emkeit (1974) SCC 19](#_Toc353797380)

[R v Violette (2009) BCSC 19](#_Toc353797381)

[e) Challenge for Cause 20](#_Toc353797382)

[CC ss. 634, 635, 638-640: 20](#_Toc353797383)

[*R v Williams* (1998), (SCC) 20](#_Toc353797384)

[f) Ban on Publication 21](#_Toc353797385)

[*Charter*, s. 2(b): 21](#_Toc353797386)

[CC s. 517 21](#_Toc353797387)

[Toronto Star Newspapers v Canada (2010), (SCC) 21](#_Toc353797388)

[Sentencing 22](#_Toc353797389)

[R v M (CA) 1996 CanLii 230 (SCC) 22](#_Toc353797390)

[R v Nasogaluak 2010 SCC 6 22](#_Toc353797391)

[s. 7 22](#_Toc353797392)

[s. 24 22](#_Toc353797393)

[NB: mandatory minimums 23](#_Toc353797394)

[R v Potts 2011 BCCA 9; R v Punko 2010 365 23](#_Toc353797395)

[- correct approach to ‘fit sentence’ 23](#_Toc353797396)

[Conditional Sentence Orders under s. 742 (1) 24](#_Toc353797397)

[R v Proulx 2000 1 SCR 61 24](#_Toc353797398)

[Discharges 24](#_Toc353797399)

[Probation 24](#_Toc353797400)

[conditional sentence order 24](#_Toc353797401)

[- objectives of con sentences: 25](#_Toc353797402)

# Intro

## Sources of Crim Proc

- crime, charge (or no charge), trial, conviction, sentence, appeal (of sentence or of conviction). Rules on procedure are in A) Crim Code CC and also in B) Charter. Charter applications can mean that rules have been broken and that this = remedy. Eg police were not entitled to search car/pockets, violates s 8 vs unreas search. S 11 b- on speedy trial. C) Common law (caselaw)- can evolve more quickly than statute, D) ethics- trials should be about truth-seeking! Adversarial system is not only system, but it works for us. Is grounded in empirical appreciation of actions, cannot give trier of fact incomplete data. This is influenced by presumption of innocence and right to silence- this puts emphasis on truth-seeking. Eg Hearsay: only some is allowed, even though it speaks to issue. But is it worth nothing, or is it just about how much weight is put on it? Or in closing remarks: def L pleads for acquittal as prosecutor is crooked in conduct and jury should send message to him and acquit.

- area btwn unethical and illegal blurs. Eg pros must disclose all fruits of investigation eg photos, fingerprints, witness stmnts. This = level playing field. Suppression of evidence is a problem: def Ls have single duty to Cl (in accordance with rules)- must advance every defence. But pros must only advance evid, do NOT win or lose. Rules of law / ethics/ civility temper human inclination to suppress evid in order to win. Eg Cl says he will lie on stand to avoid conviction, L must try to talk Cl out of this as it cannot occur, you can then apply to withdraw from case (like recuse). But Sol-Cl privilege: you usually cannot tell, so you can’t say why you are withdrawing (cannot disclose this as it is privileged).

- Investigation: police have hard job, is very impt, the better they do job the better the process. Can indicate real accused or exclude those who are otherwise suspects. DNA Databanks: for some crimes are mandatory, or on court order. But wrongful conviction can arise from hidden evidence or DNA excluding. This can only be tempered by principled use of discretion .

## Charge Approval

### R v Beaudry (2007) SCC

- police discretion in para 3- Charon J ‘is essential component of CJS, makes it more possible to apply law fairly in real life situations faced by police.’ Require leave to appeal to SCC, they are not a court of error like CA in provinces eg X is convicted, during trial the judge let hearsay in, you could go to CA and say this was wrong and conviction should be overturned. CA grants appeal to SCC to hear appeals on grounds of national importance. But language in SCC then has to be general, it must apply to ALL facts eg all police discretion. Facts are in paras 6, 11, 12. Para 35: ‘there is no doubt that police have duty to enforce law and investigate crimes.’

- para 3- **discretion is essential. But you also have duty to investigate**! KEY Para 37: ‘this duty is not applicable in every situation.’ ‘certain adjustments have to be made.’ ‘police officers must justify their decisions rationally.’

- para 38 KEY ‘discretion must be transparent, subjectively justifiable**, decisions on favourtitism/ stereotypes/ bias is imprope**r.’ Officer must **turn mind to issues on rational basis.**

Para 40 ‘facts are impt, discretion must promote **interests of justice**. This must be proportionate to conduct...some discreation is routine, others exceptional and will require officer to explain.’ Must make sense on objective basis, the more serious the offence, the more likely discretion is not warranted. See also para 48. **There are rules on how discretion is exercised.**

## Prosecutorial Discretion

### Krieger v Law Soc Alta. (2002) SCC

- do courts have any jurisd over prosecutors’ conduct? Pros in murder case got DNA that implicated someone other than acc. This was not handed over, was this a breach of pros duty? Para 4- Ls are licenced by law soc of each prov, and they control discipline. Para 15 – court sets out Alta Code of Prof Conduct ‘ when engaged as pros, a L has public function with discretion and power. Must act fairly and dispassionately, make timely disclosure.’ Para 29- gravity of power to bring prosecution at heart of AG’s role requires that they be free of govt pressure. (Can work for prov govts but are prosecuting CC offences. Others are employees of Fed Dept of Justice – Public Pros Service of Canada. Deal with things like drug offences.)

- Krieger: law soc rules exist, pros power must be free from political pressures from govt. (even though they are fed employees.) para 30- AG must be free from partisan concerns. Para 32- independence re discretion, ‘supervisign decision making process is beyond reach of court. hallmark of free society.’ Pros is ‘quasi judicial function.’

- A) law soc rules b) pros has discretion as to what they prosecute C) this discretion is beyond review of court EXCEPT if there is an allegation of abuse of process D) pros decision is indep of politics, is quasi judicial.

- abuse of process : improper use of power. Can include variety of conduct. If found, court can grant remedy eg staying proceedings (ending proceedings).See Paras 42- 54 – para 43- pros discretion is not a term of art para 46- without being exhaustive, discretion in cludes whether or not to prosecute, discreatino to enter stay, to accept a guilty plea to lesser charge, to withdraw charge, para 47- decisions that do not go to nature and extent of decision do not fall within court’s discretion. Hm. There is a core area that court cannot touch.

- at investigative stage, there is discretion. Also at pros stage (including charge approval in BC), courts endorse this but there are limits (fav ism, bias esp for police).

### R v Violette (2008) BCSC

- see paras 10-18 . Romely J : G likes him, gives summary of law. Looks at Felderhof, concludes that judges get to make law, set procedure re how things happen in their courtroom. This is trial mgmt, is properly part of ensuring that proceedings are fair.

### R v Felderhof (2003) ONCA

- judge set out rules, said he could say what rules were. At paras 78- 84- court talks about civility. This is now before Law Soc, Q: did Def L go beyond permissible rhetoric? Para 83- prof ism = advocacy, but civility is not just an adornment, it is a duty and counsel must be professional. Para 84- hostile conduct impedes goal of resolving conflicts rationally and might even impede justice.

G- 20 yrs ago, the idea of civility did not exist. There seems tobe a view now that Ls are being intolerable to each other and to court.

-pros has discretion re charge, who is charged, how many ppl on same indictment.

See CC re sufficiency of indictment, how much info does acc need in order for indictment to be fairly drafted. G will not be here next week.

Jan 21st, 2013

- Paul Reilly guest lecturer.

## The Indictment

is for Superior Court, information is for prov court- (usually sworn by police officer on reas grounds). Indictment is signed by crown alleging offence. Cases sometimes refer to infos as indictments

- indictment itself: is a charging document, is a type of criminal pleading. (like a claim in civ procedure)- sets out elements of case alleged. This is full extent of pleadings as process goes. This is now less technical than it was, there were hanging offences in past so these had to match the indictment exactly.

### R v Stinchcombe (1991) SCC

changed all this by making disclosure mandatory,

### s 7 of Ch

and many cases on full answer and defence led to notion of accused having notion of case to meet. in 1902, the only thing the acc had was the indictment so had to know with degree of exactness.

## Single transaction Rule

### CC s 581.

There will sometimes be an investigation that leads to separate counts eg robbery and assault, drug trafficking and possession of proceeds of crime. This does not preclude an offence that goes over a period of time, or even a global account (traff over months). This rule means that acc does not have to answer an offence that may be read in different ways eg acc is accused of many transactions and answers one of them in the negative, but Crown says they are talking about another one. Rule against multiplicity, one indictment = one transaction. This gives opportunity for acc to apply for severance, this adds to time and expense for courts. Duplicitous allegations = one count that mixes transactions together.

### CC s 581 (2)

- accounts can be written in popular language, eg using elements of offence.

### CC s. 581 (3)

- must have suff detail to give acc reas info of act or omission alleged, but otherwise absence of details does not vitiate account.

### CC s 583

- **where account otherwise meets s 581,** no indictment does not have to include name of v, person who owns property, person who was defrauded, the particular writing if applicable to charge, if it does not describe with sufficient precision any person, place or thing. These are not sufficiently particular to invalidate indictment.

### Brodie v The King (1936) SCC

- alleged that two parties were parties to a seditious conspiracy. This is very vague, did not tell them what they were alleged to have done. A) At p 193- under s. 581 (3)- imperative ‘shall contain’ substance means necessity to specify time, place and manner. ‘This does not merely mean classifying the offence, it requires time, place and manner of elements of offence.’ An allegation of seditious conspiracy without more is not enough. Eg did commit theft is not enough. What was stolen? Property over 1000 dollars, Toshiba laptop Ser. No. 123, property of X. This would then comply with s 581 (3). If this does not give acc notice of offence. Classification of offence itself is not enough. B) Crime here was NOT specified. C) court here went too far! Looked at old version of s 583 and did not say the absence of these things does not make the acct invalid, they said that things that are not excluded ARE necessary. This is too strict. P 195- SCC: we find in s. 583 confirmation of construction that must be placed on s 581 (3). Give example of s. 583 (d)- eg as it does not set out any writing. This assumes that doc subject of charge should be referred to in charge, but does not have to be set out itself. Accs here were charged with giving out pamphlets, do not have to specify what was written in pamphlets but do have to mention the pamphlets. D) Code at time of this offence said that when indictment failed to state substance of offence, it is invalid and there is no means to rectify that. Is invalid ab initio. BUT can now be amended unless unduly prejudicial. Eg Crown says X property of Y was stolen, defence contests this ownership and says they were answering allegation put against them. **NB Look at**

### CC s 601(1)-

what to do about a potentially defective account . an objection to an account should be raised before plea, if not court will only allow it to be raised at discretion. This is the flipside. Where there is a defect, court can order acct amended to cure the defect. This is not about details, it’s about defective accts as long as this does not cause undue prejudice to acc.

### CC Ss. 602-606

deal with amendments, eg V has changed, change acct to reflect this. Debate will then be if this is a material element of account, if not it does not have to be amended. This is called surplusage, grey scale btwn this and being material. Judge can amend it on his own motion. Court must ask if amendment will prejudice acc under CC s. 601(4). How far into process are we, what position has acc taken, will amendment prejudice acc. Eg if s one claims that acc assulated them and there is a discrepancy in dates, and defence is challenging this on credibility of complainant, date is not the issue. But if they were accounting for whereabouts on date, it will be prejudicial to defence. It must be linked to case itself.

### R v Wis Developments (1984) SCC

- charged with violation of Aeronautics Act under 32 counts of operating a commercial air service, but there are many different ways to do this (cargo, passengers, photography). P 5 on Canlii- indictment must provide particular facts. You can’t just give the CC section, but allege something. Court found that information was ab initio invalid on summary counts. But what to do about it? Remember this is SUMMARY. Ss. 581, 583 and 601 did NOT apply to summary offences at this time. Section did not contain phrase from s 601‘and court may...order indictment to be amended to cure defect.’ Motions judge did not have this discretion. Could allow it in trial, but not pre trial. Remedies available now under s 601 allow amendment pre trial. S 795: now says that all parts of indictable rules of procedure apply to all criminal proceedings. S 601 now allows judge on motion to quash pre trial to amend information.

### R v Saunders (1990) SCC

- easy one. It is not necessary to specify nature of drug in conspiracy to import, but if Crown does it might be a material particular. If at end of trial this is the allegation, and acc tries to answer this you can’t change it then. Charge was conspiracy to traffic heroin, but Crown also added cocaine. Acc seized on this, but said that he had imported X and not Y. Judge then said they could convict on conspiracy to inmport ANY drug. This would prejudice acc, new trial was ordered. If crown alleges heroin, did they actually prove this! If new trial had been on ‘any drug’, acc could have contested this as he had answered charged on cocaine. Acc would then have to prove that was all he did NOT do. Crown alleges a particular, that was not necessary in first place, but then has to prove it. Under Narcotic Control aCt, coke and heroin were under same schedule and both got you life. There might be a slight issue at sentencing based on which one. But if it was marijuana, it’s material. Now under CDSA, have to put them in same schedule. They might even amend marijuana to hashish.

### R V Nowtash – ( BC? Del Bigio case) and R v Vezina SCC

re surplusage need not be proved if NOT prejudicial to acc.

### R v B.G. (1990) SCC

- child sex ass case, date off by one year. Crown said this was not material so does not need to be proven, or if so you should amend to fix this. Trial judge: no, this is part of the allegation so I have to acquit. This was overturned at CA, SCC upheld this and ordered new trial where Crown would not have to prove this specific date. Eg any offence that has to do with the any period itself like failure to appear, or tax evasion. These have to be done by a certain date. But in many instances this is not an issue, Crown will usually try to furnish a date but canot always. This does not mean that the acct is invalid. Exceptions are set out in B.G.: case has good discussion of more flexible, substantive reuirement of amount of detail that has to be in an information. At p 8 of 13 of Canlii printout: ‘what is reas info of act or omission will vary, factual matters will be more impt in some than others. What is the nature and legal character of offence charged? In general, exact time of offence need not be satisfied but trial will continue on merits. ‘Trite to say that court must prove every element, must only essential elements. This will vary on context.’ Passage of time or young age of complainant might mean they cannot be precise, but prosecution can go on. Remember that summary matters have limitation periods, if you can’t bring yourself within these you have probs.

### R v Violette (2008) BCSC

- particulars, when they can be requeseted under CC s. 587- court may require prosecutor to furnish particulars when it is necessary for a fair trial. S. 587(2)- court may give consideration to any evidence that has been taken. This was a pre trial application for particulars, court was allowed to say that these particulars were enough. This was a crim organizations charge, but this is necessarily open ended (X did Y at direction or for benefit of or in association with this crim org.) Crown did not want to limit selves, and argue that any of the above would suffice. ‘indictment read together with info in disclosure allows lex certa, Crown does not have to prove how this assistance was provided to crim org.’ This might get into duplicity, but acc knew they were facing all of above. There are not three offences here.

Jan 28th, 2013

# Bail

- post charge and not yet convicted (so presumed innocent).

### CC S 515

: s times ppl can be detained although presumed innocent. Should law operate equally vis a vis rich and poor/ does it? Three bases for detention: won’t show up for court /to prevent them from committing further crimes/maintenance of admin of justice. X is mid class at same address for yrs, Y has no place to ill and mentally ill. There are social implications in holding people and releasing ppl. Can also have bail conditions: red zones, keep certain address, curfew, no drugs, stay away form ppl you harassed AND surety: a person who provides a financial guarantee(up to a million bucks s time!). This is like a community jailer. So you need cash, an address and if you are poor/mentally ill/addicted you are probably worse off.

- eg prosecutor: this person has done it again! No, they have not been convicted yet. But how can you have a presumption of innocence if s one has done the same thing 10 times before. Presumption of innocence is key to bail in caselaw, but it is not clear how this operates in overall calculation of how you get bail. Eg person charged with murder, a variety of these ppl are detained yet they are presumed innocent. But it can take years to get to trial and ppl STAY in custody in Remand Center MAX Security in PoCo. Murderers mixed with thieves, no rehab and no educ/ programming. To go to trial they shackle you at 6 am, dropped off at 8 30, sit in cell, unshackled, back to jail 6 30 at night, missed meals. If this is gang related/ death of spouse. You can ask for bail at charge and after conviction pending appeal, even if appealing a sentence. This is displacement of presumption of innocence, judge is dealing with an offender. Law: balances shift in bail sentence and decision whether or not to detain. It is a different kind of test, but it’s not impossible to get bail.

- eg Judge and pros agree: A) person is presumed innocent B) Will show up C) will not break law if released. BUT: pros says he wants them detained on tertiary ground (public confidence in admin of justice). Def L will point to first three grounds, so admin of justice prob has s thing to do with maintenance of bail system but what now?

### R v Morales 1992 SCC

- with regard to tertiary ground, the public interest phrase was taken out. Parl response to this: re jigged this with new phrase, which was then also considered by courts. This is SCC on principles of bail, SCC has to be general and give guiding principles.

#### Ch s 11 e

on bail talks about just cause, and in **Morales SCC** says this is ‘unconstitutionally vague.’p 21- pursuant to Ch s 11 e, there will be just cause for denial of bail only in a narrow set of circs and if denial is necessary to promote proper functioning of bail system. Cannot be done on a ‘standardless sweep.’ Called detention ‘extraordinary.’ Butwhat does this mean? Shocking? Statistically odd? P \_\_\_ heading of public safety on s 11 e Ch- this creates a basic entitltement of bail. Bail must be granted unless pre trial detention is justified by pros. NB- exam Q: there are certain offences for which onus for bail shifts ( s 469 CC). Dont’ say onus is on pros! P 33 Morales: SCC limits denial of bail. ‘bail is not denied to all who pose a risk, must have substantial likelihood under

#### CC s 515 (10).

P 35 ‘as Holmes says, life of law has not been logic but experience. Crim law is governed by practical considerations not abtract logic, most that can be established is likelihood of things re occurring.’ Is this fair? Does it just depend on which judge you get? What they had for breakfast?

- we don’t know what public interest means so bail might be denied in circs that are broad and not in accordance with just cause.

### R v Hall (2002) SCC

- 2002, decade later. Women’s body found almost decapitated, public fear of killer at large, first degree murder charge, applied for bail. Judge: will not hold you to make sure you come to court, no public safety issue but I will deny bail to maintain public confidence in admin of justice. So this went to SCC, court was able to talk about bail here at para 13 refers to Ch, para 14 history of bail and

####  Bail Reform Act 1972

in para 15: two bases for denying bail: to attend court and protection of safety of public.SCC on Morales: we understand there are probs with earlier phrasing. Is this new phrasing satisfactory? Para 25- on facts, there is convincing proof it may be proper to functioning of bail and justice system to deny bail even where there is no risk. NB – crime was heinous and unexplained, ppl were afraid. Provision at issue (tert ground) has impt purpose: to maintain confidence in admin of justice in circs such as these. Para 26- Parl provided for denial of bail where A and B (primary and tertiary grounds) but judge vewing situatin objectively might see that releasing X would erode confidence of public in admin of justice. Public unrest and vigilantism may emerge.

- G would hire ppl to picket courtroom if friend was murdered! Hwo can you address this other than saying, come on let him out? Para 36- re admin of justice (standardless sweep allowed in **Morales**) ‘inquiry is narrowed to reasonable community re denial of bail. Objeitve lens of all circs: nature of case, gravity of circs.’ **Para 40- whereas here the crime is horrific and inexplicable, court risks losing confidence of public.** So hitmen are less dangerous than random murderers?

### R v Bhullar (2005) SCC

 Paras 47 and 48 on tertiary ground: **who is the public you take into account? Eg Clapham omnibus. ‘reas, fair minded , informed persons who would consider the law of bail.’** (man who cuts lawn in shirtsleeves and takes magazines at home.) - law has to make decisions! Use phrases like **wisdom based on experience**, not logic. These phrases are those that put ppl into jail for months before trial. There is a provision in Ch on bail, there are sections on bail re onuses in CC, and that there are cases that have considered bail and SCC has tried to articulate who does NOT get bail on tertiary ground. You are denying person’s liberty PRE trial, but if you try to articulate principles on how this should operate it’s in these cases.

# - Disclosure

- witness stmnts, DNA, police report. Disclosure used to be: who are your witnesses? XYZ. There IS a right to disclosure but imagine huge fraud cases with surveillance of 10-20 ppl, financial info, wiretaps on thousands of calls with tapes and transcripts. Surveillance notes, this now comes on hard drives, was on 100s of binders. Right to disclosure is a Charter right, hm. But court wanted to put a lid on this, had led to disagreement. Pros would say it was irrelevant/ didn’t have it. Litigating this is extensive. Involves many many people (pros, def, sheriffs, witnesses). Is this just a game?

### R v Stinchcombe 1991 SCC

This was the beginning of chaos in the system. Right of disclosure derives from s 7 of Ch, aspect of right to full answer and defence. Tests are in this case. Witness was interviewed, def was told of existence of tape but not its contents. Def demanded witness called or statement. ( which one would you choose? Statement is probably safer – G says. Sopinka J looked at history of this, refers to civil law DISCOVERY, pg 9- it’s diff to justify position that Crown has LEGAL duty to provide materials based on right to produce materials. Hm. We think that an acc should not be tried by ambush! But why isn’t the same duty imposed on the defence (except for alibi so it can be investigated and disclosure of expert reports)? An acc’s person’s lawyer can do own private investigation with PIs, so why (except for alibi) does the Pros just have to sit there and be in the dark as to what def witnesses will say? Eg stabbing at a house party, witness swears to tell truth, says that deceased fell on acc and was then covered in blood and I suppose he fell on knife. Pros doesn’t know who witness is, nor how old her statement is. This touches on right to full defence AND right to silence. (This is key here.) onus is on crown to prove the charges! but what about experts in a case that depends on DNA? How can a pros cross exam an expert he knows nothing about? Pgs 9-10: suggestion that duty is reciprocal may be considered in future, but cannot absolve Crown of duty. Pg 10 refers to R v Boucher (held: role of Crown is not to obtain conviction.) **Sopinka J pg 10- fruits on investigation are not property of Crown for securing convicitno, but prop of public to be used to ensrue justice is done. Def can be adversarial to Crown.**

#### Solicitor Client Privilege

- Comm btwn L and Cl is secret! Nobody can make you or Cl tell what Comms were.

#### Informant Privilege

- Informants are key to police. Police need snitches! Law recognizes importance that these people not be disclosed. Def does not get these names. - Court sets standard for disclosure with exceptions: privilege exception on pg 12 SCR , also on pg 13 discl is aspect of full answer and def coming from s 7 Ch so statements must be handed over. Pg 15- hand over all relevant material (this is where fights take place). Bottom pg 15- there is a general duty on part of crown to disclose all material esp ev that may assist acc even if Crown does not intend to adduce it. What can help an acc? S thing that proves witnesses, something that shows weaknesses and inconsistencies in Crown case. This is also under). **work product privilege (notes of pros** Pg 17- if there is reasonable possibility that X will assist acc he gets it. - Does acc have to ask for discl? Law says discl obligation on Crown is triggered by request of acc, but in practice pros just hands stuff ove. In practice a judge would knock their heads together if nobody disclosed.

### R v Baxter (1997) BCCA

- weird case, conspiracy charges, pros gave deals that in exchange for a statutory declaration not to charge X they would not pop up on stand and say s thing against Crown’s case (also in exchange for an undertaking at odds with obligations in law- legal promise. Hm.) . Q: should acc get these? Facts here are not impt. Paras 50 – 58: discl analysis, obligation is triggered by def request but in practice it rarely plays out this way. Para 59- pros once said the didn’t want to hand stuff over bc acc is a bad person and they will tailor testimony based upon it. ‘non discl to prevent acc from tailoring is not a proper exercise of Crown discretion.’ Was in violation of presumption of innocence. Paras 60-62: set out summary of law on discl: by giving undertaking not to disclose stat declarations, Crown put self in untenable position. Para 83- appellant did not have to id how info could reas have been used.

### R v Dixon (1998) SCC

- crown not disclosing statements by 4 indivs, gave summaries in police reports. See paras 20-24. Para 22- ‘where an acc shows a reas possibility that info could have been used in advancing defence or in making a decision that could have been used to make defence, Ch right is invoked.’ Right is NOT triggered by making a phone call in terms of practice in terms of evolution of law. It is too strong to say that obligation is triggered by request. Para 28- court talks about usefulness of info, paras 31-32-36: case is an example of an appellate review on where disclosure was not made, so did it make a difference? Para 36- if at first stage a court is persuaded that there is a reas possibility on face that non discl = unreliable conviction= new trial. Or if it affects the overall fairness of the trial process= new trial. We understand principles, but let’s se how it plays out. At appeal, court can order new trial or not- this is how we figure this out based on failure to disclose.

### R v O’ Connor/ Crim Code s 278.1-.9

- Disclosure: prompted by sex cases (rape)! Law at one time spoke of rights of acc, fairness referred to their rights. In old days, rape was prosecuted under a requirement that a complainant required corroboration (external source to support rape claim). Rape case was a trial of complainant’s character and integrity re sexual history, psychiatric history was part of defence. A common argument was that the complainant was a woman of suspect morals who was not raped, sex was consensual. I want all records incl being treated for medical records on treatment for STDs.

### R v O Connor (1995) SCC (paras 36-167) LHD Dissent

- amazing dissent by LHD, was beginning of **fem politics in SCC**! Sex case that changed Code. **Have to distinguish btwn records in police hands or in third party hands (AKA O Connor application is a separate application to court for third party records).** LHd talks about V rights here, just bc person complains of sex ass this does not = examination of everything on their credibility. LHD wants an end here, so Parl made CC s. 278.3 : applicaiotn must be made in writing, particulars in id’ing record, acc gets to set out whether or not they are relevant. S. 278. 3(4)- any one or more of the following assertions by acc on their own are not sufficient to say record is relevant : that record exists, that it refres to med or psy treatment, that record relates to cred, sexual history or reputation, whether or not V had made multiple complaints in this area in past. S. 278.5- judge can order that records go to them to examine for relevance. (2) a-h: probative value, privacy of record, nature and extent of record. These are irrelevant acc to Parl. Discl is stat based AND law in O Connor and CC now says that one of the ways in which limits are set is based upon privacy interests of others AND law distinguishes btwn Crown and police records. Law re sex cases was turned on head bc privacy. Derives from **s 7 , Stinchcombe has low threshold,** one limit is privilege of Sol – Cl or informants, obligation is ongoing of Crown, is theoretically triggered by acc/ def L, appellate courts: when there is a conviction and complaint they will look at it re Dixon criteria on how much it matters. Sex cases and third part records see CC s. 278, see LHD dissent in O Connor.

# Charter Applications

second manner of defence, still stigmatized. Does right to make full answer and defence = use of Ch? Yes! ‘on the merits’ is through cross examining, or excluding evidence or that case is taking too long.

### Stinchcombe (1991) SCC

should there be a rule that requires defence to make disclosure?SCC held – no, ***Cr and Def are diff.*** Prosecutors now give to Def list of paperwork from police, witnesses etc., but Def can still surprise Crown. West End Engagement Ring murder (Rozen case)- Def called acc, said he was there but denied murder and said others did it. Pros hadn’t yet heard about this. There are two kinds of def:

#### Prong 1

on merits, no notice required.

#### Prong 2-

Ch based, is eually Const’ly protected. BUT an acc DOES have to give notice, and will not automatically be permitted to advance this application. (A) find that there was a Ch violation and B) grant a remedy. B does not necessarily follow A.)

#### Ch s 24 (1)

 is on right to fair trial, s. 24 (2) is a discretionary remedy re exclusion of evidence based on many factors. Can be found to be a violation but not serious enough to warrant remedy.

### R v Lising 2005 SCC

- cocaine dealers, wiretap, G did this case! Sweet Dreams are made of these while counting money in car, talking in code about ‘oranges.’ **Garofoli test: if you are going to challenge wiretap, judge needs basis for this.** G thought wrongly that this was unfair, this CL rule was **unConst,** but **Garofoli was upheld as not contrary to right to make full answer and defence. Held: nothing wrong with acc having to tell judge basis of Ch challenge.** This was turning point in procedure for Application under Ch. This is G’s hobbyhorse: how much of law is influenced by policy considerations. When you challenge search warrants or wiretaps you are attacking basis on which either was granted. This is supported by affidavits, need to meet legal criteria (police officer has to say he has met them). So attacks on this are on the affidavit, this it is flawed. This is usually done by cross examination of the affidavit. **There is no right of acc to cross exam a police officer upon his or her affidavit.** Para 24: acc’s right to an evidentiary hearing must be considered in context, balanced against countervailing interests eg cases taking too long.

- paras 25-27: Garofoli ‘leave requirement’: before you can cross exam on Ch issues, you need judge’s permission. IF a search was done with a warrant, Onus is on acc to show that there was a violation of s. 8 against unreas search and seizure and remedy is warranted, unless search was warrantless in which case onus is on Crown to show it ws legal. Def does not arrive empty handed at evidentiary hearing, once Def has all ev from Crown you have to be able to tell judge in 15 mins or so why there is a prob with affidavit, there is probably no prob with affidavit.

- G : makes sense, but what if PC is dirty and does not respect Const? Will they confess to illegal search in notes? No! Sneakiness is never in notes!

- evidentiary hearings are cross examinations para 28: argument fails to distinguish btwn right to test ev at trial and threshold of admissibility. Crown bears burden of proving guilt, in that context this is true. But what about Ch challenges? No. Para 30- basis for challenging wiretaps is narrow, **Para 31- right to cross exam is adjunct to s. 8 Ch, there is no point if there is no reas likelihood it will impact on admissibility of ev.**

- voir dires are proceedings within trial on elements eg statement, serach of acc, search of car. Is compartmentalized to deal with admissibility of each. But re wiretaps, this is not automatic: you have to make leave applications (ask trial judge to do so, and he can say no). If affidavit in support of wire is inaccurate, this is a good basis on which to attack it. Pros can attack this, Lising says this is not automatic right of acc. Judge will then say that SCC gives guidance here, you have to meet threshold by finding discrepancies between wiretap and affidavit.

- when you ar talking about admissibility, you are talking about remedy (exclusion of evidence). Def Ls who are doing leave applications and judge is thinking about voir dires he is thinking about remedy. Hurdle no 1: you must establish there was a breach, bc without it there is no remedy. So Def Ls make submissions of counsel and try to show there is a good chance of the breach adding up to a remedy. Pros will say if there was one at all, it was trivial. Para 34: as noted earlier, the concern over prolixity was expressly stated as the reason for these voir dires.

- G: **but nobody ever cuts off the Crown!** A) you dont’ get a voir dire (contained legal proceeding, ev in a voir dire is not ev at trial). If a judge declares a voir dire re search of a car, there will be ev in it related to search of car. This ev does not relate to offence itself, does not flow outside boundaries. This is done outside of presence of jury or before they come.) See para 40 too. **In the early days of Ch, Def Ls would stand up without notice and ask for voir dires and get them, but brakes have been put on this.** Bc onus is on acc at voir dire application, if they don’t show enough the application for leave may be dismissed. This does not sit well with def Ls who are used to onus being on Crown. But Def Ls have to set this aside, bc if you think you are being clever by hiding stuff at a leave application and judge says no, it’s over! Voir dires are half-way to races, but if he says no (esp with wiretap). Def Ls don’t like having to show cards early. Courts are now full of leave applications on whether or not there should be a voir dire!

### R v Felderhoff (2003) ONCA

- are both on judges’ powers to set rules. In Felderhoff see paras 36- 44: complex case, so judges need ability to impose order.

### R v Violette (2008) BCSC

- this affirms above, see paras 15- 20: affirmation of trial mgmt powers, judge said that yes he has these powers but they cannot be totally reinvented. G: eg judge cannot shift onus of guilt to acc, cannot disallow ev to call any ev at all on merits of case. Powers exist but are constrained.

### R v Price (2010) NBCA

- see paras 6-8, 19-20, 24.

### R v Campbell (2010) ABPC

- paras 5-8: A) judges have trial mgmt powers and use them, this means that even within each trial a judge can say how it will unfold. There is nothing written about this, he is making it up but within recognized powers. B) understand Lising’s effect: you dont’ get voir dire automatically, there is a leave application to get permission for one, onus is on acc at this, judge can deny leave if there is no reas basis for thinking it might affect admissibility (remember that Ch breach may not = Ch remedy, so leave application is remedy issue). C) increasingly true: if an acc cannot meet onues, they odn’t get voir dire. Some courts are talking about notice provisions, and saying that a pros should not be caught by surprise so acc must give notice of intent to apply for leave. If Pros cannot see what it is about, it’s could be argued that it is unfair to let judge rule on this without hearing Crown’s side. R v Mann is key for next week. Paper: with ref to diff jurisd, explain diff btwn codified powers and trail mgmt.

# Police Search Powers

- eg car pulled over going too fast, 4 guys in it, ticket given. Stopped them again! ‘home invasion kit’ in back found, claimed he smelt weed. Almost impossible to say this was false. Arrested everyone in the car. No drugs found in car, but guns found in field as if thrown away! Police

**- two kinds: search with warrant, warrantless search. Key to this is ‘unreasonable.’**

### s. 495 CC.

Power to search for detention is broader than for arrest, is linked to those police powers with an articulated basis.

### s. 8 Ch

- guarantee vs unreas search and seizure

### S. 9 Ch

Right to counsel

### Hunter v Southam (1984) SCC

- leading case, facts not impt, 1984, early post Ch, Ch is ‘purposive’ , purpose its to protect. P 156: is intended to constrain govt action, is to rein in police powers not to grant. G say: s 8 could protect people’s interests OR places. P 159- s 8 protect privacy at least, this is central to understanding following law on this.

- there is no authority to challenge a search without standing, and there is no standing unless person has a privacy interest. Privacy rights are not absolute, are balanced against other interests. P 160- to protect against unjustified state intrusion. Must stop unjustified searches before they happen, require prior authorization (warrant).p 160- warrants are a requirement in CL and in statute, but you don’t need them every time. (Searches incidental to arrest). - Exam Q – **H v S is NOT authority for always needing a warrant.**

P 161- who must grant the prior authorization. This is a chance for conflicting interests of individual and state.

- They balance interests of state and indivdiv. Someone who is NEUTRAL and capable of acting judicially(a judge). Police and indiv are not neutral. P 167- criteria must be objective. G say: think of a continuum. ‘To associate a test with the applicant (police)’s reasonable belief that something may be found ..this is alow standard, fishing expedition. Tips balance in favour of state. ‘credibly based probability replaces suspicion.’

- Key points: protects privacy, is to stop unauthorized searches in advance. Searches should be authorized by an indep judicial person, they just balance indiv privacy rights and state’s interests. These competing interests are to be weighed on credibly based probability. This is an objective standard, is beyond suspecting something might be there. Info assessed by judge must be credible. This case is stnaard for searches, esp for those pursuant to warrants. If there is no credible and probably basis to think something is there, individual’s interests win.

- G say: there is a standard of reasonable suspicion and a standard of reasonable probably grounds. Def Ls try to defeat violations of s. 8 by making an applicaiotn under s. 24 (2) of Ch for exclusion of ev. Remedy does not follow from breach! NB: **egregious violations of s. 8 are more likely to result in exclusion of ev than trivial or technical violations eg warrant is for 10-4 , you enter at 9 58 am.**

### R v Mann (2004) SCC

- great case, commonplace example. Facts: paras 4-5: night, police get radio call, b n e in progress in Winnipeg, 24 yr old ab male, clothes description, thought to be Zachary Parisien. At scene, they find guy who fit this to a T, he gave name (Mann) and date of birth. They pat him down for concealed weapons, had hoodie with pouch, felt soft object, reached in and found bag of weed. **NB – s. 10 Ch is against arbitrary detention, s. 9 is on right to counsel. Said stop was an violation of s. 10, the search of s. 8 and then of s. 9.** **This case sets standard for when a PC can search : need valid basis for arrest or at least to detain, for valid search.** Para 24:

###  R v Waterfield EW CA case

- when courts look at these situations, police conduct giving rise to claim of interference is in scope of general duty of PC. Did conduct involve an unjustifiable use of powers within duty?

- G say: eg strip searching jaywalkers. Para 26 – second stage of test is balance of police duty and liberty interest at stake.

- three ways to stop s one: arrest, investigative detention or arbitrarily. In Mann, PC did not tell him he was under arrest. para 27- court discusses detentions, are justified if the detaining officer has an articulable cause for detention. There is a subj and obj element to this: subj is that PC must turn mind to it and find obj basis to detain. Articulable cause means that there needs to be a basis upon which to conclude there is a reason to detain. Law is trying to protect against a PC who says he had a vague suspicion. Paras 33-34: prefer term ‘reas grounds’; to detain, detention must be viewed as reasonably necessary on an objective basis on totality of circumstances informing officer’s suspicion that there is nexus btwn indiv to be detained and a recent or ongoing offence. Para 34- reasonableness is assessed against all circs esp extent to which liberty interest has t be set aside vs officer’s duty to do job. Hm. Para 35- police powers and police duties are not necessarily correlative. Police safety and discovery of evidence might prompt a search, do they have power to search incident to detention (warrantless search)? Para 36warrantless searches are prima facie unreas, and cna’t be justified unless found to be reas. Para 37- PCs can search for weapons and to preserve evidence, but we must distinguish between search incidental to arrest and that to investigative detention. Scope is different. Hm. The latter does not give licence to officers to reap the seeds of an unlawful serach, without need for reas and probable grounds for an arrest. para 39- must be reasonably necessary to the detention, relevant factors are duty being prefomred , extent to which liberty is being interfered with. Para 40- powers or PC to protect life can give rise to pat down searches, but must believe that safety or that of others is reasonably at risk. ‘I disagree with suggestion that this endorses an incidental search in all cases.

- some judges think this is too complicated for police to figure out on the spot. Para 40- cannot be justified on ...hunches or mere intuition. – remember Mann had a different name, was not running away, had no weapons, nothing bulging in pockets. Police are bigger, have guns and self def training. So what is the risk? Aren’t the police just discriminating against aboriginals? Para 45- in sum, (NB) \_\_\_\_\_\_ .

## Standing

### R v Edwards (1996) SCC

- leading case for standing. If you don’t have standing, you cannot challenge a search. **If you have it, the standard becomes a Lising Voir Dire (if you get it, you have standing to challenge under s. 8 as a violation), but this does not necessarily = remedy under s. 24 (2).** You have to go through these steps in the litigation. Law is on privacy, not places! Test for who has standing: para 33- two Qs in any s. 8 challenge a) did acc have reasonable expectation of privacy (standing) B) was serach an unreas intrusion on this. Para 34- privacy right alleged must be that of acc person who makes the challenge. (cannot claim it over others) para 42- essence of test under s, 8 is of personal privacy right. Para 45- key words : claim for relief under s. 24 2 can only be made by person whose rights have ben infringed. Sub para 3- has acc reas expectation of privacy, was search conducted reasonably? (former is re presence at time of serach, ownership, ability to regulate access, subjective and objective expectations etc. Eg if you find a bag of weed with client’s fingerprints in someone else’s garage, could judge exclude one but nothte other? Yes! Different outcomes re standing. Hmn.

**- Exam- see Jir case, short. See paras 23-31 re search. Whincup- see paras 16- 33. Asp- para 9 facts, paras 25-36. All are examples of search powers.**

# Trial by Jury

Type of trial is at discretion of prosecutor, summary is always in prov court (so judge only). Indictable: CC s. 469- murder! And others like treason etc. Automatically go to BCSC and to jury. (only way to get around murder trial by jury is if prosecutor agrees you can have trial by judge alone). This is to avoid stigma in gruesome murder cases, or with bad character evidence. Strategically, prosecutor wants to get evidence in that would be difficult to get to jury for its’ prej value. In indictable (not 469)- you get choice of mode of trial (provincial court judge, Supreme court judge alone or judge and jury in SC). You might choose jury if you are a sympathetic defendant, or for reasons of appeal (setting out complicated cases with view to appeal). Prov court judge alone are most usually called, SC judges might be called in complex or Charter cases.

- Crown go first, calls all Ws. Then acc has choice to call ev. Then closing addresses. If def does not call any Ws, Crown does closing first then def ten judge instructions to jury. If def calls Ws, order changes and acc make closing first.

## Jury Selection

- done from list, some are exempt: (Lawyers, students are exempt but most with regular jobs would be excused). Get stipend, although employers are encouraged to pay. Get name/occupation/address, from this you can select those you don’t want but you are limited in this. Are encouraged to make decision!

## Role of judge vs that of jury

### R v Gunning (2005) SCC

- role of judge vs jury, TOF is only to deal with facts, judge can summarize and tell purpose some ev can be used for, or that some ev is more compelling but cannot say what is established. Judge states law. Exceptions: in reverse onus cases (eg self defence, not criminally responsible- must prove they have med disorder that means they are not responsible for actions). Otherwise, as usual. Directed verdicts can only be done on verdict of not guilty- can only direct acquittal if evidence is clearly missing.

### R v Brouillard (1985) SCC

- judge can be somewhat involved in trial. If judge goes too far, there would be an appeal. Surprising they can be involved.

## Voir Dires

- staged production for jury, jurors are excluded until judge decides ev should go through, then you have to call these Ws again. Judge can decide all or some can go in, or that it can be for specific purpose only, most common in general bad character evidence. Judge decides how much of this can be used for certain issues or not. It’s hard to say that juries can exclude evidence like this, but it’s an old tradition with lots of caselaw saying they are capable. US has shadow juries, jurors can talk about deliberations. This might be a problem for appeals as in Canada we can only look at the insturciotns they were given and questions of law.

## Trial by judge alone

- will hear own voir dire and instruct selves not to hear X for certain purpose. This might be even harder than juries. Hm

## Summarizing Evidence

### R v Le (1998) BCCA

- this is on summarizing evidence. When all evidence goes in, each counsel gets to pronounce their argument to jury. Will probably just talk about ev in their favour, ultimately what jury hears is from jdge who goes over all ev and sets out theories of both sides and how it relates to the law (things left out or over-emphasising). Can supplement this with

## written instructions.

### R v Henry

- 200 pgs of instructions! Other cases up to 500 (oral only). Jury is ultimate safeguard, is not just appointed judges doing the judging. Ppl can bring applications for change of venue if community is totally biased.

## Closing Addresses

### R v Rose (1998) SCC

- see structure above (if no def ev called, Crown go first.) going last means that you can rebut! You have all these other Const protections that give them disclosure before they choose mode of trial, get to hear all of Crown Ws before they decide if they will call theirs. BUT – **Held: this is not a Const protection to give them right to always go last, legislatures should give them the option.** However, it’s hard to say this makes sense given Stinchcomeb rules on disclosure and that Crown is not calling new ev in the closing address. NB- crafty prosecutors will obscure their final argument in their opening. Megan says accused under Ch should have option, but there is no evidence it makes any difference. **There is no automatic right of reply, although judge can allow this.** You have to make a case for this because something has come up in Crown case you could not respond to initially- depends on judge!

## Inflammatory Addresses

### R v Emkeit (1974) SCC

- this is a further step, but seems to be ok! Biker gangs, Crown read in a poem about gang in Q to acc, not closing. Asked if he had written it: ‘flash of chrome and flying hair...fear in the air, citizens take care...’ would likely not have been able to get this in in any other way. Crown are supposed to be unbiased, protecting acc and society. Def can make arguments that Crown should not be able to due to this role. Megan thinks they should have shown the poem to them and only read it out if they admitted it. judge at end has to take care of this even if he does not give written instructions to jury, will give them to counsel! Hm. Comes down to how judge sees the ev, they get last word to jury.

### R v Violette (2009) BCSC

- talks about duty of Crown Counsel/Attorney General: judge quotes ‘crown is surrogate of AG, guardian of law and order, has greater ability to influence jury. Crown must be dispassoinat, cannot make assertions for which there is no evidence or which come from counsel’s own experiences.’ This comes up when ppl say Crown are accused of not doing job correctly, but this is common as they become focussed on catching bad people and start to think in terms of types of people. Held: inflammatory addresses ok, can be addressed by judge as opposed to declaring a mistrial- remedy which will not be granted lightly.

## e) Challenge for Cause

### CC ss. 634, 635, 638-640:

* 634 peremptory challenges: (1) A juror may be challenged peremptorily whether or not juror has been challenged for cause under 638, (2) Limits on numbers of challenges (20 1st degree/treason, 12 if 5yrs+ jail, 4 otherwise)
* 635: order of challenges 🡪 accused goes first, then prosecution, then accused, etc
* 638 challenge for cause: (1) Prosecutor/accused is entitled to any number of challenges on ground that (a) name of juror doesn’t appear on panel, (b) juror is not indifferent between Queen and accused, (c) juror has been convicted of offence leading to 12mos+ jail, (d) juror is an alien, (e) juror is physically unable to perform duties of a juror properly, (f) juror does not speak official language of Canada that is language of accused
	+ (2) No challenge for cause shall be allowed on a ground not mentioned in subsection (1)
* 639: (1) Court may require a challenge for cause to be in writing and (3) other party can deny it if it isn’t true
* 640: how court must deal with various challenges

### *R v Williams* (1998), (SCC)

**Challenging potential jurors for cause**

**Facts:**  Aboriginal guy wants permission to question potential jurors to see if they’re prejudiced against Aboriginals

**Issue:** When can an accused challenge jurors?

**Analysis:** McLachlin J:

* 638: " accused is entitled to any # of challenges on ground. . . juror is not indifferent between Queen and the accused"
* **Test: judge should allow challenges when there is a realistic potential for juror partiality**
* Lack of indifference/partiality: possibility that juror's knowledge or beliefs may affect way he or she discharges the jury function in a way that is improper or unfair to the accused 🡪 inclined to a certain party or conclusion
* Classes of juror prejudice: interest (direct stake in outcome), specific (attitudes/beliefs about the specific case), generic (stereotypical attitudes about the defendant, victim, witnesses, or crime), conformity (community feeling)
* **Jury candidates are presumed to be impartial** 🡪 Crown or accused must give reason to rebut that presumption
* If basis of concern is notorious (widely known and accepted), judge can take judicial notice of its
* Racism is insidious and it can’t be presumed that jurors can put aside biases because of judicial instruction to do so
* Where this is doubt, better policy is to err on side of caution and allow prejudices to be examined
* Stereotypes can affect the way jurors assess credibility or can shape evidence to conform with the bias
* It’s within discretion of judge to determine if widespread prejudice in community gives air of reality to challenge
* **638(2) 2 stages**: (1) inquiry into whether challenge should be permitted (realistic potential/possibility of prejudice) 🡪 jury pool “may” or “might” include people with prejudices 🡪 generous approach as Charter rights may be affected; (2) question jurors about prejudices, ask if they can set them aside 🡪 will juror be able to act impartially?
* 2nd stage of challenge: issue of how prejudice would actually affect the trial
* Threshold should not be “extreme prejudice” 🡪 less extreme prejudice may cause partiality too
* Challenge is based in s. 11(d) presumption of innocence (fair trial, impartial jury) and s. 15 right to equality
* 638 must be interpreted in light of Charter values and discretion must be exercised with these principles

**Ruling:** Accused established realistic possibility of prejudice and judge should have let him challenge jurors

## f) Ban on Publication

### *Charter*, s. 2(b):

Everyone has the following fundamental freedoms… freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication

### CC s. 517

(1) If prosecution or accused intend to show cause, judge shall order publication ban on application by accused so that evidence given, representations made, and reasons for decision can’t be published in any way until (a) accused is discharged following a preliminary inquiry, or (b) the trial is completed. (2) Failure to comply with ban is an offence.

### Toronto Star Newspapers v Canada (2010), (SCC)

**Justification for mandatory publication bans**

**Facts:**  Media organizations ask court to find that s. 517 of CC on publication bans violates s. 2 freedom of speech

**Issue:** Are publication bans constitutional? They infringe freedom of speech, but is it justified?

**Analysis:** Deschamps J:

* 517: if accused applies for publication ban, it must be given 🡪 applies to evidence and info from bail hearings
* Court must balance freedom of speech with rights of the accused and interests of justice
* **Objective of 517: foster trial fairness, expeditious bail hearings** 🡪 prevent influencing jury, preserve resources of accused, prevent custody from interfering with ability to defend, limit stigma 🡪 pressing and substantial objectives
* Rational connection exists 🡪 prevents dissemination of one-sided information that goes against the accused
* Minimal impairment: having a discretionary ban would force accused to prepare for that plus normal bail hearing, would consume time, would delay bail, and if lost, would result in dissemination of harmful, untested information
* Ban is minimal: does not prevent media from attending court, publishing accused’s name, commenting on facts, reporting on outcome of bail application, or describing conditions of bail, and it is temporary until proceedings end
* If info could be published, accused may have to make strategic decisions and compromise right to silence or liberty
* Salutary effects: limits hearing to bail issues, focuses resources, protects liberty/silence, prevents jury influence from information that is one-sided, untested, often irrelevant to guilt, and often relating to character and not the crime
* Purpose of trial is the search for the truth 🡪 publishing bail hearings hinders this, often involve inadmissible evidence

**Abella (dissenting)**: cuts off public’s right to know what goes on in court, doesn’t seriously infringe fair trial rights, should rely on juries’ ability to filter out bad info, public confidence in justice system requires timely delivery of info

**Ruling:** **Mandatory publication bans are constitutional**

# Sentencing

- consecutive vs concurrent- one after the other or overlap.

### R v M (CA) 1996 CanLii 230 (SCC)

- is on totality of sentence, p 531: sentencing judge must ensure that cumulative sentence does not exceed overall culpability. Aggregate sentence must = culpability. C Ruby: a cumulative sentence may not follow aggregate principle if the total is for the maximum punishment for the most serious of the offences. Issue: when you add them up for indiv offences (none of which are life) can you give them more than 20 yrs? Parole eligibility for murder is diff than for other crimes. In murder, when you give someone 25 yrs this starts from date you were arrested (time waiting is included). Any other offence starts from sentence (you might get credit for pre trial custody). Those with life could get parole before those who got 20 yrs based on this. Judges thought there could be a cap, why should someone with multiple offences get more time than murderer? Also: sentence must be proportional to person’s moral blame so should not be more than 20 years. SCC: held- there is NO cap on aggregate sentence. Has wide discretion to give ‘just sentence’ in all circs. Facts are relevant as mitigating or aggr factors, also at parole (lesser total crime = earlier). **- NB: totality principle at p 531 and p 551 see conclusion ; re affirms wide level of discretion in terms of what they see as a just fixed term sentence. (uses old CC numbers)**

### R v Nasogaluak 2010 SCC 6

- what role does Ch play in sentencing? If there is a breach, does this affect sentencing? Acc was beaten up by police for ‘evading arrest.’ Held at ttrial: rights at

### s. 7

violated, looked to

### s. 24

 to give conditional discharge (you are bound by conditions but have no record if you comply.) there are two remedy sections in Ch: s. 24 and s. 52 (latter allows to strike down laws), former is for each indiv case. S. 24 (1)- any indiv whose rights are infringed can apply to a court...that court finds appropriate and just in circs. If so, go to s. 24 (2). This MIGHT allow for a remedy in trial (excluding evidence). Person here pled guilty , brought this out in sentencing submissions and judge said he could then grant remedy in s. 24. SCC: held- not necessary or appropriate to turn to s. 24 , sentencing judge can take police behaviour into account in sentencing. Simplified process (when you don’t have to go to Ch, don’t). You are looking at s. 718 of Ch, you can take into consideration police conduct in mitigation. Para 39- principles- to maintain a just society, you meet this by taking into consideration objectives in s. 718 (deterrence etc) and **s. 718 (1)- sentence must be proportionate.**  This is main focus. S. 718 (2)- mitigating and aggravating factors, and that you should try to avid incarceration when possible and circs of ab offenders. If you ARE going to take police conduct into consideration, it has to either be aligned with circs of offence or the offender. That’s why it can go under s. 718 (2)- try to find mitigating factors that align with circs of case. If there was a Ch breach but it was not connected to what they are being sentenced for. –

### NB: mandatory minimums

**when you have one, the sentence must comply with them.** Judge’s discretion is limited by the range of sentences (although still have discretion), but are also bound by statute. If someone is being sentenced for an offence with a mandatory minimum, the only way around this is with a challenge to constitutionality of mandatory. Judge had given a conditional discharge, but the min was a fine. This was not allowed.

### R v Potts 2011 BCCA 9; R v Punko 2010 365

- previous to this :structure of s 718, then proportionality, then go to mitigation and aggravating. Held: wrong! Same circs, East End HA, officer Plante was a plant, infiltrated. Testified against them, cases are on sentencing for trafficking. Potts: para 51- trial judge had said that you take into consideration type of offences (traff in coke and meth), his crim record, his role in crime, rehab. Said he would have given him 4.5 yrs for traff in meth, tried to see if it is proportional and saw him as less culpable than others in conspiracy and looked at other case law put forward by counsel. Mitigation: the guilty plea, the police conduct, fact that Mr Potts has med condition. So he should get one year cred for pleading guilty, police conduct (Mr Plante facilitated a lot of these drug sales. Potts and Punko were hooked on Percoset, Plante gave it to them.), fact that they could have arrested him in 2004 but kept on building up offences with Plante in ‘gang.’ Held: two yrs sentence, then one year credit for time in pre-trial. This was appealed, CA: fundamental principle of proportionality was not applied here, thought society would think this was not high enough for level of involvement in conspiracy to traffic. So how do you get to a proportionate sentence? You have to think about society’s condemnation. It’s unusual for a CA to change a sentence, there is a lot of deference given to a sentencing judge on appeal. It’s unusual for a court to do this as sentencing judges are given discretion. Para 16- proportionality is achievd by considering soceity’s degree of censure, and that sentence reflects moral culpability. This is criticizing the judge as ‘piecemeal’ placing too much weight on mitigating factors.

### - correct approach to ‘fit sentence’

**- judge must weight the objectives of sentencing in way that takes into account the circs of the offence and the offender. Mitigation and aggravation are in this determination, now weighed later. It’s one step (see para 82).**

#### Concurrent sentences

Test: (para 89)- whether the acts constituting the offence were part of a linked set of offences. Judge must consider the nature and quality of acts, temporal and special dimensions, nature of harm to community or Vs, manner in which acts were done, and offender’s role in crimes. Judge trial at gave concurrent sentences on basis that this was one investigation, CA said no- you should focus on offences, not police involvement in terms of whetr or not it is a single endeavour. So, at the end you take into account proportionality principle so you don’t have an overall sentence that’s grossly unfair.

**Punko; Tyson J in dissent in CA-** generally agreed with Smith J at trial that providing Percoset when Punko said he wanted off should have been mitigating, majority disagreed. Tyso called this piecemeal approach that gave undue weight to mitigating factors like guilty plea and police conduct = unfit sentence. There was also issue taken with the q of whether sentence should be concurrent or consecutive. Same reasoning in both cases.

## Conditional Sentence Orders under s. 742 (1)

### R v Proulx 2000 1 SCR 61

- brought in in 1996 as response in Parl, they viewed judges as sending too many to prison. (big change from min sentence mania today). S. 718 (d and e)- if appro to bring in lower sentence you should, if there is an alternative to imprisionment it should be taken. **Cond sentence order s. 742 (1)- when you are given less than two yrs for s thing that has no min, judge can let them serve this in community as long as it would not endanger safety of community and that it would be consistent with principles of sentencing (for non dangerous or non violent offenders).** Court compares a cond sentence order to a probation order- latter (s 732(1)) some that are mandatory (keep peace, appear in court, advise of address change/name change). Judge can also add reporting to prob officer, abstaing from drugs or alc, not have weapons, restraining order, community service, red zones, curfew. All are avail in probation order at judge’s discretion. S 742 (3) talks about terms of a conditional sentence order, must include keeping peace and good behaviour, appearing in court/change of name or address but HAVE to have condition of a probation officer and HAVE to have a jurisdictional limit (must stay in BC etc). This can be beefed up with restrictions on drugs and alc.

## Discharges

 (can be abs or cond, result in no record of conviction).

### Probation

 (conditions must be met, sometimes called a suspended sentence.) incarceration and or fines. **And**

## conditional sentence order

**( a lot like probation, but is a case where person would otherwise be going to jail).** Probation is not for situations where incarceration is approp, so is a fine. To get to cond sentence, you are saying that remedy would otherwise be going to prison but jdge has discreation to let you serve in community. Probation orders are intended to be rehabilitative, (person will be in community, will likely be in comm. service, will likely have prob officer and counselling. Rehab not punishment). Cond sentence order is punitive aND rehabilitative (is intended to permit offender to get out of jail but not to avoid being punished.) Terms should be stricter than probation, should have to report more frequently. Will be the norm to haae a very strict curfew or house arrest. Strict restriction on liberty bc would otherwise be in prison. Probation order has some restrictions but less.

### - objectives of con sentences:

 to reduce usage of prison and to increase restorative justice (is concerned with taking responsibility for action, must rehab selves, community and V.) prison is not as good a place as the community for rehab, prison is a ‘finishing school’ for crims. Not the best rehab for society, they will ultimately be out in society so the more skills they have the better.

**- Proulx:** para 90- p 110- when a cond sentence order MUST be considered:

- where first three stat pre reqs are satisfied (no mand minimum, would it be under two yrs and would it be safe to have them in community). It would be an error not to consider this, could be appealed on.