ADVANCED CRIMINAL PROCEDURE

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Search and Arrest

- *Charter* ss.8–9: Unreasonable search and seizure; arbitrary detention and imprisonment
- *CCC* s.495(1)(a): Police can arrest without warrant a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable [or hybrid, non s.553] offence
- *R v Juan* (BCCA, 2007): Officers need reasonable ground (more than strong suspicion, but not quite balance) with both an objective and subjective component to arrest under *CCC* s.495(1)(a)
  - Reasonable police officer has reasonable ground to suspect person in car is dealer
- *R v Mann* (SCC, 2004): Power of investigative detention exists at common law
  - Cannot be based on racial profiling, the area of town, or propensity
  - Cannot force person stopped to make a statement
  - Search power is limited: searching someone for safety of public and officers
- *R v Jones* (BCSC, 2011): Threshold for investigative detention or arrest is more than suspicion
  - Essentially the same standard for both: reasonable suspicion or articulable cause
- *R v Fearon* (SCC, 2014): Ability to search phones incident to arrest exists, but is limited
  - The "incidental" standard is increased to "truly incidental" (i.e., strictly applied)
  - Usually has to be a pretty serious offence to justify the search at all
  - There must be some benefit to doing the search right away, instead of waiting for a warrant (e.g., recovery of weapon, stolen goods)
  - Police must take detailed notes of what was examined on phone, and why
    - Where police can look on the phone (scope of search) is limited
    - Cell phones more similar to computers than briefcases — higher standard
- *Hunter v Southam* (SCC, 1984): Crown requires independent judicial authorization before searching a place of privacy
  - Standard: reasonable and probable grounds that there was an offence, and reasonable and probable grounds that there is evidence of it in the place to be searched
  - Application in writing (ITO), delivered under oath, with documents optionally attached
  - Application is *ex parte*, so full and frank disclosure required
- *R v Wilson* (BCCA, 2011): In reviewing the validity of an issued warrant, the test is whether a reasonable JP could have granted the warrant, given the material as amplified on review
  - Material non-disclosure, misinformation, etc. are relevant factors, but only relevant to determine whether there is a continuing basis to support the warrant

Charge Approval

- Cowper Report (BC Justice Reform Initiative, 2012): The decision-maker (e.g., Crown counsel in BC) in whether to charge must be immunized from judicial scrutiny
  - Ensure they are not persuaded by outside forces, despite impact on accused
  - Standard: "substantial likelihood of conviction" (BC), "reasonable prospect" (ON)
- *R v Nixon* (SCC, 2011): Repudiation of plea agreement not a violation of *Charter* s.7 rights
  - It was a matter of prosecutorial discretion, beyond reach of the court
  - No evidence of prosecutorial misconduct, improper motive, nor bad faith
    - No prejudice affecting fairness, nor conduct that contravenes fundamental justice
  - Like discretion to prosecute, accept a plea, or enter a stay under *CCC* ss.579–579.1
  - But repudiation should be rare, and prosecutor must consider public interest in trial
- *R v Malik, Bagri, and Reyat* (BCSC, 2002): Crown charging documents will not be routinely disclosed to A, where A wants to make an abuse of process allegation
  - Only disclosed where A meets the standard in *Murrin* (BCSC, 1999): a real and substantial possibility of bad faith and improper motives on the part of the Crown
  - Failure to lead evidence at trial from extradition hearing does not meet this standard

The Indictment

- *R v Saunders* (SCC, 1990): It is a fundamental principle of criminal law that the offence, as particularized in the charge, must be proved
  - Prejudicial to allow drug charge to be amended now, after accused has taken stand
- *Criminal Code* does not require all available details to be particularized or perfectly accurate
  - *CCC* s.581: Each count in an indictment shall apply to a single transaction
  - *CCC* ss.581(3), 587: If insufficient detail is given to identify the transaction, accused can apply for more particulars to be added
  - *CCC* s.601(4.1): The time and place of the particulars are generally flexible
- *R v R(G)* (SCC, 2005): Included offences exist when the smaller offence is a necessary part of the larger offence (see also *CCC* s.662)
  - Also possible to include an offence if apt words in the indictment put accused on notice, or if it is an included offence by statute (*CCC* ss.662(2)–(6), s.660)
  - Crown cannot supplement the indictment with the personal knowledge of the accused
  - Incest includes neither sexual assault (consent) nor sexual interference (underage)
    - But no defence of *autrefois acquit* should Crown proceed with proper charge
- *R v JBM* (MBCA, 2000): Detailed particulars may be "included" in the writing of the indictment
  - Court finds accused was in position of trust, but indictment says a relation of dependence
  - No prejudice to accused, because a relation of dependence is a higher class of relationship
    - Also, which relationship type he was in was not an essential element
- *R v Moore* (ONCA, 2012): Particulars that only affect sentencing are not essential elements
  - Robbery included in robbery while being armed, even if Crown cannot prove being armed
- *R v Irwin* (ONCA, 1998): The *Criminal Code* charge can be amended if there is no prejudice to the accused (see also *CCC* s.683(1)(g))
  - Two people in scrap charged with intentionally injuring third party, but proper charge should have been unlawfully causing bodily harm

  - Accused's defence is self-defence from the other person in the scrap (not unlawful)
- *R v Harris* (BCSC, 2014): A strategic decision by accused not to present part of a case prior to an amendment does not constitute prejudice against the amendment
- *R v Heaney* (BCCA, 2013): Where one offence is a strict subset of a greater offence, *res jusicata* (multiple convictions) should cause the lesser offence to be stayed
  - For example, when an element of one offence is a particularization of the same element of another

Classes of Offences

- *R v Dudley* (SCC, 2009): The Crown can reelect to proceed as an indictment with a hybrid offence, even when it first elected to proceed summarily but took too long
  - *CCC* s.787: Unless otherwise provided by law, a summary offence can yield a fine of no more than $5000 and no more than 6 months in prison
  - *CCC* s.786: Summary offences have six-month limitation period, unless agreement
  - Crown can still proceed with indictment after six months
    - Provided not abuse of process, so Crown should declare early which they choose
- Provincial offences: *Offence Act* (BC)
  - Trial before a Justice (JP or Provincial Court Judge)
  - Appeal to Supreme Court Judge, procedure as in Court of Appeal: *CCC* s.109(1); or,
    - Trial de Novo before Supreme Court Judge by order: *CCC* s.109(3); or,
    - Appeal to Supreme Court Judge, by stated case on law or jurisdiction: *CCC* s.115(1)
  - Further appeal to CA on question of law alone with leave: *CCC* s.124; and,
  - To SCC on questions of law or jurisdiction with leave: *SCA* ss.40(1), (3)
- Summary conviction offences
  - Trial before Provincial Court Judge: *CCC* Part XXVII
  - Appeal to Supreme Court Judge, procedure as in CA: *CCC* ss.813, 822(1); or,
    - Trial de Novo before Supreme Court Judge by order: *CCC* ss.813, 822(4); or,
    - Transcript or agreed facts before Supreme Court Judge, on law or jurisdiction: *CCC* ss.830(1)–(2); or,
    - Appeal directly to CA, with leave, with an indictable appeal from the same trial: *CCC* 675(1.1), 676(1.1)
  - To CA on question of law alone, with leave: *CCC* s.839
  - To SCC on questions of law or jurisdiction with leave: *SCA* ss.40(1), (3)
- Indictable offences before Provincial Court Judge (listed *CCC* s.553)
  - Trial before Provincial Court Judge: *CCC* Part XIX
- Indictable offences where the accused is given an election: *CCC* s.536(2)
  - Provincial Court Judge: trial as in *CCC* Part XIX; or,
  - Preliminary hearing before a justice (JP/PCJ) as in *CCC* Part XVIII, trial before a Supreme Court Judge as in *CCC* Part XIX; or,
  - Preliminary hearing before a justice (JP/PCJ) as in *CCC* Part XVIII, trial before a Supreme Court Judge and jury as in *CCC* Part XX
- Indictable offences which must be in superior court (listed *CCC* s.469)
  - Preliminary hearing before a justice (JP/PCJ) as in *CCC* Part XVIII, trial before a Supreme Court Judge and jury as in *CCC* Part XX; or,

  - Can be before only judge if Crown and accused consent: *CCC* ss.471, 473
- All indictable offences
  - Appeal to CA on a question of law (as of right), or a question of fact or mixed law/fact (with leave), or on sentence (with leave): *CCC* ss.675, 676, Part XXI
  - Further appeal to SCC: *CCC* ss.691–693
- Hybrid offences (summary or indictable): Crown elects which route to go

Retaining Counsel

- *Charter* s.10(b): You have the right to consult with counsel
  - Within reason, the right to counsel of your choice
  - No general constitutional right to be represented by state-funded counsel
- *R v Tremblay* (BCSC, 2013): Accused can get court-ordered counsel when the trial would not be fair without counsel, and when the accused can truly not pay
  - Called the *Rowbotham* (ONCA, 1988) criteria
  - Accused lost legal aid (summer work), which requires likelihood of jail and fiscal difficulty
  - But moderate complexity (close to trial, he does not have a good sense of the elements)
  - Accused is genuinely broke

Bail

- Policy considerations
  - Accused could be in pre-trial custody for years, harder to communicate with lawyer, more likely to plead guilty
  - Risk of not showing up (addiction, hiding), continued danger, and obstruction of justice
  - Consider financial means (able to flee), strength of the case (incentive to flee), criminal record (ironically, helpful; they came to court before)
- *Criminal Code* provisions:
  - *CCC* ss.497–499: A police officer at the scene or station, or a JP prior to a bail hearing, may release someone on bail
  - *CCC* s.515(2): Conditions may be attached to bail
  - *CCC* s.515: Generally prosecutor has balance-of-probabilities onus to show cause to deny
    - *CCC* s.515(10): Consider the flight risk, danger to the community, or necessity for public confidence in justice system
  - Onus reversed for *CCC* s.469 offences, and must be heard in superior court
    - *CCC* s.515(6): Onus reversed also for terrorism, some firearm offences, where person is not an ordinary resident in Canada, etc.
- *Toronto Star Newspapers v Canada* (SCC, 2010): Automatic publication bans on bail hearings under *CCC* s.517 is not unconstitutional
  - Violates *Charter* s.2(b) freedom of expression, but saved by *Oakes* (SCC, 1986) test
  - Already a stigma against people post-acquittal; what if there were bail-hearing publications talking about the Crown's excellent case
  - Also, allowed to lead hearsay, the accused's history, evidence that may be thrown out
- *R v Parsons* (BCSC, 2007): The facts of a case must be considered as a whole when judging bail
  - Charged with drug trafficking, flees CBSA to his home (but not out-of-country)

  - Friends, relatives live in AB; health problems make him less of a flight risk; minimal criminal record; and, a good surety
  - Bail granted, eventually acquitted
- *R v St-Cloud* (SCC, 2015): The three reasons for denying bail in *CCC* s.515(10) are three unique potential grounds for denying bail
  - *CCC* s.515(10)(a): Ensure attendance in court
  - *CCC* s.515(10)(b): Protection of the public or witness
  - *CCC* s.515(10)(c): Maintain confidence in justice system
  - The circumstances in *CCC* s.521(10)(c) are not exhaustive
    - Also, consider the heinousness of the crime, and that the public are not legal experts

Disclosure

- *R v Baxter* (BCCA, 1997): The Crown cannot contract out of its *Charter* s.7 disclosure obligations
  - Crown agreed not to use co-accused statements unless accused called them as witnesses
  - Only time Crown can delay is to protect an ongoing investigation or witness safety, but that has to be balanced against full answer and defence
- *R v Bjelland* (SCC, 2009): One remedy for late disclosure or non-disclosure is exclusion
  - Two witnesses disclosed unnecessarily days before trial; they are excluded
  - Could move the trial date, but unacceptable when accused is in custody, trial would be prejudiced, or state misconduct is intentional
- *R v Salame* (QCCA, 2010): The Crown has a duty to preserve evidence, proportional to how important it is
  - If Crown can establish that lost or destroyed evidence did not result from unacceptable negligence, there is no breach
  - Otherwise, a stay is the appropriate remedy
- *R v McNeil* (SCC, 2009): Crown must disclose the investigative file, and any other documents pulled into that file, but not all government files
  - Police discipline records related to investigative file
  - Test for such documents: is it likely relevant? If so, balance third-party privacy interests

Motions

- *Constitutional Question Act* (BC) s.8: Provincial guidelines for a motion to strike down legislation, or strike under *Charter* s.24(1) except for exclusion of evidence
  - (2) Notice must be given to AG of BC and AG of Canada
  - (5) Must be served at least 14 days before argument (unless you are authorized by court)
  - (4)(d) Must give the particulars to be argued
- *R v Sipes* (BCSC, 2008): Trial judge has management powers to ensure counsel give proper notice of motions to each other
  - Makes counsel put their motions together early and consider their strengths
  - Allows for meaningful response to complicated issues
  - Ensures trial judge understands each application
- *R v Vukelich* (BCCA, 1996): A trial judge can shut down a motion where there is no reasonable prospect of success

  - Motion to examine police officers to kill evidence, but there was so much other evidence
  - Highlights need to give advance and specific notice of motions, to avoid getting *Vukelich*'d
- *R v Bains* (BCCA, 2010): There is no absolute right to receive a *voir dire* just because you are alleging a *Charter* violation
- *R v Hooites-Meursing* (BCCA, 2008): Trial-fairness motions should not be heard before the trial
  - Exception for egregious conduct or obvious circumstances
  - Trial Judge erred by throwing out case with intimidated witness before hearing testimony

Severance

- Policy considerations:
  - Joint trials more efficient, less likely to wind up with inconsistent verdicts (especially from cut-throat defences), prevents re-victimization of witnesses
  - For accused: each isn't compellable, counsel can work together, proceedings may collapse
  - But, joint trials create evidentiary prejudice (hear about propensity), and conflicts with accused making full answer by independently saying other accused did it
  - For accused: severed trials may create inconsistent verdicts, or ability for both get to off by pointing at the other
- *CCC* s.589: A non-murder indictable offence cannot be joined with murder unless it arises from the same transaction or the accused consents
- *CCC* s.591(3): The court can order severance if in the interests of justice
- *R v Suzack* (ONCA, 2000): There is a strong presumption of keeping joint trials together
  - Consider if evidentiary problems / prejudice could be solved with jury instruction
  - Consider also how early application was made, and impact of ability to call co-accused
- *R v McEwan* (ONCJ, 2008): Merely stating your co-accused did it is not enough for severance
  - Consider how likely the co-accused would be of testifying for applicant
  - Also, how plausible any co-accused testimony would be
- *R v Last* (SCC, 2009): Severance should be granted when there is no benefit to putting counts together, but there is prejudice
  - One indictment, two counts of sexual assault
    - Different defences: consent, a different perpetrator
  - Despite factual and temporal proximity, no strong legal nexus; and, different witnesses

Preliminary Inquiries

- *R v Arcuri* (SCC, 2001): The job of the Judge is to determine if the Crown has enough evidence that — if it were all believed — a properly instructed jury acting reasonably could convict
  - Not the job of the preliminary Judge to weigh the evidence, draw inferences of fact, or consider credibility

Trial Judge and Juries

- *Charter* s.11(f): For offences with potential for five or more years, you have right to jury
  - *CCC* s.469: Some offences (e.g., murder) always give you that right
  - Juries help legitimacy of system, but at cost of confusion if facing too many issues

- *R v Gunning* (SCC, 2005): Trial Judge has no discretion to tell jury that a given element of an offence is proven
  - Trial Judge can given an opinion to the jury, but it must be left to the jury to try
  - *Charter* s.11(d): Guarantees presumption of innocence
  - If there is a dispute in the jury, the Trial Judge should not opine
- *R v Krieger* (SCC, 2006): Even if there are no facts in dispute, Trial Judge cannot instruct jury to convict
  - Jury could nullify law, but counsel may not instruct them to nullify

Closing Addresses

- *CCC* s.651(3): Where defence called evidence, defence addresses first; otherwise, last
  - Even if only one co-accused called evidence
- *R v Rose* (SCC, 1998): Threshold for finding a *Charter* violation is not just finding the defence case becomes more difficult
  - When defence presents evidence, Crown needs time to think it through
  - There is some unfairness here, but not "fundamental" unfairness
  - The precise wording of *CCC* s.651(3) does not foreclose the idea of courts implementing some manner of "reply address" for accused who have to address first

Unreasonable Delay

- *R v Morin* (SCC, 1992): Consider the conduct of the accused, defence, and Crown, plus prejudice, to the accused to determine if a delay is unreasonable
  - To even bring a motion to dismiss under *Charter* s.11(b) without getting *Vukelich*'d, need 12–14 months in Provincial Court, 24–30 months in BCSC from date of charge
  - Conduct of accused: Drawing it out (firing lawyer) without waiving the period of delay
  - Conduct of defence: Notice of motions, not asking for disclosure, being unreasonable
  - Conduct of Crown: Inadvertent failure to disclose
  - Prejudice: Suffering (especially in custody), evidence not available, reputation and career
- *R v Godin* (SCC, 2009): Scheduling requires reasonable availability and reasonable cooperation; it does not, for *Charter* s.11(b) purposes, require defence counsel to hold themselves in a state of perpetual availability
  - Defence counsel had made reasonable attempts to move the trial forward, when Crown was causing delays
- *R v Bains* (BCCA, 2010): Where delays are caused by matters beyond the accused's control, he will likely not receive a stay
  - Co-accused moved trial to from Provincial Court to BCSC, then pleaded out
  - Unfortunate scheduling trouble with both defence counsel and Judge

Appeals

- *R v Grouse* (NSCA, 2004): Standards of review for fact and law
  - The judge's findings of fact, including weight, are reviewed on the standard of palpable and overriding error

  - Statement of legal principles on the standard of correctness
  - Application of the principles to the facts is palpable and overriding error, unless the decision can be traced to a wrong principle of law, in which case use correctness
- *R v Austin* (ONCA, 2006): Objections by counsel and answers given to questions from the jury by the Judge are significant factors in finding reversible error
  - The more minor the error of law, the more objections and confusion from the jury count towards finding a reversible error
- *R v Sarrazin* (SCC, 2011): Court of Appeal can uphold verdict if Trial Judge made an error of law, but there was no reasonable possibility the verdict was influenced by the misdirection or non-direction
  - *CCC* s.686(1)(b): Test for reversibility on appeal — "that no substantial wrong or miscarriage of justice has occurred"
  - To defend verdict, focus on the strength of the case and evidence, versus the legal errors
- *R v Shen* (BCCA 2010): To appeal misapprehension of evidence, just need to show that the Trial Judge might have come to a different verdict
  - Clear errors with the Trial Judge's summary of the evidence, going to the core of his reasoning
  - But there was evidence that the conviction could still stand, so new trial ordered
- *R v Peers* (BCCA, 2009): Misapprehension of evidence that is material to the conviction will result in an acquittal if the evidence apart from the misapprehension is not reasonably capable of supporting a conviction
  - Completely speculative to think suspect there to commit murder, instead of buy drugs
  - Argued both misapprehension, then from that followed unreasonable verdict
- *R v Sinclair* (SCC, 2011): Misapprehension includes not just misunderstanding the evidence, but also failure to consider evidence relevant to a material issue
  - Verdict reached irrationally and illogically, so the only choice is a new trial
- *R v Vokurka* (SCC, 2014): Appellate courts should not substitute their own view of the evidence for the Trial Judge's, when there is more than one possible explanation
  - Only interfere with the facts where there is clear misapprehension or failure to consider relevant evidence

Historical Law

- *R v Dineley* (SCC, 2012): Changes affecting substantive rights, i.e., those changes that affect the content or existence of a defence, only affect crimes committed after the changes come into force
  - Possibly unless the change added to accused's substantive rights
  - Procedural laws that do not affect substantive rights immediately affect all trials
    - Note: rape shields are considered procedural