CHARGE APPROVAL

BC → Crown decides whether or not to lay criminal charges

Charging Standard:

1) **Evidentiary test**: substantial *likelihood* for conviction, considering
(a) what material evidence is likely going to be admissible;
(b) weight likely given to it;
(c) likelihood of viable defences will succeed
- not speculative
- exceptional circumstances may not require evidentiary test (then is *reasonable prospect of conviction*)

2) Prosecution in the **public interest**: case-by-case analysis → consider the nature of the crime and nature of the accused (age, intellig., m. health, etc)

Generally in the public interest to proceed when: (*Cowper* report)
- Allegations are serious
- Considerable harm was caused
- A weapon was used
- The victim was vulnerable
- Evidence of pre-meditation
- Victim was a vulnerable person

Some factors weigh against proceeding:
- Loss or harm was minor
- Alternative measures would be sufficient (This requirement to meet this two-part test is ongoing throughout the prosecution)

Conviction likely result in small penalty

Challenging Charge Approval:

Defence may choose to make certain disclosures/submissions to the Crown before charges are laid. These submissions could potentially lead to the withdrawal or reduction of charges.
The Crown's charging decision is part of the Crown's core discretion and, for this reason, it is *insulated from review*.
Crown are specialists in charge approval (quasi-judicial role) – judges cannot review easily and motions should be rare

PROSECUTORIAL DISCRETION IS ONLY SUBJECT TO REVIEW FOR ABUSE OF PROCESS, WHICH IS ENGAGED UNDER S. 7

(*Nixon*) → Crown repudiated a plea agreement and accused argued there was *abuse of process* ; Acts of core prosecutorial discretion include all decisions on whether to prosecute and on what basis

Releasing Crown Documents:
(*Reyat*) → terrorist attacks; argued indictment was abuse of process and contrary to *double jeopardy* rules
- sought disclosure of internal Crown documents

→ Internal Crown documents that relate to the exercise of prosecutorial discretion will only be released if the accused establishes "a real and substantial possibility of bad faith or improper motives on the part of the Crown (from *Murrin*) (*Reyat* did not meet this threshold)

ABUSE OF PROCESS

(ie. Crown was acting for improper purpose when chose to approve charges/feels political pressure).
Accused must meet evidentiary threshold if alleging AOP that shows a *reasonable basis*, then onus shifts to Crown to show circumstances/reasons (ultimate burden remains on the accused)
S. 7: Everyone has the right to life, liberty and security of the person and the *right not to be deprived thereof* except in accordance with the principles of fundamental justice.

Two categories of ABUSE OF PROCESS under s. 7: *proved OBOP*
(s. 7 and common law doctrine fused on *O'Connor*)

(1) There was conduct by Crown that affected the **fairness of the trial** = did something highly unusual + defense is caused *actual prejudice*
- must show evidence of this, not just inferred
- resulting in breach of right to *full answer and defence*

(2) There was conduct that "contravenes fundamental notions of justice"
- undermines the integrity of the judicial process
- undermines society's expectations of fairness

Accused needs to establish a proper evidentiary foundation to review prosecutorial conduct:
repudiation of a plea agreement, though highly unusual, will not always meet this threshold (not nec. improper → look into what was driven by?)

REMEDY FOR ABUSE OF PROCESS

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Remedy for Abuse of Process under 24(1):

Under either branch, a stay of proceedings will only be granted when:
(a) the prejudice to the accused will be aggravated by the trial; and
(b) no other remedy is reasonably capable of removing prejudice

THE INDICTMENT

Charging sheet ("information" or "indictment") must set out the section of the code under which the accused is charged, and the particulars (specific acts of the accused that led to the charges)

S. **581(1)**: each count in an indictment shall apply to a single transaction.

S. **581(3)**: each count shall contain sufficient detail of the circumstances of the alleged offence to give the accused reasonable information with respect to the act/omission to be proved against him.

S. **587(1)**: a court may order the prosecutor to furnish particulars of an offence, where it is necessary for a fair trial.

S. **601**: gives Crown the power to amend the charge

S. **686(1)(b)**: gives the appeal court the ability to amend the charge

S. **662**: authorizes convictions for "lesser included" offences in 3 situations:
- Included by statute
- Necessarily included (ie. assault in a sex assault)
- As described by the wording of the indictment

Crown must prove all essential elements:
- mens rea, actus reus, identity, particularizations

Assume Crown cannot change charging sheet details retroactively*
^^ does not apply to date & place, as in s. 601(4.1)

This is to align with the principle of giving accused **specific notice of the charge** so they can properly have full answer + defence/fair trial. (*Saunders*)

s. 581(3) → information must provide sufficient detail of the charge the accused must meet (so accused can identify the transaction)
Crown can amend charging sheets if: (exceptions to particularization)

1) Surplusage (fairly rare/tricky)
- A particular detail is so far outside of what Criminal Code proves (almost creates a new offence) that it is not actually an essential element (and therefore need not necessarily be proved)

[*JBM*] argued Crown failed to prove all the averments in the indictment
Indictment: "JBLM being in a relationship of trust or authority toward the victim in a relationship of dependency did unlawfully..." - SURPLUS!

"The surplusage rule – by which *a word or words in an indictment are said to be surplus in the sense that they need not be proved in order to procure a conviction* – may not be applied where it would prejudice an accused." As didn't argue JBM would be prejudiced, court invoked the surplusage rule and *maintains the integrity of the indictment*.

2) Notice of greater penalty [*Moore*]
- If a detail is only added to give notice of a higher penalty, the particular detail may be excluded as an essential element
ie. in *Moore*, Court agrees that Crown added detail of gun ("armed" robbery) simply to put accused on notice of using min. 4-year sentence

3) Averments ("shopping lists") [*Millington*]
- A conviction may be registered provided that the Crown proves at least one of the averments beyond a reasonable doubt
- if single count is particularized in various averments, Crown only needs to prove one of them BARD (*Millington*)

4) Amendments (most common) [*Harris*]
- power given by statute ↑
- Crown may at any point apply to change particulars of charging sheet to match the evidence in the case, provided it is not prejudicial to the accused [*Irwin*]↓
- "If the accused had a full opportunity to meet the issues and the conduct of the defence would have been the same, there is no prejudice" higher presumption of prejudice if bigger amendment and later in case

[*Harris*] → charged with possession of prohibited weapon but was actually "*restricted*"
- accused knew of this error and wanted to use it as an argument
- no prejudice when accused deprived of an argument they hoped to make (incl. pre-trial strategic decisions ie. voir dire, judge/jury)

[*Irwin*] → fight in a bar, accused did not intentionally apply force;
- Crown wants to switch offence charged *on appeal*
- broad amendment powers under s. 683(1)(g)
- only limit is *prejudice* (here no prejudice, would have conducted their defence the same)

*might bring motion for more particulars if not enough on sheet

INCLUDED OFFENCES

S. 662: The accused may be convicted of "included offences" even if the Crown has not proven the full offence charged.

3 CATEGORIES OF INCLUDED OFFENCES:

1) Explicitly included offences:
- An offence so included that it is proved even if the whole offence that is charged is not proved [662(1)(a)]
→ statute includes a second offence within it, ie. manslaughter
- Attempts are always included [662(1)(b)]
[660] … evidence establishes an attempt to commit the offence, the accused may be convicted of the attempt

2) Must convict of lesser to be convicted of greater:
- If second offence always has to be proven in order to prove the 1st offence (ie. possession in order to prove possession/purpose trafficking)

[*RG*]
Accused persons can only be convicted of "lesser included offences" if such offences are included by statute, necessity, or by the **clear wording of the charge**. Sexual assault is not necessarily included in incest, nor included by statute or the wording of the offence (but is often included).
**before trial, must be notified if *sexual assault* is building block to incest

3) Particulars give notice for lesser offence (that not charged with)
- something not generally included
- accused is given **notice** that some offence will be included
(ie. attempted murder + assault causing bod. harm)

KIENAPPLE SUBMISSIONS

If accused has been convicted of multiple counts that overlap, Judge can ask for a Kienapple submission

Multiple convictions rule: an accused cannot be punished more than once for the same illegal transaction or "delict"
- this principle applies when there are both a factual and legal nexus between the charges
- a single act of an accused may result in more than one dilect
- (ie. impaired dricing and driving without a license)
- principle will apply if the lesser offence has no distinct add'l elements

Ask: Was accused convicted twice for the same transaction?

[*Heaney*] → accused argues cannot be convicted of both uttering threats & criminal harassment/threatening conduct

Kienapple requires both:

(1) Factual nexus: *do the charges apply to the same conduct*?
Consider: remoteness, proximity of events in time + space, intervening events, common objective

(2) Legal nexus: *are there any additional/distinguishing elements*?

Think about essential elements of both offences (at time of transaction)

I. Where there is unequal gravity between the charges, it is okay if the lesser charge doesn't have elements the greater charge doesn't.
II. Where an element of one offences is a particularization of the same element in another offence.
III. Where there is more than one method, embodied in more than one offence, to prove a single criminal act.
IV. Where parliament has deemed an element to be satisfied on proof of another element.

Kienapple will not bar multiple convictions when: offences were designed to *protect societal interests*, where offences prescribe different consequences

Remedy: to conditionally stay the lesser charge

COUNSEL

No broad Charter right to have counsel represent accused/not guaranteed.

To get legal aid must have:
(1) Possibility of going to jail/lose means of making a living
(2) Income requirement <$1500/month single person; $3000 for family

***Rowbotham* application**:
In order for accused to be guaranteed a fair trial required that state-funded counsel be provided to an accused if the accused establishes OBOP that:

(1) accused does not have means to retain a lawyer

(2) representation is essential to a fair trial

Consider: seriousness of charge, length, complexity, accused's ability to participate effectively, intellectual ability to form a defence; all financial info including family circ./history

Remedy: conditional stay until accused retains a lawyer

* Must show real likelihood/high probability that a fair trial will not occur.

BAIL

s. 11 of Charter: Any person with an offence has the right
(e) not to be denied reasonable bail without just cause
(reasonable = $ amount/conditions)

s. 679 – pending appeal, can get bail

s. 515(5) = Presumption that the accused will **be released**, except where the prosecutor shows cause why the detention is justified (until dealt with)

Onus is on the Crown to prove a legitimate reason to detain the accused (only need 1 of 3) on the balance of probabilities.

Onus switches: as in s. 515(11),
for offences under s. 469 the detention is presumed
unless *accused* proves he is not a risk on all three grounds

GROUNDS FOR NOT GRANTING BAIL: one = enough; OBOP

s. 515(10) describes the grounds on which the detention of an accused in custody is justified:

(a) Primary Detention
Necessary to ensure **attendance** in court;
ie. non-resident, no ties, physical health, strength of case, accused fled scene on crime, $$ business successful so might have a lot of money..

(b) Secondary Detention
Necessary for protection/**safety** of the public;
[*Parsons*] → "substantial risk" of committing offence or obstructing justice, and consequent public endangerment

Factors:
1) Nature of offence
2) Circumstances of offence
3) Likelihood of conviction
4) Degree of accused's participation in offence
5) Relationship between accused and the victim(s)
6) Personal characteristics (job, lifestyle, criminal record, family, mental health)
7) Conduct prior to offence
8) Danger to affected community

(c) Tertiary Detention
** should be reserved for most serious offences in the most egregious circumstances [*Parsons*]

Necessary to maintain confidence in the administration of justice [public reputation] with regard to:

(i) the apparent strength of the prosecution's case, **(lifeline)** circumstances: problem of ID, unclear it was him, EVIDENCE

(ii) the gravity of the offence (assessed objectively/max + min sentences)
*where did the offence take place? shot gun in public area? DANGEROUS

(iii) circumstances surrounding the commission of the offence, including whether a firearm was used
[attention to aggravating factors like terrorism]

iv) accused is liable (on conviction) for a potentially lengthy term of imprisonment or "in the case of an offence that involves, or whose subject-matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more" *assessed objectively*

*can argue for bail by giving really strong restrictions

[*Parsons*] initially denied bail

Aggravating factors:
- serious offence with lengthy prison term
- strong Crown case
- that accused fled border crossing so raised concern would flee jurisdiction and fail to attend court

Mitigating factors:
- ordinary resident of BC with strong family ties to Alberta
- no criminal background/history
- long-term, stable employment

Court: judge did not consider all the mitigating factors but if had would have seen that "accused could be sufficiently managed by releasing him on a large surety or cash bail and on strict terms)

[*St Cloud*]
if a reasonable member of the community would be satisfied that denial is necessary to maintain confidence in the administration of justice, then bail can be denied

[*Manasseri*]
- talked to an expert while on bail and charged with breach of recognizance;
- immediate hearing to revoke the original bail (importance to sit down with client once signed agreement + go through all conditions)

ABILITY TO REVIEW (BAIL DECISION)

s. 520 gives accused the right to apply for judge to review interim detention

s. 521 gives Crown the right to apply for review of the release order

[*St Cloud*]
Judge may only exercise power to review decision concerning detention or release of the accused:

(1) Where there is admissible new evidence if that evidence shows a material and relevant change in the circumstances of the case;

(2) Where the impugned decision contains an error of law;

(3) Where the decision is clearly inappropriate

***Palmer* criteria**

Where there is **new evidence** for the purposes of reviewing decision:

(1) If evidence existed before, must have a legitimate and reasonable reason why it *wasn't* tendered;

(2) evidence must be relevant (broadly, not just to a material issue)

(3) evidence must be credible (reasonably capable of being believed);

(4) reasonable to think it could have affected the *balancing exercise*
*[*StC*] if meets criteria, Judge can repeat weighing as if initial decision maker

[*Parsons*]
Trucker stopped at the border and abandoned truck; charged with importing cocaine, reverse onus position under s. 515
- detained by provincial court judge on all 3 grounds

Held: Tertiary ground must be reserved for the most **serious offences** committed in the most egregious circumstances.
- accused serious health problems make it unlikely he will flee
- strict bail conditions and a surety can mitigate the concern

When deciding whether to grant bail, a judge must consider a large number of case-specific factors under each of the three grounds.

SEVERANCE

s. 591(3) The court may, where it is satisfied that the interests of justice so require, order (a + b kinda same, so just say 591(3))
(b) where there is more than one accused or defendant, that one or more of them be tried separately on one or more of the counts.

The trier of fact must consider separately the case against each accused on each indictment.

When 2+ accused are tried together, this leads to the possibility that *probative* evidence in one case is highly prejudicial in another.

There is a strong presumption that if accused are charged with the same offence they will be tried together. This is to ensure *consistency* in the proceedings and to preserve judicial resources.

[*Suzack*]
Both accused claimed it was the other who killed the officer (1st degree).
- co-accused elicited evidence of Suzack's bad character + prior bad acts
- each advanced "cut throat" defences, claiming the other did the act
- Suzack motioned for severance, which is governed by s. 591(3).
- severance may be directed where **"the interests of justice so require"**

Held: persons accused of joint crimes should generally be tried together
- by separating the accused, the truth may never come out of one points to the other
- juries should be presumed competent to understand instructions as to how they can use the evidence, and a carefully crafted jury instruction will often be enough to prevent injustice
- **interests of justice = accused's rights but also consider scarce judicial resources, + that severing trial will require witnesses to testify twice**
  - simple witness testimonies not big deal to have to repeat

2 Factors when accused seeks severance: [*MacEwan*]

1. The mere assertion of a desire to call the co-accused does not make severance automatic.
2. Where an accused seeks severance contending that his right to make full answer and defence will be prejudiced unless the co-accused can be compelled to testify, **two factors** must be addressed by the trial judge:
   i. Is there a reasonable possibility that the co-accused, if made compellable by severance, will in fact testify? (will other guy testify if get severance?)
   ii. If co-accused does testify, is there a reasonable possibility that his evidence could affect the verdict in a manner that is favourable to the applicant?
3. Even if both factors are satisfied, the court still has discretion against severance if there are other factors that outweigh the potential impairment of the accused's right to make full answer and defence.

[*MacEwan*] → here, co-accused testimony was necessary to ensure that the defendant was not wrongly convicted

DISCLOSURE (from Crown)

As part of the accused's right to make full answer and defence, the Crown must turn over *everything* in the accused's file. As in *Stinchcombe,* the Crown has a general duty to disclose any relevant or material information in its possession, regardless as to whether the Crown intends to adduce it.

Standard from *Stinchcombe*:
Is there a reasonable possibility that the information could assist the accused in making full answer and defence?

Write request to the Crown to get disclosure once you're retained. You could get some disclosure initially then will get more a week later.

[*Baxter*] Crown failed to disclose written declarations made by co-conspirators until the end of trial (gave them sentencing leniency)
Held: Initial disclosure should be made before the accused is called upon to elect the mode of trial or enter a plea.
→ Disclosure can be *denied* on the basis of informer privilege

[*Bjelland*] Crown's failure to disclose does not automatically violate the accused's s. 7 rights. The Accused must show *actual prejudice* to his ability to make full answer and defence.
Following such a finding, there are only two situations in which exclusion of the evidence is warranted:
(1) safety of the witness is at risk;
(2) an ongoing investigation requires delay, ie. wiretap

Types of Prejudice: [*Bjelland*]
(1) Prejudice to the accused's ability to make full answer and defence
(2) Prejudice to the integrity of the judicial system

[*Stinchcombe*]
"Relevance" = reasonable possibility that information could assist accused in making full answer in defence.

[*McNeil*] → "Crown" Possession
"Crown" does not mean all government so any gov't department info isn't included in "Crown possession" (except when Crown knows of material that is directly relevant = should be included in)
- defence may alert Crown to something fairly specific (put Crown on reasonable notice)
- use two-part test from *O'Connor* (below)

Remedies:
- adjournment (time to explore content of disclosure/implications) [*Bjell*]
- mistrial (for more major disclosures, what J said *should* have happened)
- exclusion (lose entitlement to use piece of evidence/call witness)
  ^ one way to keep trial moving forward
  Late disclosure should only result in exclusion in ***exceptional cases***:
  (1) unfairness can't be remedied through adjournment and disclosure; or
  (2) exclusion is necessary to maintain the integrity of the judicial system (ie. undue extension of pre-trial detention)
- acquittal/stay of proceedings (judicially shut down entire trial)

For *intentional misconduct*: could be seen as severely negligent
- Crown submits affidavit; may be cross in trial of Crown counsel; may result in new Crown

DISCLOSURE (from 3rd parties)

s. 698(1) → Where person is likely to give material evidence in a criminal proceeding, subpoena may be issued/requires person/attend/give evidence

s. 700(1) → Subpoena requires person to attend, give evidence, bring with them anything they have relating to the subject-matter of the proceedings

O'Connor Applications: (for production of third party records)
- Accused gets a subpoena and serves on 3rd party. Accused has to collect information that the information is "likely relevant to the proceedings"; (common law regime)
- There must be "a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify"
- If the judge agrees with reasonable possibility standard, they may release the documents to defence

- If record holder/interested person advances well-founded claim that the documents are privileged, the existence of privilege will effectively bar the application for the targeted documents, regardless of relevance.

- Where privilege is not in question, judge determines whether production should be compelled in accordance with two-stage test from O'Connor:

O'Connor Test:
(1) If satisfied that the record is likely relevant, judge may order the production of the record for court's inspection

(2) With records in hand, judge determines whether, and to what extent, production should be ordered to the accused

*might need to bring motion to get court order/private search warrant to get some piece of evidence that only defence knows about

RULINGS

(pre-trial applications for severance, disclosure, admissibility, alleged Charter violations)

If seeking constitutional remedy, s. 8 of the *Constitutional Questions Act* requires notice to be served at least 14 days before the day of argument unless the court authorizes shorter notice.

S. 8 *Constitutional Questions Act*:
- constitutional remedy = remedy under 24(1)
- notice must state the law in question, or the right alleged to be infringed
- give particulars necessary to show the point to be argued (including cases)
- known as "notice and foundation"
- all other notice is common law, like reasonable notice

[*Sipes*]
When bringing pre-trial applications, the applicant must give the respondent adequate notice and sufficient particulars.
- notice required depends on the application and must be sufficient to allow the respondent to prepare + respond
- while full written argument is not necessary, need suff. particulars
- most cases → 10 working days before hearing = adequate notice
- reply no less than 3 working days before the hearing

Judge + their Courtroom [*Sipes*]
- Judges have inherent jurisdiction to control their own process
- can make directions to ensure fair trial and efficient process
- Judge *can require* counsel to submit full written submissions and limit arguments (ie. 2 hours)

[*Vukelich*]
Facts: accused applied for a voir dire to determine the constitutional validity of a search of some premises
Held: no factual basis was shown for such a proceeding and denied the VD
- there was ample grounds to support the search warrant and there was not factual basis to the constitutional challenge

Accused is not always entitled to a voir dire
- the inherent jurisdiction of the court means that the trial judge has discretion:
  - refuse a voir dire; or
  - limit its scope

Threshold for holding a VD = reasonable chance of success
- based on statements of counsel
- if statements are insufficient, judge may take a more formal approach: **Vukelich hearing**
- may require affidavits and possibly an undertaking to adduce evidence
- if there is no factual basis upon which an order can be made, then voir dire need not be held

[*Bains*]
Accused sought to exclude four wiretaps on the basis of an alleged abuse of process by the Crown, who inadvertently disclosed details that allowed him to identify two confidential informants. Said the integrity of the judicial process was violated
- Judge dismissed application for *VD* to hear motion.

Held: If the application has ***no reasonable prospect of success*** there is no need to hold a voir dire.
- affirmed Vukelich

[*Wilson*] Indoor cannabis grow-op in large outbuilding on his property
Had Vukelich hearing to determine whether Mr. Wilson had met the threshold test for holding a voir dire. The Crown and defence had agreed before that both would examine the Constable as to elicit evidence, but the trial judge decided to limit the voir dire and did not allow the examination of witnesses.
- It is within a TJ's discretion to limit voir dire arguments
- Might not get a full fledged hearing
- could be limited in ability to hear witnesses, or be given a time constraint on your argument

POWERS OF SEARCH/ARREST

s. 8 = Ev. has the right to be secure against unreasonable search or seizure.
s. 9 = Ev. has the right not to be arbitrarily detained or imprisoned.
s. 495 = A peace officer may **arrest without warrant**
(a) a person who has committed an indictable offence or who on reasonable grounds he believes has committed or is about to commit an indictable offence
(b) a person whom he finds committing a criminal offence; or
(c) a person in respect of whom he has reasonable grounds to believe that a warrant of arrest … is in force within the jurisd. in which the person is found

First ask whether accused can be arrested. ID? Witness?

[*Amare*] *Governing Principles* (Justice Hill)
An arbitrary arrest is an unlawful arrest, and will be arbitrary and unlawful if officer does not have:
reasonable and probably grounds to believe subject has committed, is committing or is about to commit an offence
- requires *compelling and credible* information
- considers the *totality* of the circumstances
- court only considers circumstances *known* to officers
- peace officer must have *subjective belief*
  - that belief must be justified on an *objective* standard (reasonable person in the shoes of the officer)
- is about probabilities (less than balance of probabilities)

[*Juan*]
reasonable and probable grounds must be considered both subjectively and objectively
- officer's experience/training should be considered when assessing objective reasonableness

Facts: undercover officer sets up drug transaction; police arrest dealer as transaction occurs, also arrest passenger sitting care who had no apparent role in the deal → passenger is searched and found to have drugs
Standard for arrest: reasonable and probable grounds must be considered subjectively and objectively
- objective grounds based on "externally verifiable phenomenon" as opposed to perceptions, feelings, etc.
- officer's experience and training should be considered when assessing objective reasonableness:
  - knowledge of high-level drug transactions; it was reasonable to conclude that passenger was either a supplier, body guard, or an accomplice

[*Mann*]
investigative detention = limited common law power
- incidental power to search on arrest is distinct from arrest
- investigative detention requires "reasonable grounds to detain"
- detention must be reasonably necessary on an objective view of the circumstances and inform the officer's suspicion that there is a *clear nexus between the individual and a recent/ongoing criminal offence*
- warrantless search incidental to investigative detention permitted
  - only when it is reasonably necessary to protect officer/public safety
  - search cannot be done to find evidence

[*Pope*] → "dial a dope" operation/ officer thought drug transaction might have been going on by position of the individuals' bodies
- arrests them and finds drugs/cash

Charter issue: were there objective grounds for arrest? from [*Pope*]

DOES IT MEET REASONABLE/PROBABLE GROUNDS?
- *R v N.O.* → NOT MEET reasonable grounds
  - the fact of a hand-to-hand exchange shortly after midnight does not elevate the circumstances to the objectively reasonable level
  - fact that no conversation on exchange not reach level on own
- *R v Luong* → MET reasonable grounds
  - person driving around in rental car, using cell phone, making four stops at residents for 2 mins or less, person comes out of house and sits in car for 30sec then leaves
  - considers: that cop knew drug traffickers use rental cars to avoid, dial-a-dope sellers use cell phones to arrange deals, perform ID quick deliveries, drive around randomly to lose police tail
  - takes in evidence cumulatively, reasonable conclusion = person probably involved in dial-a-dope operation
- *R v Gill* → MET reasonable grounds
  - observation of single transaction, cop 30-40 meters away and facing directly into front of the van (could see)
  - person gets into back seat, driver looks down into lap for 20sec, reached back with shiny plastic "dime bag" to person brings back money in his hand (saw no exchange of hands because tinting)

POWER TO SEARCH A CELL PHONE

If cop searched phone:
First show there was a search of a phone.
Make a **motion** to exclude based on unreasonable search/seizure.
Practical onus on the Crown to show a practical, time sensitive search.

[*Fearon*]
Facts: robbery of jewelry merchant, cops found getaway vehicle, arrested Fearon and accomplice; during pat down search found cell phone in pocket; found draft text message "We did it…", photos of handgun (later found that handgun after warrant to search vehicle, later warrant for phone)

Cell Phones: Heightened privacy interest in personal digital devices.
Scope of the search must be tailored to the purpose for which it is lawfully conducted.

Only **recently sent or drafted** emails, texts, photos, and call log may be examined as in most cases only those sorts of items will have the necessary link to the purposes for which prompt examination of the device is permitted.

TEST = nature and extent of the search must be tailored to the purpose for which the search may be lawfully conducted

Take Notes:
Officers must make detailed notes of what they have examined on the cell phone.
Given this is an extraordinary search power that requires neither a warrant nor reasonable and probable grounds, the obligation to keep a careful record of what/how was searched should be imposed as a matter of constitutional imperative.
- incl. what apps, extent, time of search, purpose, duration

Police officers will not be justified in searching a cell phone or similar device to every arrest.

It is not enough that cell phone search is incidental to the arrest.

Both the nature/extent of the search performed on the cell phone must be **truly incidental** to the **particular** arrest for the particular offence.

Such a search **will comply with s. 8** where:
1) The arrest was lawful

2) Search truly incidental to the arrest; police have a reason based on a valid law enforcement purpose to conduct search; reason is objectively reas.
Valid law enforcement purposes in this context are:

a) protecting the police, the accused, or the public

b) preserving evidence

c) discovering evidence, including locating additional suspects, in situations in which the investigation will be stymied or significantly hampered absent the ability to promptly search the cell phone incident to the arrest

3) The nature and extent of the search are tailored to the purpose/search.

4) The police take detailed notes of what they have examined/how.

JURIES

Charter s. 11(f): Any person charged with an offence has the right
(f) (except in case of military) to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for **five years or a more** severe punishment

* what is the maximum sentence?

[*Gunning*]
SCC said that judge must decide all questions of law, but the jury, who takes its direction from the judge, is the **sole arbiter on the facts**.

- judge has duty to assist the jury by reviewing the evidence and is entitled to give an opinion on a question of fact
- the jury must determine the verdict, unless the judge determines that there is no evidence upon which a properly instructed jury acting reasonably could convict (where a judge must direct the jury to acquit)
- judge must not direct a jury to return a verdict of guilty or direct a jury that one of more elements of an offence or defence are made out (opinions allowed when warranted)

[*Krieger*] tried for unlawfully producing cannabis, was entitled to T by jury
Judges may not direct a jury to return a verdict of "guilty"
- judge can "show the jury how to do right" but cannot deprive them of their responsibility that was theirs alone
- doing so denies the accused their right to a fair jury trial
- SCC ordered new trial

([*Wills*] → certain kinds of evidence ++ likely to draw unreasonable verdict)

WARRANTS

Warrantless searches:
Accused has expectation of privacy (in home office, storage locker, etc.).

[*Hunter v Southam*] → Hunter entered and examined documents at the business premises of Southam

- Presumption that a search without warrant is unreasonable.
- The presumption stands until Crown establishes OBOP:
  - (1) search was authorized by law
  - (2) search was reasonable
  - (3) manner in which the search was carried out was also reasonable (*Collins*)
- The warrant must be issued before the search
- Must be granted by someone capable of acting judicially (not just administratively)
  - an independent judicial officer like a judge or JP
- Person issuing the warrant must have reasonable and probable (not suspicion, ~OBOP) grounds that relevant evidence is present at the site of search.
- Issuer must be presented with:
  - sworn evidence (presented under oath)
  - application needs to be detailed (full + frank disclosure)
- As there is a perception of a conflict of interest, justice must be seen to be done.

*no warrant needed if an emergency

[*Wilson*] → accused charged with running a cannabis grow-op;
- police obtained warrant to search detached garage based on neighbour's complaints
- (lack of snow on roof, infrared screening, smell of weed)

Challenging a warrant: (test from *Garofoli*)

Whether the material filed in support of the warrant, as amplified upon review, could support the issuance of a warrant.

- Amplification/calling evidence in a voir dire, is subject to a *Vukelich* ruling.

When an accused seeks to challenge a warrant, there is no right to a voir dire. The matter should proceed as follows
- The trial judge will decide whether a VD is necessary/whether calling of evidence is permitted.
- Accused must obtain leave to cross-examine, followed by re-examination.
- TJ should determine whether the record, as amplified on review, could support the issuance of the warrant.

BIAS

[*Yukon Francophone School Board*]
allegation that judge's comments + interventions at trial as well as his community involvement before + after appointment gave rise to reasonable apprehension of bias

TEST FOR BIAS:
Would an informed person, viewing matter realistically and practically (having thought the matter through), conclude real likelihood or probability of bias?

Would they think the decision maker (consciously or unconsciously) would not decide fairly?
- to ensure fairness and *appearance* of fairness
- consider **totality** of the circumstances (relatively high burden)

Judges may intervene in adversarial debate (can interrupt, ask questions, etc.) but cannot take quasi-counsel role.

They can bring in different perspectives but cannot *close his/her mind* to persuasion.

[*Brouillard v the Queen*] → judge interrupted witnesses, asking them 60+ questions with repeated sarcasm (have to add all points of bias together and see if *together* meets the threshold)

CLASS OF OFFENCE / APPLICABLE TIME

s. 34(1)(a) the offence is assumed indictable unless Crown elects to proceed summarily

Summary offences must be tried before a provincial court judge.
- must be brought within 6 months of the offence (unless Crown + defence agree to proceed summarily /s. 786)
- have maximum six-month sentence
- [*Dudley*] sometimes Crown will choose to proceed summarily but will fail to approve the charge on time

Indictable offences generally offer the accused an option:
(1) trial by provincial court judge

(2) trial by supreme court judge

(3) trial by jury in supreme court.
*no limitation period

There are special rules for s. 469 and 553 offences (including murder).

469 → must be before jury, unless Crown + defence agree to go judge alone (MURDER IS A 469 OFFENCE)

Hybrid: can proceed either route

[*Dudley*]
Crown wanted to proceed summarily but missed deadline
- this was a hybrid offence, so then went to proceed by indictment

- hybrid offences are *deemed to be indictable* unless the Crown elects to proceed summarily

- AOP would require improper Crown motive etc.; not here

* a hybrid offence that can no longer be prosecuted summarily without the defendant's consent may, absent abuse of process, be prosecuted by indictment, *whether or not* the Crown initially elected to proceed summarily

[*Dinely*]
accused raised *Carter* defence as an independent means to raise a doubt about the reliability of Breathalyzer results, which led to acquitta
- on appeal, decision reversed and ordered new trial on basis of s. 258(1) as amended (applied retrospectively!)
- SCC found could not be applied retroactively and that Mr. Dineley's acquittal should therefore stand

  - change to procedural rule → look at what's there at time of trial
  - change to substantive rule/law → go back in time for that
  - if affects rights in substantive way, impacts full answer and defence, may be looked at as substantive even if procedural

CLOSING ADDRESSES

S. 651(1) + (3) = If the defence examines no evidence/witnesses, the defence addresses jury last. If they do examine witnesses, defence addresses jury before Crown. Crown is last if defence examines witnesses.

[*Rose*]
Right to full answer and defence is protected by s. 7,
but does not imply an entitlement to rules and procedure
most likely to result in a finding of innocence

- right entitles the accused to rules and procedures which are fair in the manner in which they enable the accused to defend against and answer the Crown's case
- [*Lyons*] "at a minimum, the requirements of fundamental justice embrace the requirements of procedural fairness"
- does not entitle accused to "the most favourable procedures that could be possibly imagined"

UNREASONABLE DELAY

S. 11(b) of *Charter*
Any person charged with an offence has the right
(b) to be tried within a reasonable time

[*Morin*] decision was a reaction to a previous provincial court case where the SCC said the case should have taken 8-10 months
- made "danger zones" for delayed trials
- looked at a number of factors, but main one was *prejudice* to accused
-

[*Jordan*] total delay was 49.5 months
S. 7 impacted in the previous framework (was unpredictable)

New *Jordan* framework:
Prejudice does not play an explicit role, but it is presumed that accused is prejudiced if ceiling is exceeded.
- absence of prejudice *does not* turn unreasonable time (over limit) into reasonable time

Presumptive ceiling: (from charge to end of trial)
Provincial Court: 18-month limit — Superior Court: 30-month limit (or cases going to Prov court after preliminary hearing)

(1) Accused must establish that there is a basis for the s. 11 inquiry by looking to overall period between the charge and the completion of trial to determine whether its length merits further inquiry.

(2) Subtract delays attributable to the defence ("waiver")
- defence must have so indicated in clear and unequivocal terms
- conduct of the defence also considered (if it reveals something more than mere acquiescence in the inevitable, and meets the high bar of being clear, unequivocal, and informed acceptance) (onus on Crown to prove this)

(3) Institutional delay that is not the fault of the Crown *does* count toward the presumptive ceiling.

(4) If Above Ceiling:
Presumptively unreasonable.
Crown must rebut this presumption through showing *exceptional circumstances*, lying outside Crown's control.
- exceptional or unavoidable delay
  - lie *outside* the Crown's control in the sense that
    (i) they are reasonably unforeseen or reasonably unavoidable; *and*
    (ii) Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise (if meet this definition, will be considered exceptional)

    ⇒ depends on trial judge's good sense + experience

Fall under 2 categories:

(a) discrete events
ie. medical/family emergencies, unexpected event at trial

(b) particularly complex cases
ie. because of nature of issues/evidence [not seriousness of crime], require an inordinate amount of trial or preparation)
ie. lots of witnesses, requires lots of expert witnesses, charges occur over an extended period of time…

(5) If Below Ceiling: (rare)

Defence has onus of establishing that: (both)
(i) they took meaningful steps + demonstrated a sustained effort to expedite
(ii) case took markedly longer than reasonably should have
- consider: complexity, local considerations, whether the Crown took steps to expedite
- is a question of fact for the trial judge

Cases **currently in the system:**

If exceeds limit:
- Crown must satisfy the court that the time is justified because of a reasonable reliance on the old law

If below limit:
- defence must show that the case has taken *markedly* more time than was reasonably required
- also → consider defendant initiative was not explicitly required before new law

POWERS OF THE APPELLATE COURT

BC → notice of appeal must be filed within 30 days of sentence

S. 675 = sets out the rights of a person convicted of an indictable offence to appeal to the Court of Appeal:

1. On any ground of appeal that involves a question of law alone
2. On any ground of appeal that involves a question of fact or a question of mixed fact and law; however, on this basis the accused must be granted leave by the court of appeal.
3. On any other ground of appeal that the court of appeal considers sufficient

The Crown can only raise errors of *law* on appeal

Following an appeal hearing, s. 686 sets out grounds upon which a reviewing court can allow an appeal:

- The verdict is unreasonable or cannot be supported by the evidence
- The trial judge erred in law
- On any ground there was a miscarriage of justice

The application of the law to the facts is considered a question of mixed fact and law; however, for purposes of appeal it is considered a question of **law**.

ERRORS OF MIXED FACT + LAW

[*Grouse*]
Standard of review on mixed questions of law and fact, such as the application of a legal standard to the facts, lies along a spectrum:

ie. if the legal test requires consideration of certain factors but they are not all considered by the judge
- otherwise, mixed questions of law and fact should be reviewed on the palpable and overriding error standard.

[44] in *Grouse*
1. The judge's findings of fact, including the weight to be assigned to the evidence and the inferences drawn from the facts, are to be reviewed on the standard of palpable and overriding error.

2. The judge's statements of legal principle are to be reviewed on the standard of correctness.

3. The judge's application of the principles to the facts is to be reviewed on the standard of palpable and overriding error unless the decision can be traced to a wrong principle of law, in which case the correctness standard should be applied.

ERRORS OF LAW / REVERSIBLE ERROR

ASK:

(1) Was there an error in law?

(2) Is it reversible? If yes – curative proviso.
If no – retrial, acquittal, etc (see REMEDIES below, s. 686(2))

s. 686(1)(a)(ii) = ERROR OF LAW
On the hearing of an appeal against a conviction … the court of appeal

(a) may allow the appeal where it is of the opinion that

(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law

STANDARD OF REVIEW for ERRORS OF LAW: **correctness** [*Grouse*]

[*Austin*] → accused charged for raping woman but argued the story was made up; jury asked whether they should be focusing on credibility or whether the Crown had proved the case beyond a reasonable doubt

- accused argues jury instructions was error in law
- failed to explain jury can believe neither story and acquit

Held: counsel's failure to object to legal errors during trial will be a significant consideration on appeal, however, they do not negate a clear error on a critical legal issue

Is the error REVERSIBLE?
Did the error have an overwhelming affect on the main charge?

ERRORS OF FACT

s. 686(1)(a)(i) = UNREASONABLE VERDICT
On the hearing of an appeal against a conviction … the court of appeal

(a) may allow the appeal where it is of the opinion that

(i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence

*limited power for appellate review of the findings of fact @ trial [*Mars*]
- isn't there to look at all evidence presented at trial

STANDARD OF REVIEW: palpable + overriding error [*Grouse*]

Is an error reversible? Imagine the proceedings without the error: is there a reasonable possibility that the verdict could have been different?
Court considers three factors:
- nature of the error
- circumstances of the case
- position of the accused at trial

[*Zadeh*]
Argument: TJ's verdict was unreasonable in the sense that it cannot be supported by the evidence, or in the alternative, that the verdict was reached illogically or irrationally within the meaning of [*Beaudry*]

Verdict can be unreasonable if TJ has drawn an inference/made a finding of fact essential to the verdict that:
(1) is plainly contradicted by the evidence relied on by the TJ in support of that inference or finding, or
(2) is shown to be incompatible with evidence that has not otherwise been contradicted or rejected by the TJ *Beaudry* in *Zadeh*

- expert said effect of GHB would be 30 minutes after consumption and accused said was hour and a half
- judge resolved the conflict in the issue of timing by saying there was no conflict
- had the judge acknowledged the existence of the discrepancy he would have found a reasonable doubt or rejected the complainant's testimony as inaccurate (then convicted accused)
- where an appeal is allowed, remedy depends on whether guilt is reasonably available on the evidence → if record does not disclose evidence capable of supporting a conviction , accused is acquitted
- if verdict is unreasonable under *Beaudry* and such evidence is present, a new trial is ordered (= what happened in *Zadeh*)

[*Caron*] → A trial judge's findings of fact are entitled to considerable deference on appeal. In considering whether evidence has been properly admitted under s. 24(2), "**the trial judge's underlying factual findings must be respected, absent palpable and overriding error**" (*Grant*)

CURATIVE PROVISO – REVERSIBLE ERROR

Applies to cases where the evidence against the accused is overwhelming or it can be safely said that the legal error was harmless because it could not have had an impact on the verdict. [*Sarrazin*]

s. 686(1)(a)(iii) = CURATIVE PROVISO
"On the hearing of an appeal against a conviction … the court of appeal

(a) may allow the appeal where it is of the opinion that

(iii) on any ground there was a miscarriage of justice;

[*Sarrazin*] → accused shot victim and victim died a few weeks later, but it was unclear whether they died from the wound or from cocaine ingestion

- CA decided TJ erred in law by not leaving attempted murder with the jury
- Held: failure to leave attempted murder was not harmless; new trial

- **CRITERIA FOR REVERSIBLE ERROR**:
  an error is reversible if there is a *reasonable possibility* that the verdict would have been different
- application of 686 is limited to cases where the evidence is *overwhelming* or the legal error was *harmless*

Policy reason for 686: [*Sarrazin*]
"Parliament's recognition of the public interest in avoiding the cost and delay of retrials where a properly instructed jury at a retrial would **inevitably reach the same verdict**"

Curative proviso can only apply where the error is *harmless* and could have had no impact on the verdict.

- even if court thinks the appeal will be resolved in the accused favour due to an error of law, the court may dismiss the appeal if it is of the opinion that *no substantial wrong* or *miscarriage of justice* has occurred

UNREASONABLE VERDICT

Principles of unreasonable verdict (*Beaudry* as affirmed in *Zadeh*)
"To decide whether a verdict is unreasonable, an appellate court must ..
determine whether the verdict is one that a properly
instructed judge/jury could reasonably have rendered.

The appellate court may also find a verdict unreasonable if the TJ has
drawn an inference or
made a finding of fact essential to the verdict that is:

(1) plainly contradicted by the evidence relied on or
(2) is shown to be incompatible with evidence that has not otherwise been contracted or rejected by the TJ."

Test for UNREASONABLE VERDICT from [*Wills*]:

686(1)(a)(i) requires the appellate court to:
- *test* the jury's verdict against a reasonableness standard
- reasonableness standard = whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered
- independently weigh the totality of the evidence (CA is not making its own assessment, but determining whether verdict is beyond the reasonableness limit (don't see/hear witnesses…))

[*Mars*] Accused's print on a pizza box.

Assessing reasonableness of verdict (**considerations**):

(1) What is the burden of proof applicable in this case?
- where Crown's case depends on *inferences* drawn from the primary facts, must ask
"Could a Trier of Fact acting judicially be satisfied that the accused's guilt was only reasonable conclusion available on totality of the evidence?

(2) Is the verdict based more on exculpatory or Inculpatory evidence?

Inculpatory: (tends to prove guilt) ie. fingerprint on pizza box
- transportable, could stay on box for years
- can't in law convict on this kind of evidence

Exculpatory: (tends to prove innocence) ID evidence by witnesses

(3) Reasonableness is a fact-based determination, so standard to be applied to appellate court involves a weighing of the evidence (process case-specific)

*[*Wills*] → certain kinds of evidence ++ likely to draw unreasonable verdict

MISAPPREHENSION OF EVIDENCE

[*Shen*] accused changed his testimony over the morning break (changed who he said had hit him) and judge took second story as what had actually happened without considering repeated misstatements by the victim

Even if there is evidence still to convict the accused…
"If the misapprehension of the evidence plays an **essential part of the reasoning process** resulting in a conviction, then the appellant does not also have to show that the verdict is unreasonable or not supported by the evidence."

(can look at reasonability of verdict too but that is not part of the test for misapprehension of evidence)

Misapprehension of essential evidence = miscarriage of justice → new trial

REMEDY

s. 686(2) [Order to be made]

(2) Where a court of appeal allows an appeal under paragraph (1)(a), it shall **quash** the conviction and

(a) direct a judgment or verdict of **acquittal** to be entered; or

(b) order a **new trial**

PRELIMINARY INQUIRIES / DIRECT VERDICT

s. 535: When an accused is charged with an indictable offence, a justice shall conduct a preliminary inquiry to assess the evidentiary basis for the charge.

s. 540: the preliminary inquiry justice must hear the Crown's evidence

s. 541: the preliminary inquiry justice must hear the accused's witnesses

COMMITTING OR NOT COMMITTING TO TRIAL:
s. 548(a): after all evidence taken, justice shall:
- commit accused to trial "if in his opinion there is **sufficient evidence**",
- discharge the accused "if in his opinion on the whole of the evidence no sufficient case can be made out"

[*Arcuri*]
a preliminary inquiry judge must:
- determine if there is sufficient evidence to permit a properly instructed jury, acting reasonably, to convict
- consider whether the evidence taken as a whole could reasonably support a verdict of guilty
- weigh the evidence in the limited sense of assessing whether it is *capable of supporting the inferences* the Crown asks the jury to draw

*this task does not require the preliminary judge to draw inferences from the facts or to assess credibility

In determining whether the Crown's evidence is **to be believed**:
- do a "limited weighing" (not looking at reliability of evidence itself)
- assess reasonableness of the inferences to be drawn from the circumstantial evidence

Broader Theory Notes

Must always strive to find a fair and reasonable balance between:
- fair trials for accused persons
- the state's ability to regulate criminal activity

[98] in [*Rose*]
Right to make full answer and defence protected under s.7
= principle of fundamental justice = "one of the pillars of criminal justice on which we heavily depend to ensure the innocent are not convicted" (*Stinchcombe*)
Right to FA+D manifests itself in:
- right to full + timely disclosure
- right to know the case to be met before opening defence
- principles governing re-opening of Crown's case
- rights of cross-examination, etc.
- linked to presumption of innocence, right to fair trial, principle against self-incrimination

Kienapple will not bar multiple convictions when: offences were designed to *protect societal interests*, where offences prescribe different consequences

Jordan Discussion:
- for accused persons may present opportunities to obtain a stay in circumstances where it previously would not have been available
- where the ceilings are exceeded, the accused no longer has to undertake the task of proving that they suffered prejudice as a result of the delay
- Crown can no longer rely on chronic institutional delays in the court system as an excuse for failing to bring a case to trial within the presumptive ceiling
- also brings up issue for accused in more straightforward criminal matters, where the length of most cases would normally not come anywhere near the presumptive ceilings
- could mean regressing toward higher level of delay (bad if accused is held in custody and is waiting)
- will also depend on how strictly the exceptional circumstances are used ("unreasonableness")