**Law 260 – Advanced Criminal Procedure – Harris**

**Written by Sandra Raath**

* **General Theme**: Balance between **rights of accused, societal rights, and rights of prosecutors** to bring cases before the courts
* **S. 7 Rights:** Right to trial by impartial jury and Right to make full answer and defence (FAD) (Includes the right to full and timely disclosure, and the right to know the Crown’s case before leading defence evidence)
* Right to make FAD does not imply an entitlement to those rules and procedures most like to result in finding of innocence (***Rose***)

### I. Charge Approval

**A) Standard/Threshold**

* + In BC, **Crown** acting in a quasi-judicial capacity has **control over charge approval**, not the judge (***Mandamus***)
    - In BC, charge approval is generally outside the scope of the court
    - Different jurisdictions can use different processes (nothing set uniformly across country) – Almost always Crown, Police in Ont.
* **Policy:** Mere fact of charge can have a monumental impact on an individual
  + Stigma, expense, negative implications for family/friend relationships, damage to future career opp’s, loss of freedom etc.
  + Not something that society should ever take lightly
  + Need a charge approval process with a clear standard to try to ensure only legitimate cases are put into the system
  + **Standard for charge approval** is very high (***Mandamus***):

1. There has to be a **substantial likelihood of conviction** (Possibility is not enough)

* **Example Questions**:
  + - 1. Are there credibility/reliability issues with the witnesses?
      2. Are there admissibility issues with some of the evidence?
      3. Are there obvious defences?
      4. Is there evidence on each element of the offence?
* Crown must keep this requirement in mind **throughout the process**
  + - * May need to reassess charge if likelihood of conviction changes (right up to trial or even during trial)
      * Defence can ask them to reassess (and can disclose material early or point out potential flaws in case)
* Crown can direct police to go back and collect more evidence if there is not enough
* **Policy**: Lack of substantial likelihood of conviction has a number of consequences (Ex. Harmful to individual, and Jams

criminal justice system with needless cases – Can lead to strong cases being thrown out of court)

1. It has to be **in the public interest** that the charge be prosecuted
   * Used rarely
     + Generally used for **less serious** offences that have **since been made right** or in extraordinary circumstances
     + Ex. Accused may be suffering serious illness, situation may have turned around, crime not very serious etc.

**B) Crown Independence**

* An exercise of **prosecutorial discretion** will be treated with deference, and not subjected to outside influence or review (***Krieger***)
  + - **Policy**:
      * Constitutional right to an independent prosecutor
      * Crown can better focus on core aspects of substantial likelihood of conviction and public interest
      * Constantly justifying decisions may affect choices – They may make decisions in a way that will best protect themselves
      * Crown approval process may still be screened by more senior counsel in the AG’s office
  + **Core elements of prosecutorial discretion** encompass the following (***Krieger***)
    1. Discretion whether to bring the prosecution of a charge laid by the police
    2. Discretion to enter a stay of proceedings in either a private or public prosecution
    3. Discretion to accept a guilty plea to a lesser charge
    4. Discretion to withdraw from criminal proceedings
    5. Discretion to take control of a private prosecution
* Decisions regarding the nature and extent of the prosecution
* **Limits to how far this protection goes**
  + Courts can interfere in cases of **flagrant impropriety** (***Krieger, Mandamus***) or to prevent an **abuse of process**
    - Ex. If there is evidence that crown counsel acted for an **improper purpose** (outside their professional duties), such as

approving charges based on political influence or prosecutorial bias

* + Defence counsel must show on a **balance of probabilities** that such an abuse exists (very rarely successful)
    - Defence likely needs **access to the crown documents** discussing the approval of the charge
    - **Lack of evidence not generally sufficient**, (but may indicate some abuse occurred)
  + **Access to Internal Crown Documents** (***Reyat***)
    - High threshold test due to prosecutorial independence – Have to prevent documents from disclosure on regular basis
      * **Policy**: If Crown has to routinely turn over their documents, this may influence their decision
      * **Evidentiary Threshold:** Defence must show a **real and substantial possibility of bad faith or improper motives on part of Crown**
        + Not Probability (less stringent) - Defence will then use these documents to show abuse on balance of probabilities

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| **Keywords** | **Case** | **Facts + Analysis** |
| Private charges | ***Application For An Order of Mandamus***  (2000 – BCSC) | *Mr. Parsons brought private charges against former Attorney General, Law Society etc. claiming the Attorney General’s decision to direct a stay of proceedings in a certain case was a flagrant impropriety*  >When individuals bring private charges against others, the Attorney General has the power to step in  and decide whether or not the charge should proceed  >Can grant a stay of proceedings to prevent misuse of criminal process by private parties  >Decision to direct stay of proceedings not subject to judicial review except in the case of **flagrant impropriety**  >Not demonstrated by fact that a former AG and the ministry are named in the information  >Bone fide application of charge approval criteria (above) cannot amount to flagrant impropriety |
| Professional Conduct vs. Prosecutorial Discretion | ***Krieger v. Law Society of Alberta***  (2002 – SCC) | *P submits Law Society does not have jurisdiction to review exercise of prosecutorial discretion* *of Crown*  >**Law Society has the jurisdiction to investigate any alleged breach of its ethical standards**, even those  committed by Crown prosecutors in connection with their prosecutory discretion  >Review by the Law Society for actions of bad faith or improper purpose does not constitute a review of the  exercise of prosecutorial discretion *per se* since these actions are not within the scope of the powers of the AG  >Law Society’s jurisdiction to review **failure to disclose** is **limited to examining whether it was an ethical violation**  >Not every breach of the legal and constitutional **duty to disclose** constitutes a violation of an ethical duty |
| Disclosure of Internal Crown Documents | ***R v. Malik, Bagri and Revat***  (2002 – BCSC) | *Mr. Reyat made an application for disclosure of internal Crown documents*. *Application brought in context of application for a stay of proceedings based on an abuse of process and double jeopardy (two charges brought on same evidence). Reyat was initially charged with manslaughter of only two individuals. Crown later collected new evidence that allowed them to charge him with murder for several others. New evidence was found to be admissible. Appeared that Crown was bringing up new charges on the old evidence.*  >Mr. Reyat did not establish any real or substantial possibility of bad faith or improper motives – No disclosure  >Fact that there was some inadmissible evidence was not sufficient to meet the threshold |

### II. The Indictment

* **Relevant *Code* Provisions**: SS. 581-587, 601, 683(1)(g) (LIST?????)
* **Main Elements** of the crime come from **two sources:**
  1. **Criminal Code Provision** (sets out the minimum AR and MR elements that the Crown must prove)
  2. **Charging Sheet** (Called “**Information**” for less serious offences or “**Indictment**” for more serious offences)
     + **S. 581(3)** – Must contain sufficient detail of the circumstances of the alleged offence to give the accused reasonable

information with respect to the charge to be proved against him and to identify the transaction referred to

* **S. 587** – If indictment is vague, the defence can ask the court to require the Crown to give more detail (LOOK UP)
* **General Rule**: Crown must prove the Code requirements **and** the particular offence **as particularized**(***Saunders***)
  + **Policy**:
    - Accused must be able to make **full answer and defence**
      * Accused cannot defend himself if only provided with a very vague charge (see ***R v. R(G)***)
        + Accused is only called upon to meet the charge **as put forward by the prosecution** (***R v. R(G)***)
      * Defence would be unable to advise client or prepare case; Crown would not know what evidence to gather
      * **Overly broad indictment may** **limit future charges**
        + Accused may be guilty of same crime in multiple circumstances or separate crimes in similar circumstances
        + If Crown later tries to charge accused with other aspects of the same crime or other crimes in the same circumstances, accused can argue they have already been charged with that crime (double jeopardy)
        + If indictment is vague, Crown may be dealing with all aspects of crime without realizing it
        + **Exceptions:**

1. **Rule of Surplusage (R v. *JBM***)

* If some details in the charge are **completely surplus**, Crown may not need to prove them
  + **Surplus**: Something that is not essential to constitute the offence (not necessary to be proved)
* May only be used where it would **not prejudice the accused**
  + Generally, **two circumstances** where the court will find prejudice:
    1. Defence took a particular tactic or failed to take particular steps in reliance on the charge as written
    2. Even if the element was surplus, it was a pretty significant focus of the Crown Case

1. **Amendment Power of Crown** (***Irwin***)

* **S. 601** – During trial, court has power to **amend defective indictment** or **amend indictment to conform to the evidence**
* **S**. **683** – After trial, court of appeal has power to amend the indictment (same scope as power to amend at trial)
  + **S. 601 (4)** – **Factors to be considered** **by the court** prior to making an amendment:
    1. Matters disclosed by the **evidence**
    2. **Circumstances** of the case
    3. Whether the accused has been **misled or prejudiced** by any nonconformity or error in the charge
    4. Whether the proposed amendment can be made **without injustice being done**
* These factors are really looking at **whether the accused would be prejudiced by the amendment**
  + - **Look at:**
      1. **Timing** – **How Late in the Day is the Change Being Made?**
         * Later the change is made, the greater the chance/presumption of prejudice
      2. **Significance of the Alteration** **– How Significant is the Change?**
         * Switch of factual transaction during trial will cause prejudice to accused (***Irwin***)
         * Large risk when material amendments to indictment made on appeal (***Irwin***)

1. **Would Defence Have Been led Differently if Charge had been Changed Prior to Trial?**
   * + - Removal of a defence or legal argument after amendment not necessarily prejudicial
2. **How Important to the Crown’s Case is the Detail?**
3. **What Effect Will the Change Have on the Accused’s Ability to Meet the Charge?**

* **No blanket rule against making any changes** – **Charge/Offence itself may be changed**, but this will be rare
* Offence cannot be changed under power to correct defect unless original offence also defected (must be changed under power to amend to make a charge conform to the evidence)
* **S. 601 (4.1)** – **Date/Time and Place** of offence are **not considered essential elements** of the offence (***ASK!!!***)
  + - However, they may become essential based on what the accused has been charged with
* **Policy for Exceptions**:
  + Concern about getting people off on **pure technicalities** (Ex. Lack of proof of unimportant detail)
  + Potential **double jeopardy** problem if charge is **too particular** (Cannot bring two charges on same evidence)
  + Broad powers of amendment **promote the determination of criminal cases on their merits** (application of relevant substantive law) and **avoid a multiplicity of proceedings** (***Irwin***)

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| **Keywords** | **Case** | **Facts + Analysis** |
| Specification of Drug in Charge  Crime  Proven as Particularized | ***R v. Saunders***  (1990 – SCC) | *Crown charged Saunders with conspiracy to import heroin. During trial, it became clear that the substance the accused is alleged to be associated with is cocaine, not heroin. Accused admitted to importing other drugs, but not heroin. Judge tells jury any drug will suffice – Accused is convicted.*  >Offence must be proven **as particularized in the charge**  >Once narcotic chosen, accused cannot be convicted if a narcotic other than one specified is proved  >Otherwise, would undermine notice function of providing particulars  >**Where** **Crown is uncertain** as to particulars of drug, it can decline to give identity of specific drug  >Charge can stand provided it sufficiently identifies the particulars of the alleged conspiracy in other ways  >If drug is specified, Crown can be more broad about other particulars of the offence  >Accused was on notice that drug was heroin (and incriminated himself with respect to cocaine on this basis)  >To change charge now would be unfair and prejudicial to accused |
| Sexual Exploitation Charge  Surplusage Rule | ***R v. J.B.M***  (2000 – CA) | *Accused, an intern with a drug and alcohol residence, was charged with sexual exploitation. Sexual contact did not occur while complainant was actually in residence program*.  >**Indictment specified**: 1) Accused in a position of trust/authority; 2) Victim inrelationship of dependence  >Judge found position of trust, but no relationship of dependency (no authority over victim)  >**S. 153 of CC requires** position of trust or relationship of dependency  >Indictment turned “or” into “and” – May have been error  >Crown not required to prove dependency if it proved position of trust (**Surplus –** Both were not needed)  >Court did not feel surplusage affected the defence (had charge been correct, defence would have been same)  >No defence based on diff. btw position of dependency or trust; Defence claimed situation did not happen |
| Change to Offence on Appeal | ***R v. Irwin***  (1998 – ONCA) | *Accused charged with causing bodily harm during assault. He claimed he was acting in self-defence*.  >Crown attempted to **switch the offence upon appeal**  >Assault requires intent to cause bodily harm – No intent was found in this case  >Similar charge of unlawfully causing bodily harm captures situation but does not require intent  >**Large risk of prejudice** when making material amendments to indictment on appeal – Case demands caution  >Judge found **no prejudice** – Amendment allowed; Accused convicted  >Defence used was self-defence; Equally applicable under new charge  >Facts and essential elements requiring proof by the Crown remained the same  >If defence had been based solely on lack of intent, there would be been a higher likelihood of prejudice |

### III. Bail

* **General Rule**: Bail hearings happen in **provincial court**
* **Exception: S. 522** – Offences set out in S. 469 (Ex. Murder) go before Supreme Court)
* Accused will not always have a bail hearing (may be released w/o hearing), and when held, hearings are not always contested
* Accused will have a strong interest in getting the bail hearing as soon as possible
  + However, contested bail hearings **take time to prepare**, and accused has the **best chance of bail** **at initial bail hearing**
* **Benefits of Bail**:

1. Bail **avoids placement in pre-trial custody**

* Accused has not yet been found guilty of anything (Still under presumption of innocence)
* Pre-trial custody can be quite harsh – Mixed will all types of offenders; Essentially being warehoused before trial
* Pre-trial custody is a very **severe restriction on liberty** – Even harshest of bail agreements grants more liberty
* Bail is less severe on accused’s personal circumstances than pre-trial custody (job, family, friends, stigma etc.)

1. Bail improves the accused’s ability to defend himself

* Accused needs to meet with lawyer often (harder to do in pre-trial custody) to be prepped as a potential witness and to provide insight into the evidence (denial of bail may be a significant hurdle to full answer and defence)
* Strong statistic relationship between people not being allowed bail and the being convicted (***Toronto Star***)

**Statutory Provisions**

* **Relevant *Code* Provisions**: SS. 469, 496-499, 503, 515, 516(1), 517, 518, 679; **Relevant *Charter* Provisions**: S. 11(e)
* ***Charter s. 11(e)*** *–* Any person charged with an offence has the right not to be denied reasonable bail without just cause
  + No presumption of no bail in any offence; Have to be very careful in denying bail (undermines presumption of innocence)
* **SS. 497 – 499** – Powers of police officers to release accused
* **S. 503(1)(a)** – Person who is arrested and detained must be taken before a justice “without reasonable delay” but within 24 hours of arrest
* **S. 515** – Important **bail issues and criteria**
  + Applies to offences other than those set out in **S. 469** (Ex. Murder, Piracy, and Treason)
  + **S. 515(2)** – **Types of guarantees** an accused may need to provide upon release
    - Ex. **Undertaking** – May need to guarantee that he/she will follow the conditions of bail and appear in court
      * If accused is charged with an offence while on bail, he can also be charged with breaching their bail conditions
    - Ex. **Sureties** – May need to put some resources at stake that are put at issue if the accused breaches bail conditions
      * Can put up resources himself or have other people act as sureties to guarantee accused will follow conditions
      * Sureties may be named or unnamed
      * Often the sureties need independent legal advice (To ensure they understand the ramifications)
  + **S. 515(4)** – Judge can attach **reasonable conditions** to bail (Bail does not mean freedom)
  + **S. 515(6)** – Traditionally, **Crown has onus of proof** to establish **on balance of probabilities** that accused needs to be detained
    - **Exceptions** for a number of indictable offences (s. 569 offences + a number of other listed indictable offences)
    - **Accused** needs to satisfy **on a balance of probabilities why they should be released**
* **S. 516(1)** – Adjournment of a bail hearing cannot exceed three days except with the consent of the accused
* **S*.* 518(1)(e)** – **Evidentiary standards** for bail hearings are very flexible
  + Practically no prohibitions; Prosecutor may lead any evidence that is “credible or trustworthy”

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| **Keywords** | **Case** | **Facts + Analysis** |
| Mandatory Publication Ban | ***Toronto Star Newspapers v. Canada***  (2010 – SCC) | >**S. 517** ***CC*** – Court required to order a publication ban if an accused applies for one  >Ban applies to evidence and information produced and representations made at a bail hearing  >Media cannot publish this information until the trial has ended or the charges have been dropped  >Order limits freedom of expression and can impair truth seeking function of trial  >Openness permits public access to information about court proceedings, and allows for criticism  >Witnesses may be brought forward by media reporting  >But, mandatory ban ensures expeditious bail hearings, protects trial fairness, including lessening jury  bias and stigma, and allows accused to focus on his/her liberty rather than privacy interests  >Low evidentiary standards – Some material adduced at hearing may be quite prejudicial  >Adding a contested trial on a publication ban is not fair to the accused  >Mandatory ban is **justified under s.1** of the Charter |

**S. 510 (10) – Reasons to Potentially Deny Bail**

* Crown only needs to establish cause to detain on one ground
* When accused has onus, they must prove why they shouldn’t be detained on all three grounds
* Fairly significant circumstances required to detain on any of the grounds (***Parsons*** and ***Bhullar***)

1. **S. 515(10)(a) – Primary Ground**

* Bail may be denied if **detention is necessary to ensure accused’s attendance in court** (Concerned with **potential flight**)
* **Consider:**
  + **Degree of Accused’s Roots in the Jurisdiction** (Ex. Property, Family, Close Friends, Memberships in Community Orgs)
    - Can also look at ties in neighbouring jurisdictions (***Parsons***)
  + **Evidence of a Steady Lifestyle/Responsibility**
    - Does accused have a steady job he can likely keep if not in custody? Is accused taking classes?
    - Has accused consistently shown up for work in the past?
  + **Generalities of Crime** (Flight risk posed by persons in that type of crime in general) (***Parsons***)
  + **Circumstances of Case**
    - Ex. Did the accused turn himself in or make arrangements to be brought into custody?
    - Ex. Did the accused provide a large surety? (If yes, greater incentive not to flee)
  + **Criminal Record** – Did the person show up to court while under previous court orders?
  + **Health of the Accused** (***Parsons***)

1. **S. 515(10)(b) – Secondary Ground**

* Bail may be denied if **detention is necessary for the protection or safety of the public**, **including** any **substantial likelihood** that the accused will **commit a criminal offence** or **interfere with the administration of justice** (Ex. Destroying Evidence) while on bail
  + Denial of bail must be necessary (not just convenient or advantageous) and risk must endanger public (***Bhullar***)
  + Limited risk of further offences or interference can be addressed through strict bail conditions (***Bhullar***)
  + **Consider**:
    - **Criminal Record**
      * Has the accused committed a lot of offences? Is accused entrenched in a criminal lifestyle?
      * Were any previous offences committed while under court order not to commit offences or on probation?
      * Do they have a prior record of attempting to interfere with the administration of justice?
      * How serious were the prior offences? (The more serious the offence, the higher likelihood of a risk)
      * **Environment Accused will be Released Into**
      * Does the accused have a job/family to return to?
      * Is the environment stable? (Ex. Is accused being released to a gang?)
      * **Reports about Personality**
      * Are there prison reports etc. showing a propensity for violence or committing offences?
      * Are reports of violent tendencies the result of psychiatric difficulties that are now under control?
      * **Circumstances of Case** (Ex. Is there evidence that accused has already attempted to hide evidence/influence witnesses)
      * **Health of the Accused** (***Parsons***)

1. **S. 515(10)(c) – Tertiary Ground**

* Bail may be denied if **detention is necessary to maintain confidence in the administration of justice** **/ criminal justice system**
* **Consider:** 
  + **Apparent Strength of the Crown’s Case**
  + **Any Defences Open to the Accused** (***Parsons***)
  + **Presumption of Innocence** (***Parsons***)
  + **Personal Circumstances of the Accused** (***Parsons***)
  + **Potential for lengthy imprisonment**
  + **Gravity of the Nature of the Offence**
    - **Circumstances Surrounding the Commission of the Offence (**Ex. Whether a **firearm** was used)
  + Reserved for the most serious offences committed in the most egregious circumstances – **Rarely Used** (***Parsons*** and ***Bhullar***)
* Persons charged with very serious offences will receive bail unless there is a constellation of exceptional factors
  + Where crime is horrific, inexplicable, and **very** strongly linked to the accused, detention may be necessary (***Hall*** cited in ***Bhullar***)
* The more a crime is unexplained and unexplainable, the more worrisome bail becomes for society (***Bhullar***)
  + Judge can only deny bail if satisfied that a reasonable member of the community would be satisfied that detention is necessary
    - Reasonable person is one who Is properly informed about the philosophy of the legislative provisions, Charter values (including presumption of innocence and the importance of bail), and the actual circ’s of the case (***Parsons***and ***Bhullar***)
  + Courts must be careful not to pander to public opinion or to take account of only the overly excitable (***Bhullar***)
* Nikos thinks tertiary ground is false – Seriousness of offence speaks to first two criteria – Bail should be decided on those criteria

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| **Case** | **Facts + Analysis** |
| ***R v. Parsons***  (2007 – BCSC) | *Accused charged with importing cocaine. Accused fled at border and evaded authorities. Returned to home in Alberta. Bail denied on all three grounds*. *Accused requested bail review*. *Accused had onus* *of proof*.  >Cannot put too much weight on general characteristics of drug offenders  >Must consider personal circumstances of the particular accused  >Accused’s failure to surrender does not, by itself, indicate a likelihood that he will re-offend if released  >Long employment history, strong ties in neighbouring jurisdiction, large surety, and no criminal record  >Accused released on bail on conditions |
| ***R v. Bhullar***  (2005 – BCCA) | *Accused was charged with the murder of his adopted son. Denied bail on tertiary ground. Applied for review*. *Accused had onus*.  >No criminal record, large surety, owns own business etc.  >Crown has a strong but not overwhelming case (does not appear as strong as ***Hall*** case discussed above)  >Charge is obviously serious and accused faces lengthy prison term if convicted  >Crown alleges accused attempted to influence “key’ witness and physical evidence  >Attempt to influence witness ineffective; No threats of violence; Collection of physical evidence has reached an end  >Crowns allegations fall markedly short of the “substantial likelihood” test  >Accused should be released on bail with conditions |

**Bail Review**

* + **S. 520** – Accused may apply to a judge for a review of the bail order (**Exception:** **S. 469 offences** – See below)
    - **Accused has the burden** to show why the order of the Provincial Court Judge should be vacated or varied (***Parsons***)
    - Bail reviews go to the Supreme Court trial division – Reviews are conduced by a single judge
    - Review is generally based solely on record of bail hearing, but **new evidence and statements may be introduced** (***Parsons***)
    - Judge gives deference to decisions in the bail hearing – If no new evidence, decision will be likely affirmed unless error was made
    - **S. 680** – Accused must **apply to the Chief Justice** for permission for a bail review for **s. 469 offences**
    - **No automatic bail review** for these offences; Permission generally given quite liberally, but there **must be a reason for request**
    - If granted permission, bail review will be heard by three judges in the BCCA
    - **S. 679** – Accused can apply to the Court of Appeal for **post-conviction bail** if they are appealing their conviction
      * More difficult to get bail because presumption of innocence is no longer present
      * Accused cannot benefit from this time later – If the appeal fails, they will return to custody to serve their sentence

### IV. Disclosure

* + ***Charter* S. 7** – Accused has the right to make full answer and defence (includes right to full and timely disclosure – ***Bjelland***)
  + **General Rule**: All relevant material or information in the Crown’s possession must be presented to the defence (***Stinchcombe*** in ***Baxter***)
* **Relevant**: Has a reasonable probability of assisting the defence
  + May be information that helps or hurts the defence
  + Not just the information the Crown plans to lead in court
  + Not limited to evidence that is potentially admissible in court (may include hearsay etc.)
  + Crown must air on the side of inclusion and exercise good faith in determining which material must be disclosed
  + Disclosure **obligation is ongoing** – Disclosure must be made when and as the information becomes available (***Baxter***)
  + **General Rule:** Presumption is based on documents being in the possession of the Crown or police (part of investigative file)
    - Police have a duty to participate in prosecutions (***McNeil***)
    - **“Crown**” in this sense does not include every government agency
    - Crown Is not under an obligation to collect information from third parties (for exception, see below)

**Timing of Disclosure**

* + **General Rule:** Accused has right to timely disclosure under s.7 (Disclosure must be made as soon as possible)
    - Disclosure aids the investigation and case of the defence
      * Allows accused the ability to make full answer and defence, enter guilty plea if desired, and advise counsel
    - Allows defence to determine what it needs, understand Crown’s case, identify potential evidentiary issues etc.
    - Initial disclosure should take place before election and plea, unless Crown has valid reason to delay disclosure (***Boucher*** in ***Baxter***)
    - Obligation on defence to bring any failure to disclose on the part of the Crown to the judge as soon as possible (***Baxter***)
      * Failure to do so will be an important factor in determining on appeal whether a new trial should be ordered (***Baxter***)
  + **Exception**: Crown may have legitimate reasons to delay or deny disclosure
    - Ex. To Comply with “Informer Privilege” or to Edit Materials to Remove Personal Information
    - Ex. To Ensure Safety of Witnesses – Crown may need time to arrange witness protection or testimony from a remote location
    - Ex. To Avoid Compromising an On-Going Investigation
    - Discretion of Crown not to disclose or to delay disclosure is reviewable by the trial judge, and on review, must be justified (***Stinch*** in ***Baxter***)
    - Absolute withholding can only be justified on the basis of the existence of a legal privilege (although also subject to review)
    - Tactical Reasons are not Legitimate
    - The closer the case gets to trial, the more likely it is that the Crown will have to disclose the information
      * The more likely it is that the accused’s ability to make full answer and defence will be compromised by non-disclosure
      * Demonstration of bad faith by the Crown is not a necessary pre-condition to finding prejudice to the judicial system (***Baxter***)
      * To obtain remedy, accused must establish a breach of his/her Charter rights (Ex. S.7) (***Bjelland***)
      * This will generally require the accused to show actual prejudice to his/her ability to make full answer and defence
      * Late disclosure does not necessarily impede accused’s ability to make full answer and defence

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| **Keywords** | **Case** | **Facts + Analysis** |
| Conspiracy to Traffic  Undertaking not to Disclose | ***R v. Baxter***  (1997 – BCCA) | *Accused convicted of conspiracy to traffic in cocaine. Early in the case, defence anticipated calling co-accused as witnesses. Crown obtained sworn statements from co-accused relating to the involvement of accused by promising them favourable sentencing when charged, agreeing not to call them as witnesses, and undertaking not to disclose statements unless they are called by defence. Statements/other info not mentioned or disclosed until end of Crown’s case when the judge made an order for disclosure.*  >Appellant’s counsel applied for a judicial stay of proceedings on the grounds of an abuse of process  >No indication of any improper motive – Argued delay was for safety reasons (but rejected by judge)  >Information withheld was relevant from beginning – Not just relevant if/when witnesses called  >Crown’s undertaking precluded possibility of a review of the discretion to delay or withhold information  >Crown cannot contract out of s.7 disclosure obligations – New trial ordered |

**Remedies**

1. **Stay of Proceedings** – Very serious remedy; Requires exceptional circumstances (Ex. Severe abuse of process)
2. **Mistrial and New Trial** (***Baxter***) – Need to show severe prejudice that cannot be undone; Very Serious – Requires exceptional circ’s
3. **Exclusion of Evidence** – Quite serious remedy; Impairs truth-seeking of trials; Accused must show why less serious remedies not enough

* Only available in exceptional cases (***Bjelland***):

1. Where late or lack of disclosure results in an unfair trial

* Ex. Disclosure of evidence mid-trial will lend support to exclusion (although not necessarily determinative)
* A fair trial is not a trial that is the most advantageous to the accused
* A fair trial is one which satisfies public interest in truth while preserving procedural fairness for accused

1. Where exclusion is necessary to maintain the integrity of the justice system

* Ex. Adjournment may not be appropriate if result would be to unreasonably delay trial of in-custody accused
* Ex. Exclusion may be appropriate where there has been deliberate misconduct or reckless conduct towards

disclosure, but society has interest in fair trial based on all evidence (especially when serious offence)

* Evidence may be excluded on this basis even if no actual prejudice to the accused

1. **Disclosure Order & Adjournment** – Typical remedy for late or insufficient disclosure
2. **Order for Rules Regarding Disclosure that the Crown Must Follow** – Could help streamline process

* Remedies are given by **S. 24(1)** **of the** ***Charter*** and are flexible and contextual
  + - * To obtain remedy, accused must establish a breach of his/her Charter rights (Ex. S.7) (***Bjelland***)
      * This will generally require the accused to show actual prejudice to his/her ability to make full answer and defence
      * Important information being brought up on eve of trial creates strong presumption of prejudice (***Bjelland***)
* Degree of prejudice suffered by the accused will be relevant to which remedy is ordered (***Baxter***)
* Least severe remedy that will cure prejudice while preserving integrity of the justice system must be ordered (***Bjelland***)

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| **Keywords** | **Case** | **Facts + Analysis** |
| Importation of Cocaine  Late Witness Disclosure | ***R v. Bjelland***  (2009 – SCC) | *Accused charged with importing cocaine. Crown came forward with significant witness statements on the eve of trial that had been obtained over a year earlier. S.7 breached. Defence applied for exclusion of evidence.*  >No doubt that that the late disclosure was prejudicial to the accused’s right to make full answer and defence  >Prejudice to accused can be remedied through an adjournment and disclosure order – No exclusion  >No finding of deliberate Crown misconduct  >Nothing that otherwise compromised fairness of the trial or integrity of justice system  >No suggestion that accused was held in pre-trial custody  >Cross-examining a witness at a preliminary hearing is not part of s.7 right to make full answer and defence  >Accused does not have a Charter right to a particular method of disclosure |

**Third Party Disclosure**

* **General Rule**: Crown is not under an obligation to collect information from third parties (even at request of defence)
* **Number of Exceptions**
* Ex. Crown must make reasonable inquiries of other Crown entities, members of the government and third parties with respect to

records and information in their possession that may be relevant to the case being prosecuted (***McNeil***)

* Ex. The defence may require documents that only the government has a reasonable chance of getting possession of
  + Ex. Cross-border documents or documents that otherwise fall outside of the jurisdiction of the court
  + Defence can reasonably alert the Crown that this information exists and Crown may be required to disclose or make reasonable efforts to obtain the material for disclosure
  + Defence counsel can apply for subpoenas for documents in the possession of third parties under **s. 698** and **s. 700**
  + **Two-Step “*O-Connor* Application” Process** (***McNeil***):

1. Defence counsel must show the court why the documents are likely relevant (Burden is on the applicant)

* **“Likely Relevant”** – Reasonable possibility that the information is logically probative to an issue at trial
  + - * Includes competence of witnesses to testify, and information relating to credibility of witnesses and evidence
* Threshold is a significant but not onerous burden
  + - * Court cannot require defence to demonstration the specific use of information they have not yet seen
      * Application must not be purely speculative – Must be some substance to the application
      * Court will air on the side of disclosure

1. Court must review materials and determine whether, and to what extent, production should be ordered

* Requires a court to conduct a balancing of the third party’s privacy interests in the documents, if any, and the interests of the accused in making full answer and defence in the particular circumstances of the case (contextual approach)
* **Factors for Consideration**:

1. Privilege of documents – If documents are privileged, application will generally fail, regardless of relevance
2. If not privileged, consider true relevancy of the documents to the accused (will usually determine outcome)
3. Nature and extent of the reasonable expectation of privacy vested in the record

* Unlikely to defeat application, but may require editing or imposition of conditions
* With few exceptions, accused’s right to make full answer and defence outweighs privacy interests
* Court will err on the side of disclosure
* **Exception**: Disclosure of records containing personal information of complainants and witnesses in **sexual assault cases**
  + **“Mills Regime**” – **S. 278.1 to 278.91** – Same two steps, but much higher threshold for relevance
  + Much of the balancing of competing interests occurs at the first stage – This reflects Parliament’s assumption that there is a reasonable expectation of privacy in the types of records being targeted

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| **Keywords** | **Case** | **Facts + Analysis** |
| Police Disciplinary Records | ***R v. McNeil***  (2009 – SCC) | *Accused convicted on drug charges. After conviction, he learned that arresting officer was the subject of ongoing drug-related misconduct disciplinary and criminal charges*. *Accused sought production of all documents relating to the misconduct for his appeal.*  >Generally, criminal investigation files involving third parties and police disciplinary records need O’Connor app  >But, records relating to findings of serious misconduct by police officers involved in investigation properly fall  within the scope of the “first party” disclosure package due to the Crown where the misconduct is related to  the investigation or the finding of misconduct could reasonably impact on the case |

### V. Severance

* From an accused’s perspective, the general presumption is that severance is desirable
* **S. 589** – Murder cannot be joined with any other indictable offence unless offence arises out of same transaction or accused consents
* **S. 591** – Court may order severance of accused and counts (if one accused but multiple counts) where the interests of justice so require
  + Multiple counts may be multiple incidents on same occasion or similar incidents on multiple occasions
    - Multiple counts does not mean you can mix and match evidence (just means all evidence is heard in same trial)
  + Onus is on the applicant to show severance is necessary
  + Very broad discretion and deference given to trial judge to balance competing interests of public and accused
  + Point in a trial at which application is brought is relevant to determination of “the interests of justice” and severance (***Suzack***)
    - Judge required to take into account all practical consequences of severance and potential prejudice to co-accused
* **Factors to Consider** (***Last***) – Non-exhaustive:

1. General prejudice to accused (including right to be tried within a reasonable time and factors below)
2. Legal and factual nexus between the counts
3. Whether the accused intends to testify on one count but not another

* Must have both subjective and objective components
* Burden on accused to convey that, objectively, there is a rationale for testifying on some counts but not others

1. Possibility of inconsistent verdicts
2. Desire to avoid a multiplicity of proceedings
3. Use of similar fact evidence at trial
4. Length of the trial having regard to the evidence to be called
5. Existence of antagonistic defences as between co-accused

* Very Strong Presumption that multiple accused will be tried together where their crimes relate to similar issues (Hard to overcome) (***Suz***)

1. Increases efficiency of the judicial system

* Only have to introduce similar evidence against similar accused once
* Multiple cases require much larger resources – Cases may be kicked out of court if resources are too tight

1. Reduces likelihood of inconsistent verdicts
2. Improves truth-seeking function of trial – If accused tried separately, highly unlikely jury will hear complete story (***Suzack***)
3. Benefits witnesses

* Trials can be very long and highly emotional experiences; Not ideal to make them do this more than once
* May be situations where witnesses are fairly grouped according to accused – Less concern for multiple trials

1. Potential prejudice can be lessened by proper jury instructions (For example, on use of inadmissible evidence) (***Suzack*** and ***Last***)

* Trials with multiple parties can result in prejudice:
  1. From Confusion: Complexity of the proceedings necessarily increases (legal and evidentiary complexity)
  2. From Inadmissible Evidence being heard by same trier of fact (evidence might be admissible against some accused but not others)
* Ex. Confessions (Only admissible against statement maker)
* Ex. Bad Character Evidence (Co-accused can lead bad character evidence against others in trial to support their case)
* Always a risk that the trier of fact will be influenced by inadmissible evidence
  1. From Witness Limitations (Cannot force co-accused to testify as witnesses)
  2. From Length of Time Required (Joint trials can be very long – May lose favourable jurors (sickness etc.) or case may fall apart
  + Benefits to accused of joint trial:

1. Defence of other co-accused may benefit accused
2. Counsel and jury can compare case of accused to co-accused (evidence may weigh slightly more against other accused)
3. May be certain tactical/resource advantages

* Ex. More jury challenges
* Ex. Each defence counsel can take the lead on a certain point (Crown can only do so much with their numbers)
  + Crown can also benefit from severance – Get another shot at accused (Sometimes trials just don’t go well)
  + Defence counsel must (***Last***):

1. Point to specific examples of prejudice
   * Likely not enough to show only one example (must attempt to point to multiple examples if you can)
   * None of the examples need to be determinative on their own
2. Try to undermine the presumptions for a joint trial
   * Must try to show why the presumptions do not apply or apply with only very limited weight (***Last***)
   * Ex. Cases might be easily separable in terms of issues, defences or witnesses – Diminishes efficiency argument

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| **Keywords** | **Case** | **Facts + Analysis** |
| Murder of Police Officer  Change of Venue Application  Juror Challenge Provision  Severance Application  Jury Limiting Instructions  Severance Denied | ***R v. Suzack***  (1999 – ONCA) | *Two co-accused convicted murder of police officer. Each claimed the other was responsible.*  >Media coverage was extensive and highly emotional. Accused applied for **change of venue**. Denied  >Change of venue should be granted under **s. 599(1)(a)** where judge is satisfied that it appears  expedient to the ends of justice (incl. right to fair trial); Will depend on circ’s of case;  >Onus on defence to show, on balance of probs that there is a fair and reasonable likelihood of  partiality or prejudice in that jurisdiction that cannot be overcome by jury selection safeguards  >Pre-exposure to facts not enough (jury would hear all evidence anyways) |
| >Under **s. 635** accused and Crown must alternate the order in which they **challenge jurors**  >Tactical advantage in jury selection only unconstitutional where it skews fairness or perception  of fairness so that a reasonable person would conclude the process was fundamentally unfair  >Mere alternation (even when accused have antagonistic defences) not enough to breach s.7 |
| >Application for severance made late in trial claiming prejudice to Suzack based on Pennett’s use of  bad propensity evidence against Suzack and suggestions/statements made by Pennett’s counsel  >**Case shows incredibly high standard for severance** – Defence pointed to specific prejudice  >Potential for an inconsistent verdict if severance granted  >Much of the evidence against Suzack would have been before jury had he been tried alone  >Admission of rest not enough on its own to warrant severance  >Judge placed strong reliance on jury’s ability to follow and apply instructions as to use of evidence  >Assessment of jury ability/potential for misuse must be based on circumstances of case  >Ex. Limiting instructions regarding propensity evidence may be more difficult to apply  >Courts must proceed on the basis that juries accept and follow their instructions  >Trial judge has an obligation to balance the competing interests of co-accused in a joint trial and  minimize prejudice to each co-accused through proper instructions |
| Two Counts of Sexual Assault  Legal and Factual Nexus  Factors to be Weighed  Jury Limiting Instructions | ***R v. Last***  (2009 – SCC) | *Accused charged in one indictment with counts relating to two incidents of sexual assault. He applied for severance of the two counts.*  >Counsel argued accused more likely to testify on one count than another  >Objectively justifiable, but found that accused would likely testify on both for strategic reasons  >Factual and legal nexus between the two sets of counts is very weak (higher chance of prejudice)  >Different complainants, locations, defence theories and legal issues; One month between incidents  >No overlap in evidence or key witnesses (No similar fact evidence; No truth seeking interest)  >Coincidence not objectively improbable  >Joint trial created potential for cross-pollination on credibility assessments  >Credibility of complainants may be bolstered and credibility of accused compromised  >Joint trial created risk that jury would engage in propensity reasoning  >Minimal benefits to administration of justice; Significant risk of prejudice; **Severance granted**  >Jury limiting instructions should only be given when rational for joint trial otherwise exists |

### VI. Rulings

* Motions are used to resolve issues that arise before or during trial (Ex. Severance, Exclusion of evidence, Disclosure)
  + Generally made pre-trial, but some cannot be made until the issue arises
  + Generally made by the defence (putting the onus on the accused to prove contents of motion on a balance of probabilities)
* Mega-trials are beginning to get out of control with the amount of issues being argued and evidence being called etc.
  + Much of this happens in pre-trial motions
  + Defence has to be careful when they bring motions and be fair to the Crown and the court; Judges need to regain control
  + “Vukelich hearings” demonstrate policy consideration of courts time and the beginning of regaining control of length of trials
* **Requirements for Bringing a Motion**

1. **Notice**

* Court must hear from both sides
* Notice must be filed so that both sides can be prepared to argue the motion
* Notice must be in writing, presented to Crown, and contain particulars
* **Constitutional Question Act s.8** – Minimum two week notice required unless court authorizes shorter notice
  + - * Applies to constitutional remedies under s. 24(1) other than exclusion of evidence only
* **Common Law** – Notice must be reasonable (The more complex the issue, the longer the notice required)

1. **Foundation**

* Court may require a pre-motion or “Vukelich” hearing to decide whether motion should be heard where submissions are going to be long and drawn out
  + - * Must present factual basis for the application to the judge (Ex. By statements or in book of materials)
      * Facts must state with reasonable particularity the ground upon which the application is made
      * Facts must show reasonable likelihood of success – Not a high onus, but not random chance
      * Affidavit verifying the defence position may be necessary or possibly an undertaking to adduce evidence
      * Procedure has been used in s.8 (improperly obtained evidence) motions (Like in ***Vukelich***) and abuse of process motions
        + Standard for abuse of process is very high – Courts sometimes try to cut off these motions
      * Procedure could very well apply to other lengthy, large, or difficult motions as well, but has not been uniformly applied to all motions – Sometimes it is quicker just to hear the motion (Ex. Severance and Disclosure motions)
      * SCC has upheld the Vukelich standard as being a reasonable part of our law

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| **Keywords** | **Case** | **Facts + Analysis** |
| Voir Dire  Exclusion of Evidence (s.8)  Pre-Motion or Vukelich Hearing | ***R v. Vukelich***  (1996 – BCCA) | *Appellant was convicted on conspiracy to import cocaine. Book about cocaine had been found during execution of search warrants*. *Defence applied for motion to determine constitutional validity of the search, arguing that the affidavit supporting the warrant was deliberately false and misleading*.  >Has to be some basis shown before the court enters into such inquiries  >*Voir dire* will usually be directed when defence alleges affidavit supporting warrant is deliberately false  >***Voir dire***–Trial within a trial to determine the admissibility of evidence  >However, in this case, the allegations were purely argumentative and not related to essence of case  >Accused is not always entitled to a *voir dire* to challenge the constitutionality of a search  >Ample grounds to support the warrant  >Defence counsel not entitled to cross-examine on issue of whether there should be a *voir dire*  >Usual time for cross-examination is during *voir dire* itself, not “Vukelich” hearing  >This decision is based on **full disclosure** |

* + - * **Ruling on the Motion**
        + **Generally**, motions and rulings will occur pre-trial (so everyone knows what will be happening in the trial)
        + **Exception**: Judges may have to wait until later (even until the end of trial) to make a ruling

Ex. Motion may only be brought mid-trial

Ex. Counsel can ask court to re-visit motions mid-trial in light of the course of proceedings

Ex. S.7 motions (based on trial fairness) should be ruled upon at the end of trial, but pre-judgement (see ***Hooites***)

Trial judge will be in a better position to assess actual prejudice to the accused and potential remedies

May be exceptions where prejudice is very clear and obviously irreparable

Ex. Other motions seeking substantial remedies, such as a stay of proceedings

Very high threshold for stay of proceedings (Difficult to shut down a trial that is already in motion):

S. 7 of the Charter protects an accused’s right to a fair, but not perfect, trial

Stay of proceedings only appropriate in “clearest of cases” where prejudice to accused’s right to make full answer and defence cannot be remedied or where irreparable prejudice would be caused to the integrity of the judicial system

**Requirements:**

1. There must be a massive problem that renders the accused fundamentally unable to have a fair trial
2. There must be no lesser method to fix the problem

* Loss of evidence of questionable worth may not be enough (especially if there was a summary of what was lost)

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| **Keywords** | **Case** | **Facts + Analysis** |
| Letter to Witness  Motion for Stay of Proceedings  Timing of Motion | ***R v. Hooites-Meursing***  (2008 – BCCA) | *Accused led propensity evidence to show bad nature of victim to prove self-defence. Two witnesses testified that victim hired “underlings” for torture. Crown sent a letter to one of the potential “underlings” with names and testimonies, some of it inaccurate, of the two witnesses testifying against him*. *Defence asked for stay of proceedings based on unfair trial (intimidation of defence witnesses and tainting of Crown witness)*  >Motion for stay of proceedings was heard and ruled on pre-trial (trial judge granted stay)  >This is not a case of alleged witness tampering  >Underlying finding of the judge that trial fairness had been irreparably compromised could not, in the  circumstances of the case, rise above speculation until the defence evidence was presented  >There are ways to force witnesses to testify (subpoenas, police etc.) – Cannot say for sure they won’t  >Fairness cannot be determined until witnesses have testified or refused to testify |

### VII. Powers of Search and Arrest

* Very important policy balance
  + If powers too loose, not enough protection for individual right
  + If powers too stringent, effective investigation and policing may be compromised
* ***Charter*, s. 8** – Right to be secure against unreasonable search and seizure (***Hunter***)
  + Creates a “reasonable expectation of privacy” (Zone of privacy around the individual)
  + Protects areas with a reasonable expectation of privacy if accused not currently in that area when police want to search
  + Requires court to engage in balancing act between individual privacy rights and interests of government in law enforcement
  + Provides a means of preventing unjustified searches before they happen (***Hunter***)
    - Generally requires prior judicial authorization
    - May not be reasonable in every instance to insist on prior authorization (***Hunter***)
    - Where it is feasible to obtain authorization, such authorization is required as a precondition for a valid search
* ***Charter*, s. 9** – Right not to be arbitrarily detained or imprisoned
* **S. 495** – Peace officer may arrest a person without a warrant who has committed an indictable offence or who, on reasonable grounds,

he believes has committed or is about to commit an indictable offence, or who is currently committing a criminal offence

* Found to equate with Charter requirements – **If statutory criteria not met there is a Charter breach** (usually both ss. 8 and 9)
* **Reasonable Grounds:**
  + Must be higher than suspicion (even a strong suspicion), but lower than perfection
  + Must be both subjective and objective (***Juan***)
    - **Subjective:** Unless arrest based on ridiculous grounds, court will likely go along with it
    - **Objective:** Court must decide whether a reasonable officer with a reasonable level of experience and

knowledge in that area of law would have concluded there were reasonable grounds for arrest

* + Must exist at the time of arrest
* Once reasonable grounds are present, police may search the accused for both safety and evidence (pursuant to arrest charges)
* If reasonable grounds not present, evidence collected may be inadmissible
* Provision seeks to protect rights before they are violated
* Police have power to detain for investigative purposes
  + Police need to be able to freeze the scene of a crime to conduct investigations
* Detention justified if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime (not just general criminal activity) and that such a detention is necessary (***Mann***)
* Reasonably held suspicion
* Both an objective and subjective standard (***Mann***)
* Lower threshold than reasonable and probable grounds required for arrest (***Mann***) but higher than speculation/hunch
* Presence of individual in a high-crime area is relevant only as it establishes proximity to a particular crime (not by itself)
  + Detention for investigative purposes is, like any other detention, subject to *Charter* scrutiny (***Mann***)
  + Rights in ss. 9 and 10 of *Charter* are not engaged by delays that involve no significant physical or psychological restraint (***Mann***)
* Police can search during an investigative detention to protect life (***Mann***)
* Police must have reasonable grounds to believe that their safety, or the safety of others, is at risk,
* Search must be reasonably necessary in light of the totality of the circumstances on both objective and subjective grounds
* Can consider part of town detainee is in, whether or not they look dangerous, etc.
* Officer may engage in protective pat-down search (Cannot search for evidence)
* Both the detention and the pat-down search should be brief in duration
* Issuance of a warrant (***Hunter***)
  + Power to authorize a search and seizure is given to an impartial and independent person who must act judicially
  + There must be evidence on oath before him
    - Evidence must be compiled in a sworn affidavit; Not subjected to high evidentiary thresholds
    - Must be a full and frank account of the issues – *Ex parte* application (accused given no forewarning or attorney)
  + Evidence must satisfy justice that applicant has reasonable and probable grounds to suspect an offence was committed
  + Evidence must satisfy justice that applicant has reasonable and probable grounds to believe evidence may be on the premises
  + Judge must do an independent assessment of whether the reasonable and probable grounds standard has been met
* Standard is an objective basis (***Le***)
  + Judge cannot be merely a “rubber stamp” (***Hunter***, ***Re Restaurant***)
  + Cannot farm out requirement to an investigator (***Re Restaurant***)

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| **Keywords** | **Case** | **Facts + Analysis** |
| Undercover Drug Buy  “Reasonable Grounds” | ***R v. Juan*** (2007 – BCCA) | *Undercover officer set up drug buy. Accused accompanied trafficker to scene but remained in car. Accused was arrested and searched. Cocaine was found. Defence argued arrest unlawful and moved to exclude evidence*.  >Experienced officers testified that the arrest was reasonable – Fairly broadly accepted  >People who arrive at a drug transaction of this size are almost always involved in one way or another  >Arrest was subjectively and objectively reasonable  >Case is at the low end of the spectrum of reasonability – Shows limits of reasonability standard  >No strong evidence against Juan – Looks more like strong suspicion  >Court found some factors that pushed it over the limit of “reasonable”, but not easy decision to make |
| Search of Detainee’s Pocket  Investigative Detention and Search | ***R v. Mann***  (2004 – SCC) | *As officers approached the scene of a crime, they came across an individual matching the description of the subject. Officers did a pat down search for weapons and felt something soft in his pocket. Officer reached into his pocket and found bag of marijuana. Officer found Valium in another pocket.*  >Officer had reasonable grounds to detain the appellant  >Officer had reasonable grounds for a protective search and was justified in conducting pat-down search  >Appellant suspected of break-and-enter; Possible he was in possession of break-and-enter tools  >Officer had no reasonable basis for reaching into the pockets  >Something “soft” likely not dangerous; Turned into search for evidence; Violated expectation of privacy  >Seizure of marijuana was unlawful and evidence ruled inadmissible |
| Combines Investigation Act  No Independent and Impartial Review | ***Hunter v. Southam***  (1984 – SCC) | *Question was whether ss. 10(1) and 10(3) of the Combines Investigation Act authorized unreasonable searches and seizures and were therefore inconsistent with s.8 of the Charter*. *Mr. Hunter had authorized a search of The Edmonton Journal, a division of Southham, which was certified but had a breath-taking sweep*.  >Provisions do not require an independent and impartial review  >Investing Commission with significant investigatory functions vitiated its ability to act judicially  >Member of the Commission cannot be the impartial arbiter necessary to grant an effective authorization  >Prior authorization is inadequate and a search carried out under ss. 10(1) and 10(3) is unreasonable  >Member of Commission is not required to inquire into the reasonableness of the application  >Ss. 10(1) and 10(3) are inconsistent with the Charter and of no force and effect |
| Warrant based on investigator  Report | ***Re Restaurant Le Inc.***  (1987 – SCC) | *Judge issued warrant for premises after reviewing an information in which an official stated he had a reasonable belief for the application based on an investigation he undertook. Facts from investigation were not disclosed.*  >In order to perform his duty of supervision, the judge had to review the facts to determine whether the  informant’s belief was indeed reasonable  >Facts were not given, so judge had a duty to ask for further information, which he did not do  >Judge could not and did not verify the reasonableness of the informant’s belief – Warrant approval invalid  >Court clear that you cannot farm out your requirement to an investigator |
| BC Hydro Theft  BC Hydro Reports  Grounds for Warrant | ***R v. Le***  (2006 – BCCA) | *BC Hydro employee tipped RCMP about possible theft of electricity, including amount stolen and how that theft was determined. Accused submitted Information contained insufficient information to give rise to warrant.*  >RCMP officer was entitled to rely on the observations and complaints of BC Hydro  >Justice had before him information from persons with specialized skill and training who were employed by the  entity which was complaining about the theft of the service it provides  >Based on this credible information, justice could have been satisfied that there was an objective basis to  believe that a crime was probably being committed  >Test is whether there was reliable evidence might reasonably be believed on the basis of which the authorization  could have been issued  >Some were concerned that there was a bit of “rubber stamping” in this case – Reports were quite skimpy at first  >BC Hydro hedged their bets by adding some paragraphs |

### VII. Class of Offences

* Three basic classes of offences:

1. **Summary Offences**

* Less serious offences
* Must be tried in Provincial Court
* Appeal to Supreme Court (single judge), then Court of Appeal, then Supreme Court of Canada (see hand-out)
* **Limitation Period:** Information must be sworn within six months of offence

1. **Indictable Offences**

* More serious offences (More money involved, more violence etc.)
* May result in more severe consequences (Higher range of penalties; Some minimum penalties)
* **General Rule:** Accused has choice of mode of trial:
  + - 1. Trial in Provincial Court
      2. Trial in Supreme Court with judge alone
      3. Trial in supreme Court with judge and jury
* Many factors involved in choice:
  + Provincial court rulings tend to be a bit faster
  + More flexibility in judge-alone proceedings (Ex. Can have more adjournments)
  + Juries may be more/less sympathetic on some issues or towards some accused
  + **Exception:** Offences listed in **s. 469** mustbe tried before jury unless Crown and Defence agree otherwise
    - Has been some attempts to challenge this under the Charter
  + **Exception:** Offences listed in **s. 553** must be tried in Provincial Court (Less efficient to go to Supreme Court)
  + Appeal to Court of Appeal (panel of three judges), then Supreme Court of Canada
  + No limitation period

1. **Hybrid Offences**

* Crown can decide whether to proceed summarily or by indictment (based on circumstances of case)
  + - * Crown should announce before the plea which way they are proceeding (***Dudley***)
* Hybrid offences treated as indictable, unless Crown elects, or is deemed to have elected, to try them summarily (***Dud***)
  + - * Crown deemed to elect to try case summarily if it proceeds with offence in summary conviction court
* Crown may elect to proceed summarily at any time provided the information was sworn during limitation period
* If Crown proceeds summarily and finds limitation period has lapsed (***Dudley***):
  + - * A mistrial should be declared or a conviction at trial set aside unless limitation period waived by consent
      * Curative consent may be given at any time before the verdict (***Dudley***)
      * Consent to continue with the proceedings must be “informed, clear and unequivocal” (***Dudley***)
      * Accused may have interest in consenting – May be related indictable offences that the Crown will otherwise proceed with or Crown may proceed again by indictment with greater range of penalty
      * Crown may begin trial again by indictment except where this would amount to an abuse of process or would be completely unfair/prejudicial to the accused
        + Ex. Crown cannot proceed again by indictment if accused is initially acquitted
        + Ex. Crown may have missed limitation period solely as a result of disorganization
        + Ex. Crown may think it inappropriate to the administration of justice to proceed by indictment and

are only proceeding summarily because they missed the limitation period

* + - * + Crown’s invalid election does not invalidate an information (Information remains valid) (***Dudley***) although initial election and all subsequent summary proceedings are a nullity

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| **Keywords** | **Case** | **Facts + Analysis** |
| Hybrid Proceedings | ***R v. Dudley***  (2009 – SCC) | *Appellant was charged with fraud not exceeding $5,000. Crown elected to proceed summarily. Accused intended to plead guilty, but counsel noticed proceeding was statute-barred and moved have charges dismissed as a nullity. Crown moved to “re-elect” to proceed by indictment.* |

### VIII. Juries

* Juries help maintain community confidence in the justice system (Community becomes part of system and is generally more willing to accept verdicts made by the community) as well as serve as an important check on the system
* But, juries create a lot of difficulty (have to be assembled, seated, excluded during legal arguments, and instructed on the relevant law)

**Role of Trial Judge**

* **Judge Alone Trial**
* Judge makes rulings of both fact and law – Applies facts as he/she finds to the legal principle
* **Jury Trial**
  + Judge makes rulings of law (sets out legal principles and instructs jury on the law) (***R v. Gunning*** – (2005) SCC)
  + Judge has duty to assist the jury by reviewing the evidence as it relates to the issues in the case (***Gunning***)
  + Judge should withdraw a defence from the jury’s defence when it lacks an “air of reality” (***Gunning***)
  + When no evidence upon which a properly instructed jury acting reasonably could find in the accused’s favour
  + Jury makes all rulings of fact (including the verdict) and applies the law as instructed by the judge to the facts
    - **General Rule:** Judge is entitled to give an opinion on a question of fact but not direction (***Gunning***)
    - **Exception**: Judge has duty to direct jury to acquit where judge is satisfied that there is no evidence upon which a

properly instructed jury could reasonably convict – “Directed Verdict” (***Gunning***)

* Judge can never direct a jury to return a verdict of guilty (***Gunning, Krieger***)
* Judge cannot even direct the jury that one element of the offence has been made out
* Applies even if the judge thinks it would be perverse for the jury to return with any other finding
* Applies even where the accused has confessed and given an invalid legal defence (but no guilty plea)
  + Distinction drawn between admissions of fact covering all of the Crown’s allegations and the ultimate question of guilt or innocence that is answered by the verdict alone (***Krieger***)
  + Accused presumed innocent until ultimate verdict
  + Juries are not entitled as a matter of right to refuse to apply the law, but they have the power to do so where their consciences permit of no other course
* **Policy**:
  + Jury is confronted with so much law and evidence that we wonder if they are really able to handle it all
  + May make policy sense to give judges limited role to direct convictions to prevent perverse verdicts and assist jury

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| **Keywords** | **Case** | **Facts + Analysis** |
| Cannabis Production  Role of Trial Judge | ***R v. Krieger***  (2006 - SCC) | *Accused admitted to producing cannabis, but claimed to do have done it for medical purposes. Pled not guilty. This is not a valid defence. No basis upon which to acquit the accused. Trial judge directed the jury to convict.*  >Trial judge usurped the jury’s function  >No guilty plea or formal admission of guilt  >Subsequent conduct/statements of jurors made it clear some were uneasy to return guilty verdict  >Plea of “not guilty” entitles accused to a determination of his guilt by the jury, not the judge |

**Review the Evidence**

* Judge must not make factual findings, but must assist the jury in making its findings (***Le***)
  + Judge must review the substantial parts of the evidence, set out the positions of the Crown and defence, instruct the jury on how the evidence relates to the legal issues at trial, and try to attach the evidence to various legal issues that must be addressed
    - Judge can also review the evidence by reference to the addresses of counsel
  + Where there are substantial inconsistencies in the evidence of important witnesses, the judge should review the inconsistencies in the testimony and explain how they may impact on witness reliability or credibility or on other issues in the case (***Le***)
  + Not sufficient that the whole evidence be left in bulk for valuation (***Le*)**
  + No necessity to review all of the evidence (***Le***)
  + Trial judge has a wide discretion in how he should address the jury (***Le***)
  + Some movement towards making this a non-required element
    - Jury charges getting very long, but portions of law cannot be cut out and judge cannot make rulings to assist jury
    - The one place where they could maybe cut down is on the review of the evidence

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| **Case** | **Facts + Analysis** |
| ***R v. Le***  (1998 – BCCA) | *Two distinct but inter-related acts of violence occurred at a night-club (one inside, one outside)*. *Many witnesses from different vantage points – Some potentially conflicting evidence*.  >Trial judge left evidence to the jury in bulk – Gave jury full transcript of trial  >**Problems**:  >Unclear if jury would actually go through it and read it all  >Unclear if jury would be trying to solve their own problems rather than asking questions  >No simplification or direction as to how the evidence relates to the issues  >Number of inconsistencies in the evidence that were not discussed |

**Written Instructions**

* Appropriate written material enhances the comprehension of oral instruction (***R v. Henry***)
* Judge can never leave the jury with just written instructions
* Never know if jury will read them, have reading problems, etc.
* Judge will orally go though the instructions and read them to the jury
* Judge will usually instruct the jury that the instructions are both oral and written, and the jury should take them as a whole
* **Portion of Instructions**
  + If the aim of written material is to assist the jury by improving its comprehension, recall, and application of the oral instructions, that aim is best served by targeting those parts of the instructions which will prove difficult for the jury (***Henry***)
* If the trial judge decides to give a jury a written copy of part of his instructions, he or she should clearly identify the topics to be addressed in the written material and ensure that it contains a complete and balanced instruction on those topics (***Henry***)
* Judge must alert the jury that they are only receiving a portion of the instructions and tell them to consider instructions as whole
* Instructions dealing with the presumption of innocence and reasonable doubt should be included in almost anything given to jury
* **Dangers to Using Written Instructions**
* **Difficult to make corrections**
* Have to make sure instructions read correctly – May require input of counsel
* **Errors may be fatal**
  + - Errors in written charges may be more lethal than errors in oral charges
    - More difficult to take charge as a whole – Jury may focus on a page with errors
* **Judge must ensure instructions are balanced** – Instructions must be balanced for both sides
* Judges have flexibility as to how to impart the instructions as long as the minimum criteria is met
* For there to be an error of law, it must be shown that the charge was so unnecessarily complex and confusing that it probably diverted the jury from considering the real basis of the case – Stringent test; Not easily met

**Closing Address**

* Rules of procedure, whether common law or statutory, are subject to the *Charter*
* **S. 651(3) and 651(4)** – Requires defence counsel to give closing address before Crown counsel if defence has chosen to call evidence
  + Relates to s.7 of the *Charter* – To be struck down, procedure must be fundamentally unfair (High Threshold)
* Accused is equally capable of defending himself or herself against the Crown regardless of whether the Crown acts first or last (***R v. Rose***)
* Not fundamentally unfair to require the defence to go first
* **Persuasive Force**
  + Little if any evidence to support the proposition that addressing the jury last would provide accused with a persuasive advantage
  + Divergence of opinion – Not unfair to require accused to engage in one or two equally advantageous address procedures
  + At most, if counsel subjectively views addressing jury last as an advantage, he will be faced with weighing one tactical advantage among the various other factors which go towards determining whether or not to call and examine defence witnesses
* **Knowing Crown’s Case Before Answering it**
  + Order of addresses does not significantly affect the knowledge he accused will have at the time of the defence address
  + Crown will already have articulated its preliminary theory in an opening address and will have made fairly clear and refinements or redirections in this theory through the questions asked and the nature of the non-testimonial evidence adduced
  + Crown’s ability to take defence by surprise is severely curtailed by restrictions placed on the Crown’s closing address
  + **Crown Restrictions**
    - Crown must be accurate and dispassionate
    - Crown is duty bound to remain true to the evidence and limit his or her means of persuasion to the facts found in the evidence
    - Once Defence has started to meet its case, Crown is locked into case except in the narrowest of circumstances
    - **Remedies To Any Potential Unfairness**

1. Specific Curative Instructions to the Jury

* Trial judge is the last person to speak to the jury; Jury addresses must be detailed and will outline missteps by Crown

1. Grant of Limited Opportunity to Reply

* Judge has inherent jurisdiction at common law to remedy procedural unfairness during the trial
* Not limited to clear statutory procedures or clearly established common law to change or modify a procedure
* Ex. Judge may shut down proceedings, remove spectators, or grant right of reply – Very broad discretion
* Judge cannot go against clear statutory provision, but can formulate procedures around gaps or silences
* **S.651** is not exhaustive – Says who goes first and second, but not if anyone can go after that
* Judge must be careful in using discretion – Counsel can also argue procedures chosen were unfair
* Should only be granted in the clearest cases of unfairness (Very high threshold)
* Ex. Crown has misled accused as to the theory to be advanced
* Ex. Crown has dramatically changed theory so accused could not reasonably have been expected to answer it
* Crown can also be foreclosed from leading theories that are a complete surprise (Entirely new)
* Reply is confined to those issues improperly dealt with by the Crown counsel
* Cannot be used to restate the original position of the defence or advance new arguments or theories
* **Dangers with Closing Addresses**
* Counsel has to ensure they do not speculate or adduce theories that have no reasonable basis from the evidence
* Counsel has to avoid potential factual errors – Counsel may not introduce evidence that was not there
* Counsel have to avoid addresses that are inflammatory or denigrating to the other side

**Challenging for Cause**

* **S. 634** – Allows accused and Crown to have a guaranteed number of pre-emptory challenges depending on the type of case
* Not challenges for cause – Very limited information to base decisions on (Only know name, occupation, and what they look like)
* Left to instincts of counsel as to what type of person they want on the jury
* **Four Classes of Potential Juror Prejudice**

1. **Interest –** Jurors may have direct stake in trial due to their relationship with the D, victim, witnesses, or outcome
2. **Specific** – Involves attitudes or beliefs about particular case (From personal knowledge, media, or public discussion and rumour)
3. **Generic** – Involves stereotypical attitudes about the defendant, victims, witnesses, or the nature of the crime itself
4. **Conformity** – Involves juror perception that there is strong community feeling about case coupled with expectation for outcome

* Knowledge or bias may

1. Incline the juror to believe the accused is likely to have committed the crime alleged
2. Incline the juror to reject or put less weight on the evidence of the accused
3. Predispose the juror to the Crown, perceived as a representative of the “white” majority

* Jurors are presumed to be indifferent or impartial
  + Before the Crown or the accused can challenge and question them, they must raise concerns which displace that presumption
  + Judge should allow challenges for cause where there is a realistic potential of juror partiality
  + Very high threshold; More than a mere possibility
  + Often not sufficient to show general bias – Best to find bias that manifests itself in a criminal justice setting
  + Better to risk allowing unnecessary challenges than to risk prohibiting challenges which are necessary
  + If standard is met, there are very careful questions that can be asked – Looking for bias that cannot be put aside
  + Racial prejudice is subconscious – It cannot be easily and effectively identified and set aside
  + It cannot be assumed that judicial directions to act impartially will always effectively counter racial prejudice
  + Evidence of widespread racial prejudice in the community may lead to conclusion that there is a specific potential for partiality
  + The relevant community to consider is the community from which the jury pool is drawn
  + Absent evidence to the contrary, where racial prejudice is demonstrated at a national or provincial level, it will often be reasonable to infer that such prejudice is replicated at the community level
  + Potential for partiality is irrefutable where the prejudice can be linked to specific aspects of the trial
  + Incorrect to assume that membership in a minority group always implies a realistic potential for partiality
  + Jurors who are honest or transparent about their racist views will be removed
  + All remaining jurors will be sensitized from the outset regarding the need to confront racial prejudice to ensure minimal impact
  + Facts can be established by **evidence** or **judicial notice**
  + The fact that a certain fact or mater has been noted by a judge of the same court in a previous matter has precedential value
  + If bias is so widespread, the accused will necessarily have met the standard for challenge for cause
  + Evidence has established large widespread prejudice against **aboriginals** on a national level
  + Under ***Williams***, every time there is an aboriginal accused, the threshold is necessarily met
  + Under ***Parks***, threshold necessarily met for criminal trials involving African-Americans in the Greater Toronto area
  + Where there is bias, counsel can ask for a change in venue (Ex. If bias is media-based) or can ask for a judge-alone trial

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| **Case** | **Facts + Analysis** |
| ***R v. Williams***  (1998 – SCC) | *Mr. Williams, an aboriginal, was charged with robbery. He applied for the right to bring challenges for cause in jury selection*.  >Evidence established widespread racial prejudice against aboriginals, which established a reasonable potential of partiality |

### IX. Unreasonable Delay

* **S. 11(b)** enshrines the right of an accused to be tried within a reasonable time
* Trials often take a long time to get to court – Limited judicial resources; Many lengthy pre-trial motions; Conflicting schedules Etc.
* **Policy** – **State:** Possible deterioration of evidence – Impairs truth-seeking function of trial
* **State:** Trials that are held promptly have confidence of public and victims (who do not want to wait years for verdict)
* **Individual:** Liberty interests – Jail/Heavy bail restrictions; May lose evidence – Witnesses may forget etc.
* **Remedy** is a judicial stay of proceedings – Looked at functionally like an acquittal, but there is no trial on the merits of the case
* Seeks to protect (**1**) Right to security – Minimize anxiety/stigma; (**2**) Right to liberty; (**3**) Right to a fair trial – Ex. Ensure evidence is fresh
* Factors to be Considered in Assessing “Reasonableness” of Delay (***Morin***):

1. The Length of the Delay – Time is a critical factor, but is not the only factor

* **Threshold**: S.11(b) inquiry should only be undertaken if period of sufficient length to raise issue as to its reasonableness
* Period to be scrutinized is the time elapsed from the date of the charge to the end of the trial
* Long delays prior to charge dealt with under s.7
* Must consider other factors, such as prejudice – Ex. If accused in custody, shorter period of delay will raise issue

1. Waiver of Time Periods

* Portions of time waived by accused will be subtracted from the above length of delay
* Waiver must be clear and unequivocal, with full knowledge of its effect – May be explicit or implied
* Consent to a trial date can give rise to inference of waiver, unless mere acquiescence to the inevitable

1. The Reasons for the Delay, including
2. Inherent time requirements of the case – How long is takes to prepare case

* Dependent on nature of case – Ex. The more complicated a case, the longer it will take to prepare/conduct
* Will be affected by local practices and conditions

1. Actions of the accused

* Concerned with voluntary actions of accused – Ex. Motions and adjournments
* Was the accused acting in a manner that demonstrated a wish to have a trial within a reasonable time?
* Did the accused show concern about his/her s. 11(b) right? – Not a strict requirement
* Defence needs to actively raise concerns and be proactive (not heroic) in trying to shorten the time frame
* Scheduling requires reasonable availability and cooperation (***Godin***)
* Defence counsel does not have to hold themselves in a state of perpetual availability (***Godin***)

1. Actions of the Crown – Ex. Adjournments, Delay in Disclosure, Making case more complicated than necessary etc.
2. Limits on institutional resources – Time from which parties were ready for trial until courts could accommodate case

* Gov’t has constitutional obligation to commit sufficient resources to meet s.11(b)
* Provincial Court Guideline: 8-10 month before committal; 6-8 months after – Total 14-18 months

1. Other reasons for delay – Investigation must take into account all reasons for delay – Ex. Actions by trial judges
2. Prejudice to the Accused – If no prejudice, very hard to claim breach of s. 11(b)

* Prejudice can be inferred from prolonged delay – Generally insufficient – Court wants to see actual prejudice
* Ex. Loss of liberty, Stress or damage to rep/business., impact on right to make full answer & defence (Ex. Loss of evid.)
* Crown may try to establish by evidence that the delay benefited rather than prejudiced the accused

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| **Case** | **Facts + Analysis** |
| ***R v. Morin***  (1992 – SCC) | *Accused was charged with impaired/over .08. Accused did not receive a trial date for 14 ½ months*.  >Delay sufficient to raise issue; No waivers; Inherent time req’s about 2 months; Accused requested earliest date for trial; No  delay attributable to Crown; Delay mostly due to institutional delay – 12 months – Rapid increase in caseload in area  >Factors allow for period of delay in upper range of guideline; Delay not unreasonable |
| ***R v. Godin***  (2009 – SCC) | *Trial date initially set for 9 months after charge*. *In response to delayed disclosure, Crown re-elected to proceed by indictment.*  *Prelim Inquiry scheduled for 16 mos after charge, but not completed until 21 mos after charge; Trial set for 30 mos after charge*.  >Case was straightforward and required very modest amounts of court time  >Virtually all delay attributable to the Crown and no explanation offered for it  >Defence counsel tried to get earlier date, but his correspondence was ignored  >Long delay in obtaining and disclosing important forensic evidence – Attributable to Crown even though not at fault  >Some evidence of actual prejudice (Ex. Strict bail conditions & Witness memory) and a reasonable inference of a risk of prejudice  >Need to adjourn long-delayed preliminary inquiry because there was not sufficient court time for it |

### X. Powers of Appellate Court

* Accused persons have statutory right to appeal their convictions
* **Summary** appeals – Supreme Court of BC
* **Indictable** appeals – BC Court of Appeal
* **Indictable Appeal Procedure** – After deciding to appeal,

1. File notice of appeal within 30 days of sentencing at BC Court of Appeal Registry; Serve it on the Crown
2. Order the record from the trial below and create trial books (four copies) – Can cost between $5,000 and $15,000
3. Write your factum – Limited to 30 pages; Crown will then file its factum
4. Present oral arguments before panel of three judges in appeal court; Judges will then present their judgements

* **Different Types of Errors**
  + **Errors of Law** – Application of wrong law or legal test
    - **Standard** of **correctness** (***R v. Grouse***)
    - May be some deference to trial judge if it is unclear whether or not the judge applied the correct test
    - Appellate court may be in better position to decide issues of law – Less pressure, benefit of research/oral arguments
  + **Errors of Fact**
    - Very high **standard** – Have to show **palpable and overriding error**; Must be **patently unreasonable** finding of fact (***Gro***)
    - Must be able to show no reasonable judge could have made such a finding (***Grouse***)
    - Deference given to trial judge – They are in a better to find facts/assess credibility – Saw evidence, heard witnesses etc.
  + **Errors of Mixed Law and Fact** – Errors in the application of the facts to the law and legal conclusions or verdicts
    - **Standard** generally the same as for facts – **Patent unreasonableness**; Again, significant deference given (***Grouse***)
    - Must ask whether a reasonable judge could have come to same conclusion or the decision was clearly wrong
* **S. 675** – Basic right to bring an appeal for indictment proceedings
  + Gives right to appeal on any question of law, or with leave of the court, on questions of fact or mixed fact and law
  + Practically our court does not require special permission to bring factual or mixed factual or legal issues, but imposes a higher standard for these issues to be successful
  + **S. 686(1)** – Provides power of Court of Appeal

1. Power to allow appeals where court is of opinion that
2. The verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence
3. The judgement of the trial court should be set aside on the ground of a wrong decision on a question of law

* Need not be linked to the final verdict – Can be any decision (***Khan***)
* If found, must consider s. 686(1)(b)(iii)

1. On any ground there was a miscarriage of justice

* Encompasses errors of fact and errors of mixed fact and law

1. Power to dismiss appeals where
2. The appeal in not decided in favour of the appellant on any ground mentioned in (a)
3. There was an error of law under s. (a)(ii), but no substantial wrong or miscarriage of justice occurred

* Not enough to show error of law – Must show reversible error (Error that could have led to different result)
* Must show why the error caused serious prejudice to the accused – May need to be creative
* Can only be applied where there is no reasonable possibility that the verdict would have been different had the error not been made (***Khan***)

**Reversible Error**

* **Significance of Counsel’s Position at Trial** (***R v. Austin***)
* **Alleged Error of Fact or Inadequate/Unclear Jury Instruction**
  + Counsel’s position at trial will be a significant consideration – Ex. If counsel approved of jury instruction it now appeals
  + Ex. Did counsel object when judge presented evidence to the jury?
  + Will be particularly important where trial judge’s opinion on a matter was fairly discretionary
  + Will also be very important if it appears that the position taken at trial reflects a calculated tactical decision
  + Rationale – If this was something that really hurt the defence, counsel should or would have raised the issue at trial
* **Alleged Error of Law (Ex. in Jury Instruction)**
  + Counsel’s position at trial is of less significance on appeal
  + A misstatement of the law is no less an error in law because it was made with the full support and approval of counsel
  + Counsel’s position at trial is only one factor in determining **reversible error** – Will never be determinative

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| **Case** | **Facts + Analysis** |
| ***R v. Austin***  (2006 – ONCA) | >Judge gave improper response to jury question on the relationship between reasonable doubt and credibility  >Judge told jury to decide what they believed and accepted as facts and apply those facts to reasonable doubt standard  >Ignored possibility that the jury might not be able to decide which version of the events to believe in which case it must acquit  >Misdirection constitutes reversible error even though no objection by counsel – Error in legal principle set out in instruction |
| ***R v. Khan***  (2001 – SCC) | *Jury requested transcripts of evidence. Neither counsel nor TJ realized at the time that transcripts had not been edited to delete submissions that had been made in the absence of the jury.* >Question is whether TJ made an error in law in refusing to declare a mistrial  >Jury instruction was sufficient to cure any ill effect |

**Miscarriages of Justice**

* **Misapprehension of Evidence**
* Stringent standard
* Must establish two things (***R v. Lohrer***)

1. Mistake as to the substance of material parts of the evidence or inappropriate exclusion of evidence from analysis
2. Errors play an essential part in the judge’s reasoning process – Must be focus of judge’s reasons

* Looking for evidentiary errors that could have led to a different result – Not saying judge had to come to a different conclusion
* Might not meet stringent standard to have findings of fact overturned – Finding may still be reasonable
* Generally results in new trial

**Unreasonable Verdict**

* Not often used, but court has power in order to protect against wrongful convictions
* **Standard** – Whether, on the totality of the evidence, a properly instructed jury, acting judiciously, could have convicted (***Dell***)
  + Requires that the conclusion reaches not conflict with the bulk of judicial experience
  + Conviction will not be upheld merely by showing that there was some evidence to support the verdict (***Dell***)
  + Court must analyse the quality of the evidence
  + Neither will conviction be overturned if there is evidence to support defence (even fairly strong evid) – High standard
  + Must look for case built on speculation, very weak, unsubstantiated evidence etc. (***Peers***)
  + Insufficient for court to simply possess a “**lurking doubt**,” but vague unease or lingering doubt may be a signal that the verdict was reached in a non-judicial manner and will require court to thoroughly review, analyse and weigh the evidence (***Dell***)
  + Substantial deference must still be given to any findings of credibility and fact by the trier of fact
  + Bad character, witness evidence, expert evidence etc. is strongly associated with wrongful verdicts
  + Misapprehensions of evidence are factors to be considered in determining whether evid was capable of supporting conviction (***P***)
    - Will result in acquittal if evid apart from misapp cannot reasonably support conviction – Otherwise, new trial (above)
* Generally results in overturning of trial verdict – Appellate court will direct an acquittal
* Power to overturn verdict is not the same standard used by trial judge in determining whether to direct acquittal
* Trial judge must send case to jury if there is “some evidence” which could support conviction
* May be that there was some evidence but no jury could reasonably have convicted

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| **Case** | **Facts + Analysis** |
| ***R v. Dell***  (2005 – ONCA) | *Accused appealed conviction for first-degree murder of estranged husband who was poisoned. Central issue at trial was whether death was murder or suicide*.  >Accused argues judge ignored important evidence, Crown’s theory does not follow from evidence, and verdict was unreasonable  >Evidence to support either theory  >On totality of evidence, properly instructed trier of fact, acting judiciously, was entitled to convict  >Conclusion of murder may not have been inevitable, but it certainly was not unreasonable |
| ***R v. Peers***  (2009 – BCCA) | *Accused convicted of manslaughter based on common intention to rob formed with co-accused who beat someone to death*.  >Evidence relied on by the trial judge to support finding of common intention to rob was circumstantial  >Judge did not give much weight to testimonies stating accused were there to purchase marijuana, not commit robbery  >Finding based on lateness of hour, length of drive and failure to call ahead – All also support theory of weed purchase  >Judge misapprehended evidence – Stated no weed was found in the residence when in fact there was  >Judge attached significance to absence of weed  >Evidence overall is not capable of supporting a finding of common intention – Acquittal directed |