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# Charge Approval

* Private prosecutions happen rarely and the Crown can always intervene (*Mandamus)*
* AG has authority to assume the conduct of a private prosecution (*Mandamus)*
	+ Includes discretion to stay a private prosecution to ensure private prosecutions can meet the high threshold for charge approvals
* AG has ultimate power to initiate, conduct and terminate prosecutions (*Krieger*)

## Charge Approval Standard used by Crown counsel in British Columbia (*An Application for an Order of Mandamus)*

* 1. Substantial likelihood of conviction?
		+ Also consider defenses and admissibility of evidence
		+ This element must be satisfied throughout the process (even during trial), not just the charge approval stage
	2. In the public interest that the charge be prosecuted?
		+ Lots of discretion to exercise
		+ Diversions are appealing to the public interest component

## What is Prosecutorial Discretion? (*Nixon)*

* + - * A term of art
			* Not ANY decision by the crown prosecutor
			* Only refers to the use of those powers that constitute the core of the AG’s office and which are protected from the influence of improper political and other vitiating factors by the principle of independence
			* Includes the following (which are core to the crown discretion):
				1. Discretion whether to bring the prosecution of a charge laid by 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
		- Repudiation of plea agreements **only in exceptional and rare circumstances**
			* 1. Discretion to withdraw from criminal proceedings altogether
				2. Discretion to take control of private prosecution
			* **Whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for**
* Prosecutorial discretion vs tactics or conduct before the court?
	+ Prosecutorial discretion reviewable for abuse of process only
	+ Tactics are governed by the inherent jurisdiction of a criminal trial court
	+ **A constitutional principle in this country** that the AG act independently of partisan concerns when supervising prosecutorial decisions, courts will not interfere with this exercise of executive authority
		- **Court can only supervise conduct of litigants before the court**, not the AG’s decision-making process
		- **No political or judicial interference**
		- **Reviews within the ministry are not considered interference**

## Reviewing Prosecutorial Discretion (*Nixon*)

* Courts will **rarely** interfere with the exercise of prosecutorial discretion
	+ When that discretion is exercised in favour of proceeding, the matter becomes subject to the processes and procedures sanctioned by the court
* Production (of Crown charge approval documents and other documents about prosecutorial discretion) will be ordered only if an accused establishes that there is a real and substantial possibility of bad faith or improper motives on the part of Crown counsel (*Malik)*
	+ Merely having the case history is not good enough
* **Prosecutorial discretion not reviewable by the courts, subject to the doctrine of abuse of process**
	+ Courts should not inquire into reasons behind an act of prosecutorial discretion without proper evidentiary foundation
		- Plea bargain accepted then repudiated meets the threshold because this is highly unusual
		- Applicant has burden of proof but initially shifts to the Crown so Crown can enlighten the court on the circumstances/reasons behind the decision
* Is there an abuse of process? (burden on applicant)
	+ Come to court with documentation obtained legally (ie. Disclosure) showing real possibility of abuse before the court will hear the case – very high threshold
	+ Should review circumstances surrounding the prosecutorial decision and whether it amounted to abuse of process
	+ Is there conduct which causes prejudice to the accused by rendering the trial unfair, egregious state conduct, or affects the integrity of the justice system? (abuse of process is a section 7 inquiry)
		- Applicant can argue one (or a combination of the 3 branches for abuse of process)
		- After this stage a section 7 violation has been found
		1. Unfair trial
			- Key is fairness of the accused’s trial
			- Establishing prejudice of the requisite degree is key to meeting the test: proof of prosecutorial misconduct not a prerequisite
			- **Compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community’s sense of fair play and decency or where the proceedings are oppressive or vexatious”**
				* Oppressive does not require misconduct
		2. Egregious state conduct
			- Requires proof of bad faith or flagrant impropriety by the Crown
		3. Affecting the integrity of the justice system
			- Prejudice to the accused’s interest not determinative
			- Repudiating a plea deal is sometimes necessary but is rare
	+ Should a stay be issued?
		- only appropriate in the ”clearest of cases” (*Tobbias*)
		- remedy is to be determined under 24(1)
		- **court will usually consider a lesser remedy before giving a stay**
		- Only appropriate when the prejudiced caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial or by its outcome and no other remedy is reasonably capable of removing that prejudice

# The Indictment (the charging sheet)

## What does the Crown have to prove?

* Crown must prove every essential element in the charge (*Saunders*)
	+ **Except**
		- under the surplusage rule (*JBM*)
			* If the particular, whether as originally drafted or as subsequently supplied, is not essential to constitute the offence, it will be treated as surplusage (non-necessary which need not be proved)
			* Immaterial or non-essential averments in indictments need not be strictly proved if no prejudice results to the accused
			* **Surplusage rule**: a word or words in an indictment are said to be surplus in the sense that they need not be proved in order to procure a conviction, may not be applied where it would prejudice/mislead an accused
* **Fundamental principle of criminal law that the offence, as particularized in the charge**, must be proved to ensure the accused has opportunity for full answer and defense, section 7 and 11(d) (*Saunders*)
	+ Fundamental to a fair trial (section 7 and 11(d)) that an accused knows the charge he must meet (*R.G.)*
	+ If Crown has not given enough information, defense can ask for it under s587 of the criminal code or as a Charter right
* Details in the charge help to identify the transaction (*Saunders*)
	+ Crown can choose to specify details or not, not mandatory to give specifics of the drug, but if given, MUST PROVE IT
* **if Crown cannot prove the charge or if there is something wrong with the charge, options include** (*Irwin)*
	+ amending the charge (more traditional way to fix an issue with the charge)
	+ consider whether an included offense can be met

## Can the Charge be amended? (*Irwin*)

* Amendment powers promote 2 goals:
	+ Determination of criminal cases on their merits
	+ Wide powers of amendment avoid a multiplicity of proceedings
* Charges can be amended, but not randomly
	+ Crown should be given some flexibility, before (or even during) the trial to change the indictment to reflect the evidence
	+ The amendment of the charge should not be used to raise the seriousness of the charge (it will cause great jeopardy)
* Unfair and prejudicial to permit an amendment fundamentally and retroactively changing the nature of what the Crown must prove (ie. An essential element such as what kind of drugs) (*Saunders)*
* **S.601** provides jurisdiction to trial courts to amend
	+ **allow curing of defects in substance or form and variations between the evidence and the charge**
	+ **Crown** can make application at anytime during trial to amend the indictment
	+ **601(4)** sets out the matters the court should consider when looking at whether there was prejudice to the accused
		- **timing of the amendment will be a key to prejudice** (early = less prejudice)
		- **nature of the amendment** (substantial change = more prejudice)
		- **prejudice**
			* there is still the possibility that a late amendment will not cause prejudice
* 601(4.1) time and place are exceptions and not required elements
* S601(2) does not preclude an amendment which has the effect of changing the charge
	+ Section contemplates any amendment which makes a charge conform to the evidence
	+ Limit on the amending power not found in the nature of the change made to the charge by the amendment but rather the effect of the amendment on the proceedings and the accused’s ability to meet the charge
		- Ultimate question: what effect does it have on the accused, not what the amendment does to the charge?
* No useful purpose in foreclosing an amendment to make a charge conform to the evidence simply because the amendment will substitute one charge for another

## Can the Charge be amended on appeal? (*Irwin)*

* **S.683(1)(g)** provides jurisdiction to appeal courts to “amend the indictment unless it is of the opinion that the accused has been misled or prejudiced in his appeal or defense”
	+ **The test is not about timing, it is about prejudice to the accused**
	+ **allow curing of defects in substance or form and variations between the evidence and the charge**
* **amendment powers of appeal court mirrors that of the trial court, but most likely stronger prejudice**
	+ - **As long as there is no prejudice, amend**
		- Materially changing the charge is ok as well, as long as there is no prejudice
		- S683(1)(g) broad enough to permit an amendment which adds an offence to an indictment
		- S683(1)(g) permits an amendment on appeal where the amendment cures a variance between the charge laid and the evidence led at trial regardless of whether the amendment materially changes the charge, substitutes a new charge for the initial charge, or adds and additional charge
* should appeal court make that amendment? (was there prejudice in this case?)
	+ Can only exercise right to amend if accused will not be misled or prejudiced
	+ Factors (same as trial)
		- Nature of the proposed amendment
		- What was presented at trial?
		- Stage of the proceedings
			* Risk is greater when amendment is done on appeal
	+ If the facts/elements of the charge are the same, then no prejudice
	+ Appeal court must consider whether the accused had a full opportunity to meet all issues raised by the charge as amended and whether the defense would have conducted any differently had the charge been amended at trial
		- No prejudice if there was full opportunity to meet the issues
* **Cases where an amendment substituting a different offense for the offence charged at trial can be properly made on appeal will be few and far between**

## Criminal Code sections 581-587, 601, 683(1)(g)

* S581(3) states that charges must give people reasonable notice
* Charge specificity is protected under the Charter as well but better to go to Criminal Code first
* S583 specifies omissions that are not grounds (alone) for objection
	+ But those grounds, together, could be grounds for an objection
* S587 is the key provision
	+ Specifies what the court may order the Crown to do in giving more details in the indictment

# Bail

## Getting Released from Custody

* **Society not warranted in inflicting greater harm on a person that is absolutely necessary for the protection of society, even though that person may later be convicted at trial (*Bhullar*)**
* Factors leading to just cause under s11(e) of Charter (*Bhullar*)
	+ denial of bail must occur only in a narrow set of circumstances, and
	+ denial of bail must be necessary to promote the proper functioning of the bail system and must not be overtaken for any purpose extraneous to the bail system
1. procedures allow the police to release an accused after processing their charge
2. JP can release individuals upon undertaking to abide by some conditions, prior to a bail hearing
3. Bail (after a hearing in front of a judge)
	* Bail is not full release/liberty
		+ Section 515 allows judges to set conditions for release
			- Defense counsel presenting strict bail conditions will tip in favour of bail
	* Best luck at getting bail is the original hearing, although there is an opportunity to appeal
		+ May be a better defense strategy to delay a bail hearing to better prepare

## Grounds for Obtaining Bail (S515(10))

* Crown, for most offences, must establish at least one of the 3 grounds
	+ Some concern under all 3 grounds, but not enough on balance will not suffice
* In most cases (for most offences), there is a presumption of bail that the Crown must overcome
	+ For some offences (listed in s469, s515(6), s522(2)), there is a reverse presumption on the accused to establish bail
	+ Criminal Code does not specify offenses that will allow no bail
	+ Standard is balance of probabilities, who holds the onus really is key
* Court endorses a strong presumption of bail, but must look at the individual circumstances (*Parsons*)
1. Primary (aka flight ground)
	* Not easy to establish someone is a flight risk
	* Mitigating this risk
		+ Showing ties to the community/jurisdiction (*Toronto Star)*
		+ Showing the person is responsible (*Toronto Star)*
			- Showing up to court on previous charges (but could be an issue with secondary ground)
		+ Have someone offer a surety
	* Health of the person? (*Parsons*)
	* Whether the accused turned himself in? (*Toronto Star)*
	* Seriousness of the offense
	* Strength of the case (*Parsons*)
2. Secondary (protection and safety of the public)
	* **Substantial** risk of committing future offenses and obstructing justice (*Bhullar*)
		+ Deny bail only for those who pose a substantial likelihood of committing an offence or interfering with administration of justice
			- Must be substantial likelihood of endangering the protection or safety of the public!
			- “potential” does not satisfy “substantial likelihood”
		+ Danger/likelihood that an individual will commit an offence does not in itself provide just cause for detention
	* **Factors to consider**
		+ Criminal records (usually consider Canadian records only)
			- Especially ones where he was on bail or an order not to engage in questionable behaviour
			- Similar crimes and serious crimes are more relevant
		+ Previous attempts to tamper with witnesses
		+ Failure to surrender, standing alone, not an indication that the person will re-offend (*Parsons*)
		+ Accused’s propensity for violence or propensity to committing offenses
			- “credible and trustworthy” evidence of gang associations
			- psychological reports could be relevant
		+ affidavit from the accused setting out their information
	* seriousness of the offense
3. Tertiary (public confidence in the administration of justice) (*Parsons*)
	* Rare and exceptional (*Bhullar*)
		+ Can only deny bail if satisfied that in view of the factors and related circumstances, a reasonable member of the community would be satisfied that denial is necessary to maintain confidence in the administration of justice
			- Reasonable person making this assessment must be one properly informed about the philosophy of the legislative provisions, Charter values and actual circumstances of the case
	* Must consider whether confidence in the administration of justice is at stake and balance by all the circumstances, particularly: (*Bhullar*)
		1. Apparent strength of the prosecution case (case should be overwhelming)
			+ Keep in mind the presumption of innocence and strong presumptions of bail (even when there is a reverse onus)
			+ One of the key points to argue in a case because the other factors are likely established for serious crimes
		2. Gravity of the nature of the offence
		3. Circumstances surrounding its commission
		4. Potential for lengthy imprisonment
	* Give due consideration to the presumption of innocence
	* Consider the personal circumstances of the accused
	* This ground is reserved for the most serious offences committed in the most egregious circumstances
	* “on any other just cause” was struck down as being too general (*Bhullar*)

## Bail Hearings

* Bail hearing evidence does not need to meet the strict rules of evidence
	+ Crown leads evidence that is “credible and trustworthy”
* Publication bans under s517 is not discretionary
* **Publication ban will be effective only if it applies to all the accused**

## Appeals of bail decisions (*Parsons*)

* Accused has burden to show the order of the provincial court judge should be vacated or varied
* Reviewing judge to give due consideration to initial order but also entitled to exercise an independent discretion
* Can also hear additional evidence
* S680 allows a review of a decision under s522 by the court of appeal
	+ Review of the record, not a consideration of the application de novo
	+ Appeal court can substitute its own opinion for that of a single judge under review
	+ Not necessary that a reviewing court, before intervening, come to a conclusion that the decision was unreasonable or error being made

## Criminal Code sections 469, 496-499, 515, 679, Charter section 11(e)

# Disclosure

* Earlier requests for disclosure is required
	+ Decisions need to be made **including mode of trial and pleas** and having the disclosure materials prior to is fundamental
	+ Crown is given flexibility for certain situations
* Crown has an ongoing obligation to provide timely disclosure

## What needs to be disclosed?

* Section 7 of the Charter gives the right to full answer and defense, disclosure is 1 part of it (*Baxter*)
	+ asfasdf
* Crown has obligation to disclose but may not necessarily have an obligation to review the materials before disclosure
* **materials need not be admissible**
* **Crown should err on the side of sending it over**
* “fruits of the investigation” (investigative file) must be handed over by the police/Crown,
* Findings of serious police misconduct by officers involved in the investigation is part of the disclosure package (*McNeil*)
	+ Key is whether the police misconduct could “reasonably impact” the case against the accused
		- Not every finding of police misconduct will be part of the disclosure package, really fact dependant
* **Exception**
1. Clearly irrelevant materials need not be disclosed
* Relevance is determined in relation to its use by the defense
* If there is a “reasonable possibility” for the info to be used for full answer and defense
1. Privileged material (including solicitor-client privilege) cannot be disclosed without waiver (by the owner) or court order
	* Crown cannot contract out of (or give undertakings) not to disclose materials, unless it is covered by informer privilege exception or solicitor-client privilege (*Baxter*)
2. Materials in relation to national security cannot be disclosed
3. Materials protected by informer privilege or materials affecting witness security will not be disclosed or may be delayed in disclosure
4. Materials not held by the “Crown”
	* No obligation on the Crown to look at every other government department to find materials to disclose (general rule, with exceptions defined in this case) (*McNeil*)
		+ If Crown is aware of relevant information at another department, they are obligated to look into it. If the other department refuses to disclose, this should be brought to the attention of the defense
		+ Reasonable request from defense counsel (stating reasons why the Crown should look further) could trigger an obligation to seek further information
	* Anything to be in possession of the police is deemed to be in the possession of the Crown
	* There may be unique circumstances where the Crown is in a better position to obtain the information than the defense (ie. Other governments)
5. Materials in the hands of third parties
	* See *McNeil Test*
	* Sometimes the defense will need to enter into an undertaking to review the materials and the decide what materials they want

## Problems with Disclosures

* Trial judge makes final decisions if a disclosure issue is argued in court
* Timing
	+ Crown has discretion to delay disclosure for witness safety issue or ongoing investigation issues (*Baxter*)
		- But must disclose at some reasonable point in time
		- Defense should be put on notice asap and they can apply to the court otherwise
			* This discretion can be reviewed by the trial judge and Crown has burden
	+ Usually have an initial batch of disclosure (before bail hearing, if applicable)
* Late disclosure
	+ If disclosure is given late, the court can make an order for disclosure (and an adjournment)
		- The adjournment will be counted against the crown for the reasonable time of trial rights

## Remedies for Late/Non-Disclosure (*Baxter*)

* Possible remedies
	+ Order to disclose + adjournment (most likely)
	+ Exclusion of the evidence, *in extreme cases* (power under 24(1)) (*Bjelland)*
		- If the disclosed materials relates to a piece of evidence/witness there may be a possibility to exclude the evidence under 24(1) – but must consider less intrusive remedies first
	+ Stay of proceedings (very hard to establish)
	+ New trial (declare mistrial)
* Defense has an obligation to bring the issue in front of the trial judge if Crown does not fulfill their disclosure obligations (an important factor in considering remedies)

### Procedure (Baxter)

* 1. Find a violation under Section 7 – by showing prejudice
		+ **Showing the trial judge that the defense would have acted differently but for the disclosure can really help prove prejudice**
		+ Prejudice is self-evident if the disclosure issue occurs mid-trial
			- Bad intent of the Crown is not a necessary pre-condition for finding prejudice
		+ Breach of disclosure obligations is already a Charter violation and entitled to remedy, no need to show further prejudice (but may need to show further prejudice if the accused wants a stay or new trial under 24(1))
		+ Accused does not have to prove how the undisclosed material could have been used, the duty of disclosing relevant materials lies with the Crown
	2. Tailor a remedy under 24(1) by considering the degree of prejudice suffered
		+ **Consider fair trial and integrity of the justice system (***Bjelland)*
			- Fair trial
				* From the view of society and the accused (fair trial does not mean the most advantageous trial for the accused)
			- Integrity of the justice system
				* Must be material concern and not trivial
				* Distasteful conduct of Crown counsel could be covered under this
		+ Usually an adjournment
		+ **Accused has a burden under 24(1) to demonstrate a high degree of prejudice in order to obtain the maximum remedy (*Bjelland)***
			- Prejudice greater as trial approaches
			- Was the accused in custody?
		+ In the extreme cases a stay or new trial
			- Stay only in the clearest of cases
			- Lesser remedies must be considered before issuing a stay

## McNeil Test

* **This case lowers the standard for the defense to obtain materials**
* Two part-test for third party records (common law)
	+ Crown entities (other than the prosecuting Crown) are third parties, but this does not relieve the prosecuting Crown’s obligation to seek out information they are aware of
	+ Some specific statutory schemes are in place for some records (ie. Records for victims in relation to sexual assault)
	1. Defense application for subpoena to bring the 3rd party to court (stage to consider relevancy)
		+ “likely relevant” (not onerous)
			- purely speculative theory will not be good enough to meet “likely relevant” standard
			- a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify
				* court cannot insist on precise use of the materials
			- can include evidence that may not be admissible or used just to cross-examine witnesses or to test credibility
	2. Trial judge looks at material to decide whether it should be released to the defense (stage to balance privacy interests)
		+ Judge should err on the side of providing it to defense
		+ **Key at this stage is to assess the true relevancy of the record in the case against the accused**
			- **If materials clearly irrelevant, then summarily dismiss**
		+ Privacy issues that do not touch on the aspects of the case should be redacted and turned over
		+ **Privacy interests, with few exceptions, will not defeat an accused’s right to full answer and defense**
		+ factors to consider at this stage (should not apply mechanistically):
			1. the extent to which the record is necessary for the accused to make full answer and defence;
			2. the probative value of the record in question
			3. the nature and extent of the reasonable expectation of privacy vested in that record;
				- how the record was created
				- who created the record
				- the purpose of the record
				- the context of the case in which the record would be used
				- who holds the privacy interest
				- how the record was obtained by the Crown or police
				- the presence or absence of waiver; any applicable legislation and
				- whether the privacy interest extends to all or part of the record
			4. whether production of the record would be premised upon any discriminatory belief or bias
			5. the potential prejudice to the complainant's dignity, privacy or security of the person that would be occasioned by production of the record in question.

# Severance (s591(3))

* Appellate review of the exercise of discretion to grant/refuse severance must afford the same level of deference to the trial judge as that accorded to other discretionary decisions
	+ Severance applications are based on discretion of the judge and deference should be afforded to the extent that the judge **acted judicially and the ruling does not result in an injustice (***Last*)
	+ **When a severance application is made is relevant to the determination of the “interested of justice**”, although not determinative (*Suzack*)
	+ **Proper administration of justice (especially when it is a jury trial)**
	+ **Must take into account practical consequences of ordering separate trials (ie. New jury, wasted judicial resources, potential prejudice to the co-accused)**
* **Court can likely remedy the prejudice by jury instruction?**
	+ **But not a magic solution (*Last*)**
* Two issues that can arise in relation to severance:
	+ **Multiple charges** against an accused (*Last)*
		- Test:
			* Is there prejudice to the accused?
			* Is there benefit to administration of justice in having joint trial?
	+ **Multiple accused** charged with the same transaction (*Suzack)*
	+ **Strong presumption that persons accused of the joint commission of a crime should be tried together**
		- Even stronger presumption when each co-accused is alleging that the other is the guilty party
		- *However*, the trial judge still has discretion to sever if it appears that the attempt to reconcile the respective rights of the co-accused results in an injustice to one of the accused
	+ Each co-accused entitled to constitutional right to fair trial but not the most favourable trial
	+ **Not a law that when there is propensity evidence led by one accused, that he must order severance**

## Considerations for Joint Trials (*Last*)

* + Factors to consider (not exhausitive), captures how interests of justice may be served and avoiding injustice
	+ General prejudice to the accused
	+ Legal and factual nexus between the counts
		- Any truth-seeking interest in trying the counts together?
	+ Complexity of the evidence
	+ Whether the accused intends to testify on one count but not another (should be given significant weight but not determinative)
		- Must be **objectively justifiable**
		- Showing subjective intent by the accused is not enough, trial judge must be satisfied the circumstances show a rationale for the decision
		- Burden is on the accused to provide the trial judge with sufficient information
			* Information could consist of potential defenses open to the accused
		- Accused is not bound by his stated intention
	+ Possibility of inconsistent verdicts
	+ Desire to avoid a multiplicity of proceedings
	+ Use of similar fact evidence at trial
		- Keep in mind that the burden for severing is on the accused based on a balance of probabilities. The burden for similar fact evidence is on the Crown
	+ Length of the trial having regard to the evidence to be called
	+ Potential prejudice to the accused with respect to the right to be tried within a reasonable time
	+ Existence of antagonistic defenses as between co-accused persons

# Rulings and Motions

* Pre-trial rulings and motions before the trial judge
	+ **Usually brought forward by the defense**
		- **Defense has the onus of showing why the judge should rule in the defense’s favour in a ruling/motion**
* Major concern is the length of time spent on pre-trial motions
	+ Judges need to control the courtroom and shorten the time waste for rulings
* Defense usually does not give notice to the Crown on what they will be arguing
* Courts have developed rules to address problems with rulings (*Vukelich hearing* to strike out the motions early when there is no reasonable prospect of success)

### Procedure

1. Reasonable notice
	* **must be some indication on what the arguments are**
	* Ie. The Constitutional Question Act requires 2 weeks notice when constitutionality is in question
	* Common law says there must be reasonable notice to the other party
		+ Depend on complexity and nature of the motion
		+ Generally 1-2 weeks for simple motions and greater for complex motions
	* Notice of Motion – simple document should be provided to the other party and the court
		+ Outline of argument
2. Foundation for the motion
	* Counsel should put together Motion Book containing their arguments of the law, details of the facts (through affidavits)
	* This provides the other side with notice and a judge to see if there is prospect of success
3. Is a *Vukelich* hearing necessary? (approach should be flexible)
	* **A motion should not be ruled upon based on pure speculation on “what could happen**” and should wait until it can actually be evaluated (*Hooites – Meursing*)
	* Section 8 and abuse of process motions require higher prospect of success
		+ Section 7 motions, must consider other remedies before granting a stay (*Hooites-Meursing*)
			- And more likely to be heard after the trial because fairness cannot be determined until the trial actually occurs
	* Prime consideration is whether there is **reasonable prospect of success**
		+ Must be established before having the opportunity to call evidence
	* **Judge is not obligated to permit defense to call witness as part of its motion**
		+ **Judge can even deny hearing a motion if there is no reasonable prospect of success**

# Powers of Search and Arrest

* Must balance effective law enforcement with rights under Section 8 and 9
	+ Protection against reasonable expectations of privacy

## Grounds for Arrest

* Section 495 of the CC
	+ Committing an **indictable** offence (not summary offences). Hybrid offences will be treated as indictable for this purpose (based on the case law).
	+ Or **reasonable grounds** to believe person has committed or is about to commit an indictable offence (based on **what the officer knows of at the time of the arrest**)
* **KEY: “reasonable and probable grounds” (***Juan*)
	+ Objective + subjective standard must be met
		- Police must **subjectively** believe they have reasonable grounds for arrest
		- Reasonable police **officer with experience + knowledge** in the area = the objective standard used
			* The experience must make sense + logical, not just a “hunch”
			* Judge must take into account the officer’s knowledge and experience in determining objective reasonableness
			* Must also look **in the circumstances** to see if the reasonable police officer would have found reasonable grounds
* **Searches** incident to arrest (including search of person and surroundings) will likely lead to admissible evidence

## Grounds for (Investigative) Detention (*Mann*)

* Lower threshold than arrest
* **Investigative detentions carried out in accordance with the common law power does NOT violate Section 9**
	+ Individuals must be advised of the reasons for the detention to comply with Section 10
		- **Court did not elaborate on 10(b) right to counsel with respect to investigative detentions (left it for another day) – right available (according to *Subaru*)**
* Power to detain cannot be based on pure suspicion or hunch
* Detention must be short in duration
* Must have **specific type** of criminal activity that is being investigated, not a **general investigation** for any crimes
* **Search for weapons only (pat-down search)**
	+ officer’s decision to search must also be reasonably necessary in light of the totality of the circumstances.
	+ Search must be reasonable in the circumstances for officer safety
	+ If officer found something that is not a weapon, might be excluded
* **Test:**
	1. Does the act fall under the general scope of duty of an officer?
		+ Police powers are recognized as deriving from the nature and scope of police duties, “the preservation of peace, prevention of crime and protection of property”.
	2. Reasonable suspicion where the officer can articulate the cause
		+ Lower standard than reasonable and probable grounds required for arrest
		+ Both an objective and subjective standard
			- Cannot be based on a hunch
		+ **detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer’s suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence**
			- **overall reasonableness of the decision to detain must further be assessed against all of the circumstances, most notably the extent to which the interference with individual liberty is necessary to perform the officer’s duty, the liberty interfered with, and the nature and extent of that interference, in order to meet the second prong of the *Waterfield* test**

## Searches

### Searching Person

* Incidental to an arrest (only the person, not premises)
* Incidental to an investigative detention (for safety only)

### Searching premises (warrants) (Hunter)

* Must have a warrant to be reasonable search, otherwise will be a Charter violation under section 8 (reasonable expectation of privacy)
* Must have a pre-authorization (warrants) before searching
	+ Exceptions include emergency, risk of evidence being destroyed, etc
	+ Protects people from unreasonable invasions of privacy
* Procedure (*Hunter*)
1. Police must create an “Information to Obtain a Search Warrant”
	* **Must be under oath**
	* Materials to show there is a reasonable likelihood of crime in the premise
	* *Ex parte*
	* Full and complete information by the officer
2. ITO must be brought to someone acting in a judicial capacity (neutral and impartial)
	* person must actively assess the information to ensure Charter rights are protected
	* Must have sufficient information to make an assessment of whether there are reasonable grounds
	* Independent assessment by the person, duty is to safeguard the right, not to rubber stamp (*Le*)
	* Person need not be a judge but must at a minimum be capable of acting judicially
		+ Investigative functions erodes a person’s capability to act judicially
3. Standard of scrutiny (*Le)*
	* Reasonable probability
		+ The standard is "reasonable probability", not "proof beyond a reasonable doubt" or "*prima facie* case":
		+ A belief will be founded on reasonable grounds "where there is an objective basis for the belief which is based on compelling and credible information":
	* Can rely on expert evidence (although preferred if expert can provide more information)
	* standard of review for warrants (for trial judge after the warrant is issued)
		+ test is whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued, not whether, in the opinion of the reviewing judge, the application should have been granted at all by the authorizing judge

### Warrantless searches (Mann)

* deemed reasonable if (Crown has the burden of proving reasonableness on balance of probabilities that the warrantless search was authorized)
	1. Authorized by **law** (statute or common law)
	2. Law itself is **reasonable**
	3. **Manner** in which the search was carried out was reasonable
* good faith cannot be claimed if a *Charter* violation is committed on the basis of a police officer’s unreasonable error or ignorance as to the scope of his or her authority

# Class of Offences

* Section 787 – summary convictions **(unless otherwise stated)** the maximum penalty is $5000 fine or 6 month imprisonment
* offenses are either summary conviction, indictment, or hybrid

## Summary

* summary offenses have a statutory limitation of 6 months (proceedings must be instituted within 6 months (of the incident) unless both the prosecutor and defense agree) (s786)
* **summary offenses are tried in provincial court**

## Hybrid

* hybrid offenses are assumed to be indictment **until** an election (explicit or implied) is made by the Crown (based on prosecutorial discretion) (*Dudley*)
	+ presume Crown is proceeding summarily if they appear to follow summary conviction procedures
	+ Crown will be deemed to have elected to proceed by indictment where the accused has been put to the election as to mode of trial required by s536

### Limitation Period Passed (Dudley)

* **before the trial starts** if it is found that the 6 month limitation passed then declare mistrial UNLESS both sides waive the limitation
	+ Crown can then proceed by indictment subject to abuse of process claims and prejudice
	+ Agreement to waive should be explicit (informed, clear and unequivocal)
* If accused appeals because the proceedings were statute barred then set aside conviction
	+ Crown can then proceed by indictment subject to abuse of process claims and prejudice
* Crown cannot appeal an acquittal on the ground that the proceedings were statute barred
* Better for the Crown to explicitly elect before accused is asked to plead
* prejudice
	+ can be somewhat mitigated by an adjournment but in rare cases there could be evidence that is no longer available
* abuse of process
	+ could be very difficult to show
	+ switching from summary 🡪 indictment is not necessarily an abuse of process

## Indictment

* **no limitation on indictable offenses**
* **some indictable offenses** are within the absolute jurisdiction of the provincial court
	+ section 553
* **indictable offenses (ones not listed in 553) allows the accused to elect the following**
	+ provincial court
	+ supreme court with judge only
	+ supreme court with jury
* **indictable offenses in s469 MUST be tried in supreme court**
	+ must be tried by jury unless both Crown and accused agree to be tried judge alone (s471/473)

# Juries

* judge alone trials have more flexibility
	+ adjournments
	+ admissibility of evidence
	+ time pressure/efficiency
	+ judge can better handle prejudicial evidence (or inadmissible evidence)
* section 11(f) of the Charter guarantees the option of jury for charges that can attract maximum of 5 years imprisonment or more
* issues with jury trial:
	+ juries need to apply the law to the facts
	+ juries may read things that they are not supposed to
* judges usually have a lot flexibility on their jury charges
	+ but should be reflective of the facts in the case

## Role of Trial Judge

* Jury decide the facts and verdict (*Gunning)*
	+ juries are not entitled *as a matter of right* to refuse to apply the law - but they do have the *power* to do so when their consciences permit of no other course (*Krieger)*
* Judge decide questions of law and direct the jury accordingly, and assist by reviewing the evidence (*Gunning)*
	+ Judge can **only give an opinion** on a question of fact and express it strongly BUT must make it clear it is an opinion/advice and not a direction
		- Probably not a good idea to give an opinion if the issue is contested
	+ Judge should **direct an acquittal** if there is no evidence upon which a properly instructed jury could reasonable convict (based on defense’s no evidence motion)
		- NEVER DIRECT A VERDICT OF GUILTY NO MATTER HOW OBVIOUS (*Krieger*)
	+ Judge should **withdraw a defense** from consideration if there is no air of reality
	+ **Judge cannot take issues away from the jury UNLESS the accused conceded on the issue (*Krieger)***
		- Regardless how obvious the answer is

## Review of the Evidence (*Le*)

* Judge does not deal with the facts, but still have duties to review the evidence with the jury
* Rule is that the trial judge must review the substantial parts of the evidence and give the jury the theory of the defense + crown so that they may appreciate the value and effect of that evidence and apply the law (except in rare cases)
	+ Cannot just give jury the transcripts
	+ Help jury **group the evidence for the elements of the offense**
	+ More extensive review required if
		- Evidence was complex
		- High degree of conflict in the evidence
		- Adjournment of the trial after the end of the evidence
		- inconsistencies in the witness’ testimony and explain their impacts on credibility
* **Cannot simply rely on the address of crown/defence for the review of the evidence**
* **Cannot state that the evidence is fresh in the juries’ minds and avoid a review**
* **Flexible approach in light of what unfolded in the trial**

## Written Instructions

* Judges have a broad discretion to provide a written set of instructions, but must still go over it orally
* Dangers with written instructions:
	+ Jury might be less likely to ask the judge for clarification when there is written instruction
	+ Mistake in the written instruction
		- But still required to look at the charge as a whole
* Partial written instructions is permitted, but subject to limitations (*Henry)*
* a trial judge furnishing such instructions must take care to ensure that the **entire charge** is provided to the jury in clear and legible form
	+ - * “**entire charge**” as meaning all of the instructions on the topic or topics to which the written material is directed.
* ensure that the written material contains a **complete and balanced instruction on those topics**.
	+ - * Unbalanced charges are reversible errors
* If material relates to a specific part of the instructions only, make it clear
	+ - that **aim is best served by targeting for written reproduction those parts of the instructions which will prove difficult for the jury**.
		- Selective resort to written material to assist a jury during its deliberations could enhance the educational value of that material
* Must ensure there are written instructions for **presumption of innocence and reasonable doubt**
* instructions in each case should be **tailored** to the individual case

## Closing Addreses

* Counsel ties case together as a whole
* Judge is still last person to address jury
* No inflaming jury and mere speculations
* If the accused calls no evidence, they address jury last (s651 CC)
* If accused calls evidence, they address jury first (s651 CC)

### Closing Address Rebuttal (R. v. Rose – case challenging the CC under Section 7)

* + two approaches available to a trial judge to remedy unfairness resulting from an improper closing address
		1. if a trial judge is of the opinion that an irregularity in counsel’s address has jeopardized the fairness of the trial, then, in most situations, it may be rectified by a **specific correcting reference** to it in the charge to the jury.  This should suffice in most cases.
			- Should not favour arguments of one party over another nor should they appear to engage in contentious argument with the address of counsel for one of the parties
		2. if the trial judge is of the opinion that curative instructions alone will not suffice to remedy the damage, then in those relatively rare situations, the prejudiced party may be granted a **limited opportunity to reply to the defense**.  (based on the inherent jurisdiction of the court to ensure fairness of the process and prevent the abuse of their process through oppressive or vexatious proceedings)
			- only in the clearest cases of unfairness that the trial judge should grant an opportunity to reply as an exercise of inherent jurisdiction
			- must be emphasized that the reply must be confined to those issues improperly dealt with by opposing counsel.
			- It cannot be used simply to restate the original position of the defence or to advance new arguments or theories
			- Inherent jurisdiction allows the judge to adopt an unique procedure (not in statute or common law) to ensure fairness
				* Inherent jurisdiction can be exercised unless prohibited by statute explicitly
			- **Crown may not have a right to reply because it does not engage right to answer and defense**
				* **But it can be argued because of fairness**
	+ duty of the trial judge to present the case for the defence as fully and fairly as the case for the Crown (**fair and balanced fashion**)
		- where the trial judge fails to redress properly the harm caused by a clearly inflammatory, unfair or significantly inaccurate jury address, a new trial could well be ordered.
		- It is not only appropriate for a trial judge, in the charge to the jury, to undertake to remedy any improper address by counsel, but it is the duty of the trial judge to do so when it is required.
* **Very tough to establish a section 7 violation because section 7 guarantees a FAIR TRIAL, not the MOST FAVOURABLE trial**
	+ Must show fundamental unfairness and significant prejudice
	+ Not enough to say “it is better/more preferable”
* **Two aspects of the right to make full answer and defense under Section 7**
	1. Right of the accused to have before him the full “**case to meet**” before answering the Crown’s case by adducing defence evidence
	2. Right of the accused to **defend himself** against all of the state’s efforts to achieve a conviction
* **No concrete evidence to show an accused is less able to defend himself by addressing the jury last**
* the Crown will already have articulated its preliminary theory of the case at the opening of the trial, and will have made fairly clear any refinements or re-directions in this theory through the questions asked of witnesses and through the nature of the non-testimonial evidence adduced.
	+ - There is no evidence which the Crown will be interpreting in its jury address of which the defence will not be aware
		- Crown’s ability to take the defence by surprise is severely curtailed by the restrictions placed on the scope of the Crown's closing address to the jury
		- "[o]nce the defence starts to ‘meet the case’, thus revealing its own case, the Crown should, except in the narrowest of circumstances be 'locked into' the case which, upon closing, it has said the defence must answer.  The Crown must not be allowed in any way to change that case
	+ success in convincing the jury to find in their favour flows from **three essential ingredients**, namely, a sufficient evidentiary foundation to support the legal result sought to be reached, skilful advocacy in interpreting the evidence for the jury, and appropriate jury instructions by the trial judge

## Challenging for Cause

* Section 634 gives counsel specific number of challenges (20, 12, 4, depending on the seriousness of the offense)
	+ Name and occupation of juror is given and then challenged on this basis
	+ Most likely based on gut instincts
* Section 638(b) – Challenge for cause (rarely happens)
	+ Challenge for partiality/bias

### Standards/Procedure for Challenging for Cause (R. v. Williams)

* It is for the triers on the challenge for cause to determine:
	+ - (1) whether a particular juror is racially prejudiced in a way that could affect his or her partiality; and
		- (2) if so, whether the juror is capable of setting aside that prejudice
			* usually through the oath
* Two phases in the challenge for cause process (which requires 2 inquiries)
	1. Inquiry before the judge to determine whether challenges for cause should be permitted
		+ Test: Is there a realistic potential or possibility for partiality?
			- Question is whether there is reason to suppose that the jury pool may contain people who are prejudiced and might be incapable of setting aside prejudice even with judge’s instructions
			- **Reasonable generous approach at this stage**
			- Evidence of widespread racial prejudice may, depending on the **nature of the evidence and the circumstances of the case**, lead to the conclusion that there is a realistic potential for partiality.
			- Courts will generally say that the oath and instruction is sufficient if the bias is merely caused by media
	2. The challenge itself
		+ Test: Whether the candidate in question will be able to act impartially
			- Questioning whether the person has prejudice and if they can set it aside
			- Counsel should furnish proof that the person cannot set aside the prejudice (this is for stage 2, not for stage 1)
			- “concrete” evidence can only be obtained by questioning juror
* NO AUTOMATIC rule that accords an automatic right to challenge for cause on the basis that the accused is an aboriginal or member of a group that encounters discrimination
	+ judges can take judicial notice and not require lengthy evidence
* “Lack of indifference” or “partiality”, in turn, refer to the possibility that a juror’s knowledge or beliefs may affect the way he or she discharges the jury function in a way that is improper or unfair to the accused.
* Four classes of potential juror prejudice have been identified —  interest, specific, generic and conformity
	1. **Interest prejudice** arises when jurors may have a direct stake in the trial due to their relationship to the defendant, the victim, witnesses or outcome.
	2. **Specific prejudice** involves attitudes and beliefs about the particular case that may render the juror incapable of deciding guilt or innocence with an impartial mind.
	3. **Generic prejudice**, the class of prejudice at issue on this appeal, arises from stereotypical attitudes about the defendant, victims, witnesses or the nature of the crime itself.
	4. **conformity prejudice** arises when the case is of significant interest to the  community causing a juror to perceive that there is strong community feeling about a case coupled with an expectation as to the outcome
* Canadian: juries are presumed to be indifferent or impartial
	+ **Crown or defense MUST raise concerns which displace the presumption**
		- * Judge has wide discretion in controlling the challenge process, to prevent its abuse and to ensure fairness to prospective juror and the accused, and to prevent unnecessary delay
* it cannot be assumed that judicial directions to act impartially will always effectively counter racial prejudice
	+ - We should not assume that instructions from the judge or other safeguards will eliminate biases that may be deeply ingrained in the subconscious psyches of jurors.
	+ better to risk allowing what are in fact unnecessary challenges, than to risk prohibiting challenges which are necessary
* Where **widespread racial bias** is shown, it may well be reasonable for the trial judge to infer that some people will have difficulty identifying and eliminating their biases.  It is therefore reasonable to permit challenges for cause.
* expectation that jurors usually behave in accordance with their oaths does not obviate the need to permit challenges for cause in circumstances such as the case at bar, where it is established that the community suffers from widespread prejudice against people of the accused’s race
* object of s. 638(1)(*b*) must be to prevent persons who may not be able to act impartially from sitting as jurors.  This object cannot be achieved if the evidentiary threshold for challenges for cause is set too high
	+ Section s. 638(1)(*b*) should be read in light of the fundamental rights to a fair trial by an impartial jury and to equality before and under the law.  A principled exercise of discretion in accordance with *Charter* values is required

# Unreasonable Delay

* + Disadvantages from long trial
	+ Faded memory of witnesses through passage of time
	+ Liberty concerns if the person did not get bail (even if they got bail there are significant restrictions)
	+ Section 11(b) the right to be tried within a reasonable time
	+ Accused need not assert this right in order to be entitled to it (in the USA the accused might need to assert the right)
	+ Ideal to make application before start of trial
		- Judge more likely to let the trial happen if the application is made the day of trial
	+ **Measure of time starts from time of the charge till start of trial (on a practical level), although theoretically it should be measured till end of trial/sentencing**
		- Use end of trial/sentencing if the motion is to be brought mid way through the trial
	+ **Time from event to charge is not part of 11(b) analysis but can be challenged under section 7 for “full answer and defense”**
		- Although not applicable to 11(b) but pre-charge can give some great context
	+ *Morin* was meant to clarify the 11(b) rights and that there is no administrative deadline (ie. 10 months), must be a **contextual analysis**
	+ Time is only one of many factors to consider
* 24(1) remedies require notice to BC and federal Crown under the Constitutional Question Act

## Purpose of 11(b)

* Primary
	+ Right to security of the person
	+ Right to liberty
		- Pre-trial incarceration
	+ Right to a fair trial
		- Fresh evidence
* Secondary – societal interest
	+ Interest in seing that the least fortunate of its citizens are treated humanely and fairly
	+ Speedy trial increase public confidence
	+ Societies’ demand for trial of serious crimes
* Remedy is a stay of proceedings

## Requirements for a 11(b) application

* requires a transcript of every proceeding for the 11(b) application
	+ that’s why defense position is important in all proceedings
* correspondence between counsel
* evidence of prejudice
	+ best to have those witnesses swear affidavits, but Crown has the ability to cross-examine those witnesses

## Test (*Morin*)

* **Factors to consider for unreasonable delay**
	+ Factors are considered **contextually** and balancing the interests protected by 11(b)
		- Not an administrative or mathematical formula
	+ From issuing of charge to end of trial, excluding waivers
	+ Usually evaluated before a trial starts
	+ **Triggered by an application under 24(1) but should be undertaken only when the period of time is sufficient to raise an issue of reasonableness**
	+ **Accused bears burden of proof**
		- **But sometimes the burden shifts to the Crown for them to provide an explanation**
	1. Length of the delay
		+ MUST BE SUFFICIENT LENGTH TO WARRANT ATTENTION BEFORE RAISING IT
		+ Period is shorter if person has been in custody
		+ Pre-charge time not included but influential in overall determination
		+ Counsel should see what the time period would be in the jurisdiction that will likely trigger 11(b)
			- BC Provincial court is around 12-14 months
			- BC Supreme Court is around 20-24 months
	2. Waiter of time periods
		+ Explicit or implicit waivers
		+ Consent to a trial date CAN give rise to inference of a waiver
			- Counsel should always present themselves as intending to have a speedy trial
		+ Waiver **requires clear and unequivocal and FULL KNOWLEDGE of the rights this procedure is protecting**
	3. Reasons for delay including:
		1. Inherent time requirement of the case
			+ Influenced by local conditions
			+ Cases with preliminary inquiry is lengthier
			+ Fact dependent and depends on the type/size of case
		2. Actions of the accused
			+ Unreasonable applications for adjournments, etc
			+ Was the accused attempting to obtain of having a reasonable time of trial?
			+ **Position of defense counsel is critical**
			+ Any indication that the defense wants an earlier trial?
			+ **Scheduling requires reasonable availability and reasonable cooperation; it does not, for s. 11(*b*) purposes, require defence counsel to hold themselves in a state of perpetual availability.**
		3. Actions of the Crown
			+ Failure to disclose in time
				- Defense in these cases can argue longer adjournments to stretch out the crown’s failure
			+ **crown re-election would be counted against the Crown in a consideration for unreasonable delay (*Godin*)**
		4. Limits on institutional resources
			+ Most common source of delay
			+ **Provincial appeal courts are in best position to assess reasonableness of the province’s institutional limitations**
			+ Allowance must be made for limited institutional resources
			+ Comparing across jurisdictions can be used as a rough GUIDE ONLY
			+ Changing conditions may place sudden/temporary resource strain
			+ Changing conditions should not result in an amnesty
		5. Other reasons for delay
			+ Most of the time will be weighed against the Crown
			+ Did the accused ask for severance? (if in the case of joint trials)
	4. Prejudice to the accused (probably most important factor)
		+ **Two types of prejudice**
			- Personal impact on the accused (financial, social, health, liberty interest)
				* Usually focused on this type of prejudice
			- Prejudice to the right to make full answer and defense
		+ Longer delay 🡪 more likely of prejudice
			- Prejudice can be inferred, no need for concrete proof. Longer delay leads to more likely inference will be drawn (*Godin*)
		+ Important factor in determining the tolerated institutional delay
		+ CONDUCT OF ACCUSED VERY IMPORTANT
			- **Counsel must show willingness to have an early trial** to see if accused actually desired so
		+ Either Crown or defense may rely on evidence to show prejudice or no prejudice

# Powers of Appellate Court

* Procedures used in appeal has significant impact on access to justice
* Canada’s procedures give a broad right of appeal, broad number of issues can be argued on appeal

## Purposes of Appeal

* To supervise trial court and look or errors in the record and give guidance
* Protect against wrongful conviction and ensure fair trials

## Procedure

1. File notice of appeal within 30 days of sentencing
2. Produce trial record – transcripts of everything that was said during trial (red cover books). Used to review for reversible error.
3. Reproduction of the exhibits at trial (blue cover books: gun, drugs, etc). You can’t lead new evidence that wasn’t produced at trial, very difficult.
4. If by judge alone, you will have transcript of proceedings, rulings, and decision
* By Jury: transcript of proceedings, any rulings the judge made, and instructions to the jury
* Leave to appeal is usually required and counsel can argue a combination of errors

## How to Appeal

1. Base argument on one of the grounds for appeal. (once we find an error, we need to find a reversible error)
	* Section 675 - Accused can appeal on questions of law, or with leave questions of fact (or mixed law/fact) or any other ground that appears to be sufficient ground of appeal
2. Argue that there is reversible error
	* Depends on the objections of counsel during trial and nature of the argument on appeal (relevant and significant factor, but not determinative) (*Austin)*
		1. Did counsel raise the matter as an issue at trial? (ie. Did counsel argue the issue at trial?)
		2. Did counsel **object** when the trial judge made the ruling? (ie. Did counsel object to the instructions to the jury?)
			+ Important in seeing if there was an error at all
			+ But if the error was so serious, the position of trial counsel will not be relevant
			+ Relevance of the objection depends on the issue (*Austin*)
				- Where the nature of the instructions was discretionary 🡪 objection is particularly important
				- Clear errors of law 🡪 objection not important
			+ Seriousness of the error will be considered
			+ When jury comes back with questions, it is particular important to give them a full response (lack of objection is acceptable and still reversible) (*Austin)*
	* Error that shows serious prejudice to the accused will be more likely reversible
	* Appeal judges can overturn a verdict if on the evidence there is lurking doubt where the jury may have missed (*Krieger)*
	* Curative proviso in 686(1)(b)(iii) cannot apply when the judge usurps the role of jury (*Krieger)*

## Grounds for Appeal/Appellate Jurisdiction

* + usually focus on the first 3 items first and then try the next 2
	+ appeallate court gives different levels of deference depending on what the issue is
	+ keep in mind differences of appellate jurisdiction and scope of appellate review (Grouse)
		- appellate jurisdiction: which cases may be considered
		- scope of appellate review: what should be done with cases when they are considered. Ie. Level of deference to give
		- characterization in these 2 settings are different and characterization of an issue for one purpose does not necessarily inform its characterization for the other
1. Errors of Law
	* + principle function of appeal review the record for legal errors (findings of law by the trial judge)
			- ie. Wrong legal standards used
		+ standard of correctness, no significant deference (often best argument to put forth in appeals)
			- but there is some leeway, the trial judge’s decision is scrutinized as a whole instead of looking at some slips of the tongue
		+ admissibility of evidence is question of law (*Grouse*)
		+ can come from 3 places:
			- rulings of the trial judge on motions
				* may contain findings of fact that can have deference
			- the law articulated in the decision (or jury instructions)
2. Errors of fact
* trial judge found the wrong facts
* trial court has advantage over the appeal court and given significant deference
* judge not addressing some evidence or forgetting about some evidence is in categories 4 or 5
* standard of palpable and overriding error
	+ could any reasonable trial judge have made the same finding?
	+ Almost need complete illogic in the finding to be reversible
	+ Findings of fact usually turns on credibility and best for trial judge to do
1. Errors of Mixed fact/law
* sometimes called errors of law
* errors in applying the facts to the law
* trial court has advantage over the appeal court and given significant deference
* standard of palpable and overriding error unless it can be linked back to an error of law (then standard of correctness) (*Grouse)*
* could any reasonable trial judge have made the same finding?
* may occur, for example, if the legal test requires consideration of certain factors but they are not all considered by the judge
1. Miscarriages of justice (*Lohrer)*
* New trial may be ordered if the judge *may* have come to a different result
	+ Easier than challenging an error of fact because under this branch, there is no need to show the judge was necessarily mistaken in their verdict
		- * + Where a miscarriage of justice within the meaning of s. 686(1)(*a*)(iii), has been demonstrated an accused appellant is not bound to show in addition that the verdict cannot "be supported by the evidence" within the meaning of s. 686(1)(*a*)(i)
* **misapprehension of the evidence**
	+ Disconnect between the reasons for judgment and the trial transcripts/books
	+ Judge appeared to be mistaken about the factual record (or forgotten about the evidence)
	+ Elements to satisfy
		1. A clear mistake on the evidence,
		2. Mistake must go to the substance rather than to the detail.
		3. It must be material rather than peripheral to the reasoning of the trial judge.
		4. the errors thus identified must play an essential part not just in the narrative of the judgment but "in the reasoning process resulting in a conviction".
1. Unreasonable Verdicts
* No sufficient evidence to convict
* Appeal court is asked to convert the conviction into an acquittal
* **Rare remedy** because it involves
* **“would any reasonable trial judge convict?”** (similar analysis as errors of fact)
* **no need for misapprehensions or mistakes of fact** in order to argue unreasonable verdicts (ie. A horribly weak case)
* **analysis in mistake of fact and misapprehension of evidence** could be pushed into unreasonable verdicts category
* this is like a final/global consideration after the other grounds are considered

## Unreasonable Verdicts

### **R. v. Dell**

* test to be applied in determining whether a verdict is unreasonable is clear.
	+ The appellate court is to independently examine and assess the evidence and decide whether, on a totality of the evidence, a properly instructed jury, acting judiciously, could have convicted
		- a conviction will not be upheld merely by showing that there is *some* evidence to support the verdict.  The appellate court must thoroughly review, analyse and, within the limits of appellate disadvantage, weigh the evidence
	+ it is insufficient for the court to simply express that there is a “lurking doubt”
* must accord “great deference” to any findings of credibility by the trier of fact and recognize the great benefit the trier of fact had in actually seeing the witnesses and hearing them give their evidence
* An appellate court may only interfere with a verdict if it can clearly “articulate as explicitly and as precisely as possible” a basis for concluding that the verdict is inconsistent with the requirements of a judicial appreciation of the evidence
* standard of review applicable to jury verdicts also applies to the verdict of a judge sitting alone although, the trial judge’s reasons may be scrutinized for flaws in the evaluation of the evidence or defects in analysis that may have led to an unreasonable verdict
* it is a well-established proposition that, when considering the reasonableness of a verdict, an appellate court is entitled to treat an appellant’s silence as indicating that the appellant could not provide an innocent explanation of his or her conduct

### **R. v. Peers**

* The mistake must play an essential part in the reasoning process resulting in a conviction.  If the conviction depends on a misapprehension of the evidence the accused has not received a fair trial even if the evidence actually adduced at trial was capable of supporting a conviction
* Where the evidence is circumstantial, the test is whether the evidence is capable of satisfying the trier of fact beyond a reasonable doubt that the guilt of the accused is the only reasonable inference to be drawn from the proven facts
* A misapprehension of evidence that is material to the conviction will result in an acquittal if the evidence apart from the misapprehension is not reasonably capable of supporting a conviction.
* If a trial judge’s reasons for conviction are fatally flawed as a result of a material misapprehension of evidence but the evidence otherwise might support a conviction the remedy is a new trial rather than an acquittal

## Reversible Error

### **R. v. Khan**

* *Case where jury had transcripts containing things they shouldn’t see and trial judge was not sure if there can be mistrial after verdict delivered*
* Appeal court treated this as a question whether the trial judge erred in law instead of 686(1)(a)(iii)

**686.** (1)  On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

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

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

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

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

(*b*) may dismiss the appeal where

(i) the court is of the opinion that the appellant, although he was not properly convicted on a count or part of the indictment, was properly convicted on another count or part of the indictment,

(ii) the appeal is not decided in favour of the appellant on any ground mentioned in paragraph (*a*),

(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (*a*)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred; or

(iv) notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby;

* 686(1)(b)(iv)
	+ this subsection expands the remedial powers of courts of appeal by permitting the dismissal of appeals in case of any procedural irregularity previously perceived as having caused a loss of jurisdiction at trial, as long as the accused suffers no prejudice and as long as the trial court maintained its jurisdiction “over the class of offence[s]”
	+ The real focus of the enactment of s. 686(1)(*b*)(iv) in 1985 seems to have been to put an end to the jurisprudence holding that  procedural errors having caused a loss of jurisdiction in the trial courts could not be cured, even on appeal
	+ s. 686(1)(*b*)(iv) of the *Code* was enacted in the face of a body of case law that was becoming increasingly technical and complex and which had restricted considerably the possibility for appellate courts to conclude that an error at trial was not such that it required a setting aside of the verdict
	+ This provision is rarely invoked, because procedural irregularities that result from an error of law, which is most of them, are properly dealt with under s. 686(1)(*b*)(iii) of the *Code*
		- enacted to cure serious procedural irregularities, otherwise amounting to errors of law, in cases where under the then existing case law, jurisdiction over the person, but not over the offence, had been lost
	+ test of prejudice under that subsection should be the same as the no substantial wrong or  miscarriage of justice, under s. 686(1)(*b*)(iii)
* if an issue is raised on appeal that cannot be said to constitute an error of law, there is no access to the remedial provisions of s. 686(1)(*b*).
	+ In such a case, the court must determine whether the appeal should be allowed “on any ground [that] there was a miscarriage of justice” under s. 686(1)(*a*)(iii).
	+ If the error alleged is one of mixed fact and law, it may have to be dealt with under s. 686(1)(*a*)(iii) and appeal must be allowed
* when an error or irregularity of a procedural nature has occurred at trial, s. 686 provides that
	+ If the procedural irregularity amounts to or is based on an error of law, it falls under ss. 686(1)(*a*)(ii) and 686(1)(*b*)(iii)
	+ If the procedural irregularity was previously (before 1985) classified as an irregularity causing a loss of jurisdiction: s. 686(1)(*b*)(iv) provides that this is no longer fatal to the conviction, and an analysis of prejudice must be undertaken, in accordance with the principles set out in s. 686(1)(*b*)(iii).
	+ If the procedural error did not amount to, or originate in an error of law, which is rare, s. 686(1)(*a*)(iii) applies and the reviewing court must determine whether a miscarriage of justice occurred.  If so, there are no remedial provisions in s. 686(1)(*b*) that can cure such a defect, and the appeal must be allowed and either an acquittal entered or a new trial ordered
* 686(1)(a)(ii) and 686(1)(b)(iii)
	+ the judgment based on an error of law need not be linked to the final verdict but can be any decision, obviously having contributed to the ultimate verdict as they all do, that was an erroneous interpretation or application of the law
	+ determination of whether the error of law was prejudicial to the accused, and if so to what extent, is an analysis traditionally reserved for, and rightly so, the remedial proviso in s. 686(1)(*b*)(iii), with the burden then appropriately placed on the Crown to satisfy the reviewing court that despite the error no substantial wrong or miscarriage of justice has occurred
	+ 2 categories of error for 686(1)(b)(iii)
		- “harmless errors” = errors of a minor nature having no impact on the verdict
		- serious errors which would justify a new trial, but for the fact that the evidence adduced was seen as so overwhelming that the reviewing court concludes that there was no substantial wrong or miscarriage of justice
	+ if the reviewing court concludes that the error, whether procedural or substantive, led to a denial of a fair trial, the court may properly characterize the matter as one where there was a miscarriage of justice (686(1)(b)(iii))
	+ curative proviso can only be applied where there is no “reasonable possibility (not probability) that the verdict would have been different had the error . . . not been made
		- On the one hand, appellate courts will maintain a conviction in spite of the errors of law where such errors were either minor in themselves or had no effect on the verdict and caused no prejudice to the accused
		- In addition to cases where only a minor error or an error with minor effects is committed, there is another class of situations in which s. 686(1)(*b*)(iii) may be applied
			* possible to apply the curative proviso even in cases where errors are not minor and cannot be said to have had only a minor effect on the trial, but only if it is clear that the evidence pointing to the guilt of the accused is so overwhelming that any other verdict but a conviction would be impossible
* Apart from unreasonable verdict cases, it is fair to say that most matters that are brought as grounds of appeal against conviction in criminal cases are characterized as errors of law within the meaning of s. 686(1)(*a*)(ii).  In some cases, when the court has concluded that the error alleged was not strictly speaking an error of law, but at most an error of mixed fact and law, it has characterized the issue as falling under s. 686(1)(*a*)(iii), that is, whether it was a miscarriage of justice. In such a case, further use of the proviso is obviously precluded and the appeal must be allowed