POLICE LAW DIGEST

produced by:

RCMP Legal Services, Department of Justice

Revised 2002

POLICE

LAW

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INTRODUCTION

The purpose of this Digest is to capture the essence of those cases decided by the Supreme Court of Canada (SCC), that have a direct effect on police operations, including some of the administrative aspects related to police operations. Exceptionally, some decisions of the provincial courts of appeal are reported, where it is felt that the decision has achieved recognition as established law because leave to appeal to the SCC was not sought or was denied, and because the decision has been adopted by other provincial appellate courts or was subsequently referred to by the SCC with approval.

While the focus of the original version of the Digest was almost exclusively on Charter cases, and therefore was limited to cases decided since the Charter came into force (1982), we have now expanded the Digest to include non-Charter cases as well, and have consequently included cases going as far back as 1949 (when the SCC became Canada's highest appellate court). We usually (but with some exceptions) limit our summary to a statement of the principle for which the case stands for **(printed in bold type)**. For cases decided in the last five years, our general rule is to also provide a précis of the facts and an elaboration of the court's rationale. Where a case generates several principles affecting police operations, we report the case under the several appropriate headings to which it relates, but a précis of the facts is given under only one of the headings, with cross references to it in the other headings. The strength (and weakness) of this Digest is its focus on only those aspects of a case having an impact on police operations; therefore, the reader should not assume that all aspects of a case are summarised in the Digest.

In the 2002 revision of the Digest we achieved four things: (1) we expanded the content to include non-Charter cases; (2) we added some Charter cases that had previously eluded our attention; (3) we updated the Digest to include cases that came out since April 2000; and (4) we corrected errors and omissions. This has increased the size of the Digest by roughly 75%. Although the sizeable expansion of the Digest and other priorities prevented us from producing an update in 2001, our intention is to produce yearly updates of the Digest.

Since our objective in producing this Digest is to better serve you, we are counting on you to provide feedback to us. Send your comments by e-mail to denis.scott@rcmp-grc.gc.ca

We are distributing the Police Law Digest electronically. It is also accessible via internet at the RCMP web site. Simply search for "Police Law Digest".

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CHARTER CASES

1. GENERAL

1.1 Police illegality/unacceptable conduct

1.1.1 Reverse sting

R. v. CAMPBELL [1999] 1 S.C.R. 565

Unless legislation provides immunity for illegal action, illegal action by police may result in a finding of abuse of process. Members of the RCMP sold a large quantity of hashish to senior executives in a drug trafficking organization as part of a reverse sting operation. The purchasers were charged with and found guilty of conspiracy to traffic in cannabis resin and conspiracy to possess cannabis resin for that purpose; before sentencing, they filed a motion for stay of proceedings on the grounds that the reverse sting constituted illegal police conduct, and that therefore there was an abuse of process warranting judicial intervention. The SCC held that despite their noble purpose of fighting crime, the police had intentionally breached the Narcotic Control Act. Moreover the court held that there is no public interest immunity applying to the illegal activities of the police, unless there is legislation to that effect. Thus, the illegal conduct may give rise to a finding of abuse of process, depending on all the surrounding circumstances, such as evidence as to whether the police acted *bona fide* based on erroneous legal advice or evidence as to whether the illegal conduct shocks the conscience of the community.

1.1.2 Entrapment/"random virtue testing"

R. v. MACK [1988] 2 S.C.R. 903

There is entrapment when: (a) police provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity, or without acting in the course of a *bona fide* investigation; or, (b) although having such a reasonable suspicion or acting in the course of a *bona fide* investigation, the police go beyond providing an opportunity and induce the commission of an offence. In its judgment, the SCC provided a lengthy (yet non exhaustive) list of factors to consider in determining whether the police have employed means which go further than providing an opportunity:

" - the type of crime being investigated and the availability of other techniques for the police detection of its commission;
" - whether an average person, with both strengths and weaknesses, in the position of the accused would be induced into the commission of a crime;
" - the persistence and number of attempts made by the police before the accused agreed to committing the offence;

" - the type of inducement used by the police including: deceit, fraud, trickery or reward;
" - the timing of the police conduct, in particular whether the police have instigated the offence or became involved in ongoing criminal activity;
" - whether the police conduct involves an exploitation of human characteristics such as the emotions of compassion, sympathy and friendship;
" - whether the police appear to have exploited a particular vulnerability of a person such as a mental handicap or a substance addiction;
" - the proportionality between the police involvement, as compared to the accused, including an assessment of the degree of harm caused or risked by the police, as compared to the accused, and the commission of any illegal acts by the police themselves;
" - the existence of any threats, implied or express, made to the accused by the police or their agents;
" - whether the police conduct is directed at undermining other constitutional values."

R. v. BARNES [1991] 1 S.C.R. 449

"Random virtue testing" is a form of entrapment unless it falls within the scope of a *bona fide* investigation. It falls within that scope when the police present a person with the opportunity to commit an offence with a reasonable suspicion that (a) the person is already engaged in the particular criminal activity, or (b) the physical location with which the person is associated is a place where the particular criminal activity is likely occurring.

1.1.3 Wilful violation of Charter rights / s. 24 of the Charter

R. v. GREFFE [1990] 1 S.C.R. 755

A deliberate violation of Charter rights by the police is likely to result in the exclusion of the evidence under s. 24 of the Charter.

[See also R. v. Stillman at 3.3.1. In contrast, see R. v. Wijesinha [1995] 3 S.C.R. 422, at 446, where good faith on the part of the police was a significant consideration which swayed the SCC in admitting in evidence a recorded conversation, notwithstanding its finding that it was recorded in violation of the Charter. The Court noted that "there was no trickery or activity as an *agent provocateur* on the part of the police"; the target of the interception had invited the police into his home and had spontaneously and voluntarily talked to the police. The conversation had been intercepted some months before the SCC's decision in the Duarte case had been released, and thus at a time when the Ontario Court of Appeal ruling that such interceptions were not contrary to the Charter was still in effect. This caused the SCC to make the following observation: "The police sought legal advice on the matter and acted upon that advice in recording the conversation. The police acted in conformity with what they very reasonably believed to be the law as it existed at the time." In other words, the police had not deliberately violated Charter rights.]

R. v. ELSHAW [1991] 3 S.C.R. 24

"A violation of rights which jeopardizes the fairness of the trial cannot be 'saved' by mitigating factors (such as the good faith of the police). It can, however, be worsened by aggravating factors (such as a lack of urgency or necessity)." The SCC identified a number of factors that are relevant to the seriousness of a Charter violation: whether the violation was committed in good faith; whether the violation was inadvertent or of a merely technical nature; whether it was deliberate, wilful or flagrant; whether the action which constituted the violation was motivated by urgency or necessity to prevent the loss or destruction of evidence; whether the violation was avoidable by resorting to other available investigatory techniques. The Court added that the failure to proceed properly, when that option is open to the police, tends to indicate a blatant disregard for the Charter, and will result in the exclusion of the evidence so obtained. The Court also explained that the test for the admissibility of self-incriminating evidence under s.24(2) is more stringent than the test for real evidence: "This is so because the former is directly related to the *Charter* violation and its admission would dramatically affect the presumption of innocence of the accused and also affect his or her right not to testify. A series of decisions by this Court, beginning notably with Collins, makes it clear that the exclusion of inculpatory statements obtained in violation of s.10(b) should be the rule rather than the exception."

[See also 6.3.9.]

1.1.4 Abuse of process / violation of s.7 of Charter

R. v. REGAN [2002] SCC 12 (temporary citation)

Conduct, on the part of the Crown or the police, which connotes unfairness and vexatiousness of such a degree that it contravenes fundamental notions of justice, will undermine the integrity of the judicial process and violate s.7 of the Charter. [See 3.4.1 for the facts and the rationale.]

1.2 Extra-territorial application of the Charter

1.2.1 Arrest/detention or search & seizure by foreign police

R. v. TERRY [1996] 2 S.C.R. 207

"The general principle is that the law of the land in which one finds oneself governs the conduct of the enforcement process, supplemented, as fairness requires it, with the right to provide relief at trial." The accused, sought by Canadian police in relation to a fatal stabbing in Canada, fled to the U.S. and was arrested by U.S. police on an extradition warrant acting on information from Canadian police. The U.S. police complied with all U.S. legal requirements relating to an arrest, but did not comply with the requirements of the Charter; notably, they failed to advise the accused, forthwith upon detention, of his right to counsel. The U.S. police obtained a statement from the accused and seized items in his possession. The admissibility of these became an issue, at his trial, given that they were obtained in the circumstances of the U.S. police's failure to advise the accused of his right to counsel. The SCC held that foreign police are under no duty to comply with the requirements of Canadian law when they are exercising their police powers on their own territory. However, the Court cautioned that it would be prudent for foreign police to exercise their police powers according to high standards to avoid the possibility of evidence being excluded or a stay entered on the ground that its use would violate the principles of fundamental justice or render the trial unfair. The Court was satisfied that high standards had been applied by the U.S. police.

1.2.2 Interrogation by Canadian police

R. v. COOK [1998] 2 S.C.R. 597

The Charter applies to the actions of Canadian police on foreign territory in connection with their investigation of an offence committed in Canada for a criminal prosecution to take place in Canada. The accused was arrested in the U.S. by U.S. authorities pursuant to a warrant issued in connection with a Canadian extradition request following a murder committed in Canada. Upon arrest, the accused was read his *Miranda* rights ("right to be silent but anything you say..."). When taken before a U.S. magistrate, the accused indicated that he wanted a lawyer appointed for him. The accused was then interrogated by Canadian police, in the U.S., before he saw or contacted a lawyer. The Canadian police did not inquire whether the accused had requested a lawyer. They did inform the accused of his right to a lawyer, but in a confusing and defective manner, subsequent to asking the accused a series of background questions. The accused gave a statement which the Crown later sought to introduce to impeach the accused's credibility. The SCC held that the statement was obtained in violation of the accused's rights under s.10(b) of the Charter and should be excluded from the evidence. The Charter applies to the actions of Canadian police in foreign territory, in relation to a person who is being made to adhere to Canadian criminal law and procedure, because their policing powers are derived from Canadian law, and because there would result no interference

with the territorial jurisdiction of the foreign state.

1.2.3 Interrogation by foreign police

R. v. HARRER [1995] 3 S.C.R. 562

Foreign police interrogating a detained person in foreign territory, in relation to criminal involvement in Canada, are not required to comply with the Charter (unless they are acting as agents of Canadian police). The accused was in the U.S. when she was placed under arrest by U.S. immigration officials on suspicion that she was an illegal alien. She was read her *Miranda* rights ("right to be silent but anything you say...."). She was then taken to Michigan State police who reminded her that her *Miranda* warning still applied. They interrogated her concerning a crime which she was suspected of having committed in the U.S. Then, without re-reading her *Miranda* rights, they began to interrogate her concerning a crime which she was suspected of having committed in Canada. She was eventually prosecuted in Canada for the Canadian crime. Were the statements that she gave to U.S. police admissible against her in Canada? The SCC said yes. Had the interrogation been made by Canadian police (or by U.S. police acting as agents of the Canadian police), the Charter would have required that a new warning be given to the accused when the focus of interrogation changed from the U.S. crime to the Canadian one. But the Charter was held not to apply to interrogations in the U.S. by U.S. authorities acting on their own behalf.

1.2.4 Letter of request for foreign assistance to carry out a search & seizure

SCHREIBER v. CANADA (A.G.) [1998] 1 S.C.R. 841

A request by Canadian authorities for foreign assistance to carry out a search and seizure in foreign territory by foreign authorities in relation to an alleged crime committed in Canada by a Canadian citizen, is not subject to the Charter. Mr. Schreiber is a Canadian citizen who resides in Canada and Europe, and has an interest in bank accounts in Switzerland. The federal Department of Justice sent a letter of request to the Swiss authorities seeking their assistance concerning a Canadian criminal investigation. The Swiss government accepted the request and issued an order for the seizure of the documents and records relating to Mr. Schreiber's accounts. Was it necessary for the Canadian authorities to obtain, in Canada, prior to the delivery of the letter of request to the Swiss authorities, a search warrant or other judicial authorization respecting the search and seizure to be carried out by the Swiss authorities? The SCC held that the sending of a letter of request for foreign assistance does not engage the Charter because the letter of request itself does not intrude on Mr. Schreiber's privacy; all of the actions that will in fact interfere with Mr. Schreiber's privacy interests will be undertaken in Switzerland by Swiss authorities, and the Charter does not apply to them, per R. v. Terry [see 1.2.1].

1.3 Ancillary Powers Doctrine

KNOWLTON v. THE QUEEN [1974] S.C.R. 443

As part of their duty to preserve the peace and prevent crime, the police have the authority to take such reasonable and proper steps as are necessary for the attainment of their duty. The Edmonton City police had cordoned off an area in front of the entrance of a hotel where Premier Kosygin was to make a short stop. A citizen persistently sought to penetrate the cordoned off area in order to take photographs of the Russian Premier. The police warned him that if he entered the cordoned off area he would be arrested. The citizen began to proceed in the cordoned off area, pushing his way through two constables. He was arrested for obstructing a peace officer in the execution of his duties. The SCC held that the conduct of the police clearly fell within the general scope of the duties imposed upon them.

[The principle for which this case stands for is known as the "ancillary powers doctrine", and derives from the English case of R. v. Waterfield [1963] 3 All E.R. 659 (C.C.A.). Though Knowlton is a pre-Charter case, the SCC rendered its decision having taken into consideration the fact that the police "interfered with the liberty of the appellant, or more precisely, with his right to circulate freely on a public street". Moreover, the ancillary powers doctrine has received post-Charter recognition by the SCC in Dedman v. R. (1985) and in R. v. Godoy (1999): see below.]

DEDMAN v. THE QUEEN [1985] 2 S.C.R. 2

"Police officers, when acting or purporting to act in their official capacity as agents of the state, only act lawfully if they act in the exercise of authority which is either conferred by statute or derived as a matter of common law from their duties." A police officer randomly requested the driver of a motor vehicle to stop his vehicle, as part of a spot check program (known as R.I.D.E.) intended to detect, deter and reduce impaired driving. What was the officer's authority to stop a vehicle? There was no statutory authority either in the Criminal Code or in the Highway Traffic Act to do so. The SCC held that the authority to do so was derived from the officer's general statutory and common law duties. The Court noted that "it has been held that at common law the principal duties of police officers are the preservation of the peace, the prevention of crime, and the protection of life and property, from which is derived the duty to control traffic on the public roads", and found that the random stop fell within the general scope of the duties of a police officer to prevent crime and to protect life and property by the control of traffic. While the exercise of the power to stop vehicles interfered with the liberty to circulate freely on the highway, the Court held that this interference was necessary for the carrying out of the particular duty, and was reasonable having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference.

[The matter of check stop programs is also dealt with at 4.5.6.1 and 5.2.3.]

R. v. GODOY [1999] 1 S.C.R. 311

Where police action constitutes a *prima facie* interference with a person's liberty or property, there is authority for this action if the action falls within the general scope of any duty imposed by statute or recognized at common law, and if the action, albeit within the general scope of such a duty, does not involve an unjustifiable use of powers associated with the duty. [The facts are summarised in 4.6.3.] The SCC referred to this test as the "accepted test for evaluating the common law powers and duties of the police". The Court also adopted the following description set out in R. v. Simpson (1993) 79 C.C.C. (3d) 482 (Ont. C.A.), of what is meant by a "justifiable" use of a police power: "(...) The justifiability of an officer's conduct depends on a number of factors including the duty being performed, the extent to which some interference with individual liberty is necessitated in order to perform that duty, the importance of the performance of that duty to the public good, the liberty interfered with, and the nature and extent of the interference." The Court ruled that the values of dignity, integrity and autonomy, which underly the privacy interest (protected by s. 8 of the Charter) that residents have within the sanctity of their home, are the same values engaged in a most immediate and pressing nature by a disconnected 911 call, and that the interest of the person seeking assistance by dialing 911 is closer to the core of those values than the interest of the person who seeks to deny entry to the police who arrive in response to the call for help.

2. SECTION 2 OF THE CHARTER: Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association.

2.1 Freedom of expression

2.1.1 Child pornography

R. v. SHARPE [2001] 1 S.C.R. 45

The possession of child pornography is a form of expression protected by s. 2(b) of the Charter. Its prohibition by s. 163.1(4) of the Criminal Code is justified under s. 1 of the Charter except where: (i) the written material or visual representation in question is created by the accused alone, exclusively for his/her own personal use, with no intention other than mere private possession, or (ii) the visual recording in question is created by or depicts the accused, provided that it does not depict unlawful sexual activity and is held by the accused exclusively for private use, with no intention other than mere private possession. The accused was charged with two counts of possession of child pornography contrary to s. 163.1(4) of the Criminal Code. He challenged the constitutionality of s. 163.1(4) and of the related definition of "child pornography" found in s. 163.1(1). The Crown conceded that these provisions violate s. 2(b) of the Charter but sought to justify them under s. 1 of the Charter. The trial judge and the majority (2:1) of the B.C.C.A. declared s. 163.1(4) to be unconstitutional and the accused was acquitted. The SCC reversed their judgment. In holding that the possession of child pornography is a form of expression protected by s. 2(b) of the Charter, the SCC reasoned that "the right to possess expressive material is integrally related to the development of thought, belief, opinion and expression. The possession of such material allows us to understand the thought of others or consolidate our own thought (...) the possession of expressive material falls within the continuum of rights protected by s. 2(b) of the Charter". While acknowledging that Parliament was pursuing the pressing and substantial objective of criminalizing the possession of child pornography that poses a reasoned risk of harm to children, the SCC held that s. 163.1(4) of the Criminal Code goes too far in that it criminalizes the possession of an unjustifiable range of material which does not pose such a risk. However, because, for the most part, s. 163.1(4) is justified under section 1 of the Charter, the Court decided not to declare s. 163.1(4) to be unconstitutional; instead, the SCC remedied the overbreadth of this provision by reading into it the necessary exceptions.

2.1.2 Hate/racist literature

ROSS v. SCHOOL DISTRICT NO. 15 [1996] 1 S.C.R. 827

Where an employee's racist comments, made in public while off-duty, has the effect of undermining the public's trust and confidence in the employer's fulfilment of public functions

because of the nature of the position held by the employee, the employer may discipline the employee and transfer the employee to a different position where the employee's exercise of his freedom of expression will not have the same effect. A teacher publicly made racist and discriminatory comments against Jews, during his off-duty time. A Jewish parent complained to the provincial Human Rights Commission that the School Board's tolerance of this situation violated the provisions of the provincial Human Rights Act. The Board of Inquiry agreed and ordered the School Board to take the following actions: (1) place the teacher on leave without pay for 18 months; (2) appoint the teacher to a non-teaching position for which he is qualified if, during the period of leave without pay, such a position becomes available; (3) terminate his employment if a non-teaching position for which he is qualified does not become available in the allotted time, or if he turns down an offer for such a position; and (4) terminate his employment if at any time he continues to publicly make racist comments. While all four actions were found to contravene s. 2(b) of the Charter, the SCC held that only the fourth one could not be justified under s. 1 of the Charter. On the evidence, the SCC found that the proper balance between the employer's interest and that of the employee did not require the imposition of a permanent ban on the employee's freedom of expression.

2.1.3 Freedom of the press / publication ban

R. v. MENTUCK [2001] 3 S.C.R. 442

A publication ban, based on the common law rule enabling a court to order such a ban, sought to safeguard the proper administration of justice, should only be ordered when: (a) the ban is necessary to prevent serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and (b) the salutary effects of the ban outweigh its deleterious effects on the rights and interests of the parties and the public, including its effects on the right to free expression, the right of the accused to a fair and public hearing, and the efficacy of the administration of justice. During a trial, the Crown sought a publication ban to protect the identity of the police officers involved in the undercover investigation of the accused and to protect the operational methods used by them. The accused and the media opposed the ban. The SCC, noting that the details concerning the operational methods in question had already been well-publicized in the past, held that, on the facts of this case, publication would not pose a serious risk to the proper administration of justice. In any event, the Court was of the view that there was an overriding public interest in favour of publication: "The tactics used by police, along with other aspects of their operations, is a matter that is presumptively of public concern. Restricting the freedom of the press to report on the details of undercover operations that utilize deception, and that encourage the suspect to confess to specific crimes with the prospect of financial and other rewards, prevents the public from being informed critics of what may be controversial police actions." The Court was also prepared to hold that the accused had an overriding right in favour of publication of the details of the police operations: the Court stated that the accused's right to a public trial includes the right to have the media access and report on the trial, because this will permit a means of public supervision that will bolster the accused's right to a fair trial, and because public knowledge of the details of the police operations will assist the accused in achieving vindication if he is acquitted on

account of improper police action. However, the Court held that publication of the names and identities of the officers in question would create a serious risk to the efficacy of current, similar undercover operations in which the same officers are involved: in view of the fact that the officers use their real names in the course of their undercover work, publishing their names would alert targets that their apparent criminal associates are in fact police officers. Moreover, the Court was satisfied that the ban on publication of this information would not have any substantial deleterious effect on other interests. Nonetheless, the Court noted that in normal circumstances this information should not be protected from publication. The ban against publication of the officers' names and identities was restricted to a period of one year, subject to further order of the court. The Court rejected the notion of a permanent publication ban, to shield the officers of the physical danger they would otherwise be exposed to once their identities were revealed, because there was no evidence that the officers would be more exposed to such a danger than any other police officer.

2.2 Freedom of religion

2.2.1 RCMP uniform

GRANT v. CANADA (AG) [1995] 125 D.L.R. (4th) 556 [Fed C.A.]

The RCMP's turban policy does not violate human rights, it promotes them. The RCMP adopted regulations allowing members of the RCMP who adhered to the Khalsa Sikh religion to wear their turbans and other religious articles as part of their uniforms. Motivated by their great pride in the traditions of the RCMP, some members challenged the validity of these regulations on the grounds that they violated their rights under ss. 2(a), 7 and 15 of the Charter. The Federal Court of Appeal dismissed the challenge. There was no violation of the freedom of religion [s. 2(a)], as no one was compelled to adhere to the religious practices or beliefs of those who took advantage of these regulations. Nor did the protection of the religious freedom of one group mean that there would be non-protection for other groups; thus there was no violation of either s. 2 or s. 15. Rather than restricting religious freedom, the regulations enlarged religious freedom by accommodating the members of a particular religion. The Court also ruled that there was no evidence of a violation of s. 7, and in particular no evidence that the regulations create a reasonable apprehension of bias in the delivery of policing services.

2.3 Freedom of Association

2.3.1 Collective bargaining

DELISLE v. CANADA (AG) [1999] 2 S.C.R. 989

The freedom of association guaranteed by s. 2(d) protects RCMP members against any interference by management in the establishment and business of an employee association, but does not include the right to collective bargaining or the right to a specific collective bargaining regime set out in a specific statute. A member of the RCMP challenged the constitutionality of s. 2(e) of the Public Service Staff Relations Act and s. 6 of the Canada Labour Code, which exclude RCMP members from their respective collective bargaining regimes. The SCC held that those provisions did not violate the right to freedom of association, (nor the right to freedom of expression under s. 2(b), or the right to equality under s. 15). Freedom of association protects the right to form an association, but this does not include the right to collective bargaining, nor does it require the RCMP to grant official recognition to an independent employee association. However, the court did point out that (subject to s. 1 of the Charter- i.e., subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society), the right to freedom of association does prevent the RCMP from interfering with the business of an employee association. The association may carry on any lawful activity that its members may carry on individually, including representing their interests.

2.4 Freedom of the press

2.4.1 Search warrant

CBC v. LESSARD [1991] 3 S.C.R. 421
CBC v. NEW BRUNSWICK [1991] 3 S.C.R. 459

While freedom of the press does not as such impose new or additional requirements for the issuance of search warrants, it does require that careful consideration be given not only to whether a warrant should issue but also to the conditions which might be imposed upon any search of media premises. It also provides a backdrop against which the reasonableness of the search may be evaluated.

[See also 4.4.2 and 4.4.7.]

3. SECTION 7 OF THE CHARTER: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

3.1 Right to disclosure (to make full answer and defence)

3.1.1 General principle: Crown obligation to disclose fruits of investigation

R. v. STINCHCOMBE [1991] 3 S.C.R. 326

The Crown has a legal duty to disclose all relevant information to the defence. The accused was charged with breach of trust, theft and fraud. A former secretary of the accused gave a written and a tape-recorded statement to the RCMP; the statements were apparently favourable to the accused. Defence counsel was informed by the Crown of the existence but not the contents of the statements. The Crown refused defence counsel's request for disclosure of the statements, therefore defence counsel asked the Court to order disclosure. The SCC held that, subject to the Crown's discretion (reviewable by the court) as to timing and manner of disclosure and to withhold what is clearly irrelevant and what is protected from disclosure by legal privilege, all relevant information must be disclosed, whether or not the Crown intends to introduce it into evidence and whether the evidence is inculpatory or exculpatory. This would include all statements obtained by the police from potential witnesses, even if they are not proposed as Crown witnesses; where no statements exist, other information such as police notes or other information in the police's possession relating to the identity of potential witnesses and any evidence that a potential witness could give, should be produced. The principle behind this duty is that the fruits of the investigation are not the property of the Crown for use in securing a conviction, but the property of the public to be used to ensure that justice is done.

3.1.2 Therapeutic records (including medical, counselling, and school records)

R. v. O'CONNOR [1995] 4 S.C.R. 417

Even private or confidential documents such as therapeutic records, that are in the possession of the Crown, must be disclosed to the defence. The accused, the principal of a native residential school, was charged, in 1991, with sexual offences alleged to have occurred between 1964 and 1967. The complainants were students who had attended that school. The accused sought production from the Crown (and from third parties) of the complainants' medical, counselling and school records. The Crown was reluctant to disclose the therapeutic records, motivated by a desire to protect the privacy interests of the complainants. One of the issues before the Court was whether the Crown's disclosure obligations should be tempered by a balancing of the complainants' privacy interests in therapeutic records against the right of the accused to make full answer and defence. The SCC held that concerns relating to privacy disappear once the records in question are in the possession of the

Crown: they are now public property and have lost all expectation of privacy. Fairness requires that if the complainant is willing to release this information in order to further the criminal prosecution, then the accused should be entitled to use the information in the preparation of his defence. The Crown's duty to disclose is not affected by the confidential nature of therapeutic records. However, the Court suggested that there is a duty on the Crown seeking to obtain such records for the purpose of prosecution to explain to the complainant that the records, if relevant, will have to be disclosed to the defence.

3.1.3 Wiretap packets

R. v. GAROFOLI [1990] 2 S.C.R. 1421
R. v. DURETTE [1994] 1 S.C.R. 469

When determining whether the contents of wiretap affidavits should be disclosed to an accused, full disclosure is the rule subject to certain exceptions: to justify non-disclosure, the Crown must show that disclosure will be prejudicial to the public interest in that it will compromise confidential police informants, ongoing law enforcement investigations, the police's intelligence-gathering techniques, or the interests of innocent persons, and that the prejudice to the public's interests outweighs the prejudice to the interests of the accused. The affidavits should be edited only to the extent necessary to protect those overriding public interests.

3.1.4 Informer privilege

R. v. LEIPERT [1997] 1 S.C.R. 281

An exception to the informer privilege rule applies if the accused can demonstrate that it is absolutely essential to establishing his/her innocence. The police received an anonymous tip that the accused was growing marijuana in his basement. The police obtained a search warrant. The information for the warrant relied primarily on observations made by the police and their "sniffer"dog when they had walked by the residence, but did mention that they had received an anonymous tip. At trial, the accused sought disclosure of the tip; the Crown objected on grounds of informer privilege. The judge ordered disclosure of the tip with editing out of all reference to the tipster. The Crown refused to disclose, and the judge acquitted the accused. The Crown appealed. It was held by the SCC that informer privilege applies unless the accused can demonstrate that disclosure of the identity of the informant is absolutely essential to establishing the accused's innocence (such as where the tipster was a material witness to a crime or acted as an *agent provocateur)**. In this case, the court held that it was not established that the exception should apply. The court pointed out that informer privilege prevents not only disclosure of the name of the informant, but of any information which might implicitly reveal his or her identity. Thus, editing of information may be possible when the identity of the informant is known to the police, and the

informant can review the edited version of the information and be satisfied that his/her identity is not revealed; but, when the tipster is anonymous, "edited" disclosure is not an option, to ensure that the secrecy of the informer's identity is not compromised.

*["A third exception may exist where the accused seeks to establish that the search was not undertaken on reasonable grounds and therefore contravened the provisions of s. 8 of the Charter.": see R. v. Scott [1990] 3 S.C.R. 979, at 996.]

3.1.5 Duty to preserve the fruits of investigation, and explain their loss

R. v. LA [1997] 2 S.C.R. 680

The Crown's duty to disclose relevant evidence gives rise to a duty to preserve such evidence, and to provide a satisfactory explanation if it is lost or destroyed. Through innocent inadvertence, a police officer omitted to mention, and misplaced, a taped conversation with a complainant which was relevant to the charges faced by the accused. The accused sought a stay of proceedings on the ground that the Crown failed in its duty to disclose. The SCC held that the Crown's duty to disclose gives rise to an obligation to preserve relevant evidence, and in turn gives rise to a duty to provide a satisfactory explanation whenever the Crown is unable to discharge its duty of disclosure. The Crown's duty extends to the police. Reasonable steps, according to the circumstances, need to be taken to preserve evidence for disclosure; those circumstances include the relevance that the evidence was perceived to have at the time. The greater the relevance of the evidence, the greater the degree of care that is expected of the police in preserving the evidence. A finding of abuse of process will result not only from the deliberate destruction of evidence for the purpose of evading disclosure, but also from an unacceptable degree of negligence. Moreover, in those cases where the defence can demonstrate that the loss of the evidence is so prejudicial that it impairs the right of the accused to receive a fair trial, even a satisfactory explanation by the police/Crown may be insufficient to displace the prejudice to the accused. On the facts of this case, the Crown's explanation was satisfactory, and the right to a fair trial was not compromised.

[The Crown may also be held responsible for the deliberate destruction by third parties of relevant evidence held by them if a link can be established between the Crown and the third party. Thus, the Crown was held responsible for the deliberate destruction of relevant evidence by a sexual assault crisis centre because the centre was "an agency that not only receives public money but whose activities are scrutinized by the provincial government.": see R. v. Carosella [1997] 1 S.C.R. 80, at 114, (a 5:4 decision).]

3.2 Principle against self-incrimination/right to remain silent

[See also section 11 of the Police Law Digest re: other non-Charter principles relating to statements/confessions]

3.2.1 Confession to an undercover police officer

R. v. HEBERT [1990] 2 S.C.R. 151

The use of an undercover police officer to actively elicit information from a detained suspect to subvert the suspect's choice not to make a statement to the police, violates the right to remain silent. The accused was arrested on a charge of robbery. He was informed of his right to counsel, did consult counsel, and told police that he did not wish to make a statement. He was then placed in a cell with an undercover police officer posing as a suspect also under arrest. The undercover cop engaged in conversation with the suspect who made statements which incriminated him in the robbery. The SCC held that this method of obtaining statements violated the detainee's right to remain silent. This was considered to be an unfair trick by the police, given the accused's clear communication to the police of his intention not to give any statement to them. The court pointed out, however, that the statements would have been admissible had they been made to an inmate who was neither an undercover cop nor a police agent.

[The test to determine when the police has actively elicited information is set out in R. v. Broyles, in 3.2.2 , and in R. v. Liew, below.]

R. v. LIEW [1999] 3 S.C.R. 227

Subterfuge, in and of itself, by the police, does not violate the right to remain silent. It is the act of interrogating the accused or eliciting information from the accused, with a view to subverting the right to silence, which violates the right to silence. The accused does not have to assert his right to silence in order for the right to apply, or for subversion of the right to occur. Liew was arrested at the scene of a drug deal and the police also pretended to arrest an undercover officer involved in the deal. The undercover officer and Liew were taken together in a car to the police station. The police arranged a cell block interview between Liew and the undercover officer. Liew initiated a conversation in the course of which the undercover officer asked Liew what happened and mentioned that his fingerprints were on the drugs. Liew indicated his prints were, as well. Did the undercover officer violate Liew's right to remain silent? The SCC pointed out that Liew had the right to speak or remain silent, and whether he spoke voluntarily, in the sense of freely accepting the risks of speaking, depended on whether his statements were either actively elicited or the result of interrogation. The Court concluded that, on the facts of this case, despite the undercover officer's subterfuge, Liew's statements were not actively elicited or the result of interrogation. Liew was the one who directed the conversation to the relevant area. The undercover officer merely went along with the conversation initiated by Liew, without straying from its flow: "the undercover officer

did not direct the conversation in any manner that prompted, coaxed or cajoled the appellant to respond." Also, there was no evidence of a relationship of trust between Liew and the undercover officer which might have brought about a mental state in which Liew was more likely to talk, or which might have given Liew a reasonable expectation that the communications would not wind up in the hands of the police; the fact that Liew thought he was talking to a co-accused was insufficient, in and of itself, to create such a relationship.

[However, subterfuge by the police may affect the voluntariness of the statement or confession: see R. v. Oickle at 11.1.1.]

3.2.2 Confession to a police agent

R. v. BROYLES [1991] 3 S.C.R. 595

The use of a police agent to actively elicit information from a detained suspect to subvert the suspect's choice not to make a statement to the police, violates the right to remain silent. The accused, already arrested for fraud, was also suspected of murder. The accused had been read his rights and had consulted a lawyer. Several interrogations of the accused by the police concerning the murder yielded no incriminating statements. The police asked a friend of the accused to visit him, wearing a body pack recording device, without as such instructing the informer to elicit incriminating statements from the accused. During a conversation with the accused, the friend encouraged him to ignore his lawyer's advice to remain silent. The ploy worked, but the SCC held that the right to remain silent was infringed because the statements were obtained by an agent of the state who elicited them. The court stated the following test for determining whether an informer is a state agent for the purposes of the right to remain silent: "would the exchange between the accused and the informer have taken place, in the form and manner in which it did take place, but for the intervention of the state or its agents?" And to determine whether the statements were "elicited" by the agent, the court stated the following test: "considering all the circumstances of the exchange between the accused and the state agent, was there a causal link between the conduct of the state agent and the making of the statement by the accused?" Concerning the "elicitation" test, the court broke it down into a two-part inquiry: (1) Were the relevant parts of the conversation the functional equivalent of an interrogation? (2) Did the informer exploit the nature of his relationship with the accused to extract statements from the accused? The court added that even if the police instruct the agent not to elicit, there is a violation of the right if the agent does elicit.

3.2.3 Appropriate police perseverance in questioning a person not detained

R. v. HICKS [1990] 1 S.C.R. 120

Although having expressed the desire not to make a statement to the police, a person who is not detained may nevertheless be further questioned by the police without this being a

violation of the right to remain silent. The accused was suspected of having fled the scene of a fatal car accident. He owned the fleeing vehicle, which had been located at his residence and impounded by the police. But the police did not know who had driven the car the night of the accident. The accused voluntarily showed up at the police station, accompanied by his lawyer; he was taken to an interview room, without his lawyer. Upon being informed of the nature of the police's investigation, the accused stated that he was not prepared to make a statement. The police then asked the accused if anyone other than himself had been driving the vehicle the night of the accident, to which he said: "no". The accused was then arrested and charged. Did the police officer violate the accused's right to remain silent? The SCC also said: "no", adopting the reasons expressed by the Ontario Court of Appeal [reported at (1988) 42 C.C.C. (3d) 394]: "Provided the person is not detained, the mere asking of a further question without oppressive persistence, does not affect the voluntariness of the answer and does not infringe any constitutional right. (...) There is no rule against appropriate police perseverance."

[Editor: Note that to the extent that it applies even prior to arrest or detention, the common law rule on the voluntariness of statements made to persons in authority is stricter than is the Charter right to remain silent; it is also stricter in that the onus is on the prosecution to establish the voluntariness of the confession, whereas the onus is on the accused to establish a violation of a Charter right; moreover, a violation of the confessions rule always results in the inadmissibility of the confession, whereas despite a violation of the Charter evidence may still be admissible pursuant to s.24 of the Charter: see R. v. Oickle at 11.1.1.]

3.2.4 Statutorily compelled statement

R. v. WHITE [1999] 2 S.C.R. 417

Statements provided under compulsion of statute are inadmissible against the persons who made them. The accused was involved in a motor vehicle accident and fled the scene. The next day, feeling compelled to do so by the B.C. Motor Vehicle Act, the accused phoned the police to report her involvement. The police paid her a visit and engaged in conversation with her about the accident. The police informed her of her Charter rights. She spoke to her lawyer and informed the police that, on her lawyer's advice she would not be providing a statement concerning the accident. The police continued conversation with her about the accident. Eventually, she was criminally charged with failing to stop at the scene of an accident. At her trial, the Crown relied exclusively on statements taken from her conversations with the police, in order to prove her identity as the person who had fled the scene of the accident. Her testimony was that throughout her exchanges with the police, she felt compelled by the Motor Vehicle Act to answer the police's questions. The SCC held that the statements had been provided under compulsion of the Motor Vehicle Act, and that as such the statements were inadmissible in a criminal proceeding against her, as this would violate her right against self-incrimination under s. 7 of the Charter.

R. v. FITZPATRICK [1995] 4 S.C.R. 154

Exception: Statements provided under compulsion of statute as a condition of participation in a regulatory sphere are admissible against the persons who made them. The accused was a commercial fisher and captain of a vessel engaged in a licensed and regulated commercial groundfish fishery in B.C. under the Fisheries Act. That Act requires all fishers to file a "hail report" and a "fishing log" to allow the Department of Fisheries and Oceans to manage the commercial fishery along the west coast of B.C. efficiently by monitoring exactly where pressure is developing on fish stocks and by instantaneously adjusting fishing quotas. The accused was charged with catching fish in excess of the fixed quotas prescribed by regulation. Could the hail reports and fishing log reports filed by the accused be used against him? The SCC held that they could. There was no violation of s. 7 in this case because the requirement to file the reports arises from the accused's voluntary participation in a regulated activity, knowing that this involves the filing of those reports. Also, the predominant purpose for requiring the filing of the reports is not to use them against the persons who filed them but for the effective regulation of fishery.

3.2.5 Conscriptive versus non-conscriptive evidence

R. v. STILLMAN [1997] 1 S.C.R. 607

Evidence is conscriptive when an accused, in violation of his rights, is compelled by the state to incriminate himself by means of a statement, the use of the body or the production of bodily samples. Its admission may render the trial unfair. The accused, a young offender, was arrested for murder, and taken to the police station where he was met by his lawyers. The police indicated that they wished to take hair samples and teeth impressions, and question the accused. The lawyers gave a letter to the police which stated that the accused did not consent to give any bodily samples nor any statement and was not to be spoken to except in the presence of his lawyers. The lawyers left. The police forcibly took body samples: scalp hair, pubic hair, teeth impressions. They also seized a tissue that the accused had used to blow his nose while in the police washroom, and had thrown in the waste bin; they used the mucous on the tissue for DNA testing. In the absence of his lawyer, the police also tried to obtain a statement from the accused but did not succeed. Was the evidence that the police did obtain admissible? The SCC held that, with the exception of the mucous sample, the evidence was conscriptive and inadmissible. The evidence was gathered in breach of s. 7 of the Charter (breach of security of the person because the search was intrusive and made without consent or authority), and s. 8 of the Charter (unreasonable search because not authorised by statute or common law). Since the Crown was unable to prove, on a balance of probabilities, that the conscriptive evidence would have been discovered in any event by alternative non-conscriptive means, its admission would result in an unfair trial. The mucous sample, on the other hand, was non-conscriptive because the accused produced it of his own volition.

[Other aspects of the Stillman case are dealt with in: 3.2.6, 3.3.1, 4.3.2, 4.5.2 and 4.7.1.]

3.2.6 Derivative evidence

R. v. S. (R.J.) [1995] 1 S.C.R. 451

Section 7 of the Charter requires that persons compelled to testify be provided with subsequent "derivative use immunity", in addition to the "use immunity" guaranteed by s. 13 of the Charter. Two young offenders were charged with breaking & entering and theft. Could one youth be compelled to testify against the other? Yes, held the SCC, but neither the compelled testimony nor any evidence derived therefrom which (a) could not otherwise have been found, or (b) the significance of which could not otherwise have been appreciated, could be used in subsequent proceedings against the youth who was compelled to testify.

[Per B.C. Securities Comm. v. Branch [1995] 2 S.C.R. 3, "use immunity" and "derivative use immunity" also apply when the compelled testimony arises in the context of a regulatory regime as distinct from a criminal context; also, while a corporation cannot claim the benefit of s. 7, corporate officers may claim the immunity provided by s. 7 insofar as they are personally implicated by their compelled testimony; and, the s. 7 immunity also applies to the witness's compulsion to produce documents.]

R. v. STILLMAN [1997] 1 S.C.R. 607

Derivative evidence refers to the evidence which has been discovered as a result of conscripted evidence, as where the discovery of the murder weapon (derivative evidence) was the result of the accused's coerced confession (conscripted evidence). Its admission will render a trial unfair unless the Crown can demonstrate that the evidence would have been discovered in any event either because an independent source for the same evidence exists or because its discovery was inevitable. [The facts are summarised in 3.2.5.] For an example of a situation where there exists an alternate means of obtaining the same evidence, the SCC referred to R. v. Colarusso [1994] 1 S.C.R. 20, where bodily samples had been taken by a doctor for medical reasons, the accused's consent to do so being limited to medical reasons; the doctor turned the samples over to the coroner, who gave them to the police; the court held that since the evidence existed without state intervention and the police could have obtained a warrant to get the samples in any event, there existed an independent source for the evidence. For examples where the discovery of the evidence was inevitable in any event, the court referred to R. v. Black [1989] 2 S.C.R. 138, where the accused was conscripted into showing the police where the murder weapon was, but its discovery was inevitable given that it was located in the residence where the killing was known to have occurred, and thus a search of the residence would inevitably have occurred and yielded the murder weapon in any event. (Another example given was R. v. Harper [1994] 3 S.C.R. 343.) On the facts of the Stillman case, there was no derivative evidence, only conscriptive and non-conscriptive evidence.

R. v. BURLINGHAM [1995] 2 S.C.R. 206

Where the derivative evidence would not have been found but for conscripted evidence (i.e., information leading to it which was obtained in violation of the Charter), the derivative evidence will be inadmissible. The accused was in police custody, charged with one murder, suspected of another. During an entire weekend, the police subjected him to intensive and manipulative interrogation, despite his repeated statement that he would not speak unless he could consult his lawyer (unavailable for the weekend). The police made disparaging remarks about his counsel. They offered the accused ` deal: he would only be charged with second degree murder if he told them the location of the murder weapon and other information about the murder. His request to consult his lawyer about the deal drew more disparaging remarks about his lawyer, and an ultimatum: the deal was available only for the weekend. While he did manage to speak to a lawyer, who told him to remain silent, it was not his lawyer. Eventually, he acquiesced to the deal, made a full confession, brought the police to the murder site and the location of the murder weapon (bottom of a frozen river). The following day, he also made some incriminatory statements to his girlfriend. The police had misunderstood the deal that the Crown told them they could offer: a guilty plea to second degree murder was necessary for the deal; the accused made no such commitment. He was charged with first degree murder. The SCC held that the confession was obtained in breach of s. 10(b) of the Charter, and that all the other evidence, including the statements made to the girlfriend ("so closely related both in time and content to the breach"), derived from the confession and would not have been obtained but for the illegally obtained confession. Therefore, the confession and the derivative evidence were inadmissible.

[The Burlingham case is further discussed under 6.3.2 and 6.3.8.2.]

3.2.7 Waiver: the "operating mind" test

R. v. WHITTLE [1994] 2 S.C.R. 914

A genuine waiver of rights occurs if the person possesses an operating mind. The operating mind test requires that the person possess a limited degree of cognitive ability to understand what he is saying and to comprehend that the evidence may be used in proceedings against him. It does not require a determination that he is capable of making a good or wise choice or one that is in his interest. The accused was arrested on warrants relating to unpaid fines. From talking to him, the police thought him schizophrenic; he confirmed that he was. The police read him his rights; he did not exercise his right to counsel. He was taken to the police station. The arresting police informed others, and noted in his report, that the accused was mentally unstable. Before being placed in a cell, the accused was again read his rights; he declined to phone anyone. During conversation with police officers in the cell area, the accused said he had committed three robberies and a murder. Investigating police were informed of these statements, arrested the accused for murder and read him his rights; the accused stated that he understood his rights and did not wish to speak with anyone but the police. He provided further incriminating details of the murder and

brought the police to the location where he had disposed of the murder weapon. Later, police found the murder weapon in that location. Throughout his statements to the police the accused would mention that there were voices in his head. Some officers felt that he was not in touch with reality. The police suggested that he make a video statement. He agreed. Before starting, they again read him his rights; he declined to consult a lawyer. Shortly after the video statement commenced, the accused asked to speak to a lawyer. He was immediately put in touch with a lawyer who advised him to remain silent, but the accused told the lawyer that he had to speak to the police to stop the voices in his head. He then completed the video statement in which he made further incriminating admissions which lead the police to yet further evidence relating to the murder. Eventually, his lawyer consented to the accused undergoing psychiatric examination to determine his fitness to stand trial. He was found to be fit. Would the admission of the accused's statements, and of the evidence derived from his statements, violate s. 7 or s. 10? No, held the SCC, because the accused had the requisite operating mind to waive his rights. The court was of the view that the same test serves to determine whether the person is fit for trial or has waived the right to remain silent or the right to counsel.

[For other cases on waiver of a Charter right, see 4.10 and 6.3.7.]

3.2.8 Establishing identity of person seen committing an offence

MOORE v. THE QUEEN [1979] 1 S.C.R. 195

As part of their duty of enforcing the law, the police have the duty to attempt to identify the wrong-doer, if the police actually saw the wrong-doer committing the offence (as distinct from the police merely observing suspicious behaviour). The wrong-doer's refusal to comply with the police's request for identification constitutes an obstruction of the police officer in the performance of his duty. The police officer's request for identification does not interfere with the right to remain silent, as long as it is a simple request for identification without any attempt to obtain from the wrong-doer any admission of fault or any comment whatsoever.

[This is a pre-Charter judgment. However, the SCC did take notice of the provisions of the Bill of Rights and the notion of the right to remain silent.]

3.3 Security of the person: right to bodily integrity and sanctity, dignity and self-respect

3.3.1 Seizure of bodily substances

R. v. STILLMAN [1997] 1 S.C.R. 607

The taking of bodily samples without the person's consent violates the sanctity of the body and thus contravenes the person's right to be deprived of security of the person except in accordance with principles of fundamental justice. [The facts are summarised in 3.2.5.] The SCC held that the taking of the dental impressions, hair samples and buccal swabs from the accused violated his right to security of the person. The taking of bodily substances without the accused's consent was considered highly intrusive, an ultimate invasion of privacy; it violated the sanctity of the human body which is essential to the maintenance of human dignity. The violation was not only serious but reprehensible, even though the police claimed to have acted in good faith on advice from the Crown: (i) the police blatantly disregarded the accused's clearly expressed denial of consent; (ii) they awaited the departure of his counsel; (iii) they used force, threats and coercion; and, (iv) they were aware that they were dealing with a young offender. "Frustrating and aggravating as it may seem, the police as respected and admired agents of our country, must respect the *Charter* rights of all individuals, even those who appear to be the least worthy of respect." In contrast, the seizure of the discarded tissue with mucous was not considered to interfere with the accused's bodily integrity or to cause him any loss of dignity, since the accused had produced it of his own accord rather than at the request of, or forced by, the police.

3.3.2 Fingerprints

R. v. BEARE [1988] 2 S.C.R. 387

Fingerprinting incidental to an arrest does not violate the Charter. A person who is charged on reasonable and probable grounds with having committed a serious crime must expect a significant loss of personal privacy incidental to being taken in custody.

3.4 Right to integrity of process

3.4.1 Abuse of process

R. v. REGAN [2002] SCC 12 (temporary citation)

Conduct, on the part of the Crown or the police, which connotes unfairness and vexatiousness of such a degree that it contravenes fundamental notions of justice, will undermine the integrity of the judicial process and violate s.7 of the Charter. During the investigation of the former Premier of Nova Scotia, a police officer responding to a reporter's request confirmed that Mr. Regan was under investigation. Police policy was to remain silent about individual suspects until charges were laid. Charges were laid 18 months later. The police officer's violation of policy, together with questionable conduct on the part of the Crown Attorney (i.e., judge shopping, and pre-charge interviewing of witnesses) caused the accused to seek a stay of all charges on grounds of abuse of process. The SCC held that the conduct of the Crown and police, though not above reproach, did not amount to an abuse of process. With respect to a Crown Attorney's remark which encouraged judge shopping, the Court noted that the remark was not acted upon. Concerning the Crown's pre-charge interviews, the Court acknowledged that cooperative and effective consultation between the police and the Crown is essential to the proper administration of justice, but cautioned that it is also essential to the proper administration of justice that a distinct line be maintained between the policing function (investigation and law enforcement) and the prosecution function. Pre-charge interviews by the Crown can assist in assessing whether charges should be laid, in assessing the credibility of witnesses, in gaining a witness's cooperation by giving the witness assurances that the police could not give, or in otherwise serving the interests of justice. The Court was satisfied that the interviewing of witnesses by the Crown before charges were laid was not carried out as part of the police investigation. As for the disclosure to the media by the police that Mr. Regan was the subject of an investigation, the Court was satisfied that there was no bad faith involved in this disclosure, and that the eventual laying of charges was unrelated to the disclosure. The Court concluded that the overall conduct of the police and the Crown was not such as to offend the community's sense of decency and fair play, or jeopardize the fairness of the accused's trial.

4. SECTION 8 OF THE CHARTER: Everyone has the right to be secure against unreasonable search or seizure.

4.1 Definitions

4.1.1 Search

COMITÉ PARITAIRE v. POTASH [1994] 2 S.C.R. 406

For the purposes of s. 8, "search" includes a search of a person (in French, "fouille") and a search of a place (in French, "perquisition"); it is not limited to the criminal context but extends to the administrative context, however the standard of reasonableness will be more strict in the criminal context. An "inspection" is equivalent to a search. The SCC held that an inspection in the context of the regulation of an industry is not held to the same standard as a search in the criminal context, and thus does not require prior authorization based on the existence of reasonable and probable grounds in order to comply with s. 8.

R. v. HUFSKY [1988] 1 S.C.R. 621

The demand by a police officer, pursuant to provincial legislation, that a driver surrender his driver's licence and insurance card for inspection does not constitute a search within the meaning of s. 8 because it does not constitute an intrusion on a reasonable expectation of privacy. There is no such intrusion where a person is required to produce documentary evidence of a status or compliance with some legal requirement that is a lawful condition of the exercise of a right or privilege.

R. v. WISE [1992] 1 S.C.R. 527

"If the police activity invades a reasonable expectation of privacy, then the activity is a search". The installation and use of an electronic tracking device ("beeper") on a vehicle constitutes a search.

4.1.2 Reasonable search

HUNTER v. SOUTHAM INC. [1984] 2 S.C.R. 145

Where a person has a reasonable expectation of privacy, a warrantless search is *prima facie* unreasonable. The onus is then on the Crown to prove that the search is reasonable.

R. v. COLLINS [1987] 1 S.C.R. 265

A search will be reasonable if: (a) it is authorized by law [common law or statute law]; (b) the law authorizing the search is reasonable; and, (c) the manner of carrying out the search is reasonable.

THOMSON NEWSPAPERS v. DIR. OF INV. & RES. [1990] 1 S.C.R. 425
R. v. McKINLEY TRANSPORT LTD. [1990] 1 S.C.R. 627

A less strenuous and more flexible standard of reasonableness applies in the case of administrative or regulatory searches and seizures than in the case of a search and seizure made in the course of the enforcement of the criminal law.

BARON v. CANADA [1993] 1 S.C.R. 416

But even in the administrative or regulatory context, a power to search premises is more intrusive of an individual's privacy than the mere power to order the production of documents, and therefore its reasonableness will be assessed according to a higher standard.

4.1.3 Seizure

R. v. DYMENT [1988] 2 S.C.R. 417

A seizure occurs whenever there is a non-consensual taking of an item by the state in respect of which the citizen has a reasonable expectation of privacy.

THOMSON NEWSPAPERS v. DIR. OF INV. & RES. [1990] 1 S.C.R. 425

The essence of a seizure is the taking of a thing from a person by a public official without that person's consent. There is no difference between taking a thing and forcing a person to give it up, therefore an order to produce documents constitutes a "seizure" under s. 8. However, a power to search premises and take away documents is far more intrusive than a mere power to order the production of documents.

R. v. McKINLAY TRANSPORT LTD. [1990] 1 S.C.R. 627

A "seizure" within the meaning of s. 8 takes place when the state compels the production of documents in a regulatory context. Therefore, the SCC held that s. 231(3) of the Income Tax Act, which allows the Minister of Revenue to require individuals to provide information and documents for purposes related to the administration or enforcement of that Act, constitutes a seizure. The court distinguished this case from R. v. Hufsky [see 4.1.1] on the basis that there is a state intrusion on an individual's privacy interests in this case: while the taxpayer's privacy interest with regard to these documents *vis-à-vis* the Minister is relatively low, it remains high insofar as the disclosure of these documents to other persons or agencies is concerned.

COMITÉ PARITAIRE v. POTASH [1994] 2 S.C.R. 406

For the purposes of s. 8, "seizure" includes making a photocopy of a document.

4.2 Search incident to investigative detention (a.k.a. stop & frisk)

4.2.1 Patting down, waist pack

R. v. FERRIS [1998] 126 C.C.C. (3d) 298, [B.C.C.A.]

The common law police power of search incident to investigative detention authorizes a search for weapons to ensure the safety of the police and others in the vicinity of the detained person, if the police justifiably believe that the detained person is carrying a weapon. This will usually involve "patting down" the detainee, but may include a search of a waist pack worn by the detainee. The police stopped a vehicle displaying stolen licence plates. They believed the vehicle to be stolen and to have possibly been involved in a crime. The driver fled the car. The accused, one of two passengers remaining in the car, was told by the police to get out, was advised that she was under investigation for stolen property, and was handcuffed behind her back. The police then did a pat down search on her. When asked for id., she gave her name and indicated that her id. was in the waist pack that she wore. The police removed the waist pack and searched it for her id. as well as for weapons, and found a bag of cocaine. Were the police authorized to search the waist pack? The B.C. Court of Appeal held the search to be valid as part of the common law power to search incident to an investigative detention, inasmuch as the search was reasonably necessary for the police to carry out a police duty without risking bodily harm. Given that the detainee was handcuffed, wasn't it sufficient for the police to simply remove the waist pack without searching it? The court reasoned that this being a spontaneous investigation rather than a planned one, it would be unreasonable to expect the police to determine with precision the least intrusive manner of securing their safety in the initial stages of the investigation; moreover, given the possibility that the detention could be temporary and the waist pack returned to her owner, the police were entitled to ensure that they would not be placing themselves in danger by handing her a concealed weapon.

[The authority to search is different from, and is governed by different criteria than, the authority to detain; concerning the authority to detain, see 5.2.1.]

4.3 Search incident to lawful arrest

4.3.1 Inventory of impounded vehicle

R. v. CASLAKE [1998] 1 S.C.R. 51

The common law police power of search incident to arrest is limited to three purposes: protecting police, protecting evidence, discovering evidence. It extends to an accused's vehicle as part of his immediate surroundings. However, a search of a vehicle, after arrest, where the purpose is to inventory the contents of the vehicle rather than to search for evidence, is not a search incident to arrest, and therefore requires consent or a warrant. The accused was arrested for possession of narcotics. The police had a bag of marijuana as evidence. Six hours after his arrest, the police searched his car, which had been impounded, in order to comply with RCMP policy requiring that an inventory be taken of the condition and contents of a vehicle that has been impounded during the course of an investigation. The police found $1,400 in cash and two packages of cocaine in the car. Was the search of the car a search incident to arrest, so as to justify the fact that it was carried out without the owner's consent and without a warrant? The SCC held that this was not a search incident to arrest, not because of the delay in carrying it out, nor because it was carried out in a vehicle, but because it was never intended to achieve any of the three main purposes of a search incident to arrest: protecting the police or the public, protecting evidence from destruction, or discovering evidence.

[This was a 4:3 decision; the dissenting judges felt that the search incident to arrest can be for any valid purpose related to the proper administration of justice, and they were of the view that the inventory purpose fit the bill. Another aspect of the Caslake case is discussed in 4.5.6.]

4.3.2 Bodily samples and impressions

R. v. STILLMAN [1997] 1 S.C.R. 607

The common law power of (reasonable) search incident to a lawful arrest does not apply to the taking, without consent or authorization, of bodily samples or the making of body impressions, which are in no danger of disappearing. (The facts are summarised in 3.2.5.) The SCC summarised the three conditions that must be satisfied in order for a search to be valid under the common law power of search incidental to an arrest: (i) the arrest must be lawful; (ii) the search must be conducted as an incident to the lawful arrest; and, (iii) the manner in which the search is carried out must be reasonable. In this case, the third condition was not met. The court compared the intrusiveness of taking bodily samples to the intrusiveness of body cavity searches and found that they both go far beyond the typical "frisk" search which usually accompanies an arrest. Likewise, the taking of dental impressions was held to be highly intrusive, and not at all comparable to the routine practice of fingerprinting which usually follows an arrest. Since the common law power of search incident to a lawful arrest did not apply, the seizure of the bodily samples and impressions

without consent or authorization was held to contravene s. 8 of the Charter. Moreover it was a serious, reprehensible and intolerable violation given the intrusiveness involved, and given the force, threats and coercion used by the police, in blatant disregard of the clear expression of non consent, when fully aware that the accused was a young offender.

4.3.3 "Frisk" search

CLOUTIER v. LANGLOIS [1990] 1 S.C.R. 159

A "frisk" search is authorized as part of the common law power of search incident to lawful arrest; it is a minimal intrusion on individual rights, necessary for the effective and safe enforcement of the law. The police stopped a vehicle for violating a municipal by-law. Upon discovering that there was a warrant for committal for unpaid traffic fines against the driver, they arrested him. Highly agitated and abusive, the driver accompanied the police to their cruiser where they carried out a "frisk" search. Eventually, the driver filed an information against the police officers for common assault. The SCC held that there was no assault by the police. The frisk search was authorised by the common law power to search incident to arrest, was carried out for a valid purpose - police safety in making an arrest - and was done without excessive constraint. The court suggested three limitations to the exercise of a reasonable and justified search incident to arrest: (1) It should not be exercised if the police consider it unnecessary. (2) It should not be carried out for invalid objectives such as intimidating, ridiculing or pressuring the accused in order to obtain admissions. (3) It must not be conducted in an abusive fashion; the use of physical or psychological constraint should be proportionate to the objectives sought and the other circumstances of the situation.

4.3.4 Strip search

R. v. GOLDEN [2001] 3 S.C.R. 679

In light of the serious infringement of privacy and personal dignity that is involved, a strip search carried out as a search incident to arrest can be constitutionally valid only if: (a) the search is necessary to discover weapons in the detainee's possession or evidence related to the reason for the arrest; (b) the police have reasonable and probable grounds justifying the strip search in addition to reasonable and probable grounds justifying the arrest; and (c) the strip search is conducted in a manner that is reasonable. From an observation post, a police officer observed the accused, inside a sandwich shop, give a white substance (which the officer believed to be cocaine) to two individuals. The officer relayed this information to the "take down" team (four officers) who then proceeded inside the shop to arrest the accused and the two individuals. A "pat down" search of the accused by one officer produced no weapons or narcotics. On a hunch, the officer decided to conduct a visual search of the accused's underwear and buttocks: he undid the accused's pants, pulled back the pants and underwear, looked inside the underwear and observed a

clear plastic bag, containing a white substance, protruding from between the buttocks. When the officer tried to retrieve the bag, the accused gave him a hip check which made the officer lose his balance. Assisted by one of his team members, the officer escorted the accused to a booth at the back of the shop. At this point, the patrons in the shop were told to leave and the front door was locked. Still in the shop were the three suspects, five officers and one shop employee. The officers forced the accused to bend over a table, pulled his pants and underwear down to his knees, exposing his buttocks and genitalia to all present (but not visible to passersby outside the shop), and one officer tried, unsuccessfully, to seize the plastic bag. Somehow the detainee defecated without releasing the plastic bag. The officer then put on rubber gloves (which the shop employee used to wash the washrooms and toilets), and was successful in pulling the plastic bag out, the accused having finally unclenched his muscles. The bag contained 10.1 grams of crack cocaine. The accused's pants were pulled up, he was arrested, and brought to the police station which was a two-minute drive away from the shop. There, the accused was again strip searched and detained. Was the strip search in the shop in compliance with the Charter? The SCC held that it was not, (and acquitted the accused), because: (i) there was no exigency for the strip search to be carried out in the shop rather than at the police station which was only a two-minute drive away; (ii) there was no need, and no reasonable and probable cause, to strip search the detainee in the shop, rather than at the police station, to preserve evidence; (iii) the detainee was not given an opportunity to cooperate in producing the concealed evidence before police officers forced themselves upon him in an intrusive way; (iv) the strip search was carried out without notice to, or authorization from, a senior officer; and (v) the search was carried out in a manner that could have jeopardized the detainee's health and safety, in addition to showing considerable disregard for his dignity. The Court adopted the following definition of "strip search": "the removal or rearrangement of some or all of the clothing of a person so as to permit a visual inspection of a person's private areas, namely genitals, buttocks, breasts (in the case of a female), or undergarments." After enunciating the principle of law relating to strip searches incident to arrest (set out above in bold), the Court set out a framework for the police in deciding how best to conduct a strip search incident to arrest in compliance with the Charter:

1. Can the strip search be conducted at the police station and, if not, why not?
2. Will the strip search be conducted in a manner that ensures the health and safety of all involved?
3. Will the strip search be authorized by a police officer acting in a supervisory capacity?
4. Has it been ensured that the police officer(s) carrying out the strip search are of the same gender as the individual being searched?
5. Will the number of police officers involved in the search be no more than is reasonably necessary in the circumstances?
6. What is the minimum of force necessary to conduct the strip search?
7. Will the strip search be carried out in a private area such that no one other than the individuals engaged in the search can observe the search?
8. Will the strip search be conducted as quickly as possible and in a way that ensures that the person is not completely undressed at any one time?
9. Will the strip search involve only a visual inspection of the arrestee's genital and anal areas without any physical contact?
10. If the visual inspection reveals the presence of a weapon or evidence in a body cavity (not

including the mouth), will the detainee be given the option of removing the object himself or of having the object removed by a trained medical professional?
11. Will a proper record be kept of the reasons for and the manner in which the strip search was conducted?

[The next level in intrusive searches are "body cavity"searches, defined in the Golden case as searches "which involve a physical inspection of the detainee's genital or anal regions", but excludes the mouth. For case law relating to body cavity searches see 4.7.4.]

4.4 Warrant/authorization for search

4.4.1 Test for issuance of warrant

HUNTER v. SOUTHAM INC. [1984] 2 S.C.R. 145

The minimum standard for authorizing a search and seizure is that there be reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search.

4.4.2 Affidavit in support

CBC v. LESSARD [1991 3 S.C.R. 421
CBC v. NEW BRUNSWICK [1991] 3 S.C.R. 459

The affidavit in support of the application must contain sufficient detail to enable the justice of the peace to properly exercise his or her discretion as to the issuance of a search warrant. Although it is not a constitutional requirement, the affidavit material should ordinarily disclose whether there are alternative sources from which the information may reasonably be obtained and, if there is an alternative source, that it has been investigated and all reasonable efforts to obtain the information have been exhausted. If, subsequent to the issuing of a search warrant, it comes to light the authorities (i.e., the police) failed to disclose pertinent information that could well have affected the decision to issue the warrant, this may result in a finding that the warrant was invalid.

4.4.3 Rules when rely on informer

R. v. GAROFOLI [1990] 2 S.C.R. 1421

The affidavit in support of an application for a warrant to carry out a search may, subject to the rules stated hereafter, be based on the hearsay statements of an informer. The accused was convicted of conspiring to import a narcotic based on evidence which consisted in large measure of private communications intercepted under judicial authorizations. Among the issues raised on appeal was the test to apply when information from informers is relied on to obtain an authorization. Before granting an authorization, the judge must be satisfied by affidavit that there are reasonable grounds to believe that (a) a specified crime has been or is being committed, and (b) the interception of the private communication in question will afford evidence of the crime. Where the affidavit relies on the hearsay statements of an informer, the SCC laid down the following rules: (1) Hearsay statements of an informer can provide reasonable and probable grounds to justify a search; however, evidence of a tip from an informer, by itself, is insufficient to establish reasonable and probable grounds. (2) The reliability of the tip is to be assessed by recourse to the "totality of the circumstances",

including: (a) the degree of detail of the tip; (b) the informer's source of knowledge; (c) indicia of the informer's reliability such as past performance or confirmation from other investigative sources. (3) The results of the search cannot, after the fact, provide evidence of reliability of the information.

4.4.4 Warrant based on information obtained contrary to the Charter

R. v. KOKESCH [1990] 3 S.C.R. 3
R. v. GRANT [1993] 3 S.C.R. 223

Where the warrant was procured through an information that was based exclusively on facts which became known to the police as a result of a Charter violation, (as was the case in R. v. KOKESCH), the warrant and the search conducted thereunder will be declared unconstitutional. But where, (as in R. v. GRANT), the information is only partially based on facts that became known as a result of a Charter violation, the warrant and the search conducted thereunder will not be declared unconstitutional on that account, if the court determines that a warrant would have issued in any event without the tainted facts.

4.4.5 Narcotic search warrant

R. v. STRACHAN [1988] 2 S.C.R. 980

Because a warrant issued under s.10(2) of the Narcotic Control Act to search a dwelling place for narcotics is significantly wider in scope than a normal search warrant issued under s. 443 of the Criminal Code, it is required that an officer be named in the warrant to carry out the search so that there is some person responsible for the way the search is carried out. This requirement is not met by a warrant directed to a large number of peace officers: "Listing an entire drug squad by name in a warrant may undermine the effectiveness of the naming requirement just as much as the failure to name anyone at all."

The person(s) identified in a warrant issued pursuant to s. 10(2) of the Narcotic Control Act (to search a dwelling place for narcotics) may be assisted by persons who are not named in the warrant so long as they are closely supervised by the person(s) named in the warrant. "It is the named officers who must set out the general course of the search and direct the conduct of any assistants. If the named officers are truly in control, participate in the search, and are present throughout, then the use of assistants does not invalidate the search or the warrant."

In this case the warrant was executed by two of four peace officers named in the warrant, with the assistance of other peace officers not named in the warrant. The SCC was satisfied with the execution of the warrant: "The validity of the search should not depend on the minor details of the actual physical process of execution. The important point is that the search was conducted under the close control and supervision of two officers named in the warrant."

4.4.6 Obvious major defects in the warrant

R. v. GENEST [1989] 1 S.C.R. 59

The police are expected not to execute a warrant that is invalid on the face of it. A warrant issued pursuant to s. 10(2) of the Narcotic Control Act is invalid if it contains obvious major defects, such as not naming the officer who is to execute the warrant or a complete absence of times of execution or absence of listing the objects to be searched for. "While it is not to be expected that police officers be versed in the *minutiae* of the law concerning search warrants, they should be aware of those requirements that the courts have held to be essential for the validity of a warrant." The SCC added that a police officer should be put on his guard by a warrant that contains many blank spaces, as common sense suggests that if a form is used it should be properly filled out, especially when the form itself states that certain details are to be inserted in the blanks. Defects in a warrant "suggest carelessness on the part of the police officers."

4.4.7 Unreasonable search with warrant

R. v. GENEST [1989] 1 S.C.R. 59

A search may be unreasonable, although made pursuant to a warrant, if it is carried out in an abusive way such as by using excessive force.

[See also CBC v. Lessard [1991] 3 S.C.R. 421 and CBC v. New Brunswick (A.G.) [1991] 3 S.C.R. 459, where the SCC said that a search with warrant would be held unreasonable if it were carried out in such a way as to impede the media's news gathering function.]

4.4.8 Warrant to seize versus warrant to search (and seize)

R. v. COLET [1981] 1 S.C.R. 2

A warrant of "seizure" does not convey the power to enter or the power to search, (unless the warrant specifically provides therefor). The City of Prince Rupert had instructed its employees to "clean up" the accused's property and destroy a rudimentary shelter which he called his home and in which he resided. He made it widely known that he would not let the city employees enter on his property. A warrant was issued commanding the RCMP to "seize any firearms or other offensive weapons or any ammunition or explosive substance owned by or in the possession, custody or control of Franz Giacomelli Colet". The police sought to enter the home of the accused based on that warrant. The accused resisted what he deemed to be an unlawful intrusion of his property, and was charged with attempted murder and intending to cause bodily harm. The SCC upheld the acquittal of the accused, holding that the police had no authority to enter his home because the warrant did

not specifically authorize entry into a private residence or for that matter authorize a search of any kind. The Court added that this defect could not be cured by any deeming provisions found in the Interpretation Act.

[This was a pre-Charter case. This case is also referred to at 4.5.12]

4.4.9 Warrant to search a lawyer's office

LAVALLEE ET AL. v. CANADA (ATTORNEY GENERAL)
[2002] SCC 61 (temporary citation)

Section 488.1 of the Criminal Code, which sets out a procedure for determining a claim of solicitor-client privilege in relation to documents seized from a law office under a warrant, is unconstitutional as it infringes s.8 of the Charter and the infringement is not justified under s.1 of the Charter. The following general principles govern the legality of searches of law offices as a matter of common law until new legislation is in place:

"1. No search warrant can be issued with regards to documents that are known to be protected by solicitor-client privilege.
2. Before searching a law office, the investigative authorities must satisfy the issuing justice that there exists no other reasonable alternative to the search.
3. When allowing a law office to be searched, the issuing justice must be rigorously demanding to afford maximum protection of solicitor-client confidentiality.
4. Except when the warrant specifically authorizes the immediate examination, copying and seizure of an identified document, all documents in possession of a lawyer must be sealed before being examined or removed from the lawyer's possession.
5. Every effort must be made to contact the lawyer and the client at the time of the execution of the search warrant. Where the lawyer or the client cannot be contacted, a representative of the Bar should be allowed to oversee the sealing and seizure of documents.
6. The investigative officer executing the warrant should report to the Justice of the Peace the efforts made to contact all potential privilege holders, who should then be given a reasonable opportunity to assert a claim of privilege and, if that claim is contested, to have the issue judicially decided.
7. If notification of potential privilege holders is not possible, the lawyer who had custody of the documents seized, or another lawyer appointed either by the Law Society or by the court, should examine the documents to determine whether a claim of privilege should be asserted, and should be given a reasonable opportunity to do so.
8. The Attorney General may make submissions on the issue of privilege, but should not be permitted to inspect the documents beforehand. The prosecuting authority can only inspect the documents if and when it is determined by a judge that the documents are not privileged.
9. Where sealed documents are found not to be privileged, they may be used in the normal course of the investigation.

10. Where documents are found to be privileged, they are to be returned immediately to the holder of the privilege, or to a person designated by the court."

"Solicitor-client privilege is a rule of evidence, an important civil and legal right and a principle of fundamental justice in Canadian law. While the public has an interest in effective criminal investigation, it has no less an interest in maintaining the integrity of the solicitor-client relationship. Confidential communications to a lawyer represent an important exercise of the right to privacy, and they are central to the administration of justice in an adversarial system. Unjustified, or even accidental infringements of the privilege erode the public's confidence in the fairness of the criminal justice system. This is why all efforts must be made to protect such confidences."

DESCÔTEAUX v. MIERZWINSKI [1982] 1 S.C.R. 860

"A lawyer's client is entitled to have all communications made with a view to obtaining legal advice kept confidential. Whether communications are made to the lawyer himself or to employees, and whether they deal with matters of an administrative nature such as financial means or with the actual nature of the legal problem, all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently even before the formal retainer is established. There are certain exceptions to the principle of the confidentiality of solicitor-client communications, however. Thus communications that are in themselves criminal or that are made with a view to obtaining legal advice to facilitate the commission of a crime will not be privileged."

[Other legal aspects of this pre-Charter case have been overtaken by the Lavallee case, *supra*.

4.4.10 Warrant under C.C. 487

4.4.10.1 Purpose of 487(1)

CANADIANOXY CHEMICALS LTD. v. CANADA (ATT. GEN.) [1999] 1 S.C.R. 743

"The purpose of s.487(1) is to allow the investigators to unearth and preserve as much relevant evidence as possible. To ensure that the authorities are able to perform their appointed functions properly they should be able to locate, examine and preserve all the evidence relevant to events which may have given rise to criminal liability." The SCC went on to state that it is not the role of peace officers to decide whether the essential elements of an offence are made out, that decision being reserved for the courts. Rather, the function of the peace officers is to

investigate incidents which might be criminal, make a conscientious and informed decision as to whether to lay charges, and then present the full and unadulterated facts to the prosecutorial authorities. "To that end an unnecessary and restrictive interpretation of s.487(1) defeats its purpose." Thus, extrinsic factors such as the accused's motive or the failure to exercise due diligence are relevant aspects of the investigation. Moreover, the scope of the investigation, and therefore of s.487(1), extends to exculpatory and not just inculpatory evidence. A broad interpretation is to be given to s.487(1) so as not to frustrate "the basic imperative of trial fairness and the search for truth in the criminal process".

[This case is also referred to in 4.4.10.3.]

4.4.10.2 Warrant for offences under federal statutes

R. v. MULTIFORM MANUFACTURING CO. [1990] 2 S.C.R. 624

A warrant under s.443 [now 487] of the Criminal Code may be issued in relation to offences under federal statutes, given the amendment to s.443, in 1985, which added the words "or any other Act of Parliament", and notwithstanding the fact that the federal statute may contain its own search and seizure provisions.

4.4.10.3 Warrant for evidence of negligence to counter a defence of due diligence

CANADIANOXY CHEMICALS LTD. v. CANADA (ATT. GEN.) [1999] 1 S.C.R. 743

A warrant under s. 487(1)(b) of the Criminal Code may be issued to search for and seize evidence of negligence, with a view to negating a defence of due diligence with respect to a strict liability offence. The rationale for this is set out in 4.4.10.1.

4.4.11 Public inspection of the warrant

NOVA SCOTIA (ATTORNEY GENERAL) v. MACINTYRE [1982] 1 S.C.R. 175

After a search warrant has been executed, and objects found as a result of the search are brought before a justice, a member of the public is entitled to inspect the warrant and the information upon which it was issued. The SCC explained that public accessibility is necessary to ensure that there is no abuse in the issuance of search warrants, that once issued they are executed according to the law, and that any evidence seized is dealt with according to the law. But there are overriding values to which the ideal of public accessibility must yield. For example: where the search warrant is executed but nothing is found, then protection of the innocent from unnecessary harm to their reputation overrides the public access interest. Another overriding value is the administration

of justice; the Court explained the public has no entitlement to access before the warrant is executed as this would defeat the administration of justice: public access at that stage might result in destruction of evidence, which would frustrate the purpose of a search.

[This is a pre-Charter case.]

4.5 Expectation of privacy

4.5.1 Apartment

R. v. EDWARDS [1996] 1 S.C.R. 128

A tenant of an apartment has a reasonable expectation of privacy in the apartment, but whether a visitor to the apartment has a reasonable expectation of privacy in the apartment will depend on the circumstances of each case. The police received information that the suspect was a drug trafficker who kept drugs either on his person, at his residence or at the apartment of his girlfriend. On the day of his arrest, the police had seen the suspect drive his girlfriend's car from a residence to her apartment. The suspect entered the apartment, stayed for a brief period of time, then left. He was placed under arrest. The police suspected that he might have left drugs in the apartment, so they went to the apartment and obtained the girlfriend's cooperation in letting them in, without a warrant, to search for drugs. She directed them to a couch where she had seen the suspect replacing a cushion a few days earlier. The police removed the cushion and seized a plastic bag containing crack cocaine. Did the suspect have a reasonable expectation of privacy in the girlfriend's apartment? The SCC held that he did not. He was not a tenant, he was just a visitor who stayed over occasionally. Although he kept a few belongings in the apartment, he did not contribute to the rent or to household expenses. He had keys to the apartment, but had no authority as to who could come or not come into the apartment, and this was considered by the court to be a key element to his not having privacy expectations in the apartment.

4.5.2 Garbage

R. v. KRIST [1995] 100 C.C.C. (3d) 58 (B.C.C.A.); leave to appeal to the SCC denied (without reasons), May 31, 1999

There is no reasonable expectation of privacy in relation to information that may be obtained from trash which has been abandoned by a householder to the municipal garbage disposal system. The police received information from tipsters of unknown reliability about a marijuana-growing operation in the accused's home. The police attended at the accused's home, without warrant, noticed that there were three garbage bags on the side of the road, in front of the accused's home, ready for pick-up, and observed a garbage truck approaching. One officer seized two of the bags and placed them in the police car. At the detachment, the bags were searched and items relevant to their investigation were found, including four small marijuana plants and remnants of some paraphernalia indicative of a marijuana-growing operation. The items provided sufficient information to obtain a search warrant. The subsequent search with warrant yielded marijuana plants and marijuana-growing equipment. Did the seizure of the garbage bags, without warrant, violate s. 8 of the Charter? The court held that from the deliberate discarding or abandonment of trash for collection as garbage, it is logical to conclude that a person who has discarded or abandoned the items or things making up the trash no longer has an expectation of privacy concerning them.

R. v. STILLMAN [1997] 1 S.C.R. 607

Where an accused who is not in police custody discards an item offering potentially valuable DNA evidence in the presence of police officers, the officers may without consent or authorization gather that evidence and it will not be considered an unlawful seizure. But where the accused is in police custody, the seizure without consent or authorization may be unreasonable. (The facts are summarised in 3.2.5.) The SCC examined the concept of a person abandoning something, in which the person ordinarily has an expectation of privacy, when the person is in the custody of the police: the production of certain bodily samples is the inevitable consequence of the normal functioning of the human body; the person in custody is forcibly in the situation of yielding items of evidence without having voluntarily abandoned his expectation of privacy in them. Whether the discarded item is a tissue, a cigarette butt, chewing gum, etc., the police should not be able to take advantage of placing a person in their custody to obtain evidence which they would not otherwise obtain without a valid warrant. Since the person in police custody is not in a position to prevent police from having access to such items, only the clearest evidence that the person did abandon those items will remove the person's expectation of privacy in them. Here, the accused had clearly expressed that he did not consent to produce any bodily substance; therefore, the seizure, without warrant, of the discarded tissue was held to be unreasonable. However, the violation of rights was not considered serious as it did not interfere with the accused's bodily integrity nor cause him any loss of dignity; also, the evidence could have been obtained in any event with a search warrant; therefore this evidence was ruled admissible.

4.5.3 Hotel room

R. v. WONG [1990] 3 S.C.R. 36

The surreptitious video surveillance by police of a hotel room without prior judicial authorization infringes s. 8 of the Charter. The police were investigating the suspect for keeping a common gaming house out of hotel rooms. Without prior judicial authorization, but with the permission and cooperation of hotel management, the police installed a video camera in a hotel room registered to the suspect. They monitored the activities in the room and their observations left no doubt that illegal gambling sessions were being held. The police conducted a raid on the room and seized profit lists as well as gaming paraphernalia and a large sum of money. Did the suspect have a reasonable expectation of privacy in his hotel room? The SCC held that he did. Persons who rent a hotel or motel room have a reasonable expectation of privacy, as if they were at home; their hotel/motel room is their home away from home. The fact that they may be engaging in illegal activity is irrelevant for the purpose of determining their expectation of privacy. So is the fact that they may choose to invite strangers to join them in their room.

4.5.4 Students in school

R. v. M. (M.R.) [1998] 3 S.C.R. 393

Provided that they are not acting as police agents, elementary or secondary school officials may, without warrant, conduct reasonable searches and seize prohibited items of students on school property who are under their authority, if they have reasonable grounds to believe that a school rule has been or is being violated and that evidence of the breach will be found on the student. A high school vice-principal had been told by students that the accused, a 13-year-old student, had sold drugs on school property and would be selling some at a school dance that evening. When the accused arrived at the dance, the v-p called the RCMP. The v-p asked the accused to accompany him to his office. The police arrived. In the presence of the police, but without instruction from the police, the v-p explained to the boy that he would be searching him, and why, and on searching him found a bag of marijuana. The police placed the boy under arrest. Were the boy's rights under s.8 breached? The SCC held that, in the circumstances, they were not. The court ruled: (i) that schools constitute part of the government, and therefore the Charter did apply; (ii) that neither the mere presence of the police nor the mere fact of cooperation with the police turned the v-p into a police agent; (there was no evidence of an agreement, or of police instructions, or that the search would have been conducted differently in the absence of the police, to create an agency relationship); (iii) the boy had a subjective expectation of privacy, but not a reasonable one given the school environment where school officials are responsible for providing a safe environment and maintaining order and discipline, and to do so may have to search students and their personal effects and seize prohibited items; (iv) it would not be feasible for school officials to obtain a warrant before carrying out such searches because they must act quickly to protect their students and provide the orderly atmosphere required for learning; (v) a search by school officials of a student under their authority may be undertaken upon reasonable grounds to believe that a school rule has been or is being violated, and that evidence of the violation will be found in the location or on the person of the student searched; (vi) the search must be conducted reasonably and appropriately, in light of the circumstances and the nature of the school rule violation (i.e., the "gum" rule vs the "gun" rule).

4.5.5 Trespasser

R. v. LAUDA [1998] 2 S.C.R. 683

A trespasser on an open farm field who grows marijuana plants and takes no steps to conceal them, has no reasonable expectation of privacy. The police obtained a tip from an informant that someone was cultivating marijuana on an abandoned farm. The police confirmed this information by inspecting the property without a warrant and without the permission of the owner of the property. The farm was abandoned, its fields were not cultivated and its fences were down. The areas where the marijuana plants were growing were open rural fields about three-quarters of a mile from the public road. The marijuana plants ranged in height from three to ten feet, and were in open view of any person who might venture on the farm for legitimate reasons, or to the hunters and others who

used the farm for recreational purposes. As well, the plants were observable from the air. The police then obtained a search warrant (under s. 487 of the Criminal Code, rather than s. 487.01) and conducted a surveillance of the marijuana plants to determine their cultivator. They observed the accused, who turned out to be a trespasser rather than the owner of the property, tending the plants, and charged him with cultivating marijuana and possession of marijuana for the purpose of trafficking. Was there a violation of s. 8 of the Charter either in the police's initial inspection without a warrant or in the subsequent surveillance based on a s. 487 warrant? The SCC held that there was no violation of s. 8, because the trespasser in the fields in question, on the facts of the case, had no reasonable expectation of privacy.

[The facts above occurred in 1994. Three years later, Mr. Lauda still cultivated marijuana in open fields but, using his acquired knowledge of the law, made the necessary adjustments to acquire a reasonable expectation of privacy: see R. v. Lauda (1999) 45 O.R. (3d) 51 (Ont. C.A.). See also R. v. Boersma [1994] 2 S.C.R. 488: the accused cultivated marijuana on Crown land; the plants were in plain sight of police officers walking by on a dirt road; the SCC held that the accused "had no reasonable expectation of privacy with respect to the area on which marijuana was being cultivated".]

4.5.6 Vehicle

R. v. CASLAKE [1998] 1 S.C.R. 51

There is a lesser expectation of privacy in a car than there is in one's home or office, or with respect to their physical person. [The facts are summarised in 4.3.1.] In determining whether the evidence was admissible notwithstanding the violation of s. 8 of the Charter, the SCC took into consideration the seriousness of the breach. One of the factors considered was the accused's reasonable expectation of privacy in the area searched. The court held that "there is a lesser expectation of privacy in a car than there is in one's home or office, or with respect to their physical person".

R. v. BELNAVIS [1997] 3 S.C.R. 341

The reasonable expectation of privacy in relation to a car is greatly reduced in comparison to that expected of a home or office, and is further reduced when the car belongs to another. The police stopped a speeding car, with three women inside. The car belonged to the driver's boyfriend, but the driver could not produce the usual vehicle documentation. Suspecting the car to be stolen, the police ran a computer check of the plates. Meanwhile, the officer returned to the car in search of vehicle documentation. He looked in the glove compartment and found none. He opened the back door and stuck his head inside the car to speak to the rear seat passenger; as they were speaking, he noticed three garbage bags on the back seat; they were open and contained clothing; he could see price tags on some of the garments hanging out of the garbage bags; he reached inside the bags and

removed several articles; they were all new and still had price tags on. He asked who owned the bags and the rear passenger said they each owned one. He looked inside the trunk and found more garbage bags full of clothes. The driver, in the police cruiser awaiting a traffic ticket, claimed the bags were already in the car when she took the car. The driver and the rear passenger were charged with possession of stolen property. What expectation of privacy could the driver and the passenger have in the car? The SCC held that the driver, having permission of the owner to drive the car, had a reasonable expectation of privacy in the car, and that her s. 8 rights were violated by the police search. But the passenger had no similar expectation of privacy. The court likened the situation of the car passenger to that of the casual apartment visitor in R. v. Edwards [see 4.5.1]: the passenger had no control over the vehicle, and no relationship to the owner or driver of the car which might give her some special access or privilege regarding the vehicle. The court suggested that the spouse of a driver or owner of a vehicle could have a reasonable expectation of privacy, and likewise a passenger on an extended journey who shared the driving responsibilities and car expenses. But the court pointed out that an expectation of privacy in relation to a vehicle may, depending on the circumstances, be greatly reduced. A car in a garage attached to a home will command a greater expectation of privacy than a car on the road. The more the expectation of privacy diminishes, so does the seriousness of a violation of that privacy.

4.5.6.1 Check stop programs

R. v. MELLENTHIN [1992] 3 S.C.R. 615

When the police are conducting a random roadside check stop, they cannot, in the absence of any reasonable grounds for doing so, interrogate the driver about matters other than those related to the vehicle and its operation, or search the driver or the vehicle. The police directed a vehicle into a check stop set up pursuant to the Alberta Highway Traffic Act. A police officer shone a flashlight in the interior of the vehicle, noticed an open gym bag on the front seat, asked the driver what was inside the bag, was told that it contained food and was shown a paper bag with a plastic sandwich bag in it. The officer also noticed empty glass vials of the type commonly used to store cannabis resin. The police officer asked the driver to step outside the car, searched the car, found cannabis resin, arrested the driver for possession of a narcotic. The SCC held that since the driver's words, actions and manner of driving did not demonstrate any symptoms of impairment, and since the police officer had not even the slightest suspicion that drugs or alcohol were in the vehicle, the search conducted by the police was not based on reasonable and probable grounds and was therefore unreasonable and contrary to s.8 of the Charter. The Court considered the police questions pertaining to the gym bag, the search of the bag and the search of the vehicle to be elements of the search. "Check stop programs result in the arbitrary detention of motorists. The programs are justified as a means aimed at reducing the terrible toll of death and injury so often occasioned by impaired drivers or by dangerous vehicles. The primary aim of the program is thus to check for sobriety, licences, ownership, insurance and the mechanical fitness of cars. The police use of check stops should not be extended beyond those aims. Random stop programs must not be turned into a means of conducting either an unfounded general inquisition or an unreasonable search."

[The Mellenthin case is also referred to in 4.10.2. The matter of check stop programs is also dealt with at 5.2.3, and in the Dedman case at 1.3.]

4.5.7 Border crossings/customs searches

R. v. SIMMONS [1988] 2 S.C.R. 495

The degree of personal privacy reasonably expected at customs is lower than in most other situations. People do not expect to be able to cross international borders free from scrutiny, sovereign states having the right to control both who and what enters their boundaries. Thus a warrantless search of the person at a border crossing, as authorized by statute (Customs Act), will not violate s. 8, if the search is carried out in a reasonable manner which befits the degree of intrusiveness of the search. There are three types of border searches: (i) routine questioning, accompanied in some cases by a search of baggage and perhaps a pat or frisk of outer clothing; (ii) strip or skin search; and, (iii) body cavity search. The more intrusive the search is, the more measures need to be taken to conduct the search in such a way as to respect human dignity.

4.5.8 Regulated activities/business records/business premises

COMITÉ PARITAIRE v. POTASH [1994] 2 S.C.R. 406

In a context in which their occupations are extensively regulated by the state, employers have a considerably lower expectation of privacy with respect to documents whose content is specifically provided for by the regulating statute or with respect to premises where an activity subject to specific regulatory standards is conducted. Consequently, the SCC held that administrative inspections in the context of a regulated industry do not require prior authorization based on the existence of reasonable and probable grounds, in order for the inspection to constitute a reasonable search and seizure under s. 8.

THOMSON NEWSPAPERS v. DIR. OF INV. & RES. [1990] 1 S.C.R. 425

As long as the search and seizure occurs in the course of regulating a lawful social or business activity rather than in the course of investigating a criminal offence, there is a relatively low expectation of privacy in respect of premises or documents that are used or produced in the course of activities which, though lawful, are subject to state regulation as a matter of course. The search and seizure must be limited to evidence that is relevant to the regulatory context in which it is made in order for the lower expectation of privacy to apply. Outside the regulatory context, business premises command an expectation of privacy equivalent to a home.

B.C. SECURITIES COMM. v. BRANCH [1995] 2 S.C.R. 39

Persons involved in the business of trading securities do not have a high expectation of privacy with respect to regulatory needs that have been generally expressed in securities legislation. Documents produced in the course of a business which is regulated have a lesser privacy right attaching to them than do documents that are, strictly speaking, personal.

143471 CANADA INC. v. QUEBEC (A.G.) [1994] 2 S.C.R. 339

Although there is a lower expectation of privacy in documents that are commercial rather than personal in nature, and although there is also a diminished expectation of privacy when a search is carried out in a regulatory rather than a criminal context, there still remains some measure of privacy in commercial documents containing sensitive commercial information. Moreover, the reasonableness of the search will be held to a higher standard if the commercial documents are obtained by way of a search of premises (which is more intrusive) rather than by an order to produce (which is less intrusive), because there remains a very real and significant privacy interest in maintaining the inviolability of residential premises, and to a lesser extent of business premises. This principle was stated in the context of an application for an order to impound the documents seized by the state, pending a challenge to the legality of the search warrants pursuant to which the documents were seized.

4.5.9 Tax documents

R. v. McKINLAY TRANSPORT LTD. [1990] 1 S.C.R. 627

A taxpayer's privacy interest with regard to documents which the Minister of Revenue may require under the Income Tax Act to determine his tax liability is relatively low *vis-à-vis* the Minister, but remains high insofar as the disclosure of those documents to other persons or agencies is concerned.

4.5.10 Commercial records, computer records

R. v. PLANT [1993] 3 S.C.R. 281

There is no reasonable expectation of privacy in commercial records, including computerized commercial records, if they do not reveal information which is personal and confidential in nature. The police had access to the city's computerized records of electrical consumption. They revealed the suspect's high electrical consumption which was consistent with other indications that the suspect was growing marijuana plants in his house, and formed part of the information to obtain a search warrant. The SCC held that individuals have a reasonable expectation of privacy concerning commercial records only to the extent that they reveal information which is personal and confidential

in nature. "This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual". A person's pattern of electrical consumption does not meet that definition; but the court intimated that its conclusion might differ if there were a contractual obligation on the part of the utility company towards the consumer to keep such information confidential. The court also indicated that a reasonable expectation of privacy would attach to personal computer records confidentially maintained by a private citizen.

4.5.11 Prison

CONWAY v. CANADA [1993] 2 S.C.R. 872

"Imprisonment necessarily entails surveillance, searching and security. A prison cell is expected to be exposed and to require observation. The frisk search [by hand or by hand-held scanning device, possibly including the genital area], **the count** [a regularly scheduled and announced cell patrol] **and the wind** [an unannounced cell patrol conducted at random times] **are all practices necessary in a penitentiary for the security of the institution, the public and indeed the prisoners themselves. A substantially reduced level of privacy is present in this setting and a prisoner thus cannot hold a reasonable expectation of privacy with respect to these practices."** The SCC added that this conclusion is unaffected by the fact that the practices are at times conducted by female guards on male prisoners. The court also held that the fact that female penitentiary inmates are not similarly subject to cross-gender frisk searches and surveillance does not violate s. 15 (right to equality) of the Charter.

4.5.12 Shack or shelter

R. v. COLET [1981] 1 S.C.R. 2

Even though a person's residence is nothing more than a shack or shelter, the resident is entitled to the enjoyment of his property without intrusion by the police. [The facts are set out at 4.4.8. Please note that this was a pre-Charter case.]

4.5.13 Lost or stolen property

R. v. LAW [2002] SCC 10 (temporary citation)

The owner retains a limited expectation of privacy in property that is lost or stolen. Upon recovering stolen property, the police may search and seize the property without a warrant only for the purposes of their investigation of the theft of that property. Following a break and enter at a restaurant, the accused reported to police that a safe had been stolen. The next day, police recovered the safe in a field. The safe and its contents were dusted for prints by the Forensic

Investigation Section. Two weeks later the documents inside the safe were returned to the accused, but not before another officer, uninvolved in the theft investigation and suspicious that the accused might be evading taxes, had photocopied the recovered documents and sent copies to Revenue Canada. Based on the copied documents, the accused was charged with GST violations. Was the photocopying of the documents an unreasonable search and seizure? The SCC held that it was, and excluded the evidence. In the absence of evidence to the contrary, the owner of lost or stolen property retains a residual, but limited, expectation of privacy in that property. The expectation of privacy is limited or lost only to the extent of allowing the police to carry out its duty of investigating the theft of a stolen item or of carrying out whatever law enforcement responsibility is reasonably associated with the taking of the item by the police. "Thus, an unattended suitcase may have to be inspected for explosives, a stray wallet for identification, or a deserted vehicle for evidence of theft. More extensive investigation may be required to determine the motive of a theft, or to identify the perpetrator. However, where the police cannot reasonably conclude that the property has been abandoned by its owner, they are limited in their investigation by the privacy interest of the owner as protected by s.8 of the *Charter*." The Court explained that the principal reason for this restriction is to discourage police procedures whereby property is seized by one state agent for one purpose, for which the prerequisites for search may not be as demanding, and then sharing the fruits of the search with another state agent for a different purpose, for which the search prerequisites are more stringent.

4.6 Private dwelling (home)

4.6.1 Perimeter search

R. v. KOKESCH [1990] 3 S.C.R. 3

The police do not have the right to trespass upon private property, except where the common law or statute law gives them clear authority to do so. The police suspected the accused of being involved in the cultivation of marijuana, but did not have reasonable and probable grounds to believe that an offence had been or was being committed on the accused's property. Without a warrant, the police searched the perimeter of the accused's dwelling-house. They detected the odour of marijuana, and made other observations which enabled them to obtain a search warrant to enter the house and seize marijuana plants. Did the perimeter search violate s. 8? The SCC held that it did, pointing out that the common law rights of the property holder to be free of police intrusion can be restricted only by powers granted in clear statutory language or by common law. Here, the common law exceptions did not apply, nor could the police satisfy the statute law requirement of prior judicial authorization based on reasonable and probable grounds that an offence was being or had been committed on the property.

[See also R. v. Wiley [1993] 3 S.C.R. 263, where a search carried out pursuant to a warrant was upheld as valid even though the warrant for that search had been issued based in part on information obtained by the police as a result of having previously carried out a warrantless perimeter search. The Court's rationale was that the other information which was submitted in support of the application for a warrant was sufficient to constitute the reasonable grounds necessary for the issuance of a warrant.]

4.6.2 Doorstep

R. v. EVANS [1996] 1 S.C.R. 8

An occupant has a reasonable expectation of privacy in the approach to his home, which he impliedly waives for the purpose of facilitating communication with the public but not for the purpose of gathering evidence against him. The police received an anonymous tip that a couple grew marijuana in their house. A criminal records check and electricity consumption check provided no helpful information to the police, nor did a visual perimeter search of the house done from a distance on public property. So, dressed in plain clothes, they decided to go to the house and question the couple. They knocked on the front door. A man opened the door. The police identified themselves. They smelled marijuana, and immediately arrested the couple. They entered the house to secure the premises and ensure no one else was inside, and in the basement found marijuana plants. One officer left the house to obtain a warrant. With warrant in hand, the police seized the marijuana plants and other drug-related paraphernalia and growing equipment. The SCC held that the occupier of a house has a reasonable expectation of privacy in his home and in the approach to

his home. That expectation is deemed to be waived to give the public, including the police, permission to approach the door, knock on it and engage communication, if they are on legitimate business (thus excluding burglars), unless the occupant has clearly expressed a contrary intention. In this case, the police intended not only to engage in communication, but more so to gather evidence. When they sniffed, they were searching (without a warrant), and this went beyond the occupant's waiver of his expectation of privacy. "Clearly, occupiers of a dwelling cannot be presumed to invite the police (or anyone else) to approach their home for the purpose of substantiating a criminal charge against them".

4.6.3 "911" call

R. v. GODOY [1999] 1 S.C.R. 311

The importance of the police duty to protect life warrants and justifies a forced entry into a dwelling in order to ascertain the health and safety of a 911 caller. Two police officers received a call from radio dispatch concerning a 911 emergency call originating from the accused's apartment in which the line had been disconnected before the caller spoke. The police knocked at the apartment door. The accused partially opened the door. When asked if things were all right, the accused said there was no problem. When one of the officers asked if they could enter the apartment to investigate, the accused tried to close the door, but the officer prevented him from shutting the door and the police entered the dwelling. Once inside , an officer heard a woman crying, found her in a bedroom, curled in a fetal position, sobbing, with considerable swelling above her left eye; she stated that the accused had hit her. The accused was placed under arrest for assault. Was the police entry into the dwelling an unjustifiable use of police powers in the circumstances? The SCC held that, in the circumstances of this case, it was justified, as part of the common law duty of the police to protect life. The duty to protect is engaged whenever it can be inferred that the 911 caller is or may be in some distress, including cases where the call is disconnected before the nature of the emergency can be determined. But the police intrusion must be limited to the purpose of protecting life, and cannot be used to search the premises for other purposes. The court distinguished this case from R. v. Feeney (see 4.6.5), in that the purpose of the forced entry in Feeney was to make an arrest, while here it was to protect life.

4.6.4 Exigent circumstances

R. v. SILVEIRA [1995] 2 S.C.R. 297

"There is no place on earth where persons can have a greater expectation of privacy than within their 'dwelling-house'." To enter a dwelling-house without a warrant, even in exigent circumstances, is such a serious breach of Charter rights that it will likely lead to a ruling that the evidence seized is inadmissible. On three occasions, police observed an undercover agent purchase cocaine from a drug peddler: the agent met the peddler at a community centre, and gave

him money; the peddler then met the accused, who was driven to his residence, which he entered and left after a short time, was driven back to the peddler, who then delivered the drugs to the agent. On the third occasion, the peddler and the accused were arrested. The police feared that further evidence at the accused's residence would be destroyed or removed. Pending the arrival of a warrant to search the house, the police went to the residence, knocked on the door, identified themselves, entered the premises uninvited, and checked the premises for weapons and the location of residents; seven residents were confined to the house but allowed to continue their domestic activities. The police did not search the premises for evidence until the warrant arrived, an hour later: they found a stash of cocaine and cash (marked bills). Was the evidence inadmissible on grounds that the earlier entry without warrant invalidated the subsequent search with a warrant?. The SCC ruled the evidence admissible. The court viewed the unauthorised presence of agents of the state in a home as the ultimate invasion of privacy, a very serious violation of the Charter. But the court weighed the right to privacy in a person's dwelling against the gravity of drug crimes and the need of the police in emergency situations to preserve vital evidence and, given the exceptional facts of this case, held the violation to be mitigated by the exigent circumstances. But the court stated that the preferable course of conduct, in any case, is to have a search warrant in hand, even if obtained on relatively stale information.

4.6.5 Warrantless arrest in a home/search incident to arrest

R. v. FEENEY [1997] 2 S.C.R. 13

A warrant is required to make an arrest in a dwelling house, except in cases of hot pursuit (and possibly in other exigent circumstances). The police, investigating a murder, had reason to speak to the accused. They went to the accused's home (a trailer), knowing that the accused was asleep after a night of drinking. One officer knocked on the door, said "Police", received no answer. Without a warrant and with his gun drawn, he entered the trailer, went to the accused's bed, shook his leg and told him he wanted to talk to him. Wanting to inspect the accused's clothes for bloodstains, he told the accused to get out of bed and move into the light, (possibly touched him in leading him there). The officer noticed blood spattered all over the front of the accused. Another officer informed the accused of his right to counsel and his right to remain silent. The accused was arrested and acknowledged understanding his rights. When asked how he got blood on himself, he replied that he had been hit in the face with a baseball the previous day. When asked if a particular pair of shoes were the ones he had worn the previous night, he replied that they were his only shoes. The police seized the tee shirt he was wearing, and took him to the police station. There, (and not until then because there was no phone in the trailer), he made several unsuccessful attempts to reach a lawyer. Told he had no choice in the matter, he gave a breathalyser sample. Despite requesting a lawyer, he was questioned, made incriminating admissions which the police used to obtain a warrant to search and seize further evidence in his trailer. Was all the evidence inadmissible given the initial warrantless entry by the police in the accused's home? So held the SCC. The initial arrest was unlawful as there were no reasonable and probable grounds for arrest prior to that entry; thus, the common law power of search incident to arrest could not apply. Moreover, the authority to arrest without warrant in a dwelling house is prohibited, under the Charter, unless the police is in hot

pursuit [see also R. v. Macooh [1993] 2 S.C.R. 802] (and possibly under other exigent circumstances). The court laid out the following test to obtain a warrant for arrest in a dwelling house: there must be reasonable and probable grounds not only for arrest but also for believing that the person will be found at the address named. The court added that, even with a warrant, proper announcement must precede the entry.

[The court also found that the accused's rights under s. 10(b) had been violated, in that: (a) his rights were not read to him soon enough, the court being of the view that he was detained from the moment that the police touched his leg and ordered him to rise; (b) he was not fully informed of his right to counsel; and, (c) the police proceeded to question him and have him provide conscriptive evidence before giving him an adequate opportunity to consult a lawyer.]

4.6.6 Warrantless search authorized by statute law

R. v. GRANT [1993] 3 S.C.R. 223

A warrantless search will respect s. 8 if authorized by law (such as s. 10 of the Narcotic Control Act), and both the law authorizing the search and the manner in which the search is conducted are reasonable.

4.6.7 Surreptitious entry/electronic monitoring

R. v. THOMPSON [1990] 2 S.C.R. 1111

Interceptions obtained by surreptitious entry into residential premises which were not specifically mentioned on the face of an authorization to carry out electronic monitoring violate s. 8 of the Charter. The judicial authorization permitted the interception of private communications at all places resorted to by named persons within the province. The SCC reversed pre-Charter authorities holding that an authorization of electronic surveillance which is silent as to surreptitious entry to plant listening devices impliedly confers such authority. The Court said that, in the case of residential premises, it is necessary for the judge to specifically consider what conditions, if any, are required in the public interest to minimize the invasion of privacy in a private dwelling. At a minimum, the authorization should refer specifically to each place that is a private residence and designate the type(s) of devices that may be employed.

4.6.8 Entry by consent - revocation of consent

R. v. THOMAS [1993] 1 S.C.R. 835

A peace officer may enter the premises of another person with that person's permission, but

must leave if and when that permission is revoked. Police officers went to the accused's house to enforce a noise by-law. They entered the house with the permission of guests of the accused. When they confronted the accused, the accused told them to get out. The police did not get out. A fight ensued between the accused and the police, and the accused was arrested for obstructing a police officer and other charges. The SCC agreed that the accused should be acquitted on all charges, because the police had no authority to be in the house and therefore the arrest of the accused was unlawful. The Court did not pronounce on whether the guest's permission was sufficient to authorize the police entry up to the point when the police confronted the owner, but as of the moment when the owner told the police to get out, the Court held that the police had no authority to remain in the house.

4.7 Intrusive vs non-intrusive body searches

4.7.1 Bodily substances and impressions

4.7.1.1 By consent or judicial authorization

R. v. STILLMAN [1997] 1 S.C.R. 607

The taking of (scalp or pubic) hair samples, teeth impressions and buccal swabs is highly intrusive, is not authorized by common law, and therefore requires either the person's consent or judicial authorization in order to comply with s. 8 of the Charter. [The facts are summarised at 3.2.5.]

R. v. DYMENT [1988] 2 S.C.R. 417
R. v. DERSCH [1993] 3 S.C.R. 768

The protection of the Charter extends to prevent a police officer from taking (without a warrant or the consent of the individual) a substance as intimately personal as an individual's sample of blood from a doctor or other person who holds it for medical purposes only and subject to a duty to respect the dignity and privacy of that individual.

R. v. ARP [1998] 3 S.C.R. 339

If neither the police nor the consenting suspect limit the use which may be made of evidence derived from a search and seizure based on the informed consent of the suspect, then, as a general rule, there is no limitation or restriction to the purposes to which that evidence may be used; thus, though the evidence was gathered in the context of one criminal investigation respecting that suspect, it may also be used in the context of another criminal investigation respecting that suspect. Two women were murdered two and half years apart in the same city in similar circumstances. In the course of the investigation into the first murder, and with a view to eliminating himself as a suspect, the accused consented to giving samples of his scalp and pubic hair to the police, to see if the hair would match hair found on the victim's coat. Use for DNA analysis was not contemplated at the time. The police advised the accused that any evidence gathered as a result of the hair sample would be used in court. The accused was released when there was no match. Two and a half years later, during the investigation of the second murder, the accused refused to provide samples of his hair to police for DNA testing. The police obtained a warrant to use the hair samples obtained during the first investigation, for DNA testing in relation to a semen sample found inside the victim of the second murder. The police also used (for DNA testing) cigarette butts belonging to the accused, which he had left behind after being interviewed by the police in relation to the second crime. The resulting DNA match afforded evidence to incriminate the accused of the second murder. And, similar fact evidence was used to incriminate him of the first murder. The SCC

held that the evidence was admissible. Concerning the use of the hair sample, the SCC stated this: "In the absence of any limitation placed by the police or the consenting party on the use to be made of the hair sample, there is nothing inherently unfair or illegal about the police retaining evidence obtained in connection with one investigation and using it in connection with a later investigation which was not anticipated by the police at the time the consent was given. The police in this case could not possibly have foreseen that 30 months after they had lawfully obtained the appellant's hair samples, the appellant would again be the suspect in another homicide. Moreover, at the time the samples were taken, the appellant was clearly informed that if the police gathered 'any evidence as a result of that hair sample, [it would be used] in court' (emphasis added). Thus it is apparent that the appellant's consent was not limited in any way, nor was it vitiated through a lack of knowledge as to the consequences of that consent. The seizure of his hair samples in 1990 was both lawful and reasonable." The Court wondered whether the accused could have a subsisting privacy interest in his hair sample once given to the police, because it was given with his unconditional and reasonably informed consent; but the court found it unnecessary to rule on this issue given the fact that, for the purposes of the second criminal investigation, the police had seized the hair sample pursuant to a properly issued warrant.

R. v. BORDEN [1994] 3 S.C.R. 145

A person's reasonable expectation of privacy in his blood while it is in his body relates not only to his bodily integrity but also to the informational content of his blood. A person's consent to give the police a sample of his blood, where the consent is for a single purpose as perceived by the consenting person, is valid only for that purpose. The accused, arrested for one assault, but not told by police that he was also a suspect in relation to another assault, consented in writing to give the police a blood sample "for the purposes relating to their investigations". The police deliberately used the word "investigations" in the plural form to use the sample for their investigations in both assaults, but did not explain this to the accused. The blood sample incriminated the accused in the other assault. The SCC held that there was a s. 8 violation. The consent was valid only in relation to the offence for which the accused had been arrested at the time that he gave his consent, because a valid consent necessitates a link between the scope of the valid consent and the scope of the consenting person's knowledge in relation to the consequences of that consent. The court noted the dual aspect of the expectation of privacy: (i) bodily integrity; and, (ii) informational content of blood. From the second aspect, the consent given for a single purpose maintained the person's expectation of privacy in respect of any other purpose. The court held that there was also a breach of the s. 10(b) right (right to counsel), because the advice given by counsel in the context of the accused being arrested for a particular assault might be different knowing that his client was also a suspect concerning a different assault.

[Note that in R. v. Arp, *supra*, the SCC stated that "the general principle to be taken from *Borden* is that the scope of a valid consent may be limited by the extent of the accused's knowledge and the information given to the accused as to the consequences of giving his consent."]

4.7.1.2 Pursuant to C.C. 254(3)

R. v. GREEN [1992] 1 S.C.R. 614

A demand for blood samples by a peace officer, pursuant to s. 254(3) of the Criminal Code must incorporate the assurances of s.254(4) that the samples of blood will only be taken by or under the direction of a qualified medical practitioner and that the taking of those samples will not endanger the life or health of the person. Failure to do so invalidates the demand, and the person cannot be convicted under 254(5) for failure to comply with a demand.

4.7.2 Fingerprints

R. v. BEARE [1988] 2 S.C.R. 387

Fingerprinting incidental to an arrest does not violate the Charter. A person who is charged on reasonable and probable grounds with having committed a serious crime must expect a significant loss of personal privacy incidental to being taken in custody.

4.7.3 Breathalyser test

R. v. WILLS [1992] 7 O. R. (3d) 337 [Ont. C. A.]

The state capture, for investigative purposes, of the very breath one breathes constitutes a significant state intrusion into one's personal privacy. Where the administration of a breathalyser test is not authorized by law, it requires the person's valid consent.

R. v. BERNSHAW [1995] 1 S.C.R. 254

The requirement, in s. 254(3) of the Criminal Code, that reasonable and probable grounds exist before a person is required to submit samples of breath, is not only a statutory requirement but also a constitutional pre-requisite to a lawful search and seizure under s. 8 of the Charter. Section 8 requires that reasonable and probable grounds exist in fact; such grounds cannot be deemed to exist notwithstanding the evidence. Therefore, a positive but unreliable test taken pursuant to s. 254(2) cannot form the necessary legal foundation for a subsequent breathalyser demand under s. 254(3). A police officer observed a vehicle being driven erratically, pulled the driver over, noticed that the driver smelled of liquor and that his eyes were red and glassy. The driver admitted that he had been drinking. The officer did not inquire when the driver had last been drinking, nor did the driver provide that detail. The officer asked the driver to provide a breath sample for an ALERT roadside screening test, pursuant to s.254(2) of the Criminal Code. The driver complied, and failed the test. The officer concluded that the driver was impaired

and, pursuant to s.254(3) of the Criminal Code, requested the driver to submit to a breathalyser test at the police station. Both samples taken at the station were over the limit. The issue at trial was whether the roadside test was unreliable, because it may have been taken too quickly after the driver's last drink, and therefore removed the officer's reasonable and probable grounds to require the driver to submit to a breathalyser test. The SCC held the test to have been reliable in the circumstances. The Court stated that the explicit requirement to hold a roadside test "forthwith" is subject to the overriding requirement that the test be reliable, as implied by the words "necessary to enable a proper analysis of the breath". However, the need to delay the test to ensure its accuracy applies only if the officer is aware of the potential for inaccuracy. Here, the officer, acting in good faith throughout, was unaware of the potential inaccuracy of the roadside test, and was under no duty to inquire when the driver had last consumed alcohol. The Court also held that where the particular screening device has been approved under the statutory scheme, the officer is entitled to rely on its accuracy unless there is credible evidence to the contrary. [The Bernshaw case is also referred to at 6.3.10.]

4.7.4 Body cavity, X-ray, "bedpan vigil"

R. v. SIMMONS [1988] 2 S.C.R. 495

The most highly intrusive type of search is the body cavity search; it may involve recourse to medical doctors, X-rays, emetics, and other highly invasive means. The greater the intrusion, the greater must be the justification and the greater the degree of constitutional protection.

R. v. GREFFE [1990] 1 S.C.R. 755

The intrusive nature of the rectal search and considerations of human dignity and bodily integrity demand a high standard of justification before such a search will be reasonable. The SCC held that the police must not subject a person to a rectal examination incident to an arrest for traffic warrants when they do not have reasonable and probable grounds to believe that the person is actually in possession of drugs. Even if they had such grounds, the reasonable course of action would be for the police to detain the person in order to facilitate the recovery of the drugs "through the normal course of nature" [also known as "bedpan vigil" - see R. v. Monney hereunder] (rather than request a medical doctor to remove the drugs from the suspect's anal cavity).

R. v. MONNEY [1999] 1 S.C.R. 652

"An individual's privacy interest in the protection of bodily fluids does not extend to contraband which is intermingled with bodily waste and which is expelled from the body in the process of allowing nature to take its course." A customs inspector at an airport had reasonable and probable grounds to believe that a traveller was carrying narcotics, and may have

ingested them. The traveller was placed under detention, informed of his Charter rights, and taken to a "drug loo facility" where he was told that he would remain in detention until either a negative urine test or a clear bowel movement proved that he had not ingested narcotics. After phoning his lawyer, the traveller provided a urine sample which confirmed the presence of heroin. He was arrested, confessed to having ingested 84 pellets each containing 5 grams of heroin. After a second call to his lawyer he excreted the pellets by natural bowel movement. Medical supervision had been offered to the traveller, and declined by him; however, unbeknownst to the customs inspectors, the customs policy called for automatic medical supervision in the circumstances. Did the seizure of the pellets by the Customs inspector violate the traveller's Charter rights? No, said the SCC. The SCC held that a passive "bedpan vigil" is not as invasive as a body cavity search or medical procedures such as the administration of emetics. Because of the reduced expectation of privacy in the context of a border search [see 4.5.7], the passive bedpan vigil complied with s. 8; but the court left in doubt whether the same conclusion would apply if the customs officers had adopted a more invasive form of collection, such as surgery or inducing a bowel movement. The court also distinguished this type of search from one involving self-incrimination, as in R. v. Stillman [see 3.2.5 and 3.3.1], because in this case: (i) it was a border search, carried out to enforce the Customs Act, rather than a police search to incriminate the suspect; (ii) the bodily samples yielded contraband, rather than revealing personal information about the suspect; and, (iii) the search did not involve the intentional application of force against the detainee's will. On the facts of the case, the court also held that there was no s. 7 violation, for not conducting the passive bedpan vigil under medical supervision, since the detainee refused the offer of medical care.

4.8 Electronic surveillance

4.8.1 Interception of private communications

R. v. DUARTE [1990] 1 S.C.R. 30

The interception of private communications by an instrumentality of the state with the consent of the originator or intended recipient thereof, without prior judicial authorization, infringes the s. 8 rights of any other participant in the communication who did not consent to the interception. The police installed audio-visual equipment in the wall of an apartment rented by the police and occupied by a police informer, to intercept the conversations of the informer, an undercover police officer, and persons suspected of being involved in drug trafficking. The informer and the undercover cop had consented to the interception of their conversations, pursuant to s. 178.11(2)(a) [now s. 184(2)(a)] of the Criminal Code, so that the interception would not constitute a criminal offence. No warrant authorized the interception. Did the interception violate the s. 8 rights of the participants who did not consent to the interception? The SCC held that it did. In the absence of judicial authorization, the purpose of which is to ensure a measure of control over the state's invasion of an individual's privacy, the surreptitious electronic surveillance of the individual by the state or its agent constitutes an unreasonable search or seizure. To obtain a judicial authorization to use electronic surveillance, the Criminal Code requires the police to satisfy the judge that: (a) other investigative methods would fail or have little likelihood of success; and, (b) the granting of the authorization is in the best interest of the administration of justice. The SCC pointed out that the (b) portion of the test requires that the police demonstrate more than mere suspicion; the police must satisfy the judge that there are reasonable and probable grounds to believe that an offence has been or is being committed, and that the authorization sought will afford evidence of the offence.

4.8.2 Minimization of interception

R. v. THOMPSON [1990] 2 S.C.R. 1111

In order to be reasonable, a search by means of judicially authorized electronic surveillance must be carried out in such a way as to minimally intrude on the privacy of persons not involved in the activity being investigated. The police had judicial authorization to use electronic monitoring devices to intercept the private communications, at public pay telephones as well as in certain residences and hotel rooms, of persons suspected of being involved in conspiracy to import marijuana. On some occasions, tape recorders installed on pay phones were left on "automatic play mode" overnight, intercepting the conversations of persons not covered by the authorization. The SCC held this to be an unreasonable search because it failed to minimize the intrusion on the privacy of innocent third parties. Conversations at a public telephone should not be intercepted unless there are reasonable and probable grounds for believing that a target is using the phone at the time that the listening device is activated. "The police cannot simply install a a listening device and leave it running indiscriminately in the hope that a target may come along."

4.9 Power to search versus right to counsel

4.9.1 Suspension of search

R. v. DEBOT [1989] 2 S.C.R. 1140

As a general rule, police proceeding to a search are not obligated to suspend the search and give a person the opportunity to retain and instruct counsel, as for example when the search is of a home pursuant to a search warrant. However, when the person is being detained (and therefore the s. 10(b) right to counsel kicks in) and the person's consent is required for the search to be lawful or the person has a right to seek a review of the decision to search, the police must suspend the search while the detainee exercises his right to counsel. The SCC went on to hold that the police are not obligated to suspend a search incident to arrest until the detainee has had the opportunity to retain counsel, unless the lawfulness of the search requires the detainee's consent, or the detainee has a right to seek a review of the decision to search (as in R. v. Simmons [1988] 2 S.C.R. 495).

4.10 Waiver/consent

4.10.1 Standard for valid waiver

KORPONAY v. ATTORNEY GENERAL OF CANADA [1982] 1 S.C.R. 41

The validity of any waiver is dependent upon it being clear and unequivocal that the person is waiving the procedural safeguard and is doing so with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process. [Though this was a non-Charter case, the standard that it set was subsequently adopted in the context of s. 8 of the Charter: see R. v. Nielsen (1988) 43 C.C.C. (3d) 548 (Sask. C.A.). It was also adopted by the SCC itself in respect of other sections of the Charter: see, for example, Clarkson v. The Queen [1986] 1 S.C.R. 383 (re: s. 10(b) of the Charter). For other cases on waiver of a Charter right, see 3.2.7 and 6.3.7.]

4.10.2 Standard for valid consent

R. v. WILLS [1992] 7 O. R. (3d) 337 [Ont. C. A.]

The standard for a valid consent to a seizure by the police which would otherwise be unauthorized is the same as for a valid waiver of a constitutional right [See 4.10.1]. **The consent must be voluntary and informed. It must satisfy all of the following criteria:**

(1) The consent must be express or implied.
(2) The giver of the consent must have authority to give the consent in question.
(3) The consent must be voluntary, and not the product of police oppression, coercion or other external conduct negating the freedom to choose whether or not to allow the police to pursue the course of conduct requested.
(4) The giver of the consent must be aware of the nature of the police conduct to which he is being asked to consent.
(5) The giver of the consent must be aware of his right to refuse to permit the police to engage in the conduct requested.
(6) The giver of the consent must be aware of the potential consequences of giving the consent.

[See also the remarks on consent in R. v. Borden, in 4.7.1.]

R. v. MELLENTHIN [1992] 3 S.C.R. 615

A person who is detained can still consent to answer police questions. However, that consent must be one that is informed and given at a time when the individual is fully aware of his or her rights. [The facts in this case are set out at 4.5.6.1.]

5. SECTION 9 OF THE CHARTER: Everyone has the right not to be arbitrarily detained or imprisoned.

5.1 Detention

5.1.1 Definition

R. v. HUFSKY [1988] 1 S.C.R. 621

There is detention when a police officer [or other agent of the state] assumes control over the movement of a person by a demand or direction which may have significant legal consequence and which has an element of compulsion or coercion. The SCC also stated that there is no reason in principle why the general approach to the meaning of detention reflected in R. v. Therens and R. v. Thomsen, in the context of s. 10 of the Charter (see 6.1.1), should not also apply to s. 9 of the Charter.

5.1.2 Includes arrest/de *facto* arrest

R. v. LATIMER [1997] 1 S.C.R. 217

In the context of s. 9 of the Charter, detention includes an arrest and a *de facto* arrest. An arrest consists either of (a) the actual seizure or touching of a person's body with a view to his detention, or (b) the pronouncing of words which reasonably convey to the person the understanding that an arrest is being made. A *de facto* arrest is one where the officer has not specifically used the word "arrest", but through other words and conduct has indicated that an arrest is being made. A severely disabled child died. She was bedridden, in constant pain, and entirely dependent, for all her needs, on the constant care of her parents. Her father told police that she died in her sleep, but an autopsy and tests revealed that she died of carbon monoxide poisoning, and the police investigation revealed that he had been alone with her at the time of her death. The police went to the father's farm with the intention of taking him into custody, interview his wife, and execute a search warrant. The police told him that they were investigating his child's death and that they wished to speak to him outside the house; he followed the police inside their vehicle and sat in the back seat. He was warned that what the police officer was about to say to him has very serious consequences and that he should listen very closely. He was told that he was being detained in relation to the investigation of the death of his child, was informed of his right to retain and instruct counsel of his choice without delay and of the availability of free legal advice from legal aid duty counsel; he was asked if he understood, to which he replied "yes", was asked if he wished to call a lawyer now, to which he replied "no"; he was read his right to remain silent, and acknowledged understanding that right; he was told that he would be taken to police headquarters for questioning. He asked to return to the house to change his clothes; he was told that he could but that the police would accompany him inside the house because he was now in police custody. After he changed, he was taken to the detachment where, after re-reading his rights, with a phone in front of him with

the legal aid number on it, and after declining the offer to consult a lawyer, he was interviewed. He confessed. He was again advised of his rights and warned that he could be charged with murder. He confessed in writing. He was charged with murder. Were his rights under s. 9 violated because the initial police intention was not to arrest, or because the police used the word "detention" rather than "arrest"? The SCC held that there was no violation of his s. 9 rights because it had clearly been conveyed to him that there was a detention, in the form of a *de facto* arrest. Moreover, the SCC held that an arrest without warrant pursuant to s. 495(1)(a) of the Criminal Code is not arbitrary if the arresting officer subjectively has reasonable and probable grounds for believing that the person being arrested has committed or is about to commit an indictable offence, and those grounds are justifiable from an objective point of view such that a reasonable person placed in the position of the arresting officer can conclude that there were reasonable and probable grounds for the arrest.

[This case is also discussed at 6.2.1.]

5.2 Arbitrary detention

5.2.1 Test for arbitrariness: "articulable cause"

R. v. SIMPSON [1993] 79 C.C.C. (3d) 482 [Ont. C. A.]

To detain a person for the purpose of determining whether the person is involved in criminal activity being investigated, the police must have "articulable cause" for the detention: there must be "a constellation of objectively discernible facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation". A "hunch" based on intuition gained by experience does not constitute "articulable cause".

R. v. JACQUES [1996] 3 S.C.R. 312

The "articulable cause" test laid out in R. v. Simpson applies to all detentions, regardless of the origin of the authority to detain. The SCC adopted the articulable cause test stated in R. v. Simpson (where the detention was based on the common law power to detain for investigative purposes), to the context of a detention based on statutory authority (i.e., s. 99(1)(f) of the Customs Act).

5.2.2 Improper purpose

BROWN v. DURHAM REGIONAL POLICE FORCE (1998) 43 O. R. (3d) 223 [Ont. C. A.]

A detention authorized by statute is lawful even though also motivated by other purposes, unless any of the purposes is improper. A motorcycle club was believed by police to be an outlaw motorcycle gang whose members engaged in a variety of crimes. The gang posed a real and present danger to law-abiding members of the community, especially when they gathered to party. Informed that a party was in the making, the police established checkpoints on public highways leading to the club property. The police required anyone believed to be travelling to or from the club property to pull off the highway into a checkpoint. Anyone driving a Harley Davidson motorcycle was automatically stopped, as was anyone wearing the insignia or colours of motorcycle gangs. Persons stopped were required to produce their licence, ownership and insurance documentation, and their documents were verified through CPIC. Pending that verification, the police checked vehicles and equipment (such as helmets) for mechanical fitness and compliance with applicable safety standards. Detainees were videotaped, to assist police in identifying the gang's associates, and questioned. Some were charged for violations of the Highway Traffic Act. If the vehicle inspection and CPIC check gave no basis for further detention, the detainees were allowed to leave. Detentions varied from 3 to 20 minutes. Some of those detained sued the police for violating their rights under s. 9 of

the Charter. The Court of Appeal held that there were no arbitrary detentions. The court reasoned that inasmuch as one of the purposes for detention was a purpose for which the statute (Highway Traffic Act) authorized detention, then it didn't matter that there were other purposes also motivating the detention, as long as they were all proper purposes. Had the purpose been to carry out an unlawful search, or had the selection of persons stopped been based on their colour or sex, or motivated by personal animosity towards the person detained, then the detention would have violated s. 9 of the Charter, even if also motivated by highway safety concerns. The court also held that a detention pursuant to statutory authorization is not arbitrary if the detention is based on criteria that are relevant to the legislative purpose (here, highway safety) which underlie the statutory authorization to detain.

CHARTIER v. QUEBEC (ATTORNEY GENERAL) [1979] 2 S.C.R. 474

A warrant pursuant to s. 38 of the Coroners' Act [R.S.Q. 1964, c.29] **can only be used to ensure that the person arrested attends the Coroner's inquest. It cannot be used in order for the police to question the person, as a suspect in a crime, while in confinement.** [This is a pre-Charter case.]

5.2.3 Random stops/spot checks

R. v. HUFSKY [1988] 1 S.C.R. 621

The random stopping of vehicles to carry out spot checks as to compliance with the Highway Traffic Act constitutes an arbitrary detention in violation of s. 9 of the Charter, but is justified under s. 1 of the Charter as a reasonable limit prescribed by law to promote highway safety.

[This is so whether or not the random stopping is part of an organized program to carry out spot checks: R. v. Ladouceur [1990] 1 S.C.R. 1257; R. v. Wilson [1990] 1 S.C.R. 1291. Re: check stops, see also 4.5.6.1 and the Dedman case in 1.3]

5.2.4 Detention for line-up (identification parade)

R. v. STORREY [1990] 1 S.C.R. 241

Depending on the circumstances, a delay between arresting a person and laying a charge, for purposes of continuing an investigation after arrest such as holding a line-up, does not make the detention arbitrary. The accused was lawfully arrested, the police having reasonable and probable grounds to believe that he committed an aggravated assault, but the police knew they had no evidence to convict unless the victims identified the accused in a line-up. The accused was not charged until 18 hours after his arrest. This interim detention was necessary for bringing in the out-

of-town victims to conduct the identification parade. Did the arrest or the interim detention violate s.9? No, held the SCC, "an arrest which is lawfully made does not become unlawful simply because the police intend to continue their investigation after the arrest". The delay between the arrest and the laying of the charge was not unreasonable, but this turned on the facts of the case: the line-up was the fairest means as well as the sole practical means of identification; there was no unreasonable delay in holding the line-up: the arrest took place in the evening and the victims were out of town, thus they could not be brought in until the following day; the accused was charged immediately after the line-up.

6. SECTION 10 OF THE CHARTER: Everyone has the right on arrest or detention (a) to be informed promptly of the reasons therefor; (b) to retain and instruct counsel without delay and to be informed of that right; and (c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

6.1 Detention

6.1.1 Definition

R. v. THERENS [1985] 1 S.C.R. 613
R. v. THOMSEN [1988] 1 S.C.R. 640

In s. 10 of the Charter, "detention" refers to a restraint of liberty, other than arrest, in which a person may reasonably require the assistance of counsel. There is detention when a police officer or other agent of the state deprives a person's liberty by physical constraint. There is also detention when a police officer or other agent of the state assumes control over the movement of a person by a demand or direction which may have significant legal consequence, which prevents or impedes access to counsel, and which has an element of compulsion or coercion. The necessary element of compulsion/coercion may arise from criminal liability for refusal to comply with the demand or direction, or from a reasonable belief that one does not have a choice.

[For applications of this principle in a variety of fact situations, see R. v. Jacoy [1988] 2 S.C.R. 548 (customs search); R. v. Debot [1989] 2 S.C.R. 1140 ("spread eagle"); R. v. Schmautz [1990] 1 S.C.R. 398 (breathalyser demand); R. v. Hawkins [1993] 2 S.C.R. 157 (psychological detention).]

6.2 Right to be informed promptly of reason for arrest/detention [s.10(a)]

6.2.1 Test

R. v. LATIMER [1997] 1 S.C.R. 217

The test for compliance with s. 10(a) is whether what the detainee was told, viewed reasonably in all the circumstances of the case, was sufficient to permit him to make a reasonable decision whether or not to submit to detention, and whether or not to exercise his right to counsel under s. 10(b). [The facts are summarised at 5.1.2.] The SCC was satisfied, on the facts, that the police had conveyed to the accused a clear understanding of the extremely grave situation he was in, and held that there was no violation of s. 10(a).

6.3 Right to counsel [s.10(b)]

6.3.1 Counsel of choice

R. v. ROSS [1989] 1 S.C.R. 3

Accused or detained persons have a right to choose their counsel and it is only if the lawyer chosen cannot be available within a reasonable time that the detainee or the accused should be expected to exercise the right of counsel by calling another lawyer.

[See also the remarks of the SCC in R. v. Burlingham, in 6.3.2.]

6.3.2 Duty to "hold off"; obligation not to influence waiving right to counsel

R. v. BURLINGHAM [1995] 2 S.C.R. 206

The police must "hold off" from attempting to elicit incriminatory evidence once a detainee has asserted his right to consult a lawyer, unless justified by urgent circumstances. The police must also refrain from dissuading the detainee from exercising his right to counsel.
[The facts are summarised in 3.2.6.] The SCC held that the right to counsel had been violated in three ways: first, by continuing to question the detained suspect despite his repeated statements that he would say nothing until he had consulted his lawyer; secondly, by belittling the detainee's lawyer with the express goal or effect of undermining the detainee's confidence in and relationship with his lawyer; and thirdly, by pressuring the detainee to accept a deal without the opportunity of consulting his lawyer. The court added that s. 10(b) does not guarantee the right to counsel of one's choice at all times; but in this case it did, given the fact that the accused already had a counsel familiar with his case, and given the seriousness of the accused's situation and the circumstances of subterfuge and trickery by the police which characterized this case.

[The duty to "hold off" is discussed at greater length in R. v. Prosper [1994] 3 S.C.R. 236; in particular, the SCC held that the evidentiary presumption under s. 258 (1)(d) of the Criminal Code, which provides that breathalyser readings taken within two hours of an alleged offence are proof of the blood alcohol level at the time of offence, is not a sufficiently urgent factor to override a detainee's right to counsel under s. 10(b). The duty to "hold off" is related to the duty to allow a reasonable opportunity to consult a lawyer, which is discussed in 6.3.5. In R v. Strachan [1988] 2 S.C.R. 980, the SCC held that the duty to allow the detainee to exercise his right to counsel begins once the police is clearly in control of the situation. However, the duty to "hold off" ceases if the detainee is not reasonably diligent in attempting to obtain counsel: R. v. Black [1989] 2 S.C.R. 138; R. v. Smith [1989] 2 S.C.R. 368; R. v. Tremblay [1987] 2 S.C.R. 439.]

6.3.3 Inform about duty counsel, legal aid

R. v. BRYDGES [1990] 1 S.C.R. 190

The detainee must be informed of the applicable duty counsel and legal aid systems available in the jurisdiction.

6.3.4 Inform about free legal advice/1-800 telephone number

R. v. POZNIAK [1994] 3 S.C.R. 310
R. v. BARTLE [1994] 3 S.C.R. 173

The detainee must be informed of any available means to access immediate free legal advice, such as the existence of a 1-800 telephone number.

6.3.5 Allow reasonable opportunity to consult lawyer/myth of the one phone call rule

R. v. MANNINEN [1987] 1 S.C.R. 1233

The police must give the detainee a reasonable opportunity to consult counsel and must not elicit evidence from him until he has had a reasonable opportunity to consult counsel. [This is related to the duty to "hold off" discussed in 6.3.2.]

R. v. WHITFORD [1997] 115 C.C.C. (3d) 52 [Alta. C. A.]; leave to appeal to the SCC refused Oct. 2, 1997

"An accused who wishes to make two or three successive phone calls in the exercise and pursuit of his right to retain and instruct counsel must be permitted to do so unfettered by police questioning." The accused had been arrested for sexual assault and taken to the police station where he was informed of his rights. The accused telephoned a lawyer. After the accused had spoken to a lawyer, the police asked him if he wanted to tell them what happened, to which he replied "No, I'll wait until I talk to legal aid". The police continued to question him before he contacted legal aid, with the result that he made certain statements. The Crown wished to use those statements at his trial to attack his credibility. The Alberta Court of Appeal held that the police had violated the accused's right to counsel by continuing to question him despite his clear indication that he wished to exercise his right to counsel before talking to the police. There was no suggestion of dilatory tactics on the part of the accused in wishing to seek further legal counsel, nor any suggestion of a delay for the purpose of frustrating the investigation.

6.3.6 Explain the right/reiterate the right

R. v. EVANS [1991] 1 S.C.R. 869

Where there is a positive indication that the accused does not understand his right to counsel, the police must take steps to facilitate that understanding. And, where the accused becomes a suspect for a different and unrelated crime, or for a more serious crime, than the one respecting which he was read his rights, there is a duty on the police to re-read him his rights.

R. v. BAIG [1987] 2 S.C.R. 537

In the absence of any indication that the accused did not understand his right to retain counsel when he was informed of it, once the police have complied with s.10(b), by advising the accused without delay of his right to counsel without delay, there are no correlative duties triggered and cast upon them until the accused, if he so chooses, has indicated his desire to exercise his right to counsel.

6.3.7 Waiver of right

[See also 3.2.7 and 4.10 which deal with waiver of other Charter rights.]

6.3.7.1 Test for genuine waiver / "operating mind" test

R. v. BLACK [1989] 2 S.C.R. 138

A person will be held to have waived the right to counsel if it is clear and unequivocal that the person is waiving the right and is doing so with full knowledge of the existence and benefits of the right and of the consequences of waiving that right. The waiver may be implied from the person's words or conduct, but the standard will be very high in satisfying the court that there has been an implied waiver. The mere fact of having answered police questions does not, in and of itself, constitute an implied waiver.

R. v. SMITH [1991] 1 S.C.R. 714

The violation of the s. 10(a) right does not automatically preclude a valid waiver of the s. 10(b) right. Nor is the failure of the police to precisely identify the charge faced in the words of the statute necessarily fatal. The validity of the waiver hinges on whether the person possessed sufficient information (not full information) to understand his situation (i.e., the extent of his jeopardy) and properly appreciate his need for counsel and the consequences of waiving his right to counsel. "The emphasis should be on the reality of the total situation as it impacts on the

understanding of the accused, rather than on technical detail of what the accused may or may not have been told."

R. v. WHITTLE [1994] 2 S.C.R. 914

A genuine waiver of rights occurs if the person possesses an operating mind. The operating mind test requires that the person possess a limited degree of cognitive ability to understand what he is saying and to comprehend that the evidence may be used in proceedings against him. It does not require a determination that he is capable of making a good or wise choice or one that is in his interest. [The facts are summarised in 3.2.7.]

6.3.7.2 Where detainee changes his mind

R. v. PROSPER [1994] 3 S.C.R. 236

Once a detainee has asserted the right to counsel, the standard required to constitute an effective waiver of this right will be high. Moreover, an additional informational obligation on police will be triggered once a detainee, who has previously asserted the right to counsel, indicates that he has changed his mind and no longer wants legal advice. At this point, police will be required to tell the detainee of his right to a reasonable opportunity to contact a lawyer and of the obligation on the part of the police during this time not to take any statement or require the detainee to participate in any potentially incriminating process until he has had that reasonable opportunity.

6.3.7.3 Where detainee is intoxicated

CLARKSON v. THE QUEEN [1986] 1 S.C.R. 383

Where the person is intoxicated, the police must delay their questioning and the taking of a statement until the person is in a sufficiently sober state to properly exercise her right to retain and instruct counsel or to be fully aware of the consequences of waiving this right.

6.3.7.4 Where detainee is a young person

R. v. I. (L.R.) and T. (E.) [1993] 4 S.C.R. 504

Where the person is a young person, the young person cannot be presumed to know the extent of his or her jeopardy; therefore, to secure a valid waiver from a young person, the police must advise the young person that an application may be made to have the case tried in adult court

(if that possibility exists), and of the greater penalty that the young person would face as a result. The SCC added that "the particular characteristics of young offenders make extra precautions necessary in affording them the full protection of their *Charter* rights."

6.3.7.5 Where detainee is not reasonably diligent

R. v. TREMBLAY [1987] 2 S.C.R. 439

As a general rule, if a detainee is not reasonably diligent in exercising his right, the correlative duties of the police not to elicit evidence from a detainee who has requested the assistance of counsel will be suspended.

[In other words, the lack of diligence is tantamount to a waiver of the right. See also R. v. Black (above) and R. v. Smith [1989] 2 S.C.R. 368.]

6.3.8 Presence of counsel

6.3.8.1 Line-up

R. v. ROSS [1989] 1 S.C.R. 3

While it may be desirable to hold a line-up as soon as possible, this concern must, as a general rule, yield to the (reasonably exercised) right to retain counsel. The right to counsel does not require the presence of counsel for the line-up, but does require that the detainee have the opportunity of consulting counsel, to be apprised of his rights and obligations, especially given the fact that there is no legal obligation on the detainee to participate in a line-up. The fact that the detainee does not refuse to participate in the line-up does not, in and of itself, constitute a waiver of the right to counsel.

6.3.8.2 Plea bargain

R. v. BURLINGHAM [1995] 2 S.C.R. 206

S. 10(b) mandates the Crown or police, whenever offering a plea bargain, to tender that offer either to the accused's counsel or to the accused while in the presence of his or her counsel, unless the accused has expressly waived the right to counsel. [The facts are summarized in 3.2.6.]

6.3.9 Presumptions arising from violation of right

R. v. BARTLE [1994] 3 S.C.R. 173

Where a person's right under s. 10(b) has been violated, there arises a presumption that the person would have exercised the right, and a presumption that the evidence obtained by the police in breach of that right would not have been obtained had the right been exercised. The onus is on the Crown to rebut these presumptions. In this case the SCC held that an incriminating statement and the results of a breathalyser test were inadmissible as a result of these presumptions.

[See also R. v. Elshaw at 1.1.3]

R. v. I. (L.R.) and T. (E.) [1993] 4 S.C.R. 504

"If an inadmissible statement is followed by a further statement which in and of itself involves no *Charter* breach, the admissibility of the latter will be resolved by s.24(2) of the *Charter*."

6.3.10 Sufficiency/timing of warning of right to counsel, before/after detention begins

R. v. SCHMAUTZ [1990] 1 S.C.R. 398

A warning does not fall short of sufficient compliance with s. 10(b) for the sole reason that it is given before the exact moment in time when detention begins. If given before detention begins, there must be a close factual connection or linkage relating the warning to the detention and the reasons therefor. When the warning is given after detention begins, it must be given without delay.

R. v. DEBOT [1989] 2 S.C.R. 1140

"Without delay" allows for time spent by police in legitimate self-protection, but does not allow for a search to uncover evidence notwithstanding a concern to preserve evidence which the police fear the suspect will try to destroy or dispose of. [The SCC left undecided whether a delay to preserve evidence ("an on-the-spot drug search") could be justified, under section 1 of the Charter, as a reasonable and demonstrably justified limit prescribed by law (the Food and Drugs Act).]

R. v. THOMSEN [[1988] 1 S.C.R. 640

A roadside test, under what is now s.254(2) of the Criminal Code, must take place where and when the motorist is stopped, and be administered as quickly as possible having regard to the

outside operating limit of two hours for the breathalyser test which it may then be necessary to administer under s.254(3). Therefore, the roadside test is to be administered without giving the motorist an opportunity to contact counsel. This limit on the right to retain and instruct counsel without delay is justified under s. 1 of the Charter.

[It was also held, in R. v. Bernshaw [1995] 1 S.C.R. 254, that a delay of 15 minutes before administering the roadside test, in order to obtain a proper sample of breath, is likewise justified as a limit on the right to counsel without delay. For more on the Bernshaw case, see 4.7.3.]

6.3.11 Young offender - parent in lieu of counsel

R. v. I. (L.R.) and T. (E.) [1993] 4 S.C.R. 504

For the purposes of s.10(b) of the Charter, a parent or other adult is not an alternative to counsel (unless the right to counsel is waived).

7. SECTION 11 OF THE CHARTER: Any person charged with an offence has the right....

7.1 ... 11(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal

7.1.1 Public hearing

7.1.1.1 Publication ban

R. v. MENTUCK [2001] 3 S.C.R. 442

A publication ban, based on the common law rule enabling a court to order such a ban, sought to safeguard the proper administration of justice, should only be ordered when: (a) the ban is necessary to prevent serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and (b) the salutary effects of the ban outweigh its deleterious effects on the rights and interests of the parties and the public, including its effects on the right to free expression, the right of the accused to a fair and public hearing, and the efficacy of the administration of justice. [The facts and rationale are set out at 2.1.3]

7.2 ... 11(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again. (i.e., double jeopardy)

7.2.1 Disciplinary proceedings

R. v. WIGGLESWORTH [1987] 2 S.C.R. 541

Section 11 is restricted to criminal and penal matters; in other words, it is limited to: (a) a matter which by its very nature is a criminal proceeding, or (b) a matter in which a conviction in respect of an offence may lead to a true penal consequence. Disciplinary proceedings fall outside category (a); but, if a disciplinary proceeding involves true penal consequences, such as imprisonment or a hefty fine (i.e., a fine whose magnitude suggests that it seeks to redress a wrong done to society rather than to maintain internal discipline within a limited private sphere of activity), then paragraph (b) does apply. The SCC held that s. 11 of the Charter applied to the RCMP Act, R.S.C. 1970 c. R-9, because imprisonment was a possible penalty for the offence of being "cruel, harsh or unnecessarily violent to any prisoner or other person". However, the court also held that there was no violation of s. 11 of the Charter, in this case, because the offence for which the member was convicted under the disciplinary proceedings was considered to be quite different from the offence for which he stood charged under the Criminal Code (i.e., common assault), the first addressing his accountability to his profession as a member of that profession, the other addressing his accountability to the public at large as a member of that public.

NON-CHARTER CASES

8. GENERAL

8.1 Status of police

8.1.1 Independence

R. v. CAMPBELL [1999] 1 S.C.R. 565

A police officer in the course of a criminal investigation is independent of the control of the executive government. [The facts are summarised at 1.1.1.] The SCC held that while some of the functions carried out by the police bring them into a closer relationship to the Crown than others, (and in those cases it is possible that the police could be acting in an agency relationship with the Crown), there is no doubt that when it comes to the function of carrying out a criminal investigation, the police are independent of the control of the Crown. "A police officer investigating a crime is not acting as a government functionary or as an agent of anybody. He or she occupies a public office initially defined by the common law and subsequently set out in various statutes" (p.588-9).

8.1.2 Peace officer status under s.25 C. C., when outside territorial jurisdiction

R. v. ROBERGE [1983] 1 S.C.R. 312

A peace officer who has lawful authority to arrest a person without warrant in one province and is pursuing that person retains, for the purpose of s.25(4) of the Criminal Code, his status of a peace officer in another province inasmuch as the pursuit had commenced lawfully in his jurisdiction and as long as such pursuit is fresh. The police officer should endeavour to contact the local peace officers as soon as is possible, even during the pursuit, circumstances permitting. Once the local authorities have taken over the pursuit, he ceases to be a peace officer and becomes a person assisting peace officers and as such continues to enjoy the protection of s.25(4). A member of the Quebec Police Force was in pursuit of a vehicle, in the province of Quebec, because he believed the driver had committed the offence of dangerous driving. The driver crossed the provincial boundary into New Brunswick. The police officer continued his pursuit. After several warnings to stop were in vain given to the driver, the police officer took out his firearm and fired two warning shots. The driver stopped. As the police officer, now on foot, approached the stopped vehicle, the driver drove away. The police officer fired three shots at the vehicle's tires. The driver escaped. The police officer was charged in New Brunswick for having, without lawful excuse, carelessly used his firearm contrary to what is now s.86 of the Criminal Code. The SCC held that the police officer was, in the circumstances, acting lawfully and with the benefit of the protection given by s.25(4) of the Criminal Code.

8.2 Police "good faith"

8.2.1 Reliance on legal advice

8.2.1.1 Waiver of solicitor/client privilege

R. v. CAMPBELL [1999[1 S.C.R. 565

It is of great importance that the police be able to obtain professional legal advice in connection with criminal investigations without the chilling effect of potential disclosure of their confidences in subsequent proceedings. Nevertheless, the police will be held to have waived solicitor-client privilege when it asserts its reliance upon the advice of its solicitors in order to buttress the position, before the Court, that the police acted in good faith. [The facts are summarised in 1.1.1.] The SCC held that the police had to disclose the content of the legal advice given to them if they persisted in advancing the argument of good faith reliance. However, the Court limited the extent of disclosure which this requires to "the bottom line advice to confirm or otherwise the truth of what the courts were advised about the legal opinions provided..." (p.616). On the subject of solicitor-client privilege, the Court pointed out that the fact that the advice was provided by "an 'in-house' government legal service does not affect the creation or character of the privilege." However, the Court cautioned that not all advice given by a lawyer attracts solicitor-client privilege; for example, policy advice or advice on purely business matters is likely to fall outside the scope of solicitor-client privilege.

8.2.2 Obedience to superior orders; peace officer defence (s. 25 C. C.)

8.2.2.1 War crimes/crimes against humanity

R. v. FINTA [1994] 1 S.C.R. 701

"The defence of obedience to superior orders and the peace officer defence are available to members of the military or police forces in prosecutions for war crimes and crimes against humanity. Those defences are subject to the manifest illegality test. That is to say, the defences will not be available where the orders in question were manifestly unlawful. Even where the orders were manifestly unlawful, the defence of obedience to superior orders and the peace officer defence will be available in those circumstances where the accused had no moral choice as to whether to follow the orders. That is to say, there was such an air of compulsion and threat to the accused that the accused had no alternative but to obey the orders. As an example, the accused could be found to have been compelled to carry out the manifestly unlawful orders in circumstances where the accused would be shot if he or she failed to carry out the orders."

8.3 Discipline

8.3.1 Review by court

8.3.1.1 Jurisdiction of provincial courts

R. v. WHITE [1956] S.C.R. 154

Unless the powers given in the RCMP Act are abused to such a degree as puts the action taken beyond the purview of the statute, or unless the action is itself unauthorized, the internal management of the disciplinary process is not to be interfered with by any provincial superior court in exercise of its long established supervisory jurisdiction over inferior tribunals. The rationale expressed by the SCC for this principle was that Parliament has specified in the RCMP Act R.S.C. 1952, c.241, the punishable breaches of discipline and has equipped the Force with its own courts for dealing with them. The Court stated that such a code is prima facie to be looked upon as being the exclusive means by which this particular purpose is to be attained.

8.4 Dismissal

8.4.1 Procedural fairness

NICHOLSON v. HALDIMAND NORFOLK (REGIONAL) POLICE COMMISSIONERS [1979] 1 S.C.R. 311

Before a decision to dismiss a police officer is made, the rules of procedural fairness require that the officer, even if on probation, be given notice of the intent to dismiss and the reasons therefor, and be given an opportunity to be heard.

8.5 Mandatory retirement

8.5.1 Bona fide occupational requirement

LARGE v. STRATFORD (CITY) [1995] 3 S.C.R. 733

The age 60 mandatory retirement policy of the Stratford Police Department did not contravene the Ontario Human Rights Code, because it was a bona fide occupational requirement. The SCC held that there was a preponderance of evidence in this case to support a finding that the combination of the risk of cardiovascular disease and the decline of aerobic activity discharged the employer's obligation with respect to the objective element of the bona fide occupational requirement test. The subjective element of the test was also satisfied in that there was no evidence to suggest that the employer acted in bad faith or for ulterior motive in entering into a collective agreement which incorporated the age 60 mandatory retirement policy.

8.6 Status of the RCMP, members of the RCMP

8.6.1 Provincial Commission/Board/Agency

QUEBEC (ATTORNEY GENERAL) v. CANADA (ATTORNEY GENERAL) [1979] 1 S.C.R. 218

While a Provincial commission of inquiry can inquire into specific criminal acts allegedly committed by members of the RCMP, it cannot inquire into the administration of the RCMP. The rationale given by the SCC was that an inquiry into criminal activities falls within the proper scope of the administration of justice in the province, and "members of the RCMP enjoy no immunity from the criminal law and the jurisdiction of the proper provincial authorities to investigate and prosecute criminal acts committed by any of them as by any other person". However, the commission of inquiry cannot under the guise of investigating criminal activities engage in an inquiry into the administration or management of the RCMP, because Parliament alone has authority for the establishment of the Force and its management as part of the Government of Canada..

ALBERTA (ATTORNEY GENERAL) v. PUTNAM [1981] 2 S.C.R. 267

Even though members of the RCMP are on duty in the province pursuant to contract, the RCMP and its members are not subject to the provincial Police Act. The province has no authority over the disciplining of members of the RCMP, nor to inquire into the conduct and performance on duty of members of the RCMP performing police duties in the province.

8.7 Liability of the police

8.7.1 Criminal liability

8.7.1.1 Careless use of firearm

R. v. GOSSET [1993] 3 S.C.R. 76

Section 86(2) of the Criminal Code establishes an offence of negligence which may provide a valid basis of fault in criminal law, and may constitute the predicate offence for a conviction of manslaughter. This provision is aimed at conduct that constitutes a marked departure from the standard of care of a reasonably prudent person in the circumstances. A police officer trained and experienced in the use of firearms will be held to a higher standard of care in the handling of firearms than a non-police officer. A police officer (16-year veteran) arrested a man who was the subject of an outstanding arrest warrant, and brought him to the police station. Upon arrival at the station, the police officer opened the rear door of his vehicle to let the man out. The man, attempting to flee, ran into the police station parking lot. The officer gave chase, taking his gun out of its holster as he ran, and holding it at the side of his leg, pointing at the ground, and yelled "Stop or I'll shoot." The officer pointed his gun at the man, with his finger on the trigger. He subsequently claimed that he did this to intimidate the man into obeying the order to stop. The gun went off: a shot fatally struck the man in the head. The officer claimed that he was not aware of having cocked the gun, that he never intended to shoot the man, and that the gun went off accidentally. The police officer was found guilty of manslaughter, based on his careless use of his firearm contrary to s.86(2) of the Criminal Code.

8.7.1.2 Justified use of force - s.25 Criminal Code

[See 8.1.2.]

8.7.2 Civil Liability

8.7.2.1 Duty of care re: road safety

SCHACHT v. O'ROURKE [1976] 1 S.C.R. 53

The duty of the provincial police to maintain a traffic patrol on certain highways pursuant to s. 3(3) of the Police Act [R.S.O. 1970, c.351], includes making the road safe for traffic when the police are aware of a dangerous situation on the highway. A highway was under construction. Detour and warning signs were in place to alert motorists of the danger ahead. One motorist drove into the excavated area, demolishing his car and knocking down several of the detour and warning signs in the process. The police investigated the accident, cleared the accident scene, and departed

the scene without taking adequate precautions to warn road users of the hazard created by this accident. Another motorist subsequently drove into the excavated area. The Court held the police partially responsible for the second accident as a result of negligence in performing their duty to patrol highways: their negligence consisted of not taking steps to provide adequate warning of the danger: they could have reinstated the signs that had been knocked down, they could have immediately called the Highway Department to re-erect signs, and they could have left their cruisers with flashing lights in place until the Highway Department arrived at the scene.

8.7.2.2 Justified use of force - s.25 C. C.

POUPART v. LAFORTUNE [1974] S.C.R. 175

The justification created by s.25(4) of the Criminal Code relieves the police officer of any civil or criminal liability, not only in respect of the fugitive but also in respect of any person who accidentally becomes an innocent victim of the force used by the officer in pursuit of the fugitive. The police were trying to capture three gunmen who were perpetrating an armed robbery on certain business premises. To prevent their escape, a police officer fired three times in the direction of the fleeing gunmen. One shot hit and injured an innocent bystander whom he had not seen. The SCC absolved the policeman of any civil liability for the injuries of the innocent bystander: "The police officer incurs no liability for damage caused to another when without negligence he does precisely what the legislature requires him to do."

PRIESTMAN v. COLANGELO [1959] S.C.R. 615

"The performance of the duty imposed upon police officers to arrest offenders who have committed a crime and are fleeing to avoid arrest may, at times and of necessity, involve risk of injury to other members of the community. Such risk, in the absence of a negligent or unreasonable exercise of such duty, is imposed by the statute and any resulting damage is (...) damnum sine injuria [Editor: i.e., a loss for which there is no cause of action]." Two police officers in a patrol car were pursuing the driver of a stolen vehicle, at speeds ranging from 40 to 60 miles an hour along residential streets. Three attempts to pass the stolen vehicle failed, and on the last attempt the police vehicle was forced over the curb. Still in pursuit, one of the officers then fired a warning shot in the air, but this merely caused the driver to increase his speed. As both vehicles were headed towards a very busy intersection, one officer aimed a shot at the left rear tire of the stolen vehicle; however, as he fired the shot, the police vehicle hit a bump, the bullet struck the driver of the stolen vehicle causing him to lose control, and the vehicle fatally struck two persons who were standing on the sidewalk. The SCC held that the actions of the police were reasonably necessary in the circumstances, and were no more than was necessary both to prevent the escape and to protect those persons whose safety might have been endangered if the escaping car reached the intersection. Thus, in accordance with s.25(4) of the Criminal Code, the police were absolved of any liability.

8.7.2.3 Duty of care re: use of firearm

BEIM v. GOYER [1965] S.C.R. 638

Notwithstanding the justification provisions of s.25 of the Criminal Code, peace officers have a duty to exercise proper care in the use of firearms. The driver of a stolen car was being pursued by two police officers. The police caused the car to stop. The driver ran away from the car. The police gave chase, through a rocky, open, snow-covered field. The driver was not armed and had given no reason for the police to believe that he was armed. The police fired several warning shots. One officer stumbled and fell, and in the process fired another shot which hit the driver in the neck and seriously injured him. The SCC found the officer to be at fault in failing to exercise proper care in the use of his firearm in that he carried his revolver with his finger on the trigger while running over rough and stony ground despite having previously fallen a number of times.

9. AUTHORIZATION TO INTERCEPT PRIVATE COMMUNICATIONS UNDER PART VI OF THE CRIMINAL CODE [C. C.]

9.1 General

Please note that the related Charter concept of "reasonable expectation of privacy" as well as the Charter implications of a search even though carried out pursuant to an authorization under Part VI of the Criminal Code, are covered in section 4 of the Police Law Digest. See also section 3.1 of the Police Law Digest, concerning disclosure to the defence of the contents of wiretap affidavits and of intercepted conversations.

9.1.1 Is it a "private communication"?

MONACHAN v. THE QUEEN [1985] 1 S.C.R. 176

"A message to a police station to convey a threat to a police officer cannot reasonably be looked upon as a private communication." Since it is not a private communication, then no authorization is required to intercept it.

9.1.2 "Known" person [C. C. 185(1)(e)]

R. v. CHESSON [1988] 2 S.C.R. 148

For the purposes of Part VI of the Criminal Code, a "known" person is one who, at the time the police apply for the authorization, satisfies the two criteria of s. 185(1)(e): 1- the existence of that person is known to the police; and 2- that person is one the interception of whose private communications there are reasonable and probable grounds to believe may assist the investigation of the offence. If the person is "known" in that sense, then the authorization must identify that person, and the police cannot use the authorization's "basket"clause (reserved for unknown persons) as authority to intercept that person's private communications.

9.2 Application for authorization

9.2.1 Investigative Necessity [C.C.186(1)(b)]

R. v. ARAUJO [2000] 2 S.C.R. 992

In order to satisfy the investigative necessity test set out in s. 186(1)(b) of the Criminal Code, the police must establish in their affidavit that, practically speaking, there is no other reasonable alternative method of investigation, in the circumstances of the particular criminal inquiry. The SCC held that efficiency of investigative techniques is not an acceptable standard for this test, because it inadequately takes into consideration the privacy interests that are an essential component of Part VI. The Court also rejected the notion of "last resort" as being the proper measure for this test, because it inadequately takes into consideration the difficulties of police investigations targeting sophisticated crime. While the Court found that the affidavit in this case did satisfy the test, it went on to give the police the following practical advice concerning such affidavits: 1- Set out the material facts fully and frankly for the authorizing judge so that he/she can make an assessment of whether these rise to the standard required in the legal test for an authorization. 2- Be clear and concise. 3- Never attempt to trick/mislead the authorizing judge, either by the language used or by strategic omissions. 4- The use of boiler-plate language should be avoided. 5- The affidavit should be gathered directly from those with the best firsthand knowledge of the facts, as this will strengthen the affidavit by making it more reliable.

9.2.2 When is non-disclosure fatal?

CHAMBERS v. THE QUEEN [1986] 2 S.C.R. 29

Non-disclosure by the police of facts that are material either to whether the authorization should be granted, or to the terms of such an authorization, will invalidate the authorization. Failure by the police to disclose an ongoing income tax investigation was held not to be fatal to an authorization granted for a drug investigation because the non-disclosure was not a deliberate deception, and because the income tax investigation was not a fact that was relevant to the authorization for the drug investigation.

9.2.3 Expansion of prior wiretap authorization: renewal, or fresh authorization

R. v. THOMPSON [1990] 2 S.C.R. 1111

"Where an authorization is in existence and where it is desired to extend its term and leave its other provisions unaltered, an application for its renewal is the proper step for the authorities to take. Where the authorization has expired or where it is sought to extend the scope of surveillance, the proper course is to seek a new authorization."

[The relevance of the distinction is that the requirements to obtain a renewal [see subsection 186(6) of the Criminal Code] are different than those to obtain a fresh authorization [see subsection 185(1)]. However, per R. v. Moore (1993) 81 C.C.C. (3d) 161 at 168 (B.C.C.A.), upheld by the SCC [1995] 1 S.C.R. 756, "for fresh authorizations, the material in support of such applications should include as well a full, fair, and frank disclosure of relevant intercepted private communications obtained up to the time of the second or subsequent application."]

9.3 Acting pursuant to the authorization

9.3.1 Manner of interception

R. v. LAWRENCE [1988] 1 S.C.R. 619

The manner of interception may be expressed in very specific terms in the authorization, or in broad terms leaving open to the police the choice of manner of interception to be used.

[However, note that in R. v. Thompson [1990] 2 SCR 1111, the SCC states that where surreptitious entry into residential premises is involved, the authorization should, at a minimum, refer specifically to each place that is a private residence and designate the type(s) of devices that may be employed, otherwise the interception will violate the Charter.]

9.3.2 Use for non-specified offence

R. v. COMMISSO [1983] 2 S.C.R. 121

When an authorization to intercept private communications in respect of a specified offence is lawfully obtained, the police may also, under this authorization, intercept private communications in respect of a different offence, (even if the police anticipated the latter interceptions).

9.3.3 Basket Clauses/Overly Broad Clauses

R. v. ACKWORTH [1987] 2 S.C.R. 291
(affirming R. v. Patterson (1985) 18 C.C.C. (3d) 137 [Ont. C.A.])

A "basket" clause, in an authorization, permitting the police to intercept the private communications of unknown persons "provided that there are reasonable and probable grounds to believe that the interception of such private communications may assist the investigation" of named offences, is overly broad and invalid. Therefore, the police should not rely on such a clause as authorization to intercept private communications. The Court found such a clause to be overly broad because it delegated to the police the judge's responsibility to determine and specify who could be intercepted.

GRABOWSKI v. THE QUEEN [1985] 2 S.C.R. 434

When there is a clear dividing line between the good and bad parts of an authorization, and they are not so interwoven that they cannot be separated but are actually separate authorizations given in the same order, the Court can divide the order and preserve the valid portion, which then forms the authorization. In such case, interceptions made under the valid authorization are admissible. Clause 3 of the authorization identified the persons whose communications could be intercepted as: "(a) William MURPHY (building undertaker), and (b) certain other persons whose identity is at present unknown, but who have acted, are acting or may act in concert or in collusion with a person named in subparagraph (a) or with a person found in one of the places named in paragraph 4, and whose provate communications may be intercepted by means of this authorization". Clause 4 identified the places or localities where the private communications of the persons mentioned in paragraph 3 could be intercepted as: "(a) 620 St-Jacques West, Montréal, Que. (Underground garage); and/or (b) any other place or locality, stationary or mobile, where the persons named in paragraph 3 could be found, but the nature and location of which are at the present impossible to specify." The SCC found that the authorization contained at paragraph 3(b) read with paragraph 4(b) meant that the authorization allowed the conversations of anyone to be intercepted anywhere, and thus contained no limitation as to persons or place. However, the Court considered paragraph 4 (b) to be severable. Since all the interceptions were made at the location specified in paragraph 4(a), the interceptions were held to have been made pursuant to a valid authorization and were therefore declared admissible.

9.3.4 Privileged communications

LLOYD *et al.* v. THE QUEEN [1981] 2 S.C.R. 645

Communications protected by marital privilege remain privileged notwithstanding that such communications were the subject of a lawfully authorized interception under Part VI of the Criminal Code. In so holding, the SCC applied s.189(6) of the Criminal Code, which provides that "any information obtained by an interception that, but for the interception, would have been privileged remains privileged and inadmissible as evidence without the consent of the person enjoying the privilege."

10. INFORMANTS

10.1 Police-informer privilege

SOL. GEN. CAN. *et al.* v. ROYAL COMM. (HEALTH RECORDS)
[1981] 2 S.C.R. 494

As a general rule, based on public policy, peace officers cannot be compelled by courts or tribunals to disclose the identities of persons, to whom an assurance of confidentiality was given, from whom they have obtained information while acting in the course of their duties in connection with the investigation of crime or national security. Exeception: The rule does not apply when, in a criminal prosecution, the informer's identity is necessary for the defendant to establish his innocence. The SCC held that this rule of law, known as the police-informer rule, applies in the context of criminal prosecutions and in the context of civil proceedings no matter what form the civil proceedings take. The Court emphasized the application of this rule in the national security context: "The foundation for the existence of this rule of law, which evolved in respect of the field of criminal investigation, is even stronger in relation to the function of the police in protecting national security. A large number of the instances in which, in the present case, it was sought to obtain from the police the names of their informants concerned police investigation into potential violence against officers of the state, including heads of state. These investigations were admittedly proper police functions. The rule of law which protects against the disclosure of informants in the police investigation of crime has even greater justification in relation to the protection of national security against violence and terrorism."(p.537) The Court added that the privilege applies notwithstanding what may be the motives or the wrongdoings of the informer in disclosing the information to the police.

[Re: the exception to the police-informer rule, see also section 3.1.4 of the Police Law Digest.]

R. v. DIKAH [1994] 3 S.C.R. 1020
[confirming 89 C.C.C. (3d) 321 (Ont. C.A.)]

An arrangement whereby payment in full to a police agent is made conditional on the laying of charges does not amount to an inherent abuse of process, nor does it, in and of itself, discredit the agent as a witness. The accused was charged with trafficking in cocaine following sales of cocaine to a paid police agent. The police had agreed, in writing, with the agent to pay him up to $10,000., at their discretion, on condition that the police, through the agent's assistance, successfully investigate the accused. The activities of the agent were closely monitored by the police. The Ontario Court of Appeal, (upheld on appeal to the SCC), found this arrangement to be proper in the circumstances, and the paid agent to be qualified to testify notwithstanding such an arrangement: "The testimony of some paid agents may be untrustworthy but it cannot be said that, as a category, all paid agents cannot be trusted to tell the truth. (...) It may be that the amount of money paid to the agent and the conduct of the agent, either before, during or after the investigation, lead to the conclusion that the evidence of this witness is unreliable and the trier of fact should be alerted to the dangers of accepting it. Such a warning, however, must be premised on more than mere speculation that a witness who receives money for helping investigate the criminal activities of others is inherently untrustworthy and will necessarily fabricate evidence." The Court distinguished the facts in this case from a situation where the payment to the agent is conditional on the agent's testimony at the trial, or conditional on the trial being successful.

10.3 Jailhouse Informants

R. v. BROOKS [2000] 1 S.C.R. 237

The fact that an informant is a "jailhouse" informant will not in and of itself discredit that informant as a credible witness. [A "jailhouse" informant is "an inmate, usually awaiting trial or sentencing, who claims to have heard another prisoner make an admission about his case".] Two jailhouse informants testified that the accused, while incarcerated, had admitted to having killed a child to stop her crying. The informants had lengthy criminal records of dishonesty. Moreover, one of them unsuccessfully sought a lighter sentence in exchange for his testimony and had testified as an informant in a prior trial; the other had a history of substance abuse, as well as a psychiatric history including suicide attempts, paranoia, deep depression and a belief in clairvoyant ability. Both had previously offered to testify against other accused. The SCC held that the informants' testimony was credible. The Court acknowledged that the fact that an informant has a criminal record, has admitted that he sought to avoid incarceration in exchange for his testimony, has previously testified in exchange for a deal to avoid incarceration, or has a prior psychiatric history or history of taking drugs, raises preliminary doubts as to his credibility; but this is not sufficient to conclude that the informant's testimony cannot be relied on. Such facts are to be weighed against other factors such as the absence of contradictions in the informant's testimony, the fact that the informant's testimony is consistent, accurate and supported by other evidence, and the absence of evidence that the informant was motivated to lie.

11. STATEMENTS/CONFESSIONS

[See also section 3.2 of the Police Law Digest re: Charter principles relating to statements/confessions]

11.1 The "confessions rule"

11.1.1 Basic principle of admissibility

R. v. BOUDREAU [1949] S.C.R. 262

To be admissible against the accused, a statement made by the accused to a person in authority must be made freely and voluntarily. A statement is not voluntarily made if it has been obtained from the accused either by fear or prejudice or hope of advantage exercised or held out by a person in authority.

R. v. HODGSON [1998] 2 S.C.R. 449

To be admissible against the accused, a statement made by the accused to a person in authority must have been made voluntarily and must be the product of an operating mind.
A "person in authority" is a person who is formally engaged in the arrest, detention, examination or prosecution of the accused, and includes any other person whom the accused reasonably believes is acting on behalf of the police or prosecuting authorities and could therefore influence or control the proceedings against the accused. The accused was a family friend and babysitter of the complainant and her siblings. The complainant revealed to her mother that the accused had sexually assaulted her on several occasions. The complainant and her mother, father and stepfather confronted the accused at his place of employment. The accused confessed to them, whereupon the mother called the police, and then struck the accused. While waiting for the police to arrive and in order to prevent the accused's escape, the father held a knife in the accused's back. At trial, the accused denied having confessed, but added that he was not frightened and did not feel threatened during the confrontation. The SCC held the confession to be admissible, and that it had not been made to a person in authority. The Court explained that the basic rule on admission of statements/confessions is based upon two fundamentally important concepts: the need to ensure the reliability of the statement and the need to ensure fairness by guarding against improper coercion by the state. With respect to the concept of "person in authority", the Court identified police officers and prison officials or guards as such persons, but normally not an undercover police officer because the accused would not have a subjective belief that this is a person in authority. The Court added that a parent, a doctor, a teacher or an employer are all "persons in authority" in the broad sense of that expression, but in order for these people to be persons in authority for the purposes of the confessions rule the person making a confession to them must reasonably believe them to be acting on behalf of the police or of prosecuting authorities. [Re: undercover police not a person in authority, see also Rothman v. R. [1981] 1 S.C.R. 640; in that case, the SCC also held that the privilege against self-incrimination was not relevant in the circumstances of the case. But see 3.2.1 as to when a statement to an undercover police officer may offend the Charter right not to incriminate oneself.]

R. v. OICKLE [2000] 2 S.C.R. 3

There are two elements to the confessions rule: in order for the confession to be freely and voluntarily made, it must not be induced by any threats or promises, or by an atmosphere of oppression, or by trickery that shocks the community, and it must be the product of an operating mind capable of deciding between alternatives. Statements made as the result of intimidating questions or of questioning which is oppressive and calculated to overcome the freedom of will of the suspect for the purpose of extracting a confession, are inadmissible. The police were investigating a series of fires. To narrow the list of possible suspects, they asked the accused and others to submit to polygraph testing, done at a motel. The accused agreed. He was advised of his rights to silence, to a lawyer/legal aid, and to leave at any time. He was told that the polygraph results were inadmissible in court, but that anything he said would be admissible. The police admittedly exaggerated to him the reliability of polygraph tests. The examiner told him he had failed the test. He was re-read his rights, was questioned by the examiner for an hour, and by another officer for 40 minutes. He made a partial confession, was arrested, was re-read his rights, and was taken to the police station where he was placed in an interview room and was further questioned. After an hour, he said he was tired and wanted to go home. He was reminded that he was under arrest, was reminded of his right to call a lawyer, and was told he could not go home. The interrogation continued for two hours, culminating in a full confession. The police, after re-reading him his rights, took a written statement from him. During questioning over the course of six hours, the police minimized the moral significance of the crimes, offered psychiatric help and suggested that confessing would make him feel better and gain him the respect of the community and of his fiancee. At various times during the period of questioning, he was emotional. Throughout the period of questioning, he was repeatedly offered food and drink, and was allowed to use the bathroom upon request. After they had taken a written statement from him, the police allowed him to sleep in a cell. When he awoke three hours later, he was asked to participate in a re-enactment of his crimes, to which he agreed, having once again been read his rights. Based on his statements, the accused was charged with seven counts of arson. Were his statements admissible against him? The SCC held that they were. The Court reviewed a variety of interrogation techniques to illustrate what constitutes a threat or promise. The Court concluded that "as a general rule, confessions which result from spiritual exhortations or appeals to conscience and morality are admissible in evidence, whether urged by a person in authority or by someone else." The Court explained that inducements to confess are improper only when "the inducements, whether standing alone or in combination with other factors, are strong enough to raise a reasonable doubt about whether the will of the subject has been overborne." The Court gave a few examples of interrogation techniques which constitute oppression, and set out a non-exhaustive list of factors which may create an atmosphere of oppression: depriving the suspect of food, clothing, water, sleep, or medical attention; denying access to counsel; excessively aggressive, intimidating questioning for a prolonged period of time; use of false evidence to counter protestations of innocence. The Court also dealt with police trickery as a separate grounds which may invalidate a confession, either because of its effect on the voluntariness of the confession, or because it shocks the community and jeopardizes the integrity of the criminal justice system. Applying these standards to the facts of this case, the Court concluded that the confession in this case satisfied the confessions rule: "The respondent was never mistreated, he was questioned in an extremely friendly, benign tone, and he was not offered any inducements strong

enough to raise a reasonable doubt as to voluntariness in the absence of any mistreatment or oppression." The Court encouraged the practice of recording police interrogations, preferably by videotape.

11.1.2 Timidity of the suspect

R. v. HOBBINS [1982] 1 S.C.R. 553

The state of mind of the suspect, and an atmosphere of oppression created by the police in the circumstances surrounding the taking of a statement, are relevant to the admissibility of a statement made to the police after interrogation. However, the suspect's own timidity or subjective fear of the police will not make his confession inadmissible unless there are external circumstances brought about by the conduct of the police that can be said to cast doubt on the voluntariness of a statement or confession, or there are other considerations affecting the suspect that justify doubt as to the voluntariness of the statement/confession.

11.1.3 Insanity/unstable character of the suspect

R. v. NAGOTCHA [1980] 1 S.C.R. 714

Inculpatory statements made by an insane person are not automatically inadmissible, because the fact that a person is insane does not necessarily preclude the possibility of making a statement freely and voluntarily. [See also R. v. Horvath [1979] 2 S.C.R. 376, where the interrogation techniques used by the police in relation to a 17 year old suspect of unstable character, diagnosed by a psychiatrist as being a sociopathic personality, were held to have brought about the complete emotional disintegration of the suspect and, in the belief of some judges, to have induced the suspect into a hypnotic state: the suspect's statements were held to have been involuntarily made.]

11.1.4 Youth of the suspect

R. v. I. (L.R.) and T. (E.) [1993] 4 S.C.R. 504

"Section 56 [of the Young Offenders Act, R.S.C. 1985, c.Y-1] **sets out strict requirements which must be complied with in order to render a statement made by a young person to a 'person in authority' admissible in proceedings against him or her. The rationale for this lies in Parliament's recognition that young persons generally have a lesser understanding of their legal rights than do adults and are less likely to assert and exercise fully those rights when confronted with an authority figure. The requirements in s.56(2)(b) reflect this concern; a young person is given the right to consult with a parent or other adult as well as the right to counsel upon arrest or detention, and is entitled to have a lawyer or parent or other adult**

present when making a statement. The young person must also be specifically told prior to the taking of any statement, in language appropriate to his or her level of understanding, that he or she is under no obligation to make a statement and that anything said may be used as evidence in proceedings against him or her."

11.2 Prior inadmissible statement

R. v. HOBBINS [1982] 1 S.C.R. 553

There is no presumptive tainting of a second statement merely because a prior statement taken by the same interrogative officers is ruled inadmissible. Factual considerations govern, including similarity of circumstances and of police conduct, as well as the lapse of time between taking of statements. During an arson investigation, the police took a statement from the suspect, and two months later a second statement from him. The trial judge ruled that the voluntariness of the first statement was not established beyond reasonable doubt and found it inadmissible. But the second statement was found to be admissible, and its admissibility was held to be untainted by the prior inadmissible statement. The SCC agreed. [See also 6.3.9.]

11.3 Prior inconsistent statements

R. v. B. (K.G.) [K.G.B.] [1993] 1 S.C.R. 740

Where a major crime such as murder is being investigated, the testimony of a witness is important to the Crown's case, and the character of the witness suggests that precautions be taken to ensure the reliability of the statements taken by the police from that witness, the police should explicitly warn the witness of the severe criminal sanctions for the making of a false statement and then have the witness make his/her statement under oath, solemn affirmation or solemn declaration, and the statement should be videotaped in its entirety. The importance of taking those precautions is that if, during the trial, the witness recants on the prior statement given to the police, the prior inconsistent statement may also be admissible as evidence of the truth of its content, rather than being admissible merely to impeach the witness's credibility. The following excerpt from the SCC judgment explains how the videotaping should be carried out, and why: "In the main portion of the television screen is a medium-length shot of the witness facing the camera and seated across a table from the interviewing officer, showing the physical relationship between the two people. In one upper corner is a close-up of the witness's face as he or she speaks, capturing the nuances of expression lost in the main view. Along the bottom of the screen is a line showing the date and a time counter, with the seconds ticking off, ensuring that the continuity and integrity of the record is maintained. The audio-visual medium captures other elements of the statement lost in a transcript, such as actions or distinctive motions which the witness demonstrates (as in this case), or answers given by nodding or shaking the head. In other words, the experience of being in the room with the witness and the interviewing officer is recreated as fully as possible for the viewer. Not only does the trier of fact have access to the full range of non-verbal indicia of credibility, but there is also a reproduction of the statement which is fully accurate, eliminating the danger of inaccurate recounting which motivates the rule against hearsay evidence. In a very real sense, the evidence ceases to be hearsay in this important respect, since the hearsay declarant is brought before the trier of fact."

R. v. LAPOINTE and SICOTTE [1987] 1 S.C.R. 1253
(upholding the judgment of the Ont. C. A. (1983) 9 C.C.C. (3d) 366)

"In every case where police officers deal with a suspect whose mother tongue is different, every effort should be made to obtain a qualified interpreter. Ideally, officers taking the statements should be familiar with the language of the suspect. This is, of course, not always possible even in a multi-cultural society. Where no such officer is present, an interpreter should be made available." (Per Lacourcière, J. A., Ont. C. A., at p.385.)

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