LEGAL RIGHTS IN CRIMINAL PROCEEDINGS

CLASS NOTES

Overview of the mainstream Canadian Criminal Justice system

- Police investigation (following a report by the public or not).
- Police contact with the accused:
    - Police discretion: no action.
    - Arrest, recommendation for alternative programs, summons. During the arrest, suspects are booked, i.e., pictures are taken, fingerprints are made, and personal information is gathered.
- Judicial interim release: to determine whether the suspect will be retained in custody, pending the start of trial, or if he/she may be released. Most defendants are released on recognizance, i.e., into their own care or the care of another. Bail
    - If not, they are taken to a pretrial holding facility to await the trial.
- Crown prosecution review:
    - Insufficient grounds to prosecute.
    - Sufficient grounds to proceed with prosecution. TEST: (i) is the evidence sufficient to justify the institution or continuation of proceedings? if it is, (ii) does the public interest require a prosecution to be pursued? The evidence must demonstrate that there is a *reasonable prospect of conviction.*
- Eligible for alternative measures. If completed, no prosecution. If incomplete, prosecution.
- Ineligible for alternative measures: Prosecution
- Prosecution:
- Court TRIAL
- Sentencing options.
    - Absolute Discharge (no conviction).
    - A conditional discharge (no conviction after the fulfillment of conditions).
    - Suspended Sentence and Probation.
    - Fine.

    - Conditional Sentence **(**less than two years' imprisonment, the Court may order that the sentence be served in the community, with certain conditions, instead of jail).
    - Imprisonment.
    - Intermittent Sentence.
    - Indeterminate Sentence for Dangerous Offenders.
    - Life Sentences.
    - Victim Surcharge.
    - Restitution.
- Prison.
- Parole.

Crime Control vs. Due Process

Two competing perspectives underlie our criminal justice system: (i) crime control, and (ii) due process.

Crime control: it stresses the importance of controlling crime and favors providing criminal justice professionals with considerable powers with which to respond to crime.

Due process: it prefers to place limits on the powers of the criminal justice system.

For almost every important issues in CJ, one can find crime control and due process ways of responding. Eg., police powers: crime control advocates argue that police should have wide powers to gather evidence and to question suspects. Due Process advocated for limits to the powers of the police to ensure that individuals' rights are not compromised.

	CRIME CONTROL	**DUE PROCESS**
Function of the CJ process	Repression of criminal conduct	To protect rights.
Notion of efficiency	The system's capacity to apprehend, try, convict, and dispose of a high proportion of criminal offenders	Primacy of the individual and limitation of official power. Because power is always subject to abuse, the criminal process must be subjected to controls that prevent it from operating with maximal efficiency. For this model, maximal efficiency means maximal tyranny.

Success	When the CJ system produces a high rate of apprehension and conviction. Successful conclusion: when the system throws off at an early stage those cases where the apprehended person does not appear to be a criminal; and when it secures, as expeditiously as possible, the convection of the rest with a minimum of occasions for challenge. Failure is viewed as leading to the breakdown of public order and to the disappearance of an important condition of human freedom, i.e., a general disregard for legal controls tends to develop. The law abiding citizen then becomes the victim of all sorts of invasions of his interests. The claim is that the criminal process is a positive guarantor of social freedom.	When all the CJ safeguards and protections were respected.

Presumption of guilt vs. presumption of innocence (not a rule of law)	Presumption of guilt: The screening processes operated by the police and prosecutors are reliable indicators of probable guilt. Once a determination has been made that a person is guilty, all subsequent activity is based on the view that this person is probably guilty. Since there is confidence in the reliability of informal administrative fact-finding at the early stages of the Criminal process, the remaining stages can be mechanical. It makes it possible for the system to deal efficiently with large numbers.	Presumption of innocence: A person is not to be held guilty of a crime merely on a showing that he did factually commit the crime. Instead, he must be held guilty if and only if these factual determinations are made in a procedurally regular fashion and by the authorities acting within competences duly allocated to them. Furthermore, he is not to be held guilty if various rules designed to protect him and to safeguard the integrity of the process are not given effect (jurisdiction, venue, statute of limitations, double jeopardy, criminal responsibility, etc.). None of these requirements has anything to do with the factual question of whether the person committed the crime or not, but non compliance with any of these requirements will mean that she is legally innocent.
Nature of the presumption	Presumption of guilt: descriptive and factual	Presumption of innocence: normative and legal

Center of gravity of the process	Early administrative fact-finding, i.e., police and prosecutors, where investigative and prosecutorial officers act in an informal setting with ample faculties to elicit and reconstruct an alleged criminal event. The subsequent stages are relatively unimportant. Ideally this leads to either (i) the exoneration of the suspect, or (ii) the entry of a plea of guilty.	Insistence on formal, adjudicated, adversary fact finding processes in which the factual case against the accused is publicly heard by an impartial tribunal and is evaluated only after the accused has had full opportunity to discredit the case against him or her. Ideology is very deeply impressed on the formal structure of law.
Central actors	Police and prosecutors	Counsel Adjudicative agents are relegated to a relatively passive role.
Equality	Not central at all.	The ideal of equality holds that there can be no equal justice where the kind of trial a person gets depends upon his or her financial resources.

Attitude towards Criminal sanction	Respect	Skepticism about the morality and utility of the criminal sanction. So, doubts about the ends for which power is being exercised create pressure to limit the discretion with which that power is exercised.
Main authority	Legislature	Judiciary and there is an appeal to supra-legislative law, i.e., Constitution or Charter.

Common Values:

1) Respect of the limits imposed by the Constitution and Charter.
2) Definition of criminal conduct is prior to identifying persons as criminals.
3) There are limits to the powers of government to investigate and apprehend persons suspected of committing crimes.
4) The agreement that the process has, for everyone subjected to it, at least the potentiality of becoming to some extent an adversary struggle. The Crime Control Model tends to de-emphasize this adversary aspect, and the Due Process Model tends to make it central.
5) Conduct not defined as criminal may not be dealt with in the criminal process.
6) Conduct that as been denominated as criminal must be treated as such by the participants in the CJ process acting within their respective capacities.

Legal rights

- Life, liberty and security of the person
    - The right not to be deprived of life, liberty, and security except in accordance with the principles of fundamental justice.

- To be secure against unreasonable search or seizure.
- Not to be arbitrarily detained or imprisoned.
- On arrest or detention
    - To be informed promptly of the reasons for arrest or detention;
    - To retain and instruct counsel without delay and to be informed of that right; and
    - To have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.
- If charged with an offence, the right
    - To be informed without unreasonable delay of the specific offence;
    - To be tried within a reasonable time;
    - Not to be compelled to be a witness in proceedings against that person in respect of the offence;
    - To be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
    - Not to be denied reasonable bail without just cause;
    - Trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
        - Except in the case of an offence under military law tried before a military tribunal.
    - Not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law.
    - No double jeopardy.
        - 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; and
    - If found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.
- Not to be subjected to any cruel and unusual treatment or punishment.
- The right against self-incrimination.
    - Except in a prosecution for perjury or for the giving of contradictory evidence.

- The right to an interpreter if a party or witness in any proceedings.

Classification of Offences and Procedural Implications

Classification

Traditionally, at common law crimes were classified as felonies and misdemeanours, depending on the seriousness of the offence. Canada abandoned this classification in 1892.
Crimes in Canada are now classified into indictable offences and summary conviction offences.

Indictable offences

Indictable offences are the most serious crimes; and they are subject to a wide range of sentences, the most severe of which is life imprisonment. Indictable offences include murder, manslaughter, robbery, and aggravated sexual assault, among many others.

Summary conviction offences

Summary conviction offences include minor offences which are punishable by a fine of no more than CND 2,000 and/or an imprisonment term of six months or less. Summary conviction offences include, for instance, trespassing at night, causing a disturbance, and taking a motor vehicle without the owner's consent.

Hybrid offences

Hybrid offences are dual-procedure offences which can be treated either as indictable offences or summary conviction offences. Hybrid offences constitute the majority of offences in Canada. They include assault, child pornography, sexual assault, and criminal harassment, among many others. Hybrid offences are not an exclusive Canadian phenomenon. They exist in other common law jurisdictions, such as England and Wales. In Canada it is the prosecutor who has the exclusive authority to elect whether to treat a hybrid offence as either an indictable or a summary conviction

offence. There is a long line of cases that confirm the power of the prosecutor to make this choice. According to the SCC ‘hybrid offences are deemed to be indictable unless and until the Crown elects to proceed summarily’. When the prosecutor chooses to treat a hybrid offence as indictable, the offence assumes the characteristics of indictable offences and the procedure for indictable offences is to be followed. This includes the right of a preliminary inquiry and the absence of a statute of limitations. Similarly, if the prosecutor elects to treat a hybrid offence as a summary conviction, then the offence is treated as a summary conviction offence in all respects. This means, among other issues, that the offence is subject to the statute of limitations and that there is no preliminary hearing.

Hybrid offences give the prosecution ‘the flexibility of taking the specific circumstances of a case into account to ensure that the interests of justice, including the public’s interest in the effective and efficient enforcement of the criminal law, are best served’. In order to elect to treat a hybrid offence as either an indictable offence or a summary conviction offence, the prosecution must examine the circumstances surrounding the offence and the background of the accused before making a decision. According to federal policy, procedure by indictment is reserved for the most serious cases. The factors that the prosecution has to take into account are the following: (i) whether the facts alleged make the offence a serious one; (ii) whether the accused has a lengthy criminal record; (iii) the sentence that will be recommended by the Attorney General in the event of a conviction; (iv) the effect that having to testify at both a preliminary inquiry and a trial may have on victims or witnesses; and (v) whether it would not be in the public interest to have a trial by jury. In order to fight organized crime, the government has recently adopted legislation that allows prosecutors to consider the criminal acts perpetrated by organized crime groups as serious offences even if they are not indictable offences punishable by sentences of five years or more. Courts have not yet analysed many of the procedural implications that this new legislative act may have.

In some circumstances, the Crown’s election of the treatment of a hybrid offence may be impugned as an abuse of process if it appears that it was made solely to circumvent a limitation period.

Differences and implications

The most significant implications of this classification have to do with procedure. First of all, indictable offences have no statute of limitations. It is not unheard of in Canada for prosecutors to try cases that occurred decades ago, particularly those involving serious offences such as multiple instances of sexual assault or offences of a sexual nature against children. (In these cases, the accused is tried according to the criminal law as it existed when the offence was committed and not according to the law that exists at the time of the trial). For example, Gerald Regan, a former Nova Scotia premier, was tried in the late 1990s for eight indictable offences of a sexual nature against minors that allegedly took place between 1956 and 1969. By contrast, summary conviction offences are subject to a statute of limitations, which prescribes that no proceedings may be instituted more than six months after the time when the offence was committed. Another important procedural implication of this classification is the fact that indictable offences generally require a preliminary hearing before the case goes to trial.

Double Jeopardy

Definition and Charter

Double jeopardy is the constitutional right not to be tried again for an offence for which there was a previous conviction or acquittal. The Charter of Rights and Freedoms grants any person charged with an offence the right, "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." The constitutional double jeopardy right is elaborated and codified in a series of rules.

Rules

(i) the pleas of autrefois acquit and autrefois convict;
(ii) the rule against unreasonably splitting a case;
(iii) the rule against multiple convictions; and
(iv) the rule against inconsistent judgments.

Plea of autrefois acquit and plea of autrefois convict

An accused may plea autrefois acquit or autrefois convict, if the accused states that he or she has been lawfully acquitted or convicted of the offence charged in the count to which the plea relates (Canadian Criminal Code, s. 607). This applies to trials held both in Canada and abroad. However, with respect to trials that took place outside Canada, an accused is precluded from entering these pleas if at the trial outside Canada the accused was tried in absentia or he or she was not punished in accordance with the sentence imposed on conviction. Despite the clarity of both the Charter and the Criminal Code, the Supreme Court denied the existence of double jeopardy for the prosecution in Canada of an accused already tried in the United States.

> *'Section 11(h) [double jeopardy] applies only in circumstances where the two offences with which the accused is charged are the same. Here, the offence of which the accused was acquitted in the U.S.A. and the offence with which he is charged in Canada are different because they are based on duties of a different nature. Even though the American and Canadian offences are purely criminal in nature, the alleged conduct of the accused has a double aspect: First, wrongdoing as a Canadian official with a special duty to the Canadian public under s. 111 of the Criminal Code, and second, wrongdoing as an American official or member of the American public temporarily subject to American law. The accused must now account for his conduct to the Canadian pubic as well as to the American public, as the offences relate to different duties. Consequently, s. 11(h) is of no assistance to the accused.'*

Rule against unreasonably splitting a case

The rule against unreasonably splitting a case bars separate trials for crimes when both could conveniently be tried at the same time, whether the second crime was purposefully or negligently omitted at the first trial.

Rule against multiple convictions

With respect to the rule against multiple convictions, when "the same transaction gives rise to two or more offences with substantially the same elements and an accused is found guilty of more than

one of those offences, that accused should be convicted of only the most serious of the offences."[1] In other words, "the rule against multiple convictions is applicable when there is a relationship of sufficient proximity firstly as between the facts [factual nexus], and secondly as between the offences which form the basis of two or more charges [legal nexus]."[2]

Rule against inconsistent judgments

The rule against inconsistent judgments, also referred to as "issue estoppel", precludes the prosecution from "relitigating an issue that has been determined in the accused's favour in a prior criminal proceeding, whether on the basis of a positive finding or reasonable doubt."[3] The issue estoppel may be raised when the first trial dealt with a different offence but it included the determination of an issue, such as a ruling on the admissibility of evidence. The Supreme Court of Canada clarified that:

> *"Issue estoppel does not mean that every piece of evidence led in a first trial and leading to an acquittal is inadmissible in a subsequent trial on another matter. Only issues either necessarily resolved in favour of the accused as part of the acquittal or on which findings were made, even if on the basis of reasonable doubt, are estopped. The determination of whether an issue was decided at a first trial, either expressly or necessarily as a prerequisite to an acquittal must be based on a review of the relevant portions of the transcript of the first trial and, in particular, on the allegations, the nature of the Crown case, and the defence case."*

No application of double jeopardy

Double jeopardy does not apply when the accused has been tried outside the sphere of a criminal procedure, such as when the accused has been tried in a civil law case or when he or she has been disciplined in his or her profession. The Supreme Court held that the double jeopardy right:

---

[1] *R. v. Kinnear*, 2005 CanLii 21092 (ON CA), citing *Kienapple v. R.*, [1975] 1 SCR 729, 1974 CanLII 14 (SCC)
[2] *R. v. Prince*, [1986] 2 SCR 480, 1986.
[3] *R. v. Mahalingan*, [2008] 3 SCR 316.

‘Applies only in circumstances where the two offences with which the accused is charged are the same. The same act can give rise to different offences, each offence being based on a separate duty. Thus, the appellant in this case is not being tried and punished for the same offence. The offences are quite different. One is an internal disciplinary matter. The accused has been found guilty of a major service offence and has, therefore, accounted to his profession. The other offence is the criminal offence of assault. The accused must now account to society at large for his conduct. He cannot complain, as a member of a special group of individuals subject to private internal discipline, that he ought not to account to society for his wrongdoing. His conduct has a double aspect as a member of the R.C.M.P. and as a member of the public at large. To borrow from the words of the Chief Justice, I am of the view that the two offences were two different matters, totally separate one from the other and not alternative one to the other. While there was only one act of assault there were two distinct delicts, causes or matters which would sustain separate convictions.’

POWER TO DETAIN AND ARREST

The Charter grants everyone the right not to be arbitrarily detained or imprisoned.

9. Everyone has the right not to be arbitrarily detained or imprisoned.

10. 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.

An arrest can be made ONLY to:

- Prevent a crime from being committed.
- Terminate a breach of peace
- Compel a person to attend trial.

Warrantless arrests

Police need a warrant to arrest, except in the following circumstances:

- They have caught a person in the act of committing an offence.
- There are REASONABLE GROUNDS that a person has committed an INDICTABLE OFFENCE
- There are REASONABLE GROUNDS that a person is about to commit an INDICTABLE OFFENCE.

REASONABLE GROUNDS means that based on the information available, a reasonable person would conclude that the suspect committed the offence. The police cannot just place anyone under arrest; they must prove they have REASONABLE GROUNDS for suspecting the person they want to arrest is the offender. The arrest is also necessary in the PUBLIC INTEREST

Not arbitrary

Random stops of motorists

It is arbitrary and offensive for the police, with little or no reason, to detain or arrest a person for questioning or for further investigation.

It has also been decided that the provisions of this section are not infringed when a police officer stops a motorist on a highway for a vehicle check, and, after smelling alcohol on the motorist's breath, demands a breath test.

- Arrest Without a Warrant
    - Sometimes the police might arrest a suspect without a warrant; these circumstances are listed under Section 495 of the Criminal Code and include when the police:
    - Have reasonable grounds to suspect a person has either committed, or is about to commit, an indictable offence;
    - Find a person in the act of committing a criminal offence;
    - Find a person who they believe is named on an arrest warrant.

Anatomy of a criminal trial

- The many rituals associated with modern trials have developed over centuries. North American's common law heritage makes it possible to follow a largely uniform set of procedures. In summary form, assuming that the trial is carried out to completion, those procedures are as follows:
- **Judge or jury.** The defense decides whether it wants the case tried by a judge or a jury (the prosecution can't require a jury trial). In Canada the Charter of Rights and Freedoms [section 11(f)] states that any person charged with an offence has the right to a jury trial if the possible penalty is 5 or more years of prison.
- **Jury selection.** If the trial will be held before a jury, the defense and prosecution select the jury through a question and answer process called "voir dire." In contrast to the US, the judge has no authority to determine which of the prospective jurors are impartial. But he may excuse those who may not serve.

- Jury selection begins with the random selection of a group of 48 or more residents from a judicial district (Jury Panel). These persons are sent a summons or notice to attend court. Under the supervision of a judge of the Court of Queen's Bench, a twelve member jury (required for each criminal trial) is selected from this panel. Two people from this list are selected who will listen to prospective jurors as they respond to question approved by the court. The triers must decide if the candidate is impartial. Once the candidate is deemed impartial he replaces one of the original triers and another prospective juror is then called forward and the process continues until another impartial juror is found.
- The defence and the Crown have a limited number of times (20 for first degree murder, 12 for 5 years or more and 4 for all other cases) when they can challenge a prospective juror without explanation. This is called a **peremptory challenge**. As well, either Crown or the defence may object to any person if they believe that circumstances exist which would disqualify them. This is called **a challenge for cause** (rare in Canada). Such a challenge may be employed if either the Crown or the defence thinks a person holds some views on the matters to be presented at the trial which might influence their decision on the guilt or innocence of the accused.
- **Opening statements.** After a court employee reads the criminal charges to the jurors, the prosecution and then the defense make opening statements to the judge or jury. These statements provide an outline of the case that each side expects to prove. The Crown has an obligation to aid the jury in arriving at the truth and cannot be biased or impartial in her opening statement.
- **Prosecution case-in-chief.** The prosecution presents its main case through direct examination of prosecution witnesses, including expert witnesses by the prosecutor. Types of evidence: witnesses, expert witnesses, real evidence, direct evidence and circumstantial evidence. Cross-examination. The defense may cross-examine the prosecution witnesses (leading questions are permitted). Redirect. The prosecution reexamines the defense witnesses
- **Prosecution rests.** The prosecution finishes presenting its case.
- Motion to dismiss. The defense makes a motion to dismiss charges. (Optional) Denial of motion to dismiss. Almost always, the judge denies the defense motion to dismiss.

- **Defense case-in-chief**. The defense presents its main case through direct examination of defense witnesses (accused may choose not to testify). Cross-examination. The prosecutor cross-examines the defense witnesses. Redirect. The defense reexamines the defense witnesses.
- **Defense rests**. The defense finishes presenting its case.
- **Closing arguments:** Prosecution closing argument. The prosecution makes its closing argument, summarizing the evidence as the prosecution sees it, and explaining why the jury should render a guilty verdict. Defense closing argument. The defense makes its closing argument, summarizing the evidence as the defense sees it, and explaining why the jury should render a not guilty verdict--or at least a guilty verdict on a lesser charge. Section 651 determines who closes first. If defense presents evidence or the defendant testifies, then defense closes first.
- **The charge to the jury (instructions).** The judge instructs or charges the jury about what law to apply to the case and how to carry out its duties. (Some judges "preinstruct" juries, reciting instructions before closing argument or even at the outset of trial.)
- **Jury deliberations**. The jury (if it is a jury trial) deliberates and tries to reach a verdict. In Canada the verdict must always be unanimous. If the jury is deadlocked for a lengthy period the judge may make a final attempt for the jury to arrive at a verdict. If a reasonable attempt to reach a final verdict fails, a hung jury results. There is a mistrial. Then the prosecution may decide to retry the case with a new jury.
- **Sentencing**. Assuming a conviction (a verdict of guilty), the judge sets sentencing for another day. The judge can request a pre-sentence report from a probation officer.
- **sAppeals.** Both the defense and the prosecution can appeal. One direct criminal appeal is warranted.

Characteristics of the criminal trial

- Distrust for lay people.
    - Mediated by professionals detached from the community.
- Ritualistic
    - Raise, stand, judge gowns.

- Arbitrary
    - Number of peremptory challenges, who closes first
- It could be different
- Legalistic conception of crime
- Limited role for victims
- Not receptive to new technologies
    - Old fashioned
    - Limited use of technology

EVIDENCE: GENERAL RULES

The sources of evidence are primarily judge-made through common law rules, and some statutes, particularly the Canada Evidence Act, which codifies many of the earlier common law.
234. Judges are considered to have principled flexibility, that is, they have discretion to act within some general principles that govern evidence. These principles are:

(1) relevance, which refers to evidence that has any tendency in reason to prove a fact at issue in a proceeding. A fact is relevant if it has probative value, that is, the fact is capable of proving or has the tendency to prove something;

(2) finality, which mandates judges to eventually put a final stop to the case;

(3) efficiency, which mandates judges to make a good use of time and resources; and

(4) fairness, which requires that the prosecution and the defence have equal access to justice and that the fact finder be protected from prejudicial evidence.

I. Burden of Proof

235. In Canadian criminal trials, the prosecution has the burden of proof, that is, the prosecution has to convince the trier of fact of the culpability of the accused. The prosecution has the burden to prove every element of the crime, that is, *actus reus* – and all of its elements, that is, voluntary act, causation, social harm, and *mens rea*. Generally speaking, in Canadian Criminal procedures, the standard is beyond a reasonable doubt. The standard of proof beyond a reasonable doubt is

inextricably intertwined with the presumption of innocence, the basic premise which is fundamental to all criminal trials, and the burden of proof rests on the prosecution throughout the trial and never shifts to the accused (however, see *supra*, paragraph 104). A reasonable doubt is a doubt based on reason and common sense which must logically be derived from the evidence or absence of evidence. While more is required than proof that the accused is probably guilty, a reasonable doubt standard does not involve proof to an absolute certainty. Such a standard of proof is impossibly high. Thus, this burden is generally considered to imply that the trier of fact has to be around 95% certain of the culpability of the accused. This standard differs from the one used in civil proceedings – referred to as preponderance of evidence, which simply requires the trier of fact to be more than 50% convinced. The Supreme Court ruled that the trial judge must instruct the jurors as to the criminal law meaning of the notion of reasonable doubt.

236. In some instances, the law establishes some presumptions, which result in a reverse onus of proof. For example, for the insanity defence (*supra*, paragraph 104), the law adopted the presumption of sanity, which presupposes, subject to proof to the contrary, that every person is sane. So, it is the accused who must prove by preponderance of evidence that he or she is insane. Furthermore, before any defence can be introduced before the jury, it must have an air of reality. According to the Supreme Court:

> *The air of reality test is a legal threshold, not a factual one. The trial judge must determine if the evidence put forward is such that, if believed, a reasonable jury properly charged could have acquitted. He is not concerned with the weight of evidence or with assessments of credibility. Essentially, for there to be an air of reality, the totality of the evidence for the accused must be reasonably and realistically capable of supporting that defence. Although there is not, strictly speaking, a requirement that the evidence be corroborated, that evidence must amount to something more than a bare assertion. There must be some support for it in the circumstances. The judge's role is limited to ascertaining whether the accused has discharged the evidentiary burden imposed by s. 265(4) of the Criminal Code.*

If so, the judge may admit the defence, which will then be pondered by the trier of fact, that is, that same judge or the jury. Also, judges have to consider a possible defence even if defence counsel

failed to raise it before the jury, but there must be something specific that suggests the existence of the defence. The same applies to bench trials.

Apart from presumptions, judicial notices do not have to be proved. Judicial notices allow the court to take notice of some facts or events without formal proof because they are so well known that they do not need to be proved. For example, these would include the fact that Halifax is the capital city of the province of Nova Scotia, that English is a language, or that football is a sports game. Additionally, acts of Parliament, ordinances made by the Governor in Council, or the lieutenant governor in council of any province, and all acts of provincial legislatures are considered judicial notice. The Canadian Supreme Court ruled that judicial notice applies to two kinds of facts: (1) facts which are so notorious as not to be the subject of dispute among reasonable persons; and (2) facts that are capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy.

II. Means of Evidence

239. Evidence is classified according to its purpose and type. According to the purpose, evidence can be demonstrative or illustrative and direct or circumstantial. Demonstrative evidence is evidence that stands on its own, such as video surveillance cameras. Illustrative evidence is used by a witness to illustrate something, such as maps, photographs, and images generated by satellite global positioning systems, among many others. Direct evidence is evidence that supports a proposition directly at issue in case. For example, finger prints at a murder scene in a criminal trial. Circumstantial evidence is evidence that can be used to infer a conclusion. For example, a sighting of the accused in the neighbourhood at the time of the crime. Unlike other common law jurisdictions where direct evidence has priority over circumstantial evidence, in Canada both circumstantial and direct types of evidence have the same value.

Classification of evidence

Evidence is classified as: (i) real evidence, which consists of all tangible evidence, physical objects, such as tape recordings, computer printouts or photographs; (ii) documentary evidence, which is any printed relevant information; and (iii) testimonial evidence, which is evidence given by a witness in the form of answers to posed questions. Real and documentary evidence are subject

to the rule of authentication, which requires as a condition precedent to trial admissibility that the evidence in question satisfies a finding that it is what its proponent claims. For example, any person seeking to admit an electronic document as evidence has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic document is that which it is purported to be. Documentary evidence is also subject to the best evidence rule, which requires that the proponent of a document has to produce the original document or the closest version available to an original. Following the examples of electronic documents, which have recently caused some controversy in Canada as electronic documents – unlike printed documents – may not be considered original, the best evidence rule is satisfied on proof of the integrity of the electronic documents system by or in which the electronic document was recorded or stored.

III. Witnesses

While the police may interrogate individuals during the investigation phase, the prosecution and the defence may call any individual to testify at trial, whether these individuals were interrogated before or not. There is no obligation to call those who were interrogated during the investigation phase as witnesses during the trial. In Canada, judges, who – as analysed above (*supra*, paragraph 197) – have a somewhat passive role during the trial, may not call witnesses.

Witnesses give evidence in the form of answers to questions. Two rules govern the admissibility of witnesses – compellability and competence. The former determines whether the witness can be forced to testify at trial. For example, the accused may not be forced to testify against his or her own will at the accused's trial. Competence determines whether a willing witness is permitted to testify. Traditionally, at common law in Canada, the victim was not allowed to testify as the witness was considered to have an interest in the trial. The Canada Evidence Act abolished this common law rule, and it is customary now for the victim to appear as witness.

In general, a spouse of the accused may only be a competent witness for the defence. But when the accused is charged with certain listed offences, such as sexual assault, and incest among others, the spouse is a competent and compellable witness for the prosecution without the consent of the person charged.

A person under 14 years of age is presumed to have the capacity to testify, but minors under 14 do not take an oath or make any solemn affirmation. Solemn affirmations have the same legal value as oaths. The only difference is that a witness may opt to solemnly affirm to tell the truth instead

of swearing to tell the truth. This possibility has been included to respect individuals who do not swear on religious grounds. The evidence may only be received if the minors are able to understand and respond to questions. The accused who takes the stand is not considered a witness for the purpose of this provision.

Lay vs. expert

Witnesses are classified as either lay or expert. Expert witnesses give testimony based on their scientific, technical, or other specialized knowledge. The purpose of expert witness testimony is to assist the trier of fact to understand the evidence or to determine a fact in issue. Expert witnesses, as opposed to lay witnesses, may testify in the form of an opinion if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness can apply them to the facts of the case in a reliable form. Witnesses must qualify as experts on the basis of their knowledge, skills, experience, or education.

IV. Objections

246. The judge controls what witnesses can hear. Both the prosecution and the defence may object to questions. If sustained, the witness must refrain from answering the question. The following are the most frequent grounds for objecting questions:

(1) irrelevant: when the question is unrelated to the issues at trial;

(2) ambiguous, confusing or unintelligible: the question is not posed in a clear and precise manner so that the witness knows with certainty what information is being sought;

(3) arguing the case: a question where the prosecution or defence counsel state their version of the facts and state the conclusions to be drawn from them;

(4) argumentative: when the prosecution or counsel states a conclusion and then asks the witness to argue with it, often in an attempt to get the witness to change their mind;

(5) a question that assumes facts not in evidence: when a question contains an unproved fact, which is taken as true in the question, such as a question to a witness about something she did when this was never substantiated;

(6) leading: a question is leading when it is formulated as a yes/no question that suggests its own answer. Leading questions are permitted to question expert witnesses, hostile witnesses, and always during cross-examination. Thus, as a way of illustration, if the prosecution

asks a non-hostile witness that it called to testify the following question ‘did you see the accused kill the victim?’, the defence may object;

(7) compound: when the question contains more than one question, joined by an adversative or additive conjunction;

(8) non-responsive answer: when the witness’ answer does not directly answer the question or if it exceeds the posed question;

(9) narrative: when the question suggests that the witness narrates a series of events that may result in an irrelevant answer;

(10) speculative: when the question asks the witness to guess or make conjectures;

(11) opinion by unqualified witness: opinion testimony is reserved for expert witnesses only; and

(12) hearsay: which is a statement made by someone other than the witness testifying and offered to prove its own truth. There are many exceptions to the hearsay rule. For example, the Supreme Court recognizes that ‘out-of-court statements may be admitted for the truth of their contents where their admission is reasonably necessary to the determination of a fact in issue and where the circumstances surrounding these statements tend to support their reliability’. There exist so many exceptions to the hearsay rule in Canada that many argue that the general rule should be that hearsay is permitted, save for some exceptions.

Exclusion of evidence

Exclusion of evidence bringing administration of justice into disrepute

> 24 (2) Where a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

The court must assess:

1) The seriousness of the Charter-infringing state conduct.
    a. Admission may send the message that the justice system condones serious state misconduct.
    b. Did police act in good faith?
    c. Was the breach inadvertent and minor vs. intentional and reckless?

    d. The presence of exigent circumstances, such as the need to preserve evidence.
    e. Was the police conduct an isolated incident vs. a pattern of abuse of Charter rights?
2) The impact of the breach on the Charter-protected interests of the accused.
    a. Admission may send the message that individual rights count for little.
    b. Was the breach fleeting and technical or profoundly intrusive? Breaches relating to self-incrimination (right to silence and counsel are the most serious.
3) Society's interest in the adjudication of the case on its merits.
    a. Would the truth seeking function of the criminal trial process be better served by the admission of the evidence or by its exclusion?

The Means of Correct Training

The chief functioning of disciplinary power is to train. It links forces together to enhance and use them; it creates individual units from a mass of bodies. The success of disciplinary power depends on three elements: hierarchical observation, normalizing judgment, and examination.

Hierarchical observation, the exercise of discipline assumes a mechanism that coerces by means of observation. During the classical age "observatories" were constructed. They were part of a new physics and cosmology; new ideas of light and the visible secretly prepared a new knowledge of man. Observatories were arranged like a military camp, a model also found in schools, hospitals and prisons. Disciplinary institutions created a mechanism of control. The perfect disciplinary mechanism would make it possible to see everything constantly. The problem was breaking surveillance down into parts. In a factory, surveillance becomes part of the forces of production, as well as part of the disciplinary process; the same thing occurred in schools. Discipline operates by a calculated gaze, not by force.

Normalizing judgment.

First, at the heart of all disciplinary mechanisms, a small penal system, with a micro-penality of time, behavior and speech, existed. Slight departures from correct behavior were punished. Second, discipline's method of punishment is like that of the court, but non-observance is also

important. Whatever does not meet the rule departs from it. Third, disciplinary punishment has to be corrective. It favors punishment that is exercise. Fourth, punishment is an element of a double system of gratification-punishment, which defines behavior on the basis of good-evil. Fifth, the distribution according to acts and grades has a double role. It creates gaps and arranges qualities into hierarchies, but also punishes and rewards. Discipline rewards and punishes by awarding ranks.

This art of punishing refers individual actions to a whole, and differentiates individuals from each other by means of a rule that is the minimum of behavior. It measures individuals and places them in a hierarchical system; it also traces the abnormal. The perpetual penalty essentially normalizes. This is opposed to the juridical penalty that defines the individual according to a corpus of laws, texts and general categories. Disciplinary mechanisms create a "penality of the norm". The normal, which exists in medicine, factories and schools, is one of the great instruments of power at the end of the classical period. Marks of status were replaced by ideas of belonging to a "normal" group. Normalization makes people homogeneous, but it also makes it possible to measure differences between individuals.

Examination. Examination represents the techniques of an observing hierarchy and those of a normalizing judgment, a gaze that makes it possible to qualify, classify and punish. It is a ritualized innovation of the classical age; the organization of the hospital as an examining machine is one of the features of the eighteenth century. A similar process is evident in the development of examination in schools. Examination introduced certain new features: first, it transformed the economy of visibility into the exercise of power. The subject, and not the sovereign, becomes seen. Second, examination introduces individuality into the field of documentation; a mass of writing fixes the individual. Third, each individual becomes a "case" that can be analyzed and described.

Examination is at the center of processes that constitute the individual as an effect and object of power. The disciplines mark the move from a situation where individuality is greatest in the higher ranks, to one where those on whom anonymous power is exercised are more individual. The child

is more individual than the man, the patient more than the healthy man. If you want to individualize a man, ask how much of the madman he has in him.

Parole and Other Conditional Releases

Conditional release is the supervised early release of inmates from correctional confinement. It is a carefully constructed bridge between incarceration and return to the community.

I. Types of Conditional Release

There are four types of conditional release: (i) temporary absence, which may be either escorted or unescorted. This type of conditional release is used for several purposes, such as to allow the offender to work on community service projects, to have contact with family, for personal development or medical reasons; (ii) day parole allows the offender to participate in community-based activities that may prepare the offender for release on full parole or for statutory release. Offenders must return to the institution or a halfway house[4] at night; (iii) full parole allows the offenders to serve the remainder of their sentences under supervision within the community; and (iv) statutory release is a type of conditional release that prescribes that most federal inmates – except those serving life sentences and those convicted to indeterminate sentence – have to be released under supervision once they have completed two-thirds of their sentence. Those that apply for full parole have to convince the parole board that they meet the requirements for parole. Statutory release is automatic and is granted to all those who have spent the required time in a prison, unless there are extraordinary circumstances which require their detention. In this case, the burden of proof lies on the State, not the inmate. Those that applied for full parole and were denied full parole may still benefit from statutory release when they complete two-thirds of the sentence.

II. General and Specific Conditions

4. A halfway house is a residence outside the prison where inmates live under limited supervision. The objective of halfway houses is to facilitate the reintegration of the inmate back to society.

Offenders who are released on parole, statutory release, or unescorted temporary absence continue to serve the sentence while being at large in the community until its expiration according to law. They are subject to both general and specific conditions.

General conditions include the obligation not to leave the jurisdiction, to report to parole officers, to allow parole officers to visit them at their homes or places of business, the obligation to find a job within thirty days, and the payment of restitution to the victim.

Offenders may also be imposed specific conditions that apply to their cases. These may include prohibition to contact the victim, the obligations to follow a programme, or to refrain from drinking alcohol. The prohibition regarding alcohol has given rise to judicial and legislative controversy. The Supreme Court in *R. v. Shoker* ruled that requesting individuals under probation conditions to give bodily samples to determine the presence of alcohol in the blood were unlawful.[5] Consequently, criminal justice professionals were not able to monitor compliance with court orders prohibiting drug and alcohol use. In order to deal with this problem, the government adopted specific legislation that allows a judge to impose conditions requiring individuals under probation conditions to provide bodily samples.

III. Parole Boards

The National Parole Board of Canada has exclusive authority under the Corrections and Conditional Release Act to grant, deny or terminate parole and other types of conditional release. Some provinces, particularly Ontario and Quebec, have provincial parole boards for crimes that are served in provincial corrections facilities. These are for convictions of two years or less. Provincial norms are similar to federal legislation, but they may differ in the period of eligibility. The National Parole Board consists of forty-five full-time members and a number of part-time members appointed by the government. Full-time members hold office for periods not exceeding ten years and part-time members are appointed for three years.

§2. Unescorted Temporary Absence

In the case of unescorted temporary absence,[6] the portion of a sentence that must be served before an offender serving a sentence in a federal penitentiary may be released is: (*a*) in the case of an

5. *R. v. Shoker*, 2006 SCC 44, [2006] 2 SCR 399.
6. Corrections and Conditional Release Act (S.C. 1992, c. 20), s. 115.

offender serving a life sentence, the period required to be served by the offender to reach the offender's full parole eligibility date (*infra*, paragraph 286) less three years; (b) in any other case, (i) one half of the period required to be served by the offender to reach the offender's full parole eligibility date, or (ii) six months, whichever is greater.

279. The Parole Board may, on application, cancel or vary the unexpired portion of a prohibition order after a period of (*a*) ten years in the case of a prohibition for life; or (*b*) five years, in the case of a prohibition for more than five years but less than life. However, those that are classified as maximum security offenders (*supra*, paragraph 266) are not eligible for an unescorted temporary absence.

280. The National Parole Board or the Commissioner or the institutional head of the corrections facility may authorize unescorted temporary absence of an offender if:

(1) the offender will not, by re-offending, present an undue risk to society during the absence;

(2) it is desirable for the offender to be absent from penitentiary for medical, administrative, community service, family contact, personal development for rehabilitative purposes, or compassionate reasons, including parental responsibilities;

(3) the offender's behaviour while under sentence does not preclude authorizing the absence; and

(4) a structured plan for the absence has been prepared.

281. The authority that granted the temporary absence may cancel it, either before or after its commencement, (*a*) where the cancellation is considered necessary and reasonable to prevent or to sanction a breach of a condition; (*b*) where the grounds for granting the absence have changed or no longer exist; or (*c*) after a review of the offender's case based on information that could not reasonably have been provided when the absence was authorized.

DAY PAROLE

In the case of day parole,[7] the portion of a sentence that must be served where the offender is serving a sentence of two years or more is the greater of (i) the portion ending six months before the date on which full parole may be granted (*infra*, paragraph 286), and (ii) six months. When the

7. Corrections and Conditional Release Act (S.C. 1992, c. 20), s. 119.

offender is serving a sentence of less than two years, the offender may apply for day parole after serving one half of the sentence before full parole eligibility. Day parole may be granted to an offender for a period not exceeding six months. This period may be renewed, subject to a positive review of the case by the Board.

Those offenders that are illegal immigrants and against whom there is a removal order made under the Immigration and Refugee Protection Act are ineligible for day parole or an unescorted temporary absence until they are eligible for full parole.

Full Parole and Statutory Release

Offenders are eligible for full parole[8] after serving the lesser of one third of the sentence or seven years. If the Board denies full parole, an offender has to wait for a period of six months before making a new application for full parole.

Offenders serving a life sentence, imposed otherwise than as a minimum punishment, are eligible for full parole after serving seven years less any time spent in custody between the day on which the offender was arrested and taken into custody, in respect of the offence for which the sentence was imposed, and the day on which the sentence was imposed.

Offenders serving sentences for first- and second-degree murders are eligible for full parole after serving twenty-five years and ten to twenty-five years, respectively.

Where an offender who is serving a sentence receives an additional sentence that is to be served concurrently, the offender is not eligible for full parole until the day that is the later of (*a*) the day on which the offender has served the period of ineligibility in relation to the sentence the offender was serving when the additional sentence was imposed, and (*b*) the day on which the offender has served (i) the period of ineligibility in relation to any portion of the sentence that includes the additional sentence, and (ii) the period of ineligibility in relation to any other portion of that sentence.

Where an offender who is serving a sentence receives an additional sentence, whether for facts committed before the offender was imprisoned or during imprisonment, that is to be served consecutively to the sentence the offender was serving when the additional sentence was imposed, the offender is not eligible for full parole until the day on which the offender has served, commencing on the day on which the additional sentence was imposed, (*a*) any remaining period

8. Corrections and Conditional Release Act (S.C. 1992, c. 20), s. 119.1.

of ineligibility in relation to the sentence the offender was serving when the additional sentence was imposed; and (*b*) the period of ineligibility in relation to the additional sentence.

Rationale for granting parole

The Parole Board may grant parole to an offender if, in its opinion: (*a*) the offender will not, by re-offending, present an undue risk to society before the expiration according to law of the sentence the offender is serving; and (*b*) the release of the offender will contribute to the protection of society by facilitating the reintegration of the offender into society as a law-abiding citizen.

Breach of parole

When an offender breaches a condition of parole or statutory release, the Parole Board may: (*a*) suspend the parole or statutory release; (*b*) authorize the apprehension of the offender; and (*c*) authorize the recommitment of the offender to custody. The same applies when it is necessary to suspend the parole or statutory release in order to prevent a breach of any of the conditions or to protect society.

Dangerous offenders (*supra*, paragraph 172) are eligible for applying to full parole after serving a period of seven years. If parole is denied, they can reapply after a new period of two years. They may apply for day parole or escorted temporary absences three years before full parole eligibility.

The risk assessment decision-making regarding parole includes several aspects of information, which the Board has to take into account. These include the offender's criminal history risk factors and identified needs areas at the time of incarceration. These include: the nature of the offence, criminal and social history, the role of alcohol or drugs in the offender's criminal behaviour, information about anti-social behaviour, attitude of indifference to the criminal behaviour and its impact on the victim, any indication of violence or abuse of family members, employment, participation in treatment programmes, and his or her mental health status as it affects the likelihood of future criminal acts. The Board must also take into account recommendations by the judge, the victim's impact statement, and performance in school and psychological assessments, if available. After identifying the main case specificities, the Board considers any evidence of change in the offender, particularly efforts aimed at mitigating the risk factors; the offender's

institutional behaviour or under conditional release as indicative of the risk the offender may present to the community.; and (the release plan, prepared by the parole office with input from the offender and his or her counsel. The Board has to analyse whether the release plan is feasible and appropriate, and whether it addresses the identified needs and risk factors of the offender. The Board has to consider also whether the plan satisfactorily addresses the community assessment, community input, and requests from victims, such as a no contact condition. The plan may include rehabilitation programmes, education, job training, and other types of support.

After this extensive review, the Parole Board has to make a concluding assessment of risk presented by the offender. The Board has to consider the risk assessment based on three principles: (i) protection of society, (ii) the fact that supervised release increases the likelihood of successful reintegration to society, and (iii) the restrictions limited to those necessary to protect society. The National Parole Board must grant parole if: (a) the offender is not likely to re-offend; and (b) there is a risk of re-offending, but it can be managed by specific intervention. While making a decision, the Parole Board must consider the following principles:

(1) protection of society;
(2) consideration of all available information in the case management process; and
(3) the least restrictive determination to ensure protection of society.

SEARCH AND SEIZURE

Section 8 of the Charter states: “Everyone has the right to be secure against unreasonable search and seizure.”

Reasonable searches are permitted. The search must be reasonable in the following ways:

Searches and seizures are reasonable if authorized by law, if the law itself is reasonable, and the manner in which the search is conducted is reasonable.

- Authorized by law. E.g.: The Narcotics Act authorizes police officers to search without warrant a place other than a dwelling-house, if they have reasonable grounds to believe that it contains a narcotic in respect of which an offence has been committed.
- Law must be reasonable
- Manner in which the search is conducted must also be reasonable. E.g. police invited TV crew.

Object (what can be searched):

- Fruits of a crime
- Instruments of a crime

Reasonable expectation of privacy

This right protects every reasonable expectation of privacy. The scope of the reasonable expectation of privacy depends on each case. According to the Supreme Court there are two distinct questions which must be answered in any s. 8 challenge. The first is **whether the accused had a reasonable expectation of privacy**. The second is **whether the search was an unreasonable intrusion on that right to privacy**. Usually, the conduct of the police will only be relevant when consideration is given to this second stage.

Examples of places of lower reasonable expectations of privacy:

- Prisons
- Schools
- Border crossings
- Airports

Two ways to examine if there is a reasonable expectation of privacy:

1) Societal expectation:

a. The Court must determine what the public actually expects in terms of privacy (United States approach and Canada).

2) Normative expectation
    a. We are entitled to privacy regardless of social expectation (Canada in minority of cases).

Warrant

If there is a reasonable expectation of privacy, the police must first get a warrant, i.e., judicial authorization, to conduct a search or seizure, except under some circumstances.

A warrant may be given only if there are reasonable and probable grounds to believe **that a crime has been committed and that the search will reveal evidence of the crime**.

Warrantless searches and seizures

- Imminent danger that evidence of a crime will be destroyed or that a person may be harmed.
- Common Law Power of Search Incidental to arrest.
    - Long established common law power of the police to search a lawfully arrested person and to seize anything in his or her possession or immediate surroundings in order to guarantee the safety of the police and the accused, to prevent the latter's escape or to obtain evidence.
- Plain view: once a police officer is lawfully in residential premises, he has the right to seize articles such as narcotics that are in plain view.
- Breath Tests and Blood Samples:
    - The cases usually hold that compulsory breath tests do not constitute unreasonable search and seizure since they can be demanded only when there are reasonable and probable grounds to believe the motorist is impaired. Subsection 254(3) of the

Criminal Code allows a police officer to demand a breath or blood sample where the officer suspects that a driver has committed an impaired driving offence within the previous two hours.

- Garbage: once trash is "abandoned by a householder to the vagaries of municipal garbage disposal," he or she no longer has "a reasonable expectation of privacy in respect of it.
- Waiver. But the purpose must be fully disclosed.

Constitutional test

1) Prior authorization, e.g., search warrant.
    a. A warrantless search is presumed to be unreasonable (a rebuttable presumption). The Crown has the onus to prove that a warrantless search was not unreasonable given the circumstances , e.g., to prevent destruction of evidence.
2) Made by a judge or a person who is capable of acting judicially.
3) A judicial decision
    a. Reasonable grounds to believe that an offence has been committed and that there is evidence to be found at the place of the search.
    b. The judge must have the discretion not to make the authorization.