CHARTER LAW

PRINCIPLES OF CHARTER INTERPRETATION

While *Charter* rights must be interpreted in a "large and liberal" manner, they are ultimately bounded by their purposes. Put differently, *Charter* rights must be interpreted liberally within the limits that their purposes allow. It is an error to prioritize generosity over purpose. The most generous interpretation available to the accused must not automatically be adopted. The principle that a provision bearing more than one plausible meaning must be read in a manner that favours the accused is not a principle of *Charter* interpretation: *R v Poulin,* 2019 SCC 47

In interpreting Charter rights, binding international instruments carry more weight in the analysis than non-binding instruments, which should be treated as relevant and persuasive but not determinative interpretive tools, and courts drawing from the latter should be careful to explain why they are drawing on a particular source and how it is being used: *Quebec v 9147-0732,* 2020 SCC 32

ONUS

The onus is on the applicant alleging the *Charter* claim to prove it on a balance of probabilities. Where, however, the Applicant also brings a s.8 claim against a warrantless search, which is presumed to be unreasonable, and the Crown seeks to rebut that presumption by claiming that the search was lawfully conducted incident to a detention or arrest, the Crown must show that the detention or arrest was lawful: *R v Fearon,* 2014 SCC 77, at para 87; *R v Gerson-Foster,* 2019 ONCA 405, at para 75

NOTICE

It is generally incumbent upon an accused who alleges that evidence has been obtained by *Charter* infringement to challenge its admissibility before it is tendered at trial. The usual practice in a jury trial is to do so by a pre-trial application before

the jury is selected. But the general rule permits of exceptions. The trial judge has a discretion, where the interests of justice warrant it, to permit the issue to be raised later, as for example, where evidence adduced at trial puts in issue the admissibility of evidence already give: *R v MeGill,* 2021 ONCA 253, at para 136

The purpose of notice is: (1) to alert the court to impending *Charter* challenges so that trial time can be accurately estimated and pretrial applications can be organized and conducted in a focused manner, and (2) to enable the Crown to identify the matters in issue so that the Crown can effectively prepare for the trial and answer the challenges made. Only explicit notice of *Charter* challenges can serve these dual objectives: *R v Greer,* 2020 ONCA 795, at para 104

The discretion afforded a trial judge to hear a mid-trial *Charter* application over the admissibility of evidence is broad, as is the deference afforded to trial judges in exercising this discretion.

Courts have recognized a number of factors as relevant to the exercise of this discretion, including the reasons for, and degree of, the lack of compliance with the rules of the court; the prejudice, if any, to the Crown; the degree of disruption to the proceedings; the history of the litigation; the merits or absence of any real indication of a prospect of success on the application; and, justice and fairness to all parties: *R v Thombs,* 2023 ONCA 850, at para 13; see generally *R v Megill,* 2021 ONCA 253, at paras 148-159

The trial judge is not under any obligation to refer to the *Criminal Rules* or specifically refer to the “interests of justice” when explaining the basis for deciding not to hear a mid-trial *Charter* application: *R v Thombs,* 2023 ONCA 850, at para 14

SUMMARY DISMISSAL

A trial judge is permitted, in the exercise of their trial management powers, to summarily dismiss *Charter* motions on the basis oof lack of notice. Absent special circumstances, trial judges may decline to entertain a motion where no notice, or

inadequate notice, of the motion has been given to the other side. Similarly, trial judges may refuse to hear *Charter* motions that have no reasonable prospect of success or may terminate motions when it becomes evident that they are frivolous. A decision by a trial judge to summarily dismiss a motion on either basis is ordinarily entitled to deference.

Deference will not be due, however, if the trial judge conducted a hearing that was so unfair as to result in a miscarriage of justice. Just as a fair trial guarantees the accused "basic procedural fairness" so too does a fair *Charter* challenge.

One requirement of procedural fairness is that the accused must be given an opportunity to make submissions before summary dismissal occurs. Where a trial judge is considering summary dismissal without an evidentiary inquiry because a *Charter* claim appears to be meritless or was made without notice, the trial judge should ensure that the defence is aware of this and is "able to summarize the anticipated evidentiary basis for its claim" so that the trial judge has the information required. This includes providing the accused with an opportunity to argue against summary dismissal.

Before summarily dismissing a *Charter* claim because of non-compliance with the rules, trial judges are required to consider all relevant circumstances. This includes the *Charter* argument sought to be advanced, prejudice to the opposing party, and the impact that permitting the motion to proceed would have on the trial process. Explanations for non-compliance with the rules may also be of importance.

The second relevant requirement of procedural fairness is the trial judge's obligation to explain why a *Charter* motion is being summarily dismissed, if that is the decision that is made. The sufficiency of reasons is a relevant consideration in determining whether procedural fairness has been achieved in the summary dismissal of a *Charter* motion: *R v Grier,* 2020 ONCA 795, at para 107-114; *R v MeGill,* 2021 ONCA 253, at paras 136-137

POLICE POLICIES

Because law enforcement policies are guidelines not law, breaching them does not, without more, breach the *Charter*. That being said, deliberate or negligent

failure to follow policies designed to protect *Charter* rights can increase a *Charter* breach's seriousness: *R v Pike,* 2024 ONCA 608, at para 138

SECTION 7

A. RIGHT TO SILENCE

i. General Principles

It is an error of law to draw an adverse inference against the accused's for his pre-trial silence: *R v CG,* 2016 ONCA 316 at paras 6-7

In fact, evidence of pre-trial silence or lack of cooperation is inadmissible and a jury must be instructed to not consider it at all: *R v Chambers,* 2021 ONCA 331, at paras 12-15, 21

To use pre-trial silence against an accused would render the right to silence into an illusory right, converting the decision not to speak to the police into a sword from which an inference of guilt could be taken. Accordingly, the Crown cannot suggest that the accused's silence prior to trial informs the veracity of the accused's testimony at trial: *R v Guillemette,* 2022 ONCA 436, at paras 36-37

That being said, once "uncontradicted evidence points to guilt beyond a reasonable doubt", the accused's silence will sometimes mean that he has failed to "provide any basis for concluding otherwise": *R v Bokhari,* 2018 ONCA 183 at para 3

An accused person is entitled to remain silent and to hear the Crown's case before deciding whether to give evidence or how to respond. A suggestion that the accused is giving his story for the first time at trial amounts to an attack on his right to silence.

Absent evidence of recent fabrication, a Crown cannot allege that an accused person has tailored his evidence after receiving Crown disclosure or after hearing the Crown's evidence at the preliminary inquiry or at trial: *R v John,* 2016 ONCA 615 at paras 60-61; *R v SK,* 2019 ONCA 776, at para 129 (see also concurring reasons of Trotter J.A., dissenting on this issue, at paras 149 and following); *R v*

Esquivel-Benitze, 2020 ONCA 160, at paras 16-19; *R v GV,* 2020 ONCA 291, at paras 24-31; *R v MD,* 2020 ONCA 290, at paras 22-31; *R v BL,* 2021 ONCA 378, at paras 40-48

It is an error of law to suggest that an accused has scripted his/her evidence to the disclosure. Permitting this would convert a constitutional right into a trap, and raise concerns about the right to silence: *R v Brown,* 2018 ONCA 9 at para 14; *R v Johnson-Lee,* 2018 ONCA 1012, at para 58; *R v CT,* 2022 ONCA 163, at para 1

It is similarly improper to allege that an accused has tailored his evidence to the evidence heard in court. This argument undermines the accused's right to be present at his trial and to make full answer and defence: *R v BL,* 2021 ONCA 373, at paras 45-50; *R v Hudson,* 2021 ONCA 772, at paras 160-161; *R v Haidary,* 2023 ONCA 786, see especially para 9

However, questions relating to disclosure are not always prohibited. In *R. v. White* (1999), 42 O.R. (3d) 760 (C.A.), for example, the manner in which the accused testified raised the possibility that the jury would use phone records admitted into evidence as confirming his testimony. Cross-examination showing that the accused had access to those phone records through disclosure before testifying was therefore appropriate. No allegation of tailoring was being made. The cross-examination was designed to expose a source of knowledge that had fallen into issue: *Johnson-Lee* at para 59

A suggestion by Crown counsel that the accused is required to provide the police with information or otherwise be helpful to the police undermines his right to silence. An accused does not forfeit his constitutional right to silence because he chose to speak about some but not all of the details that he later testified to at trial. If such a suggestion is made, the trial judge must give a limiting instruction; otherwise, the jury can be left with the impression that if the accused were an innocent person, he would have volunteered to the police at the first opportunity the exculpatory information he now offers at trial. The trial judge must address the real danger that a jury could make the leap from their disbelief of an accused's exculpatory explanation to a finding of guilt based on that disbelief, especially if given for the first time at trial: *R v JS,* 2018 ONCA 28 at paras 50-51, 55, 63, 64; *R v Kiss,* 2018 ONCA 184 at para 37

It is also wrong to use the fact that the accused remained silent, instead of offering an explanation to the authorities on a previous occasion, to reject an account

offered by the accused for the first time at trial: *R v Kiss,* 2018 ONCA 184 at para 38-39

In contrast, when the accused has given a prior voluntary statement, he has given up the right to silence. A trier of fact can rely on material inconsistencies between his prior statement and testimony; this includes material omissions from a prior statement. Omissions can be integral to the existence of material inconsistencies between two versions of events: *R v Hill,* 2015 ONCA 616 at paras 45-46; *R v Kiss,* 2018 ONCA 184 at paras 40-41

However, the omissions from the pre-trial statement must be material enough to rely upon fairly. Further, the difference between the accused offering inconsistent versions on precisely the same topic and being selective about what topics are discussed must be respected. The former may count against the credibility of the accused's testimony whereas the latter may not: *R v Kiss*, 2018 ONCA 184 at paras 47-48; see also *R v Sagoo,* 2020 ONCA 770, at para 18

While the Crown cannot rely on pre-trial silence as evidence of guilt, an co-accused can attack the credibility of another accused by referring to the other accused's pre-trial silence: *R v Zvolensky,* 2017 ONCA 273 at para 157

In considering the reasonableness of a verdict, an appellate court may infer from the appellant's failure to testify, an inability to provide an innocent explanation: *Tsekouras* at para 227; see also *R v George-Nurse,* 2018 ONCA 515 at paras 17, 18, and 33

In some limited circumstances, a trier of fact may draw an adverse inference from the accused's failure to call a witness. The adverse inference principle is "derived from ordinary logic and experience". It is not intended to punish the accused for failing to call a witness

An adverse inference may only be drawn where there is no plausible reason for not calling the witness. Even where it is appropriate to draw an adverse inference, it should not be "given undue prominence and a comment should only be made where the witness is of some importance in the case".

Commenting upon the failure of the defence to call a witness runs the clear risk of reversing the burden of proof. As well, trial counsel will frequently make choices about not calling potential witnesses, the reasons for which are often entirely unrelated to the truth of any evidence a witness may give. For instance, an honest

person may have a poor demeanour, resulting in a strategic choice not to have the individual testify. Or, the evidentiary point to be made by a person may already have been adequately covered by others: *Jolivet*, at para. 28. Allowing an adverse inference to be taken from the failure to call a potential witness runs the risk of visiting strategic litigation choices upon the accused. Accordingly, an adverse inference should only be drawn with great caution

Where comment is appropriate, the "only inference that can be drawn" is not one of guilt, but an inference that, had the witness testified, his or her evidence would have been unfavourable to the accused. This inference can impact on an assessment of the accused's credibility. Cross-examination on the failure of the defence to call a witness will only be appropriate in those rare circumstances where this adverse inference is open to be drawn: *R v Degraw,* 2018 ONCA 51 at paras 30-32, 44; *R v NLP,* 2013 ONCA 773 (CA)

There is no absolute rule against requiring the defence to disclose evidence to the Crown before the prosecution closes its case: *R v JJ,* 2022 SCC 28, at para 154; see also paras 155-160

B. RIGHT AGAINST SELF-INCRIMINATION

The principle against self-incrimination imposes limits on the extent to which an accused can be used as a source of information about his or her own criminal conduct. The right to silence is closely entwined with the principle against self-incrimination. Both principles preserve the basic tenet of justice that the Crown must establish a case to meet before the accused is expected to respond.

The principle against self-incrimination is manifested in several specific constitutional and common law rules that apply both before and during trial. Before trial, the law protects an accused from being conscripted into assisting their own prosecution. It does so through the confessions rule, the right to remain silent when questioned by state agents, and the absence of a general duty to disclose. During the conduct of a trial, the principle against self-incrimination is reflected in (1) the s. 11(c) prohibition against testimonial compulsion; (2) the s. 11(d) presumption of innocence and the burden on the Crown to prove its case beyond a reasonable doubt; and (3) the s. 13 protection against self-incrimination in other proceedings.

Residual protection against self-incrimination is also provided under s. 7 of the *Charter*. The residual s. 7 protection, however, is context-dependent and does not provide "absolute protection" against all uses of information that has been compelled by statute or otherwise; nor should one automatically accept that s. 7 comprises a broad right against self-incrimination on an abstract level.

Together, these rights inform the underlying principle that it is up to the state, with its greater resources, to investigate and prove its own case, and that the individual should not be conscripted into helping the state fulfil this task: *R v JJ,* 2022 SCC 28, at paras 144-147

C. RIGHT TO DISCLOSURE

i. GENERAL

For a review of first versus third party disclosure, see Chapter on General Principles of Law: Disclosure Regimes

The accused has a constitutional right to disclosure of all material that could reasonably be of use in making full answer and defence of the case against him/her as guaranteed by s. 7 of the *Charter*: *R. v. Tossounian*, 2017 ONCA 618 at para 15

Under *Stinchcombe*, the Crown will have to disclose material that it cannot put into evidence itself, but that the defence may use in cross examination. If the information is of some use then it is relevant and the determination as to whether it is sufficiently useful to put into evidence should be made by the defence and not by the prosecutor: *R v Natsis,* 2018 ONCA 425 at para 30;

The "mere reasonable possibility" that discrepancies in a witnesses evidence contained within outstanding disclosure could have been used to impeach the credibility of witnesses "is all that is needed for it to be possible to hold that there was a reasonable possibility that the failure to disclose impaired the overall fairness of the trial:" *R v Tossounian,* 2017 ONCA 618 at para 30 [citations ommitted]

911 calls fall under the rubric of *Stinchcombe* disclosure: *R v MGT,* 2017 ONCA 736 at para 119

ii. Crown's Disclosure Obligation on Appeal

The Crown's disclosure obligation on an appeal extends to any information in the possession of the Crown that there is a reasonable possibility may assist the accused in the prosecution of his appeal. To obtain disclosure or production in aid of a proposed fresh evidence motion, an applicant must establish two things:

i. the applicant must first demonstrate a connection between the request for production and the fresh evidence he proposes to adduce by showing that there is a reasonable possibility that the material sought could assist on the motion to adduce fresh evidence, either by yielding material that will be admissible as fresh evidence or assisting the applicant in developing or obtaining material that will be admissible as fresh evidence; and
ii. the applicant must next demonstrate that there is some reasonable possibility that the evidence to which the production request is linked may be received as fresh evidence on appeal.

Where the Crown denies the existence of material that the defence contends is relevant, the defence must establish a basis which could enable the presiding judge to conclude that there is in existence further material which is potentially relevant. To establish a basis, the defence may lead or point to evidence or, in some cases, rely on the oral submissions of counsel: *R v Ivezic,* 2020 ONCA 621, at paras 8-9

iii. Establishing a Breach of the Right to Disclosure at Trial or Appeal

Where evidence proposed for admission on appeal has to do with information that was not disclosed prior to trial, an appellant must first establish that the undisclosed information meets the *Stinchcombe* standard and thus amounts to a breach of the appellant's constitutional right to disclosure.

Provided the undisclosed information satisfies the *Stinchcombe* threshold, thus the failure to disclose it establishes a breach of the appellant's constitutional right to disclosure, the accused must next establish, on a balance of probabilities, that the disclosure failure impaired the accused's right to make full answer and defence.

To establish on a balance of probabilities that the failure to disclose impaired their right to make full answer and defence, an accused must demonstrate that there is a reasonable possibility the non-disclosure affected the outcome at trial or the overall fairness of the trial process.

To appraise the impact of the disclosure failure on the reliability of the trial result, an appellate court must consider whether there is a reasonable possibility that the undisclosed evidence, when considered in the context of the trial as a whole, could have had an impact on the verdict rendered or the overall fairness of the trial process.

If, on its face, the undisclosed information affects the reliability of the conviction, the appellate court should order a new trial.

If the undisclosed material did not impact the reliability of the trial result, the court must alternatively assess the impact of the disclosure failure on the overall fairness of the trial process, This inquiry evaluates whether there is a reasonable possibility that cross-examination of witnesses or the opportunities to garner additional evidence could have been available to the defence if timely disclosure had been made. In other word, the appellate court must consider whether the disclosure failure would have had an impact on the conduct of the defence at trial.

An important factor in considering the impact of a disclosure failure on the overall fairness of the trial process is the diligence of defence counsel in pursuing disclosure from the Crown. A lack of due diligence in pursuing disclosure is a significant factor in determining whether the Crown's non-disclosure affected the overall fairness of the trial process. Indeed, where defence counsel knew or ought to have known of a disclosure failure or deficiency on the basis of other disclosures, yet remained passive as a result of a tactical decision or lack of due diligence, it is difficult to accede to a submission that the disclosure default affected the overall fairness of the trial: *R v MGT,* 2017 ONCA 736 at paras 120-125; *R. v. Tossounian*, 2017 ONCA 618 at para 15; *R v Natsis,* 2018 ONCA 425 at para 33; *R v Jiang,* 2018 ONCA 1081, at para 4; see also paras 16-19; *R v Gager,* 2020 ONCA 274, at paras 106-107; *R v Pascal,* 2020 ONCA 287 at paras 111-117

The "reasonable possibility" standard must not be entirely speculative. It must be grounded on reasonably possible uses of the non-disclosed or untimely-disclosed evidence, or reasonably possible avenues of investigation that were closed to the appellant because of the non-disclosure or late disclosure. If this possibility is

shown to exist, then the accused's right to make full answer and defence was impaired: *R v Barra,* 2021 ONCA 568, at para 140

The appropriate focus in most cases of late or insufficient disclosure under s. 24(1) is the "remediation of prejudice to the accused" and the "safeguarding of the integrity of the justice system: *Natsis* at para 35

Non-disclosure of a statement that could have affected the decision of the defence about whether to call evidence may affect the fairness of the trial process, and thus impair an accused's right to make full answer and defence: . Similarly, non-disclosure that deprived the defence of opportunities to pursue additional lines of inquiry with witnesses or to obtain additional evidence arising out of the undisclosed material may affect the overall fairness of the trial process. A remedy may also be available where late disclosure compromises the integrity of the justice system: *R v Barra,* 2021 ONCA 568, at para 145

In *Pascal,* the Ontario Court of Appeal vacated a conviction and ordered a new trial due to the failure of the Crown to disclose that a key crown witness had a criminal record and was facing charges which possibly gave rise to a motivation to lie: 2020 ONCA 287

ii. LOST EVIDENCE

A claim asserting a breach of s. 7 based on evidence lost or destroyed by the prosecution proceeds in two steps. First, the court determines whether the loss or destruction of the evidence results in a breach of s. 7 based on an interference with the accused's right to make full answer and defence. Second, if there is a s. 7 breach, the court must determine the appropriate remedy. A stay of criminal proceedings is the appropriate remedy only in extraordinary circumstances: *R v Hersi,* 2019 ONCA 94, at para 25

The loss or destruction of material in the possession or control of the police will constitute a breach of the right to make full answer and defence if the material was disclosable under the broad relevance standard established in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, and *R. v. Egger*, [1993] 2 S.C.R. 451, and the prosecution fails to show that the loss or destruction of the material was not the consequence

of “unacceptable negligence” by the police. The more obvious the importance of the evidence, the higher will be the degree of care expected of reasonable police officers: *R v Hersi,* 2019 ONCA 94, at paras 26, 30; *R v Abreha,* 2019 ONCA 392, at para 11; *R v Hillier,* 2021 ONCA 180, at paras 27-28

The Crown can meet its onus by showing that reasonable steps were taken in the circumstances to preserve the evidence, bearing in mind the relevance that the evidence was perceived to have at the time it was lost or destroyed: *R v Janeiro,* 2022 ONCA 118, at paras 107-108

Alternatively, a *Charter* applicant will succeed even in the face of a satisfactory explanation for the loss or destruction of evidence if they establish that the lost evidence is so important that its loss undermines the fairness of the trial. This is a difficult hurdle. Showing a reasonable possibility that the lost evidence could have assisted the defence is not enough to establish that the right to full answer and defence has been undermined. This is so even though the inability to determine whether the lost evidence was harmful, neutral, or helpful to the defence may arise because of the loss of the evidence by the police. In order to demonstrate irremediable prejudice when seeking a remedy, a *Charter* applicant must establish that the evidence would have played an important role in their defence.

A remedy for a stay is provided only in extraordinary circumstances, where important evidence has been deliberately destroyed, where the unacceptable negligence is extreme enough to cause irreparable harm to the integrity of the justice system, or where the accused establishes that the loss of the evidence has irreparably deprived them of evidence without which they cannot effectively present a defence: *R v Janeiro,* 2022 ONCA 118, at paras 109, 111, 125; *R v Atwima,* 2022 ONCA 268, at paras 101-103

Section 24(1) requires the court to impose the “appropriate and just” remedy in the circumstances. In making that judgment, the actual prejudice caused to the defence is a significant consideration: *Hersi,* at para 36

Automatic excision is not the sole mandatory or appropriate remedy in lost evidence cases. The range of remedies granted under s. 24(1) of the *Charter*, including for lost evidence, must remain very broad and flexible in response to the particular circumstances of a given case: *R v St. Claire,* 2023 ONCA 266, at para 25; see alos para 30

In *Abedi,* the Court of Appeal refused to allow an appeal based on alleged prejudice to the accused due to the loss of the complainant's recorded statement at trial. The Court held that other evidence containing essentially the same information existed, namely, the officer's notes, which were contemporaneous and detailed. The defence did not suggest that the notes were inaccurate or missing any important details: *R v Abedi,* 2017 ONCA 724

The correct instructional remedy for lost evidence is to advise the jury that the effect of any such unavailable evidence on the Crown's case will be for the jury to decide: *R v Abreha,* 2019 ONCA 392, at para 13

D. RIGHT TO A FAIR TRIAL

See 11(d) Below for more on the right to a fair trial

Pre-charge delay engages ss. 7 and 11(d). However, a lengthy pre-charge delay does not necessarily affect the fairness of a trial. To establish a *Charter* breach attributable to pre-charge delay, the accused is required to show that the state's conduct, namely the delay in laying charges, caused him actual prejudice

In considering whether lost evidence has affected trial fairness, the court can look at the availability of evidence from other sources: *R v Khan,* 2022 ONCA 698, at para 80

i. ROWBOTHAM APPLICATIONS

The three prerequisites for a *Rowbotham* order are that: the accused must have been refused Legal Aid; the accused must lack the means to employ counsel; and representation for the accused must be "essential to a fair trial": A fair trial in this context embraces both the concept of the ability to make full answer and defence and the appearance of fairness.

Trial and motion judges must evaluate whether appointing counsel under a *Rowbotham* order is necessary for a fair trial on a case-specific basis, having regard to relevant factors, including the seriousness of the charges, the likelihood of imprisonment, the length and complexity of the proceedings in terms of the factual evidence, and the procedural, evidentiary and substantive law that would apply. The judge must also attend to the possibility of specialized procedures such

as *voir dires*, and the accused's personal ability to participate effectively in defending the case. The trial judge has an obligation to assist unrepresented counsel, which can sometimes mitigate the need for counsel. The involvement of *amicus* also remains a relevant factor in determining whether the interests of justice can be met without a *Rowbotham* order.

An accused must act reasonably and in good faith in seeking relief from the court. The court may take into account, for example, that the accused has demonstrated an inability to work with counsel previously, and has fired multiple lawyers: *R v Imona-Russel,* 2019 ONCA 252, at paras 38-47

ii. Adverse Inference from Presence

Accused persons have not only a statutory obligation but also a right to be present at their trial, grounded in their constitutionally guaranteed rights to a fair trial and to make full answer and defence. Absent an allegation of recent fabrication, a trier of fact cannot use this right against the accused to find that he had the opportunity to tailor his evidence and that he did so. This line of reasoning is not permissible: *R v Esquivel-Benitze,* 2020 ONCA 160, at paras 16-19; *R v GV,* 2020 ONCA 291, at paras 24-31; *R v MD,* 2020 ONCA 290, at paras 22-31

There are, however, a limited range of circumstances in which the Crown may cross-examine an accused on his right to be present at trial or on his right to receive disclosure. For example, the Crown may cross-examine the accused on disclosure to substantiate a claim of recent fabrication or concoction of an alibi by the accused: However, the Crown cannot make the allegation of concoction to the jury without first putting it to the accused and giving him an opportunity to respond: *R v GV,* 2020 ONCA 291, at paras 27-28; *R v MD,* 2020 ONCA 290, at para 26

E. RIGHT TO FULL ANSWER AND DEFENCE

Full answer and defence is, in turn, a crucial component of a fair trial, a constitutionally protected right and the ultimate goal of the criminal process. Trial fairness is not measured exclusively from the accused's perspective but also takes account of broader societal interests. Those broader interests place a premium

on a process that achieves accurate and reliable verdicts in a manner that respects the rights and dignity of all participants in the process, including, but not limited to, the accused

The right to make full answer and defence is a central constitutional right. The manner in which it is pursued can vary in an infinite variety of ways and on a case-by-case basis: : *R v Dunstan,* 2017 ONCA 432 at para 73

The right to make full answer and defence is a trial right. There is no right to make full answer and defence at the preliminary inquiry. The right to make full answer and defence at trial, however, also entitles the accused to full and timely disclosure of the Crown's case. It does not entitle the accused to any particular procedure to achieve that end. Nor does it require a procedure that maximizes the ability of the accused to make full answer and defence: *R v RS,* 2019 ONCA 906, at para 65

The right to make full answer and defence includes not only the ability to challenge the Crown's case on the merits but also the ability to advance reasonable Charter and/or other process-oriented responses to the charges: *R v Sandeson,* 2020 NSCA 47

It is improper to allege that an accused has tailored his evidence to the evidence heard in court. This argument undermines the accused's right to be present at his trial and to make full answer and defence: *R v BL,* 2021 ONCA 373, at paras 45-50

The right to make submissions is a central component of the right to make a full answer and defence: *R v Grier,* 2020 ONCA 795, at para 110

For principles on cross-examination, see General Principles on Law: Cross-examination

F. RIGHT TO SECURITY OF THE PERSON

It is not every qualification or compromise of a person`s security that comes within the reach of s. 7 of the *Charter*. The qualification or compromise must be significant enough to warrant constitutional protection.

Security of the person protects both the physical and psychological integrity of the individual. For a restriction of security of the person to be established, the state

action in issue must have a serious and profound effect on a person's psychological integrity: *R v Donnelly,* 2016 ONCA 988 at paras 106-107

Note, see *Saadati v Moorhead*, 2017 SCC 28, in which the Supreme Court of Canada held that neither expert evidence nor proof of recognized psychiatric illness is required for recovery for mental injury in the civil context.

The descriptive "serious state-imposed psychological stress" fixes two requirements that must be met before the security of the person interest protected by s. 7 becomes engaged. First, the psychological harm must be state imposed, that is to say, the harm must result from actions of the state. And second, the psychological harm or prejudice must be serious. It follows that not every form of psychological prejudice or harm will constitute a violation of s. 7. In other words, there is something qualitative about the type of state interference that ascends to the level of a s. 7 infringement. Nervous shock or psychiatric illness are not necessarily required, but something greater than "ordinary stress or anxiety" is.

The effects of the state interference are to be assessed objectively. The court gauges their impact on the psychological integrity of a person of reasonable sensibility, not one of exceptional stability or of peculiar vulnerability: *Donnelly* at paras 108-109

In *R v Ugbaja,* 2019 ONSC 96, the Superior Court of Justice entered a stay of proceedings on charges of importing cocaine as a remedy for the corrections system's failure to provide adequate medical attention following the accused's foot injury, leading to long-term medical consequences.

G. RIGHT TO LIBERTY

Confinement for more than 22 hours a day without meaningful human contact constitutes solitary confinement: C.C.N., 2018 ABPC 148

Administrative segregation for more than 15 consecutive days constitutes cruel and unusual punishment, contrary to s.12 of the *Charter:* Canadian Civil Liberties Association v Canada, 2019 ONCA 243

For more on the constitutional limits of solitary confinement, see: Corporation of the Canadian Civil Liberties Association vs Canada (Attorney General), 2017 ONSC 7491 and British Columbia Civil Liberties Association v Canada (Attorney General), 2018 BCSC 62; and Canadian Civil Liberties Association v Canada, 2019 ONCA 243

In *R v Ugbaja,* 2019 ONSC 96, the Superior Court of Justice entered a stay of proceedings on charges of importing cocaine as a remedy for the corrections system's unlawful placement of the accused in solitary confinement for a prolonged period of time for medical purposes.

H. ABUSE OF PROCESS

The doctrine of abuse of process is not a tool for assessing the quality of prosecutorial decisions. It is a tool for addressing conduct of the Crown that is egregious and seriously undermines the fairness of the proceeding or the integrity of the administration of justice. Simply put, it is about misconduct, not poor performance: *Jackson v Ontario,* 2017 ONCA 812 at para 2

Abuse of process may, however, encompass an unacceptable degree of negligent state conduct: *R v Gerson-Foster,* 2019 ONCA 405, at para 98

A court should not embark on a review of prosecutorial discretion without first engaging in a threshold determination that there is an evidentiary foundation to do so. The threshold standard is whether the applicant has provided an evidentiary foundation that there is a reasonable likelihood that a hearing of the application on the merits would assist in determining the issues before the court.

The threshold burden can be met in one of two ways: first, with an evidentiary foundation; second, where the discretionary prosecutorial decision is so rare and exceptional that it demands an explanation, such as the repudiation of the plea agreement in *Nixon.* Where an evidentiary showing is relied on to meet the threshold burden, it must be evidence beyond suspicion or speculation. It must be evidence on which a court sitting on judicial review, acting judicially, could conclude that the Crown's decision involved an abuse of process: *R v Mivasair,* 2025 ONCA 179, at paras 81-83

The Crown making a legal error is not an abuse of process: *R v Mivasair,* 2025 ONCA 179, at para 117

I. SECTION 7 VERSUS S.11(D)

The SCC has recognized both ss. 7 and 11(d), as "inextricably intertwined." In respect of constitutional litigation, the correct approach is to assess these rights together when they are co-extensive. When a concern falls specifically under one of the rights, however, they should be assessed separately: *R v JJ*, 2022 SCC 28, at para 114

J. PRINCIPLES OF FUNDAMENTAL JUSTICE

It is a principle of fundamental justice that proof of penal negligence, in the form of a marked departure from the standard of a reasonable person, is minimally required for a criminal conviction, unless the specific nature of the crime demands subjective fault: *R v Brown,* 2022 SCC 18

In determining whether a law is arbitrary or overly broad, the first step is to determine the purpose of the law. The most significant and reliable indicator would be a statement of purpose within the subject law, but courts can also look to the text, context, and scheme of the legislation, and extrinsic evidence. Extrinsic evidence should be used with caution: statements of purpose in the legislative record may be rhetorical and imprecise, or poor indicators of purpose. What is to be identified is Parliament's purpose, not the purposes of its individual members: *R v Sharma,* 2022 SCC 39

The existence of prosecutorial discretion cannot cure what would otherwise be unconstitutional overbreadth: *R v RV,* 2024 ONCA 339, at para 15

SECTION 8

A. REASONABLE EXPECTATION OF PRIVACY

i. General Principles

Every investigatory technique used by police does not amount to a “search” within or for the purposes of s. 8 of the Charter. Police conduct that interferes with a reasonable expectation of privacy constitutes a "search" for the purposes of s. 8 of the Charter: *R v Law*, 2002 SCC 10 (CanLII), at para. 15; *R v Tessling*, at para. 18; *R v Wise,* 1992 CanLII 125 (SCC),

Note, it is not only the type of police conduct that determines whether a search has occurred, but also the purpose of that conduct that is controlling. A search is about looking for things to be used as or to obtain evidence of a crime: *R v Rutledge,* 2017 ONCA 635 at paras 19-21

To assert a s. 8 claim, an accused must first establish that he has a reasonable expectation of privacy over the subject matter of the search. It is important to carefully calibrate the subject matter of the search. Once the subject matter is properly identified, then the court looks to: (i) whether the accused has a direct interest in that subject matter; (ii) whether the accused has a subjective expectation of privacy in that subject matter; and, if so, (iii) whether the accused’s subjective expectation of privacy is objectively reasonable in the totality of the circumstances: *R v Dosanjh,* 2022 ONCA 689, at para 113

a) Subject Matter of the Charge

In order to engage section 8 of the *Charter,* the individual must first have a reasonable expectation of privacy in the thing searched. Only where state examinations constitute an intrusion upon some reasonable privacy interest of individuals does the government action in question constitute a “search” within the meaning of s. 8: *R v Jackman,* 2016 ONCA 121 at para 21

A functional approach to defining the subject matter of the search is required, one that necessitates an inquiry into not only the information sought, but also the nature of the information that it reveals: *R v Dosanjh,* 2022 ONCA 689, at para 115

This approach requires that the court look beyond the actual information provided and ask whether, with that information in hand, something further is revealed about the individual to whom the information relates. This requires consideration of not

only the raw data that the state came to possess, but also the nature of the information that could be inferentially derived from that raw data. However, determining the subject matter of a search should not take on hypothetical dimensions, but should be rooted in the case: *R v El-Azrak,* 2023 ONCA 440, at para 38

b) Direct Interest in the Subject Matter of the Charge

Whether an individual has a direct interest in the subject matter of a search is not defined by whether the subject matter is incriminating or not, but by the degree to which the individual has a meaningful connection to the subject matter – for example, through participation, authorship, ownership or control: *R v Dosanjh,* 2022 ONCA 689, at para 117

The need not have exclusive control over the information in order to have a direct interest in it: *R v El-Azrak,* 2023 ONCA 440, at para 58

Although an accused need not demonstrate a proprietary interest in the subject matter of the charge, they must establish something beyond a tenuous connection to it.

In Dosianjh, for example, the Court of Appeal held that the accused had only a tenous connection to a rental vehicle, by renting it under a false name and therefore coming into possession of it fraudulently. The accused could therefore neither use the car nor exclude others from it lawfully: *R v Dosanjh,* 2022 ONCA 689, at para 129

c) Subjective Expectation of Privacy

There is a distinction between a desire for privacy and an expectation of privacy. Only the latter is relevant to a s.8 analysis: *R v Duong,* 2018 ONCA 115 at para 7

The *Charter* claimant does not face a "high hurdle" at this stage of the s. 8 analysis. A subjective expectation of privacy may simply be inferred from the circumstances: *R v Jones,* 2017 SCC 60, at para 15, 20-21; *R v Marakah,* 2019 SCC 59, at paras 32, 54; *R v Dosanjh,* 2022 ONCA 689, at para 120

An accused mounting a s. 8 claim may rely on the Crown's theory of the case to establish a subject expectation of privacy. She may ask the court to assume as true any fact that the Crown has alleged or will allege in the prosecution against him in lieu of tendering evidence probative of those same facts in the *voir dire*: *R v Jones,* 2017 SCC 60 at paras 19, 30-33

The ability to rely on the Crown's theory to establish expectation of privacy is not limited to cases where the accused does not call evidence on the voir dire. Nor is it limited to cases involving informational privacy but can extend to territorial privacy cases as well: *R v Labelle,* 2019 ONCA 557, at paras 23-32

d) Objective reasonableness of the subjective expectation

An individual's reasonable expectation of privacy must be assessed contextually, and may vary depending on the nature of the circumstances: *R v Jackman,* 2016 ONCA 121 at para 21

The reasonable expectation of privacy inquiry must also reflect a normative evaluation of societal expectations and aspirations as they relate to personal privacy. The assessment of whether a person has a reasonable expectation of privacy is not limited by, or dependent upon, property law concepts even if the subject matter of the claim is real property. Those concepts can, however, inform the inquiry into issues like control and access that are central to the reasonable expectation of privacy inquiry when real property is the subject matter of that inquiry: *R v Orlandis-Habsburgo*, 2017 ONCA 649 at paras. 41-43; *R v Le,* 2018 ONCA 56 at para 49

A normative approach means that the question of whether a reasonable expectation of privacy exists is not limited to whether a reasonable expectation of privacy has already been recognized in the case law. The court considers whether a claim to privacy *should* be recognized – in other words, whether it is deserving of constitutional protection in the unique circumstances of each particular case. The answer to that question can be determined only by careful consideration of the interests and values of a free and democratic society that are in competition in each case: *R v Chow,* 2022 ONCA 555, at para 21

Put differently, section 8 does not simply focus on the here and now but also concerns itself with the long-term consequences of government action on society as a whole. Properly viewed through a normative lens, privacy interests will rise to

constitutional status when those interests reflect the aspirations and values of the society in which we live: *R v El-Azrak,* 2023 ONCA 440, at para 31

The regulatory framework within which the s. 8 issue operates diminishes the appellant's reasonable expectation of privacy: *R v El-Azrak,* 2023 ONCA 440, at paras 65, 71, 73, 74

There is no closed or definitive list of factors relevant to whether a claimant's subjective expectation of privacy in the subject matter of a search is objectively reasonable. The relevant factors include, but are not limited to:

- (i) whether the information would tend to reveal intimate or biographical details of the lifestyle and personal choices of the individual subject to the alleged search;
- (ii) the place where the alleged search took place;
- (iii) whether the subject matter of the alleged search was in public view;
- (iv) whether the subject matter had been abandoned;
- (v) whether the information was already in the hands of third parties, and if so, whether it was subject to an obligation of confidentiality;
- (vi) whether the police technique was intrusive in relation to the privacy interest;
- (vii) whether the individual was present at the time of the alleged search;
- (viii) the possession, control, ownership, and historical use of the property or place said to have been searched; and
- (ix) the ability to regulate access to the place of the search, including the right to admit or exclude others from the place: *R v Campbell,* 2024 SCC 42

In *Dosanjh,* the accused fraudulently rented a motor vehicle. The accsued was therefore a trespasser of the vehicle when it was collecting and storing data that was the subject matter of the search. The fact that he fraudulently accessed the place of the search, and his lack of control over that place – without a colour of right - , were relevant in informing whether he could objectively expect privacy in data generated by the vehicle. Trespassing is relevant to the objective reasonableness analysis in the sense that it renders the connection between the accused and the subject matter of the search tenuous *R v Dosanjh,* 2022 ONCA 689, at paras 130-135

ii. Disclosure Legislation

Disclosure exceptions are not to be interpreted in a way that makes privacy legislation virtually meaningless in the context of an ongoing police investigation", nor should disclosure exceptions be taken as defeating the reasonable expectations of privacy recognized in the legislation as a whole. After all, disclosure exceptions exist not to deny privacy interests, but to protect persons who disclose private health care information pursuant to those exceptions from being prosecuted for breach of the statute.

Moreover, even if the existence of a disclosure exception can be said, in some measure, to diminish an expectation of privacy, "a reasonable though diminished expectation of privacy is nonetheless a reasonable expectation of privacy, protected by s. 8 of the *Charter: R v SS,* 2023 ONCA 130, at paras 45-46

iii. Personal Privacy

Personal privacy equates with a person's right to require that the state leave him or her alone, absent reasonable grounds to justify interfering with that person's privacy: *R v Le,* 2018 ONCA 56 at para 52

Where a legally enforceable demand for breath samples has been made pursuant to s. 320.28(1) of the *Criminal Code* compelling a subject to yield a sample of their breath, a state examination process that intrudes upon a reasonable expectation of privacy has been triggered and a search is underway: *R v SS,* 2023 ONCA 130, at para 59

iv. Privacy in Real Property

. A subjective expectation of privacy may be inferred or presumed where an accused's home is concerned, given that the home is where our most intimate and private activities are most likely to take place. Unless the contrary is shown, information about what happens inside the home is regarded by the occupants as private: *R v Chow,* 2022 ONCA 555, at para 27

But what is it that makes something a home? Ownership is a relevant consideration, but not determinative. It might not be appropriate to infer or presume a subjective expectation of privacy if the property was not an accused person's home at the relevant time – that is, when the impugned police conduct occurred. An accused who uses his home as an income generating property only and does not live there, and has no right to come and go during the relevant time, may not have a reasonable expectation of privacy in that home when it is being rented to others. This may be the case even where the accused unilaterally enters the unit without notice to the rentee and without his consent: *Chow* at paras 28-31, 36

A reasonable expectation may exist in some ownership/rental contexts where for example, accommodation is shared or where the property rented is a home that includes personal effects. In these contexts, an accused's dignity, integrity, and autonomy interests may be more readily apparent: *Chow* at para 37

In *Chow,* the Court of Appeal opined that a rentee may have a legitimate expectation of privacy in an apartment they temporarily reside in that is owned by someone else. Such an expectation would not only entitle them to the protection of s.8 against the state during the rental period, but also to the protection of the state, insofar as they seek to invite the police into the unit to investigate offences that affect them. This was consistent with a normative approach to the question of reasonable expectation of privacy: paras 40-42

There may well be circumstances in which an invited guest has the *de facto* power to control who can access or stay on a property. In those situations, the visitor may well have a reasonable expectation of privacy in the property: *R v Le,* 2018 ONCA 56 at para at para 53; see *R v Le,* 2019 SCC 34, at paras 135-137; see also *R v Farah,* 2020 ONSC 7157, at paras 106-114

However, in *Sangster,* the Court of Appeal found that, in the circumstances of that case, the accused did not have a reasonable expectation of privacy in a bedroom he was staying at for three weeks as an invited guest: *R v Sangster,* 2021 ONCA 21, at paras 14-24

Presence is relevant to a reasonable expectation of privacy inquiry. However, its relevance, when the claim is purely territorial, lies in its potential, depending on the circumstances, to support a finding that the individual claiming the privacy interest has some kind of control over who could access or remain on the property. Physical presence may be evidence of control: *Le* at para 54

In *R v Law,* 2017 BCSC 1241, the British Columbia Superior Court came to the same conclusion, and further held that the appellant did not have a reasonable expectation of privacy in the surveillance/CCTV footage of the hallway of his apartment building. This case also reviewed jurisprudence on reasonable expectations of privacy with respect to smells and sounds coming from inside an apartment.

In *R v White,* 2015 ONCA 508, the Ontario Court of Appeal excluded evidence of police observations made from common areas of things occurring inside, as well as items inside a storage locker in the locker room, reasoning that it "although the respondent did not have absolute control over access to the building, it was reasonable for him to expect that the building's security system would operate to exclude strangers, including the police, from entering the common areas of his building several times without permission or invitation and investigating at their leisure. It was reasonable for him to assume that although access to the building's storage area was not regulated, it was not open to the general public. And it was reasonable for him to assume that people would not be hiding in stairwells to observe the comings and goings and overhear the conversations and actions within his unit.

Contrarily, in *R v Yu,* 2019 ONCA 942, the Ontario Court of Appeal found that the accused did not have a reasonable expectation of privacy in two parking garages. These were large condominium buildings and the accused had limited control over the parking garages within them. In the case of one, police had obtained management's consent before all prolonged surveillance. In the case of the other, the police had entered a visitor's section that was accessible to the general public to determine whether a target's car was parked in the garage or not, which they were entitled to do as any visitor could do. The accused had no reasonable expectation of privacy regarding observations made from a space accessible to the general public. However, the court also concluded that the accused did have a reasonable expectation of privacy – albeit low – in the hallways.

The buildings had strict security features designed to exclude outsiders, and the condominium rules… barred non-owners and non-occupants from accessing the common areas unless accompanied by an owner or occupant. It was thus reasonable for the appellant to believe that the building security systems would operate to exclude the police from entering the common areas of the building multiple times without permission.

In *Salmon,* the Court of Appeal upheld the trial judge's ruling that the appellant had no reasonable expectation of privacy in CCTV footage the police seized from the condo building security, depicting the building elevator and vestibule: *R v Salmon*, 2024 ONCA 697

In *Hoang,* the Court of Appeal upheld the trial judge's determination that the accused had no reasonable expectation of privacy in the use of a pole camera on public property that captured only the outside area of the accused's residence. The trial judge reasoned that the recordings, although surreptitiously made, were taken from a device situated on public property, did not record audio, and captured activities and traffic at the front of the house, visible to the public eye. The court noted, however, that "as a general proposition, it may well be that pole camera surveillance could give rise to an objective expectation of privacy over the subject matter of the recording within the s. 8 *Charter* analysis, based on its duration, the scope and nature of its surveillance, the basis for its placement or because of other contextual or technological factors": *R v Hoang,* 2024 ONCA 361, at paras 19-20, 41-48.

a) In another person's home

Factors relevant to the question of "standing" to challenge a search of another person's home include whether the accused: is a tenant; has a house key; gets mail at the residence; is present when the warrant occurred testified about a reasonable expectation of privacy in the home: *R v Henry,* 2016 ONCA 873 at paras 6-7

A finding of constructive possession is not inconsistent with a finding that an accused has no standing to advance a section 8 argument in relation to a search of the premises where drugs were found: *R v Qiang Wu,* 2017 ONCA 620 at paras 23-25

In *Duong,* the Court of Appeal held that the factors of possession and control of a dwelling house are undermined where an elaborate fraud was used to obtain possession. The factor of historical use of a property was also undermined where the property was not used as a residence but as a meth lab to be later discarded. The ability to regulate access was undermined where the possessors had no legal right to do so: *R v Duong,* 2018 ONCA 115 at para 6

In *Le,* 2018 ONCA 56, the Court of Appeal held that the accused did not have a reasonable expectation of privacy in the backyard of his neighbour's home. Though an invited guest, Mr. Le did not have control over who could access and remain on the property.

In *Sangster,* the Court of Appeal found that, in the circumstances of that case, the accused did not have a reasonable expectation of privacy in a bedroom he was staying at for three weeks as an invited guest: *R v Sangster,* 2021 ONCA 21, at paras 14-24

b) In Stolen Property

In *Balendra,* the Court of Appeal held that, absent evidence to the contrary, an individual does not have a reasonable expectation of privacy in a motor vehicle that is stolen because he does not have ability to regulate access to the car or any legitimate privacy interest in it: 2019 ONCA 68, at paras 53-55

v. Privacy in the Informational Context

For a thorough review of the jurisprudence on reasonable expectation of privacy, particularly in the context of informational privacy, see *R v Orlandis-Habsburgo,* 2017 ONCA 649 at paras 39-115; see also *R v Marakah,* 2016 ONCA 542 at paras 46-56; and *R v Spencer,* 2014 SCC 3 and *R v Bykovets,* 2024 SCC 6

In the informational context, s.8 of the Charter protects "a biographical core" of information that "tends to reveal intimate details of the lifestyle and personal choices of the individual. Not all biographical core information is made equal, however. A trial judge should calibrate the degree to which the accused's biographical core of personal information is engaged in any given case: *R v Saciragic*, 2017 ONCA 91 ; *R v Dosanjh,* 2022 ONCA 689, at paras 123, 124

Informational privacy engages with three different concepts of privacy, namely, privacy as secrecy, privacy as control and privacy as anonymity. Privacy as secrecy involves the ability to keep in confidence information that the individual wishes to be kept private. Privacy as control involves the ability to decide when,

how and to what extent information about oneself will be shared. And privacy as anonymity involves the ability to act publicly while remaining anonymous: *Spencer*, at paras: *R v El-Azrak,* 2023 ONCA 440, at para 30

The appropriate question where an informational right of privacy is being claimed is whether the information is the sort that society accepts should remain out of the state's hands because of what it reveals about the person involved, the reasons why it was collected, and the circumstances in which it was intended to be used: *R v SS,* 2023 ONCA 130, at para 40

A physical address does not, of itself, reveal intimate details about one's personal choices or way of life. Ordinarily, it is publicly available information: *R v Saciragic*, 2017 ONCA 91; *R v El-Azrak,* 2023 ONCA 440, at paras 85-86

Similarly, standing on its own, a cellular phone number does not engage with the lifestyle and personal choices of the accused: *R v El-Azrak,* 2023 ONCA 440, at para 88

In the particular circumstances in *Nguyen,* the Court found that a video of the appellant using a fob to enter a residential building does not attract a reasonable expectation of privacy: *R v Nguyen,* 2023 ONCA 367, at paras 30-33, 38

A contact list belonging to a third party, with the accused's contact information within it, does not attract a privacy interest: *R v Dosanjh,* 2022 ONCA 689, at para 125

There is no reasonable expectation of privacy in a motor vehicle Event Data Recorder: *R v Attard,* 2024 ONCA 616, at paras 61-70

There is no reasonable expectation of privacy in a threatening voicemail left on another person's phone, as this is the very means by which he committed the offence of criminal harassment. From a normative perspective, "a person who threatens another has no right to expect that the person who has been threatened will keep the threat private": *R v Gauthier,* 2024 ONCA 621, at paras 9, 38-43, 50

Depending on the totality of the circumstances, an accused person may retain a reasonable expectation of privacy in text messages that have been sent to another person's phone and subsequently obtained by the police: *R. v. Marakah*, 2017 SCC 59; *R v Ritchie,* 2018 ONCA 918

A reasonable expectation of privacy exists in an IP address due to the capacity of the information it can reveal about one's online activity: *R v Bykovets,* 2024 SCC 6

It is objectively reasonable for the sender of a text message to expect that a service provider will maintain privacy over the records of his or her text messages stored in its infrastructure: *R v Jones*, 2017 SCC 60

An individual has no reasonable expectation of privacy when communicating with a child stranger on the internet

Where no reasonable expectation of privacy exist, a communication cannot be said to be a "private communication" within part VI of the Criminal Code of Canada: *R v Myers,* 2019 SCC 22

Tracking information is a less intrusive means of surveillance than electronic audio or video surveillance, and attracts a somewhat diminished privacy interest. This is reflectd by the fact that, even where an individual has standing in relation to tracking data, the police can obtain a judicial authorization to have it produced on the lower standard of "reasonable grounds to suspect": *Criminal Code*, ss. 487.017. It is also reflected by the fact that the police can obtain an authorization to install a tracking device on a vehicle and have that vehicle tracked in real time for lengthy periods: *Criminal Code*, s. 492.2(1): *R v Dosanjh,* 2022 ONCA 689, at para 126, 127

That being said, a person may reasonably expect that, barring prior judicial authorization, the tracking data produced by a car that they drive will be protected from state seizure: *R v Dosanjh,* 2022 ONCA 689, at para 136

In *Saciragic,* the Court of Appeal held that the Appellant did not have a reasonable expectation of privacy in his fob data, holding that "the appellant made use of an apartment unit in a relatively large apartment complex with common areas and video surveillance. There was no evidence to suggest a reasonable expectation that his comings and goings would not be observed by others or recorded digitally, or the fact of these observations divulged to police." The Court further held that the Appellant did not have a reasonable expectation of privacy in his municipal address, holding that "A physical address does not, of itself, reveal intimate details about one's personal choices or way of life, and, ordinarily, it is publicly available information to which many people have access:" *R v Saciragic,* 2017 ONCA 91

In *Balendra,* the Court of Appeal confirmed that a person has a reasonable expectation of privacy in the content of a USB found in his pocket during a search incident to arrest: *R v Balendra,* 2019 ONCA 68, at paras 35-38

In *Campbell*, the Court of Appeal upheld the trial judge's *Charter* ruling excluding urine samples obtained from the police as a result of an unlawful police request for the accused's medical information from a hospital nurse, in circumstances where the police had no reasonable and probable grounds to obtain a warrant for the samples: 2019 ONCA 258

In *SS,* the Court of Appeal upheld the trial judge's ruling that SS had a reasonable expectation of privacy in communications being provided in the back of an ambulance to a paramedic who was medically assessing him. A police officer, whose presence was unknown to SS, listened in on the conversation. The trial judge correctly concluded that this constituted an unlawful search and seizure. SS was found to have a reasonable expectation in this informational privacy because: (1) The expectation of privacy in information exchanged for medical treatment is significant given that the patient is forced to reveal information of a most intimate character to protect his life or health; (2) the information in question was intended to be used for the purpose of S.S.'s care; and (3) the information that S.S. shared was self-incriminatory, and individuals are entitled to make a meaningful and informed choice whether to share self-incriminating information with the police or exercise their right to silence: *R v SS,* 2023 ONCA 130, at paras 41, 48-49

In *Pike,* the Court of Appeal struck down the constitutionality of s.99(1)(a) of the *Customs Act,* which authorized border officials to search travellers' digital devices based on nothing more than a genuine subjective intention to discover violations of border laws. The court held that, given the privacy interests at stake, at a constitutional minimum, the law required a reasonable suspicion standard: 2024 ONCA 608

People have unique and heightened privacy interests in personal computer data because it can expose deeply revealing information. Not only that, but they generate information without users' knowledge, retain data that users try to destroy, and let users access information stored on remote servers.

In addition to these strong informational privacy interests, digital device searches engage travellers' personal privacy with respect to their bodies. This form of privacy is not limited to physical touching but includes visual access to the body, such as by viewing photos or videos of the naked or undressed body. As a result,

digital device searches risk engaging personal privacy because people often store intimate images on their devices: *R v Pike,* 2024 ONCA 608, at paras 59-60

vi. Abandonment

The question of abandonment is a question of fact: *R v Vanier,* 2023 ONCA 545, at para 61

Even where an accused is found to have had, at one point, a reasonable expectation of privacy in the subject matter of the search, abandonment marks the point in time at which the accused ceased to have that expectation of privacy. Accordingly, a pre-existing reasonable expectation of privacy will give way where, bearing in mind all of the circumstances, a person acts in a way that would lead "a reasonable and independent observer to conclude that the person has ceased to assert any privacy interest in the subject matter of the claim: *R v Keshavaraz,* 2022 ONCA 312, at para 46

vii. In Public

For the purpose of s.162(1)(c) [voyeurism], "[i]f a person is in a public place, fully clothed and not engaged in toileting or sexual activity, they will normally not be in circumstances that give rise to a reasonable expectation of privacy. This includes a school setting: *R v Jarvis,* 2017 ONCA 778 at para 108

iii. Shared Privacy Interests

Depending on the circumstances, an individual may have a reasonable expectation of privacy in shared spaces, such as a computer used by multiple persons. A third party cannot waive the individual's privacy interest in that space, and a police search and seizure in reliance on third party consent gives rise to a violation of s.8: *R v Reeves,* 2018 SCC 56

Even when the privacy interest is limited because it is a shared privacy interest, the privacy interest in a computer is high because computers store immense amounts of information, some of which, in the case of personal computers, will touch on the biographical core of personal information: *R v Lambert,* 2023 ONCA 689, at para 51

However, the question of whether the passive receipt by the police of material that an accused may share a privacy interest in with another (e.g., a complainant providing police with a phone or computer belonging to the accused) will depend on the circumstances. Generally, the SCC's decision in *Cole*, 2012 SCC 53, which found that s.8 was breached by a seizure that occurred when police took possession of computer data after the computer was handed over to police by school authorities, provides support for a finding that a seizure will occur in such circumstances. There may, however, be several effective gatekeeping mechanisms available to defeat a s.8 *Charter* claim in such circumstances, such as the threshold question of whether a reasonable expectation of privacy exists in the item seized, or reliance on s.489(2) or 487.11, which permits a peace officer to seize items without a warrant in certain circumstances: *R v Lambert,* 2023 ONCA 689, at paras 52-56

With respect to the first gatekeeping mechanism – the doctrine of reasonable expectation of privacy - individuals do not have a reasonable expectation of privacy in the knowledge that others have. Individuals with relevant information about criminal conduct are free to communicate this information to the police, without s. 8 being engaged: *R v Lambert,* 2023 ONCA 689, at paras 58-59

In *Lambert,* the Ontario Court of Appeal further remarked that "a *Charter* claimant can have no reasonable expectation of privacy in items they have delivered to a victim in order to commit an offence. Notwithstanding the decision in *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608, it is also arguable that the same reasoning could apply where electronic messages sent by the *Charter* claimant to the victim are used as the means of committing the offence charged, such as the offence of threatening to cause death or bodily harm, or criminal harassment": *R v Lambert,* 2023 ONCA 689, at para 60; see also para 61

Even where s.8 is engaged, there will be no violation unless the search or seizure was unreasonable. Police will often be able to seize the items or the information and then obtain a search warrant: *R v Lambert,* 2023 ONCA 689, at para 63

B. ANCILLARY POWERS DOCTRINE

In the absence of statutory authority, the common law can provide authority to search or seize a car. For example, in Haflett, the Court of Appeal employed the ancillary powers doctrine to validate the police impounding of a motor vehicle. The Court found that the police common law authority to impound a motor vehicle will arise where, in the circumstances, the ability to impound the vehicle and have it towed away is a reasonable exercise of the police common law duty to prevent crime, to protect the life and property of the public, and to control traffic on the public roads: *R v Haflett,* 2016 ONCA 248 at para 23

In Wawrykiewycz, the Court of Appeal held that the swabbing of door handles of a car in a public parking lot, and analyzing those swabs using special equipment, was not a search that could be justified under the ancillary powers doctrine, and required prior judicial authorization.

The Court reasoned that this investigative technique can reveal intimate details of the lifestyle and personal choices of the individual, for example, whether the appellant had handled cocaine, as well as providing a DNA sample. Though the vehicle was in public view, any residue left by the appellant's hands was not observable to a passerby and was in this sense private. The appellant had an objective and subjective reasonable expectation of privacy in the car, and more particularly, in the residue left by his hands on the handles of the car he was using: *R v Wawrykiewycz,* 2020 ONCA 269, at paras 35-45

C. IMPLIED LICENSE DOCTRINE

The implied licence doctrine is the common law solution to the clash between police duties and the property rights of the individual. Under that doctrine, property rights or, in constitutional terms, the privacy of the owner/occupier, must yield, but only to the extent needed to allow the police, in the execution of their duties, to go onto the property to make contact with the owner or occupant: *R v Le,* 2018 ONCA 56 at paras 26, 29

The occupier of a dwelling gives an implied licence to any member of the public, including police officers, on legitimate business to come to the door of the dwelling

and knock. The implied licence can be revoked by, for example, putting up signs prohibiting entry or by locking an entry gate.

Additionally, when members of the public (including police) exceed the terms of the implied licence, they approach the property as intruders. The officer must have a *bona fide* belief that gives rise to a reasonable suspicion of criminal activity being perpetrated against the owner or occupant or the property. The police officer must be able to demonstrate an objective basis in fact that gives rise to his suspicion. There must be some articulable cause above the level of a mere "hunch", "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.

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. Any "waiver" of privacy rights that can be implied through the "invitation to knock" simply fails to extend that far. As a result, where the agents of the state approach a dwelling with the intention of gathering evidence against the occupant, the police have exceeded any authority that is implied by the invitation to knock.

Since the implied invitation is for a specific purpose, the invitee's purpose is all-important in determining whether his or her activity is authorized by the invitation. Where evidence clearly establishes that the police have specifically adverted to the possibility of securing evidence against the accused through "knocking on the door", the police have exceeded the authority conferred by the implied licence to knock: *Le* at paras 97-102

D. CONSENT SEARCHES

With respect to s. 8, a consent to search requires that the Crown demonstrate on a balance of probabilities that the consent was fully informed. IN *R. v. Wills* (1992), 70 C.C.C. (3d) 529, the Court of Appeal outlined a number of factors required to establish valid consent to a search. Among these factors is a requirement that the individual giving consent be aware of the potential consequences of giving the consent. In other words, the person asked for his or her consent must appreciate in a general way what his or her position is vis-a-vis the ongoing police investigation, including the nature of the charge or potential charge which he or she may face: *R v Sabir,* 2018 ONCA 912, at para 34

E. FEENEY WARRANTS

In the absence of exigent circumstances, ss. 529 and 529.1 of the *Criminal Code* require that the police obtain prior judicial authorization, by way of a *Feeney* warrant, before entering a residence to arrest a suspect. In executing the warrant, they are presumptively required to knock on the suspect's door, identify themselves as police, and give the suspect an opportunity to answer the door before entering forcibly.

Police who have obtained a *Feeney* warrant may enter a residence unannounced only if they have sought and obtained prior judicial authorization to do so under s. 529.4(1) of the *Criminal Code*, or if the exceptional circumstances set out at s. 529.4(3) are met. Before authorizing an unannounced entry, the issuing judge must be satisfied by information on oath that there are reasonable grounds to believe that prior announcement of the entry would either:

(a) expose the peace officer or any other person to imminent bodily harm or death; or

(b) result in the imminent loss or imminent destruction of evidence relating to the commission of an indictable offence.

Even where the police obtain a *Feeney* warrant that permits entry into a dwelling unannounced, s. 529.4(2) states that a no-knock entry is not permitted unless the executing officer has, immediately before entering, either reasonable grounds "to suspect that prior announcement of the entry would expose the peace officer or any other person to imminent bodily harm or death" or "reasonable grounds to believe that prior announcement of the entry would result in the imminent loss or imminent destruction of evidence relating to the commission of an indictable offence". Likewise, under s. 529.4(3), if the police have not obtained a warrant to enter the residence under s. 529.3, they may only enter without prior announcement if these same conditions are met immediately before they enter.

The purpose of the knock and announce rule is two-fold. First, it is intended to "minimize the invasiveness of arrest in a dwelling and permit the offender to maintain his dignity and privacy by walking to the door and surrendering himself." In addition, the rule promotes the safety of both the suspect and the police. An unexpected intrusion of a man's property can give rise to violent incidents. It is in the interests of the personal safety of the householder and the police as well as respect for the privacy of the individual that the law requires, prior to entrance for search or arrest, that a police officer identify himself and request admittance." In short, the rule not only protects the dignity and privacy interests of the occupants

of dwellings, but it may also enhance the safety of the police and the public: *R v Brown,* 2024 ONCA 453, at paras 51-55

F. SEARCH WARRANTS

i. DEFINITION

A search warrant is an order issued by a justice of the peace that authorizes the police to enter a specified place to search for and seize specific property: *R v Ting,* 2016 ONCA 57 at para 47; but see *R v Iraheta,* 2020 ONCA 766, at paras 10-18

ii. GENERAL WARRANTS

Section 487.01(1)(b) requires that the issuing judge be satisfied that it is in the best interests of the administration of justice to issue the general warrant. This analysis engages two components: consideration of whether the authorization would further the objectives of justice, and a balancing of the interests of effective law enforcement against the individual's interest in privacy: *R v Nguyen,* 2023 ONCA 367, at paras 45-46

One relevant component to the second component is if the execution of a traditional search warrant would prematurely terminate the investigation: *R v Nguyen,* 2023 ONCA 367, at para 54

A peace officer may obtain a general warrant pursuant to s.487.01, which authorizes a peace officer to "use any device or investigative technique or procedure or do any thing described in the warrant that would, if not authorized, constitute an unreasonable search or seizure in respect of a person or a person's property."

Section 487.01(1)(c) provides that a general warrant is not available where there is another statutory provision that "would provide for a warrant, authorization or order permitting the technique, procedure or device to be used or the thing to be done."

However, there is nothing in the language of s. 487.01(1)(c) that precludes a peace officer from obtaining a general warrant solely because he or she has sufficient information to obtain a search warrant. Resort to a search warrant is only precluded when judicial approval for the proposed technique, procedure or device or the doing of the thing" is available under some other federal statutory provision.

That the police are in a position to obtain a search warrant does not prevent them for continuing to investigate using all other lawful means at their disposal. In many cases the information the police present in support of an application for a general warrant would also support an application for a search warrant. There is nothing wrong in utilizing a general warrant to obtain information with a view to gathering additional and possibly better evidence than that which could be seized immediately through the execution of a search warrant.

A general warrant is to be "used sparingly as a warrant of limited resort" so that it does not become an "easy back door for other techniques that have more demanding pre-authorization requirements.

Where police are confronted with the choice between a series of conventional warrants or an application for a general warrant, if they apply for a general warrant they must meet the stricter requirements of s. 487.01, which can only be issued by a judge, not a justice of the peace, and they must establish that it is in the best interests of the administration of justice to issue the general warrant: *R v Jodoin,* 2018 ONCA 638, at paras 1, 11, 13, 14

iii. DNA Warrants

Section 487.05(1) of the Criminal Code, provides that, for a DNA warrant to be issued, there must be reasonable grounds to believe that:

a) A designated offence has been committed;
b) A bodily substance has been found or obtained at specified places, including at the place where the offence was committed, or at any place associated with the commission of the offence;

c) The person targeted by the warrant was a party to the offence; and

d) Forensic DNA analysis of a bodily substance from that person will provide evidence about whether the bodily substance referred to in (b) was from that person: *R v Mackey,* 2020 ONCA 466, at para 52

G. SEARCH WARRANT CHALLENGES - GAROFOLI APPLICATIONS

For a review of the principles and procedure to be applied on a Garofoli Application, see *R v Beauchamp*, 2015 ONCA 260 and *R v Crevier*, 2015 ONCA 619

i. THE ITO - REASONABLE GROUNDS TO BELIEVE

The ITO must contain reasonable grounds to believe that there is evidence respecting the commission of an offence in the location to be searched. "Reasonable grounds to believe" is constitutionally defined as credibly-based probability. This standard exceeds suspicion, but falls short of a balance of probabilities: *R v Herta,* 2018 ONCA 927, at para 20; *R v Kalonji,* 2022 ONCA 415, at para 29

The reference in a search warrant to the "suspected commission or intended commission of an offence" exceeds the statutory power of search authorized by s.487 of the *Criminal Code,* which is predicated upon reasonable and probable grounds. This is known as the "*Branton error*": *R v Neill,* 2023 ONCA 765, at para11; see paras 12-16

Reasonable inferences based on common sense can be relied upon in the absence of direct evidence. For example, in *Kalonji,* the Court of Appeal found that the existence of sufficient grounds to establish that the appellant had possessed a firearm, and that a certain address was one of his residences, was sufficient to establish that there were reasonable and probable grounds to believe that a search of that residence would afford evidence of the firearms: *R v Kalonji ,* 2022 ONCA 415, at paras 25-27, 30

Reasonable grounds can be based on a reasonable belief that certain facts exist even if it turns out that the belief is mistaken: *R v Robinson,* 2016 ONCA 402 at para 40. But, for example, see *R v Brown, 2012 ONCA 225,* in which two officers

with the same information arrived at different conclusions as to the existence of reasonable grounds

The ITO must contain information about the informer's source of knowledge regarding the presence of criminal activity and where it will be located; otherwise, there is nothing in the information to compel a belief that the criminality would be in the location when the search was conducted. Failure to specify this information constitutes a serious and significant deficiency in the ITO. *R v Szilagyi,* 2018 ONCA 695 at para 47-48

It is an error to hold that, in effect, direct evidence was required to establish a link between the Vaughan address and drugs that would be evidence of the commission of offences. Reasonable inferences may be relied on in the absence of direct evidence. The question was whether the ITO set out facts sufficient to allow the issuing judge to reasonably draw the inference that evidence of drug trafficking would be found at that location: *R v Ifesimeshone,* 2024 ONCA 834, at para 35

An officer must have had subjective knowledge of information at the time they formed their belief for that information to be consulted by a court in assessing the reasonableness of the officer's subjective belief. The issue is whether the officer's belief was reasonable, and this is determined by asking whether a reasonable person standing in the shoes of the police officer", or "placed in the position of the officer" would have believed that reasonable ground existed: *R v Ilia,* 2023 ONCA 75, at para 9

Reasonably reliable hearsay evidence can be considered in forming reasonable and probable grounds. Reasonable grounds can also co-exist with exculpatory possibilities: *R v Ilia,* 2023 ONCA 75, at para 17

In *Gomboc,* the Court of Appeal held that, the fact that an accused person is seen leaving their residence and then engaging in drug transactions gives rise to a reasonable inference that drugs can be loated at their residence: 2022 ONCA 885, at para 28

ii. THE ITO – OBLIGATION TO BE FULL, FAIR, AND FRANK

The obligation of full, fair and frank disclosure is not a licence to include irrelevant information; invite propensity reasoning; contest factual determinations explicit or

implicit in decisions of courts of competent jurisdiction; or offer opinions unsupported by essential factual underpinnings: *R v Tran,* 2019 ONCA 1011, at para 18

The facts underlying charges which do not result in convictions, including the facts underlying stayed charges, in some circumstances, may be validly considered as a basis for search warrants, though in other cases will be irrelevant and improper: *R v Ribble,* 2021 ONCA 897, at para 9

The affiant's failure to specify that, although the target had been subject to many charges, he had not been convicted of any offences, is a "serious deficiency": *R v Paryniuk,* 2017 ONCA 87, at para 78

iii. The ITO – Recency of Information

There is no rule as to how recent information has to be in order to be relevant: *R v James,* 2019 ONCA 288, at para 55; upheld at 2019 SCC 52

Merely because information is "dated" does not mean it is "stale". However, the length of time that has passed is to be taken into account as one factor in a reasonable-grounds determination: *R v Fuller,* 2021 ONCA 411, at para 9

Factors such as a pattern of drug dealing, and a criminal record demonstrated prior involvement in the drug trade is a relevant factor to consider in determining whether there are reasonable and probable grounds for a search: *R v James,* 2019 ONCA 288, at paras 56-7; upheld at 2019 SCC 52

iv. The ITO - Manner of Execution

Police choices about equipment and the manner of execution of a search need not be included in the ITO. These decisions are better considered as part of the inquiry into whether the search was conducted in a reasonable manner. This is supported by the fact that the statutory form used for an ITO, Form 1, makes no reference to the manner of execution: *R v Rutledge,* 2017 ONCA 635 at para 22

v. The ITO – Electronic Devices

It cannot be assumed that a justice who has authorized the search of a place has taken into account the privacy interests that might be compromised by the search of any computers or mobile communication devices that might be found within that place: *Nero* at para 157

A computer search requires specific pre-authorization. If police intend to search computers or mobile communication devices found within a place with respect to which they seek a warrant, they must satisfy the authorizing justice, by information on oath, that they have reasonable grounds to believe that any computer or other mobile communication device they discover will contain the things for which they are looking: Nero at para 158-159

Where, however, an ITO establishes sufficient grounds to believe that any electronic devices in the residence will yield evidence of an offence, and the warrant authorizes a search of those devices, police are justified in searching any such devices, notwithstanding that they belong to persons other than the target of the warrant. The ITO does not need to mention the device owner or identify him/her specifically as a target for the warrant to authorize a search of their device (though it should do so if such evidence is available): *R v McNeil,* 2020 ONCA 313

A broad search of multiple devices or large amounts of data unrelated to the specific investigation may nonetheless violate s.8 of the *Charter*: *R v John,* 2018 ONCA 702 at para 25 (citations omitted).

a) Child Pornography cases

In a search warrant targeting child pornography on a computer, it may be reasonable for police to look at all image and video files. In a case where there are multiple users of the computer, it may also reasonable be reasonable for police to examine the internet search history and the dates and times of access to the accused's internet accounts to identify the person searching for child pornography. The search for the identity of the person searching for child pornography may also justify the police looking at documents, banking records, and other programs or files: *R v John,* 2018 ONCA 702 at paras 21-22

There need not be prior evidence of concealment of incriminating evidence before police can look at all images and videos stored on a computer in this kind of investigation where some child pornography has been located on the computer on initial examination. Rather, a search of all images and videos is appropriate in an

investigation like this precisely to determine whether there is more child pornography on the computer. To limit police to searches by hash values, file names and download folders would be to provide a roadmap for concealment of files containing child pornography.

Nor is a search necessarily overbroad because it is not tailored to a date range in terms of the files searched, provided the police are looking for images and videos of child pornography and evidence that might show who was responsible for that content: *John* at paras 24-25

vi. The ITO – Confidential Informants

a) General Principles

In circumstances where confidential informant information is at issue, one must weigh whether the informant was credible, whether the information predicting the commission of a criminal offence was compelling, and whether the information was corroborated by police investigation. The totality of the circumstances must meet the standard of reasonableness: *R v Dhillion,* 2016 ONCA 308 at para 30

Weakness in one of the *Debot* criteria can be compensated for by strengths in the other areas: *R v Herta,* 2018 ONCA 927, at para 34

b) Debot Factor #1: Credibility

The ITO must indicate whether the Justice of the Peace was aware of any record for crimes of dishonesty or other offences relevant to credibility. It is insufficient to simply indicate, for example, that the informant was involved in the drug trade and expect the justice to infer criminal involvement that could undermine the informant's credibility. The purpose and effect of disclosing an informant's police involvement is to give the issuing justice a full picture of the credibility and reliability of the informant, particularly when the entire warrant is based on that person's information. It is not to say one thing but expect the justice to infer another.

An informant's credibility and reliability may not be enhanced simply because the ITO indicated that s/he had previously provided reliable information. However, in some cases, the inability to assess the credibility of the source may be compensated for by the quality of the information and corroborative evidence: *Szilagyi,* at paras 50-51, 69-70; see also para 60 and 61 referencing *R v Rocha,* 2012 ONCA 707

Factors tending to show that the credibility of the informant(s) is weak:

- Where the CI is untested.
- Where the CI is said to be reliable and accurate, but no support is given for this assessment.
- The lack of information about whether the CI has a criminal record - especially when s/he is described as being deeply entrenched in the criminal sub-culture: *Dhillion,* at para 31
- The lack of information about the duration of the relationship between the CI and the handler
- The lack of information about the past reliability of the CI's information
- The lack of information about the CI's motivation to give information: *R v Herta,* 2018 ONCA 927, at para 32

Factors tending to enhance credibility:

- The fact that the police know the informants and they are not anonymous tipsters.
- The fact that the informants are informed of the potential criminal consequences if they lied or embellished the information they provided: *Dhillion* at para 32;

Where the police rely on an untried informant, "the quality of the information and corroborative evidence may have to be such as to compensate for the inability to assess the credibility of the source": *Dhillion* at para 33 (citation to *Debot*); *Herta* at para 34, 39

There is no distinct category of scrutiny owed to "jailhouse informants" as opposed to other sorts of informants. The trigger for caution is not so much the label "jailhouse informant" as it is the extent to which these underlying sources of potential unreliability are present in a particular case: *R v Kerr,* 2022 ONCA 530, at para 12

The fact that the CI had a financial motivation to assist the police is a factor to consider; however, financial compensation is quite often provided to informants

and should not, in and of itself, render a source uncredible: *R v Jones,* 2023 ONCA 106, at para 16

c) Debot Factor #2: Compellability

Factors tending to show that the information is compelling:

- The information is fairly detailed and specific (e.g., it describes various personal characteristics of the respondent, the types of drugs being trafficked, where the transactions occurred, and how they were carried out, as well as the target's precise address).
- The fact that the CI knew the target personally (e.g., as a customer) and therefore had first-hand knowledge. This relationship helps to alleviate the concern that they were just perpetuating rumours or gossip: *Dhillion* at paras 34-35

Conclusory statements that do not provide a basis to assess their veracity and do not disclose the source of the information are not compelling: *R v Herta,* 2018 ONCA 927, at para 47

Biographical information, such as the target's age, phone number, addresses and vehicles, is not compelling, since it is largely publicly available: *R v Ifesimeshone,* 2024 ONCA 834, at para 23

While information that takes the form of bald conclusory statements or rumour or gossip is not compelling, an informer's personal, detailed and recent observations of drug trafficking may be considered compelling: *R v Ifesimeshone,* 2024 ONCA 834, at para 25

d) Debot Factor #3: Corroboration

Factors tending to support corroboration of the information:

- The consistency of information from several informants. This is distinguishable from circumstances in which there is only one anonymous or untried informant.
- Where police confirm the accuracy of specific information during their investigation (e.g., the target's name, the colour, make, and age of the his

vehicle; the target's ethnicity, address, his approximate age, his criminal record, and the criminal activity alleged).

Note, there is no need to confirm the very criminality of the information given by the tipster, but there must be more than corroboration of innocent or commonplace conduct when the police are relying on an untested informant. Corroboration must be such so as to remove the possibility of innocent coincidence: *Dhillion* at paras 39-44; *R v Herta,* 2018 ONCA 927, at para 38; *R v Jones,* 2023 ONCA 106, at para 20; see *R v Ifesimeshone,* 2024 ONCA 834, at para 30

In *Herta,* the Court of Appeal held that there was insufficient corroborative evidence to warrant the belief that the target was in possession of the gun. This was in light of the fact that the corroborative facts related to information that many people would know, such as the target's telephone number, the type of car he was driving and where he was hanging out: 2018 ONCA 927, at para 40

a) Appointing Amicus

The trial judge has discretion to appoint amicus to assist in the consideration of issues relevant to confidential informants in "particularly difficult cases". But the appointment of amicus on a step six procedure is the exception rather than the rule. It is incumbent on the defence to demonstrate why the appointment of amicus is necessary in a particular case and to set out a proposed procedure for the use of amicus that protects the confidentiality of the CI's identity: *R v Shivrattan*, 2017 ONCA 23, at paras. 65-66; *R v Thompson*, 2017 ONCA 204 at para 17.

There are many sensitive issues that would have to be resolved before the trial judge could appoint amicus on a "Step Six" procedure," including the relationship between amicus and defence counsel. Steps would have to be taken to ensure that amicus did not inadvertently disclose anything that would reveal the identity of the CI: *Shivrattan* at para 67; *Thompson* at para 21.

b) Piercing Informer Privilege

Informer privilege is a fixed rule of law. In order to overcome that privilege, an accused person must persuade a judge that their innocence is at stake unless the

privilege is set aside: *R v Durham Regional Crime Stoppers Inc.*, 2017 SCC 45 at para 11

vii. The ITO - Amplification

When a reviewing judge determines whether the warrant could have been issued, s/he may be permitted to rely on "amplification evidence", which is additional evidence presented at the voir dire.

The limitations to the use of amplification evidence include that: 1) it is not a means for the police to adduce additional information so as to retroactively authorize a search that was not initially supported by reasonable and probable grounds; 2) It cannot be used to provide evidence that was not known to the police at the time the ITO was sworn; 3) it is to be used only to correct "some minor, technical error in the drafting of the affidavit material" so as not to "put form above substance in situations where the police had the requisite reasonable and probable grounds and had demonstrated investigative necessity but had, in good faith, made" such errors: *R v Ting,* 2016 ONCA 57 at paras 63-64, 70

Amplification evidence may be used to correct good faith errors of the police in preparing the ITO, as long as it was available to the affiant at the time of the warrant application: *R v Lowe,* 2018 ONCA 110 at para 38; *R v Ilia,* 2023 ONCA 75, at para 9

While amplification does extend to failures to communicate what was known by the affiant as a result of want of drafting skill, it is not an opportunity during the search warrant review for the Crown to retroactively add information that it could have included in support of the warrant but failed to do so. To permit this would turn the authorization process into a sham: *R v Griffith,* 2025 ONCA 322, at paras 18-19

In *Feizi,* the Court held that amplification was available to explain why the affiant substituted one address for another. In that case, police were provided with a certain address of interest. However, based on investigation, they came to believe that a different address should be searched. The affiant merely stated his conclusion that police were looking to search the latter address. The court found this to be a good faith, technical, and minor error: 2022 ONCA 517, at para 10

Deference is afforded to a trial judge's characterization of an error unless it is unreasonable: *R v Feizi*, 2022 ONCA 517, at para 12

A motion judge has a broad discretion. In exercising that discretion, the nature of the defect in the affidavit is important. If the affiant acted honestly and in good faith in preparing and presenting the affidavit, amplification or excision of parts of the affidavit must be considered by the motion judge: *R v White,* 2022 ONCA 538, at para 18

viii. THE ITO – EXCISION

Unlawfully obtained information must be excised from the information to obtain the search warrant: see *R v Barton,* 2021 ONCA 451, at para 7; *R v Hibbert,* 2019 ONSC 3219, at para 14; *R v SS,* 2023 ONCA 130, at para 79

A reviewing judge has no jurisdiction to excise correct information from an affidavit: *R v Min Mac,* 2016 ONCA 379 at para 59

The court may excise information obtained through the violation of third party *Charter* rights. Excision is not a 24(2) remedy, which requires that the information be obtained in violation of own's own *Charter* rights: *R v. Hamid, Leyva and Andrews*, 2019 ONSC 5622, at para. 45s.

Lost evidence that arises to a constitutional infringement is not evidence that is "obtained in a manner" that infringed the Charter. It is therefore not available for excision from an ITO: *R v St. Claire,* 2023 ONCA 266, at para 21

ix. FACIAL VALIDITY OF WARRANT

In order to be facially valid, it is fundamental that a warrant contain an adequate description of: 1) the offence; 2) the place to be searched; and 3) the articles to be seized: *R v Ting,* 2016 ONCA 57 at para 50; *R v Saint,* 2017 ONCA 491

Where there are errors on the face of the ITO in connection with the jurat of the commissioner of oaths, including failure by the commissioner to sign the jurat and failure by the affiant to sign the affidavit, extrinsic evidence is admissible to

demonstrate that the ITO was in fact properly sworn: *R v Pulford,* 2024 ONCA 202, at para 21

a) The Place to be Searched

It is incumbent on police officers obtaining and executing a search warrant to be vigilant about the accuracy of the address to be searched, because the consequences of an error can be far-reaching. As a general matter, because of the importance of the accuracy of the address to the validity of the warrant, an error in the address should not be characterized as minor: *R v Pampena,* 2022 ONCA 668, at paras 28, 30

Without an adequate description of the place to be searched, a warrant is invalid because: 1) the issuing justice cannot be assured that s/he is not granting too broad an authorization, or an authorization without proper reason; 2) the police officers called on to execute the search warrant would not know the scope of their search powers; and 3) those subject to the warrant would be left in doubt as to whether there is valid authorization for those searching their premises: see *Ting; Saint* at para 7

Just what constitutes an adequate description will vary with the location to be searched and the circumstances of each case.

With respect to a multi-unit, multi-use building, as seen in this case, the description must adequately differentiate the units within the building: *R v Ting,* 2016 ONCA 57 at paras 48-51

It is not enough for the ITO to accurately describe the premises to be searched. For a search warrant to fulfill its functions, those who are relying on it – including police officers who are executing it and third parties whose cooperation is sought – must not be required to look past the warrant to the ITO: *R v Ting,* 2016 ONCA 57 at paras 59-60

The inadequacy of the warrant is not remedied by the fact that the police nonetheless executed the warrant at the correct residence, because in such circumstances they may be guided by their personal knowledge of the premises to be searched, not by the warrant itself: *R v Ting,* 2016 ONCA 57, at para 61

If police enter the wrong premises based on a facially invalid ITO, and then promptly leave, the initial entry does not preclude obtaining a second warrant properly identifying the premise to be searched. If, however, they remain and search the premises and remain present until a second warrant is obtained, the second warrant is invalid: *R v Ting,* 2016 ONCA 57 at paras 54-55

Where a warrant is issued for the wrong address, and the police nonetheless enter the intended address, the police conduct a warrantless entry of a residence, which is a serious breach: *R v Pampena,* 2022 ONCA 668, at para 25

b) The date and time of execution of a warrant

A non-expiring warrant would undermine the purposes for the warrant requirement in the first place: facilitating meaningful judicial pre-authorization; directing and limiting the police in the execution of the search; and allowing occupants to understand the scope of their obligation to cooperate with the search.

There is an implied requirement that warrants be executed within a reasonable time of being issued. Warrants that are not executed within a reasonable time, whether because of delayed execution or because an unreasonable time frame is expressly authorized by the warrant, have long attracted judicial disapprobation: *R v Saint,* 2017 ONCA 491 at para 9

Where, however, the Information to Obtain requested a warrant to permit police to enter the residence on a specific day, and the warrant was on that day, and no other date appears on the warrant, it is implicit that the warrant that was sought was intended to be executed on the day it was issued. In such a circumstance, the date of issuance stated on the warrant is also the date for execution: an express specification of the date for execution would be superfluous: *Saint* at para 19

See, for example, *R v Malik*, 2002 BCSC 1731, where the Crown conceded that a warrant that similarly authorized a search “at any time” was open-ended and therefore invalid, and that a search conducted two days after the warrant was issued violated s. 8 of the Charter;

But see also *R v Shivrattan*, 2017 ONCA 23. In that case, and in the context of assessing the reasonableness of a nighttime search pursuant to a CDSA warrant, Doherty J.A. interpreted “at any time” in s. 11 of the CDSA as obviating the need

for special justification for execution after 9:00 p.m. for warrants issued under the *Criminal Code,* as required by s. 488 of the Criminal Code.

The prospective execution of a search, based on a future contingency, together with the simultaneous execution of related searches is not contemplated by a conventional search warrant: *R v Jodoin,* 2018 ONCA 638 at para 19

Where police seek to conduct a night search, s. 488 of the *Criminal Code* provides that the ITO is to include reasonable grounds for the search to be executed by night. A night search is only meant to be invoked exceptionally.

In *Lowe,* the Court of Appeal upheld the night entry that the police successfully requested in an ITO on the basis of an "imminence of a threat to public safety" arising from an alleged firearm in the residence: *R v Lowe,* 2018 ONCA 110 at paras 64-67

x. CROSS EXAMINATION OF AFFIANT

a) Standard of Review:

Absent error in law, a failure to consider relevant evidence, a material misapprehension of evidence, or an unreasonable factual finding, the appellate court must defer to the trial judge's assessment of the effect of the cross-examination on the sustainability of the authorization: R v Hall, 2016 ONCA 013at para 52-53

b) General Principles

The cross-examination of the affiant may be intended to show either that: 1) there were misleading facts or omissions in the affidavit, which should be excised or amplified; OR 2) the informant was not credible or reliable, therefore requiring that all of the information s/he provided must be disregarded: *R v Hall*, 2016 ONCA 013 at paras 50-51. See example of intentional and grossly negligent police misconduct in drafting afidavit: *Hall* at paras 43, 65

Cross-examination of the affiant may occur where the accused shows that the proposed cross-examination will elicit testimony that tends to discredit the

existence of a pre-condition to the issuance of the warrant, as for example, reasonable and probable grounds: *Min Mac* at para 27

Where the affiant is unavailable to be produced for cross-examinations, the factual inferences that could realistically flow from the ordered cross-examination of the affiant should be drawn in favour of the accused, (and coincidentally, adversely to the Crown): *R v Gill,* 2024 ONSC 2089, at para 22

xi. Residual Discretion to Set Aside

A trial judge has residual discretion to set aside a search warrant, despite the presence of reasonable and probable grounds for its issuance, where the judge is satisfied that the conduct of the police has been subversive of the pre-authorization process leading to the issuance of the search authority. However, the threshold is high. Subversion requires an abuse of the pre-authorization process by non-disclosure or misleading disclosure or their like: *R v Paryniuk*, 2017 ONCA 87, at paras. 62-74.

xii. Judge-Shopping the Warrant

There is no bright-line rule prohibiting the police from making a second application for a warrant if the first application is rejected. The second judge considering whether to grant the search warrant is not sitting in appeal of the first judge's decision nor in review of that judge's decision by way of prerogative writ. It is a hearing *de novo*, not a review of the decision of the first justice of the peace. However, an initial denial doess play a role, and should be considered by the second application judge: *R v Bond,* 2021 ONCA 730, at paras 28-31

xiii. Notice Requirements to Recipient

A search warrant can include a statutorily-mandated requirement to inform the recipient of the existence and execution of the warrant within 180 days after the warrant's execution: *R v Coderre,* 2016 ONCA 276 at para 2

The requirement of after-the-fact notice casts a constitutionally important light back on the statutorily authorised intrusion because s. 8 protects an "ability to identify and challenge such invasions, and to seek a meaningful remedy."

The failure to abide by a statutorily-mandated requirement to provide notice fails to give effect to those protections and, therefore, infringes the Charter: *Coderre* at para 13

iv. EXCLUSION UNDER S.24(2)

Applying for and obtaining a search warrant from an independent judicial officer is the antithesis of willful disregard of Charter rights. However, where the ITO that formed the basis for the issuance of the warrant is found to be insufficient to support it, the proper approach to determine the seriousness of the *Charter* breach is to first consider whether the ITO was misleading. If it was, the seriousness will depend on whether the use of false or misleading information was intentional or inadvertent: *R v Szilagyi,* 2018 ONCA 695 at para 54

A section 8 breach will arise where significant redaction renders the ITO insufficient to support the issuance of an ITO. However, where the court, after being able to review and summarize the unredacted ITO, finds reasonable and probable grounds to support the issuance of the warrant, this will militate in favour of inclusion of the evidence because, in such cases, the *Charter* violation does not arise from police misconduct in preparing the ITO but only as a matter of law from the Crown's inability to disclose enough of the information in the ITO to demonstrate at the trial the reasonable and probable grounds that did exist: Szilagyi, at paras 66-67, citing *R v Learning* 2010 ONSC 3816

Even in the absence of false or deliberately misleading information, an ito that is deficient in its grounds can translate to a finding that the police did not act in good fait, and that the state misconduct was serious. For example, in Wise, the court relied on such a global deficiency in the ITO, in the context of further findings that: the breach was not simply the product of a drafting error or a decision made quickly in light of public safety issues, and that the ITO was poorly organized and strewn

with errors, and lacked evidence to support important facts: *R v Wise,* 2022 ONCA 586, at para 41

Where police misconduct lead to the obtaining of a search warrant, the fact that the issuing judge was told about the misconduct does not impact the seriousness of the breach under s.24(2). It is axiomatic that there be truthful disclosure in the ITO. Anything less would compound the police misconduct: *R v Strauss,* 2017 ONCA 628 at para 48

To rely on an after-the-fact acknowledgement of wrongdoing as a way to diminish the seriousness of a breach, and thereby achieve admission of the evidence, would give the police a licence to engage in misconduct and render the *Charter*'s protection meaningless: *Strauss* at para 50

xiv. Appellate Review of Search Warrant Challenges

The task for the reviewing judge is to determine whether on the supportive affidavit, as amplified by evidence adduced on the review, there was sufficient reliable evidence that might reasonably be believed on the basis of which the authorizing judge could have concluded that the probable cause requirement had been met: *R v Min Mac,* 2016 ONCA 379 at para 29; *R v Nero,* 2016 ONCA 160 at para 126

Reviewing justices must remain mindful of the fact that affiants need not state the obvious reasonable inferences that arise from information in an ITO. This is because, whether spelled out or not, it is open to issuing justices to take these inferences into account. When determining whether an authorization could have issued, reviewing justices must consider all of the information that was available to the issuing justice, as well as any reasonably available inferences that the issuing justice may have drawn from that information: *R v Hamouth,* 2023 ONCA 518, at paras 11

The standard of review on appeal is one of deference to findings of fact made by the motions judge. Absent a demonstrated misapprehension of the evidence, a failure to consider relevant evidence, a consideration of irrelevant evidence, an unreasonable finding or an error of law in the application of the governing

principles, the appellate court will not interfere with the decision of the motions judge: *Nero* at para 124; *R v Wise,* 2022 ONCA 586, at para 38

The court must also defer to the findings of fact made by the reviewing judge in his or her assessment of the record, as amplified on review, as well as to his or her disposition of the s. 8 Charter challenge: *R v Min Mac,* 2016 ONCA 379 at para 34

Even the trial judge applied the wrong test, or failed to provide legally sufficient reasons related to the test, this does not mean that his conclusion was not the correct one. The appellate court is entitled to consider the record and decide whether there was a basis on which the search warrant could issue. There may, however, be cases where the factual circumstances would require a new trial, for example, where there are factual disputes or credibility issues: *R v Shedden,* 2022 ONCA 25, at para 9

H. SAFETY SEARCHES

A trial judge's finding that the police officer was justified to conduct a safety search is a question of mixed fact and law. The trial judge is owed deference in relation to their factual findings unless the appellant can show a palpable and overriding error. Whether or not those findings meet the relevant standard for a safety search is a question of law, reviewable on a correctness standard: *R v Buakasa,* 2023 ONCA 383, at para 30

It is only when police officers have reasonable grounds to believe that there is an imminent threat to their safety that it will be reasonably necessary to conduct such a search: *R v Jupiter,* 2016 ONCA 114 at para 1

What is required is the existence of circumstances establishing the necessity of safety searches, reasonably and objectively considered, to address an imminent threat to the safety of the public or the police. Given the high privacy interests at stake in such searches, the search will be authorized by law only if the police officer believes on reasonable grounds that his or her safety is at stake and that, as a result, it is necessary to conduct a search: *R v Buakasa,* 2023 ONCA 383, at para 34

In *Buakasa,* the Court of Appeal noted a divide in the jurisprudence questioning whether there are two different standards for a safety search – reasonable

suspicion of a risk of risk to safety, which applies when the safety risk is conducted incident to an investigative detention or arrest; and a reasonable belief in imminent harm, which applies outside of circumstances of a detention or arrest.

Where officers decide to conduct a "safety" search before they arrive at a place and regardless of what happens when they get there, that predetermination by the officers, while not conclusive as to the propriety of the safety search, goes a long way in support of a conclusion that the safety search cannot be justified on the basis of a reasonable apprehension of imminent harm: *Jupiter* at para 2

A safety search may in some circumstances extend beyond a pat-down search of the appellant's person to include a vehicle or a bag: *R v Buakasa,* 2023 ONCA 383, at para 32

For an extensive review of general principles governing the authority for police to conduct a safety search incidental to an investigative detention, particularly pursuant to a 911 call, see *R v Lee,* 2017 ONCA 654 at paras 27-43. See especially the concurring reasons of Pardu J beginning at para 72.

I. SEARCH INCIDENT TO DETENTION AND ARREST

i. Search Incident to Detention versus Arrest

In order to search incident to an investigative detention, the police must have reasonable grounds to believe that their safety is at risk. However, reasonable grounds are not necessary to conduct a search incident to arrest. A person who is under lawful arrest has a lower reasonable expectation of privacy. The only question is whether the objective of the search is connected to the arrest and whether it is reasonable in the circumstances: *R v Stairs,* 2020 ONCA 678, at paras 54-56; see also dissenting reasons at paras 76-79

ii. General Principles

A search incident to arrest is only valid if the arrest itself is lawful.

Valid police purposes associated with searches incidental to arrest include police safety, public safety, securing evidence, and discovering evidence

The search must be truly incidental to the arrest. There must be some reasonable basis for the search, for example, to ensure the safety of the public and police; to protect evidence from destruction; or to discover evidence. To be truly incidental to the arrest means that the police must be attempting to achieve some valid purpose connected to the arrest. This involves both subjective and objective elements. The police must have one of the purposes for a valid search incident to arrest in mind when conducting the search. And the searching officer's belief that this purpose will be served by the search must be reasonable: *R v Gonzales,* 2017 ONCA 543 at para 98; *R v Santana,* 2020 ONCA 365, at para 28

The subjective component of the relevant legal standards plays an important role in ensuring that the police act for legitimate purposes and turn their minds to the legal authority they possess: *R. v. Lai*, 2019 ONCA 420, at paras. 29-30; *R v Dudhi,* 2019 ONCA 665, at para 64

Where the searching officer is acting as agent for another officer – e.g., the arresting officer – it is the subjective grounds of the principal officer, not the agent, that matters: *R v Francis,* 2022 ONCA 729, at paras 36-38

Where the justification for a search incident to arrest is to find evidence, there must be some reasonable prospect of securing evidence of the offence for which the arrest has been made. What matters is that there be a link between the location and purpose of the search and the grounds for the arrest: A search incident to arrest may include a search of an automobile of which the arrested person is in possession, but the scope of that search will depend on several factors: *Gonzales* at para 99 *R v Fearon*, 2017 SCC 77 at paras. 22, 25

For analysis on warrantless search of camera pen and admissibility of the evidence, see *R v Jarvis,* 2017 ONCA 778

iii. Reasonableness of search

In order to be valid, a search incident to arrest must be conducted reasonably. One aspect of reasonableness is necessity to search – which should be considered under the third branch of the test – i.e., whether the search is done for the purpose of discovering evidence that may be useful at trial.

An example of this arose in the case of *Sureskumar*. In that case, the Court of Appeal held that the appellant's s.8 *Charter* rights were violated when the officer searched his vehicle to obtain identification. Although the officer was genuinely attempting to confirm the appellant's identity, the search was not necessary. The court reasoned:

> With respect, the trial judge erred in failing to analyze why a search that she found was one of many avenues to confirm identity was reasonable in the circumstances. Had she done so, it would have been clear that there were multiple equally convenient and expeditious means to obtain confirmation of identity. For example, the arresting officer could have confirmed the appellant's identity by speaking with bank employees, including the bank investigator who was in the branch at the time of the arrest. I am also comfortable taking judicial notice of the fact that the arresting officer had an onboard computer in her police vehicle that would have provided her access to the driver's licence database.

R v Sureskumar, 2023 ONCA 705, at para 18; see also paras 15-19

iv. Search Incident to Arrest in a Home

The basic common law standard for search incident to applies when the police search an area of the arrested person's home that is within that person's physical control. The police may search a lawfully arrested person and seize anything in their possession or the surrounding area of the arrest to guarantee the safety of the police and the arrested person, prevent the person's escape, or provide evidence against them.

However, where the area searched in the arrested person's home is outside that person's physical control at the time of the arrest — but the area is sufficiently proximate to the arrest — the police may search incident to arrest if two conditions are met. First, police must have reason to suspect that there is a safety risk to the police, the arrested person, or the public which would be addressed by a search.

Relevant considerations include (a) the need for a search; (b) the nature of the apprehended risk; (c) the potential consequences of not taking protective measures; (d) the availability of alternative measures; and (e) the likelihood that

the contemplated risk actually exists. The reviewing judge must be alive to the volatility and uncertainty that police officers face — the police must expect the unexpected.

Second, the police must carefully tailor their searches incident to arrest in a home to ensure that they respect the heightened privacy interests implicated. The search incident to arrest power only permits police to search the surrounding area of the arrest. The nature of the search must be tailored to its specific purpose, the circumstances of the arrest, and the nature of the offence. The search should be no more intrusive than is necessary to resolve the police's reasonable suspicion.

The key question in determining whether an area is sufficiently proximate to the arrest is whether there is a link between the location and purpose of the search and the grounds for the arrest. The inquiry is highly contextual; the determination must be made using a purposive approach to ensure that the police can adequately respond to the wide variety of factual situations that may arise. Depending on the circumstances, the surrounding area may be wider or narrower: *R v Stairs,* 2022 SCC 11

v. Search Incident to Arrest of Motor Vehicle

In *Stonefish,* the Court of Appeal held that it was reasonable to search the trunk incident to an arrest of simple possession of marijuana in a grinder in the car: "The fact that there was a small amount of marijuana in the cup holder led quite naturally to a search for more marijuana elsewhere in the car:" 2019 ONCA 914

There are circumstances when the police arrest a person in a vehicle in which the police are authorized, indeed required, to take control of, and responsibility for the vehicle and its contents. In those circumstances, the police are also sometimes authorized to itemize and secure the contents of the vehicle: *R v Santana,* 2020 ONCA 365, at para 32

In circumstances where police arrest a person inside their motor vehicle for possession of drugs, they are entitled to search the car and its compartments incident to arrest. This includes the right to break open and search a safe inside the car; *R v Smith,* 2022 ONCA 439

vi. Cellphones

Excerpts from R v Tsekouros, 2017 ONCA 290 at paras 84-94

A cellphone may be searched incident to arrest, provided what is searched and how the search is conducted are strictly incidental to the arrest and the police keep detailed notes of what has been searched and why: *R v Fearon*, 2017 SCC 77 at para. 4. The search must be truly incidental to the arrest, that is to say, exercised in the pursuit of a valid purpose related to the proper administration of justice: *Fearon*, at paras. 16 and 21.

The scope of the search of a cellphone or similar device incident to arrest must be tailored to the purpose for which it may lawfully be conducted. Not only the nature, but also the extent of the search performed on the cellphone or similar device must be truly incidental to the particular arrest for the particular offence. As a general rule, therefore, only recently sent or drafted emails, texts, photos and the call log may be examined: *Fearon*, at para. 76.

The searches must be done promptly to effectively serve their purpose, such as the discovery of evidence: *Fearon*, at para. 75. However, cellphone searches incident to arrest are not routinely permitted simply for the purpose of discovering additional evidence. A cellphone or similar device search incident to arrest for the purpose of discovering evidence is only a valid law enforcement objective when the investigation will be stymied or significantly hampered without the ability to search the device incident to arrest. Investigators must be able to explain why it was not practical, in all the circumstances of the investigation, to postpone the search until they could obtain a warrant: *Fearon*, at para. 80.

Officers executing the search must make detailed notes of what they have examined on the device and how it was searched. The applications searched, the extent and time of the search. Its purpose and duration. See, *Fearon*, at para. 82.

In *Balendra,* the Court of Appeal held that the strict test of "truly incidental to arrest" laid out in *Fearon* applied to the search of a USB key found in the appellant's pocket incidental to his arrest: 2019 ONCA 68, at paras 44-48

J. STRIP SEARCHES

A strip search is defined as "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: *R v Pilon,* 2018 ONCA 959, at paras 13, 28

The common law search incident to arrest power includes the authority to conduct a strip search. A strip search must be related to the reasons for the arrest itself. For example, where the arrest is for an offence involving possession of contraband and the purpose of the search is to discover contraband secreted on the arrestee's person: *R v Gonzales,* 2017 ONCA 543

Where a strip search is conducted as an incident to a person's lawful arrest, there must be reasonable and probable grounds justifying the strip search, in addition to reasonable and probable grounds justifying the arrest. In *Ali,* the SCC held that these grounds are met for the strip search where there is some evidence suggesting the possibility of concealment of weapons or other evidence related to the reason for the arrest: *R v Ali,* 2022 SCC 1, at para 2

Strip searches must not be carried out as a matter of routine, an inevitable consequence of every arrest. In addition to the reasonable grounds which must underpin the arrest for it to be lawful, additional reasonable and probable grounds must also justify the strip search. The mere *possibility* of an individual concealing evidence is not sufficient to justify a strip search to locate that evidence: *R v Gonzales,* 2017 ONCA 543 at paras 135-139; *Pilon* at paras 15, 16

An arrested person's non-cooperation and resistance does not necessarily entitle the police to engage in behaviour that disregards or compromises his physical and psychological integrity and safety: *Pilon* at para 16

Strip searches should be conducted at a police station unless there are exigent circumstances requiring that the detainee be searched prior to being transported to a police station: *Pilon* at para 17

The following guidelines provide a framework for 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? : *Pilon* at para 19

In *Pilon,* the Court of Appeal accepted that the jurisprudence has thus far only recognized safety concerns as justifying a field strip search on the basis of exigent circumstances. However, the court left open the possibility that very serious and immediate concerns about the preservation of evidence may create an urgent and necessary need to conduct a strip search in the field: paras 26-27

In *Byfield,* the Ontario Court of Appeal rejected the submission that the strip search should have waited until the Appellant arrived at the police station, which was only four minutes away from the location of the arrest and search. The court held that "The evidence demonstrates that the searching officer's safety concerns were real and that it was appropriate to conduct a second pat down search": *R v Byfield,* 2020 ONCA 515, at para 15

In *Black,* the Ontario Court of Appeal held that a strip search involving an officer of the opposite sex was justified due to the exigent circumstances of safety risks to the officers and the appellant: 2022 ONCA 628

In *Francis,* the Court of Appeal held that the discovery of a significant quantity of drugs and a loaded handgun in the appellant's car created a lawful basis for the police to strip search him for weapons or evidence: *R v Francis,* 2022 ONCA 729, at para 46

i. Custodial Strip Searches

A custodial strip search is not limited to search for weapons or other evidence related to the offence. Rather, it is animated by concerns related to the safety and well-being of the prison population. Where individuals are entering into a prison environment, there is a greater need to ensure that they are not concealing weapons or illegal drugs on their person prior to their entry. This risk can arise from any prisoner, regardless of why they were arrested.

Where, given the nature of the charges, it is clear the accused would be held in custody until his show-cause hearing, a custodial strip search is appropriate. Further, where the police discover a gun, it would be dangerous to allow the accused to enter the prison population without a search of his person: *R v Francis,* 2022 ONCA 729, at paras 48-51

In *Gerson-Foster,* the Court of Appeal suggested that, even if a strip search is otherwise appropriate, a strip search should not be conducted until it is assured that an accused would be mingling with other prisoners. The Court further suggested that custodial searches may be justified for any prisoner, because of the great need to ensure that individuals entering the prison population do not possess concealed weapons or illegal drugs on their person: *R v Gerson-Foster,* 2019 ONCA 405, at paras 104, 109

K. PLAIN VIEW DOCTRINE

The plain view doctrine is a seizure doctrine, not a search doctrine. There are four criteria to be applied in determining whether the doctrine is operative:

i. whether the police were lawfully positioned relative to where the item(s) were found;
ii. whether the nature of the evidence was immediately apparent as constituting an offence
iii. whether it was discovered inadvertently; and
iv. whether the item(s) were visible without any exploratory search: *R v Stairs,* 2020 ONCA 678, at para 62

L. EXIGENT CIRCUMSTANCES

i. The Right to Privacy in One's Home

The s. 8 right to be secure against unreasonable searches protects a person's expectation of privacy from state intrusion. Nowhere is that expectation of privacy higher than in one's home. To enter a home, police ordinarily need previous authorization: a warrant. Warrantless entries of a home are presumed to be unreasonable and in breach of s. 8. However, statutory and common law exceptions exist: *R v Davidson,* 2017 ONCA 257 at paras 2-21

Police are entitled to enter a home in response to a 911 call to determine whether the caller is in need of assistance; in doing so, they are not trespassing: *R v Zarama*, 2015 ONCA 860

ii. Under the Controlled Drugs and Substances Act

Exigent circumstances under s. 11(7) of the CDSA exist if: 1) the police have grounds to obtain a search warrant under s. 11 of the CDSA (the probable cause requirement); and 2) the police believe, based on reasonable grounds, that there is imminent danger that evidence located in the premises will be destroyed or lost,

or that officer or public safety will be jeopardized if the police do not enter and secure the premises without delay (the urgency requirement): *R v Phoummasak,* 2016 ONCA 46 at para 12: *R v Paterson,* 2017 SCC 17 at para 37

The first requirement is determined by asking whether the police had adequate grounds to obtain a warrant to search the location they entered without a warrant. That assessment is made based on the facts the police knew or reasonably should have known when the entry was made: *R v Hobeika,* 2020 ONCA 750, at para 36

The existence of what would otherwise amount to exigent circumstances will not justify a warrantless entry if those circumstances were the consequences of a pre-planned police operation. The police cannot circumvent the warrant requirement by devising and implementing a strategy which creates an imminent danger evidence will be destroyed, and then rely on that imminent danger as justification for acting without a warrant. If the police strategy creates the supposed urgency, the circumstances are not "exigent", but are anticipated, if not planned for, by the police: *R v Hobeika,* 2020 ONCA 750, at para 49

Evidence the police could have proceeded in a different manner may have evidentiary value when assessing whether the alleged exigent circumstances were created by the police. The availability of a different strategy does not, however, mean that the police created the alleged urgency. The question is not could the police reasonably have done something else, but whether the police operational plan would, in its implementation, create the very circumstances said to justify acting without a warrant: *R v Hobeika,* 2020 ONCA 750, at para 750

Evidence that the police had grounds to obtain a search warrant, but instead proceeded with other investigative measures, can in some situations afford evidence that the police set out to create exigent circumstances to justify entry into a premise without a warrant: *R v Phoummasak,* 2016 ONCA 46 at paras 14-16

iii. Under the Child and Family Services Act

Under s. 40(2), a child protection worker may obtain a warrant to seize a child from a home if reasonable and probable grounds exist to show the child is in need of protection and a less restrictive course of action will not protect the child adequately. Section 40(7) authorizes a child protection worker to enter a home without a warrant to bring a child to a place of safety, but only if two conditions are

met. The child protection worker must believe on reasonable and probable grounds that:

- The child is in need of protection; and
- There would be a substantial risk to the child's health or safety during the time needed to obtain a warrant or to bring the matter on for a hearing.

Section 40(11) supplements s. 40(7) and provides that if necessary the child protection worker can enter a home by force to search for and remove a child. Section 40(13) provides that a police officer has the same powers as does a child protection worker under s. 40(2), (7) and (11): *R v Davidson,* 2017 ONCA 257 at paras 38-42

iv. Under the Criminal Code

Under s. 529.3 of the *Criminal Code*, the police may enter a home without a warrant to arrest or apprehend a person if the conditions for obtaining a warrant exist but "exigent circumstances" – that is, urgent or pressing circumstances – make it impractical to obtain one. The Code includes among exigent circumstances those where the police have reasonable grounds to suspect entry into the home is necessary to protect a person's imminent harm or death, or to prevent the imminent loss or destruction of evidence: *R v Davidson,* 2017 ONCA 257 at para 21

v. At Common Law

The police have a common law duty to protect a person's life or safety and that duty may, depending on the circumstances, justify a forced, warrantless entry into a home. For example, when the police receive a 911 call they have authority to investigate the call, which can include a warrantless entry into a home to determine whether the caller is in need of help. The police must, however, reasonably believe that the life or safety of a person inside the home is in danger. And once inside the home, their authority is limited to ascertaining the reason for the call and providing any needed assistance. They do not have any further authority to search the home

or intrude on a resident's privacy or property: *R v Davidson,* 2017 ONCA 257 at paras 22-27

In *Davidson,* the Court of Appeal found that the police warrantless entry into the home was not justified by exigent circumstances. The entry was therefore unlawful and the evidence discovered as a result of that entry, drugs, was excluded.

i. Pinging a Phone

Where exigent circumstances exist, the police can use a cellular telephone ping to locate a suspect. These circumstances will arise where there is an imminent threat to the police or public safety, or the risk of the imminent loss or destruction of evidence: *R v Atwima,* 2022 ONCA 268, at para 139

M. MOTOR VEHICLE SEARCHES

Where the police conduct a valid HTA stop and thereafter legitimately form reasonable and probable grounds to arrest and search a vehicle, the fact that the police had a dual HTA/criminal purpose at the very outset of the stop does not taint the lawfulness of the initial stop and detention: *R v Shipley,* 2015 ONCA 914, at para 6

The police decision to call a tow truck to remove a vehicle does not justify an inventory search in every case: *R v Harflett,* 2016 ONCA 248 at para 29-30

ii. Liquor License Act Searches

Where an officer has reasonable grounds to believe there was unlawfully kept alcohol in the vehicle, they may search under s. 32(5) of the Liquor License Act. In such circumstances, the investigating officer does not need to have reasonable and probable grounds for each specific location searched: *R v Guerrier,* 2024 ONCA 838, at para 15

The s. 32(2)(b) exception requires that open alcohol not be readily available to *any* person in the vehicle. Where there are other occupants of the vehicle,

including in the backseat, the entirety of the passenger area can be said to be within reach of an occupant. This would entitle an officer to search the entire cabin of the vehicle, including the console and the back seat area.

Section 32 of the LLA governs the operation of a motor vehicle, and proscribes anyone from driving a motor vehicle carrying alcohol without a licence or permit to do so. It provides two exceptions. One is if the alcohol is "in a container that is unopened and the seal unbroken". The other is if the alcohol "is packed in baggage that is fastened closed or is not otherwise readily available to any person in the vehicle".

The phrase "fastened closed" means that the alcohol contained in the baggage must be closed in a manner that results in it being not readily available. For example, open alcohol placed in a gym bag that can be opened effortlessly by the passenger seated next to it by pulling a zipper is readily available, and so is not contained in baggage "fastened closed": *R v Gurrier,* 2024 ONCA 838, at paras 22-25

Further, the search power in s. 32(5) authorizes a search without a warrant where an officer has reasonable grounds to believe that alcohol is unlawfully kept in a motor vehicle. If there is an open bottle of alcohol contained in a bag in the vehicle, it would be unlawfully kept. The search of such a bag on would therefore be authorized by s. 32(5) regardless of whether the bag was zipped closed or not: *R v Gurrier,* 2024 ONCA 838, at para 27

N. BORDER-SEARCHES

Persons arriving at the border have a reduced expectation of privacy. Because of individuals' reduced expectation of privacy at the border, section 8 is not engaged by routine questioning and luggage searhes: *R v Johnson,* 2016 ONCA 31 at paras 16, 23

Section 8 is not engaged by a routine dog-sniff search at the border, which falls within the category of routine border-searches that attract no reasonable expectation of privacy: *R v Johnson,* 2016 ONCA 31at paras 22, 24-26. However, a dog-sniff search that is specifically targeted towards a suspect at the border is distinguishable and may engage s.8 of the Charter: *R v Johnson,* 2016 ONCA 31 at para 27

i. Manner of Execution of a Search

In an assessment of the manner in which a search has been executed, a reviewing court balances the rights of suspects, on the one hand, with the requirements of safe and effective law enforcement, on the other.

Police decisions about the manner in which a search will be carried out fall to be adjudged by what was or should reasonably have been known to them at the time the search was conducted, not through the lens of how things turned out to be. Police are entitled to some latitude on how they decide to enter premises under a warrant. Omniscience is not a prerequisite for a search to be conducted in a reasonable manner: *R v Rutledge,* 2017 ONCA 635 at paras 25-26

O. BODILY SEARCHES

For an overview of the jurisprudence relating to police officers' seizure of blood samples taken at the hospital, see *R v Culotta,* 2018 ONCA 665, especially the dissenting opinion of Pardu J.A.

P. PRODUCTION ORDERS

i. Challenging a Production Order

a) The Test

The enabling warrant or order is presumed to be valid, but this presumption is rebuttable: *R v Nero,* 2016 ONCA 160 at para 68

b) Standing to Challenge

In *Jones,* 2017 SCC 60 the Supreme Court held that it is objectively reasonable for the sender of a text message to expect that a service provider will maintain privacy over the records of his or her text messages stored in its infrastructure, but

that the accused's rights were not violated because the text messages were legitimately seized by police pursuant to a production order.

c) General Principles

A production order should outline specifically the records being sought so that there is no confusion between what the police seek, and what the recipient provides: *R v Baskaran,* 2020 ONCA 25, at para 25

Like the authorizing justice, the reviewing judge is entitled to draw reasonable inferences from the contents of the ITO. That an item of evidence in the ITO may support more than one inference, or even a contrary inference to one supportive of a condition precedent, is of no moment: *Nero* at para 71

In *Baskaran,* for example, the Court of Appeal upheld the trial judge's common sense inference that cell phones were used in the commission of an offence: 2020 ONCA 25, at paras 14-15

Inaccuracies and omissions in the ITO are not, without more, fatal to the adequacy of the material to establish the necessary conditions precedent: *Nero* at para 72

The judge may consider documents relating to the order or warrant, any additional evidence adduced at the hearing and the submissions of counsel. The review requires a contextual analysis of the record: *Nero* at paras 67-68

Hearsay statements of a CI can provide reasonable and probable grounds to justify a production order: *Nero* at para 75

Corroboration is not required on every single detail, but the ITO should describe efforts to confirm the credibility and reliability of the source: *Nero* at para 76.

d) Appeal

On appeal, deference is owed to the findings of fact made by the reviewing judge in his assessment of the record, as well as to his disposition of the s. 8 *Charter* challenge. In the absence of an error of law, a misapprehension of material evidence or a failure to consider relevant evidence, the appellate court should not interfere: *Nero* at para 74

The test or standard a reviewing judge is to apply is whether the ITOs contained sufficient reliable evidence that might reasonably be believed on the basis of which the authorizing justice could have concluded that the conditions precedent required to be established had been met: *Nero* at paras 66, 69, 70

ii. TEXT MESSAGES

Production orders may authorize the seizure of historical text messages. A production order must not, however, authorize the production of any text messages that are either not yet in existence or are still capable of delivery (i.e., in the transmission process) at the time the order is issued. This should be clear from the face of the order. A production order should not be used to sidestep the more stringent Part VI authorization requirements for intercepts: *R v Jones,* 2017 SCC 60

Q. NUMBER PRODUCTION WARRANTS

The principles governing review of production orders are applicable to the review of number production warrants: *Nero* at para 69

R. Interceiption Of Private Communications: S.184.1

Section 184.1 permits the police to intercept private communications where, amongst other things, there is a risk of bodily harm and the interception is to prevent bodily harm. The phrase “bodily harm” is to be given a broad interpretation in this context, and *may* include psychological harm: see *R v Schlatter,* 2024 ONCA 56, at paras 36, 38

S. INTERCEPTION OF PRIVATE COMMUNICATIONS: S.186(1)

The acquisition of historical text messages does not constitute an intercept: *R v Jones,* 2016 ONCA 543 at paras 20-36

i. The Test

There are two conditions precedent required to grant an authorization to intercept private communications: 1) that it would be in the best interests of the administration of justice to do so ("probable cause"); and 2) that other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures ("investigative necessity"): *R v Nero,* 2016 ONCA 160 at para 114

The *Hunter*-compliant standard of reasonable grounds to believe that the interception of private communications "will assist" the investigation applies only to the authorization as a whole, and not on an individualized basis. Indeed, on this point. A lower standard (e.g., "may assist") can apply to particular people, places and devices named in the authorization – but this standard is *not* as low as suspicion: *R v Hafizi,* 2023 ONCA 639, at paras 7, 124

ii. The Probable Cause Requirement

The probable cause requirement demands reasonable and probable grounds to believe that: 1) a specified crime, and "offence" as defined in s. 183(1) of the Criminal Code, has been or is being committed; and 2) the interception of the private communication sought will afford evidence of the, or an, offence for which authorization is sought. The analysis must involve a common sense approach that takes into account that the subject matter of the investigation is future communications, not yet in existence: *Nero* at paras 115-116

The reasonable and probable grounds standard, also referred to as the probable cause requirement, requires more than suspicion, but less than proof on the balance of probabilities: *Beauchamp*, at paras. 90-92. There must be a "credibly-based probability" the interceptions will afford evidence of the named offences. The affidavit must be read as a whole and an issuing judge may draw common sense inferences from the information provided. The review of the validity of the authorization begins from the premise that the order was properly granted.

An interception "will afford evidence" if the communications to be intercepted shed light on the circumstances relating to the alleged offence, or the involvement of the named targets in the offence. The interceptions need not provide evidence that would be admissible at a trial: *R v Muddei,* 2021 ONCA 200, at paras 37-38

iii. The Investigative Necessity Requirement

The investigative necessity requirement does not dictate that interception of private communications is an investigative tool of last resort. This factor is met where, practically speaking, there is no other reasonable alternative method of investigation, in the circumstances of the particular criminal inquiry: *Nero* at paras 118-122

Whether investigative necessity is established is informed by the investigative objectives pursued by the police. The requirement may be met where an investigative objective is to obtain evidence confirmatory of information provided by a source whose testimony is not available through no fault of, or connivance by, the authorities, or is subject to special scrutiny. The requirement applies to the investigation as a whole, not to each individual target. The supportive affidavit need not demonstrate investigative necessity on an individual target basis

The police have more need for wiretapping where they are trying to move up the chain and catch the higher-ups in the operation. However, the fact that wiretap authorization might inevitably be required because of the nature of the activity being investigated does not excuse the police from the obligation to establish a firm evidentiary foundation for the authorization through the use of less intrusive methods of investigation: *R v Mac,* 2016 ONCA 379 at paras 39-40

The ITO must set out the basis for why investigative necessity is made out. The affiant's conclusion, without more, is insufficient.

Absent any attempts to bring an investigation in respect of a dated crime up-to-date before applying for an authorization, and absent urgency, investigative necessity will not be made out.

The investigative necessity requirement must speak to the status of the investigation at the time the application is made, not years earlier: *R v Muddei,* 2021 ONCA 200, at paras 68-70

See also *R v Beauchamp*, 2015 ONCA 260, at paras 115-129; *R v Telus,* 2013 SCC 15

See generally *R v Duarte*, [1990] 1 SCR 30, which deals with the simultaneous interception of voice communication by the state.

iv. "Known" Persons under s. 185(1)(e)

Section 185(1)(e) of the Criminal Code enacts the standard for including persons as "known" in the supportive affidavit. The standard is a modest one:

The threshold for describing a person as a "known" in the supportive affidavit is a modest one. Investigators need not have reasonable and probable grounds to believe that the person was involved in the commission of an offence being investigated. Provided investigators know the identity of the person and have reasonable and probable grounds to believe that the interception of that person's private communications may assist the investigation of an offence, that person is a "known" for the purposes of s. 185(1)(e): *R. v. Mahal*, 2012 ONCA 673 at para 71; *R v Burgess,* 2022 ONCA 577, at para 11

The police need not be aware of the person's proper or full name. In such cases the common practice would be to use various known descriptors and information in order to identify the known person as best as the police can: *R v Eckstein,* 2024 ONCA 665, at para 133

The authorizing judge must focus upon whether the affidavit provides a "sufficient link" between the named target and the offences charged or others involved in the investigation to conclude whether the interception of their communications could assist in the investigation of the offences: *R v Hafizi,* 2023 ONCA 639, at para 124

v. The Standard of Review

The standard of review on appeal is one of deference to findings of fact made by the motions judge. Absent a demonstrated misapprehension of the evidence, a failure to consider relevant evidence, a consideration of irrelevant evidence, an unreasonable finding or an error of law in the application of the governing principles, the appellate court will not interfere with the decision of the motions judge: *R v Nero, ,* 2016 ONCA 160 at para 124

While deference is owed to the trial judge's factual findings, her legal conclusions are reviewable on the correctness standard: *R v Balendra,* 2019 ONCA 68, at para 30

vi. Examples from the Case Law

In *Muddei,* the Ontario Court of Appeal found that the ITO could not support the wiretap authorization in connection with a dated offence. The court reasoned:

> It is certainly possible a person implicated in a serious crime committed years earlier may, if stimulated by police activity, communicate with others who were involved in, or had knowledge of, that crime. However, that possibility alone cannot be enough to warrant the granting of an authorization to intercept private communications. Were the possibility the police could stimulate communications about the offence enough, individuals who the police reasonably believed to have been involved in a crime years earlier, or perhaps to have been in communication with others involved in a crime, would remain subject to seriously intrusive state invasions of their privacy, as long as the investigation of the crime remained open and the police could think of something that might possibly stimulate communications relevant to the crime.

No one would quarrel with the statement that persons suspected of offences, who are prompted by police investigative techniques, sometimes communicate with others about those offences. Prompting can induce communications with other targets, or unknown third parties. However, it cannot be inferred that, because prompting sometimes works, there is a reasonable probability it will work in any given case. The availability of that inference must depend on the circumstances. Those circumstances include the details of the prompting plan: *R v Muddei,* 2021 ONCA 200, at paras 10, 60; see also para 53

In *SS,* the Court of Appeal upheld the trial judge's conclusion that the police officer searched and seized the accused's communications with a paramedic, which were given in circumstances in which the accused had a reasonable expectation of privacy and where the accused did not know that the police officer was listening to the conversation: *R v SS,* 2023 ONCA 130, at paras 29-51

T. SEIZURES

A “seizure” embraces any investigative conduct by the police in which they take control of a thing, to the exclusion of a person holding a reasonable expectation of privacy in that thing.

The matter seized remains under the protective mantle of s. 8 so long as the seizure continues” *R v Lambert,* 2023 ONCA 689, at paras 70-71, 77

The Crown cannot rely on lawful authority to justify the seizures unless evidence on the record shows that the officer who conducted the seizure believed that they had the lawful authority that the Crown is relying upon. This includes ss. 487.11 and 489(2): *R v Lambert,* 2023 ONCA 689, at para 82

i. POST-SEIZURE SUPERVISION

Section 489.1 applies to all seizures, including warrantless seizures: *R v Lambert,* 2023 ONCA 689, at para 97

This includes seizures made by peace officers as a result of searches incident to arrest. Where the thing seized is not being returned to the person lawfully entitled to possess it, s. 489.1(1)(b)(ii) requires the seizing officer, as soon as it is practicable to do so, to report to a justice that she or he has seized something and is detaining it to be dealt with by the justice under s. 490(1).

The *Report to a Justice* must be in a statutory form – Form 5.2. This form must describe the authority under which the seizure was made; the thing that was seized; and where, how or where applicable by whom it is being detained. The officer who files the report must date and sign it.

The reporting requirement of s. 489.1(1)(b)(ii) provides a link to s. 490(1) and ensures long-term post-seizure supervision of the things seized by a judicial officer: *R. v. Garcia-Machado*, 2015 ONCA 569 at paras. 15-16.

Failure to file a *Report to a Justice* in Form 5.2 means that no post-seizure supervision of the thing seized will take place: *Garcia-Machado*, at para. 16. But failure to file a *Report to a Justice* as soon as practicable after a thing has been seized also has a constitutional dimension: the continued detention constitutes a breach of s. 8 of the *Charter*: *Garcia-Machado*, at paras. 44-48.

Neither section 489.1 nor Form 5.2 has anything to say about how the report is to be provided to a justice. The *Report* requires the signature of the peace officer who submits it, but does not require or provide space for a justice to sign the report to acknowledge its receipt, endorse a disposition or advise the submitting officer of either event.

Section 490 governs extended detention of seized items. Section 490(2) requires notice to the person from whom a thing has been seized if the thing has been detained more than three months from the date of seizure. Neither the section nor any other *Code* provision prescribes a form for the notice, although s. 490(2)(a) describes the procedure as a "summary application". But one thing is clear: while the provision provides the opportunity, no obligation is imposed upon the person from whom the thing was seized to take any steps for its recovery: *R v Tsekouras,* 2017 ONCA 290 at paras 95-100.

U. CONSTITUTIONAL CONSIDERATIONS

Laws authorizing privacy intrusions are reasonable if they strike a proper balance between people's privacy interests and the state's interests. Courts assess search laws' reasonableness by considering their: (1) intrusiveness, (2) reliability, (3) oversight mechanisms, (4) purpose, and (5) criminal or regulatory nature.

More intrusive searches require greater protection and, thus, higher thresholds: *R v Pike,* 2024 ONCA 608, at paras 49, 52

SECTION 9

Police duties and their authority to do things in the performance of those duties are not co-extensive. Police conduct is not rendered lawful merely because it helped the police perform their assigned duties. Where that conduct interferes with the liberty or freedom of an individual, it will be lawful only if and to the extent it is authorized by law: *R v Gonzales,* **2017 ONCA 543** at para 61

A. ANCILLARY POWERS DOCTRINE

Establishing and restricting police powers is something that is well within the authority of legislatures, and ought to be left to the legislature, not the courts. However, courts cannot abdicate their role of incrementally adapting common law rules where legislative gaps exist. The court must be diligent in its role as a custodian over the common law, which, by its very nature is organic and must develop incrementally in tandem with a changing society: *R v McColman*, 2021 ONCA 382, at paras 49-50

Absent statutory authority to legitimize police conduct, the common law may prevail, pursuant to the Waterfield analysis/ancillary powers doctrine. At the preliminary step of the analysis, the police power that is being asserted and the liberty interests that are at stake must be clearly defined. The analysis then proceeds in two stages.

The first inquiry or step requires a determination of whether the police conduct that gives rise to the interference falls within the general scope of any duty imposed upon an officer by state or at common law.

Police officers have broad duties in relation to the public, as reflected in s. 42 of Ontario's *Police Services Act*. Included within these duties, is "the preservation of the peace, the prevention of crime, and the protection of life and property":

Where this threshold has been met, the second step or stage requires a determination of whether the conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty.

The second step or stage involves and requires a balancing of the competing interests of the police duty and the liberty interests at stake. This entails consideration of whether an invasion of individual rights is necessary for the police to perform their duty, and whether the invasion is reasonable, in light of the public purposes served by effective control of criminal conduct, on the one hand, and respect for the liberty and fundamental dignity of individuals, on the other. Relevant factors to consider include:

i. the duty being performed;
ii. the extent to which some interference with individual liberty is necessary to perform that duty;
iii. the importance to the public good of the performance of that duty;

iv. the liberty intruded upon;
v. the nature and extent of the intrusion; and
vi. the context in which the police/citizen confrontation took place: *R v Gonzales,* 2017 ONCA 543, at paras 62-63; see also *R v McColman,* 2021 ONCA 382, at paras 45-64

Throughout the analysis, the onus is always on the state.

The second stage of the ancillary powers doctrine must always be applied with rigour to ensure that the state has satisfied its burden of demonstrating that the interference with individual liberty is justified and necessary. The standard of justification must be commensurate with the fundamental rights at stake.

An arrest cannot be justified of someone engaged in lawful activity in order to prevent an anticipated breach of the peace

Fleming v Ontario, 2019 SCC 45

B. DEFINITION OF "ARBITRARY"

A lawful detention is not arbitrary within s. 9 of the Charter unless the law authorizing the detention is itself arbitrary. On the other hand, a detention not authorized by law is arbitrary and violates s. 9 of the Charter:

A discretionary statutory authority may be arbitrary where the statute provides no criteria, express or implied, to govern its exercise. A discretion to detain persons will be arbitrary if there are no criteria, express or implied, which govern its exercise. A detention governed by unstructured discretion is arbitrary: *R v Donnelly,* 2016 ONCA 988 at paras 69-70

C. Onus to Prove Unlawful Arrest or Detention

Ordinarily, a claimant has the burden to prove that there has been an unlawful arrest. Where, however, the claimant has brought an overlapping challenge against the warrantless search incident to arrest, the Crown bears the burden to show that the predicate arrest was lawful: . This is to avoid conflicting burdens on the same issue because warrantless searches are presumptively unlawful and the

Crown ordinarily bears the burden to show their lawfulness: *R v Dasilva,* 2022 ONCA 879, at para 55

D. GENERAL PRINCIPLES ON ARREST

An arrest consists either of (i) the actual seizure or touching of a person's body with a view to his detention, or (ii) the pronouncing of "words of arrest" to a person who submits to the arresting officer. The substance of what the accused can reasonably be supposed to have understood, rather than the formalism of the precise words used matters. The test asks what the accused can reasonably be supposed to have understood in light of what he was told, viewed reasonably in all the circumstances of the case: *R v Bielli,* 2021 ONCA 222, at paras 69-70

There is no difference between "reasonable grounds" and "reasonable and probable grounds: *R v Desilva,* 2022 ONCA 879, at para 57

An arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Further, those grounds must be objectively justifiable to a reasonable person placed in the position of the officer: *Dhillion* at para 24

A reasonable belief exists when there is an objective basis for the belief which is based on compelling and credible information: *R v Beaver,* 2022 SCC 54

The subjective component of the relevant legal standards plays an important role in ensuring that the police act for legitimate purposes and turn their minds to the legal authority they possess: *R. v. Lai*, 2019 ONCA 420, at paras. 29-30; *R v Dudhi,* 2019 ONCA 665, at para 64

Reasonable grounds can be based on an officer's reasonable belief that certain facts exist even if it turns out that the belief is mistaken: *R v Williams,* 2024 ONCA 42, at para 69

Before reasonable grounds exist, "the officer must conduct the inquiry which the circumstances reasonably permit. The officer must take into account all information available to him and is entitled to disregard only information which he has good reason to believe is unreliable. There is, however, a limit to the extent of pre-arrest inquiry that police must conduct. The obligation of the police to take all factors into account does not impose a duty to undertake further investigation to seek out

exculpatory factors or rule out possible innocent explanations: *R v Williams,* 2024 ONCA 42, at para 43

Warrantless arrests are often carried out in dynamic situations and police are not required to inquire into the constitutionality of prior investigative steps before acting on the information they yielded. However, they are required to consider whether they are acting within constitutional limits when they act.

In the case of an arrest made without a warrant, it is even more important for the police to demonstrate they had reasonable and probable grounds for the arrest: *R v Zacharias,* 2023 SCC 30

Clear evidence of a facial breach of the law will provide reasonable and probable grounds for arrest even where the possibility of a lawful excuse for the suspect's behaviour exists, if investigating whether the lawful excuse applies would take time and effort and the circumstances are exigent: *R v Williams,* 2024 ONCA 42, at para 47

Whether a particular inquiry is one that an arresting officer must make is a context specific question. Relevant factors include the ease by which information could be obtained, whether something said by the suspect or on the suspect's behalf gives rise to the need for further enquiry, and the urgency of the situation: *R v Williams,* 2024 ONCA 42, at para 44

In *Williams,* for example, the Court of Appeal held that the police were required to search Versadex to determine whether the complainant had provided her consent to communicate with the accused before arresting him for breach: *R v Williams,* 2024 ONCA 42, at paras 50-56

An officer may not ignore signs that other officers may be misleading them or omitting material information and may not rely on information that they knew or ought to have known to be false: *R v SS,* 2023 ONCA 130, at para 68

The question of whether one officer can base reasonable grounds on the intentionally misleading information provided by an informant officer has yet to be decided by the court of appeal. However, an alternative way to deal with the issue is to apply the *Pino* analysis to find that the evidence was "obtained in a manner' that violated the *Charter* as a result of the breach/misconduct of the initial officer: see *R v SS,* 2023 ONCA 130, at paras 69-75

Subjective grounds for arrest are often established through the police officer's testimony. This requires the trial judge to evaluate the officer's credibility, a finding that attracts particular deference on appeal: *R v Beaver,* 2022 SCC 54

The focus for the subjective part of the test is on the *bona fides* of the arrest – whether the arresting officer "honestly believe[s] that the suspect committed the offence. Typically, this involves a determination of the arresting officer's credibility. That said, the evidence of subjective grounds for an arrest does not necessarily come from a single officer. An arrest may involve multiple officers, and occur in a dynamic situation as new information rapidly comes to light. The evidence of various officers may, as in this case, be contradictory in certain respects. As such, evidence about the subjective grounds for arrest may come from one or more officers and other sources, including the surrounding circumstances: *R v Fyfe,* 2023 ONCA 715, at para 53

How an officer specifically articulates the grounds, that is the officer's explanation of the grounds for the arrest, while relevant to their credibility, is not determinative. The question for determination at the first stage is whether the officer or officers at the time the arrest was made had an honest belief that the person committed (or was about to commit) an offence: *R v Fyfe,* 2023 ONCA 715, at para 54

The objective assessment is based on the totality of the circumstances known to the officer at the time of the arrest, including the dynamics of the situation, as seen from the perspective of a reasonable person with comparable knowledge, training, and experience as the arresting officer. The arresting officer's grounds for arrest must be more than a hunch or intuition. In evaluating the objective grounds to arrest, courts must recognize that the officer's decision to arrest must often be made quickly in volatile and rapidly changing situations, and the officer must make their decision based on available information which is often less than exact or complete. At the same time, the police cannot rely on evidence discovered after the arrest to justify the subjective or objective grounds for arrest. Courts must also remember that determining whether sufficient grounds exist to justify an exercise of police powers is not a scientific or metaphysical exercise, but one that calls for the application of common sense, flexibility, and practical everyday experience: *R v Beaver,* 2022 SCC 54

The objective reasonableness of the arrest is not tethered to the officer's articulated grounds for arrest. Rather, court considers the objectively discernible facts through the eyes of a reasonable person with the same knowledge, training and experience as the officer. Put differently, the focus is on what a reasonable

person standing in the shoes of the officer would have perceived. The officer's belief must be supported by "objective facts". In the result, the court may rely on objective circumstances known to the officer at the time, even if those circumstances were not articulated by the officer as part of his or her subjective grounds. Officers are expected not to shut their eyes to relevant circumstances, ignore appropriate inquiries or fail to take into consideration exculpatory, neutral or equivocal information. They must take account of all available information and disregard only information reasonably believed to be unreliable: *R v Fyfe,* 2023 ONCA 715, at para 52-62

The standard is met at the point where credibly-based probability replaces suspicion: *Dhillion,* at para 25

Reasonable grounds can be based on a reasonable belief that certain facts exist even if it turns out that the belief is mistaken: *R v Robinson,* 2016 ONCA 402 at para 40; *R v Gerson-Foster,* 2019 ONCA 405, at para 70. But, for example, see *R v Brown, 2012 ONCA 225,* in which two officers with the same information arrived at different conclusions as to the existence of reasonable grounds.

The assessment of reasonable and probably grounds is made at the time of the arrest, bearing in mind that an arrest may be a dynamic process, not necessarily a discrete point, and information may be continuously gathered and processed up to the time that the detainee is arrested. Breaches are determined not based on what officers intend to do, but what they actually do: *R v Desilva,* 2022 ONCA 879, at para 60

The standard of reasonable and probable grounds for an arrest is not lower than the standard for a search warrant, the standards are just different: *R v Reid,* 2023 ONCA 395, at para 15

The police's failure to take detailed contemporaneous notes of the grounds for arrest and the material relied on in forming those grounds does not preclude a finding of reasonable and probable grounds. Although notes are generally desirable, they are not mandatory in all cases: *R v Beaver,* 2022 SCC 54

In determining whether the arresting officer had reasonable and probable grounds to arrest based on his own observations, it is irrelevant that other officers also made those observations, if those observations did not factor into the arresting officer's decision to arrest: *R v Gonzales,* 2017 ONCA at para 543 at para 106

Although a police officer is entitled to follow instructions from another officer to arrest someone even where the arresting officer personally lacks the objective grounds to do so, that arrest will be lawful only if the instructing officer had reasonable and probable grounds. The Crown must establish the instructing officer's grounds by evidence: *R v Gerson-Foster,* 2019 ONCA 405, at para 84

Put differently, it is the police officer who directed the arrest who must have reasonable and probable grounds: *R v Beaver,* 2022 SCC 54

The uncorroborated testimony of a witness can provide a basis to find reasonable and probable grounds for arrest: *R v Chandrasegaran*, 2022 ONCA 241, at para 31

An arrest, made reasonably, may become unreasonable, thereby rendering the continued detention of the arrestee unlawful. For example, reasonable reliance by an arresting officer on erroneous information may become objectively unreasonable if, in the circumstances, the police failed to make reasonable inquiries which would have led to the discovery of the deficiencies or defects: *R v Gerson-Foster,* 2019 ONCA 405, at paras 87-88

An officer cannot rely upon an accused's refusal to answer questions as a factor supporting reasonable and probable grounds to arrest, as this "extracts a price for the exercise of a constitutional right:" *Gonzales* at para 105

When considering the objective reasonableness of the subjective grounds for arrest, a court must look to the totality of the circumstances, and it is not appropriate to consider each fact in isolation: *R v Labelle,* 2016 ONCA 110 at para 10

Where confidential informant information is the basis of grounds to arrest, the *Debot* factors apply. The court must weigh whether the informant was credible, whether the information predicting the commission of a criminal offence was compelling, and whether the information was corroborated by police investigation. The totality of the circumstances must meet the standard of reasonableness: *Dhillion* at para 30

Since it is illegal to act in a manner that is an abuse of process, it is arguable that s. 9 can be relied upon in lieu of s. 7 where the gravamen of the complaint is that the abusive recording of CPIC information resulted in detention: *R v Gerson-Foster,* 2019 ONCA 405, at para 98

Where an officer relies on CI information that is not disclosable to establish the grounds for arrest, there are limitations to what the Crown can rely on to establish a valid arrest. Subjectively, if an officer testifies that they made an arrest based *only* on information that they cannot disclose, it would be difficult to assess their credibility and likely the Crown would be unable to establish that the officer had subjective reasonable and probable grounds. When assessing the objective reasonableness of an officer's subjective grounds the court can only rely on the public record of evidence i.e., the non-redacted portions of the ITO, the judicial summaries of the redacted CI information and the *viva voce* testimony of those who testified: *R v Fyfe,* 2023 ONCA 715, at para 66, 69

A suspect's criminal history or past record of violence can be relevant and form part of the cumulative circumstances supporting an arrest: *R v Cameron,* 2024 ONCA 231, at para 41

Where grounds for arrest are based on evidence that was unlawfully obtained, the court must excise this evidence from the factual matrix and determine whether the police had reasonable and probable grounds for arrest having regard to the totality of the circumstances known to the officer based on the remaining evidence: *R v Zacharias,* 2023 SCC 30

For "a non-exhaustive legal backdrop to review of the exercise of police arrest powers" by Justice Hill, see *R v Cunsolo,* [2008] OJ No 3754 (Sup Ct Jus) at para 68; see also *R v Censoni,* [2001] OJ No 5189 (Sup Ct Jus) at paras 30-40

i. ARRESTS INSIDE A HOME

A *Feeney* warrant authorizes the police to "enter a dwelling-house described in the warrant for the purpose of arresting or apprehending" a person: *Criminal Code*, ss. 529(1), 529.1. The whole purpose of the *Feeney* warrant is to protect the elevated privacy interests in a home, requiring certain grounds to be met before entry can be made to effect an arrest. However, when the police are already legitimately inside a dwelling-place under the ancillary powers doctrine, they may be entitled to effect an arrest without a *Feeney* warrant: *R v Stairs,* 2020 ONCA 678, at para 32

ii. STANDARD OF REVIEW

The existence of reasonable and probable grounds is a factual finding reviewable only for palpable and overriding error, yet whether the facts as found by the trial judge amount to reasonable and probable grounds is a question of law reviewable for correctness: *R v Beaver,* 2022 SCC 54

E. GENERAL PRINCIPLES ON DETENTION

In assessing whether a detention has occurred, it would be erroneous for a trial judge to approach a detention determination by looking at the indicia of detention piecemeal or individually, without considering the evidence cumulatively: *R v Ceballo,* 2021 ONCA 791, at para 31

i. OFFICER'S EVIDENCE REGARDING DETENTION

Whether the circumstances were in law a detention was a legal question for the court to determine, not for the officer to dictate to the court.

The fact that an officer testifies that, if the accused had tried to leave, he would have stopped him, is not determinative. What might have happened had events unfolded differently does not inform the legal character of what did happen. *Charter* rights are not breached by intention, but action: *R v Reid,* 2019 ONCA 32, at para 43

Put another way, an officer's subjective belief that he had detained the accused is a factor that weighs in favour of finding that the appellant was detained, but only to a limited degree. The question of whether an individual is detained is a legal question for a court to determine: *R v Ranhorta,* 2022 ONCA 548, at para 46

ii. REASONABLE SUSPICION STANDARD

The police may detain a person for investigative purposes if they have reasonable grounds to suspect that the person is connected to particular criminal activity and that such a detention is reasonably necessary in the circumstances: *R v Darteh,* 2016 ONCA 141 at para 4; *R v McGuffie,* 2016 ONCA 365 at para 35

The standard "reasonable grounds to suspect" requires that the police have a "reasonable suspicion" or a suspicion that is grounded in objectively discernible facts, which could then be subjected to independent judicial scrutiny: *R v Darteh,* 2016 ONCA 141 at para 4

Reasonable suspicion may be grounded in a constellation of factors, even if any one of those factors on its own would not have been sufficient: *R v Darteh,* 2016 ONCA 141 at para 7

A standard of reasonable suspicion addresses the possibility of uncovering criminality, not a probability of doing so as is the case for a reasonable belief: *R v Nero,* 2016 ONCA 160 at para 73

Put differently, reasonable suspicion requires a reasonable possibility of crime, while reasonable and probable grounds requires a reasonable probability of crime: *R v Beaver,* 2022 SCC 54

While reasonable grounds to suspect a crime has been committed may not exist where the sole factor informing the grounds is attendance at a drug house – where the information concerning the location is itself of unknown age and reliability – this does not mean that attendance at a drug house in other circumstances cannot furnish the grounds for an investigative detention. Indeed, there are times where, based upon the totality of circumstances, a person's attendance at a drug house may even form sufficient grounds for arrest: *R v Buchanan,* 2020 ONCA 245, at para 32

iii. Duration and Nature of Detention

Detention requires more than a fleeting interference or delay but less than where the police take explicit control over the person and command obedience: *R v Omar,* 2018 ONCA 975, at para 34; rev'd on other grounds at 2019 SCC 32

An investigative detention must be "brief in duration" and conducted in a reasonable manner.

There is no bright line temporal rule in determining when an investigative detention becomes unjustifiably long. The word "brief" is descriptive and not quantitative. It describes a range of time and not a precise time limit. The range, however, has

temporal limits and cannot expand indefinitely to accommodate any length of time required by the police to reasonably and expeditiously carry out a police investigation. This requirement of brevity applies even if the police treatment of the suspect is otherwise exemplary during the period of detention.

All investigative detentions must be "brief" because the state interference with the individual's liberty rests on a reasonable suspicion of criminal activity, a much lower standard than the reasonable and probable grounds needed for an arrest.

The purpose of the brief detention contemplated under the investigative detention power is to allow the police to take investigative steps that are readily at hand to confirm their suspicion and arrest the suspect or, if the suspicion is not confirmed, release the suspect. The police cannot use investigative detention as an excuse for holding suspects while the police search for evidence that might justify the arrest of the suspect. Nor does investigative detention mean that the police can detain suspects indefinitely while they carry out their investigation: *R v Barclay,* 2018 ONCA 114 at paras 21-32; *R v McGuffie,* 2016 ONCA 365 at paras 38-39

The permitted duration of an investigative detention is determined by considering whether the interference with the suspect's liberty interest by his continuing detention was more intrusive than was reasonably necessary to perform the officer's duty, having particular regard to the seriousness of the risk to public or individual safety. In other words, the duration and nature of an investigative detention must be tailored to the investigative purpose of the detention and the circumstances in which the detention occurs.

The permitted duration of an investigative detention is case-specific. Some of the relevant factors include:

- the intrusiveness of the detention.
- the nature of the suspected criminal offence.
- the complexity of the investigation.
- any immediate public or individual safety concerns.
- the ability of the police to effectively carry out the investigation without continuing the detention of the suspect.
- the lack of police diligence.
- the lack of immediate availability of the required investigative tools: *R v Barclay,* 2018 ONCA 114 at paras 21-32

F. DETENTION VERSUS ARREST

"[A]n investigative detention is not the same thing as an arrest and could not be allowed to become “a de facto arrest”. The significant interference with individual liberty occasioned by an arrest is justified because the police have reasonable and probable grounds to believe that the arrested person has committed an offence. Investigative detention does not require the same strong connection between the detained individual and the offence being investigated. The detention contemplated by an investigative detention cannot interfere with individual liberty to the extent contemplated by a full arrest," *R v McGuffie,* 2016 ONCA 365 at para 37

D. PSYCHOLOGICAL DETENTION

Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.

In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual’s circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider the following factors:

a) The circumstances giving rise to the encounter as would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or singling out the individual for focused investigation.

b) The nature of the police conduct, including: the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.

c) The particular characteristics or circumstances of the individual where relevant, including: age; physical stature; minority status; and level of sophistication

The central question is whether the police conduct would cause a reasonable person to conclude that he or she was not free to go and had to comply with the police direction or demand. The basis of psychological detention, absent a legal requirement to comply, remains that of a demand by the police officer coupled with a reasonable belief that there is no option but to comply with that demand.

The test for psychological detention must be determined objectively, having regard to all the circumstances of the particular situation. The focus is on the state conduct in the context of the surrounding legal and factual situation, and how that conduct would be perceived by a reasonable person in the situation as it develops. The objective nature of the inquiry recognizes that the police must be able to know when a detention occurs, in order to allow them to fulfill their attendant obligations under the *Charter* and afford the individual its added protections.

The views of the arresting officers may be significant in determining whether a psychological detention has occurred. However, those subjective intentions are not determinative. Similarly, while the test is objective, the individual's specific circumstances must be taken into account, as will his or her personal circumstances, including age, physical stature, and minority status, and level of sophistication. The individual's perception at the time may also be relevant: *R v NB,* 2018 ONCA 556 at para 112 – 117, 119 (citing *Grant*); *R v Omar,* 2018 ONCA 975, at para 42; rev'd on other grounds at 2019 SCC 32: *R v LaFrance,* 2022 SCC 32

No single consideration, including a police statement to an individual that he or she is not detained or otherwise under any obligation to cooperate or may leave, is determinative of whether a detention has occurred: *R v LaFrance,* 2022 SCC 32

The police are entitled to question anyone in the course of investigating an offence or determining whether an offence has been committed, but they have no power to compel answers. Police questioning, even at a police station, does not necessarily result in a detention where the accused attended voluntarily as a result of a request and there was no evidence that he or she felt deprived of his liberty: *NB* at para 119

The "minority status" of an individual is a relevant consideration in the mix of factors informing what a reasonable person in the individual's circumstances would have concluded: *R v Reid,* 2019 ONCA 32, at para 28; *R v Le,* 2019 SCC 34, at paras 82-83

The focus of the s. 9 analysis should not be on what was in the accused's mind at a particular moment in time, but rather on how the police behaved and, considering the totality of the circumstances, how such behavior would be reasonably perceived: *R v Le,* 2019 SCC 34, at paras 113-117; *R v Thompson,* 2020 ONCA 264, at paras 41-51; *R v Tutu,* 2021 ONCA 805, at paras 19-21

E. MISTAKE OF LAW ON DETENTION OR ARREST

The right against arbitrary detention under s. 9 of the Charter is infringed when an arrest is based on a mistake of law. A warrantless arrest is lawful only if the arresting officer's reasonable belief in the facts, if true, traces a pathway to a criminal offence known to the law. If there is a mistake of law, it makes no difference whether the mistake involves a non-existent offence, or an existing offence that could not be engaged on the facts, even if true, relied on by the officer. Thus, an officer's arrest based on an accused's possession of gabapentin, which the officer mistakenly believed was a controlled substance, gave rise to an arbitrary arrest: *R v Tim,* 2022 SCC 12

F. ATTEMPTED DETENTION AND FLIGHT

Even when a reasonable person would have perceived an obligation to stop, an accused who immediately fled and relinquished no control to the police has been found not to have been detained. In other cases, courts have concluded that a brief period of acquiescence or submission to police, followed by flight, resulted in a detention: *R v Green,* 2022 ONSC 1259, at paras 35-50

G. THE SMELL OF MARIJUANA AS GROUNDS

No bright line rule prohibits the presence of the smell of marijuana as the source of reasonable grounds for an arrest. However, what is dispositive are the circumstances under which the olfactory observation was made. Sometimes,

police officers can convince a trial judge that their training and experience is sufficient to yield a reliable opinion of present possession. It is for the trial judge to determine the value and effect of the evidence: *R v Gonzales,* 2017 ONCA 543 at para 97

The sense of smell is highly subjective. Where the police are advised by a confidential informant that s/he smelled marijuana coming from property associated to the suspect, this does not give rise to grounds to arrest, especially where there is no indication that the CI has special or even reliable olfactory powers or training or experience in detecting the odour of marijuana. It does, however, give the police grounds to detain: *R v Barclay,* 2018 ONCA 114 at para 36

H. MOTOR VEHICLE DETENTIONS

i. General Principles

A roadside stop of a vehicle for a provincial regulatory offence under statutes like the HTA (e.g. speeding) is a detention: *R v Harflett,* 2016 ONCA 248 at para 18

Where the police conduct a valid HTA stop and thereafter legitimately form reasonable and probable grounds to arrest and search a vehicle, the fact that the police had a dual HTA/criminal purpose at the very outset of the stop does not taint the lawfulness of the initial stop and detention: *R v Johnson,* 2016 ONCA 31 at para 9

Sometimes, a traffic stop may have more than one purpose. However, the mere existence of another purpose motivating the stop, beyond highway regulation and safety concerns, does not render the stop unlawful. But the additional purpose must itself not be improper, or proper but pursued through improper means, and must not entail an infringement on the liberty or security of any detained person beyond that contemplated by the purpose that underpins s. 216(1): *R v Gonzales,* 2017 ONCA 543, at para 58; *R v Dudhi,* 2019 ONCA 665, at para 91

Gathering police intelligence falls within the ongoing police duty to investigate criminal activity. And so it is that it is permissible for police to intend, within the confines of a stop and detention authorized by the *HTA* to avail themselves of the

opportunity to further the legitimate police interest of gathering intelligence in their investigation of criminal activity: *Gonazles* at para 59

The continued detention of a passenger after an HTA investigation is complete is unlawful and violates s.9: *R v Mhlongo,* 2017 ONCA 562

A private driveway is not a highway as defined in the *HTA.* As a result, a in their private driveway cannot be a "driver" under s.1(1) as they are not a "person who drives a vehicle on a highway"*: R v McColman,* 2021 ONCA 382, at paras 33-35

Police have a common law power to randomly stop vehicles in the course of protecting public roadways, absent reasonable suspicion. Random stops for the purpose of investigating motor vehicle infringements on a public highway are an arbitrary detention, but are justifiable pursuant to s. 1. However, the stop must not be turned into a means of conducting either an unfounded investigation or unreasonable search. The power to stop must be made in furtherance of the police duty to protect those who use the public roadways: *R v McColman,* 2021 ONCA 382, at paras 46-47

[The common law does not authorize the police to conduct a random sobriety check on a private driveway, in circumstances not authorized by the *HTA*, where the person exited the highway after the officer decided to conduct the stop but before the officer initiated the stop, and there are no grounds to suspect that an offence has been or is about to be committed: *R v McColman,* 2021 ONCA 382, at para 48

ii. SECTION 48(1) OF THE HTA

Section 48(1) of the *Highway Traffic Act* reads:

A police officer, readily identifiable as such, may require the driver of a motor vehicle to stop for the purpose of determining whether or not there is evidence to justify making a demand under section 254 of the *Criminal Code* (Canada).

Police officers have the right to stop a vehicle for the purpose of checking on the sobriety of the driver. This is a power that the police have both at common law and through statutes such as the *Highway Traffic Act*: *R. v. Orbanski; R. v. Elias*, 2005 SCC 37, [2005] 2 S.C.R. 3, at para. 41.

s. 48(1) authorizes an officer to randomly stop a vehicle absent reasonable suspicion or reasonable and probable grounds: *R v McColman,* 2021 ONCA 382, at para 29

The actions of the police in stopping a vehicle under their authority at common law or by statute only constitutes an unconstitutional stop if the reason for the stop is unconnected to a highway safety purpose: *R v Gardner,* 2018 ONCA 584 at paras 21-22

Police power to stop under s.48(1) is confined to highways. If a driver reaches a private driveway before police initiate a stop, they no longer have authority to stop the driver either under the HTA or at common law: *R v McColman,* 2021 ONCA 382, at paras 30-44; affirmed in 2023 SCC 8

iii. SECTION 216(1) OF THE HTA

Section 216(1) of the *HTA* authorizes a police officer to stop vehicles for highway regulation and safety purposes, even where the stops are random. This detention is circumscribed by its purpose. It is limited to the roadside. It must be brief, unless other grounds are established that permit a further detention. An officer may require a driver to produce the documents drivers are legally required to have with them. To check those documents against information contained in databases accessible through the onboard computer terminal in police vehicles, an officer is entitled to detain the vehicle and its occupants while doing so.

In addition to requiring production of various documents associated with the operation of a motor vehicle, a police officer, acting under the authority of s. 216(1) of the *HTA*, may also make a visual examination of the interior of the vehicle to ensure their own safety during the detention. However, s. 216(1) does not authorize more intrusive examinations of the interior of the vehicle or inquiries of any occupant directed at subjects not relevant to highway safety concerns: *R v Gonzales,* 2017 ONCA 435 at paras 55-56

Stops made under s. 216(1) will not result in an arbitrary detention provided the decision to stop is made in accordance with some standard or standards which promote the legislative purpose underlying the statutory authorization for the stop, that is to say, road safety concerns. Where road safety concerns are removed as a basis for the stop, then powers associated with and predicated upon those

concerns cannot be summoned to legitimize the stop and some other legal authority must be found as a sponsor: *Gonzales* at para 60

If the officer does not have a legitimate road safety purpose in mind and is using the Highway Traffic Act authority as a mere ruse or pretext to stop a vehicle in order to investigate a crime, then the detention will be unlawful. As Doherty J.A. held in Brown, the Highway Traffic Act powers will not authorize police stops if the police use these powers as a "ruse" to justify a stop for another purpose: see *R v Mayor,* 2019 ONCA 578, at para 9, see also paras 6-10

The trial judge cannot rely on the fact that a valid HTA purpose existed as dispositive of whether or not an arbitrary detention occurred. It is incumbent on the trial judge to analyze whether, notwithstanding that a valid basis for the stop existed, the police in fact subjectively relied upon this purpose, rather than using it as a pretext to advance a criminal investigation: *R v Mayor,* 2019 ONCA 578, at para 13

iv. Standard of Review

A trial judge's finding that highway regulation or safety concerns was a purpose that animated a traffic stop is a finding of fact. As a consequence, the finding is subject to deference and cannot be set aside by this court unless it is unreasonable or based upon a material misapprehension of the evidence adduced at trial: *R v Gonzales,* 2017 ONCA 435 at para 57

v. CPIC Check During Detention

In *Loewen*, 2018 SKCA 69, the Saskatchewan Court of Appeal held, in part, that a passenger in a vehicle was detained when the police took his identification card away to run a "CPIC check" of police computerized records. The detaining police officer testified he always requested identification from passengers during traffic stops "to find people who are either breaching court ordered conditions, wanted on warrants, outstanding criminals, that type of thing as part of [his] job" (quoted at para. 7). The court held a passenger would feel unable to leave while the police had his identification. Because the police had no grounds to detain the passenger and were only running a "check," the detention was arbitrary.

The improper request for a passenger's identification for a purpose unrelated to the *HTA* stop and investigation (e.g., for running a CPIC check) will be a breach of s. 8 of the *Charter*: *R v Mhlongo,* 2017 ONCA 562 at para 31

I. BORDER DETENTIONS

Routine border searches do not result in a detention and therefore do not give rise to any right to counsel or the right to remain silent: *R v. Jackman,* 2016 ONCA 121 at para 33; *R v Sinclair,* 2017 ONCA 287 at para 6

In the context of a traveller crossing the border, there are two alternative ways of identifying when the line has been crossed and a detention will occur.

The first approach is the "intrusiveness test." When the questioning and searches become less routine and more intrusive, the person is detained and that individual's s. 7, 8 and 10(b) Charter rights are engaged.

The line between detention and routine investigation is not always bright. It must be appreciated that given the importance of border security, a robust concept of permissible routine forms of inspection operates. For example, the use of x-rays and ion scans capable of detecting drugs are routine forms of inspection. So, too, is questioning related to the contents of luggage, or the provenance of those contents 3. Similarly, questions intended to expose possible contraband or immigration issues, including questions about marital or employment status, income, or the purpose of a trip, or questions intended to probe the credibility of the answers a traveller has provided, are routine: *R v Ceballo,* 2021 ONCA 791, at paras 19-21

Contrarily, searches conducted pursuant to s. 98 of the Customs Act, including strip searches, body cavity searches, and "bedpan vigils", are intrusive and will trigger a finding of detention. Questions can cross the line and become intrusive when they amount to a coercive or adversarial interrogation, contain improper inducements, or exert unfair pressure: *R v Ceballo,* 2021 ONCA 791, at para 22

Digital device searches now also constitute a more intrusive form of inquiry that will give rise to a border detention: *R v Pike,* 2024 ONCA 608, at para 116; see also para 122

Where a border services officer unlawfully searches a digital device, triggering a s.24(2) analysis, the court will consider the countervailing factors of a heightened privacy interest in digital devices generally and a reduced expectation of privacy at the border: *R v Pike,* 2024 ONCA 608, at para 129

The second method for determining whether a detention has arisen involves an analysis of whether the border officer has decided, because of some sufficiently strong particularized suspicion, to go beyond routine questioning of a person and to engage in a more intrusive form of inquiry". Where the officer has made that decision, the individual may be detained, even when subject to that routine questioning: see *R. v. Jones* (2006), 81 OR (3d) 481 (CA), at para. 42; see also *R v Peters,* 2018 ONCA 493 at para 8; *R v Ceballo,* 2021 ONCA 791, at para 23

It may be that for a detention to occur, another step is required. Namely, in addition to having a sufficiently strong particularized suspicion, and a subjective decision to engage in an intrusive investigation or detain the subject, the border services officer may have to engage in some action that makes that intention known to the traveller. There is also authority to support the need for some act by the border services agent that indicates their intention to engage in more intrusive investigation or to detain the subject: *Ceballo* at para 26

The trial judge must assess the objective reasonableness of the border officer's subjective belief, through the lens of a reasonable person standing in the shoes of the [border] officer: *Peters* at para 9

Put differently, the. border services agent must take actions that cause a reasonable person in the traveller's position to expect that they would be subjected to a non-routine, more intrusive inquiry. A traveller is detained if an officer's conduct causes a reasonable person in the traveller's position to expect that they are the subject of a non-routine and more intrusive inquiry. This can include, for example, a demand with significant legal consequences. This is so even if the first two subjective factors, the officer's particularized suspicion and decision to conduct a non-routine, more intrusive search, are absent. This objective test furthers the rule of law by subjecting all claims to the same standard, regardless of officers' or travellers' subjective perceptions. The first two subjective factors, while not necessary, make it more likely that the final factor's objective test is met by supporting an inference that officers followed through on their subjective suspicion and decision to search by their actions.

For example, an officer's focussed suspicion of the accused, in and of itself, does not turn the encounter into a detention" absent action that would cause a reasonable person in the accused's position to believe that the accused is detained. Neither does an officer's intent to detain and search that is unaccompanied by action. Conversely, officers can unintentionally detain a person they do not suspect if their actions cause a reasonable person in that person's position to conclude that the person is detained: *R v Pike,* 2024 ONCA 608, at paras 116-120

Where, following a routine sniffer dog search at the border, a sniffer dog alert arises, this alert, standing alone, does not necessarily give rise to such a particularized level of suspicion that the accused's case ceases to be routine: *R v. Jackman,* 2016 ONCA 121 at para 33; *Sinclair* at para 7

In *Peters,* the Court of Appeal found that the trial judge was entitled to rely on the officer's testimony that in his experience, X-ray anomalies in food products often yield innocent results and so, at the point of the X-ray, the level of particularized suspicion did not lead to questioning beyond what was routine.

In *Pike,* the Court of Appeal struck down the constitutionality of s.99(1)(a) of the *Customs Act,* which authorized border officials to search travellers' digital devices based on nothing more than a genuine subjective intention to discover violations of border laws. The court held that, given the privacy interests at stake, at a constitutional minimum, the law required a reasonable suspicion standard: 2024 ONCA 608

J. STANDARD OF REVIEW

The trial judge's factual findings are entitled to deference. Whether the factual findings of the trial judge amount at law to reasonable and probable grounds is a question of law and is reviewed on a standard of correctness: *R v Dhillion,* 2016 ONCA 308 at para 22; *R v Le,* 2019 SCC 34, at paras 23, 29, 66

K. RACIAL PROFILING

Racial profiling has two components: (1) an attitudinal component; and (2) a causation component. The attitudinal component is the acceptance by a person in authority, such as a police officer, that race or racial stereotypes are relevant in identifying the propensity to offend or to be dangerous. The causation component requires that this race-based thinking must consciously or unconsciously play a causal role.

Racial profiling occurs where race or racial stereotypes are used to any degree in suspect selection or subject treatment, regardless of whether articulable cause otherwise exists: *R v Dudhi,* 2019 ONCA 665, at paras 54-66

A well-known risk factor for racial profiling is that the accused is a man of colour who is driving an expensive car is: *R v Dudhi,* 2019 ONCA 665, at para 79

Racial profiling may be proved where [W] the evidence shows that the circumstances relating to a detention correspond to the phenomenon of racial profiling, and provide a basis for the court to infer that the police officer is lying about why he or she singled out the accused person for attention: *Dudhi,* at para 80

The focus of the correspondence test is not necessarily whether the circumstances demonstrate that the officer was lying, i.e. deliberately misleading the court, but rather, whether the circumstances give the court a basis to reject the officer's evidence as untrue because they are indicative of racial profiling: *R v Sitladeen,* 2021 ONCA 303, at para 48; see paras 80-82

This approach to the correspondence test is consistent with the concept of unconscious bias, where a person either does not recognize, or does not acknowledge his own bias.https://www.ontariocourts.ca/decisions/2021/2021ONCA0303.htm - _ftn4 An officer who has unconsciously allowed racial stereotypes to influence his decision to detain a racialized person may not believe he is being untruthful, and therefore may not be lying when he testifies that racial stereotypes played no role in the decision. Nevertheless, a trial judge is entitled to reject that evidence as untruthful, if the judge is satisfied, based on the circumstances consistent with racial profiling, that unconscious bias and racial profiling were factors in the decision: *R v Sitladeen,* 2021 ONCA 303, at para 49

Being non-white does not immunize someone from having biases, including against people who share their own ethnic or racial background: *R v Morgan*, 2023 ONSC 6855

For a comprehensive review of the jurisprudence in this area, see David M Tanovich, "Applying the Racial Profiling Correspondence Test."

For civil rewards for racial profiling, see Elmardy v Toronto Police Services Board, 2017 ONSC 2074

SECTION 10(A)

Any person who has been detained or arrested has the right to be informed promptly and clearly of the reasons for the detention or arrest, pursuant to s.10(a). Section 10(a) extends to includes both temporal and substantive aspects.

A functional equivalent of the term "promptly" in s. 10(a) is the phrase "without delay", which appears in s. 10(b). There, the phrase is synonymous with "immediately", but does permit delay on the basis of concerns for officer or public safety.

The right to prompt advice of the reasons for detention is rooted in the notion that a person is not required to submit to an arrest if the person does not know the reasons for it. But there is another aspect of the right guaranteed by s. 10(a). And that is its role as an adjunct to the right to counsel conferred by s. 10(b) of the *Charter*. Meaningful exercise of the right to counsel can only occur when a detainee knows the extent of his or her jeopardy.

To determine whether a breach of s. 10(a) has occurred, substance controls, not form. It is the substance of what an accused can reasonably be supposed to have understood, not the formalism of the precise words used that must govern. The issue is whether what the accused was told, viewed reasonably in all the circumstances, was sufficient to permit him to make a reasonable decision to decline or submit to arrest, or in the alternative, to undermine the right to counsel under s. 10(b): *R v Gonzales,* 2017 ONCA 543 at paras 122-125; *R v Sabir,* 2018 ONCA 912, at para 33

In other words, Section 10(a) does not require that detainees be told of the technical charges they may ultimately face. A person will be properly advised of the reason for their detention if they are given information that is sufficiently clear and simple to enable them to understand the reason for their detention and the extent of their jeopardy: *R v Roberts,* 2018 ONCA 411 at para 78

There are times when a police officer must go beyond disclosing the grounds for arrest. For example, in *R. v. Carter*, 2012 ONSC 94, Mr. Carter, arrested for drug offences, was suspected of committing a murder. While under arrest, Mr. Carter was interviewed about the murder. The court held that s. 10(a) was breached because he was not told what he was really being questioned about: *approved* in *R v Roberts,* 2018 ONCA 411 at para 75

Quite simply, if the police wants to use a person detained for one offence as a source of self-incriminating information relating to a different offence – including an aggravated form of the offence for which they have been detained – the police must tell the detainee this before proceeding. Indeed, they must tell the arrested detainee what they are being investigated for before they have been given their right to counsel: *R v Roberts* at para 76

Satisfaction of the informational duty may be complicated in certain cases where the detainee positively indicates a failure to understand his or her rights to counsel. In such cases, the police cannot rely on a mechanical recitation of those rights; they must make a reasonable effort to explain those rights to the detainee: *R v Culotta,* 2018 ONCA 665 at para 29

Valid safety concerns can justify a delay in advising a person of the reason for a detention: *R v Cameron,* 2024 ONCA 231, at para 33

SECTION 10(B)

A. GENERAL PRINCIPLES

Section 10(b) creates the right to retain and instruct counsel without delay, and the right to be informed of that right without delay.

The right exists because those who are arrested or detained are apt to require immediate legal advice that they cannot access without help, because of their detention. Such advice can be useful in preventing an unjustified search, in advising detainee's of their rights during detention, including the right against self-incrimination, in providing reassurance to an arrestee or detainee, and in advising them on what can be done to regain liberty: *R v Noel,* 2019 ONCA 860, at paras 23-26

Police are not obliged to caution a suspect simply because he or she is a suspect. Rather, s. 10(b) of the *Charter* is engaged at the time of arrest or detention: *R v Al-Enzi,* 2021 ONCA 81, at para 86

i. The Informational Component

The rights created by s. 10(b) attach immediately upon detention, subject to legitimate concerns for officer or public safety: *R v McGuffie,* 2016 ONCA 365 at paras 41-42

Informational rights are not provided solely as a means of enjoying implementational rights. A detained person requires the immediate assurance that "they are not entirely at the mercy of the police while detained" and are entitled to a "lifeline to the outside world" through which they can learn whether they are lawfully detained, and of their legal rights and obligations relating both to their liberty and the investigation: *R v Davis,* 2023 ONCA 227, at para 41

Police do not have a duty to positively ensure that a detainee understands what the rights under s. 10(b) entail. Officers are only required to communicate those rights to the detainee. Absent special circumstances indicating that a detainee may not understand the s. 10(b) caution, such as language difficulties or a known or obvious mental disability, police are not required to assure themselves that a detainee fully understands the s. 10(b) caution: *R v Culotta,* 2018 ONCA 665 at para 38

In *R v Mian,* 2014 SCC 54, the Supreme Court of Canada upheld the trial judge's finding that an unjustified 22-minute delay in complying with the informational duties under s.10(a) and (b) constituted a *Charter* breach. The court further upheld the trial judge's decision excluding the evidence of cocaine found in the investigation under s.24(2).

Even a three-minute delay is contrary to the language of "without delay", read strictly: *R v Ahmed,* 2022 ONCA 640, at para 36

A police officer has an obligation under s.10(b) of the *Charter* to afford an accused person not only a reasonable opportunity to contact counsel of his choice but also to facilitate that contact: *R v Vernon,* 2016 ONCA 211 at para 2

Absent proof of circumstances indicating that the accused did not understand his right to retain counsel when he was informed of it, the onus has to be on him to prove that he asked for the right but it was denied or he was denied any opportunity to even ask for it": *R v Tyler*, 2015 ONCA 599

Satisfaction of the informational duty may be complicated in certain cases where the detainee positively indicates a failure to understand his or her rights to counsel. In such cases, the police cannot rely on a mechanical recitation of those rights; they must make a reasonable effort to explain those rights to the detainee: *R v Culotta,* 2018 ONCA 665 at para 29

ii. The Implementational Component

The rights created by s. 10(b) attach immediately upon detention, subject to legitimate concerns for officer or public safety: *R v McGuffie,* 2016 ONCA 365 at paras 41-42

The onus is on the Crown to demonstrate that a delay in facilitating access to counsel is reasonable: *R v Hobeika,* 2020 ONCA 750, at para 73

If a detained person, having been advised of his right to counsel, chooses to exercise that right, the police must provide the detained person with a reasonable opportunity to exercise that right and must refrain from eliciting incriminatory evidence from the detained person until he has had a reasonable opportunity to consult with counsel: *R v Hamilton,* 2017 ONCA 179 at para 71; *R v GTD,* 2018 SCC 7

The duty on police to implement contact between a detainee and counsel arises only if the detainee expresses a desire to contact counsel. Words to the effect of

“I will at some point” or “no, not at the moment” do not amount to a desire to contact counsel: *R v Simpson,* 2023 ONCA 23, at para 11

The question of the words exchanged between police and a detainee in relation to whether the detainee expressed a desire to speak to counsel is a question of fact, reviewable only for palpable and overriding error: *R v Simpson,* 2023 ONCA 23, at para 9

The s. 10(b) jurisprudence has always recognized that specific circumstances may justify some delay in providing a detainee access to counsel. Those circumstances often relate to police safety, public safety, or the preservation of evidence. For example, the police could delay providing access to counsel in order to properly gain control of the scene of the arrest and search for restricted weapons known to be at the scene. Specific circumstances relating to the execution of search warrants can also justify delaying access to counsel until the warrant is executed.

However, concerns of a general or non-specific nature applicable to virtually any search cannot justify delaying access to counsel. The suspension of the right to counsel is an exceptional step that should only be undertaken in cases where urgent and dangerous circumstances arise or where there are concerns for officer or public safety. The police may delay access only after turning their mind to the specifics of the circumstances and concluding, on some reasonable basis, that police or public safety, or the need to preserve evidence, justifies some delay in granting access to counsel. Even when those circumstances exist, the police must also take reasonable steps to minimize the delay in granting access to counsel. A policy or practice routinely or categorically permitting the suspension of the right to counsel in certain types of investigations is inappropriate.

The justification may be premised on the risk of the destruction of evidence, public safety, police safety, or some other urgent or dangerous circumstance. Furthermore, if the police determine that some delay in allowing an arrested person to speak to counsel is justified to permit execution of the warrant, then they must consider whether it is necessary to arrest the individual before they execute the warrant. The police cannot create a justification for delaying access to counsel by choosing, for reasons of convenience or efficiency, to arrest an individual before seeking, obtaining, and executing a search warrant. Police efficiency and convenience cannot justify delaying an arrested person’s right to speak with counsel for several hours: *R v Rover,* 2018 ONCA 745 at para 26-28, 32-33; *R v La,* 2018 ONCA 830, at para 45

Concerns to hold off on providing access to counsel must be circumstantially concrete. General or theoretical concern for officer safety and destruction of evidence will not justify a suspension of the right to counsel. Rather, the assessment of whether a delay or suspension of the right to counsel is justified involves a fact specific contextual determination. The trial judge must analyze whether any concerns on the part of the police were reasonable in the circumstances: *R v La*, 2018 ONCA 830, at paras 39, 41; see also *R v Rover,* 2018 ONCA 745 at para 26-28, 32-33

See, for example, *R v Griffith,* 2021 ONCA 302, and *R v Keshavarz,* 2022 ONCA 312, at paras 69-83*,* where the Court of Appeal found that the police had case-specific concerns that justified delaying access to counsel – primarily, the need to execute warrants after arrest and the concern over preservation of evidence.

Where the right to counsel is suspended for valid reasons, it is incumbent upon police to facilitate access to counsel as soon as the circumstances reasonably permitted: *R v DeSilva,* 2022 ONCA 879, at para 84

The Court cannot assume that an accused ultimately spoke to counsel in the absence of evidence: *Noel* at para 20

The obligation on the police to facilitate contact with counsel and the responsibility of the detainee to take reasonable steps to contact counsel work in tandem. The police must make reasonable efforts to connect the detainee with counsel of choice "without delay". The detainee must exercise reasonable diligence in his or her efforts to connect with counsel of choice. Both obligations are tested against reasonableness-based standards: *R v Edwards,* 2024 ONCA 135, at para 36

There are a number of ways in which the police may facilitate a detainee's right to immediate contact with counsel. Where the police assume the responsibility of making first contact, rather than providing the detainee with direct access to a phone or internet connection, they must be taken to have assumed the obligation to pursue the detainee's constitutional right to [access counsel] as diligently as she would have. Anything less would encourage token efforts by the police and imperil the right of those in detention to consult a lawyer of their choosing: *R v Jarrett,* 2021 ONCA 758, at para 43

This does not mean that the police must act with the same level of diligence as the specific detainee in question. Such a requirement imposes an unworkable standard. Rather, the analysis requires the police to act as diligently as a

reasonably diligent detainee would: *R v Edwards,* 2024 ONCA 135, at paras 37-42

The question is whether, in all the circumstances, the police took reasonable steps to connect the detainee with counsel of choice, not whether there is some additional step the police did not take which may have assisted in contacting counsel: *R v Edwards,* 2024 ONCA 135, at para 43

In *Jarrett*, the Court of Appeal held that the police breached the duty to immediately provide the accused with a reasonable opportunity to speak to counsel when they did nothing but leave a single message with counsel, without any follow up, for 30 hours. The Court highlighted that the police "did not explore whether there were other means of making contact with the counsel the appellant had specified. Nor was the appellant told that a message had been left with the counsel he had specified, or that it had not been answered. Thus, he was not given the opportunity to provide other contact information for that counsel if he had it, or to specify another counsel who might be more immediately responsive": *R v Jarrett,* 2021 ONCA 758, at para 42

The seriousness of a s.10(b) implementational breach cannot be attenuated by the fact that:

1. the police do not commit an additional breach by attempting to solicit information prior to facilitating rights to counsel:
2. the right to counsel is delayed, as opposed to denied altogether
3. the accused does not demonstrate that the delay occasioned a failure to have a meaningful conversation with counsel: *R v Noel,* 2019 ONCA 860, at paras 19-22

iii. THE DUTY TO HOLD OFF

If an accused person asserts his/her right to speak to a lawyer when read his/her rights, then the question "Do you wish to say anything in answer to the charge?" asked at the conclusion of the standard caution, violates the police duty to hold off questioning. Any statements elicited as a result of this question may be excluded: *R v GTD,* 2018 SCC 7

In *Mohamed,* 2017 ONCA 117, the Court of Appeal found that the police decision to continue to engage in conversation with the Appellant after he expressed a desire to speak to counsel, and to ask him if he had drugs or weapons on him, constituted a serious breach of 10(b). The police then used his silence in answer

to that question to justify a strip search. The breaches were sufficiently serious as to warrant exclusion of 20grams of crack cocaine.

Questions related to immediate safety concerns, for example, the presence of fentanyl, do not offend the duty to hold off: *R v DeSilva,* 2022 ONCA 879, at para 98

iv. Mental Illness

In order to make a meaningful choice respecting their participation in the investigatory process, a detainee must possess a certain basic cognitive capacity. The standard for assessing capacity in the s. 10(b) context is the same as the "operating mind" standard that applies under the common law confessions rule. To have had an operating mind at the time a statement was made, the accused must have possessed the limited cognitive ability to understand what they were saying and to comprehend that the statement might be used as evidence in criminal proceedings.

The presence of a mental illness does not in and of itself mean legal advice was not understood or that a statement must be involuntary. Rather, the question is whether the accused was so devoid of rationality and understanding, or so replete with psychotic delusions, that his uttered words could not fairly be said to be his statements at all. This means that a detainee can have an operating mind even when experiencing psychosis at the time a statement is given.

To establish a *Charter* breach, the burden is on the accused to prove, on a balance of probabilities, that he did not have an operating mind at the time he gave his statement: *R v Kostuk,* 2025 ONCA 195, at paras 27-30

v. The Right to Reconsult Counsel

There three situations in which a second consultation with counsel would be constitutionally required:

1. where, after the initial consultation, non-routine procedures are proposed by the police (such as participating in a line-up or submitting to a polygraph)

that do not generally fall within the expectation of the advising lawyer at the time of the initial consultation

2. where, after an initial consultation, the investigation takes a new and more serious turn" making the advice inadequate in light of the actual situation, or jeopardy, the detainee faces (*R. v. Blake*, 2015 ONCA 684; *R v Roberts,* 2018 ONCA 411 at para 76)
3. where the circumstances indicate that the detainee did not understand his right to counsel, or if police undermined the legal advice received by the detainee distorting or nullifying it: *R v Tahmasebi,* 2020 ONCA 47, at para 21; *R v Dussault,* 2022 SCC 16; *R v LaFrance,* 2022 SCC 32

In the context of legal consultation for an impaired driving arrest, a subsequent police request for a DRE test or a urine sample test does not fall within the category of a non-routine procedure or change in jeopardy necessitating a second consultation. Both the DRE test and the urine sample are integrally connected with the consequence of an arrest for impaired driving, and legal advice on these topics would be expected of the lawyer providing advice on the initial consultation: *R v Tahmasebi,* 2020 ONCA 47, at parars 24-35

In respect of the third category of changed circumstances, police can undermine legal advice by undermining confidence in the lawyer who provided that advice. Undermining is not limited to intentional belittling of defence counsel. Police conduct can unintentionally undermine the legal advice provided to a detainee. The focus should remain on the objectively observable effects of the police conduct, rather than on the conduct itself. There is no need to prove that the police conduct was intended to have this effect. The purpose of s. 10(b) will be frustrated by police conduct that causes the detainee to doubt the legal correctness of the advice they have received or the trustworthiness of the lawyer who provided it: *R v Dussault,* 2022 SCC 16

In *Dussault,* for example, the SCC found that the police undermined the accused's confidence in his lawyer when they (1) effectively falsified an important premise of the lawyer's advice — i.e., that the accused would be placed in a cell until the lawyer arrived to speak with him; and (2) misled the accused into believing that his lawyer had failed to come to the station for their in-person consultation when he told him that he would – and when he in fact did. These actions caused the accused to openly question his lawyer's advice

The third category also covers circumstances where the detainee may not have understood the initial s. 10(b) advice of his right to counsel, which imposes on the

police a duty to give him a further opportunity to talk to a lawyer. The inquiry is into circumstances, stated broadly, and an inquiry into whether a detainee understood that he or she could remain silent is not sufficient. It is only by ensuring that detainees obtain legal advice that accounts for the particular situation they face, conveyed in a manner they can understand, that s. 10(b) can meaningfully redress the imbalance of power between the state (whose agents know the detainee's rights) and the detainee (who may not).

It is uncontroversial that the purpose of s. 10(b) is to mitigate the imbalance between the individual and the state. Investigating officers and reviewing courts must be alive to the possibility that a detainee's vulnerabilities, which may relate to gender, youth, age, race, mental health, language comprehension, cognitive capacity or other considerations, coupled with developments that may occur in the course of police interrogation, will have rendered a detainee's initial legal advice inadequate, impairing his or her ability to make an informed choice about whether to cooperate with the police: *R v LaFrance,* 2022 SCC 22

vi. Spontaneous Statements

If a detainee makes an un-elicited and spontaneous incriminating statement after being appropriately cautioned, there is no violation of s. 10(b): *R v Miller,* 2018 ONCA 942, at para 14

vii. Counsel of Choice

The right of an accused person to choose his or her counsel does not require the state to pay for an accused person's chosen counsel, even where the accused person wins a Rowbotham order. The exception is where a) counsel of choice is necessary to a fair trial; or b) where accused shows he cannot find competent counsel under Legal Aid rates & conditions: *R v. Hafizi*, 2015 ONCA 534

The right to counsel in s. 10(b) clearly includes the right to a reasonable opportunity to contact counsel of choice. Police conduct which interferes with a detainee's ability to contact counsel of choice within a reasonable time will amount to an infringement of s. 10(b): *R v Edwards,* 2024 ONCA 135, at para 27

The obligation on the police to facilitate contact with counsel and the responsibility of the detainee to take reasonable steps to contact counsel work in tandem. The police must make reasonable efforts to connect the detainee with counsel of choice "without delay". The detainee must exercise reasonable diligence in his or her efforts to connect with counsel of choice. Both obligations are tested against reasonableness-based standards: *R v Edwards,* 2024 ONCA 135, at para 36

viii. Counsel at Trial

As important as the right to counsel is, it is not an unlimited right. It must be balanced against the timely disposition of cases. The decision to grant or not to grant an adjournment for an accused to retain counsel is a matter that is within the discretion of any trial judge. An appellate should only interfere with a trial judge's refusal to grant an adjournment if it deprives an accused of a fair trial or the appearance of a fair trial: *R v Patel,* 2018 ONCA 541 at para 3

The failure to inquire into whether a self-represented litigant wishes to retain counsel at trial means that the accused's decision to proceed without counsel cannot be said to be an informed one: *R v Walker,* 2019 ONCA 765, at para 30

ix. Roadside Sobriety Tests

The constitutional right to be protected from conscription until a reasonable opportunity to consult counsel has been provided would be breached by roadside sobriety testing, unless the testing is a demonstrably justifiable and reasonable limit on this constitutional right that is prescribed by law: *R v Roberts,* 2018 ONCA 411 at para 87

In this regard, the Court of Appeal has held that conscripting detainees through roadside sobriety testing provided for in provincial highway traffic legislation is demonstrably justifiable and reasonable. This includes questions about alcohol consumption and co-ordination tests. Such roadside sobriety testing is reasonable and justifiable so long as the evidence obtained is used solely to support an officer's ground for arrest or detention. In contrast, it would be disproportionate, and therefore not demonstrably justifiable, to use conscripted evidence as proof of impairment during a trial: *Roberts* at para 88

B. A TAINTED SECOND STATEMENT

The *Plaha* test applies in determining whether, when the police have obtained a statement in violation of s. 10(b), and the suspect gives a second statement after having consulted a lawyer, the second statement was "obtained in a manner" that infringed the Charter: *R v Hamilton*, 2017 ONCA 179 at para 45

There are two components to the s. 24(2) analysis. The first is a threshold requirement: was the impugned statement obtained in a manner that infringed a Charter right? If that threshold is crossed, one turns to the second "evaluative" component of s. 24(2) to determine whether the admission of the impugned evidence would bring the administration of justice into disrepute.

A generous approach is to be taken to the threshold issue. The relationship between the breach and the impugned evidence may be temporal, contextual, causal or a combination of the three. The connection must be more than tenuous. In *Plaha,* a six and a half hour gap between the two statements was sufficient to make out a temporal connection. In *Hamilton,* a four-hour gap between the two statements was sufficient to make out a temporal connection: *Hamilton* at paras 38-42, 51.

The police can make a "fresh start" by clearly severing their subsequent interrogation from the earlier Charter breach.

In *Hamilton,* the Court of Appeal found that the second statement was tainted and should have been excluded in circumstances where the police did not give a fresh start warning, despite the fact that: the accused received legal advice after the first statement and before he made the second statement; the accused told the second statement officer that he was aware of his right to silence and that duty counsel had told him not to speak to police; the accused was aware of the charges that he faced throughout; during the interview, the second statement officer affirmed the accused's right to silence; and, the second statement officer did not refer to the accused's first statement during his interview with him: *Hamilton* at paras 56-59

C. PROSPER WARNING

The “Prosper warning” is meant to equip detainees with the information required to know what they are giving up if they waive their right to counsel. A Prosper warning is not required in all cases. It is needed only if a detainee has asserted the right to counsel and then apparently changes his mind after reasonable efforts to contact counsel have been frustrated. In such circumstances, the burden of establishing a waiver of those rights is on the Crown and is a high one, requiring proof of a clear, free and voluntary change of mind made by someone who knew what they were giving up. A proper Prosper warning is therefore significant in enabling the Crown to prove waiver of the right to counsel in such cases.

It is helpful in understanding the Prosper warning to appreciate the rights that are stake when a detainee waives their right to counsel. Specifically, when a detainee asserts their desire to exercise the right to counsel, either expressly or by not waiving their right to counsel, the police are obliged to cease questioning and are under a duty to facilitate the exercise of that right. The temporary obligation to cease questioning also extends to other efforts to elicit evidence from the detainee, and is often referred to as the obligation or duty to “hold off”, since there is no problem in properly using the detainee as a source of evidence after they have exercised or relinquished their right to counsel.

The proper warning imposes an additional informational obligation on police that is triggered once a detainee, who has previously asserted the right to counsel, indicates that he or she has changed his or her mind and no longer wants legal advice. At this point, the police are 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 statements or require the detainee to participate in any potentially incriminating process until he or she has had that reasonable opportunity.

If the detainee is not reasonably diligent in exercising the right to counsel, the duty to hold off will be suspended and the police may question the detainee. The obligation on the police to make efforts to facilitate contact with counsel will also be suspended. The right to receive a Prosper warning at the time will also be lost. After all, there is no need to advise a detainee of what they will lose if they waive their right to consult counsel without delay, where the detainee has already forfeited that right by not being reasonably diligent in exercising it: *R v Fountain,* 2017 ONCA 596 at paras 27-30

The requirement to provide a *Prosper* warning is limited to cases where the accused waives the right to speak to counsel after not being able to get in touch with counsel of choice. A *Prosper* warning is not required where the accused opts to speak to duty counsel, as no waiver of the right to counsel occurs in such circumstances: *R v Edwards,* 2024 ONCA 135, at paras 20-25

D. EXCLUSION OF EVIDENCE

A court may exclude evidence not seized as a result of a s.10(b) violation. While the "obtained in a manner" component is usually established where there is a causal connection between the evidence seized and the Charter right violated, this is not always the case. The "obtained in a manner" component also includes temporal and contextual connections: *R v Shang En Wu,* 2017 ONSC 1003; *R v Pino*, 2016 ONCA 389

An officers' ignorance of the very well-entrenched rights of an accused to immediate access to counsel puts their conduct on the very serious end of the spectrum under the first branch of the *Grant* analysis: *R v La,* 2018 ONCA 830, at para 45. So too does officers' simple neglect of those rights: *R v Jarrett,* 2021 ONCA 733, at paras 46-50

The seriousness of a s.10(b) breach cannot be attenuated by the fact that:

1. the police do not commit an additional breach by attempting to solicit information prior to facilitating rights to counsel:
2. the right to counsel is delayed, as opposed to denied altogether
3. the accused does not demonstrate that the delay occasioned a failure to have a meaningful conversation with counsel: *R v Noel,* 2019 ONCA 860, at paras 19-22

In *Francis,* the Court of Appeal found that the police failure to give a second counsel caution when they re-arrested the accused was not serious, given that the accused had already received an initial caution in relation to the initial arrest for more serious charges: 2022 ONCA 729, at paras 62-63

On the second branch of the Grant analysis, a trial judge must consider the extent to which the s. 10(b) breach undermined all the interests it protects, *regardless* of whether the police succeeded in obtaining an incriminating statement from the accused. Those interests go well beyond the accused's fair trial rights as considered by the trial judge and include the vulnerability of an arrested accused

who requires the immediate ability to consult with a lawyer to obtain counsel, not just for legal advice, but as a lifeline to the outside world. The psychological value of access to counsel without delay should not be underestimated: *R v Pino*, 2016 ONCA 389, at para. 105; *R v Rover*, 2018 ONCA 745 at para. 45; *La* at para 48; *R v Jarrett,* 2021 ONCA 733, at paras 52-55

When it comes to a delayin speaking to counsel of choice, there are additional considerations. Even if the breach did not ultimately cause the appellant to suffer any lasting prejudice, a lengthy delay before an can speak with his counsel of choice can be presumed to have caused psychological stress that affected their security of the person. The psychological value of the accused being allowed to speak with a lawyer he already knew, and presumably trusted, should not be underestimated: *R v Vassel,* 2024 ONCA 771, at paras 29-31

The impact on the accused's *Charter*-protected interests may be reduced if it is clear that the detainee would have made the statement in question notwithstanding the *Charter* breach: *R v Miller,* 2018 ONCA 942, at para 21

Where the Crown undertakes to not rely on utterances obtained in violation of s.10(b), the fact that the state is not going to benefit from the self-incriminating statements that were elicited as a result of the breaches lessens the negative impact of the s. 10(b) violations: *R v Hamouth,* 2023 ONCA 518, at para 45

The impact of a 10(b) breach is mitigated by the fact that statements made were not of evidentiary value and were not sought to be admitted by the Crown. The impact is also mitigated where the accused does not make any statements at all: *R v DeSilva,* 2022 ONCA 879, at paras 98, 101

Because causation is not a realistic factual concern where purely informational breaches of s. 10(b) occur, to treat the absence of causation as mitigating the impact of the breach on the *Charter*-protected interests of the accused would systemically and artificially devalue the vitality of informational rights. It is therefore not generally instructive to consider causation relating to purely informational breaches of s. 10(b), since a purely informational breach is not apt to "cause" the discovery of evidence in any case: *R v Davis,* 2023 ONCA 227, at para 65

The court can nonetheless consider the causal impact of the breach on the discovery of real evidence. While the impact on the *Charter*-protected interest can be serious even without a causal connection, the fact that the police do not take a statement from the arrested person while violating the right to counsel, or the fact

that there is no causal connection between the breach and the evidence discovered may lessen the impact of the breach: *R v Hamouth,* 2023 ONCA 518, at paras 54-56

SECTION 11(B)

A. THE TEST

s. 11(b) is being engaged during any period that an accused person is in fact subject to charges, or when a person no longer actively charged remains subject to the very real prospect of new charges: *R v Wookey,* 2021 ONCA 68, at para 56

In *R v Jordan*, 2016 SCC 27, the Supreme Court of Canada created a new s.11(b) framework, which is based upon a presumptive ceiling that defines unreasonable delay. The presumptive ceiling is set at 30 months for cases going to trial in the superior court and 18 months for cases going to trial in the Ontario court of justice; beyond this ceiling, delay becomes “presumptively unreasonable" (para 46).

The 11(b) clock runs from the date of the charge, not the date of arrest: *R v Allison,* 2022 ONCA 329, at paras 41-43

The presumptive ceiling for cases going to trial in the superior court does not change when an indictable matter proceeds directly to the superior court without a preliminary inquiry. Nor does preferring an indictment lower the presumptive ceiling: *R v Bulhosen,* 2019 ONCA 600, at paras 67-72; 86-94

Cases going to trial in the superior court for which no preliminary inquiry has been held are still subject to the 30 month ceiling: *R v Bulhosen,* 2019 ONCA 600, at paras 67-72

Once the presumptive ceiling is exceeded, the burden shifts to the Crown to rebut the presumption that the delay is unreasonable. In order to do so, the Crown must establish that there were exceptional circumstances outside of their control, and that these circumstances were both (1) reasonably unforeseeable or reasonably unavoidable and (2) the Crown could not reasonably remedy the delays once they occurred. In other words, the Crown must prove that it took “reasonable available

steps to avoid and address the problem before the delay exceeded the ceiling" (*Jordan* at paras 69-70).

In addition, under *Jordan*, “prejudice will no longer play an explicit role in the s. 11(b) analysis,” Once the ceiling is breached, the accused person is presumed to have suffered prejudice to his Charter-protected liberty, security of the person, and fair trial interests (*Jordan*, para 54).

It matters not which level of government is at fault. The only question from the *Charter’s* perspective is whether the delay is unacceptable in accordance with the *Jordan* principles. The court’s focus in the analysis must be on the right-holder, not on the Crown: *R v Villanti,* 2020 ONCA 755, at paras 44-45

A re-election that an accused makes on consent is not reasonably unforeseen or reasonably unavoidable: *R v Long,* 2023 ONCA 679, at para 62

Crown counsel must be alive to the fact that any delay resulting from their prosecutorial discretion must conform to the accused’s s. 11 (*b*) right. For example, in *Thanabalasingham,* the SCC held that the Crown’s exercise of prosecutorial discretion leading to a preliminary hearing that lasted a year was not to be treated as a discreet exceptional event, but was delay that fell at the feet of the Crown: 2020 SCC 18

Crown counsel is tasked with making reasonable and responsible decisions regarding who to prosecute and for what, delivering on their disclosure obligations promptly with the cooperation of police, creating plans for complex prosecutions, and using court time efficiently: *R v Thanabalasingham,* 2020 SCC 18

To sustain an argument that delayed or incomplete disclosure caused delay, the record must establish some causal connection between the incomplete disclosure and the delay: *R v Jones,* 2025 ONCA 103, at para 20

The modern *Jordan* framework for s. 11(b) delay encourages both sides to engage in proactive, preventative problem solving and encourages courts to develop “robust case management and trial scheduling processes. Where delays arise or are anticipated, the parties can and should invoke case management by a JPT judge who can monitor and regulate delays arising from matters such as disclosure and election issues, as well as the conduct of pre-trial motions: *R v Anderson,* 2025 ONCA 172, at paras 16-17, 24

In respect of motions, the parties must act responsibily to set a schedule for motions, comply with that schedule, and bring any difficulties to the attention of the court: *R v Anderson,* 2025 ONCA 172, at para 25

Delay attributable to a party may arise where that parties abandons a pre-trial motion without timely notice to the Court, which wastes valuable court resources and prevents the court from amending the schedule by using the allotted time for other pre-trial motions in the case: *R v Anderson,* 2025 ONCA 172, at para 26

The presumptive ceiling of 18 months applies to all cases that proceed to trial in the provincial court, including when the accused re-elects trial in the provincial court after having originally elected to have a preliminary inquiry and trial in the Superior Court: *R v Wookey,* 2021 ONCA 58, at paras 61-76

A party who causes an adjournment is responsible for the entire delay until the matter can be rescheduled, unless the other party is unavailable for an unreasonable period of time: *R v Picard,* 2017 ONCA 692, at para 117

However, in *Grant,* the court rejected the appellant's argument that *Picard* could be relied upon to find that the defence delay should be restricted to the delay between the start of the originally scheduled preliminary inquiry and it's actual start where the preliminary inquiry was adjourned by the defence. This is because the originally scheduled preliminary inquiry was scheduled over a single block of time, btu the defence adjournment resulted in segmented blocks of time that significantly delayed the proceedings: 2022 ONCA 337, at paras 38-42

An accused must raise the unreasonableness of trial delay in a timely manner. Lateness in bringing a s. 11(b) motion for a stay of proceedings is an important factor in determining whether an accused has waived delay. Waiver is established on the basis of the accused's conduct, having regard to the circumstances of each case: *R v JF,* 2022 SCC 17

Inaction may be considered illegitimate conduct, and the delay associated with it may be attributed to the defence. In assessing such delay, the court will examine the record to determine whether defence counsel's timing deprived the Crown of the ability to mitigate the delay by obtaining earlier trial dates: *R v Valloton,* 2024 ONCA 492, at para 31

B. DEFENCE DELAY

Defence delay does not count towards the presumptive ceiling. Defence delay has two components: waiver and delay caused solely by the conduct of the defence. Waiver by an accused must be clear and unequivocal, and made with full knowledge of the rights being waived and the effect of the waiver on those rights. The court cannot accept the failure to assert the right, silence, or lack of objection as constituting a valid waiver. Importantly, waiver also implies choice. As the Supreme Court noted in *R v Askov*, [1990] 2 SCR 1199, "unless some real option is available, there can be no choice exercised and as a result waiver is impossible:" *Jordan*, at para 106.

Waiver cannot be inferred from an accused's silence or failure to act. an accused must take some direct action from which a consent to delay can be properly inferred: *R v JF,* 2022 SCC 17

The second type of defence delay occurs when defence conduct directly causes delay, or when both the Crown and court are ready to proceed but the defence is not. However, "defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay." Defence applications and requests that are not frivolous will typically not contribute to defence delay: *Jordan,* paras 60-66.

Although actions that are legitimately taken to respond to the charges will fall outside of defence delay, when what prevents the matter from proceeding is simply that the defence is not available when the Crown and the court are, this constitutes defence delay and will be subtracted from the total delay: *R v Mallozzi,* 2018 ONCA 312 at para 6

Defence delay does not include taking time to prepare, as well as defence actions taken in response to negligent Crown conduct, such as late disclosure, even where such conduct is not deliberate: *R v Zahor,* 2022 ONCA 449, at para 65; see e.g., *R. v. Pyrek*, 2017 ONCA 476, at paras. 19-22; *R. v. D.A.*, 2018 ONCA 96, paras. 20-22.

Defense conduct encompasses both substance and procedure — the decision to take a step, *as well as the manner in which it is conducted* , may attract scrutiny: *R v Cody,* 2017 SCC 31; *R v Lai,* 2021 SCC 52

Although defence delay will typically arise where the crown and court are ready to proceed but the defence is not, in some cases, the circumstances may justify apportioning responsibility for delay among these participants rather than attributing the entire delay to the defence: *R v Boulanger,* 2022 SCC 2, at para 8;

see also *R v Hanan,* 2022 ONCA 229, at paras 54-59; see also dissent of Nordheimer J at paras 136-137; see also *R v Zahor,* 2022 ONCA 449, at para 102

Defence counsel are not expected to hold themselves in a state of perpetual availability for trial dates. Scheduling requires reasonable availability and reasonable cooperation: *R v Godin,* 2009 SCC 26, at para 23.

The offering of one set of earlier trial dates essentially at the last minute does not require that defence counsel be available or risk having any consequent delay characterized as defence delay: *R v Bechamp,* 2025 ONCA 233, at para 1

There should be no "bright-line" rule according to which all of the delay until the next available date following defence counsel's rejection of a date offered by the court must be characterized as defence delay. All relevant circumstances should be considered to determine how delay should be apportioned among the participants: *R v Hanan,* 2023 SCC 12, at para 9; see *R v Bowen-Wright,* 2024 ONSC 293; see, for example, *R v Jones,* 2025 ONCA 103, at paras 31-36

A trial judge may be justified in finding that no delay should be apportioned to the defence's inability to accept earlier dates when defence counsel otherwise acted reasonably throughout the proceedings: *R v Veritis,* 2024 ONCA 232

In some circumstances, it may legitimate for the defence to require time to review the disclosure before proceeding as scheduled, for example, when Crown provides significant new material in the moments leading up to an appearance. The same will not hold where defence counsel continually refuse to move forward on the basis of inadequate Crown disclosure, notwithstanding that the defence has sufficient disclosure to advance: *R. v. D.A.*, 2018 ONCA 96; *R v Hanan,* 2022 ONCA 229, at para 45; *R v Allison,* 2022 ONCA 329, at para 47

Delay arising from frivolous positions taken by defence counsel constitute defence delay: *R v Mallozzi,* 2017 ONCA 644, at para 41

While delay in pursuit of extradition proceedings has been attributed to the Crown, delay arising from an accused's flight from the jurisdiction is attributable to defence delay and is to be subtracted from the net Jordan delay: *R v Burke,* 2018 ONCA 594

For a review of considerations in characterizing delay arising from the delay in executing a bench warrant upon failure of the accused to attend court, see: *R v JM,* 2021 ONCA 256, at paras 38-43

In *RB,* the Court of Appeal held that the entire period of delay arising from the accused's flight from Canada in breach of his bail conditions constituted defence delay. The court rejected the argument that the state's failure to seek his surrender pursuant to an extradition treaty meant that the Crown was responsible for a large period of the delay: *R v RB,* 2018 ONCA 594

C. EXCEPTIONAL CIRCUMSTANCES – DISCRETE EVENTS

An exceptional circumstance typically falls into one of two categories: discrete events and particularly complex cases. The former concerns events such as medical or family emergencies and unforeseen events at trial (e.g., a recanting witness) that cause delay. Such delay should be subtracted from the total delay used in determining whether the presumptive ceiling has been breached (*Jordan,* paras 71-75).

Discrete events can also include, for example, elongated trials despite good faith timeline estimates: *Jordan*, at paras. 72-73; *R. v. MacIsaac*, 2018 ONCA 650, at para. 44; *R v Zahor,* 2022 ONCA 449, at para 71

In *KJM,* the SCC held that a -one-month delay arising from an administrative error in ordering a transcript was an administrative error that was neither reasonably foreseeable nor reasonably avoidable, and was therefore considered a discrete, exceptional event. The court noted that trials are not "well-oiled machines" and that "mistakes happen:" *R v KJM,* 2019 SCC 55, at para 100

Trial judges – equipped with on-the-ground local expertise on the needs, practices, and culture of their own courts – have significant discretion on how best to respond to an exceptional circumstance. Appellate courts ought to defer to trial judges' expertise on local circumstances and practices: *R v Coates,* 2023 ONCA 856, at paras 6, 44

This includes circumstances where the trial judge is making an assessment of whether the pandemic caused scheduling delays in the particular jurisdiction and

case in question: *R v JJ,* 2023 ONCA 52; *R v Kirkopoulos,* 2024 ONCA 596, at para 43

The assignment of judges to education programs does not qualify as an exceptional circumstance.

It does not matter that the prosecuting Crown can do nothing about the staffing of courts. The Crown at large is responsible for preventing systemic delay: *R v Perreault,* 2020 ONCA 580, at paras 4-5

Superior Court judges know how many vacancies exist in the local complement at any one time. This is a fact of which a judge can take judicial notice: *R v Villanti,* 2020 ONCA 755, at para 34

Although delays in filling judicial vacancies may be understandably described as "unreasonable" in a colloquial sense, it is not unreasonable, in and of itself, within the meaning of s. 11(b) of the *Charter*. Conflating those uses of the term unreasonable constitutes error.

Two mistrials qualify as discrete, exceptional events that were reasonably unforeseeable: *R v Mallozzi,* 2017 ONCA 644, at para 41

In a vigorously contested, multi-day and witness trial, it is not in itself a discrete exceptional event that the trial judge required time to provide the parties with reasons. In other words, the time while the decision is under reserve does not constitute a discrete exceptional event: *R v MacIsaac,* 2018 ONCA 650 at para 48

When the need for continuation dates arises, it is incumbent on all justice participants to make best efforts to accommodate the earliest possible dates so that trials can finish close to on schedule. This will sometimes require the parties to assess and reassess their priorities and, where possible, adjust their schedules to accommodate the dates offered so as to avoid lengthy adjournments: *R v JS,* 2024 ONCA 794, at para 78

Similarly, the decision whether to seek leave to appeal is not an unforeseeable or unavoidable event of the sort contemplated by *Jordan*. On the contrary, it is a routine matter that arises in every case in which an appeal from conviction succeeds: *MacIsaac* at para 51

Where a trial goes longer than "reasonably expected", even where the parties have in good faith attempted to establish realistic timelines" it is "likely that the delay was

unavoidable and is therefore to be treated as an exceptional circumstance: *R v Jurkus,* 2018 ONCA 489, at para 55; *R v Antic,* 2019 ONCA 160, at para 8.

Where access to courts has been limited in ways akin to those arising during the pandemic, the attributable delays are to be treated by the reviewing court as discrete exceptional circumstances in assessing delay, whether in respect of jury or judge-alone trials in the SCJ, or trials in the OCJ. This approach is subject to the right of the defence to argue that the delay is unacceptable nonetheless as set out in *Jordan*. That said, it is not open to the defence to second-guess the policy decisions made that limited access to courts: *R v Agpoon,* 2023 ONCA 449, at paras 33-34

Commencing the start date of the exceptional circumstance delay from the date the courts closed lends certainty and simplicity to the analysis: *R v Long,* 2023 ONCA 679, at para 72; see also para 70

However, there is no rule that all periods of delay during the COVID-19 pandemic, including those resulting from scheduling backlogs, should be attributed to exceptional circumstances. Even in the case of pandemic-related delay, the Crown must make reasonable efforts to mitigate the delay resulting from COVID-19 and delay that could reasonably have been mitigated may not be subtracted: *R v Kirkopoulos,* 2024 ONCA 596, at para 45

There is no *per se* rule that all delay coincident with the pandemic must be subtracted for purposes of s. 11(b). To be subtracted as exceptional, delay must be attributable to the pandemic in some articulable sense.

The appellate court will deferring to trial judges' expertise on local circumstances and practices. defer judges, equipped with on-the-ground local expertise on the needs, practices, and culture of their own courts, are in the best position to determine whether an exceptional circumstance has contributed to delay: *R v Jones,* 2025 ONCA

In responding to the exceptional circumstance of a backlog of cases that have resulted because of the pandemic, trial judges must remain cognizant of the fact that no case is an island to be treated as if it were the only case with a legitimate demand on court resources.

To that end, the Crown need not tender evidence to prove that it took all available steps to expedite any given trial delayed by the pandemic – it must simply show that it took reasonable steps to avoid and address the problem before the delay exceeded the ceiling. The Crown does not have to show that the steps it took were successful, only that it reasonably attempted to avoid the delay. A trial judge's sense of local conditions, based on the judge's good sense and experience, can suffice to ground a finding of reasonableness: *R v Jones,* 2025 ONCA 103, at paras 55-56

Finally, the same considerations that must be taken into account in rescheduling a retrial do not necessarily apply to a case that had to be adjourned due to the closure of the courts following COVID-19 *R v Coates,* 2023 ONCA 856, at paras 45-46, 58-53

D. EXCEPTIONAL CIRCUMSTANCES - COMPLEXITY

Particularly complex cases are those that require an "inordinate amount of trial or preparation time such that delay is justified." This may be because of the nature of the evidence (e.g., voluminous disclosure, a large number of witnesses, complex and lengthy expert evidence, charges covering a long period of time etc.) or the nature of the issues (e.g., a large number of charges and pre-trial applications, and novel or complicated legal issues. The 11(b) application will fail if the court finds that the case was particularly complex such that the delay is justified (*Jordan*, paras 77-80)

In determining whether a case is particularly complex, the following factors are of importance:

- case complexity requires a qualitative, not quantitative, assessment:
- complexity is an exceptional circumstance only where the case as a whole is particularly complex:
- complex cases are cases that, because of the nature of the evidence or the nature of the issues, require an inordinate amount of trial or preparation time such that the delay is justified
-

If the case is complex, then the court must look at whether the Crown developed and followed a concrete plan to minimize the delay occasioned by the complexity: *R V Powell,* 2020 ONCA 743, at para 7

Determining the overall complexity of a case is well within the trial judge's expertise. As a result, the trial judge's findings in relation to this issue are "entitled to deference: *R v Anderson,* 2025 ONCA 172, at para 32

The presumptive ceilings set in *Jordan* already reflect the increased complexity of criminal cases since *Morin*, including the emergence of new procedures, new obligations on the Crown and police, and new legal tests. Complexity is an exceptional circumstance only where the case as a whole is particularly complex.

Complexity cannot be used to deduct specific periods of delay. The delay caused by a single isolated step that has features of complexity should not be deducted. Instead, a case's complexity as a whole may be relied upon to justify the time that the case has taken and rebut the presumption that the delay was unreasonable. As a result, when determining whether a case's complexity is sufficient to justify its length, trial judges should consider whether the net delay is reasonable in view of the case's overall complexity.

Trial judges must focus on the case *as a whole*, not simply on the trial itself: like a case can simplify as it proceeds, a case can also acquire complexity over time. However, it is an error to focus on one portion of the case over another. The case must be viewed in its entirety: *R v Zahor,* 2022 ONCA 449, at paras 106, 109

Complexity can arise from cases involving more than one accused. Proceeding jointly against multiple co-accused, so long as it is in the interest of justice to do so, may also impact the complexity of the case: *Jordan,* at para. 77; *R v Gopie,* 2017 ONCA 728 at paras 169-171; *R. v. Manasseri,* 2016 ONCA 703 at para. 311; *R v Jurkus,* 2018 ONCA 489 at para 66. There are a host of reasons why accused charged in relation to the same incident should be tried together, such as: conserving judicial and trial resources; avoiding inconsistent verdicts; and avoiding witnesses having to testify more than once: *Gopie,* at para. 138; *Jurkus* at para 68

It is not sufficient for the Crown to simply assert that the case was complex; it must link complexity to the delay that ensued and also demonstrate that, despite developing a plan to address the complexity and minimize the delay, it was unable to do so: *R v Wookey,* 2021 ONCA 68, at paras 83-86

Whether a particular case is complex will often be in the eye of the beholder. These determinations fall well within the trial judge's expertise: *R v Wookey,* 2021 ONCA 68, at para 88

While voluminous disclosure is a hallmark of particularly complex cases, its presence is not automatically demonstrative of complexity. The question is whether *the case* is sufficiently complex such that the delay is justified. It is the manner in which the Crown discharges its disclosure obligations that is key: *R v Wookey,* 2021 ONCA 68, at para 92

E. REASONABLE STEPS TO MINIMIZE DELAY

The inquiry into whether the Crown took reasonable steps to minimize delay remains a contextual one. In light of *Jordan*, reasonable efforts must be made to obtain continuation dates as quickly as possible. However, the reality of extremely busy provincial courts, handling the vast majority of criminal matters, must also be kept in mind: *R v Jurkus,* 2018 ONCA 489 at para 59

JPT teleconferences may be appropriate in some situations, particularly where a long delay may be generated to accommodate personal attendance. When this arises, counsel must inform the court of their availability to proceed this way.

Generally speaking, however, personal appearances for JPTs are preferable. Personal appearance accords with the purpose pre-trials are designed to achieve. They are designed to promote general efficiency in the criminal justice system by, among other things, facilitating resolutions, resolving issues, simplifying motions, arriving upon agreed facts, identifying triable issues and setting meaningful schedules. In this age of concern about delay in our criminal justice system, there is an added premium on ensuring the success of judicial pre-trials. Undoubtedly, personal attendance enhances the opportunity for meaningful discussions and successful outcomes: *R v Jurkus,* 2018 ONCA 489 at paras 32-33

Delay may be unreasonable, notwithstanding Crown's efforts to minimize delay: *R v Villanti,* 2020 ONCA 755, at paras 35-40

In light of the Court of Appeal's decisions in *R v Gordon*, 2017 ONCA 436 and *R v Picard*, 2017 ONCA 692, the Crown's decision to oppose a defence re-election to avoid delay may be considered unreasonable delay post-*Jordan*

F. CASES BELOW THE CEILING

The defence may establish unreasonable delay below the ceiling only if the defence can establish two things, that: (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings, and (2) the case took markedly longer than it reasonably should have. In determining whether a case took markedly longer than it should have, case-specific factors will inform how to characterize the delay. Those factors will include the complexity of the case, any local conditions that may be operative, and whether the Crown took reasonable steps to expedite the proceedings.

As for local conditions, trial judges should employ the knowledge they have of their own jurisdiction, including how long a case of that nature typically takes to get to trial in light of the relevant local and systemic circumstances": Jordan, at para. 89. At the end of the day, trial judges assessing whether the case has taken markedly longer than what was reasonably required are advised to step back from the minutiae and adopt a bird's-eye view of the case: *R v SA*, 2025 ONCA 737, at paras 25-26

The issue is not whether the case should reasonably have been completed in less time. Rather, the issue is whether the case took *markedly* longer than it reasonably should have. The Court should start from the position that the state brought the accused to trial within a presumptively reasonable time, and, from that starting point, the court should whether the accused had rebutted the presumption of reasonableness: *R v SA*, 2025 ONCA 737, at para 35

The practical reality is that first trial dates are often set optimistically when it is not certain that the parties will, in fact, be ready for trial and given the pressures on the parties to set dates in order to keep the case moving forward, a first trial date may be more aspirational as to timing than it is realistic: *R v SA*, 2025 ONCA 737, at para 38

As a direct result of the collapse rate and the desire to achieve maximum efficiency by not having courtrooms left empty, trial coordinators will deliberately overbook or "stack" trial lists. There are almost always excess cases scheduled for trial in a given week because the reality is that a certain number of cases invariably collapse, either on the trial date, shortly before the trial date, or shortly after the trial date.

A judicious use of stacking is to be encouraged, not discouraged, because it avoids leaving courtrooms empty and judges without trials. Done properly, stacking will generally reduce trial delays. Of course, there is a risk that, from time to time, such as in this case, not every trial will be reached as the collapse rate that week is less than anticipated. Where this happens, it is reasonable to expect that cases will be triaged taking into account constitutional demands: *R v SA*, 2025 ONCA 737, at paras 39-40

G. TRANSITIONAL CASES

The Jordan framework applies to all cases currently in the system. However, for cases that exceed the presumptive ceiling, a "transitional exceptional circumstance" applies if "the Crown satisfies the court that the time the case has taken is justified based on the parties reasonable reliance on the law as it previously existed." This necessitates a contextual assessment of the delay under the previous framework, including the allocation of delay under the Morin categories, the prejudice to the accused, the seriousness of the offence, and the institutional delay previously acceptable in the region in issue – as these considerations would have informed the parties' behaviour prior to Jordan: *Jordan* at paras 95-97; *R v Manasseri,* 2016 ONCA 703 at para 321; *R v McManus,* 2017 ONCA 188

In *Gopie*, at para. 178, the Court of Appeal emphasized the following relevant factors informing a transitional exceptional circumstances analysis: (i) the complexity of the case; (ii) the period of delay in excess of the *Morin* guidelines (a total period of between 14 to 18 months for institutional delay for matters proceeding in superior courts); (iii) the Crown's response, if any, to any institutional delay; (iv) the defence efforts, if any, to move the case along; and (v) prejudice to the accused: see also *R v Jurkus,* 2018 ONCA 489 at para 75

The Crown will rarely, if ever, be successful in justifying the delay as a transitional exceptional circumstance under the Jordan framework if the case would have warranted a stay under *R. v. Morin*: *R v Thanabalasingham,* 2020 SCC 18

Although a case may not be sufficiently complex to meet the requirement of exceptional circumstances under Jordan, complexity remains a relevant factor to consider in a transitional case: *R v Zahor,* 2022 ONCA 449, at para 123

Defence efforts to advance the case may be considered under the transitional exception, although this was not an express requirement under the *Morin* framework. As a result, any defence initiative to further the case prior to the release of *Jordan* may assist in calibrating the amount of delay that was reasonably required, but the presence or absence of defence initiative is not itself dispositive: *R v Zahor,* 2022 ONCA 449, at para 134

H. POST EVIDENCE DELAY

Although the right to be tried within a reasonable time enshrined in s. 11 (b) extends beyond the end of the evidence and argument at trial and encompasses verdict deliberation time, the presumptive ceilings established by the Court in Jordan do not. Properly construed, the *Jordan* ceilings apply from the date of the charge until the actual or anticipated end of the evidence and argument. Where an accused claims that the trial judge's verdict deliberation time breached their s. 11 (b) right to be tried within a reasonable time, they must establish that the deliberations took markedly longer that they reasonably should have in all of the circumstances.

The burden on the accused is a heavy one due to the operation of the presumption of judicial integrity. The presumption of judicial integrity operates in this context to create a presumption that the trial judge balanced the need for timeliness, trial fairness considerations, and the practical constraints they faced, and took only as much time as was reasonably necessary in the circumstances to render a just verdict.

In conducting this objective assessment, the reviewing court should consider all of the circumstances. Some relevant considerations include: the length of the verdict deliberation time; how close to the relevant *Jordan* ceiling the case was before the trial judge reserved judgment; the complexity of the case; and anything on the record from the judge or the court. It may also be helpful to compare the length of time taken with the time that a case of a similar nature in similar circumstances would typically take to be decided: *R v KGK,* 2020 SCC 7

I. POST VERDICT DELAY

The presumptive ceilings set out in *Jordan* do not apply to post-verdict delay: *R v Charley,* 2019 ONCA 726, at para 58

The presumptive ceiling for post-verdict delay at five months. Five months is the point at which the delay is sufficiently long that it is regarded as presumptively unreasonable for the purposes of s. 11(b). The onus falls to the Crown to justify the delay: *R v Charley,* 2019 ONCA 726, at para 76

Entrapment hearings do not apply to the Jordan presumptive ceilings. Rather, they count as post-trial motions unrelated to sentencing. It is not possible to prescribe a presumptive ceiling for the completion of post-trial motions. The number and complexity of post-trial motions will vary with each case. The time taken for post-trial motions should not be unreasonable considering the number and complexity of the motions in the specific circumstances of the particular case: *R v Haniffa,* 2021 ONCA 326, at para 36

It is arguable that the remedy for post-verdict delay should not affect the conviction, but should be based on a determination of the "appropriate and just" remedy as it relates to sentencing. Appropriate remedies might include a stay of the sentencing, or a stay of the enforcement of all or part of the sentence imposed: *R v Charley,* 2019 ONCA 726, at para 114

A case in which a Gardiner hearing becomes necessary is not the routine sentencing framework contemplated by this court in Charley when the presumptive ceiling of five months was set: *R v Lewis,* 2021 ONCA 59, at para 12

In *Hartling,* the Court of Appeal held that 14 months of post-verdict delay to obtain a *Gladue* report was unreasonable. The Court concluded that the appropriate remedy was enhanced mitigation against the appellant's sentence, reducing a 30 month sentence to a 25 month sentence – rather than a stay : *R v Hartling,* 2020 ONCA 243, at paras 96-120. In *RBC,* the court took a similar approach in finding that unreasonable post-verdict delay should be treated as an ehnahced mitigating factor. They reduced a 2 year conditional sentence by 4 months: 2024 ONCA 930

On a post-conviction s. 11(b) application, the court is to follow the same framework as established in *Jordan*, at para. 105, for calculating whether the delay was unreasonable. First, the court is to calculate the total time between the date of conviction and the date of sentencing. Second, the court is to subtract delay solely attributable to the defence, which results in the net delay. A net delay that exceeds the five-month ceiling is presumptively unreasonable. The Crown can rebut this presumption by showing that the delay was due to exceptional circumstances, which can arise from discrete events or from the particular complexity of the proceeding, but not from chronic institutional delay: *R v RBC,* 2024 ONCA 531, at para 51; see also footnotes 2 and 3.

The case must be particularly complex to justify delay beyond 5 months. While collateral immigration consequences add some complexity to sentencing, this is not the type of "particular complexity" that would justify delay beyond the presumptive ceiling. Unless the immigration circumstances in a particular case are truly exceptional, collateral immigration consequences on their own should not be viewed as exceptional. Similarly, minor technical malfunctions and attendant delays are not what the Supreme Court meant by stating that delay caused by exceptional circumstances could justify an extension of time. On the contrary, this is precisely the type of institutional drift or delay that participants in the justice system should guard against: Further, trial judges must properly manage complex issues that may arise on sentencing to avoid delay beyond the presumptive ceiling: : *R v RBC,* 2024 ONCA 531, at paras 65-74

At sentencing, an accused is no longer presumed innocent. Nor does the right to silence permit the defence to withhold disclosure of what it proposes to do on sentence. A trial judge's power to control trial proceedings includes the power to require counsel on both sides to lay out their "game plan" for sentencing very early in the sentencing process. That "game plan" should include a realistic estimate as to how much court time will be needed to deal with sentencing. If dates are set based on those estimates, counsel must expect they will be required to adhere to them. In taking firm but fair control over the sentencing process, the trial judge can invoke the powerful language in *Jordan*, to the effect that all participants in the criminal justice system have an obligation to work toward achieving prompt justice: *R v Charley,* 2019 ONCA 726, at para 75

Counsel should provide opposing counsel with material to be relied on well before the scheduled sentencing date. Any unexpected problems with holding and completing the sentencing on the selected date should be brought to the attention

of the court and opposing counsel immediately, so that steps can be taken to minimize the delay. Crown counsel who do not fully engage in this cooperative process will find it difficult to justify any delay above the presumptive ceiling: *Jordan*, at para. 70. Defence counsel who fail in their obligation to participate in the appropriate management of the sentencing process may find causally related delays attributed to the defence or viewed as implicitly waived by the defence conduct.

In cases in which the sentencing proceeding will be complex, the parties should be required very soon after the verdict to make the trial judge aware of the issues that will be raised on sentencing. In doing so, counsel must be prepared to discuss those issues and their potential complexities in some detail and with some precision. Vague references to evidence that might or might not be called in respect of undefined issues are not good enough and should not be accepted by the trial judge. All parties are responsible for developing a plan that will allow the sentencing to proceed expeditiously.

When a trial judge has been alerted to complex issues that will be raised on sentence, the trial judge should set an appropriate schedule with counsel to address those issues in a timely and efficient manner. That schedule must keep the presumptive ceiling firmly in mind. If it appears to the trial judge that the proposed plans of counsel could run up against the presumptive ceiling, the trial judge should raise that issue with counsel at the scheduling meeting. Counsel should be asked to specifically address issues such as waiver and exceptional circumstances considered in the context of their proposed plans with respect to sentencing. Potential s. 11(b) problems should be confronted and addressed before they become s. 11(b) violations.

The trial judge is entitled to expect a high level of cooperation between counsel on sentencing. For example, the impact of pre-trial custody conditions on sentence has become a commonly litigated matter. Counsel should be well-aware of the kind of material that should be put before the trial judge in support of a claim that the sentence should be mitigated to reflect those pre-trial conditions. Defence counsel should be able to identify, with particularity, the material needed. The trial judge is entitled to look to the Crown to cooperate with the defence in obtaining that material, especially if it is in the hands of government agencies: *R v Charley,* 2019 ONCA 726, at paras 89-92

J. RETRIALS

The *Jordan* criteria must be understood in the context of the Crown's duty to re-try cases as soon as possible. The 18-month presumptive ceiling established for a first trial may be too long in the circumstances of a re-trial. Re-trials must receive priority in the system, and in the normal course re-trials in the Ontario Court of Justice should occur well before Jordan's 18-month presumptive ceiling. It may be that a lower presumptive ceiling is appropriate for re-trials: R v MacIsaac, 2018 ONCA 650 at paras 27-28, 52, 59

Retrials must be prioritized when scheduling hearings, and retrials are, as a general rule, to be conducted in less time than first trials: *R v JF,* 2022 SCC 17

Where an appeal is allowed allowing a new trial, the 11(b) clock re-starts to run from the date of the appellate court's decision. This is because the right to be tried within a reasonable time arises on being charged with an offence. An appellate court's order quashing the appellant's conviction leaves him/her in the position of being a person charged with an offence: *MacIsaac* at para 31

While the clock resets to zero when a new trial has been set, the delay from the first trial is a relevant factor to consider in an 11(b) application brought on the re-trial. For example, in a context where the first-trial delay exceeds the applicable ceiling, failure to act expeditiously and to prioritize the case could weigh in favour of a finding that the retrial delay is unreasonable. Further, delay on a retrial (or any trial) is not reasonable simply because it is within the applicable ceiling; it is only presumptively reasonable: *R v JF,* 2022 SCC 17

K. REELECTIONS

When a reelection occurs before a preliminary inquiry to conduct a trial in the Ontario Court of Justice, the 18 month ceiling applies. Section 561(1) of the *Criminal Code* requires Crown consent before the accused can re-elect to a trial by a provincial court judge. Where re-election would create the risk of s. 11(b) problems, the Crown has the authority to, and should, refuse consent, absent a s. 11(b) waiver: *R v Shaikh,* 2019 ONCA 895, at paras 47-58

L. EXTRAORDINARY REMEDIES

Where the Crown has brought a *certiorari* application and/or appealed from a decision granting or refusing *certiorari* resulting in net delay that exceeds the *Jordan* ceiling, it should be open to the Crown to argue that such delay constitutes a discrete event.

In determining whether delay caused by a Crown application should be excluded from the delay calculation, the reviewing judge must recognize the Crown's discretion to take such steps and limit the analysis to a consideration of whether the Crown's actions were frivolous, undertaken in bad faith, or executed in a dilatory manner. A frivolous application is one which has no arguable basis.

With regard to defence applications, where they are frivolous or made in bad faith, they will generally constitute defence delay. Where they are brought in good faith, they constitute an exceptional circumstance because they would be outside of the control of the Crown, unless in opposing such an application or an appeal therefrom the Crown is acting in bad faith, taking a frivolous position, or responding in a dilatory manner: *R v Tsega,* 2019 ONCA 111, at paras 79, 81, 82; *R v Daponte,* 2021 ONCA 14, at para 4

M. YOUTH COURT JUSTICE

The *Jordan* principles and ceilings apply to youth justice. The decision not to alter the *Jordan* ceilings to apply differently to youth justice court proceedings does not, however, mean that an accused's youthfulness has no role to play under the *Jordan* framework. The enhanced need for timeliness in youth matters can and should be taken into account when determining whether delay falling below the presumptive ceiling is unreasonable. Like the other factors identified in *Jordan*, the enhanced need for timeliness in youth matters is simply one case-specific factor to consider when determining whether a case took (or is expected to take) markedly longer than it reasonably should have.

This approach recognizes that while the presumptive ceiling remains the same whether the accused is a youth or an adult, the tolerance for delay differs. While the presumptive ceiling provides a hard backstop that offers certainty, predictability, and simplicity, the test for a stay below the ceiling affords the necessary flexibility to ensure case-specific features — such as the age of the

accused — are not lost in the analysis. may be less rare when considered against the smaller body of youth applications for a stay for delay under the ceiling.

In most cases, failed attempts at extra-judicial sanctions will be counted as defence delay: *R v KJM,* 2019 SCC 55

N. PROVINCIAL OFFENCES

While the *POA* is intended to provide a speedy and efficient process for dealing with regulatory offences, the 18-month presumptive ceiling for single-stage provincial court proceedings established in *Jordan* applies to proceedings under Part 1: *R v Nguyen,* 2020 ONCA 609, at para 26

O. STANDARD OF REVIEW

Although underlying findings of fact are reviewed on a standard of palpable and overriding error, the characterization of those periods of delay and the ultimate decision as to whether there has been unreasonable delay are subject to review on a standard of correctness: *R v Jurkus,* 2018 ONCA 489 at para 25; *R v Daponte,* 2021 ONCA 14, at para 15

The parties are not stuck on appeal with an erroneous position taken on a s. 11(b) application at trial: *Jurkus* at para 71

When the actual completion date of the trial is later than what was originally anticipated on the s.11(b) application, appellate courts will consider the actual end date. The reverse is not necessarily the case – that is, when the actual completion date is sooner than what was originally anticipated: *R v Bulhosen,* 2019 ONCA 600, at para 75

P. EXAMPLES OF RECENT 11(B) CASES:

SCC Trilogy accompanying *Jordan*: *R v Williamson*, 2016 SCC 28; *R v Cody,* 2017 SCC 31; *R v Vassell,* 2016 SCC 26

Co-accused delay: see *R v Gopie,* 2017 ONCA 728 at paras 123-142 and 171; see also *R v Manasseri,* 2016 ONCA 703; *R v Jurkus,* 2018 ONCA 489 at para; *R v Pauls,* 2020 ONCA 220, at paras 45-54

Transitional and Exceptional circumstances: *Gopie; Baron, R v Coulter*, 2016 ONCA 704; *R v Manasseri*, 2016 ONCA 703; *R v McManus*, 2017 ONCA 188; *R v Gordon*, 2017 ONCA 436; *R. v DC,* 2017 ONCA 483; *R v Mallozzi*, 2017 ONCA 644; *R v Pyrek*, 2017 ONCA 476; and *R v Picard*, 2017 ONCA 692; *R v Jurkus,* 2018 ONCA 489; *R v Lopez-Restrepo,* 2018 ONCA 887; *R v DA,* 2018 ONCA 96; *R v Saikaley,* 2017 ONCA 374; *R v Baron,* 2017 ONCA 772; *R v Mallozzi*, 2017 ONCA 644; 2018 ONCA 312; *R v JCP,* 2018 ONCA 986; *R v Powell,* 2020 ONCA 743, at paras 10-11

Complexity: *R v Lopez-Restrepo,* 2018 ONCA 887; *R v CG,* 2020 ONCA 357

Crown preferring indictment: *R v Bulhosen,* 2019 ONCA 600

SECTION 11(C)

Section 11(c) guarantees that "[a]ny person charged with an offence has the right . . . not to be compelled to be a witness in proceedings against that person in respect of the offence".

This right is limited to testimonial compulsion and applies only where a person is (1) compelled to be a witness (2) in proceedings against that person (3) in respect of the. It does not apply to protect against the disclosure of physical evidence, including documentary evidence that is not created due to state compulsion: *R v JJ,* 2022 SCC 28, at para 149

SECTION 11(D)

Any person accused of a crime is entitled to a fair and impartial trial. Trial judges are charged with ensuring that, to the degree possible, such a trial will take place. A critical component of ensuring a fair and impartial trial revolves around the conduct of the trial judge. As is often said, "justice should not only be done, but should manifestly and undoubtedly be seen to be done." In that same spirit, a trial judge must be conscious of not only being impartial, but being seen to be impartial: *R v Hungwe,* 2018 ONCA 456 at para 39

For more on reasonable apprehension of bias, see General Topics on Law: Bias

Section 11(d) encompasses the following principles: (1) an individual must be proven guilty beyond a reasonable doubt; (2) the state must bear the burden of proof; and (3) criminal prosecutions must be carried out in accordance with due process. However, s.11(d) does not guarantee the most favourable procedures imaginable for the accused, nor is it automatically breached whenever relevant evidence is excluded. Nor is the broad principle of trial fairness assessed solely from the accused's perspective. Crucially, fairness is also assessed from the point of view of the complainant and community: *R v JJ,* 2022 SCC 28, at paras 124-125

An accused's right to a fair trial does not include the unqualified right to have all evidence in support of their defence admitted: *JJ* at para 129

A direction from Parliament that proof of one fact is presumed to satisfy proof of one of the essential elements of an offence can only comply with s. 11(d) if, in all cases, proof of the substituted fact leads inexorably to the conclusion that the essential element it replaces exists. Otherwise, the substitution may result in the accused being convicted, based on proof of the substituted fact, despite the existence of a reasonable doubt as to the essential element of the offence that it replaces.: *R v Brown,* 2022 SCC 18

The right of an accused person to choose his or her counsel does not require the state to pay for an accused person's chosen counsel, even where the accused person wins a Rowbotham order. The exception is where a) counsel of choice is necessary to a fair trial; or b) where accused shows he cannot find competent counsel under Legal Aid rates & conditions: R v. Hafizi, 2015 ONCA 534

A trial judge should grant an adjournment for an accused to retain counsel if it is necessary for a fair trial or the appearance of a fair trial. However, as important as the right to counsel is, it is not an unlimited right. It must be balanced against the

timely disposition of cases. There comes a point at which the court is entitled to refuse any further adjournments for the purpose of retaining counsel.

On appeal, the appellate court should only interfere with a trial judge's refusal to grant an adjournment if it deprives an accused of a fair trial or the appearance of a fair trial: *R v Patel,* 2018 ONCA 541 at para 3

In *Chouhan,* the SCC held that, in determining whether s. 11(d) is breached, the question is not whether a new process chosen by Parliament is less advantageous to the accused, but rather whether a reasonable person, fully informed of the circumstances, would consider that the new jury selection process gives rise to a reasonable apprehension of bias so as to deprive accused persons of a fair trial before an independent and impartial tribunal: 2021 SCC 26

SECTION 11(E)

A. THREE CLEAR DAYS' ADJOURNMENT: S. 516(1)

Section 516(1) of the *Criminal Code* permits a justice, before or at any time during the course of a judicial interim release hearing, on application by the prosecutor or accused, to adjourn the proceedings and remand the accused in custody in prison. Where the adjournment exceeds three clear days, the consent of the accused is required. It necessarily follows that an adjournment that is not more than three clear days does not require any consent on the part of the accused: *R v Donnelly,* 2016 ONCA 988 at para 76

B. REMEDY FOR VIOLATION

In *Kift,* the Ontario Court of Appeal upheld a trial judge's decision to remedy a 15-day detention without bail through the exclusion of evidence obtained from the appellant during his detention and the remission of his sentence - rather than by granting a stay of proceedings: *R v Kift,* 2016 ONCA 374 at paras 5-8

SECTION 11(F)

The purpose of s. 11(f) is to guarantee an underlying benefit that comes from jury trials. The benefit of trial by jury is formed by four elements, which are the four advantages of jury trials in comparison to judge-alone trials. First, the jury is an excellent fact finder because of the cumulative abilities of its members and the diversity of their experiences. Second, a jury represents the conscience of the community: it is best placed to determine whether applying the law would be inequitable or would accord with society's values. Third, the jury is a bulwark of individual liberty, protecting against oppressive laws or oppressive enforcement of the law. Fourth, the jury serves the broader social interests of public education and legitimization of the justice system: *R v Chouhan,* 2021 SCC 26, dissent of Cote J. at paras 249-253

In *Chouhan,* the SCC held that s. Section 11(f)'s guarantee of representativeness requires the state to provide a fair opportunity for a broad cross-section of society to participate in the jury process, by compiling a jury roll that draws from a broadly inclusive source list and delivering jury notices to those who have been selected: 2021 SCC 26

In *R v Peers,* 2017 SCC 13 and *R v Aitkens,* 2017 SCC 14, the Supreme Court of Canada upheld the Alberta Court of Appeal's majority decision in *Aitkens* to deny an interpretation of 11(f) of the *Charter* that would allow the Appellants the right to a jury trial where their offences carried a maximum sentence of fives years less a day and a fine of up to $5. 11(f) guarantees a right to a jury trial where the maximum sentence is five years. The appellants argued that the potential punishment of five years less a day, plus a $5 million fine, amounted to a "more severe punishment" which generated the right to a jury trial.

The Supreme Court agreed with the Alberta Court of Appeal decision in *Aitkens*, which held that, on a proper purposive interpretation of s. 11(f) of the Charter, the expression "imprisonment for five years or a more severe punishment" should be interpreted as primarily engaging the deprivation of liberty inherent in the maximum sentence of imprisonment imposed by the statute. This interpretation appropriately serves the purpose of the Charter in distinguishing between those crimes that are serious enough to warrant a jury trial and those that were not. A maximum penalty of "five years less a day" does not become a more severe penalty just because some collateral negative consequences are added to it: 2017 SCC

SECTION 11(H)

Section 11(h) looks forward from the date of sentencing and applies to legislation or other state action that is said to increase the punishment imposed on the offender at the time of sentence.

Section 11(h) promotes finality and fairness in the sentencing process by enjoining state conduct that adds to the punishment already imposed for the offence. Section 11(h) crystallize[s] punishment at the time that sentence is imposed. The protections afforded by s. 11(h) apply only if the challenged state conduct amounts to "punishment:" *R v Dell,* 2018 ONCA 674, at paras 32-34

In *Whaling*, for example, the Supreme Court held that the repeal of early parole for offenders who were already serving their sentence amounted to the imposition of a second and additional punishment for the offence, and thereby violated s.11(h) of the Charter: *Whaling v. Canada (Attorney General)*, 2014 SCC 20

A. DEFINITION OF PUNISHMENT

If a prohibition that is imposed as part of a criminal sentencing process meaningfully restricts the liberty or security interest of an accused, the object of the prohibition is sufficiently punitive to attract the presumption against retrospectivity, even if it also serves to protect the public. *R v Hooyer,* 2016 ONCA 44 at paras 41-44. E.g.: a DNA order or a sex-offender registry order would not be regarded as punishment: para 45

In deciding whether a particular legislative provision, or other state action, amounts to punishment, the court takes a pragmatic and functional approach, focusing on the actual impact of that legislation or state conduct on the offender's liberty and security interests. In other words, what does the impugned state action actually do to the offender's liberty expectations?

Sanctions, which are imposed as a consequence of conviction in furtherance of the purpose and principles of sentencing, are viewed as punishment. Similarly,

other changes in the terms or conditions of a sentence that thwart or compromise the offender's reasonable liberty or security of the person expectations will be regarded as punishment for the purposes of s. 11(h) and s. 11(i).

Legislation or other state conduct that does not impose or alter a criminal sanction may still constitute punishment under s. 11(h) or s. 11(i). Changes in the conditions of an offender's sentence can sufficiently compromise reasonable settled expectations of liberty to constitute additional punishment for the purposes of s. 11(h) and s. 11(i). It is a question of degree: *R v Dell,* 2018 ONCA 674 at paras 53, 55, 56, 58

SECTION 11(I)

A. GENERAL PRINCIPLES

Section 11(i) is applicable if there has been a change in the penalty, whether an increase or a decrease, between the date when the offence was committed and the date when the sentence is imposed.

Section 11(i) enhances the predictability and fairness of the sentencing process by identifying the applicable sentencing provisions when those provisions have been changed in the course of the process, and by preventing the retrospective application of harsher penalties. The protections afforded by s. 11(i) apply only if the challenged state conduct amounts to "punishment:" *R v Dell,* 2018 ONCA 674, at paras 32-34

Section 11(i) does not permit an offender to receive a temporary reduction in punishment between the time of commission of the offence and the time of sentencing. This *Charter* right only guarantees that the offender is eligible to receive the lesser punishment available between these two distinct periods of time: *R v Poulin,* 2019 SCC 47

For example, applying a stricter test for the faint hope analysis under s.745.61(1) as a result of a statutory elevation of the test between the date of commission of the offence and the date of the application infringes s.11(i): *R v Dell,* 2018 ONCA 674; *R v Liu,* 2022 ONCA 460

B. DEFINITION OF "TIME OF SENTENCING"

For the purpose of section 11(i), sentencing for murder involves a unique two-step process. The first step is taken when the sentence is imposed and the second occurs if and when an application for a reduction of the period of parole ineligibility is made. Even though the second part of the process occurs after the person has served at least 15 years of her sentence, for the purposes of s. 11(i), the "time of sentencing" can encompass both steps in the process: *Dell* at para 39

Other cases have that the phrase "time of sentencing" in s. 11(i) should be read as reaching the time at which an appeal court reviews the fitness of a sentence imposed at trial. Changes in sentencing provisions made between the trial and the appeal, which increased or decreased the sentence for the offence as it stood when the crime was committed, were subject to review under s. 11(i): *Dell* at para 40

C. DEFINITION OF PUNISHMENT

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In deciding whether a particular legislative provision, or other state action, amounts to punishment, the court takes a pragmatic and functional approach, focusing on the actual impact of that legislation or state conduct on the offender's liberty and security interests. In other words, what does the impugned state action actually do to the offender's liberty expectations?

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D. APPLICATION OF THE PRESUMPTION

The application of the presumption against retrospectively applies to criminal laws. It does not depend on the specific terms of an order made by a judge under a criminal law in a given case: *R v Hooyer,* 2016 ONCA 44 at para 46

E. TIME OF COMMISSION

Section 11(i) fixes "the time of commission" of the offence as one of the two relevant points in time to be considered when applying the section - the other being the time of sentencing. A crime is committed when culpability attaches. In the case of a conspiracy, liability attaches when the accused forms the agreement to commit the offence: *R v Lalonde*, 2016 ONCA 923, at paras 26-28

F. SPECIFIC EXAMPLES

The presumption against retrospectively applies in interpreting the temporal scope of that section: *R v Hooyer,* 2016 ONCA 44 at paras 48-49

In *Lewis,* the Court of Appeal agreed with the appellants that the repeal of early parole provisions between the commission of their offences and their sentencing violated s.11(i), and those offenders were entitled to the benefit of the "lesser punishment" that is, the parole regime that included access to early parole: *Canada (Attorney General) v. Lewis*, 2015 ONCA 379

In *R v Lalonde*, 2016 ONCA 923, the Court of Appeal held that the retrospective abolition of *eligibility for* accelerated parole increased the punishment on inmates and therefore violated s 11(i).

In *Dell,* the Ontario Court of Appeal held that the 2011 amendments to the "faint hope clause" violate s.11(i). The faint hope clause grants the right to an offender serving a murder sentence to apply after 15 years to a jury for a reduction in their parole ineligibility term. The 2011 amendments imposed a judicial screening mechanism that required judges to first determine whether the application has a "substantial likelihood" of success. By removing potentially meritorious applications from consideration by a jury, the amendments were not rationally connected to the government's objective of preventing families of murder victims from being exposed to meritless faint hope applications. The amendments also did not minimally impair 11(i) rights. By contrast, the 1996 amendments, which required judges to first determine whether the application has a "reasonable prospect" of success, were upheld.

SECTION 12

Section 12 of the *Charter* provides that "[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment."

The purpose of s. 12 of the Charter is to protect human dignity and ensure respect for the inherent worth of each individual. The protection afforded by s. 12 has two prongs. Section 12 protects, first, against the imposition of a punishment that is so excessive as to be incompatible with human dignity and, second, against the imposition of a punishment that is intrinsically incompatible with human dignity.

Where both prongs of the protection of s. 12 are in issue in the same case, the analysis of the nature of the punishment must precede that of gross disproportionality: *R v Bissonnette,* 2022 SCC 23

A. DEFINITION OF PUNISHMENT

State action is considered to be punishment for the purposes of s. 12 if it is a consequence of conviction that forms part of the arsenal of sanctions to which an

accused may be liable in respect of a particular offence, and either it is imposed in furtherance of the purpose and principles of sentencing, or it has a significant impact on an offender's liberty or security interests.

Applying this definition, the length of parole ineligibility constitutes punishment, within the meaning of s. 12 of the *Charter*: *R v Bissonnette,* 2022 SCC 23

B. PRONG 1: GROSS DISPROPORTIONALITY IN SENTENCING

A mandatory minimum sentence will constitute cruel and unusual punishment under s. 12 if it is grossly disproportionate to the punishment that would be appropriate, having regard to the nature of the offence and the circumstances of the offender.

To meet the grossly disproportionate standard, the sentence must be "more than merely excessive" or "disproportionate. The sentence must be so excessive as to outrage standards of decency and be disproportionate to the extent that Canadians would find the punishment abhorrent or intolerable.

The s. 12 analysis involves two steps. The first is to determine what constitutes a proportionate sentence for the offence having regard to the objectives and principles of sentencing under the *Criminal Code*. It is not necessary to fix the sentence or sentencing range at a specific point, but the court should consider the rough scale of the appropriate sentence.

At the second step the court must ask whether, in view of the fit and proportionate sentence, the mandatory minimum sentence is grossly disproportionate to the offence and its circumstances: *Lloyd*, at para. 23. There are two stages to the gross disproportionality analysis. The first stage is to consider whether the impugned sentencing provision is grossly disproportionate in its application to the individual offender (the particularized inquiry). If a sentencing provision is not grossly disproportionate in relation to the offender before the court, the second stage is to consider whether it is grossly disproportionate when applied in "reasonably foreseeable" circumstances. Legislation should *not* be struck down based on scenarios that would be "far-fetched", "marginally imaginable", or "remote:" *R v Vu,* 2018 ONCA 436 at paras 19-23 [citations omitted; *R v Hills,* 2023 SCC 2

Constitutional challenges rooted in section 12 of the *Charter* can be argued on the basis of reasonable hypotheticals involving the "best offender": *R v Nur,* 2015 SCC 15; *R v McIntyre,* 2018 ONCA 210 at para 28

Various factors may inform the gross disproportionality analysis, both as it applies to the particular accused and to reasonable hypotheticals. Such factors include: (i) the gravity of the offence; (ii) the personal characteristics of the offender; (iii) the particular circumstances of the case; (iv) the actual effect of the punishment on the individual; (v) the penological goals and sentencing principles reflected in the challenged mandatory minimum; (vi) the existence of valid, effective, alternatives to the mandatory minimum; and (vii) a comparison of punishments imposed for other similar crimes: *Vu* at para 24; *R v Hills,* 2023 SCC 2
The resulting sentence must respect the fundamental principle of proportionality: *R v Hills,* 2023 SCC 2

A court's conclusion based on its review of the provision's reasonably foreseeable applications does not foreclose consideration in future of different reasonable applications: *R v Nur,* 2015 SCC 15, at para 71; see also *R v Plange,* 2019 ONCA 646, at paras 37-38

When comparing a mandatory minimum sentence to the fit sentence, the focus must be on the sentence itself. Courts must not consider parole eligibility as a factor reducing the actual impact of the impugned sentence, because the possibility of parole cannot cure a grossly disproportionate sentence: *R v Hills,* 2023 SCC 2

The process of assessing the existence and extent of any disparity between a fit punishment and the mandatory minimum imposed bears a resemblance to what occurs when a sentence is appealed and challenged as being demonstrably unfit. However, a sentence may be demonstrably unfit in the sense that an appellate court would intervene, but nevertheless not meet the constitutional threshold of being grossly disproportionate.

Three crucial components must be assessed when determining whether a mandatory minimum sentence is grossly disproportionate:

1. The scope and reach of the offence. A mandatory minimum sentence is more exposed to challenge where it captures disparate conduct of widely varying gravity and degrees of offender culpability.
2. The effects of the penalty on the offender. This calls for an inquiry into the effects that the impugned punishment may have on the actual or reasonably

foreseeable offender both generally and based on their specific characteristics and qualities.

3. The penalty and its objectives. When assessing gross disproportion, courts assess the severity of the punishment mandated by Parliament to determine whether and to what extent the minimum sentence goes beyond what is necessary to achieve Parliament's sentencing objectives relevant to the offence while having regard to the legitimate purposes of punishment and the adequacy of possible alternatives. In order to respect s. 12, punishment or sentencing must take rehabilitation into account. For example, a mandatory minimum sentence will be constitutionally suspect and require careful scrutiny when it provides no discretion to impose a sentence other than imprisonment in circumstances where there should not be imprisonment, given the gravity of the offence and the offender's culpability: *R v Hills,* 2023 SCC 2

Indigeneity should factor into the s. 12 analysis of gross disproportionality. Courts must consider *Gladue:* (1) when sentencing the individual offender; (2) when crafting reasonably foreseeable hypotheticals; and (3) when assessing whether a mandatory minimum sentence is grossly disproportionate depending, in part, on the penalty's effect on indigenous offenders, and its reflection of *Gladue*'s framework: *R v Hillbach,* 2023 SCC 3

Many Indigenous offenders may serve harder time as Indigenous offenders are often more severely affected by incarceration and treated in discriminatory ways in custodial environments. Further, incarceration itself can be a culturally inappropriate consequence for wrongdoing for Indigenous offenders. These effects must carry significant weight: *R v Hillbach,* 2023 SCC 3

i. Reasonable Hypothetical

A reasonable hypothetical scenario needs to be constructed with care and should include five characteristics:

1. The hypothetical must be reasonably foreseeable. It ought not to be a far-fetched or marginally imaginable case, nor should it be a remote or extreme example.
2. In defining the scope of the hypothetical scenario and the qualities of a reasonably foreseeable offender, courts may rely on reported cases since they not only illustrate the range of real-life conduct captured by the offence, they actually happened. However, courts may modify the facts of a reported case to illustrate reasonably foreseeable scenarios.
3. The hypothetical must be reasonable in view of the range of conduct in the offence in question. It needs to involve conduct that falls within the relevant provision.
4. Characteristics that are reasonably foreseeable for offenders, like age, poverty, race, Indigeneity, mental health issues and addiction, may be considered in crafting reasonable hypotheticals.
5. Reasonable hypotheticals are best tested through the adversarial process. All parties should ideally be afforded a fair opportunity to challenge or comment upon the reasonableness of the hypothetical before making submissions on its constitutional implications.

A court, may find it somewhat more difficult to fix a specific sentence for a reasonably foreseeable offender, given that hypotheticals are advanced without evidence or detailed facts. Accordingly, some latitude in fixing the fit sentence may be necessary. Courts may specify, for instance, that a sentence would be around a certain number of months. Any estimate must be circumscribed and tightly defined: *R v Hills,* 2023 SCC 2

C. PRONG 1: EXCESSIVE USE OF FORCE

An accused only has the burden of demonstrating that a *Charter* remedy should be granted. The accused does not have the burden of showing that excessive force was used. Rather, once an accused shows that the police used deadly force, a *prima facie* breach of s. 7 exists, and the evidentiary burden shifts to the Crown to prove the force used was justified. This requires a subjective-objective analysis. The court has to be satisfied that the police officer subjectively believed that the use of force was necessary in the circumstances to protect the officer or others from death or grievous bodily harm, and the belief must have been objectively reasonable: *R v Davis,* 2021 ONCA 758, at para 61

A police officer is justified in using force intended to cause grievous bodily harm in only limited circumstances, pursuant to s. 25(4). In essence, the officer must believe, on reasonable grounds, that the use of that force was necessary to protect the officer or others from grievous bodily harm.

The ultimate determination of whether an officer's use of force was justified under s. 25(4) of the *Criminal Code* is a question of law reviewable on a correctness standard. However, in deciding that question of law, the appellate court must accept the relevant findings of fact made by the trial judge unless those findings are tainted by a material misapprehension of evidence, a failure to consider relevant material evidence, or are unreasonable: *R v Black,* 2023 ONCA 799, at para 5

D. PRONG 2: INTRINSICALLY CRUEL AND UNUSUAL

A punishment is cruel and unusual by nature if the court is convinced that, having regard to its nature and effects, it could never be imposed in a manner consonant with human dignity in the Canadian criminal context. To determine whether a punishment is intrinsically incompatible with human dignity, the court must determine whether the punishment is, by its very nature, degrading or dehumanizing. The effects that the punishment may have on all offenders on whom it is imposed can also inform the court and provide support for its analysis of the nature of the punishment. A punishment that is cruel and unusual by nature must always be excluded from the arsenal of punishments available to the state. It follows that the mere possibility that a punishment that is cruel and unusual by nature may be imposed is enough to infringe s. 12 of the *Charter*: *R v Bissonnette,* 2022 SCC 23

The imposition of a sentence of imprisonment for life without a realistic possibility of parole is a punishment that is, by its very nature, intrinsically incompatible with human dignity. It is degrading in nature in that it presupposes at the time of its imposition that the offender is beyond redemption and lacks the moral autonomy needed for rehabilitation: *R v Bissonnette,* 2022 SCC 23

SECTION 13

To invoke s. 13 of the Charter , it must be shown, first, that the testimony in question was compelled; and, secondly, that this testimony is incriminating. The term "incriminating testimony" refers to testimony that may be used by the state, directly or indirectly, “to demonstrate the guilt of the witness, that is, to prove or assist prove one or more of the constituent elements of the alleged offense of the witness at his subsequent trial.”

An "incriminating testimony" includes an earlier testimony that may appear innocuous in itself, but that would become incriminating thereafter. For example, the state may use testimony in later proceedings to prove the fabrication of the original testimony made "with the deliberate intent to deceive the court and to impede the course of justice". This "would demonstrate the conscience of guilt, from which the trier of fact could, if he so chose, infer the guilt" of the accused

If the initial testimony of a witness is incriminating, the state may not subsequently use it in other proceedings, nor to cross-examine him as to his credibility or the incrimination. The only exception is prosecution for perjury or contradictory testimony: *R v Lauzon,* 2019 ONCA 546, at paras 6-9

In *White*, [1999] 2 S.C.R. 417 at para. 67, the Supreme Court held that where a driver is statutorily compelled to make a statement for highway traffic purposes, the driver is entitled to use immunity in criminal proceedings in relation to the contents of that statement. The court set out the test for determining whether a statement is statutorily compelled. The court also held, at para. 89, that statutorily compelled statements are to be automatically excluded from evidence under s. 24(1) of the *Charter*: *R v Roberts,* 2018 ONCA 411 at para 37

Note that, although drivers in general know that they have a duty to report an accident and that they have to ‘talk to the police’ about it, this proposition of common sense is not a legal rule that creates a presumption of statutory compulsion: *Roberts* at para 55

Further, s. 7 prevents statutorily compelled statements from being used for any purpose in a criminal trial, including during a *Charter voir dire* to establish whether an officer had reasonable and probable grounds to arrest the subject: *Roberts* at para 39; *R. v. Soules*, 2011 ONCA 429.

The Crown cannot use the fact that a witness has "invoked" the protection of s. 13 of the *Charter* or s. 5 of the *Canada Evidence Act* to discredit the testimony of that witness. Nor can a witness be cross-examined about his or her understanding of the rights and protections afforded by s. 13 or s. 5. Finally, a trial judge cannot discredit a witness's evidence because the witness was aware of the protections afforded to the witness by s. 13 and s. 5 when the witness testified: *R v Morgan,* 2021 ONCA 812, at para 6

In *Morgan,* the Ontario Court of Appeal noted an important nuance to this jurisprudence. In that case, a defence witness testified and claimed responsibility for the drugs in issue. In doing so, he stated that he was coming forward for the noble purpose of ensuring that the accused did not wrongly go to jail for something he was responsible for. In cross-examination, the Crown probed this answer, confirming that he agreed to come forward because he knew he was protected (under s.13). The Court found that it was proper for the Crown to cross-examine the witness on his motives for coming forward, which could lead the trier of fact to conclude that he was not being frank and honest when he originally claimed that he only came forward for the noble goal of taking responsibility for the drugs. The Court further held that the trial judge's reliance on this evidence to conclude that the witness was not credible or reliable in this regard was permissible. The Court noted that the trial judge use of the evidence "went no further than that:" *R v Morgan,* 2021 ONCA 812, at paras 4-17

Lawfully obtained evidence conscripted from a detainee through roadside sobriety testing is admissible to establish grounds for an arrest or detention, but such evidence is not admissible as proof of actual alcohol consumption or impairment. According to the law of Ontario, evidence is conscripted in the relevant sense only if the act directed by the officer is, itself, a sobriety test. If an officer directs a motorist to get out of the car not as a sobriety test, but to facilitate further investigation, including gathering other information about sobriety through questioning once the driver is outside of the car, observations made of the motorist while exiting the car are admissible at trial to prove impairment.

Sobriety testing is not confined to the physical co-ordination tests prescribed by regulation as contemplated by s. 254(2)(a) of the *Criminal Code*. Sobriety testing can include questions asked about alcohol consumption, directions to detainees to perform physical challenges not provided for in s. 254(2)(a) such as informal co-

ordination tests, or directions to exit a motor vehicle, or directions to blow into the face of an officer: *R v Roberts,* 2018 ONCA 411 at paras 82-83, 88, 91, 93

SECTION 14

A. GENERAL PRINCIPLES

The right to obtain the assistance of an interpreter ensures that a person charged with a criminal offence hears the case against him or her and is given a full opportunity to answer it: *R v Saini,* 2023 ONCA 445, at para 35

A person alleging a violation must show that (i) they needed an interpreter, (ii) there was a departure from the basic, constitutionally guaranteed standard of interpretation, and (iii) the alleged lapse in interpretation occurred in the course of the proceedings themselves when a vital interest of the accused was involved, i.e., while the case was being advanced, rather than at some point or stage which was extrinsic or collateral to the advancement of the case. In other words, an appellant must demonstrate that there is a real possibility that the appellant either did not understand or was misunderstood: *R v Saini,* 2023 ONCA 445, at para 36; *R v Chica,* 2016 ONCA 252 at para 26; *R v Chen,* 2025 ONCA 168, at paras 60-62

Establishing the accused's need for an interpreter is not normally an onerous step unless the issue of interpretation is being raised for the first time on appeal and/or there is some question as to whether it is being raised in bad faith: *R v Chen,* 2025 ONCA 168, at para 60

The onus to establish a breach falls on the party asserting the violation and the standard of proof is on a balance of probabilities. Once a court is satisfied that the first three requirements have been met, a violation of s. 14 will have been made out unless the Crown is able to prove, again on a balance of probabilities, that there was a valid and effective waiver of the right which accounts for the lapse in (or lack of) interpretation shown to have occurred. This must be assessed in the overall context of the trial and not on a piecemeal basis. The standard is not perfection given the real time demands of the court room, the possibility of ambiguity in the original phrases, and the fact that there may not always be an

exact translation for certain phrases and the standard is lower than it might be for translation of a written document. The number, quality and impact of the errors are all relevant: *R v Saini,* 2023 ONCA 445, at para 37

An interpreter's failure to properly interpret key evidence may amount to trial unfairness and may give rise to a breach of an accused's right to an interpreter under s. 14: *R v He,* 2021 ONCA 240, at para 20

Unless the Crown is able to show on a balance of probabilities that there was a valid and effective waiver of the right which accounts for the lack of or lapse in interpretation, a violation of the right to interpreter assistance guaranteed by s. 14 of the *Charter* will have been made out. A court is not to engage in speculation as to whether the lack of or lapse in interpretation made any difference to the outcome of the case:

While there will be circumstances in which waiver of the right to interpreter assistance will not be permitted for reasons of public policy, in situations where waiver is possible, the Crown must not only show that the waiver was clear and unequivocal and made with a knowledge and understanding of the right, but also that it was made personally by the accused or with defence counsel's assurance that the right and the effect on that right of waiving it were explained to the accused in language in which the accused is fully conversant: *R v Chen,* 2025 ONCA 168, at paras 65-66

However, the accused's failure to indicate that there was anything he did not understand weighs against his assertion that inadequate interpretation prevented him from meaningfully participating in his trial: *R v Saini,* 2023 ONCA 445, at para 41

The absence of a timely objection does not constitute a waiver of the s. 14 right. Nor is it determinative of a s. 14 claim on appeal. It can, however, be a very serious consideration in determining whether the accused has satisfied the burden of proving that interpreter assistance was required and that the interpretation provided fell short of the requisite standard. This is particularly relevant in situations where the accused needs only limited assistance from the interpreter and is able to follow the court's direction that they speak up about interpretation problems, but fails to do so: *R v Chen,* 2025 ONCA 168, at para 67

Courts must not be too quick to draw adverse inferences where the accused has some facility with the language used in the proceeding. Judges must avoid

falling into the trap of the “misinterpretation fallacy” by always expecting the accused to identify errors when they have limited understanding of the language being interpreted to or from. A claimant who lacks comprehension or the ability to communicate may be totally unaware of deficiencies in the interpreter assistance provided. This is one of the challenges associated with a lack of complaint. If the accused do not understand or speak English, how are they always to know whether something has been improperly interpreted?: *R v Chen,* 2025 ONCA 168, at para 68

An Accused's s. 14 Charter rights do not depend on his having asserted the right to interpreter assistance. Nonetheless, the timing of his interpreter complaint may undermine his assertion that he needs such assistance to properly comprehend the evidence or defend himself at trial. This is particularly so if the issue is raised for the first time on appeal: *R v Chica,* 2016 ONCA 252 at para 34

Absent any indication from a fair reading of the trial transcript that the accused did not understand the proceedings or that he could not be understood for language-related reasons, the trial judge in not obliged, on his own motion, to conduct an inquiry into the accused's need for an interpreter or to order one: *Chica* at para 35

Instrumentalizing language rights on appeal is a highly objectionable practice that must be sanctioned to the greatest extent possible. Language rights should not be raised for the first time on appeal for an ulterior motive or for purely strategic reasons: *R v Chen,* 2025 ONCA 168, at para 59

Where missing parts of a proceeding can be cured by reading back the missing parts to allow the interpreter to translate them, it may not be necessary to order a new hearing of the issue: *R v Saini,* 2023 ONCA 445, at para 44

A party must have the same opportunity to understand and be understood as if they were conversant in the language being used in the proceedings. That said, the principle of linguistic understanding should not be elevated to the point where those with difficulty communicating in or comprehending the language of the proceedings are given or seen to be given unfair advantage. Ultimately, the purpose of the right to interpreter assistance is to create a level and fair playing field, not to provide some individuals with more rights than others: *R v Chen,* 2025 ONCA 168, at para 59

At the outset of the proceedings, the trial judge should establish a system for the accused to advise the court if any difficulty with the interpretation arises. It is advisable to use the interpreter to ensure that the accused understands the importance of alerting the court about any deficiency in interpretation at the earliest opportunity. This is particularly important if the defence counsel does not understand the accused's language and is not in a position to notice any problem with the interpretation. Defence counsel also has a role to play. The need for a competent interpreter should be raised at the earliest opportunity so as to ensure that no difficulties subsequently arise: *R v Chen,* 2025 ONCA 168, at paras 89, 91

SECTION 15

The two-step test for assessing a s. 15(1) claim requires the claimant to demonstrate that the impugned law or state action a) creates a distinction based on enumerated or analogous grounds, on its face or in its impact; and b) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage. This framework also applies in cases of adverse impact discrimination, which occurs when a seemingly neutral law has a disproportionate impact on members of groups protected on the basis of an enumerated or analogous ground.

Under the first step, the claimant must establish a link or nexus between the impugned law and the discriminatory impact, but does not need to show why the law being challenged has that impact. Two types of evidence are helpful: evidence about the full context of the claimant group's situation, and evidence about the outcomes that the impugned law or policy has produced in practice.

Ideally, claims of adverse impact discrimination should be supported by both. To give proper effect to the promise of s. 15(1), however, a claimant's evidentiary burden cannot be unduly difficult to meet. Courts should bear in mind that: no specific form of evidence is required; the claimant need not show the impugned law or state action was the only or the dominant cause of the disproportionate impact; the causal connection may be satisfied by a reasonable inference; scientific evidence of causation should be carefully scrutinized; and novel scientific evidence should be admitted only if it has a reliable foundation.

Under the second step, courts must examine the historical or systemic disadvantage of the claimant group. Several factors may assist in determining whether claimants have met their burden at step two: arbitrariness, prejudice, and stereotyping. Concerning arbitrariness, a distinction that is based on an individual's actual capacities will rarely be discriminatory; but a distinction that fails to respond to the actual capacities and needs of the members of the group will often be discriminatory. Stereotyping or prejudice can play a critical role if the impugned law furthers stereotypes and prejudicial notions or stigmatizing ideas about members of a protected group, and, in so doing, perpetuates the disadvantage they experience. With regard to the evidentiary burden at step two, the claimant need not prove that the legislature intended to discriminate, a court may take judicial notice of notorious and undisputed facts, and courts may infer that a law has a discriminatory effect, where such an inference is supported by the available evidence.

In addition, to determine whether a distinction is discriminatory under the second step, courts should consider the broader legislative context. Relevant considerations include: the objects of the scheme, whether a policy is designed to benefit a number of different groups, the allocation of resources, particular policy goals sought to be achieved, and whether the lines are drawn mindful as to those factors: *R v Sharma,* 2022 SCC 39

SECTION 24(1)

A. GENERAL PRINCIPLES

A "just and appropriate remedy" will:

1. Meaningfully vindicate the rights and freedoms of the claimants
2. Employ means that are legitimate within the framework of our constitutional democracy
3. Be a judicial remedy which vindicates the right while invoking the function and powers of a court; and
4. Be fair to the party against whom the order is made: *R v Singh,* 2016 ONCA 108 at para 67

The power to grant remedies under s. 24(1) is "part of the supreme law of Canada. It follows that this remedial power cannot be strictly limited by statutes or rules of the common law": *Singh* at para 67

Neither the Superior Court of Justice nor the Summary Conviction Court has jurisdiction to entertain an application for an alleged breach of a Charter right once a stay is entered pursuant to section 579: *R v Martin,* 2016 ONCA 840 at paras 38, 42

However, in a situation where a trial judge comes to a final disposition in a matter, including entering a judicial stay of proceedings, he or she retains jurisdiction to craft an appropriate remedy for a Charter violation, including awarding costs, where appropriate. That is because a remedy under s. 24(1) of the Charter, in those circumstances, is part of the trial judge's discretionary adjudicative process. *Martin* at para 39

A trial judge has the widest possible discretion to fashion an appropriate remedy under s. 24(1) of the *Charter*, and deference is owed to this decision on remedy, unless the trial judge misdirected themself or rendered an unjust decision: *R v St. Claire,* 2023 ONCA 266, at para 30

A. REMEDY OF DECLARATION

Forthcoming

B. REMEDY OF COSTS

i. JURISDICTION

Statutory courts have jurisdiction to hear applications for Charter relief, and grant costs as part of a remedy under s. 24(1). The implied power is linked to the court's control of its trial process: *R v Martin,* 2016 ONCA 840 at para 35

The Summary Conviction Court does not have jurisdiction to hear a costs application when the Crown exercises its prerogative to enter a stay pursuant to

section 579 of the Criminal Code because, in these circumstances, the Court's process if not invoked: *Martin* at para 36

ii. When Available as Remedy

A trial judge may award costs against the Crown for a breach of its disclosure obligations in circumstances where there is a marked and unacceptable departure from the reasonable standards expected of the prosecution: *R v Singh,* 2016 ONCA 108 at para 32

Given the policy concerns associated with exposing prosecutors to civil liability, it is necessary that the liability threshold be set near the high end of the blameworthiness spectrum - where conduct such as deliberate failure to disclosure exculpatory evidence lies: ***Singh*** at para 36

Costs should not be awarded if alternative remedies under s.24(1) can address the *Charter* breach: *Singh* at para 37

Costs orders will not be made against the Crown for the misconduct of other parties, such as witnesses or investigative agencies, unless the Crown has participated in the misconduct: Singh at para 45

a) Factors to consider

The costs award against the Crown should provide “a reasonable portion” of the costs an accused incurs to secure his Charter rights. How the precise calculation should be done, as noted, is a matter for the trial judge’s discretion, but the following factors should be considered where the issue is non-disclosure:

- the nature of the case and the legal complexity of the work done;
- the length of the proceedings;
- the nature and extent of the misconduct found;
- the impact of the misconduct on the rights of the accused;
- the efforts (or lack thereof) of defence counsel to diligently follow up on disclosure; and
- the actual impact upon the accused’s ability to defend the charges in the future: *Singh* at paras 41-42, 57

The fact that an accused is legally aided is relevant in determining the last factor - impact on ability to defend charges and whether this was engaged because of financial hardship: *Singh* at para 65

b) Quantum

The fact that an accused is legally aided is relevant ot the quantum of costs: *Singh* at para 66

B. REMEDY OF A STAY

i. The Test

Unless the appropriateness of a stay of proceedings is manifest at the outset of trial, applications for stays of proceeding should not be adjudicated until after the evidence in the case has been heard so that issues of prejudice can be more meaningfully assessed. That same admonition applies, for similar reasons, to the order in which a denial of a stay of proceedings should be considered on appeal: *R v Janeiro,* 2022 ONCA 118, at para 106

In general, stays of proceedings for an abuse of process will be warranted in two categories of cases:

i. where the state conduct compromises the fairness of an accused's trial (the main category); and
ii. where the state conduct creates no threat to trial fairness but risks undermining the judicial process (the residual category): *R v Ke,* 2021 ONCA 179, at para 76

The test to determine whether a stay of proceedings should be entered consists of three requirements:

1. There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome

2. There must be no alternative remedy capable of redressing the prejudice (E.g., exclusion of evidence or sentence remission: *R v Kift,* 2016 ONCA 374 at para 5); and

3. Where there is still uncertainty over whether a stay is warranted after steps 1) and 2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against the interest that society has in having a final decision on the merits: *R v Babos,* 2016 SCC 16 at para 32; *R v Kift,* 2016 ONCA 374 at paras 7-8

For cases in the main category, the question involved in the prejudice element is whether the accused's right to a fair trial has been prejudiced by the state conduct and whether that prejudice will be carried forward through the conduct of the trial. The focus is on whether there is ongoing unfairness to the accused.

For cases in the residual category, the prejudice element is concerned with whether the state conduct, usually but not always misconduct, offends societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would harm the integrity of the justice system.

In connection with the remedy element, the question is whether some remedy short of a stay is capable of redressing the prejudice. The spectrum of available remedies depends on the nature of the prejudice involved. Where the main category is implicated, with its concern about trial fairness, the focus is on restitution of an accused's right to a fair trial. For the residual category, where the claim has to do with prejudice to the integrity of the justice system, the focus is on whether something less than a stay will adequately dissociate the justice system from the state conduct going forward.

The balancing element assumes added importance for cases that invoke the residual category. The task of the court is to decide which of two options better protects the integrity of the justice system: staying the proceedings or having a trial despite the challenged conduct. Relevant factors include but are not limited to:

i. the seriousness of the state conduct;
ii. the systemic or isolated nature of the conduct;
iii. the circumstances of the accused;
iv. the offences charged; and
v. society’s interest in a trial on the merits

An accused who seeks a stay under the residual category faces an onerous burden. This follows from the combined effect of the “clearest of cases” threshold

and the balancing of societal interests that must take place in such cases. Cases warranting a stay will be “exceptional” and “very rare". A stay will be entered only where the affront to fair play and decency is disproportionate to society’s interest in the effective prosecution of criminal cases: *R v Ke,* 2021 ONCA 179, at paras 75-82

A stay is a prospective remedy, not a redress for past state misconduct: *R v Gowdy,* 2016 ONCA 989

There is no principled reason why a partial stay would not be just and appropriate in some circumstances: *R v Brown,* 2024 ONCA 453, at para 61

A stay for state misconduct that does not affect fair trial rights would only be just and appropriate where the state misconduct is likely to continue in the future, or where the carrying forward of the prosecution will offend society’s sense of justice. In general, however, society will not take umbrage at the carrying forward of a prosecution unless it is likely that some form of misconduct will continue. As a result, if there is no evidence that the impugned conduct represents a systemic problem, a stay is generally not justified and appropriate: *R v Brown,* 2024 ONCA 453, at para 84

C. REMEDY OF SENTENCE DEDUCTION

While state misconduct can mitigate a sentence, the general rule is that a sentence reduction outside statutory limits is not an appropriate remedy under s.24(1) unless the constitutionality of the stastutory limit itself is challenged. Such a remedy would only be appropriate in exceptional cases: *R v Gowdy,* 2016 ONCA 989; *R v Donnelly,* 2016 ONCA 998

Even in circumstances where there has been a breach of the accused’s *Charter* rights warranting a remedy under s. 24(1), it would not be appropriate to grant a sentence reduction where the circumstances are unrelated to the offence: *R v AS,* 2019 ONCA 900, at para 29; *R v Thompson,* 2020 ONCA 361, at para 17

D. REMEDY OF REPRIMAND

When the residual category is invoked, remedies are directed to mitigating prejudice to the integrity of the justice system on a go-forward basis. Since the accused's fair trial rights have not been directly affected, an appropriate and just remedy will not serve to "fix" or undo a problem created by police misconduct, such as excluding evidence which was illegally seized. The focus on restoring public confidence in the justice system does not preclude the possibility, however, that a just and appropriate remedy for a wrong in the residual category will dissociate the justice system from state misconduct while incidentally providing some benefit to the accused. This includes sentence reductions and strongly worded reprimands: *R v Brown,* 2024 ONCA 453, at paras 66-67

E. STANDARD OF REVIEW

A trial judge's choice of remedy under s. 24(1) of the *Charter* is discretionary, but that discretion must be exercised judicially. Appellate intervention is limited to cases in which the trial judge has misdirected themself, or where the decision is so clearly wrong that it amounts to an injustice: *R v Barra,* 2021 ONCA 568, at para 149

SECTION 24(2)

A. STANDARD OF REVIEW

An appellate court should intervene in a trial judge's decision on a *Charter* application only where a trial judge misdirects him or herself in law,

commits a reviewable error of fact, or renders a decision that is 'so clearly wrong as to amount to an injustice: *R v Brown,* 2024 ONCA 453, at para 56

A court should advise parties before ordering a remedy or advancing a theory not proposed by the parties: *R v Brown,* 2024 ONCA 453, at para 59

Absent legal error, a palpable and overriding error, or an unreasonable conclusion, the appellate court must defer to the trial judge's ruling: *R v Hall,* 2016 ONCA 013 at para 63; *R v Ting,* 2016 ONCA 57 at para 74; *R. v. McGuffie*, 2016 ONCA 365, at para. 64; *R v Gonzales,* 2017 ONCA 543 at para 161

Appellate intervention may also be warranted where the trial judge erred in law in his/her application of the legal test or principles or failed to consider relevant factors or circumstances that could affect whether admitting the evidence would bring the administration of justice into disrepute: *R v Szilagyi,* 2018 ONCA 695 at para 41; *R v Omar,* 2018 ONCA 975, at para 49; rev'd on other grounds at 2019 SCC 32

Where the trial judge has considered the three lines of inquiry, appellate courts should defer to the trial judge's ultimate decision. Deference is not warranted, however, where the trial judge's reasoning on the application of s. 24(2) of the Charter was sparse, deficient and erroneous in material ways: *R v Harflett*, 2016 ONCA 248 at para 55

Where the appeal court considers the trial judge's finding of no charter breach to be in error, the appeal court owes no deference to the trial judge's section 24(2) analysis: *R v. Wong*, 2015 ONCA 657

When the trial judge finds no *Charter* breach but considers s.24(2) in the alternative, this alternative inquiry is not owed any deference by the appellate court: *R v Sureskumar,* 2023 ONCA 705, at para 21

When the trial judge did not find a *Charter* violation and therefore did not undertake a s. 24(2) analysis, an appellate court may, upon finding a *Charter* violation, conduct it's own 24(2) analysis, provided that there is a sufficient evidentiary record to do so. Otherwise, the appellate court may remit the matter to the trial judge to determine the issue: see, for example, *R v Pilon,* 2018 ONCA 959, at para 43; *R v Ritchie,* 2018 ONCA 918, at para 19

The trial judge's failure to properly consider the cumulative effect of the various *Charter* breaches is, itself, an error in principle: *R v Adler,* 2020 ONCA 246, at para 39; see also *R v Becessar,* 2024 ONCA 528, at para 18

B. THE TEST

i. PRECONDITION: OBTAINED IN A MANNER

The connection between the breach and the obtaining of the evidence may be temporal, contextual, causal, or a combination of the three. The connection must be more than tenuous: *Coderre* at paras 14-18

Indeed, a temporal connection alone may be sufficient to meet the "obtained in a manner" criterion: *R v Rover,* 2018 ONCA 745 at para 35

A breach that does not have a causal, contextual, or temporal connection to the obtaining of evidence does not trigger 24(2). However, those breaches are not irrelevant to a 24(2) analysis that arises on other breaches that do have such a connection. If s. 24(2) is engaged, the conduct of the police throughout their investigation and even throughout the prosecution, are germane to the admissibility inquiry required under s. 24(2): *R v Boutros,* 2018 ONCA 375 at para 26

Prior unconstitutional conduct may also have an impact on the decision about admissibility of evidence obtained by later *Charter* infringement, at least where there is a sufficient nexus between the prior infringement and the later gathering of evidence: *R v Mahmood,* 2011 ONCA 693, para 117.

The "obtained in a manner" requirement allows the court, in an appropriate case, to exclude the evidence because of a Charter breach occurring after the evidence was discovered: *R v Pino,* 2016 ONCA 389 at para 48; *R v Shang En Wu,* 2017 ONSC 1003

Evidence obtained pursuant to a lawful production order, or search warrant, may still be obtained "in a manner" that infringed a *Charter* right, where unlawful police conduct was a component of the investigative process that lead to the issuance of the order or warrant: *R v Boutras,* 2018 ONCA 375 at paras 17-22

The fact of abandonment may dilute the strength of a contextual connection between the underlying *Charter* breach and the abandoned evidence targeted for exclusion. To use the framework language, it may render that connection too "tenuous" or "remote" to satisfy the "obtained in a manner" requirement: *R v Keshavarz,* 2022 ONCA 312, at para 54

ii. A "Fresh Start"

Evidence will not be "obtained in a manner" that breached the *Charter* when the police made a "fresh start" from an earlier *Charter* breach by severing any temporal, contextual, or causal connection between the *Charter* breach and the evidence obtained or by rendering any such connection remote or tenuous. The police may make a "fresh start" by later complying with the *Charter*, although subsequent compliance does not result in a "fresh start" in every case.

The "fresh start" inquiry applies to any form of evidence that the police obtain following a *Charter* violation; it is not limited either to successive statements or to s. 10(b) *Charter* violations.

When undertaking the case-specific factual inquiry into whether the police effected a "fresh start", some potentially illustrative indicators include whether:

a. the police informed the accused of the *Charter* breach and dispelled its effect with appropriate language;
b. the police cautioned the accused after the *Charter* breach but before the impugned evidence was obtained;
c. the accused had the chance to consult counsel after the *Charter* breach but before the impugned evidence was obtained;
d. the accused gave informed consent to the taking of the impugned evidence after the *Charter* breach;
e. the accused was released from detention after the *Charter* breach but before the impugned evidence was obtained; and
f. whether and how different police officers interacted with the accused after the *Charter* breach but before the impugned evidence was obtained: *R v Beaver,* 2022 SCC 54

In *SS,* the Court of Appeal found that a breath demand made by one officer was not a fresh start from a prior unlawful breath demand made by another officer where (1) the unconstitutional demand provided the legal basis for the second officer's request; and (2) the second officer relied on the first officer's

unconstitutional demand in making his own demand: *R v SS,* 2023 ONCA 130, at para 74

A relevant consideration in applying the "fresh start" doctrine is whether the subsequent compliance by the police dispelled the effect of the initial breach. By parallel consideration, the "fresh start" doctrine has more obvious application in cases where the impact of an earlier *Charter* violation has been effectively dispelled by subsequent *Charter* compliance that occurs before the discovery of the subject evidence: *R v Davis,* 2023 ONCA 227, at para 38

A delay in providing the informational component of 10(b) cannot be easily cured by a "fresh start." Compliance with the immediacy requirement under the informational component of s.10(b) provides assurance that of accused is not entirely at the mercy of the police while detained, and is entitled to a lifeline to the outside world, through which he can learn of his legal rights and obligations. The subsequent compliance with s. 10(b) may not fully dispel the effects of the informational breach: *R v Davis,* 2023 ONCA 227, at para 41

The "fresh start" doctrine should be applied to breaches of the immediacy requirement of the informational component of s. 10(b) only in clear cases. If belated s. 10(b) compliance is readily accepted as making an earlier immediacy breach too remote to warrant the exclusion of evidence, then s. 10(b)'s immediacy requirement will become a right without a remedy: : *R v Davis,* 2023 ONCA 227, at para 44

iii. Step 1: Seriousness of the Breach

The placement of the police conduct on the spectrum requires an exercise of discretion that the trial judge is uniquely positioned to undertake from her or his chair in the courtroom: *R v Buchanan,* 2020 ONCA 245

As a general rule, faced with genuine uncertainty, police should err on the side of caution by settling on a course of action that is more, rather than less respectful of the accused's privacy rights: *R v Fearon*, 2014 SCC 47 at para. 94.

The court must consider the seriousness of the violation, viewed in terms of the gravity of the offending conduct by state authorities whom the rule of law requires to uphold the rights guaranteed by the Charter: *R v Coderre*, 2016 ONCA 276 at para 20

Absent additional or independent state misconduct, a breach that is entirely consequential on an initial violation is unlikely to significantly increase the overall seriousness of the *Charter*-infringing state conduct. An arrest that can be viewed only as a consequential breach is distinct from state action that is characterized by additional or independent misconduct. In the absence of additional state misconduct, the focal point for evaluating seriousness is likely to remain the initial breach: *R v Zacharias,* 2023 SCC 30

In these circumstances and where the police honestly believed they were proceeding lawfully, subsequent state conduct should be situated on the less serious end of the scale of culpability: *R v Zacharias,* 2023 SCC 30

Various factors may attenuate or exacerbate the seriousness of the *Charter*-infringing state conduct. Extenuating factors, such as the need to prevent the disappearance of evidence, or good faith on the part of investigators, may attenuate the seriousness of police conduct that results in a *Charter* breach. On the other hand, no rewards are given for ignorance of *Charter* standards. Negligence or wilful blindness is not the equivalent of good faith. Nor can good faith be based on an unreasonable error or ignorance about the officer's scope of authority. The more deliberate the conduct of the police in breach of the *Charter*, the more likely this line of inquiry will favour exclusion: *R v Tsekouras,* 2017 ONCA 290 at para 109; *R v Gonzales,* 2017 ONCA 543 at para 158

A conclusion as to good faith cannot be grounded on a lack of bad faith. Ignorance of *Charter* standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith. For errors to be considered to have been made in good faith, they must be reasonable. And the police do not get credit for doing what is expected. Further, the *Charter*-infringing conduct in question need not be deliberate, nor result from systemic or institutional abuse to result in exclusion of evidence that was obtained as a result of a clear violation of well-established rules. courts may be required to dissociate themselves from evidence obtained as a result of police negligence in meeting *Charter* standards: *R v Szilagyi,* 2018 ONCA 695, at paras 55-57; see also *R v Paterson,* 2017 SCC 15 at para 44; *R v Omar,* 2018 ONCA 975, at paras 30, 44, 45, 46, 48; rev'd on other grounds at 2019 SCC 32; *R v Dudhi,* 2019 ONCA 665, at para 90; *R v Jarrett,* 2021 ONCA 758, at paras 48-49

It is not necessary for infringing police conduct to be part of a systemic problem for such conduct to rise to the serious breach category, as the absence of a

systemic problem is not mitigating: *R v Yaghoubi-Araghi,* 2025 ONCA 314, at para 26

The state of the police officer's knowledge of the right breached is relevant to the seriousness of a violation. An officer, who violates a Charter right while knowing better, commits a flagrant breach. For those officers who do not know of the relevant right, the reason they do not know can properly influence where on the good faith/bad faith continuum the Charter breach might fall. Ignorance may result, for example, from disinterest or an absence of care on the part of the individual officer, or systemic training deficiencies within the police service: *R v Adler,* 2020 ONCA 246, at para 27

It is an error of law to consider *Charter*-compliant police behaviour as mitigating under the seriousness prong of the analysis: *R v Reilly,* 2021 SCC 38

It is an error of law for a trial judge to speculatively try to explain or justify police conduct that infringes the *Charter* (in the *Pino* case, dishonesty). This evidence must come from the evidentiary record (generally, the officers themselves) and it is the Crown's burden to advance any such explanation in this part of the analysis: *R v Pino,* 2016 ONCA 389 at paras 95-97; *Tsekouras* at para 113

To use after-the-fact acknowledgement of wrong-doing and a change in practice as a basis for minimizing the seriousness of the breach and admitting the impugned evidence "would render the *Charter*'s protection meaningless: *Szilagyi* at para 64; see also *R v Strauss,* 2017 ONCA 628 at para 60

The court must consider all breaches under the seriousness prong of the analysis – even when a subsequent breach is caused by a prior breach that is being considered, and when that subsequent breach was made necessary by the prior breach: *R v Reilly,* 2021 SCC 38

Re Dishonest police testimony: "The integrity of the judicial system and the truth-seeking function of the courts lie at the heart of the admissibility inquiry envisaged under s. 24(2) of the Charter. Few actions more directly undermine both of these goals than misleading testimony in court from persons in authority:" *Pino* at para 102, quoting *R v Harrison*, 2009 SCC 34

A finding that an officer gave untrue testimony typically requires the court to disassociate itself from such conduct by excluding the evidence: *R v SS,* 2023 ONCA 130, at para 90

A finding that an officer intentionally attempted to mislead a court about a constitutional violation that has occurred is an important pro-exclusionary consideration in an s. 24(2) application: *R v Lai,* 2019 ONCA 420, at paras 13, 36, 37

A finding that the police deliberately breached charter rights as part of a ruse to further their investigation is highly aggravating, and the courts should disassociate themselves from such conduct: *R v Bielli,* 2021 ONCA 222, at paras 107-108

The seriousness of police conduct that resulted in Charter violations will be mitigated to the extent that the lawfulness of their conduct was legally uncertain at the time: see, for example, *R v Boutros,* 2018 ONCA 375 at para 35. That being said, the police cannot choose the least onerous path whenever there is a gray area in the law. In general, faced with real uncertainty, the police should err on the side of caution by choosing a course of action that is more respectful of the accused's potential rights: *R v Fearon,* 2014 SCC 77 at para 94; *R v Jones,* 2017 SCC 60, at para 118

Additional *Charter* breaches occurring during the same investigation can enhance the seriousness of each of the *Charter* breaches: *R v Barton,* 2021 ONCA 459, at para 9

The systemic nature of the violation plays a central role in assessing its long-term impact on the proper administration of justice. Constitutional breaches that are the direct result of systemic or institutional police practices must render the police conduct more serious for the purposes of the s. 24(2) analysis. A police practice that is inconsistent with the demands of the *Charter* produces repeated and ongoing constitutional violations that must, in the long run, negatively impact the due administration of justice. This is so even if many of the breaches are never exposed in a criminal court. *R v Rover,* 2018 ONCA 745 at para 37, 40

When dealing with the systemic nature of the police misconduct, the issue is not punishment of the police but rather preservation of public confidence in the rule of law and its processes. Minor or inadvertent breaches may only minimally undermine public confidence. Wilful and ongoing disregard of *Charter* rights will have a negative effect on public confidence: *R v Strauss,* 2017 ONCA 628 at para 53

In assessing the systemic nature of a breach, the court is not limited to considering localized patterns. If a particular kind of breach is occurring frequently across the province, this may elevate the seriousness of the breach. After all, one of the primary objectives of the exclusionary remedy is to avoid the danger that admitting the evidence may suggest that *Charter* rights do not count, thereby negatively impacting on the repute of the administration of justice. Accordingly, the court may consider the frequency of a kind of breach in reported case law when determining the prevalence of that kind of breach: *R v Davis,* 2023 ONCA 227, at para 55

The seriousness of a s.10(b) breach cannot be attenuated by the fact that:

1. the police do not commit an additional breach by attempting to solicit information prior to facilitating rights to counsel:
2. the right to counsel is delayed, as opposed to denied altogether
3. the accused does not demonstrate that the delay occasioned a failure to have a meaningful conversation with counsel: *R v Noel,* 2019 ONCA 860, at paras 19-22
4. the accused chose not to speak to counsel in the end: *R v Keshavarz,* 2022 ONCA 312, at para 110

The failure by the police to commit an additional breach simply means that the seriousness of the initial breach is not aggravated by the presence of multiple breaches: *R v Davis,* 2023 ONCA 227, at para 67

Exclusion does not follow from the length of a 10b breach per se: *R v Keshavarz,* 2022 ONCA 312, at para 121

Discoverability of the evidence is not a proper consideration under the first branch of the *Grant* analysis, but is under the second branch of the *Grant* analysis: *R v Buffong,* 2024 ONCA 660, at para 11

a) Specific Examples from the case law

In *Harflett,* the officer's invariable practice of searching every car was said to fit the description of an impermissible “fishing expedition conducted at a random highway stop." This was characterized as falling at the serious end of the spectrum of state misconduct and therefore favoured exclusion of the evidence: *R v Harflett,* 2016 ONCA 248 at paras 40-45

Re firearms case: the breach does not have to be more serious when the evidence sought to be excluded is a firearms case. There is not a different test for admission where the impugned evidence is a firearm: *R v Dunkely,* 2015 ONCA 597 at para 53.

In *Ritchie,* the Court of Appeal found that the police misconduct of searching the Appellant's text messages on a third party's phone without a warrant was made more serious by the fact that the police searched the phone six months after they seized it, and obtained a warrant two months after that: *R v Ritchie, 2018 ONCA 918*

In *Lai,* the Court of Appeal held that the trial judge erred in minimizing the seriousness of the breach by relying on the fact that, although the searching officer did not have subjective grounds to search the residence, objective grounds nonetheless existed. "A person with a reasonable expectation of privacy in a place has the constitutional right to be free from an illegal search. A search without subjective grounds is illegal, even where objective grounds would have existed had the officer acted on those grounds." Further, "a court cannot justify a search based on the existence of objective grounds for a form of search that was not undertaken." *R v Lai,* 2019 ONCA 420, at paras 26, 31

In *Mohammed,* the Court characterized as extremely serious the conduct of the police in 1) questioning the accused for 20 minutes without giving him an opportunity to consult with counsel, resulting in the accused making self-incriminating statements; and 2) unjustifiably searching his cell phone incident to arrest, resulting in the viewing of incoming and saved messages and photographing eight messaged that were used as evidence of drug trafficking: 2020 ONCA 9, at paras 17-18

iii. Step 2: Impact of the Breach on Accused's Charter Protected Interests

The second line of inquiry requires an examination of the extent to which the *Charter* breach actually interfered with or undermined the interests protected by the right infringed. Again here there is a spectrum: fleeting and technical to profoundly intrusive. The more serious the impact, the greater the risk that admission of the evidence will bring the administration of justice into disrepute by signalling to the public that the high-sounding nature of the rights is belied by their

feeble evidentiary impact in proceedings against the person whose rights have been trampled: *R v Tsekouras,* 2017 ONCA 290 at para 110; *R v Gonzales,* 2017 ONCA 543 at para 159

To determine the seriousness of the infringement under this line of inquiry, a court must look to the interests engaged by the right infringed and examine the extent to which the violation actually impacted on those interests. *Tsekouras* at para 111.

In assessing the actual impact of a breach on a *Charter*-protected interest of an accused, discoverability retains a useful role. The more likely that the evidence would have been obtained without the *Charter*-infringing state conduct, the lesser may be the impact of that *Charter*-infringing conduct on the underlying interests protected by the *Charter* right. The converse is also true. Of course discoverability is a double edged sword. It may signal that the breach of the accused's right was less serious. But it also renders the state conduct more egregious as the evidence was "discoverable" without breaching the accused's *Charter* rights: *Tsekouras* at para 112; see *R v Mengesha,* 2022 ONCA 654, at para 12

Discoverability has, in appropriate circumstances, a useful role to play in the s. 24(2) analysis where the interest at stake is one other than self-incrimination. The analysis of whether the evidence in issue could have been obtained through other *Charter*-compliant means cannot be speculative. There must be compelling grounds to believe the evidence would otherwise have been obtained. In those circumstances, discoverability is a factor that should be considered in determining the impact of the violation of the rights of the accused: *R v Sureskumar,* 2023 ONCA 705, at para 28

The absence of any causal connection between the s. 10(b) breach and the obtaining of the evidence is a factor mitigating the impact of the breach on the appellant's *Charter*-protected interests: *R v Rover,* 2018 ONCA 745 at para 43

After considering the lack of a causal connection as mitigating the impact of the breach, it is appropriate to consider the significance of any remaining impact.
In the context of a 10b breach, the interest in liberty and against self incrimination that 10b seeks to protect is not impacted where the accused does not incriminate themselves and there is no suggestion they would have regained their liberty earlier. Further, the psychological impact is lessened when the delay in access to counsel is not lengthy, and when the accused is kept informed of the reason for the delay and the time when they will be given access to counsel: *R v Truong,* 2025 ONCA 69, at paras 54-56

Discoverability of the evidence is not a proper consideration under the first branch of the *Grant* analysis, but is under the second branch of the *Grant* analysis: *R v Buffong,* 2024 ONCA 660, at para 11

Conversely, the presence of a causal connection is a factor enhancing the impact of the breach: see *R v Pike,* 2024 ONCA 608, at para 129

In other words, the fact that the evidence was discoverable without the breach – and was discovered without the breach – militates in favour of admission: *R v Keshavarz,* 2022 ONCA 312, at para 115

It is open to application judges to take the exclusion of evidence arising from *Charter* breaches into account under the impact analysis when determining whether other evidence should also be excluded pursuant to s. 24(2): *R v Hamouth,* 2023 ONCA 518, at para 42

For example, where the Crown undertakes to not rely on utterances obtained in violation of s.10(b), the fact that the state is not going to benefit from the self-incriminating statements that were elicited as a result of the breaches lessens the negative impact of the s. 10(b) violations: *R v Hamouth,* 2023 ONCA 518, at para 45

Similarly, the court may take into account situations when the Crown voluntarily excludes evidence arising from *Charter* breaches as mitigating the impact of the breach: *R v Truong,* 2025 ONCA 69, at para 57

The breach of a person's rights is not "tempered" by the fact that the police have other evidence of a similar type, properly obtained. The maxim "no harm, no foul" has little place in the assessment of a violation of constitutionally protected interests: *R v Mann,* 2021 ONCA 103, at para 32

The breach of a person's rights is also not mitigated by the fact that there is an absence of aggravating factors: *R v Pampena,* 2022 ONCA 668, at para 35

A consequential breach will be more relevant at this stage than at the seriousness stage. When additional rights and breaches of those rights are factored into the analysis, there will necessarily be a more significant impact: *R v Zacharias,* 2024 SCC 30

Re s.8: An unreasonable search that intrudes upon an area in which an individual reasonably enjoys a high expectation of privacy or that demeans a person's dignity is more seriousness than one that does not: *Tsekouras* at para 111. The impact of even a minimally intrusive search must be weighed against the absence of any reasonable basis for justification. The impact of an unjustified search is magnified where there is a total absence of justification for it: *R v Harflett,* 2016 ONCA 248 at paras 47, 56

For example, while drivers have a reduced expectation of privacy in their vehicles, this does not mean that an unjustified search is permissible. *Harflett* at para 48

A search of a residence involves a serious invasion of privacy interests: *R v Just,* 2020 ONCA 362, at para 46

In *Just,* the Court of Appeal stated that "the privacy interest in a barn and greenhouse is less than a house, and perhaps greater than the leased [farm] field: at para 47

In *Herta,* the Court of Appeal found that the impact on the accused's *Charter* protected interests lay at "the apex of seriousness." In that case, the accused's home was subject to an unlawful search warrant involving a third party target. The search was highly intrusive, and involved the breaching of the door, multiple police officers, sniffer dogs, Emergency Services Unit, photographs, and searching in floor vents. Although the breach was not very serious, the serious impact on the accused's privacy interests tipped the scale in favour of exclusion: *R v Herta,* 2018 ONCA 927, at paras 60-74

The extent to which a breach undermines the substantial privacy interest in a dwelling house does not vary depending upon whether, in spite of the breach, objective grounds existed: *R v Lai,* 2019 ONCA 420, at paras 26, 28

Re s.10: A sufficiently lengthy delay in providing access to counsel, even when the police do not attempt to question the arrested person, has a significant impact on the arrested person's rights. This is so having regard to the security of the person interest protected by s. 10(b), and the risk posed to the accused's right against self-incrimination *R v Rover,* 2018 ONCA 745 at para 44

The privacy interests in cell phone records is "one that is significantly reduced," which accordingly militates any impact on one's *Charter* protected interests: *R v Baskaran,* 2020 ONCA 25, at para 29

iv. Step 3: Society's Interest in a Trial on the Merits

The third inquiry is a matter of assessing the harms to individuals and groups in a society caused by the offence in question. This is an objective assessment of safeguarding society's interests – rather than responding to public outcry or expression of public concern: *R v Ting,* 2016 ONCA 57 at para 84

The third Grant factor cannot be used to systematically require the admission of reliable evidence obtained in plain disregard of an accused's Charter rights: *R v Harflett,* 2016 ONCA 248 at para 54

Relevant to the enquiry is whether a remedy has already vindicated the *Charter* violation such that excluding other evidence extracts too great a toll on the truth seeking function of the trial. This arises where, for example, the Crown has already voluntarily excluded the evidence arising from the impugned *Charter* violation: *R v Truong,* 2025 ONCA 69, at para 62

In respect of child pornography offences that have an international dimension, the trial judge must consider Canada's strong interests in protecting children abroa] who are abused by Canadians, and preventing travellers from misusing the advantages of their Canadian nationality and residence to do so with impunity. These interests are especially strong because they engage Canada's international legal duties under Articles 3-4 and 10 of the *Rights of the Child Protocol* to cooperate with the countries that Canadian travellers visit to suppress child pornography crimes they commit against children of those countries: *R v Pike,* 2024 ONCA 608, at para 133

v. Balancing the Interests of the Individual and Society

No overarching rule governs how the balance is to be struck: *R v Gonzales,* 2017 ONCA 543 at para 161

The first two lines of inquiry work together. Singly and in combination they pull towards exclusion of constitutionally-tainted evidence. The strength of the claim for exclusion equals the sum of the first two inquiries. The third and final inquiry resists this combined influence, pulling in the opposite direction with especial force when the evidence is reliable and crucial to the case for the Crown: *R. v. McGuffie*, 2016 ONCA 365, *R v Gonzales,* 2017 ONCA 543 at para 156

Where the first two lines of inquiry under *Grant* advance a strong case for exclusion, the third line of inquiry will rarely, if ever, tip the balance in favour of admissibility. On the other hand, where the first two lines of inquiry offer weaker support for exclusion, the third line of inquiry will almost certainly confirm the admissibility of the evidence: *McGuffie*, at para. 63; *Gonzales* at para 157

The overall balancing must occur at the end. To conduct this balancing under the first two prongs of the anlysis waters down any exclusionary power these factor may have: *R v Reilly,* 2021 SCC 13

Where different officers gathered evidence through different means. In that situation, one might be able to distinguish the impact of *Charter* breaches from some pieces of evidence over others, and thereby exclude some evidence and not other evidence: *R v Adler,* 2020 ONCA 246, at para 50

Where a remedy is already available and directed at vindicating a specific *Charter* violation, such as in a case where the trial Crown acknowledges that incriminating statements obtained through a violation of s.10(b) should not be admitted, also excluding the balance of the Crown's case based upon the same *Charter* breach could extract too great a toll on the truth-seeking function of the trial: *R v Hamouth,* 2023 ONCA 518, at para 47

SECTION 32(1)

Section 32(1) limits the territorial reach of the *Charter* to legislature and government of each province and of Canada. *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, the Supreme Court of Canada discussed the the territorial reach and limits of the *Charter* under s. 32(1).

See also *R v McGregor,* where in concurring reasons (not on this point) Karakatsanis J. and Martin J. rejected a territorial limit on the applicability of the *Charter,* and held that the *Charter* applied to acts of Canadian government against individuals abroad: 2023 SCC 4

SECTION 52(1) OF THE CONSTITUTION ACT

A. DECLARATIONS OF INVALIDITY

A declaration of invalidity made by a Superior Court of Justice is of general force and effect in the province in which it is made. Individual claimants do not have to re-litigate the issue to obtain a constitutional remedy: *R v Sarmales,* 2017 ONSC 1869; *R v Ali,* 2017 ONSC 4531

It is not open to a judge to declare statutory provisions invalid if those provisions do not apply to the accused's circumstances: *R v Vu,* 2018 ONCA 436 at para 107

Where a court makes a declaration of invalidity, there is a strong presumption that it operate restrictively. When the declaration is purely prospective, the law was valid from its enactment but is invalid once the declaration takes effect. Where a declaration of invalidity is suspended, the purpose of a suspension must be considered in determining whether the declaration operates retroactively or purely prospectively.

The presumption of retroactivity can be rebutted explicitly or by necessary implication. The rare circumstances and constitutional considerations that warrant a suspension of a declaration of invalidity can justify an exception to the retroactive application of declarations where necessary to give effect to the purpose of the suspension. When retroactivity would defeat the compelling public interests that required the suspension, the presumption is rebutted and the declaration must apply purely prospectively. In such circumstances, an accused could be charged and convicted, after the suspension expired and the declaration took effect, for committing the offence during the suspension period: *R v Albashir,* 2021 SCC 48

When a s. 52(1) declaration is prospective, a person whose *Charter* rights are breached by the law declared to be unconstitutional may apply for a s24(1) remedy. This arises where the compelling public interests that required suspending the declaration would not be undermined and when additional relief is necessary to provide an effective remedy in a specific case.

B. JURISDICTION

The Superior Court of Justice does not have jurisdiction to declare unconstitutional law that does not apply to the accused: *R v Vu,* 2018 ONCA 436

C. REMEDY OF STRIKING DOWN, READING DOWN OR READING IN

To respect the differing roles of courts and legislatures foundational to our constitutional architecture, determining whether to strike down legislation in its entirety or to instead grant a tailored remedy of reading in, reading down, or severance, depends on whether the legislature's intention was such that a court can fairly conclude it would have enacted the law as modified by the court. This requires the court to determine whether the law's overall purpose can be achieved without violating rights. If a tailored remedy can be granted without the court intruding on the role of the legislature, such a remedy will preserve a law's constitutionally compliant effects along with the benefit that law provides to the public: *c*

Reading down is "warranted only in the clearest of cases" where: (i) the legislative objective is obvious, (ii) reading down would not constitute an unacceptable intrusion in the legislative domain, and (iii) the remedy would not intrude upon budgetary considerations: *R v Vu,* 2018 ONCA 436 at para 90

The effect of a declaration should not be suspended unless the government demonstrates that an immediately effective declaration would endanger a compelling public interest that outweighs the importance of immediate constitutional compliance and an immediately effective remedy for those whose *Charter* rights will be violated. The court must consider the impact of such a suspension on rights holders and the public, as well as whether an immediate

declaration of invalidity would significantly impair the legislature's democratic authority to set policy through legislation. The period of suspension, where warranted, should be long enough to give the legislature the amount of time it has demonstrated it requires to carry out its responsibility diligently and effectively, while recognizing that every additional day of rights violations will be a strong counterweight against giving the legislature more time: *Ontario (Attorney General) v G,* 2020 SCC 38

STANDING TO ADVANCE CONSTITUTIONAL ISSUES

For a review of the jurisprudence on public interest standing, see: British Columbia Civil Liberties Association v Canada (Attorney General), 2018 BCSC 62; Corporation of the Canadian Civil Liberties Association vs Canada (Attorney General), 2017 ONSC 7491; and *R v Bedford*, 2010 ONSC 4264; *Alford v. Canada (Attorney General)*, 2019 ONCA 657