

Framework 3.2 – Rules of Criminal Procedure

The rules of criminal procedure embody the balance that society has struck between the importance of learning the truth about criminal acts and the need to protect the civil liberties of its citizens. In Canada this may be viewed as a balancing between offence-creating legislation such as the Criminal Code and the Canadian Charter of Rights and Freedoms.

Crime Scene Investigation

The police play a very important role at the outset of a criminal investigation; they are responsible for identifying and collecting evidence at the crime scene. Mistakes or inappropriate methods can negatively affect any prosecutions that follow. To avoid this, they must carefully follow rules that govern the investigative process.

Securing the Crime Scene

The first officers to arrive at a crime scene are responsible for gaining **control** over the participants and any potential evidence. This may include arresting suspects, assisting injured parties, eliminating any physical hazards, and determining and protecting the boundaries of the crime scene. **Section 129** of the Criminal Code makes it an offence to obstruct a police officer in the lawful execution of his or her duties. In their 1973 decision for ***R. v. Knowlton***, the Supreme Court of Canada specifically recognized that these duties include refusing admittance to a crime scene.

Releasing the Crime Scene

The **officer in charge** of the investigation determines when a crime scene may safely be removed from police control, unless there has been a death. In that case, the security of the crime scene falls under the authority of the **coroner** pursuant to the **Coroners Act, 1990**. This Ontario statute also provides police with the authority to secure and investigate a crime scene until it is ordered released by the coroner, typically following the **post mortem examination**.

Collecting Evidence

Evidence, such as weapons, clothing, or fingerprints, is collected at the crime scene by a **mobile crime lab** or **identification officers**. These individuals are responsible for preparing descriptions, taking photographs, making diagrams or sketches, and collecting physical evidence. Police departments preserve the **continuity of evidence** by following rules that govern its seizure, handling, and storage. For example, most departments require the **case officer**, who initially seized the item, to maintain care and control of it at all times other than when it is in storage. Items in the police property storage facility are under the control of the **property clerk**.

Processing Physical Evidence

It is the responsibility of **forensic scientists** to analyze the physical evidence collected at the crime scene. They may use their knowledge of different fields such as biology, chemistry, physics, anthropology, geology, and computer science to construct the details of what really happened.

Fingerprints

Fingerprints are considered one of the best ways to identify a suspect and place him or her at the crime scene. **Latent fingerprints** are created when a person's fingers deposit a residue of oil and perspiration on a relatively smooth surface. They are invisible until chemicals or laser light is applied. **Visible impressions** are created when a finger comes into contact with a surface where blood, dust, or grease has been previously deposited. **Moulded fingerprints** are three-dimensional impressions left in a soft substance, such as clay, wax, or putty. Fingerprints taken from a crime scene are compared against the **RCMP national repository of criminal records** in Ottawa. Experts then determine if there is a match, which would typically require 10 to 12 points of comparison.

Trace Elements

Trace elements are small amounts of identifiable material, such as dirt, dust, hair, fibres, and chemical residue. Once these elements are identified, they may be matched with the suspect or personal or real property that they have had contact with in order to link them to the crime. Trace elements are often transferred between the perpetrator and the victim during crimes involving physical contact. Hair, for example, can provide a great deal of information, especially if the root is included, such as the part of the body from which it originated, racial background, and blood type.

Blood

Since blood contains evidence of any substances taken into the body, it is crucial in proving impaired-driving and in cases where *mens rea* is an issue due to the consumption of intoxicating substances. The shapes of individual drops and spatters can also provide important details regarding body locations, positions, and motions since blood is a fluid that follows predictable laws of physics.

Gunshot Residue

When a gun is fired, a number of substances are discharged from the barrel other than the bullet, and some of them may be deposited on the suspect's hands. These discharges, referred to as **gunshot residue**, may include gases, unburned or partially burned grains of gunpowder, carbon particles, bullet lubricant, primer components such as lead and barium, lead or antimony from the bullet, or fragments from the bullet jacket or the gun itself. A suspect may be required to undergo a **handwash test** in which they wash their hands in a chemical solution. The solution is then analyzed in a laboratory for elevated levels of lead, barium, and antimony. The one shortcoming of this test is that it sheds no light on the time at which the suspect may have handled the weapon; it can therefore lead to false positive results for individuals who may have handled the weapon at a different time. A more accurate and consistent test that is

becoming more common involves the use of a **scanning electron microscope**. In this case, a sample is collected by pressing an adhesive utensil against the skin of the suspect. It is then analyzed for its chemical composition.

DNA Evidence

Analysis of skin, hair follicles, blood, semen, saliva, or other bodily fluids can identify their source through the distinctive genetic code contained in the **DNA** (deoxyribonucleic acid) that is present in most organic cells. DNA testing has provided a more accurate way of identifying people since its introduction in the early 1980's; the probability of **matching** random samples is one in several billion. DNA evidence is also useful due to the fact that very small traces can be isolated and identified. For example, the genetic codes of multiple individuals can be found in a complex sample taken from a point of contact. The improved accuracy of DNA testing is certainly useful in prosecutions, but it can also operate in favour of suspects, ruling them out when a negative result is obtained. **Section 487.05** of the Criminal Code authorizes judges to issue warrants to police to collect DNA samples from **suspects**; similarly, the federal **DNA Identification Act, 1998**, allows judges to authorize the collection of DNA samples from **convicted offenders**. The **National DNA Data Bank** contains thousands of profiles in both a convicted offender index and a crime scene index.

The Charter and the Power of the Police to Collect Evidence

Dating back to the Middle Ages in Britain, there has been at least some regard for the rights of the accused. For example, the **Magna Carta** recognized a person's right to privacy in their own home, and judges had the authority to issue a **writ of habeas corpus**, which would require that an imprisoned person be brought before the court to determine if their detention was lawful. Although there had been recognition of such rights for centuries, the **Charter** did have a significant impact by making specific remedies available when those rights are breached. For example, **subsection 24(2)** gave courts the discretion to exclude evidence obtained illegally or unconstitutionally if its admission would bring the administration of justice into **disrepute**. In their decision from **R. v. Stillman, 1996**, the Supreme Court of Canada identified the following factors as being relevant to the application of s.24(2):

- The **seriousness** of the offence
- The **importance** of the evidence
- Will the admission of the evidence render the trial **unfair**?
- Was the Charter breach **inadvertent or trivial**, or was it **deliberate and flagrant**?
- Was the breach motivated by **urgency** or the need to prevent the loss or destruction of evidence?
- Will the administration of justice be brought into **disrepute** as a result of the exclusion of the evidence?

The Power to Make an Arrest

The primary purpose of an arrest is to **compel the appearance** of an accused person at trial. The legal definition of "arrest" includes touching with a view to detention or using words of arrest to which a suspect submits. In some circumstances, arrests may be made by private citizens, but most are made by police officers either with or without the authority of a judicial **warrant**.

Levels of Offences

Summary conviction offences are Criminal Code violations of a less serious nature, and **indictable offences** are those considered more serious. Procedures for the prosecution of indictable offences are more complex and the penalties more severe. Some offences, called **Crown elect, hybrid, or dual procedure** offences, give the Crown the option of which type of prosecution to pursue. These are offences that include a wide range of gravity, such as assault.

Citizen's Arrest

Section 494 of the Criminal Code authorizes private citizens to make arrests under the following circumstances:

- The suspect is found **committing** an indictable offence
- It is believed, on reasonable grounds, that the suspect has committed an indictable offence and is **fleeing** to avoid arrest.
- A suspect found committing a criminal offence on or in relation to property may be arrested by the **owner**, a person in lawful possession of the property, or a person authorized by one of them.

Any suspect who is arrested by a private citizen must then be **immediately delivered** to a peace officer.

Arrest by a Peace Officer Without a Judicial Warrant

Section 495 of the Criminal Code authorizes peace officers to arrest without warrant any person who he or she finds **committing** a criminal offence. Suspects who have already committed an offence or who are believed, on reasonable grounds, to be about to commit an offence may be arrested without warrant only for the more serious **indictable offences**, or if it is believed, on reasonable grounds, that a warrant does exist in the jurisdiction where the person is found. If no warrant exists, and the suspect is not "caught in the act", then the peace officer does not have the authority to make an arrest for a summary conviction or a hybrid offence.

The Impact of the Charter

Sections 9 and 10 of the Charter apply both to detentions and formal arrest. The only situation not covered is when a private citizen merely detains another private citizen without delivering them to a peace officer.

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

10. Everyone has the right on arrest or detention

a) to be **informed** promptly of the reasons therefor;

b) to retain and instruct **counsel** without delay and to be informed of that right; and

c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

In their 1985 decision from **R. v. Therens**, the Supreme Court interpreted the meaning of "detention" broadly as they considered the right to counsel guaranteed by s.10(b) of the Charter. The test is subjective: Would the person have **reasonably believed** that he or she was not free to leave? In that case, the police officer demanded that a person suspected of impaired driving take a breathalyzer test. The driver then accompanied the officer to the police station, but was not informed of his right to counsel. The Court considered this a detention and held that the evidence had been properly excluded at trial. This broad interpretation of detention can cover a wide range of situations, such as roadside screenings, border searches, and customs interviews.

The Balance between Criminal Investigation and Individual Rights

Both the Charter and the Criminal Code recognize that infringements of individual rights must be **justifiable**. The Code often states the requirement to be "**reasonable grounds**", and the Charter guarantees against arrest or detention that is "**arbitrary**". These terms are of course open to interpretation. One way for an accused person to demonstrate arbitrariness or a lack of reasonable grounds is to prove the existence of a practice of **racial profiling**. Consider, as an example, the argument that young male black drivers in expensive cars are pulled over at a disproportionately high rate. The Ontario Human Rights Commission launched an inquiry into racial profiling in 2003 and defined it as, "any action undertaken for reasons of safety, security, or public protection, that relies on stereotypes about race, colour, ethnicity, ancestry, religion, or place of origin, or a combination of these, rather than on reasonable suspicion, to single out an individual for greater scrutiny or different treatment."

The Powers of Search and Seizure

Search and Seizure with a Warrant

The police do not have a general right to search an individual or a place in the hopes of finding useful evidence. Searches must be explicitly authorized, either by statute or common law. The most important statutory search power is provided by s.487 of the Criminal Code:

- 487.** (1) A justice who is satisfied by information on oath in Form 1 that there are **reasonable grounds** to believe that there is in a building, receptacle or place
- (a) anything on or in respect of which any **offence** against this Act or any other Act of Parliament has been or is suspected to have been **committed**,
 - (b) anything that there are reasonable grounds to believe will afford **evidence** with respect to the commission of an offence, or will reveal the whereabouts of a person who is believed to have committed an offence, against this Act or any other Act of Parliament,
 - (c) anything that there are reasonable grounds to believe is **intended** to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant, or
 - (c.1) any offence-related property,
- may at any time **issue a warrant** authorizing a peace officer or a public officer who has been appointed or designated to administer or enforce a federal or provincial law and whose duties include the enforcement of this Act or any other Act of Parliament and who is named in the warrant
- (d) **to search the building, receptacle or place for any such thing and to seize it**, and

The key elements of s.487 are the reasonable grounds for the search, the judicial authorization of the search, and the specificity of the objects for which the search is

conducted. These elements are considered by the courts whenever the issue of a potential violation of **s.8** of the Charter is raised. That section contains the guarantee against **"unreasonable search or seizure."** In **Hunter et al. v. Southam Inc., 1984**, the Supreme Court of Canada determined that prior judicial authorization of a search is a precondition to its reasonableness for the purposes of a s.8 analysis; it is essential to establish under oath the reasonable and probable grounds that an offence has been committed and that there is evidence to be found at the place of search.

Search and Seizure without a Warrant

One exception to the requirement of prior judicial authorization is the common law **power of search incidental to arrest**. For this type of search to be legal, it must be conducted to achieve an objectively reasonable purpose connected to the arrest, such as to ensure the safety of the police and the public, to protect evidence from destruction, or to discover evidence.

Ensuring the Appearance of the Accused in Court

One important premise of our criminal justice system is the **presumption of innocence**, which is now entrenched in s.11(d) of the Charter. For this reason, most individuals charged with a crime retain their freedom until required to attend at court. The process differs, however, depending upon the seriousness of the offence, whether the arrest was made without a warrant, whether a warrant for arrest exists, and whether there are reasons to detain the accused. Continued detention may be justifiable if it's for the purpose of establishing the identity of the accused, to preserve evidence, to prevent the continuation or repetition of the offence or the commission of another offence, or to ensure attendance in court.

Procedural Options to Ensure Attendance

The following options apply to those charged with **summary conviction offences**, **Crown elect offences**, and the **less serious** indictable offences listed in **s. 553** of the Code:

- An **appearance notice** is issued by a **police officer** when **no arrest** is made. It notifies the accused of the offence, the date to appear for fingerprinting if required, and the date to attend court.
- A **summons** is issued by a **justice or judge** after an **arrest** is made. It also serves as notification of the offence and dates of required appearances.
- A **promise to appear** is issued by the **officer in charge** of a police station after an **arrest** is made and the accused is taken to the station. It embodies the agreement of the accused to appear in court at the stated time and place.
- A **recognizance** is issued by the **officer in charge** of a police station after an **arrest** is made and the accused is taken to the station. It embodies the agreement of the accused to pay a certain amount of money if they fail to appear.

Those charged with one of the **more serious** indictable offences are detained in custody to await a judicial interim release or bail hearing. This hearing must be held within 24 hours of an accused detention or as soon as possible. At the hearing, the onus is on the Crown to demonstrate that continued detention is necessary except for the most serious

“reverse-onus” offences, for which the burden of proof shifts to the accused to convince the court that they should be released.

The Trial Process

Determination of Court

There are two courts that hear criminal trials in Ontario; the **Ontario Court of Justice**, which is a court of **inferior jurisdiction** with **provincially** appointed judges, and the **Ontario Superior Court of Justice**, which is a court of **superior jurisdiction** with **federally** appointed judges. The terms “inferior” and “superior” signify the differences in the offences over which they have jurisdiction and the differences in the types of trials which they may supervise. All summary conviction offences, hybrid offences in which the Crown elects to proceed summarily, and the least serious indictable offences are tried in the Ontario Court of Justice. The most serious indictable offences are tried in the Ontario Superior Court of Justice. For the middle range of indictable offences, between the least serious and most serious, the accused may choose between the two courts. One factor in making this choice is whether the accused would prefer a jury trial, as they may only be presided over by a judge of the Superior Court.

Preliminary Inquiry

A person charged with an indictable offence, other than the least serious ones within the exclusive jurisdiction of the Ontario Court of Justice, are entitled to a **preliminary inquiry** to determine whether sufficient evidence exists to commit the accused for trial before the **Ontario Superior Court of Justice**.

Pre-trial Conference

A pre-trial conference is mandatory in all jury trials and may be requested in non-jury trials by the judge, the Crown, or the accused. It allows the judge to “promote a fair and expeditious” trial by facilitating the settlement of matters between the Crown and the accused or the accused’s lawyer prior to trial.

Crown Disclosure

In *R. v. Stinchcombe* [1991], the Supreme Court of Canada held that the Charter right to a “fair and public hearing”, contained in s.11(d), requires that the Crown disclose all relevant information, including both incriminating and exonerating evidence, to the accused before trial. The defence, on the other hand, has no corresponding duty to disclose incriminating evidence to the Crown. One famous example occurred when one of *Paul Bernardo’s* lawyers, Ken Murray, was acquitted after being charged with obstruction of justice for failing to disclose incriminating videotapes that were in his possession.