***From last week…***

***PROCEDURE:***

***The Start of the Criminal Process – The Complaint: A Few More Comments…***

*We will be using some terms in this course that you will want to be familiar with:*

1. *Complainant: often but not always the person wronged*
2. *Suspect: person the subject of an investigation before charge*
3. *accused/defendant: the person who is facing a charge and presumed innocent*
4. *victim: if the charged person is convicted the person wronged is the victim*
5. *offender: if the person charged is found guilty he or she is the offender*

*In order for a person to be the subject of a criminal prosecution, there has to be someone who makes a complaint (the complainant), the person against whom the complaint is made has to be identified by an investigating agency, nearly always the police, and the person has to be compelled to court (directed to go so the court has authority over the person).*

***Significance of an Arrest****: If the police arrest someone, they must take action to deal with the person who is now the responsibility of the police. The root word of custodian is “custody” which derives from a latin word meaning “guardian”. This helps to explain the relationship between the arrestee and the police.*

*The most common way for a person to be notified he or she is the subject of a criminal complaint is for that person to be arrested. However it is not essential that for a person to be charged, he or she must be arrested.*

*We most often associate an arrest with the police and with some exertion of force by a police officer over that person. However, an arrest need not involve force.*

*Criminal Code sections 493-503 deals generally with what happens when the police come into contact with a person believed to have committed a criminal offence.*

***This week…***

Powers of Arrest (Police and Civilian) – section 494, 495 and 499 of the Criminal Code (see below)

What is an **arrest**? It is a physical or psychological restraint by someone having the lawful authority to take another into custody. Notably once someone is taken into custody, they become their jailers’ responsibility.

This is to be contrasted with a **detention**, for example, that could be fleeting and usually does not involve a physical restraint, and may not be in relation to one’s conduct or not for anything specific, but may be for information gathering or to secure someone against harm.

An arrest is for a reason, and that means it is in relation to a specific allegation or reasonable belief of an offence having been committed.

Arrests can be made by civilians (section 494 of the Criminal Code) and by police officers (section 495 of the Criminal Code). Arrest authority has a relationship to the type of offence in issue.

Types of Offences: The type of charge, which roughly equates to its seriousness, matters to arrest powers. There are three types of offences:

Summary:

Hybrid:

Indictable:

And there are two special lists of offence that are not about their classification, but in what court they are heard and how complex the proceeding. Section 469 and 553 of the Code. We can these Absolute Jurisdiction offences.

Section 469: see for example section 235 (murder) is only in the province or territory’s Supreme Court

Section 553: see for example section 201 (keeping a gaming or betting house) is only in the province or territory’s Provincial Court

Classification of offences matters for the following reasons:

1. some offences draw a greater penalty if proceeded with by indictment as opposed to summarily, and more generally summary matters draw a lesser penalty
2. the procedure by which the case proceeds through the courts may differ in complexity
3. the manner in which someone is compelled to court may vary
4. the court within which matters of bail is decided and onus may be different
5. whether the Identification of Criminals Act applies depends on the type of offence
6. limitation period applies to charging summary offences (12 months)

Summary of Arrest Authority

Section 494 allows non-police officers to arrest the following persons:

* a person he or she finds committing an indictable offence (section 494(1)) or,
* a person he or she reasonably believes has committed a criminal offence and is escaping from someone who has authority to arrest (like a police officer) (section 494(1)(b)) or
* a person he or she finds committing an offence on his or her property or within a reasonable period after, but he or she must turn that person over to the police right away (sections 494(2)(a)(b) and 494(3))

Section 495 allows police officers to arrest the following persons without warrant:

* a person who has committed or who the officer believes has or is about to commit an indictable offence (section 495(1)(a)) or
* a person the officer finds committing a criminal offence (section 495(1)(b))

but a police officer shall not arrest a person without warrant if the offence is

* a 553 offence or a hybrid offence or a purely summary offence and
* the officer believes that he has identified the person and
* the person doesn’t need to be held to recover or secure evidence and
* the person is not going to continue or repeat the offence and
* the officer believes the person will attend court without being held in custody

Section 499 is an authority to arrest on a warrant. A warrant is authority from a judicial officer (for our purposes, think of this person as a judge, but in any event an independent arbiter).

An arrest or detention by the state can trigger a right. See section 10 of the Charter of Rights and Freedoms. Once arrested the person no longer has individual freedoms that other persons in Canada can exercise.

The contact between the police and the suspect (or the accused in the case of an arrest warrant) is significant because it is a time at which the person can be compelled to attend court (either because he or she is in custody because arrested with or without a warrant, or they have been directed by way of appearance notice, or they have promised to attend court in accordance with an undertaking, or the police know to whom a summons should be delivered if the person is later charged).

**There are four ways that a person can be made to attend (compelled to) court:**

1. Appearance notice (see section 500)
2. Undertaking to a police officer (see section 501)
3. Summons (see section 507)
4. Warrant (see section 507)

**Note** that for a person to be summonsed to court, or for a warrant to be issued, there must be a formal charge. If the accused is released by police on an appearance notice or a police undertaking, generally speaking that person is not yet charged.

With some exceptions (including some specific types of offence like murder, or some specific circumstances such as a person who has already been released on conditions and failed to abide by the conditions), the presumption is that any person either arrested or detained should be:

1. Released as soon as reasonably possible, keeping in mind the considerations of the police and their investigation and the courts and their need to have the accused person before them and the public and their confidence in the justice system. (see sections 493.1, 495, 498, 499, 515)
2. When released, the person whether charged or not should be subject to the least onerous restrictions on his or her liberty to satisfy the considerations in (1) (see section 493.1)

***Role of the Police as Contrasted with Crown Counsel:***

*One easy way to distinguish between the activities of the police and those of the Crown are that police generally are dealing with a person before a formal charge is laid while the Crown are generally dealing with the time after the charge is laid. There is some blurring of the lines at times, but this is a convenient way of demarking who is responsible for the accused at two stages of the process.*

*In our system, the Crown is a prosecutor and not an investigator. The police investigate and the Crown prosecutes. There is an emphasis on the independence of each from the other, except where there is a need to interact. The interactions come at two junctures in BC; charge assessment (before charge) and disclosure (after a charge is approved).*

***Police do not work for the Crown and the Crown do not work for the police; their actions are independent, but their activities necessarily are interrelated. This will become clearer when we talk in more detail about the role of Crown Counsel in a criminal proceeding.***

**Role of Crown Counsel**

*Boucher v. The Queen , 1954 CanLII 3 (SCC)*

This is the most important case regarding the duties of Crown Counsel in Canadian criminal law. The most significant statement of the duties are found in Rand, J.’s decision.

*It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion 'of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.*

The Crown Counsel derives its authority to prosecute in this province from the Crown Counsel Act [RSBC 1996] CHAPTER 87.

**Responsibilities of Crown counsel**

**4**. (3) Subject to the directions of the ADAG or another Crown counsel designated by the ADAG, each Crown counsel is authorized to

(a)examine all relevant information and documents and, following the examination, to approve for prosecution any offence or offences that he or she considers appropriate,

(b)conduct the prosecutions approved, and

(c)supervise prosecutions of offences that are being initiated or conducted by individuals who are not Crown counsel and, if the interests of justice require, to intervene and to conduct those prosecutions.

The decision to undertake a prosecution lies solely with Crown Counsel. The considerations are found within the Crown Counsel Charge Assessment Guidelines

<https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/cha-1-charge-assessment-guidelines.pdf>

\*You should generally understand the charge approval standard in this link\*

A prosecution may only be undertaken if there are two criteria satisfied (a two-part test):

1. There is a substantial likelihood of conviction and
2. There is a public interest in a prosecution.

These considerations are alive and must be satisfied throughout the course of the proceeding.

BC Prosecution Service Charge Assessment Guidelines

<https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/cha-1-charge-assessment-guidelines.pdf>

Role of Counsel in a Criminal Proceeding

**Fitness to stand trial**

Criminal Code s.2 interpretation section / definitions

unfit to stand trial means unable on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to

* (a) understand the nature or object of the proceedings,
* (b) understand the possible consequences of the proceedings, or
* (c) communicate with counsel;

**Presumption of fitness**

**Criminal Code s.672.22***An accused is presumed fit to stand trial unless the court is satisfied on the balance of probabilities that the accused is unfit to stand trial.*

**Judicial Interim Release (Bail)**

The authorities must take the accused before a judge “without unreasonable delay” and, in any event, within 24 hours maximum since the time of arrest.

S. 503 (1) of the Code applies

**The following laws help govern decisions of the Crown and the Court regarding bail:**

1. The Charter, Section 11 (d) and (e),

Any person charged with an offence has the right:

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

**(e)** not to be denied reasonable bail without just cause;

1. The Criminal Code, Sections 493.1 and 493.2 requiring restraint

**Section 515 (2) The Bail Ladder**

As each step moves up the stakes are higher and the obligation on the accused person is more onerous.

e) deposit cash &have surety only if 200+ KMs away from home

d) the obligation to deposit cash or other valuable security with the court

c) the obligation to have one or more sureties

b) promise to pay financial obligation to the court of a specified amount

a) release order with no financial obligation

**Grounds for detention**

The Criminal Code, Section 515 (10) grounds for detention:

For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:

* **(a)** where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law;
* **(b)** where the detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, or any person under the age of 18 years, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice; and
* **(c)** if the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including
  + - **(i)** the apparent strength of the prosecution’s case,
    - **(ii)** the gravity of the offence,
    - **(iii)** the circumstances surrounding the commission of the offence, including whether a firearm was used, and
    - **(iv)** the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject-matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more.

Subsections:

1. = primary ground
2. = secondary ground
3. = tertiary ground

Criminal Code s.515 (4)

When making an order under subsection (2), the justice may direct the accused to comply with one or more of the following conditions specified in the order:

(a) report at specified times to a peace officer, or other person, designated in the order;

(b) remain within a specified territorial jurisdiction;

(c) notify a peace officer or other person designated in the order of any change in their address, employment or occupation;

(d) abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the order, except in accordance with any specified conditions that the justice considers necessary;

(e) abstain from going to any place or entering any geographic area specified in the order, except in accordance with any specified conditions that the justice considers necessary;

(f) deposit all their passports as specified in the order;

(g) comply with any other specified condition that the justice considers necessary to ensure the safety and security of any victim of or witness to the offence; and

(h) comply with any other reasonable conditions specified in the order that the justice considers desirable.

**Important Recent Cases from the Supreme Court of Canada**

**R. v. Antic 2017 SCC 27**

The ladder principle. s. 515 (2)

The least restrictive form of release that could be appropriate should be imposed. The presumption is that an accused will be released unconditionally and before a judge can move on to more onerous types of release and more restrictive conditions they must first consider and justify why a less onerous type of release or condition is not appropriate.

**R. v. Zora 2020 SCC 14**

The default form of bail for most crimes is release on an undertaking to attend trial, without any other conditions. **Bail conditions can be imposed, but only if they are clearly articulated, minimal in number, necessary, reasonable, the least onerous in the circumstances, and sufficiently linked to the accused’s risks regarding the statutory grounds for detention (primary secondary tertiary)…**

**Only conditions specifically tailored to the individual circumstances of the accused can meet the required criteria. Bail conditions are intended to be particularized standards of behavior designed to curtail statutorily identified risks posed by a particular person and are to be imposed with restraint**. Restraint is required because bail conditions limit the liberty of someone who is presumed innocent of the underlying offence and, through the offence in s. 145(3), create new sources of potential criminal liability personal to that individual accused.