**SOC 3395: Criminal Justice & Corrections**

**Overheads Class 12: Pretrial Criminal Procedures 2**

\* Today we continue our look at pre-trial procedures

**Search & Seizure:**

\* Search & seizure under the Charter:

- s.8: the right to be secure from unreasonable search & seizure

- s.24(2): the exclusion of such evidence

\* Both protect the individual right to privacy

\* Three relevant areas of law:

- common law: general body searches & surrounding area

- s.487 of Criminal Code: obtaining search warrants

- s.487.05 of Criminal Code: obtaining search warrant for DNA

**Requirements for Search Warrants:**

(1) Reasonable & probable grounds (i.e. that crime committed)

(2) Particularity (i.e. the place to be searched, what to be seized &

why)

**Searches Needing a Warrant:**

\* Before issuing a warrant, a JP must decide on whether reasonable grounds exist

\* Courts have been split on the procedure to determine “reasonableness” under s.8 of the Charter: (i.e. before or after) If possible, it is best to determine beforehand:

- police have to assess reasonableness before acting

- Judges will have the exact information police used when ruling

on legality

- decision/assessment made by a neutral individual

**Warrantless Searches in Exigent Circumstances:**

\* Some warrantless searches may be deemed reasonable under the circumstances (but police can’t simply go on “fishing expeditions”)

\* Examples:

(1) Hot pursuit (to prevent bodily harm, death, or loss of evidence)

(2) Minor technical defects

(3) More leeway given in drug cases to prevent destruction of

evidence

\* Considerations by court:

(1) Whether preceding information compelling

(2) Whether based on credible informant’s tip

(3) Whether corroborated by prior police investigation

(4) Accused’s past record & reputation

**Searches Incident to an Arrest:**

\* Suspects may be searched for weapons/evidence without a warrant if their arrest is itself lawful (i.e. based on reasonable grounds)

\* Searches incident to arrest have been allowed when:

(1) Needed to protect arresting officers

(2) Needed to protect destruction of evidence

(3) Intrusiveness of the arrest is so great that the incidental search

is minor

(4) The individual could be subjected to an inventory search at

police station

\* Nevertheless, police must inform suspects of right to counsel

\* Limitations to this power:

(1) Necessity (i.e. for effective/safe application of law)

(2) Must be for valid criminal objective (e.g. weapons search)

(3) Cannot be used to intimidate, pressure or ridicule accused

(4) Cannot be done in an abusive way

**Warrantless Searches in Motor Vehicles:**

\* Warrantless searches of cars OK if reasonable grounds exist for believing drugs/contraband present

\* Mellinthin case: stop checks for drunk drivers dangerous vehicles don’t justify searching bag with no reasonable grounds

**Other Types of Warrantless Searches:**

\* Three types:

(1) Plain view doctrine: further search/seizure OK if illegal object

openly visible

(2) “Reasonable grounds” that an offence is being committed/ has

been committed

(3) When individual voluntarily consents (police must prove)

**Electronic Surveillance:**

\* Courts can authorize wiretaps / electronic surveillance & evidence so obtained may be used in criminal cases (very few applications rejected)

\* If police act in good faith, such evidence doesn’t violate Charter

\* Electronic surveillance without prior judicial authorization violates s.8 of Charter

\* Video surveillance of area with “reasonable expectation of privacy” without prior judicial authorization violates s. 8 of Charter

\* Unlike some countries (e.g. U.S., U.K., Canada’s laws have not kept up with technology). Critics argue this makes it easier for organized crime and terrorists

\* Bill C-74 attempted to update laws, but died on order paper. Controversial among civil libertarians

**Stay of Proceedings:**

\* Judicial discretion exists to stay proceedings in very old cases (where offence occurred many years before charges laid)

\* Not typically done for sexual offences

\* Fairness of trial is not necessarily jeopardized by lengthy delay

\* If parties come to an understanding beforehand, & authorities told accused wouldn’t proceed, then situation may be different

**Legal Aid:**

\* s.10(b) of Charter gives right to retain & instruct counsel without delay. Thus important to consider legal aid

\* Courts have held police must inform suspects of existence/availability of duty counsel/legal aid in area, including toll-free number

\* Court decisions have expanded legal aid entitlement beyond initial court appearances (e.g. appeal or parole revocation hearings)

\* Before legal aid existed, accused of limited means were discriminated against on the basis of wealth & income

\* Gideon v. Wainright: established legal aid as a constitutional right

\* Canadian legal aid began in Ontario in 1967 (in place across Canada by end of 1970's, following federal funding in 1973)

\* Government funding peaked in mid 1990's, has been cut back since - resulting in a patchwork of services, no national standards, & leaving only “poorest of the poor” eligible.

\* The philosophy of the law (though not necessarily the courts) suggests that eligibility for legal aid should be broadened

\* Currently 3 models of legal aid delivery are used in Canada:

(1) *Judicare model* (Ontario, N.B., and Alberta): Qualified

applicants get a certificate/ choose own lawyer

- lower cost - increased availability

- one lawyer handles case - serves rural areas well

(2) *Staff system* (Sask, NFLD, N.S., & Yukon): legal counsel work

for the government

- staff counsel work together

- efficiencies of centralization

- enables specialization

(3) *Mixed system* (P.E.I., Man., Quebec, Territories): choosing

either staff or private counsel from a list

\* Conviction rates don’t vary by type of program, though sentences do

- judicare: more jail terms/ discharges

- staff: more probation, restitution, community work & fines

\* Aboriginal offenders criticize system as ineffective / little choice

**Conclusion:**

\* Pretrial procedures are important, largely concern the actions of the police, & are subject to various limits set by the Charter

Other controversial issues, like bail reform, electronic surveillance & legal aid will continue to work their way through the courts