

Sociology 3395: Criminal Justice & Corrections **Classes 11 & 12: Pretrial Criminal Procedures**

Between an arrest and a trial lie a series of pre-trial criminal procedures - procedures that are significant because most cases never go to trial. Since trials are relatively infrequent, it is important that we consider the matters that most people experience when they enter the CJS.

Pretrial criminal procedures involve the actions of the police between the arrest of a suspect and the beginning of a trial. Many procedures are necessary during this period, and many have been the subject of challenges in the courts (e.g. "privacy" rights vs. the need of the police to investigate). For example, in the Feeney case, a neighbor told police, after a very violent murder, that she had witnessed the accused walking away from the scene and entering a trailer nearby. The police knocked on the door, and hearing no response, entered without a warrant and awakened the sleeping suspect (who was covered in blood and had some of the deceased's money on him). The accused was charged and convicted of second degree murder. However, after a round of appeals this case ended up in the SCC, which ruled that the police search was illegal and ordered a new trial. The majority, following the due process model, felt the officer acted on a hunch - since she admitted not having reasonable grounds nor attempted to seek a warrant. This was based on the officer's statement that, when entering, he had reason to believe that the suspect was involved in the murder, but didn't have sufficient reason to make the arrest until viewing the bloody clothing. The majority ruled that while the officer may have been correct in his hunch, that didn't legitimize his actions. The chief justice wrote that "in general, the privacy interest outweighs the interests of the police and warrantless arrests in dwelling houses are prohibited." Another matter of concern was the fact that the officer delayed reading the suspect his rights (i.e. they should have done so as soon as he was awakened).

The minority, on the other hand, followed the crime control philosophy arguing that the police officer acted properly by ensuring that a murder suspect was not at large in the community. The concern here was more for the victim and the community.

Nevertheless, the SCC ordered a new trial but ruled that the bloody shirt, shoes, and the deceased's money were inadmissible as evidence as their use would bring the CJS into disrepute. Interestingly, up until this case, the common law permitted an officer to enter a private dwelling to arrest a suspect without warrant. But now, the SCC ruled that the officer was incorrect to believe that there were reasonable and probable grounds to arrest the suspect. Now, the existing rules were thrown to the wind.

The impact of this decision on police was so great that the SCC allowed the previous rules governing warrants to continue for 6 months. Parliament stepped in by passing Bill C-16. This allows an officer to enter a dwelling and make an arrest without warrant if there is a need to prevent the loss or destruction of evidence, if s/he believes her warnings will lead to personal harm, or if there is an urgent call for assistance (e.g. in domestic violence, such as in the Godoy case; in limited circumstances where a search is unconnected to the arrest). Note, however, that just because evidence is seized without warrant and this is found to violate the right to privacy, this doesn't necessarily mean that it will be excluded at trial, such as in the Caslake case (where, while cocaine was seized "unjustly," the court ruled that "excluding the evidence would have a more serious impact on the repute of the administration of justice than admitting it. The prosecution had no case without the evidence").

Investigative Detention:

Arrest isn't the first step in pretrial procedure, since police have the right to detain, interrogate and search a person even when there is less than reasonable grounds to believe an offence has been committed. Today, police can hold someone for questioning even without grounds for arrest. The legality of this procedure, however, depends on the importance of the issue being investigated and the amount of intrusion necessary.

Investigative detention is defined as "a reactive power dependent upon a reasonable belief that the detained person is implicated in a prior criminal act (Brown vs. Durham Police). However, s.9 of the Charter protects citizens against arbitrary detention or imprisonment. According to Bilodeau, police are allowed to detain someone due to safety concerns (e.g. if an alleged drug trafficker suspected of having a weapon runs, is caught, and, during the search for a nonintrusive search for weapons illegal drugs are found, the officer can legally arrest the suspect without fear the evidence will be excluded. However, an officer risks having the evidence excluded when deciding s/he is at risk when s/he really isn't (e.g. a burglar running away without being suspected of having a weapon and that made no threats). Also, strip searches are much more legally difficult to justify to the courts. Basically, while officers are allowed to detain an individual to determine if s/he had been involved in a crime, this doesn't give the police the right to make an intrusive search if it does not involve issues of safety.

Police conduct investigative detentions because the opportunity to stop and confront suspects is an invaluable tool. Police may also be afforded the time and opportunity to use other warrantless search powers they have, such as the "plain view doctrine." If, during investigative detention, find enough evidence to formally arrest an individual, s. 495 allows them to conduct a search incident to an arrest. Yet, this also may bring other

Charter rights into action for the suspect, such as s. 10(a) and (b) (i.e. to be informed promptly of the reason for arrest, to retain and instruct counsel without delay and to be informed of that right).

Arrest:

Arrest involves the power of the police to restrain an individual. Police may stop and question many people for a variety of reasons (e.g. to obtain information or see what someone is up to). But to legally arrest someone the officer has to verbally inform the suspect that s/he is under arrest. This also involves at least the potential use of force if the suspect resists being taken into custody. Otherwise, the person must at least acknowledge acquiescence. Upon arrest, again, the suspect has the Charter right to be informed promptly of the reasons therefor. Indeed, an arresting officer must inform the suspect of his rights the moment that individual becomes a suspect in the crime being investigated. If the suspect isn't so informed, any evidence obtained is inadmissible in court under the Charter as putting the administration of justice into disrepute. Basically, then, upon arrest suspects must be told of the reason for arrest, of their right to counsel, of their right to silence, and that they do not want to influence the suspect in making a statement.

Arrest Without a Warrant:

Under s.495(1) of the Criminal Code, arrests may be made without a warrant when a person is (1) found committing a criminal offence; (2) is about to commit an indictable offence on the basis of reasonable and probable grounds; (3) the officer, on reasonable and probable grounds, believes that there is an outstanding warrant for the suspect; and (4) the suspect is someone the officer knows has committed an indictable offence. S. 495(2) also allows police to arrest, without a warrant: (1) anyone they find committing any criminal offence; (2) anyone who has committed an indictable offence; (3) anyone they believe, on reasonable grounds, has committed or is about to commit an indictable offence; and (4) anyone they believe has an outstanding arrest warrant in force in that jurisdiction. S. 495(2), however, states that no arrest shall be made where no reasonable grounds exist to believe that the accused will fail to appear in court and the public interest is satisfied (i.e. the suspect's identity is clear, evidence is secured, and the continuation of the offence/ commission of another offence is prevented) . Essentially, this restricts warrantless arrests in summary conviction, absolute provincial court jurisdiction, and hybrid offences. In such cases, police must either issue the suspect an appearance notice, release the suspect and apply for a summons from a JP, or release the suspect unconditionally.

Arrest With a Warrant:

If the police intend to arrest someone with a warrant, they must suspect on the basis of reasonable grounds that the person committed a crime and that the suspect's appearance cannot be compelled by a summons. The police must go before a JP and lay an information that a criminal offence has been committed. If successful, the arresting officer must have the warrant if the suspect requests to see it. They must also inform the suspect of the reason for arrest, right to counsel, that they are not required to say anything - but what they say may be given in evidence, and that the officer does not want to influence them in making a statement. Also, warrants can sometimes contain authorization to enter private residences to arrest suspects. Police can also enter private residences in "hot pursuit." Of course, police can arrest without a warrant if they observe the offence, but still will wish to go before a JP ASAP. This is because s.503(1) of the Criminal Code states that an accused must be taken before a JP within 24 hours or within a reasonable period. If not, the case may be stopped right there due to "unreasonable delay" (e.g. 18 hours OK/ 36 not).

Custodial Interrogation:

Upon being placed in police custody (wherever this may occur), the suspect must be informed of the right to silence and counsel before questioning begins (protected by s.7 of the Charter, among others). Indeed, some police will stop their questioning until defense counsel are present. Yet, police can, and often do, ask certain questions like the suspect's address, place of work, etc. The accused can decide to stop at any time and refuse to answer more questions until a lawyer arrives. Suspects can waive this right only if they are aware of what they're doing and are able to contact a lawyer at any time they wish.

Traditionally, courts have admitted out of court statements by an accused so long as they are voluntary. If in issue, voluntariness must be proven beyond a reasonable doubt. Now, s.7 of the Charter imposes limits on the powers of the police over detained individuals. They can now only obtain statements if they respect the principles of fundamental justice.

Of course, civil libertarians and others get very concerned about police interrogation tactics. For example, the "conditioning strategy" involves providing an environment in which the suspect is encouraged to think positively about the interrogators and subsequently cooperates with the authorities. The suspect's anxiety is reduced and a sense of trust is reached. The "de-emphasizing strategy" involves police informing suspects that rights are unimportant compared to empathizing with the victim(s) and his family (ies). In such cases, suspects rarely if ever thinks of stopping the

interrogation to contact a lawyer. The “persuasion strategy” involves investigators informing the suspect if he doesn’t tell his side of the story, only the victim’s side will be used at trial.

Hence, while the Charter has significantly increased the rights of accused in the CJS, this hasn’t necessarily led to significant changes in police interrogations. This is largely because suspects don’t appreciate the nature and significance of their rights given problems with the clarity and adequacy of their communication. Not only that, police use a number of legal, but informally innovative techniques designed to elicit a confession. Many of these (though not all) slip by (false confessions like the Guy Paul Morin case, would be one that didn’t slip by).

Some experts argue that false confessions are made and typically videotaped after hours of intense interrogation, the suspect gets tired and just wants to go home, so it is a myth to think this is putting the truth before a court. Three types of false confessions: (1) voluntary: to protect someone else, establish an alibi for something more serious, or due to fear of the real guilty party; (2) coerced-complaint: usually the result of intense custodial interrogation; (3) coerced-internalized: a vulnerable suspect’s recollection of events is distorted by interrogation into false memories of culpability.

Regardless of these tactics, the law of evidence requires that voluntariness be shown before confessions can be introduced in criminal court. Usually a *voir dire* is held on this issue first. Beyond the law of evidence, s. 7, 10(a) and (b) of the *Charter* is relevant - such evidence may be excluded if, having regards to all of the circumstances, its admission would bring the administration of justice into disrepute.

Jailhouse Interrogations:

A related issue is the use by police of jailhouse informants to provide evidence against an accused - a practice that led to the wrongful convictions of Guy Paul Morin and Thomas Sophanow. Many questions have been raised about the credibility of such informants, especially when they are promised something in return. This has a long history, going back to Medieval England and remains a common practice, despite the fact that jailhouse informants figure in about 20% of wrongful conviction cases in the U.S. The SCC in *Vetrovex* suggested trial judges provide “clear and sharp warning” to juries about evidence offered by jailhouse informants. The *Morin* and *Sophanow* inquiries have also criticized the use of jailhouse informants, and several provinces have introduced reforms to ensure that jailhouse informants are carefully scrutinized (e.g. second opinions, a screening committee) before being allowed to provide evidence (e.g. Alberta, Ontario).

Right to Counsel:

Under s.9 of the Charter, everyone has the right not to be arbitrarily detained or imprisoned. But, even if detention is justified, the right to counsel in s.10 comes into effect. It involves the right to be informed promptly of the reason for detention, to retain and instruct counsel without delay and to be informed of that right, to have the validity of the detention determined by habeas corpus, and to be released if the detention is not lawful.

Of course, issues of interpretation have emerged in specific cases. Generally, the accused must be given reasonable opportunity to consult a lawyer and to confer privately. However, an accused cannot simply drag things out, taking their time to contact a lawyer. The burden is on the accused to prove that it was impossible to contact a lawyer when the opportunity is given (R.v.Smith). Also, the right to counsel is only available on arrest or detention, not when a suspect voluntarily agrees to accompany police without being formally detained.

Once a suspect requests to see a lawyer, police are still allowed to ask “innocuous” questions like the person’s name and address. However, questions about the facts of the case are prohibited until counsel has spoken with the suspect (R. v. Manninen; R. v. Black). If the police proceed, any evidence obtained may be excluded.

A person may waive their right to counsel, but must appreciate the consequences of doing so. If this is done when drunk, for example, courts may rule evidence, including confessions, to be inadmissible (Clarkson).

As for the length of time an accused has to call, this depends on the seriousness of the charge. In the Smith case, an accused refused to call later in the evening as he found only a business number, despite police urging that he call that night. Later, the accused confessed. The courts allowed the statements in because the crime (robbery) was not serious. If it had been more serious, the court suggested that he would have to have been given another opportunity to contact counsel.

Compelling Appearance, Interim Release, and Pretrial Detention:

After an arrest, accused are often taken to a police station where a complaint is lodged. This usually involves taking down the charges, the suspect’s description and the circumstances of the offence. If caught in the act, the arresting officer swears an information and presents it to a JP ASAP.

What happens to the accused depends on the charge. In the case of summary conviction offences, accused are usually released on their own

recognizance after a promise to appear in court. If an indictable or hybrid offence is involved, police need to have reasonable and probable grounds for believing that an offence has been committed. This is sworn in a document called an information and presented to a JP. If accepted, the JP must decide whether to proceed by way of a summons or arrest warrant.

Those charged with indictable offences are usually then processed at the police station. This can involve fingerprinting and photographing the accused. Afterwards, depending on the charge, the accused may be released. However, if police believe s/he may not appear in court, they may keep the suspect locked up to await a bail hearing.

If, however, the accused is charged with a s.469 crime (e.g. murder), a Superior Court judge must decide whether or not to order the accused into a detention facility. In these cases, a reverse onus applies and the accused must show why he should be released. In all other cases, it is the prosecutor that must show cause why detaining the accused is justified. In most cases, this means that the accused is released (with or without conditions such as putting up cash or providing a surety who will guarantee the accused's appearance in court). The judge cannot impose any more control over the accused unless the Crown shows that it is necessary.

The continued detention of the accused in most cases can only be justified if required to ensure his or her attendance in court, if necessary for the protection and safety of the public (including victims and witnesses), if there is substantial likelihood that the accused will commit a criminal offence or interfere with the administration of justice, or where the detention is necessary in order to maintain confidence in the administration of justice.

In many cases, the suspect will be released but only after s/he agrees to certain conditions set by the court (e.g. to remain at a certain address/avoid contact with witnesses).

Bail Reform:

The Bail Reform Act created this system and remains the basis for bail in Canada. It is based in earlier studies showing that bail discriminates against the poor, many of whom were detained until trial (84% of those arrested in 1965 remained in custody until trial). Yet, in the U.S., the Manhattan Bail Project had shown that those who could not afford bail but who were released on their own recognizance had appearance rates consistently the same or better than those released on monetary bail. As a result, release on recognizance programs grew throughout North America.

The prevailing view became that release should be available, regardless of financial circumstances, unless overwhelming factors precluded it. This was reflected in the 1972 Bail Reform Act, which instructed police to issue appearance notices rather than arresting suspects unless officers felt the public was in jeopardy or the accused had committed a serious indictable offence. Additional levels of screening were introduced in relation to the officer in charge of the lockup, who could overrule the arresting officer, and magistrates, who had to release the accused unless the prosecutor shows cause the release shouldn't occur. The "ladder effect" determines if the accused should be released. For most offences, a prosecutor must convince a magistrate that a less severe release mechanism is not appropriate in any given case (the ladder starts with recognizances, followed by unsecured bail and fully secured bail).

Criticisms of bail include that Aboriginals are more likely to be denied bail than others, and they spend longer in pretrial detention. The Ontario Commission on Systemic Racism found that Black accused were also more likely to be remanded to custody than non-Blacks. Also, suspects who received negative personality assessments from police were more likely to have bail denied.

Search and Seizure:

Two sections of the Charter deal with search and seizure. s.8 states that everyone has the right to be secure from unreasonable search and seizure, while s.24(2) enables evidence so obtained to be excluded if its admission would bring the administration of justice into disrepute. A fundamental right, this gives citizens the right to be left alone by the government or its agents unless there are grounds that allow them to intrude. A search is the intrusion of a government representative into an individual's privacy, of which every citizen has a reasonable and justifiable expectation. A seizure is the exercise of control by a government representative over an individual or item. Generally, a search warrant is required before a search of an individual or a place may be legally conducted. Three areas of law are relevant here.

The common law gives police the right to conduct general body searches and searches of the immediate surrounding area when arresting a suspect (including taking hair samples, but not intrusive searches, such as for blood samples). For an invasive search, special statutory authorization is required.

Most of what police do in this area, however, are governed by s.487 of the Criminal Code. All police officers are required to obtain a search warrant by swearing an information under oath in front of a JP. Before issuing the warrant, the JP must decide whether there are reasonable

grounds for believing the objects in question will be found at the location and that these will prove to have been involved in the commission of an offence. If granted, the search warrant provides police with the power to search places, but not individuals. In obtaining a warrant, police must specify the offence, the place to be searched, and explain how the search will turn up the items mentioned. This information may be based on hearsay evidence or come from an unnamed source so long as there is evidence to support the reliability of the evidence.

But what about DNA samples? s. 487.05 authorizes a warrant to obtain these from a suspect. Yet, much debate exists over the appropriate behavior of the police and their actions are constantly challenged in the courts (e.g. using a tissue thrown away by the accused, as in Stillman).

Police also have the legal right to seize items not mentioned in the warrant if they have reasonable grounds for believing those items were obtained or used in the commission of an offence.

Importantly, search warrants are not meant to justify “fishing expeditions” on the part of police. There are several requirements before a JP will issue a warrant:

Requirements for Search Warrants:

First, there is the “reasonableness test.” This means that police officers, in requesting a search, must have “reasonable and probable grounds.” In other words, a search warrant can only be granted if the request is accompanied by facts that indicate to the court that a crime has been committed or is being committed.

Secondly, there is the requirement of “particularity.” This means that the warrant must specify the place to be searched and the reasons for doing so. The warrant must identify the premises and personal property to be seized, and it must be signed by a police officer. The facts and information justifying the need for a search warrant are set out in an accompanying affidavit.

Searches Needing a Warrant:

The power to issue a search warrant is found in s. 487 of the CC. Before it is issued, a JP must decide that there are reasonable grounds that the objects will be found at the location and will prove to have been used during the commission of an offence.

The SCC’s interpretation of s.8 of the Charter is key in relation to the question of whether police must obtain a search warrant. In early years, the

courts took different positions on this. Some focused on the issue of the reasonableness of police conduct, meaning that a critical analysis of the “reasonableness” of the search can, if the issue comes up, be dealt with after the fact. This view resulted in a hodge-podge of different practices across the country - some more thorough beforehand than others. The Law Reform Commission criticized this unevenness of procedures. Other courts interpreted s.8 as requiring that the reasonableness of the search and seizure be determined beforehand. Under this view, failure to obtain a warrant without all pertinent information is unreasonable itself except in the most extraordinary situations. Taking this latter position is argued to be preferable because police have to assess “reasonableness” before acting. Second, it provides judges with the exact information an officer has obtained, giving judges the basis to make more informed decisions on the legality of the warrant. Finally, it provides a neutral and objective assessment of the evidence by a disinterested individual (a JP, rather than a gung-ho police officer).

Warrantless Searches in Exigent Circumstances:

While many warrantless searches may be deemed illegal and the case thrown out, some warrantless searches may be considered reasonable in exigent (immediate) circumstances. It is clear that police cannot merely go on “fishing expeditions” for evidence. The circumstances of the case and how police conduct themselves are critical.

Bill C-16, which prohibited warrantless searches of dwellings, did introduce some exemptions (besides “hot pursuit”). These indicate that warrantless searches are permissible when a police officer (1) has reasonable grounds to suspect that entry is necessary to prevent bodily harm or death; or (2) has reasonable grounds to believe that entry is necessary to prevent the imminent loss or destruction of evidence.

In addition, illegal searches are not always ruled to be unreasonable (e.g. searching bags at concerts without prior reasonable grounds; warrants containing minor technical defects). Drug cases commonly involve disputes over search and seizure, and courts have given police some leeway here (e.g. to prevent the destruction of evidence).

Ultimately, in determining the reasonableness of a search, the courts consider: (1) whether the information predicting the offence was compelling; (2) whether the information was based on a credible informant’s tip; and (3) whether the information was corroborated by a prior police investigation. In these deliberations, police are to take into account the accused’s past record and reputation, provided that such information is relevant.

Searches Incident to an Arrest:

Another exception to the requirement for a warrant involves searches incident to an arrest. The common law allows police to search a suspect for weapons and evidence of a crime without first getting a search warrant. To be lawful, it is necessary that the arrest itself be lawful. This means that there must be reasonable grounds for believing that a suspect committed an indictable offence. Police cannot make an arrest as a means of assisting their investigation.

The courts have allowed searches incident to arrest when: (1) needed to protect the arresting officers; (2) needed to prevent the arrestee from destroying evidence; (3) the intrusiveness of the lawful arrest is so great that the incidental search is of minor consequence; and (4) the individual could be subjected to an inventory search anyway at the police station.

The SCC unanimously agreed in Cloutier v. Langois that most searches are to be based on reasonable and probable grounds, but that searches incident to arrest are not (e.g. especially when police believe the search is necessary for their safety). In most cases frisk searches at the time of arrest are permitted, as are searches of the immediate vicinity of a crime scene based on prompt and effective discovery and preservation of evidence.

Yet, the courts have stated that before conducting a frisk search police must inform suspects of their right to counsel (though they don't have to wait for the suspect to call lawyers before going ahead).

The SCC has established the following limits on the common law right to search incident to arrest: (1) the police have discretion over whether a search is necessary for the effective and safe application of the law; (2) the search must be for a valid criminal objective (e.g. weapons search); (3) the search cannot be used to intimidate, ridicule or pressure the accused; and (4) the search must not be conducted in an abusive way.

Warrantless Searches in Motor Vehicles:

The SCC has established that a warrantless search of a motor vehicle may be reasonable if grounds exist for believing that it contains drugs or contraband. Yet the power to search such a vehicle must be found in either statute or common law. This has proved to be a tough issue for the police. In R. v. Mellinthin the SCC ruled that an accused's rights were violated when, at a police stop, the accused was asked about the contents of a bag (later found to contain drugs). This was because the officer had no suspicion that the accused was in possession of drugs when first asking to search the bag. According to the SCC, police check stops are to detect drunk drivers or

dangerous vehicles, not to go on fishing expeditions through unreasonable searches.

Other Type of Warrantless Searches:

There are three other types of warrantless searches. First, the doctrine of plain view gives police the power to search for and seize evidence if the illegal object is in plain view (e.g. called to a home on a domestic matter and drugs are openly visible).

Secondly, warrantless searches can be conducted on “reasonable grounds” (e.g. when a car is pulled over for a broken tail-light and the driver is observed to lean over, then afterward appears nervous, the officer will have reasonable grounds that something is being hidden and may conduct a search. s. 101(1) of the CC provides the rationale, allowing an officer to search without warrant if s/he has reasonable grounds that an offence is being committed or has been committed (e.g. accused fitting the description of a suspect being pulled over, acting shifty, and having a noticeable bulge in pants indicating a weapon). s. 489 also permits officers to seize items not mentioned on a warrant. In such cases, the officer must believe, on reasonable grounds, that the item has been obtained by, or used in, the commission of an offence.

Finally, warrantless searches are permitted when an individual voluntarily consents to a search. In doing so, such individuals are waiving their constitutional rights. Hence, the police will have to prove in court that consent was voluntarily given. The major issue here is voluntariness. In the Wills case, the test of voluntariness was set out as follows: (1) The giver of consent had authority to do so; (2) the consent was free from coercion and not the result of police oppression, coercion, or other external conduct that negated the freedom to choose whether or not the police should continue; (3) the giver of consent was aware of his right to refuse to give consent to the police to search; and (4) the giver of the consent was aware of the potential consequences of doing so.

Electronic Surveillance:

The use of wiretaps and other means of electronic surveillance has had a significant impact on policework. In Canada, the courts can authorize the interception of private communications and admit the information so obtained as evidence in criminal cases. Most applications for authorization of such procedures are accepted (between 1985-89 only 3 of 2222 applications were rejected). Such a low rejection rate reflects the fact that: (1) strict procedures are being followed; and (2) judges return an unknown number of applications to police for more information before proceeding further. Most cases involve conspiracies to commit serious drug offences,

and such tactics appear necessary in the fight against organized crime.

Nevertheless, Charter defenses have been mounted by such offenders to argue that the use of such techniques brings the administration of justice into disrepute. However, the SCC has ruled that if the police act in good faith - in accordance with what they understand the law to be - the evidence should be admitted. Nevertheless, it violates s.8 of the Charter to conduct electronic surveillance without judicial authorization. This is so even when one of the individuals (such as an informant) has agreed beforehand (R. v. Duarte). Similarly, video surveillance of a location in which there is a reasonable expectation of privacy without prior judicial authorization contravenes s.8 of the Charter (Wong). Moreover, the Garofoli case held that s.7 of the Charter entitled the accused to the materials used to obtain a police authorization for electronic surveillance (subject to editing).

Electronic surveillance is likely to continue being a hot topic as many western countries (e.g. the UK, US and NZ) have updated their legislation in this area. In Canada, our laws are 30 years old, and police feel they are hampered in being able to keep up with the technology used by organized crime and terrorist groups. In 2005 Bill C-74 was introduced to modernize police powers of surveillance, but it died on the order paper when the government was defeated. Many had great concerns about the abuse of such powers by authorities.

Stay of Proceedings:

Another question we must consider involves situations where a criminal offence occurs years before charges are laid. Judges have discretion to stay proceedings in such cases when they believe the situation abuses the rights of the accused (this is not typically done, however, in the case of sexual offences). For example, in R.v. L. An accused was charged in 1987 with incidents between 1957-1985. While the trial judge stayed the proceedings, both the BCCA and the SCC ruled that the charges should not have been stayed. The argument was that the fairness of a trial is not automatically jeopardized by a lengthy pre-charge delay. In fact, this may favor the accused, since evidence is harder to come by. In some cases, a complainant may report crimes to police but not wish to proceed with charges, as the parties have come to an understanding (e.g. to have no contact). Then later, they may change their mind. Accused in such cases that argue their rights have been violated will have to consider the case of R. v. D. where such an argument did not find favor with the appeal courts, but mainly on the basis of the fact that the Crown, at the earlier time, did not give specific guarantees to the accused in this respect.

Legal Aid:

Since s.10(b) of the Charter gives all Canadians the right to retain and instruct counsel without delay for criminal cases, this may involve legal aid lawyers for those who cannot afford private counsel and earn below a certain income level. At one time, defense counsel did this *pro bono* as an expression of social responsibility. More recently, formal legal aid programs have been created as both an aspect of social welfare and an effective CJS.

Since the Charter, the role of legal aid has changed. s.10(b) has been interpreted by the courts to mean that any person arrested must be informed by the police of the existence and availability of duty counsel and legal aid in the area (Brydges). The SCC has also held that police had to tell accused of a toll-free number in the jurisdiction through which to contact duty counsel or a legal aid lawyer (Pozniak).

In recent years, Charter decisions have extended legal aid in our CJS. Along with the rights granted to accused during initial appearances in the CJS, entitlement to a legal aid lawyer is recognized, under certain conditions, in appeals or parole revocation hearings. The right to legal aid continues to be expanded (e.g. to prisoners facing solitary confinement).

Before legal aid was introduced, accused who could not afford lawyers were susceptible to local provisions for free legal representation. Such a system discriminated against people on the basis of wealth and income. In the U.S., Gideon v. Wainwright brought this issue into high relief. This was a case where an accused in a B+E case requested the court to appoint a lawyer for him, but it refused (at that time free counsel was only available in capital cases). The accused tried to represent himself, but was convicted. He appealed, arguing that the court's refusal to appoint him a lawyer infringed his right to counsel. When finally reaching the U.S. Supreme Court, he was vindicated and free legal counsel became a constitutional right.

This case had an impact in both the U.S. and Canada. Four years later, Ontario set up the first Canadian legal aid system in 1967 (all provinces and territories soon followed, the last being the Yukon in 1979). At the federal level, money to fund such legal aid programs began in 1973, with some strings attached (e.g. the accused had to be charged with an indictable offence or face the loss of liberty or livelihood in a summary conviction matter).

Governments are the major source of funds for legal aid plans (total cost in Canada during 1987-88 was \$260 million, peaking during the mid 1990's at over \$600 million, and settling at a staggering \$536 million in 1996-97). The federal government has reduced its contribution significantly over this time, making the provinces pick up more of the costs.

Consequently, some provinces have cut funding or programs, forcing the bar to pick up the slack. This has caused controversy and protest.

A federal government evaluation of legal aid has reported that the cutbacks in the mid to late 1990's have had a significant negative impact. Legal aid is now a “directionless program” hampered by cuts, a patchwork of services, and no national standards ensuring that the poor have access to justice. As a result, only the poorest of the poor qualify - and usually only if they face jail terms otherwise. Yet, legal aid is considered so important to the courts that the CBA and the Chief Justice of the SCC have argued that the federal government should establish minimum legal aid standards.

Indeed, some feel that legal aid is such an important part of our CJS that it should become a Charter right to have mandatory legal aid. Up to this point, the closest the courts have ruled is in a case giving a mother the right to public funding to defend herself from provincial authorities attempting to take custody of her children. Others argue that this right is extended in certain criminal cases where judges are able to order legal aid for an accused who will serve time in a correctional facility if convicted.

Legal aid applications totaled 755,300 in 2004-05, a significant drop from the 1.1 million in 1994-95. This was largely caused by pre-screening procedures, changes in coverage, stricter eligibility requirements, and increased use of duty counsel and pro bono services by private lawyers.

Currently, 3 models for providing legal aid for qualified clients are used in Canada. First, the judicare model (Ont., N.B. and Alta.) involves qualified applicants receiving a certificate and selecting their own lawyer. This system lowers costs, offers increased availability of services, enables one lawyer to handle the case from beginning to end in the traditional solicitor-client relationship, and serves rural areas better than other approaches. In contrast, the staff system (Sask., N.L., N.S., and Yukon) provides legal aid counsel who are employees of the provincial government. This provides steadier, salaried pay for counsel, ensuring more effective representation. It also enables staff counsel to work together and benefit from each others' knowledge and experience. Such counsel often become specialists in representing the poor, there are efficiencies resulting from centralization, and counsel don't have to cut corners due to inadequate funding. Finally, the mixed system (P.E.I., Man., Quebec, N.B. and the Territories) involves clients choosing legal counsel, either staff or private, from a panel of lawyers providing legal aid services.

The question is often raised as to whether accused represented by legal aid counsel face a greater chance of conviction. Brantingham (1985) conducted a study comparing judicare and public defender counsel in B.C., finding no difference between the two in conviction rates. However, she did

find that judicare clients received more jail sentences or absolute discharges, while the clients of public defenders were given more probation orders, restitution, community work orders and fines. This may have to do with the fact that more clients of public defenders were sentenced after guilty pleas in the context of plea bargains.

Also, Aboriginal offenders have made considerable criticisms of legal aid lawyers, noting that they are so overworked that 75-90% of accused are told to plead guilty. Moreover, they claim that there is no real choice as to who represents them, that counsel don't invest much time in their cases, and that they often don't see them in custody until 5 minutes before court. As a result only 41% of Aboriginal offenders in a study by Morse and Lock (1988) claimed satisfaction with their legal representation.

Summary & Conclusion:

Today we have looked at pretrial criminal procedures. Many concern the actions of police, who have the power to use many different techniques to investigate and apprehend suspects. These include searches, electronic surveillance, interrogation, the use of informants, and DNA evidence. However, the Charter has placed many constitutional limits on police, such as the requirement of warrants to conduct searches, which must be strictly followed or run the risk that evidence will be thrown out. Similarly, the interrogation techniques of the police are subject to judicial scrutiny, though a number of issues continue to work themselves through the courts in this area.

A significant issue for the accused is whether s/he receives bail or is detained pending trial. During the past 25 years, bail provisions have been loosened, allowing many individuals charged to remain free pending trial. However, there has been controversy in recent years due to crimes committed while offenders were on bail - ensuring that this issue will not likely go away.

Finally, we have looked at the controversial issues of electronic surveillance, stays of proceedings, and legal aid. Given the cutbacks in this latter area, questions may be raised as to whether the rights of accused will continue to be protected - or be protected as well - in the future.