

Table of Contents

<i>Preface</i>	iii
Chapter 1 Basic Principles	1
1. Structure of <i>Charter</i>	1
2. “Purposive” Interpretation	3
3. Dialogue with Parliament	8
4. Endangering Democracy through Constitutionalizing Judicial Values?	14
5. Trend to Ever More Unscrupulous Law and Order Politics	17
6. The Unruly Assertion of <i>Charter</i> Values Rather Than Rights	21
7. Demonstrably Justified Reasonable Limits Under Section 1	23
(a) <i>Oakes</i> Approach	23
(b) Minimum Intrusion Test is Key	24
(c) <i>Edwards Books</i> : As Little as Reasonably Possible	24
(d) <i>Prostitution Reference</i> : Legislative Scheme Need Not Be Perfect	25
(e) <i>Keegstra</i> : Need for Flexibility Given Context and Values of Free and Democratic Society	26
(f) <i>Chaulk</i> : Test of Effectiveness	27
(g) What’s Wrong with Test of Effectiveness?	28
(h) <i>Laba</i> : Stricter Section 1 Test in Criminal Law	29
(i) <i>R.J.R. MacDonald</i> : Context, Less Deference and Proof	29
(j) Inconsistency	31
(k) <i>Swain</i> : No Judicial Deference in Case of Common Law	32
(l) Prescribed by Law	33
(m) Can Any Violation be Saved by Section 1?	34
8. Waiver	37
9. Jurisdiction	39
(a) Section 24	39
(i) Trial courts	39
(ii) Supervisory jurisdiction of superior courts	41
(iii) Appellate review	43
(b) Section 52	45
(c) Collateral <i>Charter</i> Attacks on Criminal Proceedings through Civil Action	47
(d) Complainants (Principal Witnesses)	47

x / Table of Contents

10. Balancing Rights	48
(a) No Hierarchy of Rights	48
(b) Victims' Rights	50
(c) Privacy and Equality Rights for Complainants in Sexual Assault Cases	51
11. Constitutional Notice	56
12. Onus and Standard of Proof	57
13. Establishing Facts	58

**Chapter 2 Section 7: Right to Life, Liberty and Security of Person and
Guarantee of Principles of Fundamental Justice**

1. Residual Right	63
2. Everyone	65
3. Life, Liberty and Security of Person	66
4. Principles of Fundamental Justice	72
(a) Substantive Review	72
(b) Basic Tenets of Our Legal System	73
5. Constitutional Requirement of Fault	77
(a) Public Welfare (Regulatory) Offences	79
(i) Pre-Charter	79
(ii) <i>Motor Vehicle Act Reference</i>	80
(iii) Vicarious liability	85
(iv) Due diligence standard not to be qualified	86
(v) Reverse onus for regulatory offences	86
(b) True Crimes	86
(i) Constructive murder unconstitutional	87
(ii) Constructive first degree murder not unconstitutional	91
(iii) Subjective awareness required for few crimes to reflect stigma and proportional punishment	92
(iv) Intentional conduct to be punished more than negligence	94
(v) No constitutional requirement of foresight of consequence	95
(vi) Objective crimes require marked departure	98
(vii) Marked and substantial departure for criminal negligence (s. 216)	100
(viii) Objective crimes cannot consider individual factors short of incapacity	102
(ix) Limited fault required for crimes based on predicate offences	106
(x) Why have constructive liability?	106
(xi) Special case for constructive manslaughter?	107
(xii) Doctrine of common intent	107
(xiii) Attempted murder	108
(xiv) Mistake of fact	109
(xv) Intoxication	113

6. Challenges to Causation Requirements	122
7. “Moral Involuntariness” Becomes <i>Charter</i> Standard for Defences	126
8. Void for Vagueness, Overbreadth, Arbitrariness or Gross Disproportionality	128
(a) Vagueness	129
(b) Overbreadth	137
(c) Arbitrariness	140
(d) Separate Doctrines of Arbitrariness, Overbreadth and Gross Disproportionality	141
9. Right to Silence	145
(a) Pre-trial	145
(i) Common law	145
(ii) Section 7 right: <i>Hebert</i>	147
(iii) No adverse inference	156
(iv) New common law voluntary confession rule: <i>Oickle</i>	160
(v) Right to silence subsumed by voluntary confession rule: <i>Singh</i>	171
(vi) Interrogation by torture	176
(vii) Mr. Big strategy by undercover officers	177
(b) At Trial: No Adverse Inference from Accused Not Testifying	184
(i) Pre- <i>Noble</i>	184
(ii) <i>Noble</i>	185
(iii) <i>Prokofiew</i> (Discretion to comment on the accused’s silence at trial)	189
10. Principle Against Self-Incrimination	193
(a) New Protections Under Section 7	193
(b) Resistance in Lower Courts	196
(c) The Supreme Court Applies Brakes	197
11. Abuse of Process	197
(a) Pre- <i>Charter</i>	197
(b) Post- <i>Charter</i> Review of Police and Prosecutorial Discretion	198
(c) Common Law Power to Stay in Clearest of Cases	202
(d) Appeal Courts’ Resistance to Common Law Stays	203
(e) <i>O’Connor</i> : Common Law to be Subsumed under Section 7	205
(f) The Supreme Court Splutters on the Residual Category	208
(g) Reviewing Prosecutorial Discretion	212
(h) Lower Court Rulings	216
(i) Pre-Charge Delay	221
12. Right to a Fair Trial (Right to Make Full Answer and Defence)	222
(a) Right to Disclosure	222
(i) Pre- <i>Charter</i>	222
(ii) <i>Charter</i> pre- <i>Stinchcombe</i>	224
(iii) <i>Stinchcombe</i> right to disclosure	225
(iv) Discovery of third party records	232
(v) Lost evidence cases	241
(b) Right to Counsel at Trial	244

- (i) Right to have counsel paid for by State 244
 - (ii) Judge’s duty to assist unrepresented accused 248
 - (iii) Right to effective assistance of counsel 249
 - (c) Procedural Fairness 252
 - (i) General tests 252
 - (ii) Attacks on established trial procedures 255
 - (iii) Duty to give reasons 260
 - (iv) Post-trial challenges 268
 - (v) Extradition hearings 269
 - (d) Fair Rules of Evidence 271
 - (i) Challenges to rules excluding evidence 271
 - (ii) Rape shield protection for complainants in sexual assault cases 273
 - (iii) Right of accused to cross-examine 281
 - (iv) Excluding to ensure fair trial 286

Chapter 3 Section 8: Right to be Secure Against Unreasonable Search or Seizure 291

- 1. Legal Powers to Search and Seize 292
 - (a) Statutory 292
 - (b) Common Law 295
 - (i) Incident to arrest 295
 - (ii) On consent 299
 - (iii) Within the general scope of police duties under statute or common law and the interference with liberty is reasonably necessary, having regard to the nature of the liberty interest interfered with and the importance of the public purpose (Ancillary powers doctrine) 300
- 2. Minimum Constitutional Standards: *Hunter v. Southam Inc.* (1984) 303
 - (a) “Search or Seizure” 305
 - (b) No Reasonable Expectation of Privacy: No Section 8 Rights 307
 - (i) Neutral question 307
 - (ii) Property interests crucial: *Gomez* test in *Edwards* 308
 - (iii) Passengers in vehicles 309
 - (iv) Other contexts 311
 - (v) *Tessling*: Protecting lifestyle and biographical core 314
 - (vi) *Patrick*: Abandoned property 320
 - (c) Third Party Privacy Interests 323
 - (d) Proper Approach to Section 8 Challenges 324
 - (e) Illegal Search or Seizure Necessarily Unreasonable Under Section 8 324
 - (f) Constitutional Requirement of Warrant 327
 - (g) Minimum Constitutional Standards for Warrant 335
 - (h) Minimum Standards for Warrantless Searches 340
 - (i) Reasonable and probable grounds 340
 - (ii) Reasonable suspicion 345

(i)	Reasonable Manner of Search	347
(i)	Generally	347
(ii)	Strip searches	348
(iii)	Cell phones	353
(iv)	Penile swabs	355
(v)	Knock and announce principle	359
(j)	Demonstrably Justified Unreasonable Searches or Seizures	360
(k)	Consent and Waiver	361
(l)	“Plain View” Doctrine	363
(m)	Reduced Standards Based on Context	365
(i)	Customs	365
(ii)	School children	366
(iii)	Police sniffer dogs	369
(iv)	“Administrative” or “regulatory”	374
Chapter 4 Section 9: Arbitrary Detention or Imprisonment		379
1.	Detention	379
2.	Arbitrary	380
(a)	Unfettered Discretion	380
(b)	Capricious	381
(c)	Unlawful Action Necessarily Arbitrary	384
3.	Random Vehicle Stops: Demonstrably Justified Arbitrary Detention	385
4.	Investigative Detention	391
(a)	<i>Simpson</i> : Detention for Questioning on Articulable Cause	391
(b)	<i>Mann</i> : Brief Detention on Reasonable Grounds and Power to Search to Protect Officer Safety	394
(c)	<i>Clayton and Farmer</i> : Roadblock Stop Powers	400
(d)	Racial Profiling	402
5.	Remedy	409
Chapter 5 Section 10: Rights on Arrest or Detention		411
1.	Triggering Mechanism: Arrest or Detention	411
(a)	Arrest	411
(b)	Detention	412
(i)	Including psychological compulsion	412
(ii)	Revised approach to detention in <i>Grant</i>	416
2.	Section 10(a): Right “To Be Informed Promptly of the Reasons” for the Arrest or Detention	423
(a)	<i>Pre-Charter</i>	423
(b)	<i>Charter</i>	425
3.	Section 10(b): Right to Retain and Instruct Counsel on Arrest or Detention	428
(a)	Purpose of Right	428
(b)	Informational Duties	428
(i)	Content of duty	428
(ii)	Waiver	432

(iii) Timing: When must accused be informed?	433
(iv) Where reasons change	434
(c) Implementation Duties	436
(i) Not absolute	436
(ii) Police duty to afford reasonable opportunity to exercise right	436
(iii) Right to communicate in private	440
(iv) Police duty to refrain from questioning or attempting to elicit evidence until there has been a reasonable opportunity to instruct counsel	441
(v) Police cannot denigrate reputation of defence counsel	443
(vi) Police or Crown cannot enter into a plea bargain without the participation of defence counsel unless the accused expressly waives that right	443
(vii) No continuing obligation	445
(viii) No right to have a lawyer present during interrogation	446
(ix) No right to further consultation with counsel unless circumstances objectively change	446
(x) Consultation with duty counsel sufficing	449
(xi) Waiver	449
(xii) Accused's duty to assert right with reasonable diligence	452
4. Section 10(c): Right "To Have the Validity of the Detention Determined by Way of <i>Habeas Corpus</i> and to be Released if the Detention is not Lawful"	456
Chapter 6 Section 11: Rights of Persons Charged with an Offence	457
1. Trigger: Charge of Offence	457
(a) <i>Wigglesworth</i> Tests	457
(b) Prison Disciplinary Proceedings	460
(c) Meaning of Charge	461
2. Section 11(a): Right "To Be Informed Without Unreasonable Delay of the Specific Offence"	461
3. Section 11(b): Right "To Be Tried Within a Reasonable Time"	464
(a) Forum	465
(b) Remedy	465
(c) Time Runs from Moment of Charge	466
(d) Test for Unreasonable Delay	468
(i) <i>Barker/Ontario</i> trilogy	468
(ii) Lamer approach	468
(iii) <i>Askov</i> : Comparative jurisdiction test for institutional delay	469
(iv) Application of <i>Askov</i> in Ontario	472
(v) <i>Morin</i> : Emphasis on discretion and prejudice	474
(vi) Post- <i>Morin</i> rulings	479
(vii) <i>Godin</i> : Inferring prejudice and burden back on Crown	482

(viii) Waiver	485
(ix) <i>Jordan</i> : Presumptive ceilings reversing <i>Morin</i>	486
4. Section 11(c): Right “Not To Be Compelled To Be a Witness in Proceedings Against That Person in Respect of the Offence”	489
(a) Introduction	489
(b) Testimonial Compulsion	490
(c) Charge “In Proceedings Against that Person in Respect of the Offence”	491
(d) Adverse Inferences	491
5. Section 11(d): Right “To Be Presumed Innocent Until Proven Guilty According to Law in a Fair and Public Hearing by an Independent and Impartial Tribunal”	492
(a) Presumption of Innocence and Reverse Onuses	492
(i) <i>Oakes</i> : Minimum content	493
(ii) Applicability to defences: <i>Whyte</i>	495
(iii) Onus of proving certificate	498
(iv) Legislative avoidance by exclusion of elements or defences from offence definition	500
(v) Evidentiary burdens	501
(vi) Justifying reverse onuses and mandatory presumptions under section 1	506
(vii) Reverse onus for due diligence defences for regulatory offences	511
(b) Independent and Impartial Tribunal	513
(i) <i>Valente</i> test	513
(ii) Part-time judges	515
(iii) Justices of the peace	517
6. Section 11(e): Right “Not To Be Denied Reasonable Bail Without Just Cause”	518
(a) Grounds for Release: <i>Morales</i> to <i>Hall</i> to <i>St-Cloud</i>	519
(b) <i>Antic</i> : Re-enforcing the Ladder Approach	532
(c) Reverse Onuses	534
(d) Procedure at Show Cause Hearing	537
7. Section 11(f): Right “Except in the Case of an Offence under Military Law Tried Before a Military Tribunal to the Benefit of Trial by Jury where the Maximum Punishment for the Offence is Imprisonment for Five Years or a More Severe Punishment”	538
(a) Non-Applicability	538
(b) Five Years or More Punishment	540
(c) <i>Criminal Code</i> Restrictions on Right to Trial By Jury	541
(d) Waiver	543
(e) Right to Non-Jury Trial	544
(f) Right to Twelve-Person Jury	544
(g) No Right to Representative Jury	544
(h) Limits on Directions to Jury	547

8. Section 11(g): Right “Not To Be Found Guilty on Account of any Act or Omission unless, at the Time of the Act or Omission, it Constituted an Offence under Canadian or International Law or was Criminal According to the General Principles of Law Recognized by the Community of Nations”	547
9. Section 11(h): Right “If Finally Acquitted of the Offence, not to be Tried for it Again and, if Finally Found Guilty and Punished for the Offence, not to be Tried or Punished for it again”	549
(a) Non-Charter Protection against Double Jeopardy and Double Punishment	549
(i) Pleas of <i>autrefois acquit</i> or <i>autrefois convict</i>	549
(ii) Rule against multiple convictions	550
(iii) Issue estoppel	552
(iv) Judicial stay as abuse of process	552
(b) Section 11(h) Narrower	552
(c) “Finally Acquitted” or “Finally Found Guilty and Punished”	553
(d) Charge of Offence	555
(e) “Not to be Tried or Punished for it Again”	556
10. Section 11(i): Right “If Found Guilty of the Offence and if the Punishment for the Offence has been Varied Between the Time of Commission and the Time of Sentencing to the Benefit of the Lesser Punishment”	557

Chapter 7 Section 12: Protection Against Cruel and Unusual Treatment or Punishment	563
1. Historical Origins	563
2. <i>Canadian Bill of Rights</i>	564
3. Gross Disproportionality Test: <i>Smith</i>	565
4. Section 12 Challenge Not Dependent on Individual Case	568
5. Effects of Sentence Protected	568
6. Can Section 12 Violations be Saved Under Section 1?	572
7. Minimum Punishment for Murder	572
8. <i>Goltz</i> : Restricting the <i>Smith</i> Approach	575
9. Constitutional Exemptions?	581
10. <i>Nur</i> : Reinvigorating Section 12 Challenges to Minimum Penalties	585

Chapter 8 Section 13: Right of Witness Not to Have Incriminating Evidence Used in Subsequent Proceedings	593
1. Common Law Right Not to Answer Incriminating Questions	594
2. Section 5 of <i>Canada Evidence Act</i>	594
3. Greater Protection Under Section 13	595
4. Purpose of Section 13	595
5. Scope of Section 13	596
(a) Case Law Prior to <i>Nedelcu</i>	596
(b) <i>Nedelcu</i> (Revised Approach to Use Immunity)	599

6. “Except in a Prosecution for Perjury or for the Giving of Contradictory Evidence”	603
7. Broader Protection against Self-Incrimination	604
Chapter 9 Section 14: Right to an Interpreter	607
1. Purposes of Section 14	608
2. Establishing Violation	608
3. General Standards for Interpretation	609
4. Waiver	610
5. Remedy	610
Chapter 10 Section 15: Equality Rights	613
1. <i>Canadian Bill of Rights</i>	613
2. Purpose of Section 15	614
3. Rejection of “Similarly Situated” Test	615
4. <i>Andrews/Turpin</i> Test of Equality	616
(a) Breach of Equality Rights	617
(b) Amounting to Discrimination	618
5. Reconsideration in <i>M.E.T.</i> Trilogy	620
6. Consolidated Test in <i>Law</i> Decision	623
7. <i>Kapp</i> : Rejecting Law and Returning to <i>Andrews</i>	630
8. <i>Withler and A.</i> : Further Embellishment of the New Approach	632
9. Demonstrably Justifying Inequality under Section 1	637
10. Rejection of Geographic Equality for Criminal Law	637
11. Discriminatory Law Enforcement	640
12. Sexual Offences	642
13. Other Section 15 Challenges in Criminal Law	646
14. Corporations Excluded	648
Chapter 11 Section 24: Charter Remedies	649
1. Right to Remedy	649
2. Section 24(1): Just and Appropriate Remedies	650
(a) Legislative History	650
(b) Exclusion of Evidence Not Being Remedy Under Section 24(1)	651
(c) Exclusion of Evidence to Ensure Fair Trial	652
(d) Range of Just and Appropriate Remedies	655
(e) Restoration of Property Seized in Violation of Section 8	661
3. Section 24(2): Exclusion of Evidence	662
(a) Common Law Rules on Excluding Illegally Obtained Evidence	662
(i) Canada: <i>Wray</i>	662
(ii) Other Commonwealth countries	665
(iii) Exclusionary rule in United States	667
(b) Canadian Complacency	671

xviii / Table of Contents

(c)	Drafting of Section 24(2)	672
(d)	Early Disagreement in Courts of Appeal	673
(e)	Interventionist Perspective of Supreme Court	677
(f)	Onus	679
(g)	Evidence “Obtained in a Manner that Infringed or Denied” <i>Charter</i> Rights or Freedoms	680
(h)	Purpose of Section 24(2)	686
(i)	Rejection of Community Shock Test	686
(j)	Disrepute in Eyes of Judges Not Public	687
(k)	“Shall Exclude” — Discretion or Duty?	689
(l)	<i>Grant</i> : Revised Three Factors for What “Brings the Administration of Justice into Disrepute”	690
(i)	<i>Grant</i> principles	690
(ii)	Rulings on facts in <i>Grant</i> and <i>Harrison</i>	693
(iii)	Abandoning conscripted/non-conscripted distinction	695
(iv)	Seriousness of violation rather than seriousness of offence is key	697
(v)	Reliability and importance of evidence not determinative	698
(vi)	Police “Good Faith”	698
(vii)	Discoverability	702
(viii)	Considerable deference to trial judges	703
(ix)	Canadian and U.S. Supreme Courts: Rowing in opposite directions	704
(m)	Exclusionary Trend since <i>Grant</i> and <i>Harrison</i>	706
(n)	Admissible for Another Purpose such as Credibility?	709
4.	Section 52: Declarations of Invalidity	711
(a)	Only Remedy?	711
(b)	Reading In and Reading Down	714
	<i>Table of Cases</i>	717
	<i>Index</i>	775