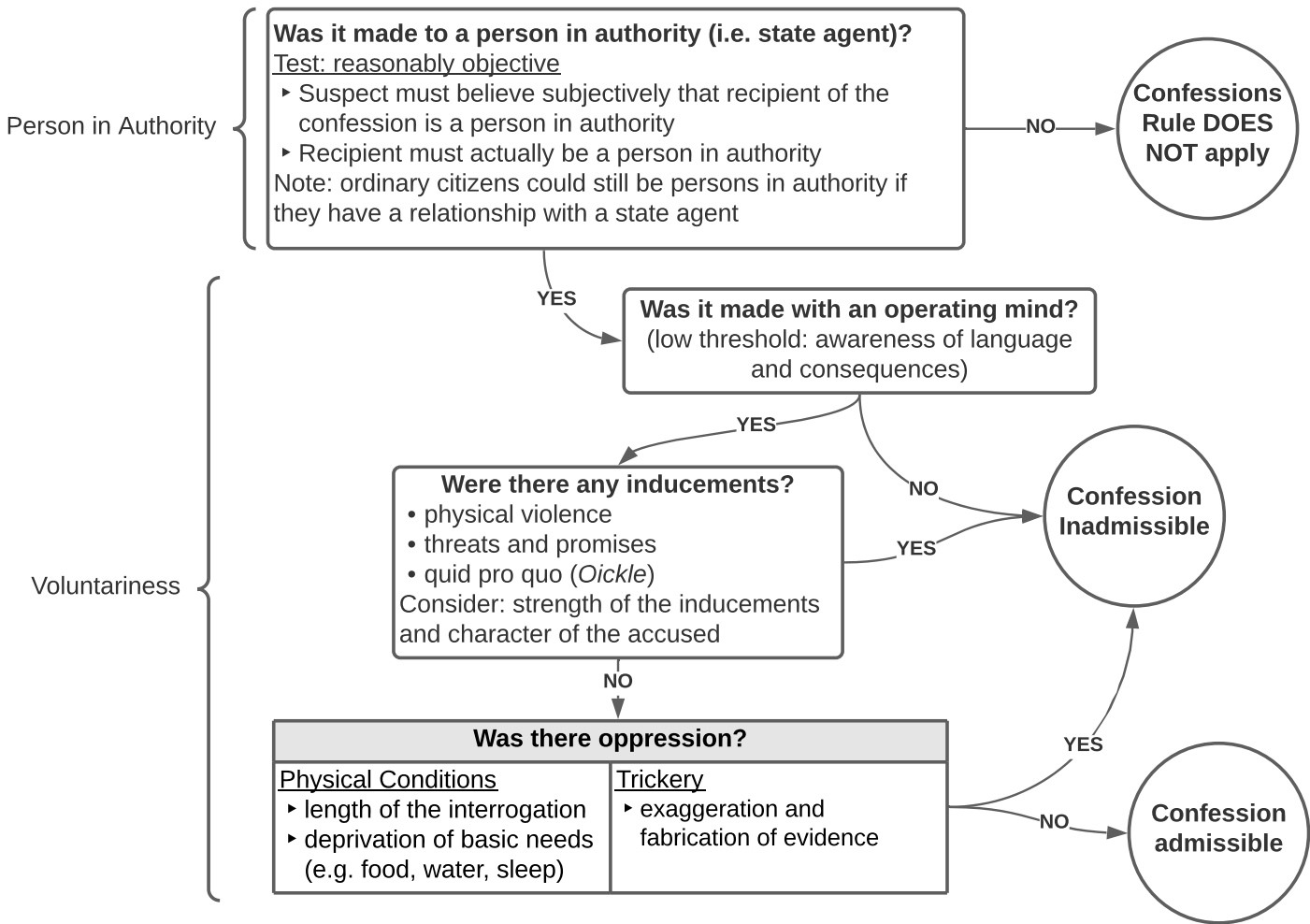


Confessions Rule

The burden of proof is on the 🏛️ to prove beyond a reasonable doubt that the confession by the suspect is voluntary

TRIGGER: Confession (self-incriminating statement)



Mr. Big Rule

TRIGGER: Confession in a Mr. Big Operation

Presumption that confessions made in Mr. Big operations are inadmissible. Onus is on the 🏛️ to rebut on a balance of probabilities

For confession to be *admissible*, probative value must outweigh prejudicial effect AND there is no abuse of process

Prejudicial Effect: trier of fact is exposed to info that discredits the accused

- Willingness to engage in criminality
- Willingness to associate with criminals

Probative Value: reliability of the statement

- Characteristics of operation
 - Duration, complexity, any coercive tactics, psychological manipulation, threats
- Characteristics of accused
 - Vulnerability, socio-economic status, cognitive ability, deference, psychological needs
- Corroboration
 - Can confession be confirmed with independent evidence?

Abuse of Process: probative value outweighs prejudice **but** police process was abused = push for confession to be inadmissible

- violence or threats of violence
- police took advantage of extreme state of vulnerability

s.8: Search and Seizure

TRIGGER: Search and Seizure (i.e. invasion of REP)

s.8 Everyone has the right to be secure against **unreasonable search or seizure.**

- Elements of a s.8 claim**
1. State action
 2. Search or seizure
 3. Search or seizure was unreasonable

- Other Considerations**
- Ex ante v. ex post: look at information available to police *before* they obtain the evidence (*Wong*)
 - Normative v descriptive: s.8 is a normative right, not merely a description of the type and amount of privacy that exists
 - No third party standing: no REP unless *your* rights have been violated (*Edwards*)

Reasonable Expectation of Privacy (REP)

No REP = No search or seizure = No s.8 claim

REP Analysis:

- subject matter of alleged search
- claimant's interest in subject matter
- claimant's subjective expectation of privacy
- objective reasonableness of expectation

Biographical Core: attracts a strong REP (inherently private, confidential, intimate information)

- sexuality, politics, religion, lifestyle choices
- home, personal belongings (interior), purses, wallets, handbags, suitcases, trunks, glove compartments, phones, computers, digital devices, bodies themselves

Relevant Cases

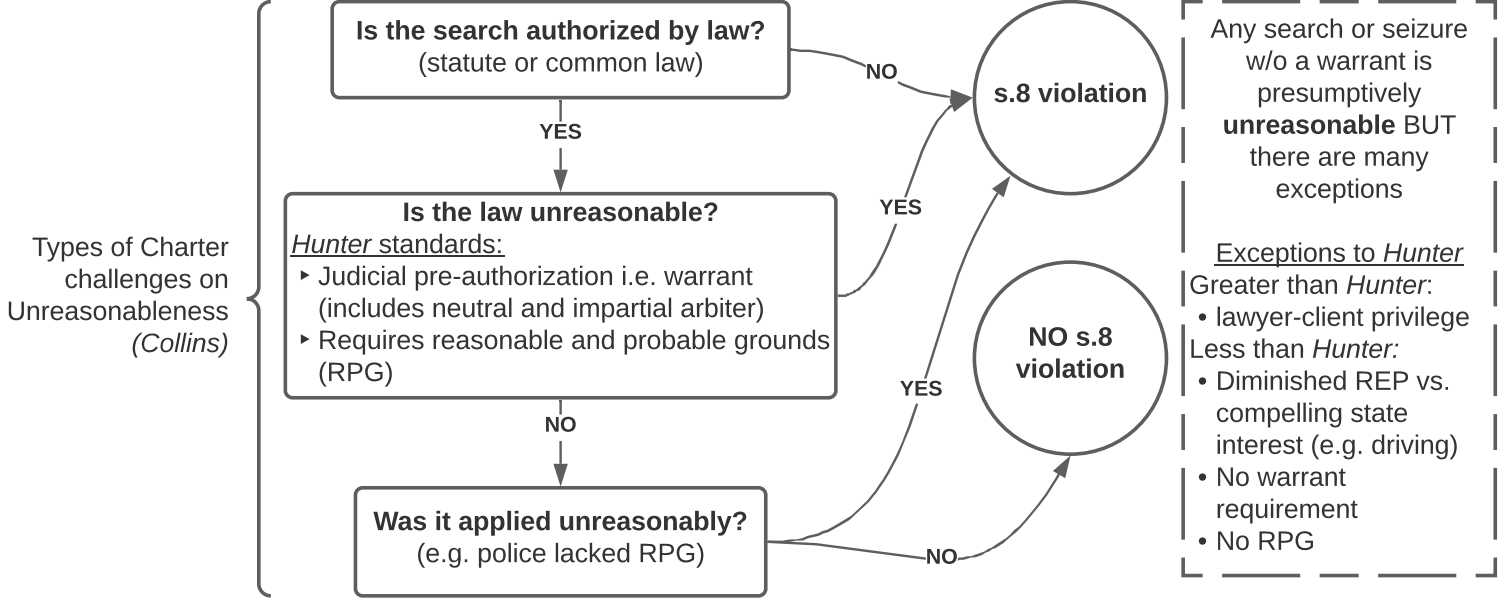
Courts found REP
Kang-Brown: dog sniff (indicates criminality)
Spencer: subscriber info held by internet service provider
Wong: police surveillance in hotel rooms
Buhay: rented locker
Cole: employer-issued computer
Marakah: sent text messages received by recipient

Courts found NO REP
R v Tessling: Information revealed is fuzzy or undefined (e.g. infrared camera used to detect heat and infer a marijuana grow-op)
Plant and Gomboc: readout of electricity usage

Loss of Privacy: information falls within bio core and has REP **but something happens that extinguishes the REP**

Edwards - no sufficient connection with property
Belnavis - passengers do not have REP in vehicle bc they're not the owner/driver or they don't have an intimate relationship with owner/driver
Patrick - garbage put out for disposal

Note: giving information out to others ≠ losing REP (inherently bare risk when revealing info to others but don't expect police to be listening in)



	Warrant	No Warrant
RPG	<i>Hunter</i> standards	Exigent circumstances (e.g. breathalyzer demand)
Reasonable Suspicion	Metadata warrants (when you used phone, how long call lasted, etc. but not content)	Dog sniff
No Suspicion	N/A	Approved screening devices, regulatory audits

TRIGGER: Detention or Arrest

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

Three Types of Detention

1. Physical Restraint
 - significant degree of touching or physical control over the suspect, beyond a fleeting touch/brush
2. Psychological Restraint (with legal compulsion)
 - specific legal consequences if do not comply
3. Psychological Restraint (without legal compulsion)
 - No requirement to comply but person complies anyway and reasonably believes they don't have any other choice but to do so
 - *Grant* Factors – test for whether a reasonable person would have concluded there was a detention
 - Circumstances of the encounter (general inquiry vs focused investigation)
 - Nature of the police conduct (language, contact ,place, duration)
 - Characteristics of the suspect (age, physical stature, minority status, sophistication i.e. level of education)

Detention Powers

Traffic Safety Stops

- Includes:
 - Reactive stops
 - Reasonable suspicion of driving offence
 - Random stops
 - Fixed point stops (*Dedman, Hufsky*)
 - Suspicionless driving stops
 - Arbitrary but saved by s.1 to deter and detect dangerous drivers
 - Roving stops (*Ladouceur*)
 - same as fixed stops
- Police powers:
 - Compell you to produce documents
 - Questioning
 - must be related to driving offence inquiries
 - Visual inspection
 - Plain view (exterior + whatever you can see when you peek in but not inside glovebox, etc.)
 - Dual purpose
 - Police permitted to be on lookout for other signs of criminality that are in plain view

Investigative Detention

- Gives police power to detain under **reasonable suspicion (RS)**
 - No RS = Arbitrary = s.9 Violation
- Police powers:
 - Detain
 - Reasonable force can be used
 - Preliminary questioning
- s.10 must be complied with (*Suberu*)
 - Safety search
 - Police need RPG to believe that safety is an issue
 - Frisk search
 - Weapons only, cannot search for evidence

Roadblock Stops (*Clayton*)

- Not a violation of s.9 UNLESS police go too far e.g. cordoning 10 blocks 25 mins after reported stabbing (too large proximity) or cordoning 2 blocks 5 minutes after reported shoplifting (too minor offence)
- Factors:
 - Seriousness of the offence
 - Temporal proximity
 - Geographic proximity

Arrest Powers

Requires RPG

- Arrest powers are all found in the Code
 - s.494 Citizen's Arrest:
 - Anyone may arrest w/o warrant a person found committing an indictable offence
 - s. 495 Peace Officer Powers
 - Can arrest w/o warrant with RPG that person has committed or will commit an indictable offence
 - Can arrest w/o warrant person committing a crime
- Police powers:
 - Use of force and restraint
 - Search incident to arrest (see below)
 - Identification procedures (Fingerprinting, photographing)
 - Custody and the 24 hour rule
 - Can interrogate
 - Can imprison

Search Incident to Arrest

Requires: lawful arrest (RPG to believe that accused has committed an offence)

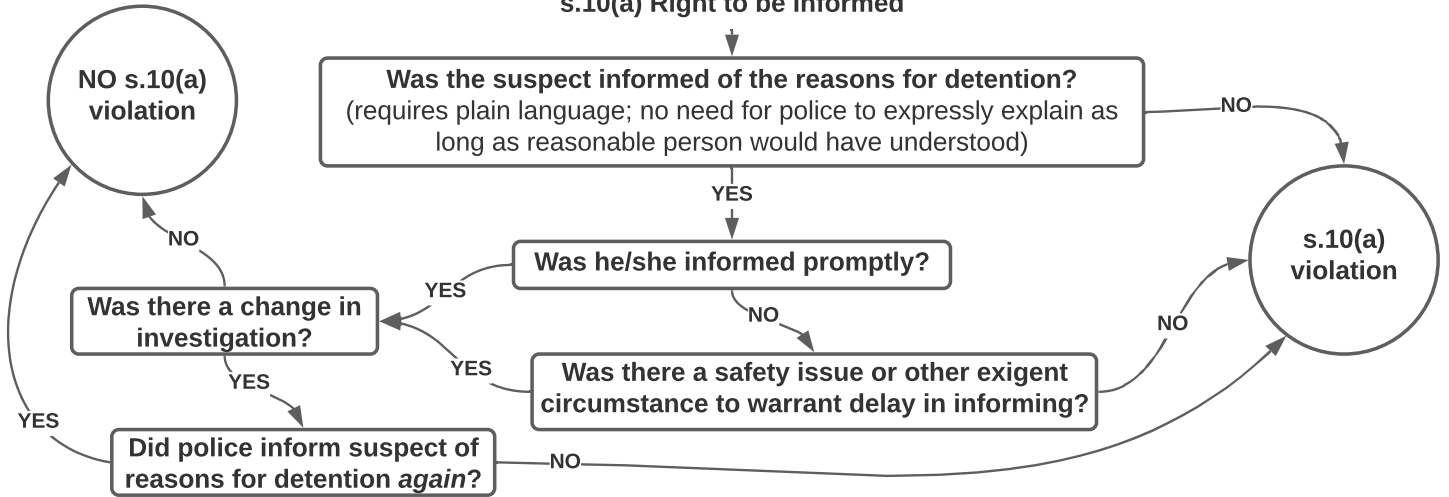
- Search must be lawful:
 - Weapons and evidence (evidence logically connected to the offence)
 - Scope (immediate vicinity of arrest)
- Strip search
 - To discover weapons or evidence
 - Requires RPG
 - Requires necessity (evidence will be lost/destroyed)
 - Must be minimally intrusive
- Penile swab
 - Requires RPG
 - Only done if there is realistic probability that evidence can still be found on accused's body
- Phone search
 - No warrant needed but can only search for serious offences where investigation will be stymied w/o search and police take detailed notes.
 - Only recent content can be searched

s.10: Right to be Informed and Right to Counsel

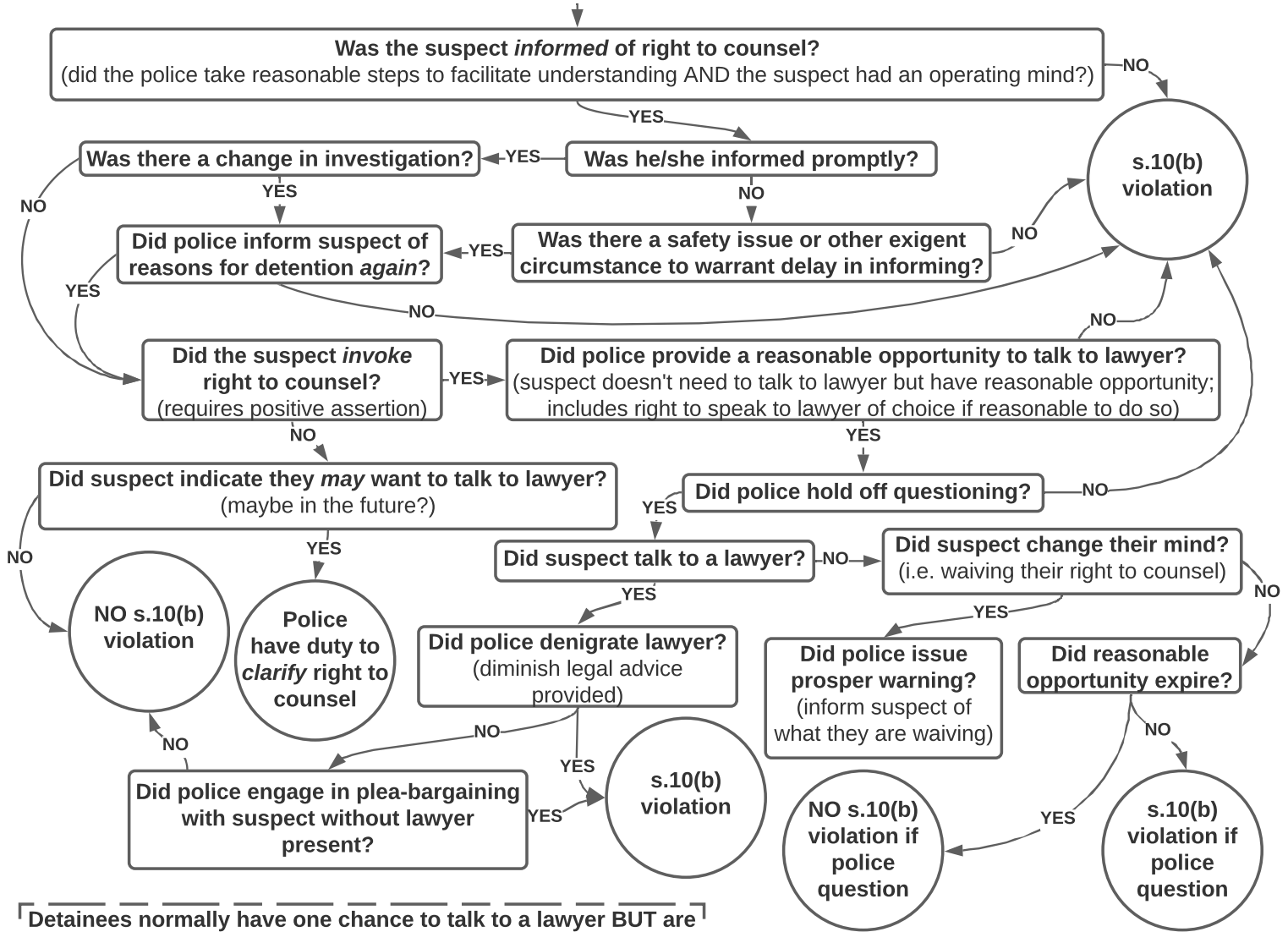
s.10 Everyone has the right on arrest or detention
 (a) to be **informed promptly of the reasons** therefor
 (b) to **retain and instruct counsel** without delay and to be **informed of that right**

TRIGGER: Detention or Arrest

s.10(a) Right to be Informed



s.10(b) Right to Counsel



Detainees normally have one chance to talk to a lawyer BUT are entitled to further consultation when:

- ▶ There is a change in the purpose of the investigation
- ▶ They are subjected to non-routine procedures (e.g. polygraph, line-up)
- ▶ Police become aware they didn't understand initial s.10(b) caution

Police must inform detainees of their s.10(b) rights AND give them another reasonable opportunity to talk to a lawyer

Failure to comply with s.10(b) is justified under s.1 if limitation is prescribed by law and reasonable under Oakes test

e.g. brief detention of driver on roadside for vehicle offence investigations (roadside alcohol screening, sobriety testing, detentions and searches related to other motor vehicle offences)

s.7: Right to Life, Liberty and Security

s.7 Everyone has the right to **life, liberty, and security of the person** and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

TRIGGER: Detention and Confession to Undercover State Agent

Hebert Rule

Detainees who are tricked into providing a self-incriminating statement by a state agent who is undercover or an informant working as an agent of the state **violates s.7**

Requires:

1. Detention (does not apply to Mr. Big operations)
2. State agent
3. Active elicitation (state agent must be proactive and seeking to induce the detainee to provide the incriminating statement)

s.24(2): Exclusion of Evidence

s.24(2) Where...a court concludes that evidence was obtained in a manner that **infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded** if it is established that, having regard to all circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

TRIGGER: Evidence

Grant Factors: test to determine whether evidence should be excluded

1. Seriousness of misconduct
2. Impact on accused's Charter-protected interests
3. Adjudication on the merits

Discoverability of Evidence

Can be used to show seriousness of police misconduct under first *Grant* factor (if police could have obtained the evidence legally, why did they not do so?)

BUT could also be used under second factor to diminish the impact on accused's Charter-protected interest (if evidence was discoverable, impact is not that severe because police would have obtained it anyway)

Grant Factors

Seriousness of misconduct

- ▶ How serious was police misconduct?
- ▶ How many breaches were made (i.e. is it a systemic problem)?
- ▶ Deceit or falsehood can aggravate

Inadvertent/Reasonable Mistakes Negligence Deliberate

Impact on accused's Charter-protected interest

- ▶ Nature of the interest
- ▶ Was the impact fleeting or severe?
- ▶ What interests were affected?
 - ▶ s.8: privacy
 - ▶ s.9: liberty
 - ▶ s.10: right against self-incrimination

Adjudication on the merits

- ▶ How essential is the evidence?
- ▶ How reliable is the evidence?
- ▶ How serious are the charges?

Push for the **exclusion** of evidence

Push for the **inclusion** of evidence