

**LAW 420**

**CRIMINAL LAW**

**PENNEY**

## Sources of Criminal Law

### Three Main Sources

- 1) The Constitution as the Supreme Law
- 2) Statute Law and in particular the *Criminal Code* of Canada
- 3) Common law or judge-made decisions (incl. interpretation of the Criminal Code)

#### (1) Constitutional Context

- 1867, **division of powers**: Who can create offences? Federal gov't (criminal offenses) but provinces *and* feds can create offenses.
- Constitution Act 1867, s. 91 (27): "The criminal law, except the Constitution of Courts of Criminal Jurisdiction, but including the procedure in criminal law matters."
- **Federal Statutes**, eg, *Criminal Code*, *Controlled Drugs and Substances Act*, *Youth Criminal Justice Act*, *Firearms Act*, etc...

#### Scope of the federal criminal law power: "prohibited act with penal consequences"

- (a) Not "**colourable**" invasion of provincial power.

#### Provincial Regulatory Offences: *Constitution Act 1867, s. 92 (15)*

- "The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section."
- "Property and Civil Rights" (92(13)) - "matters of a local and private nature" (92(15)).

#### Dominant Purpose Test:

##### Upheld

- highway traffic (*O'Grady v. Sparling*)
- film classification and censorship
- compulsory drug treatment (*Schneider*)

##### *Enbling*)

##### Struck Down

- prostitution (*Westendorp*)
- abortion (*Morgentaler*)
- censorship (*Switman v.*

- 1982, *Charter of Rights and Freedoms*: large no. of *Charter* cases are criminal cases.
- \*Federal gov't can also legislate **REGULATORY OFFENSES** (as can provinces)
- BUT only feds can legislate **CRIMINAL OFFENSES** under **s.91(27)**.

#### Policing and Prosecutions

- **What branches are responsible for the administration of the criminal code?**
  - *Constitution Act, 1867*
  - **91(27)** Criminal Law, feds can enforce *any* criminal law. (If you can pass it you can enforce it)
  - **92(14)** Administration of Justice.
  - **Look at s.2 of the *Criminal Code***, Feds can investigate all crimes, but in practice most are handled by the provinces.
  - **RCMP** – Federal agency often acting as a police force employed by provinces

#### Corrections

- Federal penitentiaries s. **91(28)**, 2 years or more
- Provincial prisons **92(6)**, less than 2 years
- **2 years or more rule**, (*Criminal Code*, s. **743.1**)

### Trial Courts

- **Superior Courts:** Supreme Court, Queen's Bench and Court of Appeal, Federal Court
- **Tier-of-fact:** person in a trial who decides factual (as opposed to legal issues, that's the judge) issues, this may be a judge or jury.
- Serious crimes, eg murder, treason etc. tried in Superior courts

### Provincial Courts

- No juries, judges appointed by the province.
- **Offenses:** all summary conviction offenses, provincial regulatory offenses, many indictable offenses.
- On indictable offences, defendant can choose prov/QB
- **Summary conviction offense** – can go to jail for up to 18 mo.
- **Indictable offense:** punishment set out in *Criminal Code* (usually not more than 5 years).

### Appeals

- Either side can appeal. In Canada you can appeal an acquittal, but only on errors of law etc... Double jeopardy does not attach because its an appeal, not a re-trial.
- **Summary conviction v. indictable offenses:** for **summary** regardless of where you were convicted, you appeal to the **superior court**, and then with leave to the court of appeal and with leave again, to the SCC. With **indictable**, you go automatically to the **Court of Appeal** and with leave to the SCC. There is an automatic right to appeal to the SCC when in the Court of Appeal there is a dissent on a legal issue

### Legal Rights in the Charter

- **General Legal Right (s.7):** "right to life, liberty, and security of the person, not to be deprived thereof except in accordance with the principles of fundamental justice."
- **Specific Legal Rights (s.8):** unreasonable search and seizure

**S.8 to 10** – protects those subject to investigation by the state

**8** – unreasonable search and seizures

**9** – arbitrarily detained or imprisoned

**10** – for those who have been arrested – rights to counsel etc.

**s. 11 to 14** – To protect those who are tried and convicted of an offence

**11.e** – right not to be denied reasonable bail

**11.b** – tried within reasonable time

**11.d** – presumed innocent until proven otherwise in a fair trial

**11.f** – right to a jury in certain circumstances

**11.h** – once acquitted, accused has a right not to be tried again for the same crime

**s.12** – everyone has the right not to be subjected to cruel and unusual treatment or punishment

**s.15** – everyone equal under the law

If a law infringes on one of these rights, the onus is on the state to prove that under s.1 it is a reasonable infringement

### The Criminal Code

*Criminal Code* contains wide ranging offences, depending on the offence they are designed to do 1 of 3 things;

- 1) protect bodily integrity (murder, assault, etc.)

- 2) protect property (theft, fraud etc.)
- 3) proclaim standards of acceptable societal behaviour (possession/sale of drugs)

### Common Law Offences:

**Frey p21 v. Fedoruk** (this is not a criminal case, one individual v. the other) – One common law offence was ‘breach of the peace.’ In this case the breach was ‘peeping.’ Fedoruk in defense says he was conducting a citizen’s arrest – that defense hinges on whether or not peeping was a crime. Fedoruk argues that it was a common-law offence (since breaching the King’s peace is not in the criminal code).

**Decision:** SCC finds that they can’t find something criminal which had not in the past been found to be criminal in the case law, we can’t create new common law crimes. The common-law method was thus too uncertain. *We put a high importance on certainty.*

- 1953 revision of the *Criminal Code* – in response in part to *Frey v. Fedoruk* that abolished common-law offences **EXCEPT for contempt of court (s.9)**. Common law defences still allowed s.8(3).

### Use of Common Law in Statutory Interpretation:

**Jobidon p23 v. The Queen** (1991 SCC) – **s. 265(1)(a)**: Jobidon is charged with assault after a fight in which the other person was killed. Jobidon argues that they agreed to fight – therefore other party *consented*.

**Decision:** common law legitimately served in this appeal to find certain situations where people are not allowed to consent – and that already existing principles in the common law should be considered if the Code does not expressly displaced the common law. **Consent** in this context, it is not a good thing to allow people to voluntarily fight. **Consent must be interpreted to mean that consent will exist when trivial bodily harm is intended and caused** (i.e. in sporting events). Anything more serious than this there is no real consent, therefore Jobidon found **guilty**.

**Dissent:** Justice **Sopinka** dissents – argues that the Court has essentially created a common-law offence (offence created was the intentional application of force with the consent of the victim) by changing the meaning of s. 265(1)(a), which they are not allowed to do under s.9 of the CC.

### Common Law Defenses

**Amato p132:** defense advanced was *entrapment*, a defense the SCC had not previously recognized.

**Decision:** The SCC wants to give judges the flexibility to change with the circumstances and change with the times. So the **courts can recognize new common-law defenses**.

**Doctrine of Strict Construction (DSC):** When the text of a statute can be understood in more than one way, the approach which would afford the greatest benefit to the accused is adopted

- **Goulis p37, Pare p41**– used a **contemporary approach** to the doctrine of strict construction. These are all examples of the court looking to what Parliament aimed at doing with the legislation *first*, before going to strict construction. Plain meaning of statute considered first, if ambiguity persists then benefit given to accused

**Pare p41** – (issue of strict construction because “while committing” was contested). Even if a murder is not premeditated it can still be 1<sup>st</sup> degree if it is committed while the accused is committing another listed crime in the CC (i.e. sexual assault).

**Issue:** In this case can the doctrine of strict construction be used to benefit the criminal because the murder was committed *after* the sexual assault?

**Decision:** Upon considering statute, there is no ambiguity, assault and murder seen as single transaction

### Non-retroactivity

- Charter ss. 11(g) & (i) Principle that crimes cannot be created or punished retroactively. Applies to both charge and punishment.

### Oakes Test (see Orbanski Smp25 for good ex.) - used for assessing whether charter limit is reasonable and justified

- (1) objective of the law must be sufficiently important. Must show that the law is of **pressing and substantial** concern (pretty easy)
- (2) show **proportionality** of the effects of the law on the right being infringed (minor, severe?) and balance it against the positive effects of the law. Are the means and the ends in a reasonable degree of proportionality to each other?
  - To establish **proportionality** – is there a **rational connection**? Does the law impair the Charter right as **minimally** as possible? Is there **proportionality** between the good and bad effects of the law?

**S.7 is the “Catch-all”** □ “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.” This section mirrors s.1 in many ways and courts have been reluctant to find that a violation of s. 7 is saved under s. 1.

### Vagueness and the Charter (Nova Scotia Pharm)

You can argue that a law is **unconstitutionally vague** in three ways:

- (1) It violates principles of fundamental justice (Charter s. 7)
  - (2) “*Prescribed by law*” (s.1) you can argue that the limitation is not prescribed by law because it is so vague
  - (3) Can also argue that it fails the “*minimal impairment*” part of s. 1. An all-encompassing prohibition on certain things (i.e. Speech) will catch too many things and people won’t know what they can say.
- APPLICATION:** Extremely difficult to demonstrate in practice, courts go to great lengths to find certainty

### **Problems w/ VAGUENESS:**

1. **No FAIR NOTICE** to citizens – absolute certainty is not required, there has to be sufficient guidance, common law and societal standards are considered. Ignorance is **no** excuse.
2. **Give too much LAW ENFORCEMENT DISCRETION:** We want to limit arbitrariness to avoid abuses by law enforcement.

### ***Canadian Foundation for Children, Youth and the Law v. Canada A.G. (2004) CFCYL p29***

*Case about reasonableness of parents using force in child correction (CC s. 43) - shows that courts will go to great lengths to clarify what’s not in a statute in plain language.*

**Decision:** upheld provision not too vague or broad, serves as guidance not direction. No violation of charter ss. 2/15

### **D. Overbreadth**

- Law's means are far more sweeping than its objective. Consider the means chosen by state in relation to purposes. Overbreadth occurs when a state employs means that are far broader than necessary for an objective.

- (1) **Overbreadth v. vagueness** (*Heywood p27*) "Overbreadth and vagueness are related in that both are the result of a lack of sufficient precision by a legislature in the means used to accomplish an

objective. In the case of vagueness, the means are not clearly defined. In the case of overbreadth the means are too sweeping in relation to the objective."

(2) **Application** *Heywood p27, CFCYL p29, Demers*

**Heywood p27 Case** – if you have been convicted of a sexual offense you can't go to public place with children for an undetermined amount of time. Law was struck down for being (1) **overbroad** on geographical terms, (2) chronologically **overbroad**, (3) **too broad** in that it affected ALL convicted of sexual assaults even if not on kids, (4) enforced without notice to those affected

## Limits on Criminal Law

- When should we regulate human behaviour with criminal sanction and when isn't it? And who gets to decide?
- **Theories of Criminal Law, 2 sets of theories:**

### **1. The Moral Approaches:**

- **Conservative Approach** (i.e. Stephen, Devlin):
  - (1) For large complex societies to function we need certain *shared values* to govern human norms otherwise we get social disorder,
  - (2) To ensure that these values are passed on we can be fairly heavy-handed through *paternalism*,
  - (3) *Societal integration* – conformity
- **Liberal Approach** (i.e. Mills, Feinberg):
  - (1) We need to have *autonomy*, that is the basic social contract, not conformity;
  - (2) Millian notion of *harm*, do what you want as long as it doesn't harm others (i.e. consensual crimes, or suicide should not be a crime for example that is a paternalistic law).
  - (3) *Exceptions*

### **2. The Economic Approach: (bentham, becker) ?**

1. We assume rationality of ppl in system
2. We assume that people have all the info they need
3. People have concrete interests that don't change and can be assumed, we can maximize utility according to *preferences* (which are taken as a given)
4. People make decisions based on the above – perfect rationality with perfect information with set preferences.

### **Charter Limits**

#### ***Jobidon v. The Queen***

**Issue:** Is consent a defence to a serious assault?

**Held:** No

**Reasons:**

- Fights are socially useless
- Not in the public interest to allow this sort of thing
- Result in this case was the death of a young man on his engagement day
- Argued for the sanctity of human body should vitiate against the validity of consent to bodily harm

### ***R v. Welch***

- Ontario CA held that consent would not be a defence to a charge of assault
- Complainant claimed that she did not consent to the acts
- But, court said that the defendant could still be guilty even if there had been consent
- Court explained that hurting people is wrong – doesn't matter whether the victim gave consent

### **Prostitution: (*Prostitution Reference p62*)**

Not illegal in Canada, but we have criminalized almost every other aspect of prostitution besides the act itself (i.e. communicating for the purposes of, keeping a common bawdy house etc...) and these have been found to be constitutional

### ***Reference Re ss. 193 and 195.1(1)(c) of the Criminal Code* (1990) p62**

Court upheld under the *Charter* certain sections of the *Criminal Code* that deal with prostitution

#### **Court Held:**

- s. 195.1(1)(c) (against communicating in a public place for the purposes of engaging in prostitution) did infringe freedom of expression under s. 2(b) of *Charter*, but that it was justified under s. 1 – it was held to be a reasonable limit
- Held that neither (included s. 193 - against operating a “bawdy house”) violated s. 7 of the *Charter* – although they infringed liberty and security of the person, they did so in accordance with the principles of fundamental justice

### **Pornography**

***R. v. Butler p68 (1992 SCC)*** Justified infringement on certain types of porn (freedom of expression) Accused operated shop selling porn material, charged with 77 counts of violating s.163Code.(distribution is prohibited of materials with explicit sex with violence, and explicit sex without violence but which subjects people to treatment that is degrading or dehumanizing)

- S.163 violates freedom under s.2 (freedom of expression) but could be upheld under s.11Charter: **(1)** "Community standard of tolerance" - determine standard of community **(2)** S.163 only refers to types 1 & 2 of porn: risk of harm **(3)** Is the legislative objective outweighed by infringement of freedom? No, objective aimed at avoiding harm.

**Butler p68 Test** – In determining if pornography is too explicit or graphic(obscene - where exploitation of sex is undue), the following test was created:

1. **Community Standard of Tolerance** – Responds to the changing morals of the **nation**. Does not ask people what they would view, but what would they allow others to see. (the most important step of the test)
2. **Degradation** - sex depicted in a degrading or dehumanizing manner, which includes submission, subordination and humiliation, will not generally be accepted. To depict sex in this way is against the principles of dignity, and this kind of exploitation is harmful, especially to women.
3. **Internal Necessities** – Does the sexual exploitation have a legitimate role in advancing a theme or plot in an artistic, literary, intellectual or scientific work? If so, it may be justified. This kind of sexual exploitation is not just dirt for dirt's sake, but has a purpose.

***R. v. Sharpe p71 (2001 SCC)*** Justified provision prohibiting possession of child porn BC trial judge ruled s.163.1(4)Code provision (forbidding possession of porn)

- SCC found the provision constitutional: 1) Provision combats material that poses risk of harm to kids. 2) Provision violated the freedom of expression but was justified under s. 11Charter as the government

objective of protecting children from exploitation was proportional to the violation.

**Two exceptions** (also apply to making child porn):

-a) does not prohibit possession of expressive material created through the efforts of a single person and held by that person alone, exclusively for his or her own personal use, such as personal journals and drawings

-b) does not prohibit possession of visual recordings created by or depicting that person, but only where these recordings do not depict unlawful sexual activity, are held only for private use, and were created with the consent of those persons depicted

### **The Harm Principle**

#### ***R. v. Marmo-Levine; R v Caine (2003 SCC) p78***

Justified infringement on use of marijuana Issue of criminalization of simple possession of marijuana contrary to principles of fundamental justice, as to whether it causes to harm to others. Challenge to Narcotic Control Act provision. SCC: imprisonment for marijuana possession does not violate s.7 principle against gross disproportionality: **(1)** Court: harm principle is not a strict legal principle since many examples of criminal laws "do not cause harm to others" (cannibalism, bestiality, incest). **(2)** A claimed charges based on s. 71 Charter since it is his chosen lifestyle. Court: his lifestyle choice is not protected by s. 7 since harm is not insignificant or trivial. **(3)** Court acknowledges Parliament entitlement to act under crim power for reasons other than avoidance of harm to others, but is subject to Charter rules such as arbitrariness, irrationality, gross disproportionality. A used the legality of alcohol and tobacco as an example of arbitrariness of the law. Court: Parl's choice to limit one harmful behavior more than another is not arbitrary or irrational of the law by itself.

Of note from Marmo - a principles of fundamental justice must:

-a) be a legal principle

-b) about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and

-c) it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty, or security of person

-the harm principle is not a principle of fundamental justice

ex. of princs - law cannot be inordinately vague, overly broad, no retroactive application of law, only voluntary conduct should attract criminal liability (Ruzic p291), right to a fair trial, law of causation and mens rea (Cribbin p341), presumption of innocence (Wholesale Travel, p406)

### **Police Powers**

#### **Kent Roach on Parker's Theory, Criminal Control vs. Due Process Criminal Control p107:**

**Efficiency** - Assembly line model: go through arrest, conviction, punishment as fast as possible (current system government. Procedural aspects are seen as obstacles; currently an objective-oriented process) - Though concerned with limiting abuse of powers, criminal control system wants to control outside of criminal process; if the police's conduct is unreasonable, we should not exclude evidence or give a stay

#### **Due Process: Fairness of trial and pre-trial**

- Excludes evidence obtained through unreasonable methods; focuses on possible remedies if police misbehave. This system considers exclusionary rules (excluding "tainted" evidence) as it is believed that evidence that is obtained through force is unreliable. There is less trust in the police and skepticism of their powers.

### Questioning Suspects:

- **Most** important tool police have.
- Allows police to gather evidence and (hopefully) incriminating statements from the accused.
- Two standards, Confessions Rule and s. 10 of the *Charter*

**(1) Confessions Rule (common law rule of evidence**, you don't need to invoke the *Charter* to use it because it's a common law rule) – *Boudreau, Clarkson p113*.

**Voluntary Confession Rule:** evidentiary rule: Whenever a person makes a statement to police or other persons in authority, and Crown wants to submit it as evidence, prosecution must show that statement was submitted voluntarily BRD, otherwise all evidence collected can not be used.

- **Rationales for rule –**
  1. **Ensures the innocent are not convicted**
  2. Society places tremendous weight on self-incriminating evidence
  3. Public underestimates how often people confess to crimes that they didn't commit
  4. Disincentive towards police abuses ie torture etc.

### **Three things court will consider in determining Voluntariness:**

- (1) Operating mind - (Whittle)
- (2) Was there a threat or a promise (quid pro quo?) violence=always exclude, offers to procure lenient treatment = almost always exclude
- (3) Oppressive conditions
- (4) Trickery (see below)

### **Trickery**

- 1) Courts may consider certain forms of trickery, such as the use of fabricated evidence, in determining whether the interrogation was oppressive and hence involuntary.
- 2) Even where a court determines that a statement is voluntary, it may exclude it if it was obtained by trickery "so appalling as to shock the community."

**R. v. Spencer, 2007, SCC, SM p13** - confession admissible, R tried to make deals w/ police who refused. However, police allowed visit to gf conditional on giving confessions. no offer of leniency made to R w/ respect to gf, only withholding visit to her until at least partial confession was made - not strong enough inducement. fact that R took bargaining role was significant. **Affirmed use of Oickle test: Do a contextual analysis to see if will of subject has been overborne.** Used above factors. quid pro quo is the most important consideration, but is not exclusive, when an inducement is alleged to have been offered by a person in authority -regardless, it is the strength of the inducement and his or her circumstances, that is to be considered in the overall contextual analysis into the voluntariness of the accused' statement-**inducements become improper only when standing alone or in combination with other factors, they are strong enough to raise a reasonable doubt about whether the will of the subject has been overborne**

**Operating mind! (lowered Clarkson p113 requirement) (Whittle SCC 1994) you can confess as long as you basically understand what you are saying and comprehend that the evidence may be used against you.** If you exercise poor judgment, that doesn't necessarily mean that you didn't have this level of understanding. Schizophrenic heard voices to confess, wasn't fully rational but had some understanding of the consequences.

**Clarkson p113 v. The Queen (1986 SCC)**

**Facts:** Voluntary confession rule: exclusion of evidence because D was drunk when she murdered her husband. Police instructed of her right to counsel; meanwhile, A blabbed about murder in their presence.

**Issues:** Are the drunken confessions admissible? Is an involuntary confession admissible? (No)

**Decision:** Accused had not voluntarily waived right with full awareness of consequences. Appeal permitted; evidence excluded, court restored acquittal:

(1) D could not waive her 10(b) right to counsel until she was sober enough to do so "with full knowledge of the rights the procedure was enacted to protect and the effect the waiver will have on those rights" -- she did not know what was at stake.

(1)a - waiver - must be clear and unequivocal that the person is waiving the safeguard with full knowledge

(2) Police should have held off investigation -- they exploited opportunity to violate D's rights.

(3) Under s.24(2), evidence obtained in violation of Charter should be excluded as it "would bring AOJID".

(4) Purposive interpretation of 10(b): designed to protect fairness to A with respect to incriminating themselves.

**R. v. Oickle 2000 SCC - confession thrown out**

Failed polygraph (not admissible in court anyways), admitted he set gf's car on fire after a 6 hour interview that he asked many times to leave from, police played "good cop"

**(2) Section 10 of the Charter:**

**COMPONENTS OF s. 10 of Charter**

- Triggered by **arrest** or **detention** (*Therens p173, Thomsen p177, Obranski, Elias*),
- Police have no legal power to demand cooperation in interrogation. They can seek it, but not demand it.
- (*Obranski*) If police have reasonable grounds to believe that you are driving impaired by alcohol, they can *demand* s. 254(2) that you provide a breath sample. If you refuse, you can be charged with an offence of "Refusing to Blow." s254(5) \*They cannot physically force you to do it, but you'll be charged if you don't. 10b rights must be given before blood sample/breathalyzer sample can be taken s.254(3) - note that this is not required if you're too drunk to understand right to counsel (Mohl p175)

**R. v. Therens p173 (1985) – Three types of detention outlined**

**Facts:** accused collides w/ tree, officer takes to station to provide breath sample under 254(3) (not screening device), accused complies, over legal limit; at no time was informed of right to counsel under 10(b).

**Issue:** Was this a detention under s.10? If it was a detention was 10(b) violated?

**Reasons:** In its use of 'detention', s.10 is directed to restraint of liberty other than arrest in which a person may reasonably require assistance of counsel but might be impeded from doing so but for the constitutional guarantee. **s.254(5)** of Crim Code: criminal liability under this section is sufficient to make compliance **involuntary**. Detention (besides physical threat) can be effected if person submits in the deprivation of liberty and believes that the choice to do otherwise doesn't exist.

**Finding:** 10(b) violated, evidence of breath sample excluded under 24(2) b/c obtained as a result of 'flagrant' and 'overt' Charter violation.

### Three Categories of Detention:

- (1) Physical Compulsion
- (2) Legal Compulsion
- (3) Psychological compulsion - accused reasonably believe no choice but to submit

**\*NEED TO KNOW** □ In Canada, when the police question someone with the intention of *furthering the investigation by gathering information*, the court tends to find that the person is NOT detained under s.10. *But*, when the police's prime motive is to elicit self-incriminating evidence, then the person WILL be considered to be detained under s. 10.

**R. v. Thomsen p177 (1988)** – violation saved under s. 1.

**Issue:** whether demand made by cop to accompany him to his car and provide breath sample (under 234(1) now 254(2)) resulted in detention of appellant under s.10 of Charter

**Reasons:**

See definitions of detention from *Therens p173*:

- The request under 234(1) to give roadside sample does meet this criteria and appellant was therefore detained.
- Then found denial of right to counsel implicit in wording of 234(1) (forthwith, roadside) but this denial of 10(b) rights justified under s.1 of Charter (noting that counsel is available at the more serious Breathalyzer stage...police station).

**NOTE:**

In *R. v. Grant* 1991 – 30 min delay was not acceptable

In *R. v. Bernshaw* – immediate demand nor required after immediate alcohol consumption

- 15 min delay acceptable

### 2 categories to think about that SC has read-in to s.10:

(1) **Informational Duties** (*Brydges p123, Bartle*)

- 10a - Police must tell you ALL of the reasons you are being arrested or detained. *If the nature of the investigation changes while you are being detained, they have to tell you that as well.*
- 10b have to tell you that free duty counsel exists, and give you the number
- have to provide without delay, unless imminent risk of serious bodily harm
- must ensure basic level of linguistic understanding - may need interpreter

**R. v. Brydges p123 (1990)** The defendant said that he couldn't afford a lawyer and the SC found that his statement was a request for a lawyer that should have triggered the police to help him do that including telling him about duty counsel or Legal Aid in that jurisdiction.

**Ratio:** as part of information given re: 10(b), **detainees should be informed of existence of Legal Aid/duty counsel/equivalent**

\*\*After this case Ontario set up toll free number (24 hour), Nova Scotia didn't

**R v. Bartle (1994)** - *if there is a list of lawyers on-call you must inform the defendant of that service as well and about how you can access it.*

**Facts:** Accused arrested for drunk driving, informed of right to counsel and availability of legal aid but not the free 1-800 number

**Decision/Reasons:** Court held that 10(b) rights violated, excluded Breathalyzer under 24(2)

(2) **Implementational Duties** – (*Manninen p119, Prosper p125, Obranski and Elias SM p21*).

1. 1<sup>st</sup> component – must hold off when accused requests a lawyer, (can't persistently question (Manninen p119), can't denigrate counsel's integrity, can plea bargain
  2. 2<sup>nd</sup> (*Prosper p125*) – must give accused a **reasonable opportunity** to talk to a lawyer (not indefinite). relevant factors - is counsel available? urgency? suspect must be diligent, however
  3. **BUT** – “lawyer of choice” is also guaranteed, law is not clear what reasonability standard is here
  4. Courts will consider factors such as the time of day, and the importance of carrying on the investigation immediately
- Have to ask someone if they want to talk to a lawyer. Must record the answer.
  - If “no”, police can proceed
  - If “yes” – **Implementational Duties**

***R. v. Prosper p125 (1994 SCC) Violation of s. 10(b) right: exclusion of evidence***

Accused was arrested for impaired driving, informed of legal aid and his 10(b) right, but after attempting to call 15 legal aid lawyers, he stated that he could not afford private counsel. Accused failed a breath test.  
 - Evidence was inadmissible: taking of the breath sample infringed on rights. - Court: not necessary to impose requirement to ensure all detainees get legal counsel, as 10(b):

- 1) Does not impose positive constitutional obligation of government
- 2) Far-reaching implications; it would mean in order to arrest, every province must have a duty counsel system. - Suggested remedy: police should hold off until person gets counsel, even if benefit of presumption is lost.

***R. v. Manninen p119 (1987 SCC) Exclusion of confession when police used baiting question***

Suspect detained for robbery; asked to see lawyer, but request was ignored. Suspect was tricked into admitting he had the weapon.

- Confession inadmissible: accused right to counsel was denied. Nature of the questioning (two simple questions followed by baiting one) led to involuntary self-incrimination. **Act of answering some questions does not indicate that one has voluntarily waived one's right to counsel.**

***R v. Obranski, R v. Elias (2005 SCC) Smp21– police do not have to give s. 10(b) right during roadside screening***

**Facts:** Obranski stopped after seen running through a stop sign and swerving on the road. Elias stopped in his vehicle at a random road-side stop. In both cases officers could smell alcohol when they approached the cars. Both were arrested and neither was advised of right to retain a lawyer prior to being tested or questioned. Both charged with impaired driving and “driving over 80”

**Decision:** SCC – the police acted lawfully when they stopped

**Reasons:** Lawful police conduct won't always be outlined in statute. Limit on s. 10(b) right of drivers in both cases was “prescribed by law”, **scope of the police power to check the sobriety of drivers at the roadside is: a procedure cannot be reasonable... unless it can be performed at the site of the detention, with dispatch, with no danger to the safety of the detainee and with minimal inconvenience to the detainee -necessarily calls for a case-specific inquiry.** Also, **Limit on right to counsel during questioning and compliance with s. 254(2) demand for roadside screening device sample is reasonable under Oakes test.**

**Oakes Test:** justified limit because: (1) objective of reducing the effects of impaired driving is a compelling state objective, (2) infringement on the right to counsel is rationally connected to that objective, (3) minimal impairment - scope of powers carefully limited and limitation on right to counsel temporal, (4) Proportionality - screening is short and minor inconvenience

**Administering the road-side screening test, prior to consulting a lawyer was held to be a justifiable breach of the D's Charter s. 10b rights.**

**Ratio:** Why can police get away with this?

- (1) Time is an important consideration – accuracy of the Breathalyzer,
- (2) Objective of road safety – not efficient to stop people for long periods of time (police should be out enforcing the law, not waiting on sides of roads for people to talk to lawyers)
- (3) and the road-side screening device number can only go to suspicion NOT conviction for impaired.

**Entrapment:**

- Generally arises in investigation of consensual crimes
- **Rationales** (*Mack p135*, Posner) – Moral - permits discrimination, police can go too far, also Economic - waste of resources. Police can't be arbitrarily testing the virtue of random people. central issue is not disciplining police or prosecutorial conduct, but avoiding the improper invocation by the State of the judicial process and its powers (*Mack p135*)

***R. v. Mack p135 (1988) – Test for Entrapment – Appellant gets new trial***

**Facts:** Accused a former drug user w/ several convictions

-Repeatedly (over 6mo period) asked by informer for drugs, repeatedly said no (only real estate now)

-Informer took accused into woods w/ handgun, said one could get lost in woods (accused thought this was a threat)

-Informer took accused to see a purchaser (undercover cop), showed \$50,000

-Accused was arrested when delivered 12oz of coke (bought on credit) to informer.

**History:** Trial: convicted (said more probable that accused became involved for profit rather than fear); Appeal court: confirmed conviction; now at SCC...

-Police didn't interrupt ongoing criminal enterprise, offence was brought on by their conduct, would not have occurred otherwise.

-Length of time (6mo) show police had to go beyond merely providing opportunity

-**Most important factor here:** informer acting threateningly in woods; if police have to go this far they have gone beyond providing reasonable opportunity.

**Finding:** entrapment applies (accused met burden of proof - BOP), allow appeal, set aside conviction, ordered new trial (?) and entered stay of proceedings

**Entrapment TEST:**

(a) The authorities provide a person w/ an opportunity to commit an offence w/out acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a bona fide inquiry; (sufficient connection between the past conduct of the accused and the provision of an opportunity?)

(b) Although having such a reasonable suspicion or acting in the course of a bona fide inquiry, they go beyond providing an opportunity and induce the commission of an offence. (what the average non-predisposed person would have done?)

-To determine whether police have gone farther than providing opportunity, a number of factors useful to consider (10 on p139)

**More on Bona Fide Inquiry: R v. Barnes, SCC, 1991 p141, bona fide inquiry** requires: -1) the officer's conduct must be motivated by the genuine purpose of investigating and repressing criminal activity; and-2) the inquiry must be directed at a suitable area. BFI - Here, officer induced person outside of Granville mall, where officer reasonably believed drug offences were occurring. Conversely, **random virtue-testing** only arises when a police officer presents a person with the opportunity to commit an offence without a reasonable suspicion that: -a) the person is already engaged in the particular criminal activity; or -b) the physical location with which the person is associated is a place where the particular criminal activity is likely occurring

**Amato p132 v. The Queen (1982)** – no entrapment – asking to buy drugs is **not** in itself entrapment

**Facts:** Informer (persistently) asks Amato (A) for coke, A sells him small amt. Informer persists for more, A sells him ½ oz. -D introduced to undercover cop who asks (persistently) for coke, cop told D that he “didn’t screw around” and that he needed coke to answer to “these ppl” and if not, these ppl would come see D. Next day, D sold cop 2 ½ oz coke and charged and convicted for trafficking

**Reasons:** Evidence falls short of evidence required to establish entrapment; amounts to no more than persistent solicitation by informer/undercover officer.

-Informer importuned D, police simply had relationship w/ informer...this doesn’t give rise to entrapment

-Only where police tactics leave no room for criminal intent can entrap. enter into determination of guilt.

**Dissent:** there was persistent importuning, police had no reason to suspect that accused was related to such activity.

-This enterprise by police would ‘in all circumstances’ be viewed by community as shocking; such conduct is contrary to proper principles of justice.

### **Procedural Issues:**

- To be decided by trial judge, proper remedy: stay of proceedings (Jewitt p131).
- Guilt established first, then look at entrapment;
- If jury, judge decides entrapment
- BOP - Onus on accused to prove on balance of probabilities that entrapment occurred.

### ***An Economic Theory of the Criminal Law (Richard A. Posner) SM p27***

police inducements that merely affect the timing and not the level of criminal activity are socially productive; those that increase the crime level are a waste of social resources

### **Search and Seizure: Hunter p144, Collins, Buhay SM p29**

- **Pre-Charter** case *Entick v. Carrington* (hundreds of years ago in Britain) where police were searching for evidence of sedition and entered home without consent and were sued for trespass (plaintiff won). “A man’s home is his castle.” Common law protected from search and Seizure under application of trespass laws

**Section 8 challenges:** Number of different ways that state action can be challenged under s. 8 of *Charter*. Set out in *Collins*

-In a s. 8 charter case, you need:

- 1) to prove state action (s.32 - applies to state or state agents)
- 2) need a search or seizure
- 3) *need it to be unreasonable*

-To show an *unreasonable* search, you can do 1 of three things:

- **First way to challenge under s. 8 - can challenge the law itself** as being unreasonable in allowing searches and seizures. Law applied generally, does it violate s.8?

**Hunter p144 v. Southam** Competition Bureau responsible for fair competition. The CB (federal agency) enforcing *Combines Act* was suspicious that Southam company was engaged in unfair competition and wanted to search offices of Edmonton Journal to establish this. Edmonton Journal challenged the search and took Hunter (director of CB) to court. Challenged the law allowing the search under s.8 .

### **Decision:**

- (1) a member of this commission was NOT independent of government like a judge (impartial) and also had an important role in the investigation. Independent body authorizing searches is req’d
- (2) there was no requirement in the statute that the search be based on reasonable and probable grounds.

**Ratio** A reasonable search and seizures occurs if:

- 1) **Prior Authorization** where it is feasible to obtain prior authorization, I would hold that such authorization is a pre-condition for a valid search and seizure

-2) **Neutral Arbiter** it is necessary for the person authorizing the search to be able to assess the evidence as to whether that standard has been met, in an entirely neutral and impartial manner; and

-3) **RPG** where the state's interest is law enforcement and the individual's interest is his expectation of privacy, reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search, constitutes the minimum standard, consistent with s. 8 of the charter, for authorizing search and seizure.

**Reasoning:** s.8 acts as limitation on powers of search that the gov has; it is entrenched (not vulnerable to change by legislative enactments); guarantees a broad/general right.

-Guarantee from *unreasonable* search/seizure only protects a *reasonable* expectation; assessment must be made whether public's interest to be left alone must give way to govt in order to advance its goals, notably law enforcement.

**Finding:** the disputed statute does not embody the above requirements, therefore it is inconsistent w/ the *Charter*

**NOTE 4th REQUIREMENT (FROM BARRON):** the neutral and impartial arbiter retains the discretion to not authorize the search

**2. Second way to challenge under s.8** – the action of the police wasn't authorized by law (common law or statute) in the first place. (*Stillman p167*) *Entick v. Carrington* (Britain hundreds of years ago) can't just go into people's houses to search for evidence because not authorized by law to do so.

**3. Third way to challenge under s. 8** – argue that the law in this case was applied unreasonably. Example of this case:

**R. v. Collins** [1987] SCR 265

**Facts:** Police conducting surveillance of drug dealers who tended to swallow 'goods' before being caught by police. Woman about to swallow a balloon, the cop grabbed her by the throat to prevent it. The technique is actually authorized by law (as valid incidental to arrest), as applied generally the law complies with s.8, BUT as applied in this particular case it didn't. **Decision:** Search was unreasonable. **Reasons:** Because in this case the police didn't demonstrate *reasonable and probable* grounds that she was about to commit a crime. Crown has to show that the warrantless search was reasonable, they must establish:

(1) Reasonable grounds to believe that there was a narcotic in place;

(2) Whether the manner of the search was reasonable. Seizure by the throat was found to have been unreasonable unless cop had reasonable grounds to believe that the person was a drug handler.

### **Sniffer Dogs - AM and Kang-Brown**

**Kang-Brown, SCC, 2008** - officer tried to look into guy's bag at bus depot, guy didn't want him to, sniffer dog alerted to drugs, arrest. All judges agree its a search

Lebel+3 = need RPG for sniffer dog search. Not auth at common law

Binne+1 = need RS because of minimal intrusion and high accuracy - no RS

Deschamps+1=need RS because minimally intrusive, RS in this case, consider totality of circumstances

Bastarache =need generalized susp,

**R. v. AM, SCC, 2008** - sniffer dog search found drugs in backpack in gym, students knew search would happen

Lebel+3=no auth at common law, student entitled to privacy at school

Binne+1=no RS, exclude

Deschamps+1=RS, no SEP, no OEP

Bastarache=unreasonable search, don't exclude, not- conscriptive

## EXCEPTIONS TO WARRANT REQUIREMENT

- State must demonstrate, when it conducts a search, that it was authorized by a neutral third party.
- In *Thompson Newspapers* court found that it was NOT required to get a warrant because a regulatory seizure, no criminal sanctions and sometimes it's too hard to get a warrant based on the evidence.
- *Hunter p144* also a classic example of a **regulatory search** (NOT going after criminals) but because of the fairly unrestricted nature of investigative powers, court found that search violated s. 8. \*This case is in opposition to *Thompson Newspapers*.
- Onus is on crown to prove warrantless search was reasonable

**Regulatory searches** – (*Thomson Newspapers p148*) Section in the *Combines Act* requiring books and records as part of an investigation challenged. The regulation and investigation of competition is a regulatory law (federal, but not criminal law). Courts found that the **Hunter Standards** will be relaxed in the context of **regulatory investigations**, i.e. don't need prior authorization and reasonable and probable grounds.

- B. **Why would they do this?** Too hard to get to get evidence in advance so we can't make it too hard for the state to investigate, plus the people generally being investigated are wealthy companies and organizations there seems to be some implicit agreement to play by the rules state needs to be able to investigate what they are doing, also because there is less social stigma with regulatory infractions.
- C. We make it harder to investigate criminal matters because those usually involve less powerful people who need more protection.

### ***Thomson Newspapers Ltd. v. Canada (Director of Investigations, Restrictive Trade Practices Commission) (1990) p148***

**Finding:** court held that the power of the director of investigations to demand the production of documents under s.17 of Combines Investigation Act did not violate s.8 of Charter though it did amount to seizure under the section.

**Reasons:** To require warrant for any power of investigation would, in these circumstances, immunize perpetrators from discovery/prosecution. Power to search/take away documents is more intrusive than mere power to order production of them. **Dissent:** Important to look past form of information gathering and look at the effect the gathering has on the individual. Looked at criteria from *Hunter*  
- Concluded that these requirements not satisfied, s.17 violates s.8

**WHY DID THE COURT RULE DIFFERENTLY THAN IN HUNTER?** Difference in the search power in the cases, because in this case they were just *demanding* documents, whereas in *Hunter* they were actually *taking* documents during an intensive search

### **Others (R. v. M (M.R.) SM p45– Hunter Standards Relaxed for schools**

**R. v. M.(R.)(1998 SCC) SM p45** Requirement for lawful search and seizure in school setting Search conducted by vice-principle (in RCMP presence) on grounds that he was told by several students that the appellant was selling drugs on school property. - Search was reasonable: modified standard should apply to searches of students on school property conducted by teachers not acting as agents of the police, because orderly environment needed for learning. Search was authorized by the provisions of Nova Scotia *Education Act*. - Vice-principal was not acting as an agent of the Police; search would have occurred w/o RCMP. - **Reasonable expectation of privacy was diminished**, as a student in a school, where teachers are responsible for safe school environment - **standard to be applied to searches by school authorities:**

*Exception to the Hunter rule, a search of a student by a teacher may not require a warrant ahead of time*

and it will not create the presumption that the search is *prima facie* unreasonable.

- **A warrant is not essential in order to conduct a search of a student by a school authority.**
  - The standard should NOT be that a search by school authorities *is prima facie* unreasonable if no warrant is obtained.
  - Standard of care expected of schools is sufficient to justify relaxed standard
- **The school authority must have reasonable grounds to believe that school regulations have been breached and a search of the student would reveal this breach.**
- **School authority is in the best position to assess information given to them and relate it to the situation existing in their school, and decide whether reasonable grounds exist.**
  - The basic principle that a reasonable search must be based on reasonable and probable grounds should still apply, but teachers are in a better position to determine if reasonable grounds exist.
- The following is a list of reasonable grounds, but it is **not exhaustive**: info received from a student considered to be credible, info from more than one student, a teacher or principal's observations, any combination, etc. The compelling nature of the information and the credibility of these or other sources must be assessed by the school authority in the context of the circumstances existing at the particular school.

#### The search must be reasonable

- Factors to consider to determine if a search was reasonable
  1. Can it be inferred by the relevant Education Act that the school authority is authorized to conduct searches in appropriate circumstances? In the school environment such a statutory authorization would be reasonable.
  2. The search itself must be carried out in a reasonable manner. It should be conducted in a sensitive manner and be minimally intrusive.
  3. To determine whether the search was reasonable all the circumstances will have to be considered.

The standard from M.(R.) will only be applied if agent acting for school is not a police officer

PENNEY argues that if you are going to bring in the police, then shouldn't the *Charter* apply? The student may now be facing criminal charges and a criminal record so it would seem to make sense that the search should be conducted in accordance with the *Charter*.

#### REASONABLE EXPECTATION OF PRIVACY (REP)

- **General principles** (*Hunter, Lebeau p150 & Lofthouse, Buhay SM p29 (has TEST)*)
- **Electronic Surveillance** – (*Wong p152, Duarte p156*)
- **Plain View Doctrine** – (*Buhay SM p29*)
- **Sense-Enhancing Technologies** – (*Tessling SM p35*)
- **Search or seizure**, generally mean the same thing because of the inclusive word “or” in s.8. Requires a *reasonable expectation of privacy*.

- **REP** test is a cost-benefit analysis: benefits of privacy (vis a vis the individual) vs. benefits of surveillance (vis a vis society).
- When we say there was no REP, we forgo our ability to regulate law-enforcement in certain kinds of searches.
- If there IS a REP, then we have the ability to regulate law-enforcement's search powers.
- Depending on the case (i.e. *R.v. M*) the standards may be more lax (i.e. in the case of regulatory principles) or more stringent (in the case of criminal investigations).

***Lebeau p150 v. Lofthouse*** 1988 Ont.CA – *No expectation of privacy: public washroom*

Police had surveillance in a public washroom used by gay men for sexual encounters in the public area of the washroom.

Ont.CA □ found that there was no REP in the public area of the washroom, and moreso because D kneeled in cubicle and would be seen by outsiders. The fact that there were ‘lookouts’ implies that these men didn’t think that they had a REP.

**CASE ILLUSTRATES** – physical characteristics of the place where we are claiming a REP are going to be very important to court’s determination. REP in the stall, not in the public area of the washroom because people are free to come and go.

***R. v. Wong p152*** SCC – *There is an expectation of privacy - **electronic surveillance** of a hotel room*

Police suspect group of men had illegal gambling ring in a hotel room. Police would normally send in undercover, but at the time had lack of Chinese cops so they used electronic surveillance. Under part 6 of Criminal Code there are strict guidelines for such surveillance, but there was a loophole in it because it only covered private *audio* communications. So cops just set up a camera (with no audio) to capture what was going on.

**ISSUE:** In this case, is there a REP (no.2 above) when invitation has been extended to public to come to a hotel room?

**DECISION:** SCC □ Yes, there was REP. When we rent a hotel room, even if we invite strangers, we have a REP. But evidence admitted because its admission wouldn’t bring the AOJ into disrepute.

**REASONS:** If you want to use something as invasive as electronic surveillance, you must get a warrant based on reasonable and probable grounds. Finds that s. 8 violated because there was no warrant (however, there was no CC provision requiring one at the time) but allowing the tape wouldn’t bring administration into disrepute. Court asks:

- Was there state action? YES

(2) REP? YES

- Must consider if invasion of REP is *reasonable* under *Hunter* requirements (warrant? Reasonable and probable grounds?)

- If this is found to be *unreasonable* based on above, then there is a violation of s.8.

NOTE: s.487.01 now allows general warrant for any investigative technique that might constitute an unreasonable S or S.

Also - no REP in GF's apartment, even if have key - R. v. Edwards 1996 p154

***R. v. Duarte p156 (1990 SCC)*** Reasonable expectation of privacy: taped conversation *by* informer

Accused was charged with trafficking narcotics. Evidence was obtained through taped conversations by informer. Trial judge excluded tapes as violation of s.8, Ont CA allowed them, accused appealed to SCC.

- Appeal dismissed: evidence violated s.8, but admissible under s.24(2) (good faith, reasonable belief of legality).

- S.178.111Code allowed police to tape conversations provided they had consent of one party. Court said that this allowed police to do indirectly what they could not do directly, by dispensing police from requirement to seek a warrant for conducting participant surveillance. Police had onus of proving they were justified in performing warrantless search according to *Hunter*. They did not satisfy this onus, so the onus of proving the evidence should be excluded then lies on accused. Re: admission of evidence, cites R. v. Collins.

- Recording should be viewed as search and seizure in all circumstances except where all parties to conversation have expressly consented, therefore standard of reasonableness applied in *Hunter* should be used to assess constitutionality of search.

**Note:** Ss 184.1 and 184.61Code enacted in part in response to this case.

**note** that it is a criminal offence to intercept communications w/out warrant s. 184

**R. v. Buhay SM p29** [2003] SCR 631 – *Section 8 violation: warrantless search of locker*

**FACTS:** police seize pot from a Winnipeg locker in a bus terminal. Security guards smell pot, open the locker and find it in the locker. Call police, open locker for them, defendant arrested. Defendant argues violation of s.8.

**ISSUES:** Does the Charter apply to the initial search of the locker by the security guards?

1. Did the subsequent search and seizure by the police violate the appellants rights under s. 8 of the Charter.

2. Did the appellant have a reasonable expectation of privacy in the rented locker?

3. Should the evidence be excluded under s. 24(2)?

**DECISION:** find that the trial judge did not err in finding that the appellant had a reasonable expectation of privacy in the locker he rented and the search violated his s. 8 rights and should be excluded under s. 24(2)

- **Ratio:** A search will be found to be unreasonable if the person has a subjective expectation of privacy which is objectively reasonable. The fact that there may not have been sufficient grounds for a search warrant does not make a warrantless search reasonable. Bad faith of police as well.

**Plain View Doctrine** – (*Buhay SM p29*) also brought up □ argued that by the time the police came along they were seizing something in plain view. If police *see* something that is clear and obvious, they can seize it without violating s. 8. SC rejects this because the police didn't have authorization to have access to the pot in the first place.

**State Agents?** test is would the exchange between the accused and the informer have taken place, in the form and manner in which it did take place, but for the intervention of the state or its agents? (Broyles) - security guards not state agents

**Test for REP** determined on the basis of the totality of the circumstances, considering following factors: include, but are not restricted to:

- the accused's presence at the time of the search,
- possession or control of the property or place searched,
- ownership of the property or place,
- historical use of the property or item,
- ability to regulate access,
- existence of a subjective expectation of privacy, and
- the objective reasonableness of the expectation**

**R. v. Tessling** [2004] 3 SCR 432 SM p35 *No expectation of privacy: FLIR technology*

Police use overhead Forward Looking Infra-Red (FLIR) technology to take pictures of a home with a suspected marijuana grow-op as it will pick up heat patterns emanating from a house. This is a *passive* technology because it doesn't show what is *inside* the home. But it does allow police to glean information about what is going on inside the home. Police had a tip, and used this technology to get warrant. Turns out there was a grow-op

**ISSUE:** Does the FLIR image obtained of the accused house without a warrant violate the accused rights under s. 8 of the Charter?

- Should the police have been granted a search warrant for the house based in part on the FLIR image, when they did not have a warrant to take the image in the first place?

- Did the accused have a reasonable expectation of privacy against the FLIR image taken by the police?

**DECISION: No violation** - the FLIR image did not trigger s. 8 b/c the info generated by the image does not touch on a biographical core of the respondents personal information,

External patterns of heat distribution on an external surface is not information that the respondent had a reasonable expectation of privacy with. Note pg 38 factors.

**REASONS:** The nature of the information revealed was characterized by the court as not disclosing sensitive personal (lifestyle) information. In *Plant*, looking at electrical bills is not a violation of s.8

because there is no reasonable expectation of privacy. In this case they found that same thing, no reasonable expectation of privacy. **WHAT s. 8 PROTECTS:** s. 8 of the Charter should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish

to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual.

## Arrest and Detention

- S. 8 (search and seizure), s. 9 (arrest and imprisonment)
- **RPG** higher standard than that “**articulable cause**” or “**reasonable suspicion**”
- People may decline unless officer places them under arrest or detention
- Police may **not** use any force unless they are placing someone under arrest or detention

### Arrest Powers:

#### **Criminal Code**

- **s. 495** sets out arrest powers of a peace officer w/out a warrant - NOTE: officer must subjectively have reasonable and probable grounds on which to base the arrest. -Those grounds must, in addition, be justifiable from an objective point of view (R. v. Storrey p165)
- **s. 495(2)** States that a police officer will not arrest a person w/out a warrant for less serious offences where public interest in establishing identity and securing attendance in court, as well as evidence of the offence, and preventing repetition of the offence can be satisfied by issuing an appearance notice.
- **S. 494** arrest powers of ANYONE without a warrant. Used the most by police as they have inherent powers over liberties but only according to specific powers by the statute and common law, which ordinary citizens do not have
- **s. 507** states that if the officer believes a case has been made by oath that will compel the accused to answer the charge, then the officer will issue a summons, unless there is evidence presented that discloses reasonable grounds to believe that it is necessary in the public interest to issue an arrest warrant.
  1. The code has a preference for the procedure that constitutes the least drastic interference w/ the accused’s liberty.

### Statutory Powers:

- **SEARCH INCIDENTAL TO ARREST** - Once you arrest someone, you are permitted as a police officer to conduct a search incidental to arrest. (Storrey p165, *Cloutier p166 v. Langlois, Stillman p167*)
  - can do this if:
    - (a) lawfully arrested
    - (b) logical basis - some relationship between reason for arrest and reason for search
- **Do you need reasonable and probable grounds to conduct search incidental to arrest? NO**
  - Power to search incidental to *arrest*, you can also search for evidence relating to the offense (as well as weapons or anything to ensure safety or health) , can do pat down, check bags, vehicle, basically the immediate vicinity
    - (a) Restricted - no body cavity searches except for the mouth, and no body samples to be taken
    - (b) Justified b/c a suspect has a lessened REP,
    - (c) Also,keep in mind search must meet objectives of **Discretion, Valid Purpose, and Non-abusive fashion** from Cloutier p166):

### Strip Searches Incident to Arrest: (Golden p169)

- In addition to RPG for the arrest, you need RPG to justify a strip search. Again, may be for weapons or evidence. Absent extenuating circumstances, you must conduct the search at the

station where the person is afforded more privacy.

**R v. Golden p169** (2001 SCC) *Requirements of a reasonable strip search* -only constitutionally valid at common law where they are conducted as an incident to a lawful arrest for the purpose of discovering weapons in the detainee's possession or evidence related to the reason for the arrest. -In addition, the police must establish **reasonable and probable grounds** justifying the strip search **in addition to reasonable and probable grounds** justifying the arrest. -Strip searches conducted in the field could only be justified where there is a demonstrated necessity and urgency to search for weapons or objects that could be used to threaten the safety of the accused, the arresting officers or other individuals. **Relevant factors** - see p170 - Police strip searches require a high degree of justification

### **DETENTION POWERS:**

- Fixed point stops (*Dedman p175, Hufsky p179*)
- Random, roving stops (permitted so long as the purpose of the stop is to investigate *driving-related offenses*) – (*Ladouceur*)
- Give police this power because of concern mostly over drunk driving, but for other traffic-related offences as well (i.e. vehicle fitness, insurance, licenses etc...)
- Even though these stops technically violate s.9, they are upheld under s.1 out of concern for safety on highways.

**R v. Dedman p175** (1985 SCC) – *Can use Waterfield Test to show that fixed stops are a valid exercise of police power* **Facts:** stopped under RIDE program and refused to provide a breath sample. Challenged legality of stop and detention. **Decision:** Appeal dismissed – public safety justifies the police action:

#### **Reasons:**

- (1) Random stops fall within the scope of officer duties under statute of common law: **preservation of peace, prevention of crime, and protection of life and property**
- (2) Interference with liberty was reasonable and necessary for carrying out the duty; related to impaired driving
- (3) Driving is licensed activity subject to regulation and control in the interest of safety
- (4) Wide publicity of RIDE program reduces the psychological effect of stopping innocent drivers (Court acknowledges psych effects of random stops on innocent drivers, but decides it is only a slight inconvenience).

**R v. Hufsky p179** (1988 SCC) – *Upheld power to randomly detain*

**Facts:** Appellant stopped at road check under *Highway Traffic Act* and claimed violation of s. 9. He was asked to surrender license and insurance, claims violation of s. 8 as well.

**Decision:** Random stops/detentions fall with the meaning of s. 9 according to *Therens p173 Test*:

**Reasons:** Detention was arbitrary (no criteria that govern exercise), but justified, since:

- 1) Driving is a licensed and regulated activity
- 2) Controlled in the interest of safety and,
- 3) Intrusion is proportionate to the purpose being served

\*There was no unreasonable search or seizure: requirement to produce a license never qualifies as a search under s. 8 (no reasonable expectation of privacy according to *Hunter v. Southam Test*)

### **Random Roving Stops:**

**R v. Ladouceur** (1990 SCC) p181– *Police power to drive around and select who to stop*

**Facts:** Driver stopped randomly and was found to be driving with a suspended license. Challenged *Highway Traffic Act* under s. 9 of the *Charter*.

**Decision:** Appeal dismissed – police may stop motorists randomly but **only** to inquire about driving

related offences, can check licence/registration, sobriety, and mechanical fitness only.

**Reasons:** Random stops are arbitrary in violation of s. 9, but are saved because:

- They are rationally connected to highway safety;
- Degree of intrusion is minor – stops are authorized by statute and are proportional to the ends served.

### Limitations:

**R v. Mellenthin** p 182(1992 SCC) – *limitation to random roving stops: must be related to a driving offence, affirms Ladoceur*, can only do more if RPG, or if drugs/alcohol/weapons in plain view

**Facts:** Accused stopped during a random traffic spot check - police officer asks what was in a gym bag, opening reveals drugs. Claimed his s. 8 rights violated.

**Decision:** SC says no RPGs to search the bag. Evidence excluded. Also, Mellenthin was not informed of his right to refuse to have his bag searched. No voluntary consent, so not a consented search. Stop itself allowed under s.1. Cop does not suspect that he is impaired; he had his papers in order. Cop should have let him go as there were no further causes for detention. However, notices gym bag with a brown baggie and becomes suspicious. Has him open bag where drugs are revealed.

**Reasons:** Police road checks should not be extended beyond the scope of traffic related offences.

According to *Collins*, admission of this real evidence would generally not affect trial fairness, but it would in this case for above reasons. Check stop does **not** constitute a general warrant to search vehicles, drivers, or passengers; search and seizure of plain view evidence.

### Investigative Detention Power: (*Simpson, Mann SM p52*)

\*There are no detention powers set out in the Criminal Code absent **reasonable and probable grounds**. Meaning of detention is same for ss. 8 and 9

**R. v. Simpson (1993 ON CA)** *Failure to meet investigative requirements: exclusion of evidence* Accused emerged from a suspected crack: house and drove away Police stopped him and asked him to remove a lump from his jacket which turned out to be cocaine

- Accused rights under ss. 9 and 8/Charter were violated, evidence should be excluded:

- 1) Detention requires "articulable cause"; a hunch is never good enough
- 2) Suspicion of illegal activity in the house was based on weak evidence
- 3) Police did not know D and there was no evidence that D was engaged in criminal conduct
- 4) Passing through a suspected location of illegal activity is not articulable cause

### Searches incident to Detention:

**R. v. Mann SM p52 (2004 SCC)** *Failure to meet investigative requirements: exclusion of evidence* Police were looking for a suspect, described as a 21 year old aboriginal male. Near the scene of reported crime, police stopped A, asked him questions, conducted pat-down search and found illegal substances in his pockets. A was arrested for the offence of possession for the purpose of trafficking marijuana.

- SCC: evidence should be excluded because police had no reasonable reason to go beyond pat down search

- 1) Officers had reasonable grounds to detain, as A matched the description of the suspect, near crime scene
- 2) There were reasonable grounds for a protective search of A; logical possibility that A was the suspect.
- 3) However, search into the A s pocket was an unreasonable violation of the A's reasonable expectation of privacy.

**Ratio:** To avoid violation of ss. 8 and 9 of the Charter, the police must follow this procedure regarding the detention of an individual:

- 1) **Detention for investigative purposes** - police officers may detain an individual for

investigative purposes if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary. (Penney says "reasonable suspicion" ok) -the high crime nature of a neighbourhood is not by itself a basis for detaining individuals. matching description is though.

-2) **Search incident to Detention** - where a police officer has reasonable grounds to believe that his or her safety or that of others is at risk, the officer may engage in a protective pat-down search of the detained individual. -Both the detention and the pat-down search must be conducted in a reasonable manner. -the investigative detention should be brief in duration and does not impose an obligation on the detained individual to answer questions posed by the police. . If the officer provides reasonable grounds to believe the search necessary, the search must also be conducted in a reasonable manner (*Collins* test)

### **R. v. Clayton, SCC, 2007, SM**

**Facts:** Affirms Waterfield test, Police stop car with black guys after caller sees parking lot of black guys and handguns. Black guys act suspiciously under questioning and try to run for it, and are stopped. Used waterfield test to affirm presence of common law justification of initial and continuing detentions

1) **Lawful Duty** -met, because although the police had no specific statutory authority for the initial stop, the police "were clearly acting in the course of their duty to investigate and prevent crime" when they stopped the car and detained its occupants

2) **Justifiable Use** -both the initial and the continuing detentions of Clayton and Farmer's car were justified based on the information the police had, the nature of the offence, and the timing and location of the detention. -initial detention: -met, as police were justified in stopping "all vehicles" emerging from the parking lot and "would have been derelict in their duties had they sat by and watched vehicles leave"- further detention and search: -facts of matching description of race, Clayton wearing gloves despite being a passenger and non-glove weather, and evasive behaviour by Clayton to remain in the car, gave rise to the reasonable suspicion that the Ds could be in possession of the reported handguns and that, as a result, the lives of the police officers and of the public were at risk, justifying their continued detention.

### **Waterfield Test for Common Law Police Powers (see Mann SM p52, Dedman p175 and Clayton SM p59)**

**Step 1 -Lawful Duty** Interference falls w/in the general scope of a duty imposed by statute/common law for the police officer, which is to protect life and property - were the police clearly acting in the course of their duty to investigate and prevent crime? (Clayton)

**Step 2 -Justifiable use-** The search must be conducted in a manner justified by law.-requires consideration of: **-a) necessity:** whether an invasion of individual rights is necessary in order for the peace officers to perform their duty, and **-b) reasonableness:** whether such invasion is reasonable in light of the public purposes served by effective control of criminal acts on the one hand and on the other respect for the liberty and fundamental dignity of individuals.

**NOTE** -the necessity and reasonableness must be assessed against all of the circumstances, most notably the extent to which the interference with individual liberty is necessary to perform the officer's duty, the importance of the performance of the duty to the public good, the liberty interfered with, and the nature and extent of that interference (Mann)

## **Charter Remedies**

**S.24:** (1) "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances"

### **Kinds of remedies you could apply for under this section:**

- a court order for Crown to comply if you haven't received all of your evidence.
- a witness may be recalled
- you can ask for costs to be awarded (i.e. if there is an adjournment because of wrongful Crown action, defense can ask that their costs be awarded during that time).
- Can ask for a more lenient sentence.
- If crown was really bad, they may be ordered to pay the costs of the defendant.
- A **stay of proceedings** □ equivalent of an acquittal \* only granted when the Crown's behaviour is especially bad and it is *clear* and *obvious*. i.e. the Crown has made it impossible for you to get a proper defense.
- Assuming that we have a violation *not* saved under s. 1 you can seek a remedy under s. 24(1) and (2) □ exclusion of evidence.
- S. 1 is rarely relevant to s.8 (but can be relevant to s. 9 and s. 10).

**S. 24(2)** - "Where, in proceedings under subsection (1), 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 the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."

### **If you want evidence excluded under s. 24(2) you must:**

- **Establish standing**, must show on BOP that your client's rights were violated (not in the abstract),
- "**Obtained in a manner...**" There has to be a causal ("but for") or temporal (no but for, but obtained in same transaction) relationship between the violation the right and the obtaining of evidence. Allow temporal to send message to cops to behave
- **Disrepute (R. v. Grant SM p65)**: The admission of the evidence into the proceedings would bring the administration of justice into disrepute. NEW TEST: **GRANT!** (*Collins, Stillman p167, Buhay SM p29, Mann SM p52, Obranski, Elias SMp21* formed old test)

### The New Admission of Evidence Rule – aka, **The s. 24(2) Analysis**

- When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's long-term confidence in the justice system having regard to the following three lines of inquiry:
  - **Seriousness of the Charter-infringing state conduct**
    1. Would the admission of the evidence bring the Administration of Justice into Disrepute by sending message that courts condone deviation?
    2. How bad was it?
      1. Flagrant or slight
        1. deliberate violation, or pattern of abuse, tends to support exclusion
      2. Reasonable or unreasonable
      3. Understandable or in 'good faith'
    3. Good Faith (doesn't include negligence or blindness)
      1. Must have acted reasonably
      2. Requires more than intention
      3. Looks at the amount of training received by the officer and the level of knowledge of Charter requirements
        1. Police are required to have received adequate training, therefore ignorance is not a defense
    4. Exigency - Here the court will also considers any need to act without certainty due to urgent situation

- **Impact of the breach on the *Charter*-protected interests of the accused**
  1. Calls for an evaluation of the extent to which the breach actually undermined the interests protected by the right infringed.
    1. fleeting or profoundly intrusive?
    2. s. 7 right to silence
    3. S. 8 – Search and Seizure - What level of privacy was expected?
    4. S. 9 – Arrest and Detention – To what degree was the liberty of the accused limited?
    5. s. 10b - right to counsel
  2. Not generally directed at the accused’s interest in avoiding a conviction
- **Society’s interest in the adjudication of the case on its merits.**
  1. Would the truth-seeking function of the criminal trial process be better served by the admission or exclusion of the evidence?
  2. How important is the evidence?
    1. Reliability
    2. Required for trial
  3. Seriousness of the offence
    1. May be a relevant factor, however Can cut both ways
      1. Public has a heightened interest in punishing offender
      2. Offender faces a more serious sentence
    2. *Grant* seems to suggest the conflicting lines of reason cancel each other out
  4. Discoverability
    1. Would the cops have discovered the evidence regardless of the breach?
      1. Only one of the many factors to be considered therefore **not determinative**. If yes, it would weigh in favour of admitting evidence

Application to three kinds of evidence:

**a. Statements by the Accused**

- i. presume exclusion of statements obtained in breach of the *Charter*.
- ii. first inquiry focusses on whether admission of the evidence would harm the repute of justice by associating the courts with illegal police conduct.
- iii. second inquiry
  - right violated by unlawfully obtained statements is often the right to counsel under s. 10(b)
  - particular circumstances may attenuate the impact of a *Charter* breach on the protected interests of the accused from whom a statement is obtained in breach of the *Charter*.
    - eg. individual informed of choice to speak, but compliance with s. 10b technically defective at either the informational or implementational stage
    - also, statement made spontaneously after, or would have been made regardless of, a breach
- iv. The third inquiry focusses on the public interest in having the case tried fairly on its merits. This may lead to consideration of the reliability of the evidence.

**b. Bodily Evidence**

- i. evidence taken from the body of the accused, such as DNA evidence and breath samples.
- ii. Plucking a hair from the suspect’s head may not be intrusive, and the accused’s privacy interest in the evidence may be relatively slight.
- iii. a body cavity or strip search may be intrusive, demeaning and objectionable.
- iv. first inquiry - fact-specification determination
- v. second inquiry requires the court to examine the degree to which the search and seizure intruded upon the privacy, bodily integrity and human dignity of the accused.

- high intrusion = the forcible taking of blood samples or dental impressions (as in *Stillman* p167).
  - low intrusion= relatively innocuous procedures such as fingerprinting or iris-recognition technology, or breath sample evidence
- vi. third inquiry favours admission - evidence obtained from the accused's body is generally reliable,

**c. Non-bodily Physical Evidence**

- first inquiry - fact-specification determination
- second inquiry - breach most often associated with non-bodily physical evidence is the s. 8 protection against unreasonable search and seizure
  - Privacy is the principal interest involved in such cases.
  - illegal search of house more serious than a place of business or automobile
  - an unjustified strip search or body cavity search is demeaning to the suspect's human dignity and will be viewed as extremely serious on that account
- third inquiry - Reliability issues not generally be related to the *Charter* breach, admission favored

**d. Derivative Evidence**

- physical evidence discovered as a result of an unlawfully obtained statement
- first inquiry - depends on the factual circumstances of the breach: the more serious the state conduct, the more the admission of the evidence derived from it tends to undermine public confidence in the rule of law.
- second inquiry - in many cases the *Charter* right breached is the s. 10(b) right to counsel, which protects the accused's interest in making an informed choice whether or not to speak to authorities. The relevant consideration at this stage will be the extent to which the *Charter* breach impinged upon that interest in a free and informed choice.
  - **discoverability** of the derivative evidence may also be important as a factor strengthening or attenuating the self-incriminatory character of the evidence.
- third inquiry - since evidence in this category is real or physical, there is usually less concern as to the reliability of the evidence, and thus, the public interest in having a trial adjudicated on its merits will usually favour admission of the derivative evidence.

e. **General rule** =where reliable evidence is discovered as a result of a good faith infringement that did not greatly undermine the accused's protected interests, admission favored.

f. **Caveat** =On the other hand, deliberate and egregious police conduct that severely impacted the accused's protected interests may result in exclusion, notwithstanding that the evidence may be reliable.

**R. v. Grant- SM p65**

**Facts:** The defendant, Grant, was stopped and questioned by the police on the grounds that he was acting suspiciously. While being questioned by the police Grant admitted to having a handgun in his possession. He was then arrested and charged with possession of a restricted weapon. Grant appealed on the grounds that he was detained and questioned in violation of the Charter.

**Issues:** 2) Should the evidence be admitted in this case?

**Decision:**2) The evidence should be admitted even though it was obtained in violation to the charter

**Ratio:** See above

**Reason:** In balancing all of the relevant issues, the court found that the police in this case acted reasonably, and that the public interest outweighed any effect on the perception of the administration of justice. weighing the factors, admission of the gun is favored. **-first inquiry** - police conduct was not in bad faith, egregious, or deliberate - admitting the evidence would not greatly undermine public confidence in the rule of law-**second inquiry** - interests of accused include liberty interest (s. 9) and right to counsel (s. 10b) - impact of the infringement of Mr. Grant's rights under ss. 9 and 10(b) of the *Charter* was

significant. **-third inquiry** - gun is reliable and thus valuable evidence

## Trial Process

### Wrongful Convictions

Causes:

- The scope of the problem
- No. 1 Reason □ Police Misconduct and “Tunnel Vision”
- Accomplice and Jailhouse informant testimony
- Leading Cause □ Eyewitness testimony (often completely genuine).
- Forensic evidence
- False confessions
- Prosecutorial misconduct
- Ineffective assistance of counsel
- Judicial error and bias
- Racism
- Lack of Post-conviction remedies □ we don’t have an independent investigative body, what we have is still associated with the Crown.
- The death penalty

### Prosecution and Defense:

- Crown Counsel (*Boucher p219*)

***Boucher p219 v. The Queen*** (Supreme Court of Canada (1954)) - *Case deals with the role of the Crown counsel in a criminal trial*

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

***Ratio:*** 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

### Disclosure (Stinchcombe p223):

- Prosecutor should make timely disclosure to the accused or defense counsel of all relevant facts and known witnesses, whether tending to show guilt or innocence, or that would affect the punishment of the accused.
- Although there are no changes to the Criminal Code, section 7 of the *Charter* now includes a broad right to disclosure by order of the SCC

***R. v. Stinchcombe*** (SCC 1991) **p223-** *Case imposed a concrete obligation on the Crown to disclose its case. This same requirement is NOT imposed on the defense.*

**Issue:** The appeal raises the issue of the Crown’s obligation to make disclosure to the defence

**Facts:** Crown decided not to call a witness that gave favourable testimony to the accused, and would not produce the statements made in an interview. The judge at trial and appeal refused the application by defence for disclosure

**Reasoning:** Requires Crown to turn over everything in its possession that is **not (1) “clearly irrelevant”** or **(2) “anything that is privileged”**

- “**Clearly irrelevant**” – to make the point that if there is any uncertainty as to whether it is relevant, it should be turned over.
- Relevance – *anything* that might bear on the ability of the defense to make a full answer in defense.
- Privilege means you own a privilege, and that evidence is inadmissible in court. Most relevant in criminal cases is “**informer privilege**” (i.e. relying on an informant to obtain a warrant). Crown can claim privilege and must tell the defense that they are doing so, but not disclose the information in violation of the privilege. One **exception** to “informer privilege” is when the very guilt or innocence of the accused is at stake.
- If Crown fails to disclose then defense can challenge it and the judge will decide if the information is relevant and not privileged.
- Evidence obtained by the Crown is **not** property of the Crown, it is property of the public to ensure that justice is done
- Much court time can be saved if all evidence is revealed by the Crown including increases in guilty pleas, withdrawal of charges, etc
- “Anything less than complete disclosure by the Crown falls short of decency and fair play”
- This obligation is not absolute, and is in the discretion of the Crown with regards to withholding information and the timing of the release of information. For example, the Crown has to respect the rules of privilege, and to protect the identity of informers
- Discretion must also be exercised with respect to the relevance of information. Doesn’t need to provide clearly irrelevant material

### **Plea Bargaining:**

1. Most cases resolved at this stage without going to trial.
2. Ok for defence counsel to advise to plea bargain for lesser offence, if have informed consent

### **Defense Counsel:**

- **Duties** of Defence Counsel
  1. When Defending an accused person, the lawyer’s duty is to protect the client as far as possible from being convicted except by a court of competent jurisdiction and upon legal evidence sufficient to support a conviction of the offence.
  2. Admissions made by the accused to the lawyer may impose strict limitations on the conduct of the defence and the accused should be aware of this
    1. EG when the accused admits guilt, lawyer can’t allow perjury
- a) Tend to have even more limited resources than the Crown.
- b) There are limitations placed on defense if you are *certain* that your client is guilty. I.e. if your client intends on committing perjury, you can’t be a party to it. You can’t actively mislead the court. Basically, everything you do to attack the Crown’s case is fair game. When you are *actively* misleading the court that you *know* is unreliable and false, you can’t do that.

**USA v. Burns and Rafay, SCC 2001 p211** - when fugitives are sought to be tried for murder by a death penalty retentionist state, however similar in other respects to our own legal system, this history weighs powerfully in the balance against extradition without assurances.

### **Bail:**

- **S. 11(e)** of the *Charter* provides that those charged with an offence have the right not to be denied reasonable bail without just cause
- **S. 515(10) Criminal Code**
- Generally, Onus on Crown to show why bail should be denied

### **Bail can be denied on 3 Grounds s. 515(10):**

- **Primary** - Demonstration that the person is not likely to show up for their trial. consider past

history of not showing up, if you are extremely wealthy you could flee to a country with no extradition (not a likely grounds), connection to the community (is important) i.e. job, family, assets, etc...

- **Secondary** – protection of the public. If a case can be made that the person will not adhere to terms of bail and possibly re-offend then bail is often denied. Court will look at: seriousness of the offense (but not always! Someone charged with murder may NOT actually be a significant risk to the public i.e. domestic violence which is a *situational crime*); a past criminal record is going to be key especially if those crimes were committed while on bail (kiss of death);
- **Tertiary** – (note development - *Morales p236, Hall p239*)
  1. The judge can deny bail for any other just cause including, “**the need to maintain confidence of the administration of system of justice.**” (This is the **ONLY** ground recognized by the SCC). See factors
  2. Parliament has outlined in *Hall*: p. 240 in CB – reproduction of s. 515 strength of prosecution’s case, gravity offense, circumstances of offense, potential for a lengthy term of imprisonment. Court also noted in *Hall* that you can detain someone for their own protection.

**MOST IMPORTANT TO KEEP IN MIND** □ we don’t need the **tertiary** ground if we can make our case based on the either of the first two grounds. So by definition in any case where we rely on the tertiary ground, we have *already* established that they don’t meet the first two criteria. Therefore the threat to public argument should **NOT** come up in the tertiary argument because it would have already been successful in the second step. So the third step seems to center on the reaction of the public. The strength of the case and the seriousness of the offense seem to be overriding factors here.

**PROBLEMS:** strength of the case is tough at this point and you could contaminate the jury pool if they see that someone was denied bail because of the strength of the prosecution’s case.

**Reverse Onuses (Cr. C. s. 515(6), Charter, s. 11(e)):**

- Key question is who bears the **burden of proof**?
  1. Indictable offense while at large in another indictable offense □ If you’ve demonstrated in the past that you have done this, less likely that you are going to get bail. That is why burden is on you to prove this.
  - (2) Criminal organization offense (charged with) – broad definition of this
  - (3) Terrorism and national security offences
  - (4) Indictable offense and not ordinarily a resident of Canada – you are a flight risk
  - (5) Offense based on failure to attend court and comply with conditions of release
  - (6) Serious drug trafficking offenses (Pearson) – in that case SCC addressed whether reverse onus for drug traffickers complied with 11(e). Tend to deny bail in drug trafficking because it’s very lucrative and likely to go back to it. Also because it’s lucrative, they have resources and connections to get out of the country. **DISSENT** in *Pearson* argued that there is a stereotype of wealthy drug traffickers that isn’t very accurate. They tend to be street level addicts and dealers.
  - (7) **S. 469 offences** (i.e. murder) – *Bray p233, Pugsley p234, Sanchez* – just murder and the rest are crimes against the state (i.e. treason, alarming the Queen, political crimes). There is some suggestion that the reverse onus for murder violates s. 11(e).

**Juries:**

- **S. 11(f)** of the *Charter* allows any person charged with an offence to have the benefit of jury if the maximum punishment for the offence is imprisonment for five years, or a more severe punishment
- 90% plus cases are tried by judge alone
- Why do we have juries?
  1. They connect the community to the justice system: i.e. public education
  2. Rights to jury trials (**Cr. C. s. 473, Charter, s. 11(f)**) but only for a small subset of offenses.

### **Selecting the Jury:**

3 ways to exclude people:

#### **(1) Challenging the array: (Cr. C. s. 629) (Kent p249)**

**R. v. Kent p249 et al** (Manitoba Court of Appeal (1986)) – *Accused has no right to demand members of their racial/ethnic group on a jury*

**Facts:** Member of a Native band is challenging the racial composition of a jury. Only one of those who identified themselves as Indian sat on the jury

**Reasoning:** It is implicit in the reasoning, that if there had been deliberate exclusion of persons of a particular race or origin, that would be contrary to the Bill of Rights and would require the dismissal of the array. Accused has no right to demand that members of his race be included on the jury, just as discriminatory to require certain numbers of people be from certain races

**Decision:** Sinclair has not been deprived of a jury of his peers, and thus has not been deprived of any Charter rights

- **Challenges to the poll:**

- **Judicial exclusion (Cr. C. ss. 632, 633)** maybe you know the accused or the judge, also hardship

#### **(2) Peremptory challenges: (Cr. C. s. 634) (Pizzacalla p252, Biddle) –**

- Under s 634, both the prosecutor and defence counsel can make peremptory challenges of 4-20 jurors depending on the seriousness of the crime
- Have the ability to insert racial prejudice in the jury selection process.

**R. v. Pizzacalla p252** (Ontario Court of Appeal (1992)) – *Jury must be “impartial, representative, and competent*

**Facts:** Appellant convicted on indictment in which he was alleged to have committed sexual assault. Crown used 23 stand asides, 20 of which were to prevent men from being on the jury. This resulted in the whole jury being composed of women

**Decision:** Appeal allowed, new trial ordered

**Reasons:** Based on the jury selection process, not the fact that the jury was composed of all women. Selection process of Crown using stand asides to defeat defenses challenges was not right, just so all women could be present on jury. An apparent attempt by the prosecution to change the composition of the jury so as to exclude representatives as occurred in this case, in itself undermines the impartiality of a jury

#### **(3) Challenges for cause: (Cr. C. s. 638) (Hubbert, Parks p255, Williams p256)**

- Under s. 638, the prosecutor and the accused are entitled to any number of challenges for cause. The most common of which is the challenge for cause that a juror is not indifferent between the Queen and the accused.
- Tough to select 12 jurors who have not heard of the case in an age where dissemination of information is so quick
- Once challenge for cause has begun, the party making the challenge may call the proposed juror as a witness without calling for evidence to establish a prima facie case
- You have to demonstrate to the judge that there is a realistic potential that the jury pool as a whole will be biased and not impartial based on something that can't be remedied by proper instruction etc... Can do this on the basis of pre-trial publicity and racial bias.
- **SEE CAN!!!**

## The Trial

### Quantum and Burden of Proof

**Burden of Proof:** *Who has the responsibility?* General rule is the Crown has this

**Quantum of Proof:** *What level of proof is required?* Beyond a Reasonable Doubt (BRD) or Balance of Probabilities (BP)

**Persuasive Burden:** *Who has the Burden?* Usually the Crown, otherwise Reverse Persuasive Burden

**Evidentiary Burden:** *Who has the Burden to Raise an Issue?* If not the Crown then Reverse Evidential Burden (AOR). This is the case in regards to defences.

The burden on the crown to prove the guilt of an accused beyond a reasonable doubt is one of the most important safeguards in the criminal justice system

- Presumptions may be: FROM OAKES
  - permissive or mandatory
  - irrebuttable or rebuttable
    - rebuttable, three potential ways the presumed fact can be rebutted:
      - First, the accused may be required merely to raise a reasonable doubt as to its existence.
      - Secondly, the accused may have an evidentiary burden to adduce sufficient evidence to bring into question the truth of the presumed fact.
      - Thirdly, the accused may have a legal or persuasive burden to prove on a balance of probabilities the non-existence of the presumed fact.
    - presumptions of law or fact
- **Burden of Proof**
  - Presumption of innocence is a principle of fundamental justice
  - Burden falls on the Crown to demonstrate the requirements (Burden of Proof) for conviction beyond a reasonable doubt (Quantum of Proof) (*woolmington p261*)
  - Conversely, the accused is not expected to prove his innocence, must only demonstrate a reasonable doubt for acquittal

### **Under the Constitution**

- Burden of proof is now codified within s. 11(d) of the Charter

S. 11 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;

- Any criminal offence that imposes a persuasive reverse onus (BOP) (allows accused to be convicted despite RD) violates s. 11(d) of the *Charter (Oakes)*
  - includes mandatory presumptions, even if evidential burdens ("in the absence of evidence to the contrary") sic (Downey)
  - ex. s.8 NCA possession presumed for trafficking, and accused must 'establish' that it wasn't for trafficking (Oakes)
  - ex. if drunk behind wheel of care, deemed to have care and control of vehicle (Whyte)
  - ex. person selling minerals had persuasive burden to show had lawful auth. (Laba)

- Exceptions, see p277
  - only if the existence of the substituted fact leads inexorably to the conclusion that the essential element exists, with no other reasonable possibilities, will the statutory presumption be constitutionally valid. (Whyte)
  - permissive presumptions don't infringe (Downey)
- Once a violation is demonstrated, the courts will consider the provision in the light of s. 1 to determine if the infringement is justifiable

S. 1 The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

- In their analysis the court will consider the criteria set out in *Oakes* (the Oakes test)
  - (1) There must be a *pressing and substantial objective*
  - (2) The means must be *proportional*
    - (a) The means must be *rationally connected to the objective*
    - (b) There must be *minimal impairment* of rights
    - (c) There must be proportionality between the infringement and objective
- Where a provision fails as it did in *Oakes*, an appropriate constitutional remedy will be applied
- Reverse onus placed on drug possession amounting to trafficking was overturned in *Oakes*
- Reverse onus placed on Care and Control offences was upheld in *Whyte*
- Reverse onus placed on Living on the Avails of Prostitution was upheld in *Downey*

### Quantum of Proof (Lifchus)

- For Criminal Cases – Beyond a Reasonable Doubt (BRD)
  - B. Does not require absolute certainty (*Lifchus*), but falls much closer to AC than BOP (Starr)
  - C. Requires more than ‘probably guilty’, i.e. higher than BOP, if this is the best the jury can agree upon then they must acquit
  - D. based on reason and common sense, not sympathy/prejudice
  - E. "In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt." (*Lifchus*)

### Conduct or Actus Reus (Guilty Act)

- Sometimes referred to as the act requirement
- There is no guilty act w/out a guilty mind

#### (2) Three Requirements for *Actus Reus*

1. Subject
2. Voluntary (ruzic p958)
3. Prohibited Act
4. Circumstances (**ONLY when explicitly required in statute**)
5. consequences/causation

### Voluntariness

- For any offence, the *actus reus* is not satisfied unless the defendant acted voluntarily
- Criminal liability cannot be attributed to a person unless that person is responsible for his or her acts

- “It is a principle of fundamental justice that only voluntary conduct - behaviour that is the product of a free will and controlled body, unhindered by external constraints should attract the penalty of criminal liability.” (*ruzic p958*)
- Requires sufficient degree of conscious choice and control of action
- Involuntary conduct
  - Reflexive action (instinct), accident
  - Automatism (see automatism below)
    - Accused engages in a series of complex acts without actual awareness, Eg. sleep walking or dissociation
    - ex. involuntary - man killed step-parents while sleepwalking (*ruzic p958*)
  - Includes morally involuntariness (*ruzic p958*)
- Does not require awareness of consequences

### ***Absolute Liability***

- Some offences do not require *mens rea*
- *Actus Reus* is sufficient for a conviction
- Photo Radar may be an example
- Absolute Liability + Possible Jail Time = violation of s. 7 of Charter

### ***Contemporaneity***

- “It is a principle of natural justice, and of our law that *actus non facit reum nisi mens sit rea*. **The intent and the act must concur [in time] to constitute the crime.**” (Must coincide in time) (*Fowler v. Padget*, *fagan p292*, *cooper p791 p694*)
- Penney's approach - when faced with contemporaneity, argue continuing transaction - analysis of omission stuff should be reserved to where statute creates duty (from Pare)
- Sometimes there is a “fuzziness”
  - *Fagan p292 v. Commissioner of Metropolitan Police*
    - Act – driving the car onto the cops foot, preceded the *mens rea* component, i.e. failure to remove the car
    - Court viewed the action and failure to move the car as a single continuous action
  - *R. v. Miller p295*
    - *R. v. miller p295* accidentally set mattress on fire but did nothing to stop fire from consuming house
    - An unintentional act followed by an intentional omission to rectify that act or its consequences can be regarded in toto as an intentional act
  - *R. v. Cooper p791 p694* (only Canadian case of the three)
    - SCC - “It was sufficient that the intent and the act of strangulation coincided at some point. It was not requisite that the intent continue throughout the entire two minutes required to cause the death of the victim.”

### ***Action, Inaction, & Status***

- Action - “the verb in the sentence”
- Inaction (or Omission)
  - if you see failure to act, identify presumption that it is not generally criminally culpable. Then talk about exceptions, give examples, mention possibility that duty could be derived from common law but SCC in *thornton p307* deliberately avoided the issue, find an

- example from CC that sets out duty, find an offence provision in CC
- Eg. Failing to stop a blind man from walking off a cliff
- **As a default, is not criminal (for policy reasons)**
  - Exceptions
    - (a) Where 'Good Samaritan' laws have been enacted, (Quebec)
    - (b) Or when inaction is viewed as action by the courts (*fagan p292 & r. v. miller p295*)
    - (c) Omitting to do a legal duty
      - 1. usually statute
      - 2. use common law if not statute- arguable since SCC in thornton p307 avoided issue
- In Canada statutory obligations sometimes criminalize inaction
  - Eg. s. 252(1) Failing to stop after an accident (Hit and Run)
  - S. 126 Disobeying a Statute (Catch all)
    - (a) Can be used to criminalize inaction when it is contrary to a statutory provision
    - (b) Any provision creating an offence for failure to act can be used w/ s. 126
  - s. 180 see thornton p307 Below
- *R. v. thornton p307*
  - HIV positive and donated blood
  - Charged w/ s. 180(1) – common nuisance endangering public
    - (a) "endanger" doesn't require actual injury/damage, and includes even slight risks
  - Court found him guilty on the grounds that he failed to live up to the duties of civil legal duty.
    - (a) legal duty PROBABLY includes common law duties (OCA in thornton p307, and SCC in *R. v. Cuerrier p315*)
- Legal Duties PROBABLY include Common Law
  - ex. Under the common law anyone carrying such a dangerous weapon as a rifle is under the duty to take such precaution in its use as, in the circumstances, would be observed by a reasonably careful man. (*R. v. Coyne, 1958*)
  - ex. a parent is under a legal duty at common law to take reasonable steps to protect his or her child from illegal violence used by the other parent or by a third person towards the child which the parent foresees or ought to foresee. *R v. Popen, 1981*
  - ex. moore p301 - implied duty to provide one's name/address before arrest, failing which you are guilty of obstruction of justice (moore p301)

### Common Nuisance

180. (1) Every one who commits a common nuisance and thereby (a) endangers the lives, safety or health of the public, or (b) causes physical injury to any person, is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

Definition

(2) For the purposes of this section, every one commits a common nuisance who does an unlawful act or fails to discharge a legal duty and thereby (a) endangers the lives, safety, health, property or comfort of the public; or (b) obstructs the public in the exercise or enjoyment of any right that is common to all the subjects of Her Majesty in Canada.

215. (1) Every one is under a legal duty (a) as a parent, foster parent, guardian or head of a family, to provide necessities of life for a child under the age of sixteen years; (b) to provide necessities of life to their spouse or common-law partner; and (c) to provide necessities of life to a person under his charge if that person (i) is unable, by reason of detention, age, illness, mental disorder or other cause, to withdraw

himself from that charge, and (ii) is unable to provide himself with necessaries of life.

**126. (1)** Every one who, without lawful excuse, contravenes an Act of Parliament by wilfully doing anything that it forbids or by wilfully omitting to do anything that it requires to be done is, unless a punishment is expressly provided by law, guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

**S. 216 -** Every one who undertakes to administer surgical or medical treatment to another person or to do any other lawful act that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill and care in so doing.

**S. 219 – Criminal Negligence (1)** Every one is criminally negligent who (a) in doing anything, or (b) in omitting to do anything that it is his duty to do, shows wanton or reckless disregard for the lives or safety of other persons.

### *Status*

- Generally, you cannot criminalize status
- Some offences have attempted to restrict certain status type activities or some specific state of affairs, Most have been repealed
  - Vagrancy (void in Heywood)
  - Keeper, inmate, or being found in a gaming (s. 202) or bawdy house (s. 210)
  - Living off the avails of prostitution (s. 212)
  - Nude in a public place (s. 174)
  - Possession offences s. 4(3) - need a measure of control on the part of the person deemed to be in constructive possession - terrence p317
  - Participation or contribution to a terrorist organization (s.83.18)
  - Participation or contribution to a criminal organization (s.467.11)

### *Circumstances*

- Many offences require a circumstance under which the offence was committed
- Definition sections, look to s.2
- In these cases Circumstance forms another required component of *Actus Reus*
- An example is sexual assault where – assault of a sexual nature (circumstance) is committed
  - ex. of CCC provisions that identify relevant circumstances that form part of the actus reus pp322-326

### *Consequences and causation*

- Examples
  - Assault *causing* bodily harm
  - Criminal negligence *causing* death
  - Any murder requires demonstration of causation
- Ss. 224-226 establish causation rules for homicide

**S. 224** –Where a person by an act or omission does any thing that results in the death of a human being he causes the death of that human being notwithstanding that death from that cause might have been prevented by resorting to proper means

- If you stab someone and they bleed out because the ambulance ran out of gas on the way to the hospital, you still caused his death

**S. 225** - Where a person causes to a human being a bodily injury that is of itself of a dangerous nature and from which death results, he causes the death of that human being notwithstanding that the immediate cause of death is proper or improper treatment that is applied in good faith

- If you stab someone and they die because the wrong blood type was transfused in the hospital, you still caused his death

**S. 226** - Where a person causes to a human being a bodily injury that results in death, he causes the death of that human being notwithstanding that the effect of the bodily injury is only to accelerate his death from a disease or disorder arising from some other cause.

- If you stab someone who was about to die from cancer, you still caused their death

## Causation

### Tests for Causation

There are two tests for causation, both must be satisfied

- Factual Causation
  - onus on crown to prove BRD
  - The “but for” test
  - “but for” the relevant act, would the consequences have followed?
  - Most follow a logical sequence, therefore the test is reasonably simple
  - Basically, if the act contributed in any way, the “but for” test is satisfied, and factual causation is established
  - Q for trier of fact (smithers p327)
- Legal Causation
  - onus on crown to prove BRD
  - “How significant was the relevant act in producing the consequences?”
  - Significant contributing cause beyond *de minimus* standard (don’t just say “the de minimus standard”) (nette p343 reworded smithers p327)
    - This is a low standard - death may be unexpected and physical reactions unforeseen, but still responsible (smithers p327)
    - ex. met - stomach kick caused epiglottis to malfunction which caused death (smithers p327)
  - Thin skull principle
    - The mere fact that the victim suffered from some frailty is not sufficient to negate a criminal act
  - Remoteness - Court in *smithers p327* recognized the role of **remoteness**.
  - Multiple Causes
    - Acts of accused don't have to be medical cause of death (cribbin p332)
    - Acts don't have to be the most immediate and severe factor in death, as long as is a supervening cause
      - ex. two beat man to death, one only punched him once (cribbin p332)
    - Intervening cause - whether an act or series of acts (in exceptional cases an omission or series of omissions) consciously performed by the accused is or are so connected with the event that it or they must be regarded as having a sufficiently substantial causal effect which subsisted up to the happening of the event, without being spent or without being in the eyes of the law sufficiently interrupted by some other act or event. (nette p343)
  - Court in *nette p343* reworded the finding of *Smither*
    - *De minimus* = “not trivial or insignificant” = “significant”
    - The current rule is: “**A significant contributing cause**”
    - Court may have effectively changed the requirements for Legal Causation

- “significant” may imply a higher legal standard than *de minimus*, only time will tell
- Upheld as Constitutional under s. 7 in *Cribbin* p332

## Criminal Offences

### First Degree Murder

- Best not thought of as a separate offence, is a sentencing provision
- Consider all murders as a second degree murder first
  - Factual and Legal causation, etc.
  - All homicides have the same level of causation except 1st degree (see below)
  - intent is subjective foresight of death (*Nettie* p343)
- Once second degree murder proven, consider if 1st degree
  - 1<sup>st</sup> degree murder requires all second degree murder causal requirements, plus acts must form an **essential, substantial and integral** part of the killing (*Nettie, Harbottle*)
  - usually direct physical contribution
  - Also apply the *mens rea* requirements
- Life sentence, w/ 25 year minimum before parole

### Hypothetical

#### Manslaughter - Requirements for manslaughter

- S. 234 - Manslaughter is culpable homicide that is not murder
- Manslaughter requires some form of assault (unlawful act) causing death
- Two elements, **Assault** and **Causation**
- **Assault** Requirements
  - 265(1) application of force w/out consent
  - voluntariness is always required, not an issue here
  - *Jobidon?*
    - Assault is not present where there is consent
    - Consent can only exist where there is no serious harm
    - Consent is vitiated where Non-Trivial Bodily Harm is intended and caused
      - NTBH - bodily harm (s. 2) means any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature;
- **Causation** Requirements
  - Legal cause and “but for test” – satisfied?
    - But for test
    - Legal causation
      - consider ss. 224-226

### Criminal Negligence Causing Death

- Two elements, **Negligence** and **Causation**
  - **Negligence** Requirements
    - S. 219 (b)(1)– Was there an act or an omission?
      - Omission must be combined w/ a legal duty
    - S. 215 (d)– legal duty defined –
    - Was the duty satisfied?
    - S.219 – wanton disregard DLSOP– gross negligence (marked departure) – ordinary negligence is insufficient – same standard is applied to all skill levels -

- **Causation** Requirements
  - But for test
    - If he had been given access to medical attention he would have lived
  - Legal causation
    - Significant cause of death?
    - Failure to provide med treat. was a significant cause

## Absolute & Strict Liability

### *Regulatory Offences vs Criminal Offence*

#### **Is it Criminal or Regulatory?**

- 1) Is it provincial leg? All offences passed by the provinces can be categorized as *regulatory offences* or *public welfare offences*
  - note that regulatory offences can be strict, absolute, or subjective fault
- 2) Is it from the CCC? Federal offences can be either *regulatory* or *criminal*
  - if from the CCC/drug act (probably), presume subjective mens rea
- 3) If may be regulatory or criminal, consider all the theories:
  - malum in se v. malum prohibitum Cory J- Wholesale
    - traditional analysis of absolute vs. criminal - some activities are inherently wrong and prohibited for the public good.
  - licensing theory (Cory J - Wholesale)
    - certain areas of activity such as economic activity where you are figuratively agreeing to be subject to a certain form of regulation in exchange for a privilege to do that activity
  - Vulnerability (Cory J - Wholesale)
    - we pass regulations to protect vulnerable groups, such as workers, consumers, environment
    - criminal standard may be too harsh for these things, so don't impose the same stigma
    - regulations to protect public interests in health, convenience, safety and general welfare of public
  - Penalty
    - we can look to the penalty imposed and decide whether the legislation is criminal or regulatory
- 4) Interpret what the offence requires:
  - if no mention of absolute liability or subjective fault, PRESUME strict
    - For Absolute liability - Legislation must send a clear and obvious signal if this is the case. (beaver p374)
      - ex. "automatically and without notice" (pontes p628 p393)
- Other considerations:
  - Regulatory offences are generally structured differently
  - Both can carry strict penalties including prison
  - Regulatory if it is a "regulation of conduct in the interests of health, convenience, safety, and the general welfare of the public" (ex. undersized lobsters - *piece fisheries p380*)
  - Regulatory if it is a "public welfare" offence (ex. dumping prohibition - *city of sault ste. marie p380*)
  - Regulatory if it is passed by one of the provinces
  - Criminal if it's in the *Criminal Code*, (probably the *Drugs Act* too)

- Criminal if there is a mandatory prison sentence
- For Criminal Offences there is a presumption of full *mens rea* (beaver p374)
- For Regulatory Offences there is a presumption of limited fault requirement

**Absolute Liability v. Strict Liability v. Subjective Fault**

- This distinction applies to regulatory offences
- Absolute Liability = no fault requirement, conduct is the only requirement
  - no defence of DD - pontes p628 p393
- Strict Liability = crown must demonstrate conduct, but then defendant can use the Defence of Due Diligence
  - If you can show that you have done everything that can be reasonably expected then DDD will succeed
- Subjective Fault = onus is on the crown to demonstrate both fault and conduct BRD
  - look for words like wilfully, with intent, without excuse, knowingly, etc. (Pierce)
- Strict Liability is presumed in all regulatory offences (*city of sault ste. marie p380*)
  - available if:
    - the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or
    - if he took all reasonable steps to avoid the particular event.

<b>Absolute Liability</b> Conduct is the only req.	<b>Strict Liability</b> Onus is on Accused to demonstrate due diligence <b>(This is the Presumption)</b>	<b>Subjective Fault</b> Crown must show both conduct and fault
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***Constitutional Considerations***

**Absolute Liability and S. 7 of the Charter**

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.

- Where there is potential jail time, there can be no liability w/out fault (Motor Veh. Ref.)
- Mere possibility of imprisonment will trigger liberty component of s. 7
- Where there is no possibility of imprisonment (even if fine is not paid), the liberty component is not triggered (pontes p628 p393)
  1. Liability without fault is possible where no risk of jail time
- Punishments other than jail time will not likely trigger s. 7 (william cameron trucking p397)
- Exception - corporations cannot avail itself of protection offered by s. 7 (Irwin Toy), unless the provision also violates human s. 7 rights (wholesale travel p403)

**Reverse Onus and s. 11(d) of the Charter**

11. 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;

- Due diligence reverse onus is supported in most regulatory offences because otherwise it would be too hard for the crown to prove BRD, and also not enough stigma in the offence (*wholesale travel p403*)

## Fault or Mens Rea

### Definitions

- Where *Actus Reus* is concerned with conduct, *Mens Rea* is concerned with fault
  - For criminal offences both must be present to establish guilt
- It is the component that makes the act “blame-worthy” or “morally wrong”
- Different than the voluntary component of conduct
- Knowledge of a prohibition is **not** required - see ignorance of the law
  - Also, knowledge that act is wrong or immoral is **not** required
- Concerns a subjective appreciation that the consequences would follow
- The fault requirement can be found in the written statute and the relevant case law
- Often more than one fault component required
  - Eg. Sexual Assault – requires knowledge of assault, and knowledge (or recklessness) of non-consent

### Why have it?

Two Theories

#### Moral Approach

- Based on liberal theory of independent actors with choice, deserve punishment if choose wrong
- *Mens Rea* addresses this at the source by focusing on states of mind
- Has some limitations, especially in hard cases
  - Eg. Copyright infringement

#### Economic Approach (prices (tort/regulatory law) and sanctions (criminal law))

- Where two values conflict, society places a lower price on the one that is to be deterred
- Valueless activities are generally qualified as criminal activity
- A sanction is imposed in proportion to the expected negative value of the crime
  - Cannot be equal because of the probability of detection
  - Still not sufficient because we do not have perfect info to determine appropriate penalty
  - Leads to upward bias which can lead to a deterrence of lawful activity
- *Mens Rea* allows us to conduct lawful activity without fear of disproportionate consequences for accidental infringements

### Subjective /Objective Distinction:

- **Intent** □ high degree of fault – **subjective** (*vaillancourt p709*) If someone intentionally does the act, high degree of fault
- **Knowledge** □ **Not** lower than intent – **subjective**
- **Recklessness** □ knows likely and does it anyways – high degree - close to intent - **subjective mens rea**
- **Criminal Negligence** □ lowest level - **objective/statutory s. 219** – very close to recklessness – **ss. 220 and 221**

## Subjective States of Fault

### Motive or Desire

- **Not** an essential element *Mens Rea*
- Ulterior purpose for action
- “that which precedes and induces the exercise of the will” *lewis p419*
  - (a) distinct from intent (“the exercise of a free will to use particular means to produce a particular result”)
- desire - (step down from motive) - a wish or hope to bring some consequence into effect
- Highest or most subjective mental state
- Relevant in three cases
  - (a) Statutory exceptions eg. “terrorist activity”
    - 1. 83.01(1)(b)(i)(a): in whole or in part for a political, religious or ideological purpose, objective or cause, and
  - (b) In support of a defence (self-defence, necessity, duress)
  - (c) Evidence of intent, or to prove a disputed issue at trial (ex. *lewis p419*)
- a. *Lewis p419- Dickson* on motive - following propositions:
  - i. (1) As evidence, motive is always relevant and hence evidence of motive is admissible.
  - ii. (2) Motive is no part of the crime and is legally irrelevant to criminal responsibility. It is not an essential element of the prosecution's case as a matter of law.
  - iii. (3) Proved absence of motive is always an important fact in favour of the accused and ordinarily worthy of note in a charge to the jury.
  - iv. (4) Conversely, proved presence of motive may be an important factual ingredient in the Crown's case, notably on the issues of identity and intention, when the evidence is purely circumstantial.
  - v. (5) Motive is therefore always a question of fact and evidence and the necessity of referring to motive in the charge to the jury falls within the general duty of the trial judge "to not only outline the theories of the prosecution and defence but to give the jury matters of evidence essential in arriving at a just conclusion."
  - vi. (6) Each case will turn on its own unique set of circumstances. The issue of motive is always a matter of degree.

### Purpose / Intention / Willfulness

- Highest forms of subjective *mens rea*

#### (1) Purpose

- a. Generally synonymous with Intent, except does not include desire (*hibbert p951 p426*)
- b. S. 21(1)(b) – act for the **purpose** of aiding a criminal
- c. It is not necessary to desire the consequences, it is sufficient that the defendant knew that the consequences were substantially certain

#### (2) Intention or Willfulness

- a. They are synonymous (*Docherty*)
- b. Do not confuse with motive and desire, also doesn't matter if accused didn't think was immoral (*theroux p438*)
  - i. ex. doesn't matter that he didn't want his friend to die - *hibbert p951 p426*
- c. Can prove the intention with either of two things: (*hibbert p951 p426*)
  - i. Either a desire to bring about certain circumstances, or
  - ii. knowledge that the circumstances are substantially certain to result
- d. Willfulness = intention generally (*buzzanga p430 and durocher p418*)

- i. Either conscious purpose or foresaw consequences
  - ii. If person knew consequences were certain or substantially certain the intended the consequences
- e. Recklessness can in some cases be sufficient
- f. Where either 'intentionally' or 'willfully' are used, presumption is either desire or certain belief
- g. Even where accused is forced to commit a crime they can intend the consequences  
(*hibbert p951 p426*)

### Knowledge (theroux p438, Duong)

- Triggers presumption that fault is required
- if leg says "knowing" - presume certain belief needed, unless some other standard given - may be believing in a possibility (ex. theroux p438)- consider wilful blindness, below
- Common for possession based offences
- Eg. Cannot possess something unless you are aware of its nature (*buzzanga p430 and durocher p418*)
- Knowledge is based on Belief as opposed to truth
  - If you stab a manikin believing it to be a human you will satisfy the *mens rea* requirement of knowledge
- Ex. Fraud s. 380 (theroux p438) the actus reus of the offence of fraud will be established by proof of:
  - 1. the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and
  - 2. deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk.
- b. Correspondingly, the mens rea of fraud is established by proof of:
  - i. 1. subjective knowledge of the prohibited act (certainty); and
  - 2. subjective knowledge that the prohibited act could have (awareness of possibility) as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk).
  - ex. party to an offence - s. 23(1)

### Recklessness

- Note: two different levels: Possibility or Probability
  - Reckless = possibility (PRESUME unless otherwise stated)
    - PRESUME if provision silent on mens rea
  - Likely = probability , ex. s. 229aii cooper p791 p694 - For murder, recklessness exists where there is subjective knowledge that death is **likely** - *cooper p791 p694*
  - “[recklessness] is found in the attitude of one who, aware that there is danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk. **It is, in other words, the conduct of one who sees the risk and who takes the chance.**” *sansregret p444*
  - Lower level of subjective *mens rea* than knowledge, do not confuse with negligence
  - Risk = takes a deliberate and unjustified risk (*buzzanga p430 and durocher p418*)
    - NOTE: maybe modified to substantial and unjustified risk (*hamilton sp88*), but not clear if applies beyond secondary liability (i.e. counselling), bring it up and decide - probably doesn't apply because Fish uses "unjustified risk" in the next sentence to clarify, maybe a typo not intended to change the law.

### Willful Blindness (sansregret p444, Duong)

- Do not apply WB where recklessness is sufficient! Its redundant

- Proxy for knowledge - Only relevant when offence requires knowledge
  - Used as a substitute for knowledge but satisfies requirements for near certain belief
- where the Crown proves the existence of a fact in issue and knowledge of that fact is a component of the fault requirement of the crime charged, wilful blindness as to the existence of that fact is sufficient to establish a culpable state of mind (Duong)
  - Actual suspicion, combined with a conscious decision not to make inquiries which could confirm that suspicion, is equated in the eyes of the criminal law with actual knowledge. (Duong, also sansregret p444)
  - Not clear what level of suspicion is required - Don't have to show that inquiry would have provided knowledge, just that the inquiry was not made
- ex. WB- accused helped alleged murderer hide, knew of murder and alleged murderer told him he was wanted for murder - didn't have specific knowledge but was WB and guilty under s. 23 of accessory after the fact (Duong)
- ex. zWB accused broke into house and terrorized ex -gf, then she let him sleep with her (Duong)

### **Interpretation**

- If criminal, presume subjective fault -beaver p374
- If silent - presume recklessness (awareness of possibility)
- Look for *mens rea* words:
- In a criminal case this means recklessness is the default *theroux p438*
  - “for the purpose of”(Intent), “knowingly”(Knowledge), “intentionally”(Intent), “willfully”(Intent)
  - if there are words then the appropriate fault requirement is applied to the applicable conduct requirement
  - They all require desire or certain belief *Duong*
  - “dangerous, careless, criminal negligence - presume objective, and marked departure unless crim negl, which is marked and substantial departure. Also, if objective look at capacity and circumstances
- wilful blindness relevant only when recklessness not sufficient

### **Proving Subjective Fault**

- Inferences from conduct (*buzzanga p430 and durocher p418 and Durocher*)
  - “Since people are usually able to foresee the consequences of their acts, if a person does an act likely to produce certain consequences it is, in general reasonable to assume that the accused also foresaw the probable consequences of his act, and if he, nevertheless, acted so as to produce those consequences, that he intended.”
- Reasonable Person (*Tennandt and tennant p703*)
  - “Where liability is imposed on a subjective basis, what a reasonable man ought to have anticipated is merely evidence from which a conclusion may be drawn that the accused anticipated the same consequences.”

### **Objective States of Fault**

- Fairly rare, s. 219 (Criminal Negligence) is one example
- Look for
  - “wanton or reckless disregard”
  - “dangerous”
  - “negligent”

- duty
- *Tutton and Tutton* applied an objective standard in the case of negligence

### Criminal Negligence

**219.** (1) Every one is criminally negligent who

(a) in doing anything, or

(b) in omitting to do anything that it is his duty to do, shows wanton or reckless disregard for the lives or safety of other persons.

### Causing Death by Criminal Negligence

**220.** Every person who by criminal negligence causes death to another person is guilty of an indictable offence and liable

(a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and

(b) in any other case, to imprisonment for life.

### Causing Bodily Harm by Criminal Negligence

**221.** Every one who by criminal negligence causes bodily harm to another person is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

### Consider medical treatment provision

**S. 216 -** Every one who undertakes to administer surgical or medical treatment to another person or to do any other lawful act that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill and care in so doing.

### Parent/guardian duty

215. (1) Every one is under a legal duty (a) as a parent, foster parent, guardian or head of a family, to provide necessaries of life for a child under the age of sixteen years; (b) to provide necessaries of life to their spouse or common-law partner; and (c) to provide necessaries of life to a person under his charge if that person (i) is unable, by reason of detention, age, illness, mental disorder or other cause, to withdraw himself from that charge, and (ii) is unable to provide himself with necessaries of life.

Consider other sections in the inaction section above, ex. 126 (breach of statute) and 180 (common nuisance)

- The standard
  - There are three levels
    - Lowest negligence(1) – not applied to criminal law
      - “Negligence”
    - Middle negligence(2) – applied in most criminal cases involving negligence
      - “Marked departure” (Hundal, creighton p462)
    - Highest negligence(3) – criminal negligence
      - “Marked and substantial departure” (JL)
  - Standard (circumstances) creighton p462
    - Same standard for everyone -what would reasonable person do in the circumstances (creighton p462)

- (1) Actus Reus - Negligence constitutes a marked departure (or gross negligence) from the standard of the “reasonable person”
- (2) Mens Rea - Objective foresight of risk of NTBH via standard of a reasonable person in the same circumstances - no need to foresee death in crim negl causing death
  - Personal characteristics - Not shifted up or down based on personal limitations or experiences or skills
    - Standard lowers **only if** the defendant is incapable of appreciating the nature, quality and consequences of act (creighton p462)
    - Some subjective elements are relevant
      - Such as: info at time, other factors beyond their control
- (3) Trier of fact must still be convinced BRD that negligence occurred (Hundal)
- (4) Marked Departure (creighton p462)

### ***Constitutional Considerations***

- The SCC has indicated that some offences require a minimum of subjective *mens rea* due to their serious nature
- Any lower standard would trigger s. 7 of the *Charter*
- Examples: Murder (vaillancourt p709), Attempted Murder, War Crimes, and Crimes Against Humanity
  - ex. s. 21(2) - Common intention - the phrase "ought to have known" in s. 21(2) is of no force and effect when applied to the crimes of murder or attempted murder (R. v. Logan p521)
- Other crimes are very unlikely to trigger s. 7 in the same way; *Durham*, (careless storage of firearms s. 86(2) *Finlay*), (wilfully set fire to certain things s. 434(a)) *Peters*, (dangerous driving s. 249) *Hundal*, (manslaughter requires only reasonable foreseeability of BH s. 222(5)(a)) *creighton p462*, (unlawfully causing bodily harm s. 269) *DeSouza*

## **Participation**

### Parties v. non-parties

- (1) A party to an offence is charged with the same crime as the perpetrator (ss. 21 & 22)
- (2) A non-party is charged with a separate offence (such as ss. 23, 23.1 & 463 – accessory after the fact)
- (3) Can be convicted as party even if principal can't be convicted - s 23.1
- (4) 23.1 For greater certainty, sections 21 to 23 apply in respect of an accused notwithstanding the fact that the person whom the accused aids or abets, counsels or procures or receives, comforts or assists cannot be convicted of the offence.

### ***Principals***

#### **S. 21 – Aiding or Abetting**

Parties to an offence,

S. 21 (1) Anyone is a party to an offence who,

4. Actually commits it;
5. Does or omits to do anything for the purpose of aiding any person to commit it; or
6. Abets any person in committing it.

S. 21 is usually brought up where more than one person is involved in the committing of a crime *H(LI) p490*

Circumstances - an offence must have been committed

- Act
  - Anyone who satisfies (a), (b), or (c) can be charged with the offence itself (thatcher p484)
    - This means that someone committing a crime through the agency of another (b or c) is seen as a principal party in the same way as the actual perpetrator (a)
    - In *thatcher p484* the SCC ruled that a jury can rule on both a) and b) or c), prosecution does not need to choose one or the other
    - Even if you can't prove (a), (b) or (c) can be sufficient for conviction of the same crime
  - Did the actions of the accused have the effect of encouraging the principals?
    - must be evidence of encouragement -dunlop and sylvester p511
    - Aiding and abetting are effectively the same thing
  - Can be convicted for an omission (*Kulbacki, dunlop and sylvester p511 and Sylvester* (only SCC case), *Popen, Nixon*)
    - ex. if had authority to control/stop crime, or if had a statutory duty to act
  - kulbacki p508 - mere presence while girl sped car
  - dunlop and sylvester p511 - passive acquiescence at the scene of the crime is not enough to constitute aiding or abetting
    - however presence may be evidence that the trier of fact can use to decide aiding/abetting
    - have to draw a line between mere presence and anything that we can characterize as offering implicit encouragement or assistance
  - Popen - acquiescing silently with knowledge other parent is hurting child
  - Nixon - if purpose in omitting was to facilitate - ex. senior officer in jail watching beating
  - Innocent Agency: the person who causes a crime to be committed by means of the act of an innocent agent is considered to be a principal party under (b) or (c) states that even where not the person who actually carried out the act, you can still be guilty of (b) or (c) if you aided or encouraged that person in committing the crime (passport forgery) *berryman p501*.
  - Consequential offences - party liability follows where crime committed is of the same type as the one which the accused has assisted (kirkness p515 p520)
    - offence must be similar and must be sufficiently contemporaneous with the contemplated offence (Kirkness p520)
  - Where several people participated in a murder, it is irrelevant who actually inflicted the mortal blow, all are parties and can be charged w/ the same offence (H)(LI) - consider causation as principal first, then as aider/abetter
- Fault (hibbert p951 p426)
  - Did the accused intend to help or knew that their actions would assist? (Desire or near certain belief)
    - purpose is synonymous with intent (hibbert p951 p426)
  - accused need not be convictable s. 23.1
  - Defence -Duress does not negate a s. 21 offence, although common law duress may provide a separate defence (hibbert p951 p426)
  - defence of abandonment available, see common intention below (Kirkness p516)

### ***Common Intention***

S. 21(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them in carrying out the common purpose commits an offence each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

- Result - If two parties plan to commit an offence in conjunction and actually commit the offence, both are equally culpable regardless of who actually committed the offence
- Act requirement
  - form a common intention...
    - (a) Common intention need not be pre-planned, it can arise just prior to or at the time of the commission (*Kirkness p515*)
  - No actual assistance is required -
  - consequential offences - look at the particular offence committed
    - (a) s. 21(2) is reserved for where there has been a break in time between two offences, and a consequential offence occurs after but as a consequence of the planned offence (*Kirkness p520*)
  - Must be common intention to carry out an unlawful purpose
- Two essential fault elements (*Kirkness p515*)
  - 1). common intention to carry out unlawful purpose
  - 2) The commission of the offence has to be probable (reckless). and the accused must know or ought to have known of the probability
  - **“Knew or ought to have known”** this implies an objective standard
    - (a) For ‘stigma’ offences, a subjective standard is applied (just read-down ought to have know) (*Logan p 521*)
    - (b) leave ought to for manslaughter - objective awareness of risk of NTBH (*Davy p524*)
- accused need not be convictable s. 23.1
- Defence - Intention can be abandoned prior to offence (*kirkness p515*)
  - issue is quality of withdrawal, and D held to different standard depending on degree of participation in crime *Kirkness p518*
    - (a) factors p518
  - ex. unclear if saying "stop it you'll kill her" good enough to absolve liability for murder after accused facilitated rape and robbery of victim (*kirkness p515*)

## S. 22 – Counselling the Commission of an Offence

**22.** (1) Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.

Idem

(2) Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.

Definition of “counsel”

(3) For the purposes of this Act, “counsel” includes procure, solicit or incite.

1. Also known as inciting an offence that is committed, if the offence wasn't committed then see Incitement, below
2. Act - Counsel - includes procure, solicit, incite
3. Fault
  1. 1) intention to counsel
  2. 2) knew or ought to have known was likely -
    1. subjective = knowledge
    2. objective standard except in the case of murder; subjective standard. As

long as the conseq was not foreseeable, the A cannot be convicted.

- accused need not be convictable s. 23.1
- see also incitement section below, and note distinction from incitement = incitement (oral), abetting (physical)

### *Accessory after the fact -camponi p530, Duont*

23. (1) An accessory after the fact to an offence is one who knowing that a person has been a party to the offence receives comforts or assists that person for the purpose of enabling that person to escape.

- Does not fall under s. 21, but forms a separate offence
- Act (Camponi p532)
  - 1) conduct on the part of the accused which had the effect of receiving, comforting or assisting a person
  - 2) circumstances that such person had been a party to the offence with respect to which the accessoryship is alleged.
- Fault (Camponi p532)
  - 1) intention with respect to the conduct alleged
  - 2) knowledge by the accused of the circumstance that the person was a party to the offence with respect to which the accessoryship is alleged.
  - 3) ulterior intention or desire (purpose) that the person assisted "escape" as a consequence of the conduct alleged.
- ex. accused was present during murder, and helped wash clothes - Camponi p530
- no exception for spouses
- Can be guilty under s. 23 even if principal offender is not convictable - s. 23.1
- Accessory after murder falls under s. 240 w/ a stiffer penalty
- sentencing provisions - s. 463, generally half principal but not always

## Inchoate Offences

**Inchoate** (incomplete) offences: where the substantive offences are not completed.

Three types in Canadian law:

- **Attempt**
- **Incitement** (counseling)
- **Conspiracy**

These offences recognize criminal liability for culpable conduct, and fault that lies between innocent behaviour and the successful completion of a substantive offence.

Rational: criminality does not lie solely in the completion of an offence. There is demonstrable and sufficient harm, once the commission of a criminal offence has been set in motion to, to sanction the commencement of the offence as criminal conduct on its own.

### *Attempt*

- A person who tries to commit a criminal offence but does not succeed can nevertheless be found guilty of attempting the offence if his or her conduct falls within the terms of s.24:

**24.** (1) Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out the intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.

Question of law

(2) The question whether an act or omission by a person who has an intent to commit an offence is or is not mere preparation to commit the offence, and too remote to constitute an attempt to commit the offence, is a question of law.

- s. 24 is the general provision, although specific provisions also exist (ex. s 71 - dueling, 265(1)b assault)
- Act
  - o Must go beyond mere preparation Cline p540
  - o the distinction between preparation and attempt is essentially a qualitative one, involving the relationship between the nature and quality of the act in question and the nature of the complete offence, although consideration must necessarily be given, in making that qualitative distinction, to the relative proximity of the act in question to what would have been the completed offence, in terms of time, location and acts under the control of the accused remaining to be accomplished. (Deutsch p542)
    - ex. if A had intent to induce women to be employed for intercourse, holding out of financial rewards in interview could be sufficient actus reus (Deutsch p542)
  - o More from Cline p540
    - evaluated on a case by case basis
    - Evidence of similar acts done by the accused before the offence with which he is charged, and also afterwards if such acts are not too remote in time, is admissible to establish a pattern of conduct from which the Court may properly find mens rea.
    - not essential that the actus reus be a crime or a tort or even a moral wrong or social mischief.
    - when the preparation to commit a crime is in fact fully complete and ended, the next step done by the accused for the purpose and with the intention of committing a specific crime constitutes an actus reus sufficient in law to establish a criminal attempt to commit that crime.
  - o Depends on how obvious mens rea is - where the accused's intention is otherwise proved, acts which on their face are equivocal, may, nonetheless, be sufficiently proximate to constitute an attempt. Where, however, there is no extrinsic evidence of the intent with which accused's acts were done, acts of the accused, which on their face are equivocal, may be insufficient to show that the acts were done with the intent to commit the crime that the accused is alleged to have attempted to commit, and hence insufficient to establish the offence of attempt. (Sorrell p546)
- Fault
  - o intent to commit offence (mere recklessness appears to be insufficient)
  - o For attempted murder there must be subjective foresight of the fact that the death of the victim was likely to ensue. (Ancio p543, Logan p545)
- Defences
  - o Impossibility - whether or not it was possible"
    - only a defense where the offence is imaginary (*dynar p586 p547*)
  - o not defences - Legal Impossibility = Factual Impossibility in Canada, both are different from imaginary crimes
  - o ex. factually impossible - accused thought he was laundering drug money, but it was set up by the gov't (*dynar p586 p547*)
- Result
  - o Generally carries half of the penalty that the completed offence would bring

- sentencing s. 463 (general) and 239 (attempted murder)

### ***Incitement***

Two types:

- Incitement of an offence that is **actually committed** (counselling - s. 22: where the inciter, in effect, causes the commission of the offence through another person, see participation above)
  - Defendant is a party to the offence
- Incitement of an offence that is **not committed** (s. 464: an offence of inchoate liability)
  - Defendant is a non-party
  - Also called counseling a crime that isn't committed

Criminal Code., s. 464:

<p>S. 464</p> <p>(a) everyone who counsels another person to commit an indictable offence is, if the offence is not committed, guilty of an indictable offence and liable to the same punishment to which a person who attempts to commit that offence is liable; and</p> <p>(b) everyone who counsels another person to commit an offence punishable on summary conviction is, if the offence is not committed, guilty of an offence punishable on summary conviction.</p>
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Can be applied to any Criminal Code offence

1. ex. unilateral conspiracy (Dery SM p82)

#### A. Act

- I. Section 22(3) of the Code states that counselling includes soliciting, procuring, and inciting. This form of participation requires not only completion of an offence, but completion that is a consequence of the inciter's action.
  1. Counselling: advise or recommend
  2. Procuring: investigate encourage or persuade
  3. Soliciting: Entreat or urge
  4. Inciting: Urge, stir up, or stimulate
- i. deliberate encouragement or active inducement of the commission of a criminal offence. - Hamilton SM p89
  - the materials or statements made or transmitted by the accused must actively induce or advocate - and not merely describe - the commission of an offence - Hamilton SM p89
- II. Does not require agreement as conspiracy does, can be unilateral (Dery SM p82)
- III. distinction from abetting = incitement (oral), abetting (physical)

#### B. Fault

- I. an accompanying intent or conscious disregard of the substantial and unjustified risk (i.e. recklessness) inherent in the counselling; that is, it must be shown that the accused either intended that the offence counselled be committed, or knowingly counselled the commission of the offence while aware of the unjustified risk that the offence counselled was in fact likely to be committed as a result of the accused's conduct. (Hamilton Sp91)
  - Do not have to initiate the transaction, can start with party alleged to have been incited (*Gonzague*)
  - Awareness of a possibility that the crime will be committed and not justified in taking the risk
1. This gives protection to those who teach potentially unlawful skills to people for a lawful and valuable purpose ie. Teachers
  - ex. no intention to induce bomb-making or burglary- D attached instructions on bomb-making and burglary to a credit card generator - he hadn't read the instructions (Hamilton Sp91)
  - Can't attempt to incite

- Same penalty as attempt (half of actual offence)

### *Conspiracy*

- A conspiracy exists when two or more people agree to commit a criminal offence and the offence of conspiracy is complete upon their agreement. S. 465 CCC
- If unilateral conspiracy, see incitement
- Again, applies to any criminal code offence
- Act (Dungey, dynar p586 p547, dery smp82)
  - agreement -must have a meeting of at least two minds
  - must be an underlying offence before the elements of the attempt offence can be considered. (dynar p586 p586)
  - offence need not be legally or factually impossible (dynar p586 p586)
  - requires at least two ppl, although all conspirators need not be identified or convictable (Dynar p586)
  - Can't attempt to conspire (Dery Sp82)
    - (a) ex. no consp - two discussed possibility of stealing liquor, but didn't agree and didn't take steps to complete (dery smp82)
- Fault Requirements (dynar p586 p547)
  - Intention to agree
  - At least two ppl must agree
    - (a) pretending not to agree isn't agreement (Dynar p586)
    - (b) police informant can't be one of the two (Dynar p586)
  - Intention to put common design into effect - requires knowledge of terms of agreement (dynar p586 p547)
  - More than one person must intend (Undercover cops don't count)
  - Defence of Impossibility? Only relevant when two people conspire to commit an imaginary crime (dynar p586 p547)

### **Corporate Liability**

s. 2: "organization" means (a) a public body, body corporate, society, company, firm, partnership, trade union or municipality, or (b) an association of persons that (i) is created for a common purpose, (ii) has an operational structure, and (iii) holds itself out to the public as an association of persons;

"representative", in respect of an organization, means a director, partner, employee, member, agent or contractor of the organization;

"senior officer" means a representative who plays an important role in the establishment of an organization's policies or is responsible for managing an important aspect of the organization's activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer;

22.1 In respect of an offence that requires the prosecution to prove negligence, an organization is a party to the offence if

- (a) Acting within the scope of their authority
  - (i) one of its representatives is a party to the offence, or
  - (ii) two or more of its representatives engage in conduct, whether by act or omission, such that, if it had been the conduct of only one representative, that representative would have been a party to the offence; and

(b) the senior officer who is responsible for the aspect of the organization's activities that is relevant to the offence departs — or the senior officers, collectively, depart — markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent a representative of the organization from being a party to the offence.

- Concerns a corporation being a party to a negligence type offence
- (a) - “acting within the scope of their authority
- (b) –“marked departure” must be more than simple negligence or lack of due diligence
  - does not require actual knowledge
- aggregate approach, corporation can be a party even if no single officer satisfies “marked departure” as long as the total equals a marked departure
- Strict liability offence

**22.2** In respect of an offence that requires the prosecution to prove fault — other than negligence — an organization is a party to the offence if, with the intent at least in part to benefit the organization, one of its senior officers

- (a) Acting within the scope of their authority, is a party to the offence;
- (b) having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organization so that they do the act or make the omission specified in the offence; or
- (c) knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence.

- Applies to all offences other than those requiring negligence (subjective fault crimes)
- No aggregate element, one officer must have required fault elements
  - Must be acting within scope
  - Must intend to benefit the corporation
- Three types
  - Officer is actor
  - Officer acts through representatives
  - Officer allows representative to commit offence

vicarious liability = acts and fault of one person are attributed to another - normally disfavored under criminal law, as such a crime may be said to offend the principles of fundamental justice under s. 7 - however, a statute that applies to only corporations may be immune from s. 7 challenge since corporations are not protected under s. 7

## Ignorance

- S. 19 – ignorance is not an excuse
- Reason: we expect people to learn the basic rules of society (*Jorgensen* p621)
  - Encourage knowledge of the law, if we don't, then there is an incentive to remain ignorant
- Due diligence in trying to figure out law not a defence (*Jorgensen* p621)

Exceptions

- Colour of right if explicitly stated in provision: ex. ss. 322 Theft, 429(2), 72(2) Forcible entry (*Howson* p615)
  - Accused charged with theft for towing a car, there was no statutory right for the towing company to keep the car.
  - Colour of right applied, Howson honestly believed he had the authority, therefore could not be applied
  - Onus is on the crown to show that there was no colour of right

- Sometimes when one provision requires knowledge of breaching another - ex Probation Violation (*Docherty*)
  - Care and control of a motor vehicle while impaired
  - Willful Breach of a term of probation (keep the peace and be of good behaviour)
  - Court said 'willfully' meant there must be knowledge that his actions were a breach of his probation, this basically circumvents s. 19
  - Was still guilty of care and control, but got away with breach of parole, law then removed willfully
- impossible to gain knowledge of law because not published (jorgensen p621 p621)
- mistake of fact, ex. property

### ***Mistake of law vs Mistake of Fact***

- If you honestly believed you had satisfied the legal requirements then this is a mistake of fact and is a component of *mens rea*
- A mistake of law is where you don't think the law prohibits what you are doing
- License suspension (*Prue and Baril (ignore)*, *MacDougall*, *pontes p628 p393*)
  - When charged under CCC, If you didn't actually know your license was suspended you'll be acquitted, mistake of fact (*Prue*)
  - When charged under Provincial Statute, mistake of law, no defence (*MacDougall*)
  - SCC has said that both cannot be correct, probably mistake of law (*pontes p628 p393*)
- Obscenity (*Jorgensen p621*)
  - If you don't know that the specific content is prohibited, then mistake of law
  - If you don't actually know what content is on the tapes, then mistake of facts

### ***Officially induced error (Jorgensen p621, Levis, sp98)***

- Various factors will be taken into consideration in the course of this assessment, including the efforts made by the accused to obtain information, the clarity or obscurity of the law, the position and role of the official who gave the information or opinion, and the clarity, definitiveness and reasonableness of the information or opinion. It is not sufficient in such cases to conduct a purely subjective analysis of the reasonableness of the information. This aspect of the question must be considered from the perspective of a reasonable person in a situation similar to that of the accused. (Levis sp98)
- Six Requirements
  - c) Must be a question of law, or mixed fact and law
  - d) Must be consideration of legal consequences, aware of possibility that their actions might be unlawful
  - e) Require accused to obtain advice from an appropriate official
    - f) general, therefore, government officials who are involved in the administration of the law in question will be considered appropriate officials. (jorgensen p621)
      - relying on a court judgement for others insufficient (*Chez Pierre*)
    - g) Advice received must be reasonable
      - h) if an appropriate official is consulted, the advice obtained will be presumed to be reasonable unless it appears on its face to be utterly unreasonable.
    - i) Advice must also be erroneous
    - j) Must rely on the advice given
      - k) ex the advice was obtained before the actions in question were commenced and by showing that the questions posed to the official were specifically tailored to the accused's situation.
- If all are satisfied then D is acquitted
- Does not apply to advice from lawyers, or reliance on judgments (only public officials?)

## Sexual Assault and Assault in General

- There are a bunch of elements that do not apply to other offences
- Effects women and children disproportionately
- History
  - Until 1983, a husband could not be convicted of raping his wife
  - Was also difficult to obtain conviction
  - Past sexual history was admissible
  - Doctrine of recent complaint, if not immediately made, then adverse assumption
  - Corroboration required crown to produce evidence beyond testimony
  - Sexual assault was created in 1983, most restrictions were eliminated
  - Darrach upheld the current evidence exclusion laws s. 276 (see CAN)- Darach p659

### Elements → Section 265(1) and (2)

- If have weapon, or injury, use 272 or 273, resp. otherwise use 265
- Conduct
  - (Voluntary) touching
  - Without consent (*ewanchuk p668*)

### Jurisprudence

- Consent is determined subjectively from the point of view of the complainant at the time assault occurred
- If crown can prove BRD that the complainant did not consent in their own mind, then no consent
- doesn't matter if conduct reasonable, or if consent communicated
- if the complainant's testimony is the only source of direct evidence as to her state of mind, credibility must still be assessed by the trial judge, or jury, in light of all the evidence. It is open to the accused to claim that the complainant's words and actions, before and during the incident, raise a reasonable doubt against her assertion that she, in her mind, did not want the sexual touching to take place.
- Consent can be vitiated where there is intent to cause NTBH and NTBH caused - unclear if applies in SA but lower courts say yes! (*Jobidon*)
- Legislation
  - S. 265(3) – no consent when compl. submits/doesn't resist because
    - (a) Application of force to compl. or 3rd party
    - (b) Threats or fear of above appl of force.
    - (c) Fraud
    - (d) Exercise of Authority
  - S. 273.1(1) – consent is the voluntary agreement of the complainant to engage in sexual activity
  - S. 273.1(2) – no consent when
    - (a) Consent is given by someone other than the complainant
    - (b) Complainant is incapable of consenting
    - (c) Induced through trust, power or authority
    - (d) Complainant communicates a non-consent
    - (e) Complainant communicates a desire to cease sexual conduct
- Sexual nature (*Chase p638*)
  - sexual integrity of the victim must be violated
  - objective test: "Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer"
    - The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other

- circumstances surrounding the conduct, including threats which may or may not be accompanied by force, will be relevant
- The intent or purpose of the person committing the act, to the extent that this may appear from the evidence, may also be a factor in considering whether the conduct is sexual. If the motive of the accused is sexual gratification, to the extent that this may appear from the evidence, it may be a factor in determining whether the conduct is sexual. It must be emphasized, however, that the existence of such a motive is simply one of many factors to be considered, the importance of which will vary depending on the circumstances.
- ex. grabbing breasts and saying you want it (Chase p638)
- No requirement of penetration

## **Fault**

- 1) Intention to touch
  - This should be easy
- 2) Without consent (*pappajohn p639, sansregret p444, ewanchuk p668*)
  - knowing of, or being reckless or wilfully blind (not necessary to discuss since recklessness is sufficient) to a lack of consent on the part of the person touched. (ewanchuk p668)
    - ex. WB - accused broke into victims' house (Ex gf), she had sex with him because she was afraid (sansregret p444)
    - Belief of consent must relate to actual communication
      - Can be through words or conduct
      - Implied consent is not adequate
    - Awareness of the possibility the consent has not been given
  - Mistaken Belief Defence applies (*Oslin*)
    - Where the D honestly believed that valid consent had been given, cannot convict (ewanchuk p668)
      - the accused believed that the complainant effectively said "yes" through her words and/or actions.
      - silence, passivity, inertness is not sufficient
      - ex. Continuing sexual contact after someone has said "No" is, at a minimum, reckless conduct which is not excusable. ewanchuk p668
    - (Beware of mistakes of law, for example, even if D believed consent had been given, if that consent would not have been valid under one of the statutes, then this is a mistake of law and conviction is still possible)
    - D must provide an AOR to substantiate their claim to mistaken belief (pappajohn p639, Oslin)
      - AOR - Must go beyond a mere assertion by the D, need more support, (Oslin) consider D's testimony and surrounding evidence:
        - ex. clothes neatly folded, no damage, present in the house for hours, no physical injuries (pappajohn p639 p643)
      - Can use any evidence given before the court - but consider s. 276 for evidence of complainant's sexual history - upheld as constitutional in darrach p659
    - Mistaken Belief Defence is invalid when (s. 273.2)
      - Mistaken belief arises due to self-induced intoxication, or willful blindness
        - note: no point discussing WB, since it equates recklessness
      - Or the accused did not take reasonable steps to ascertain whether consent had actually been given
    - Also consider - trier of fact is to review evidence and consider the presence or absence of reasonable grounds for the belief - s. 265(4)
- 3) (There is NO fault element for sexual nature!! ewanchuk p668)

## Homicide

- CCC s. 222

### Homicide

**222.** (1) A person commits homicide when, directly or indirectly, by any means, he causes the death of a human being.

### Kinds of homicide

(2) Homicide is culpable or not culpable.

### Non-culpable homicide

(3) Homicide that is not culpable is not an offence.

### Culpable homicide

(4) Culpable homicide is murder or manslaughter or infanticide.

### Idem

(5) A person commits culpable homicide when he causes the death of a human being,

(a) by means of an unlawful act;

(b) by criminal negligence;

(c) by causing that human being, by threats or fear of violence or by deception, to do anything that causes his death; or

(d) by wilfully frightening that human being, in the case of a child or sick person.

### *Second-degree murder s. 229*

229. Culpable homicide is murder

(a) where the person who causes the death of a human being

(i) means to cause his death, or

(ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;

(b) where a person, meaning to cause death to a human being or meaning to cause him bodily harm that he knows is likely to cause his death, and being reckless whether death ensues or not, by accident or mistake causes death to another human being, notwithstanding that he does not mean to cause death or bodily harm to that human being; or

(c) where a person, for an unlawful object, does anything that he knows or ought to know is likely to cause death, and thereby causes death to a human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being.

- 229a(ii)
  - Fault (simpson p790 p692, cooper p791 p694)
    - (a) subjective intent to cause bodily harm;
    - (b) subjective knowledge that the bodily harm is of such a nature that it is likely to result in death.
  - Act and fault concurrent (*cooper p791 p694*)
    - Must concur in time - ex. accused began strangling before passing out (*cooper p791 p694*)
    - Not strict or precise - If death results from a series of wrongful acts that are part of a single transaction then it must be established that the requisite intent coincided at some point with the wrongful acts. (*cooper p791 p694*) p694

- Must occur during the same transaction (*Pare*)
- S. 229 (b) Transferred intent (*fontaine p698*)
  - If you kill someone other than who you intended to kill, you still satisfy the intent requirement
  - Can't intend to kill yourself and kill someone else by mistake (*fontaine p698*)
- S. 229(c)
  - Unlawful object (*tennant p703 and naccarato p418 and Naccarato p 705, vasil p705 p705*)
    - the "unlawful object" contemplated by Parliament in that section is that which, if prosecuted fully, would amount to an indictable offence requiring mens rea (*vasil p705*)
  - "ought to have known" – **likely** no longer of effect, unconstitutional (*Martineau p721*)
  - Where accused knows death is likely (probable), can still convict
  - Very rare, only when no intent to cause bodily harm, but there is an awareness the death is likely
- Consider section 230

230. Culpable homicide is murder where a person causes the death of a human being while committing or attempting to commit high treason or treason or an offence mentioned in section 52 (sabotage), 75 (piratical acts), 76 (hijacking an aircraft), 144 or subsection 145(1) or sections 146 to 148 (escape or rescue from prison or lawful custody), section 270 (assaulting a peace officer), section 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm), 273 (aggravated sexual assault), 279 (kidnapping and forcible confinement), 279.1 (hostage taking), 343 (robbery), 348 (breaking and entering) or 433 or 434 (arson), whether or not the person means to cause death to any human being and whether or not he knows that death is likely to be caused to any human being, if

(a) he means to cause bodily harm for the purpose of

(i) facilitating the commission of the offence, or

(ii) facilitating his flight after committing or attempting to commit the offence, and the death ensues from the bodily harm;

(b) he administers a stupefying or overpowering thing for a purpose mentioned in paragraph (a), and the death ensues therefrom; or

(c) he wilfully stops, by any means, the breath of a human being for a purpose mentioned in paragraph (a), and the death ensues therefrom.

### ***Charter considerations (Vaillancourt p709, martineau p717, Sit)***

- Any murder or stigma offences which allows for a conviction in the absence of subjective fault (not aware of the possibility of death) is of no force or effect (vaillancourt p709)
- (Maybe) As a minimum the Charter requires knowledge of the probability of death
- (Definitely) Recklessness (possibility of death) is the bare minimum standard

### ***First degree Murder***

- An enhanced sentencing mechanism
- Must show the requirements for second degree murder, then show the additional requirements for first degree murder
- Requirements
  - Must satisfy criteria for Murder from s. 229 and/or s. 230
  - Must satisfy the criteria for one of the categories of First Degree Murder set out in s. 231
  - All types require the additional Causal requirement of “substantial and integral cause” (nette p343, see causation above)
- There are several different types of first degree murder
- Use to be capital murder, was abolished in 1976, first degree murder was established (capital murder carried the possibility of capital punishment)
- First-degree murder still carries the most severe (other than US) sentence in the western world, 25 years w/out the possibility of parole

s. 231(2) - “Murder is first degree murder when it is planned and deliberate”

- Interpretation (*more p723, Widdifield*)
  1. planned has natural meaning of calculated scheme or design which has been carefully thought out, and the nature and consequences of which have been considered and weighed. Can be a simple plan (Widdifield p724)
  2. deliberate means considered, not impulsive (More p723), slow in deciding, cautious (Widdifield p724)
- Attempt to make the distinction between planned and impulsive murder
- Recklessness is sufficient, ex. group beat man to death with bats, but didn't intend to kill him (*Nygaard*)
  1. Awareness that a planned beating was likely to result in death is sufficient to satisfy the requirements for first degree murder

- s. 231 (4) Murder is first degree murder when it is murder of a police officer and others
- Does not require planning or deliberation
  - Must show that accused (Collins p730)
    - had knowledge of identity of victim as one of the listed ppl and that such person was acting in the course of his duties or
    - was reckless as to such identity and acts of the victim
  - Includes a police officer, constable, sheriff, warden, jailer, other prison workers
- s. 231(5) While committing or attempting to commit
1. while committing or attempting to commit requires the killing to be closely connected, temporally and causally with an enumerated offence (Russell p735)
  2. one continuous transaction Russell p735
- Sexual assault, hijacking an aircraft, kidnapping, forcible confinement, hostage taking
  - Forcible confinement can exist almost anywhere there is a robbery
  - Some Courts of Appeal have found that a Robbery could therefore result in a charge of first degree murder, not in Alberta
- S. 231(6) –(6.2)
- (a) 6 Criminal harassment
  - (b) 6.01 Terrorist Activity
    1. Penney says pure politics,
  - (c) 6.1 Use of explosives in association with criminal organization
    1. Penney says pure politics,
  - (d) 6.2 Intimidation

#### Charter challenges

- All have failed
- SCC has said that the minimum standard is recklessness, but because First degree murder does not require a reduced component of mens rea, the recklessness standard is met
- Minimum 25 year punishment is not grossly disproportionate, challenge on these grounds have also failed
- 231(5)(b) - Arkell p737, 231(5)(e) Luxton p738

#### *Manslaughter 222(5), 234, creighton p462*

- If a culpable homicide is not murder or infanticide then it is manslaughter, s. 234
- 222(5) A person commits culpable homicide when he causes the death of a human being,
- (a) by means of an unlawful act;
  - (b) by criminal negligence;
  - (c) by causing that human being, by threats or fear of violence or by deception, to do anything that causes his death; or
  - (d) by willfully frightening that human being, in the case of a child or sick person.
- While culpable homicide is not the same as manslaughter, if you commit culpable homicide, manslaughter will be found as a minimum
  - Two forms in Canada, ss. 222(5) (*creighton p462*)
    - Actually there are four, last two are redundant
    - Unlawful Act s. 222(5)(a)
      - Must be either a criminal or regulatory offence, and must be inherently dangerous
      - Where the unlawful act is strict liability offence, under s. 7, it must be shown that

- the accused made a marked departure from the usual standard
  - ex. injecting drug (creighton p462)
- Criminal negligence s. 222(5)(b)
  - Defined in s. 219
    - Doing anything, or not doing something they have a duty to
  - Requires a marked and substantial departure from the standard

## Provocation

**232.** (1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.

### **What is provocation**

(2) A wrongful act or an insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section if the accused acted on it on the sudden and before there was time for his passion to cool.

For the purposes of this section, the questions

- (a) whether a particular wrongful act or insult amounted to provocation, and
- (b) whether the accused was deprived of the power of self-control by the provocation that he alleges he received, are questions of fact, but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being.

Culpable homicide that otherwise would be murder is not necessarily manslaughter by reason only that it was committed by a person who was being arrested illegally, but the fact that the illegality of the arrest was known to the accused may be evidence of provocation for the purpose of this section.

- Manslaughter has no minimum, could be found guilty and get an absolute discharge
- Restrictions (thibert p760)
  - Can only be made out for murder charges, not other offences like attempted murder (Campbell p772)
  - Provocation must be made by the victim
    - can't be by a 3rd party
  - Cannot be provoked by something done with legal right
    - Legal right only includes action that is protected by law, and does not include activity that is not explicitly prohibited
    - Positive legal rights only
      - There is a legal right to self-defense, therefore where SD is being exercised by the deceased, the defense of provocation won't fly
      - Police officer has a right to detain etc, won't constitute provocation
  - Victim (provoker) cannot have been incited to provoke by accused
    - Can't induce the victim to provoke
  - Provocation must be sudden
    - History is only relevant as it gives colour to the reaction

### **The test (Hill p753) - must meet AOR threshold to be put to jury**

- A. 1. Would an ordinary person be deprived of self-control?
  - I. Subjectivised objective standard
    - a. Normal temperament and level of self-control (*hill p750*)
    - b. We expect a minimum standard for everyone

- c. not exceptionally excitable, pugnacious (Hill p757)
  - d. Transitory states like drunkenness not considered (hill p750)
  - e. Constitutionality sound because provocation is only brought up after all the elements of Murder are already proven, it does not violate s. 7 of the Charter for applying an objective standard (*cameron p772*)
  - f. Personalization
    - i. Non-idiosyncratic personal characteristics (*hill p750*)
    - ii. attributes of accused that we can ascribe to a group, ex. Same age, sex, race
    - iii. Consider factors having “a special significance” to accused (*thibert p760*)
      - Race may be relevant in certain situations (Hill p757)
    - iv. Background history - consider background of relationship, including earlier insults which culminated in the final provocation (Thibert p762)
      - note: rejection in context of romantic relationship alone not basis for defence (Thibert p765)
- B. 2. Was accused provoked? (*thibert p760*)
- I. subjective
    - a. can take into account mental state and psychological temperament - Hill p757
    - b. take into consideration background and history of relationship (Thibert p763)
- C. 3. Did the accused act on the provocation on the sudden and before there was time for his or her passion to cool?

#### **Relationship to fault (*campbell p770, cameron p772, parent p774*)**

- Defense of Provocation may be relevant in showing that the accused did not have the required *Mens Rea* (*campbell p770*)
  - Eg. Reaction is so impulsive that they did not know death was likely
  - This would be applied before defence is raised and specifically addresses the issue of whether there was a murder
- As normally applied, provocation does not detract from the *mens rea* required to establish murder. (*cameron p772*)

#### **How it works**

- Crown must first show murder
- To bring up defense, the accused must only establish an air of reality (*thibert p760*)
  - This is decided by the judge
- Once AoR is established, Crown must show accused was not provoked BRD
- Need only establish a reasonable doubt

#### **Critiques**

- Homosexual panic - seems to favor overreactions that we more typically associate with men.
- Violence against women - men have used this defence to defend action against women
- Cultural Background
- Defense is probably in effect because of the minimum sentence for murder

### **Defences of Mental Disorder and Automatism**

- Basically there are three branches, **unfit to stand trial** (ss. 2 & 672.22), **Not Criminally Responsible** (s. 16) by reason of mental disorder, and non-mental disorder automatism

### ***Unfitness to stand Trial***

s. 2 "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;
- S. 672.22 – accused is presumed fit until otherwise proven otherwise on BOP
- S. 672.23
  - (1) Accused, crown, and court all have the power to raise issue
  - (2) Onus falls on party raising the issue
  - (3) Issue can be raised before or during trial
- s. 672.32(1) Where accused is found to be unfit, the crown may try again at a later date if the accused becomes fit
- Consequences - mental health board, panel, may get committed for life

### ***Interpretation (Whittle p781)***

- need operating mind (same as for voluntary confessions rule)- must possess a limited degree of cognitive ability to understand what he or she is saying and to comprehend that the evidence may be used against him
  - not a prerequisite that accused be capable of exercising analytical reasoning in making a choice to accept the advice of counsel or in coming to a decision that best serves her interests
- Very minimal standard
- Very Different from the standards set out in s. 16
  - Can be NCR but still fit to stand trial
  - Can be unfit but still criminally responsible

### ***Not Criminally Responsible, s. 16***

**16.** (1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person: incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

#### **Presumption**

(2) Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities.

#### **Burden of proof**

(3) The burden of proof that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party that raises the issue.

### **Procedure**

- Crown can only raise issue of MD when; (*Swain p783*)
  - The trier of fact has found the accused otherwise guilty
  - When the Defence raises issues of capacity in regards to intent
  - at any other time, will violate Ds s. 7 rights
- Burden falls on party alleging MD, proof is based on a BOP, and must overcome a presumption that the accused does not suffer from MD
- Previous presumption was upheld as constitutional (*Chaulk p800 and Morrissette p785*)
- Issues of law addressed by Judge

- Is there an Air of Reality?
- Would the condition amount to a MD if proved?
- Issues of fact addressed by Jury
  - Was the accused capable of appreciating the nature and quality? Or
  - Did the accused know it was wrong?

### Consequences (Winko p788)

- Court has three options where Defence is raised, conviction (if defence fails), or acquittal or Review Board (if the defence succeeds and accused found to be dangerous)
- Review Board (RB)
  1. Where accused is NCR they are referred to a review board
  2. RB has the power to keep accused in a secure institution, release the accused on conditions, or release the accused unconditionally
  3. Other than unconditional release the Review Board must find that the accused is dangerous to society
  4. RB must employ the least intrusive method that is not contrary to public safety
  5. Decisions by the Review Board must be reviewed at least every 12 months
  6. There can be no presumption of dangerousness

### What is a Mental Disorder?

- (1) Judge decides - it is not a medical or scientific opinion, but we rely on experts as to nature of the accused's mental state, illness, condition, etc. (simpson p692 p790)
  - a. ex. MD -personality disorder or psychopathic personality (simpson p692 p790)
- (2) Can be any illness, disorder, or abnormal condition of the human mind that impairs the human mind and its functioning (cooper p694 p794)
- (3) Excludes self-induced states caused by alcohol or drugs as well as transitory mental states such as hysteria or concussion, or non MD -automatism (cooper p694 p794)

### The Two Branches of s. 16

- If either is satisfied then accused is NCR
- Applied to the accused at the time of the act (*cooper p694 p796*)
- Accused doesn't have to have a normal (or any) emotional response (simpson p692 p796)
- There are two distinct branches
  1. a) appreciating the nature and quality of the act, and
    1. "Was the accused unable fully to appreciate not only the nature of the act but the natural consequences that would flow from it?"(*cooper p791 p694 p694*)
    2. Requires the accused appreciate that they are doing a certain act, but must also perceive the consequences, impact and results of that act
    3. Do not need to "appreciate" the penal consequences attached, or that they are applicable to him (*Abbey p798*)
      1. ex. accused thought that he was protected from the law (*Abbey p798*)
      2. ex. irresistible impulse not sufficient (*Abbey p798*)
      3. ex. satisfied - accused thought he was god and victim was satan - Landry p814
  2. b) knowing that the act is wrong
    1. Wrong means wrong according to law and ordinary moral standards (*Chaulk p803*)
    2. Boils down to whether the accused was impaired in a way that prevented him from making a rational decision
    3. Must be able to know right from wrong in an abstract sense (i.e. killing is wrong). But must also be able to apply that knowledge in a rational way to the specific killing that took place (*Oomen, p809*)
      1. ex. satisfied - accused was convinced deceased was about to kill him, and that the only

- way out was to kill the deceased (Oomen p812)
- 2. ex. satisfied - accused thought he was god and victim was satan - Landry p814

## Automatism

- A state of impaired consciousness, rather than unconsciousness, in which an individual, though capable of action, has no voluntary control over that action (Stone p864)
- Available whenever there is evidence of unconsciousness throughout the commission of the crime (*rabey p817*)
- Where automatism is shown, the accused acted involuntarily and therefore does not have the required *actus reus*
- Falls into two branches - Stone p864
  - Non-mental Disorder Automatism – leads to a full acquittal
  - Mental Disorder Automatism – same as MD, NCR

### *Automatism flowchart (stone p837)*

- 1) assess whether a proper foundation for a defence of automatism has been established.
  - is the equivalent of satisfying the evidentiary burden for this defence.
  - The mere assertion of involuntariness will not suffice.
  - Question of mixed law and fact, decided by the Judge
  - Large presumption that it stems from a disease of the mind (*stone p837*)
  - presumed voluntary - so burden on defence to prove involuntariness BOP
    - reverse onus justified under s. 1 p870
  - defence must make an assertion of involuntariness and call expert psychiatric or psychological evidence confirming that assertion.
  - trial judge must decide if there is evidence upon which a properly instructed jury could find that the accused acted involuntarily on a balance of probabilities. trial judge must first examine:
    - the psychiatric or psychological evidence and inquire into the foundation and nature of the expert opinion.
    - all other available evidence, if any.
    - TJ shouldn't weigh evidence - leave for jury fontaine p698 p885
    - Relevant factors are not a closed category and may, by way of example, include: pp872-874
      - the severity of the triggering stimulus,
      - corroborating evidence of bystanders,
      - corroborating medical history of automatistic-like dissociative states,
      - whether there is evidence of a motive for the crime, and
      - whether the alleged trigger of the automatism is also the victim of the automatistic violence.
      - no single factor is meant to be determinative.
- 2) If proper evidentiary foundation established, TJ must next determine whether to leave mental disorder or non-mental disorder automatism with the trier of fact (Stone p875+)
  - Comes down to Q of is the condition a mental disorder? p875
    - presume MD
  - Holistic Approach (*Stone p877*)
    - No single Factor is conclusive
    - Were the factors Internal or External?
      - compare with a normal persons reaction to the stimulus p877

- use this theory in case of psychological blow automatism 879
- contextual objective test -take in the circumstances p880
- Internal, where the cause of the automatism is internal to the D, this serves as evidence of MD
  - Often permanent, or at least non-transient in nature
- External, where the cause of the automatism is external to the D, this serves as evidence of non-MD automatism
  - Often transient, ex. Concussion, extreme stress, etc.
  - limited to things ppl would find extremely shocking p878
- ex. Stone - shock of wife insults wasn't extraordinary (Stone)
- Continuing Danger p880
  - any condition which is likely to present a recurring danger to the public should be treated as a disease of the mind.
    - qual - absence of danger not determinative of no MD
  - the more frequent the trigger, the greater the risk to society, more likely MD
- Policy Factors p882
  - automatism easily feigned
  - if unclear whether MD or non MD, presume MD
  - concerns based on facts, ex. parks p834 was clearly sleepwalking (hard to fake), acquit
  - consider greater level of awareness, ex. motive, Stone's claim suspicious because came from angry wife (stone p837)
- ex. MD automatism - only cause was wife's words, continuing danger existed Stone p884
- Types of Evidence
  - Anything from the first step
  - Motive, or lack thereof
  - Expert testimony
  - Corroborating evidence (eye-witnesses, documented history, etc.)
- Onus (*stone p837*)
  - D must show air of Reality of Automatism
  - Evidentiary – D must prove to Judge that automatism was not due to a MD – Balance of Probabilities
  - Legal – D must also prove to the Decider of Facts that he was disassociative – Balance of Probabilities

**Who decides what?**

Judge	Jury
Is there a Mental Disorder? <ul style="list-style-type: none"> <li>• Internal v. external, cont. danger</li> </ul> Air of reality? <ul style="list-style-type: none"> <li>• There must be some evidence support the claim</li> </ul>	If Judge did not find MD, then address the question of whether there was automatism? <ul style="list-style-type: none"> <li>• Jury will never be instructed on both s. 16 and automatism</li> </ul>

**DEFENCES**

**(1) Intoxication**

**The conventional defence (bernard p901)**

- For specific intent offences, Intoxication is considered among other evidence

- If accused was too intoxicated to have required *mens rea*, then must acquit
- For all other offences, requiring general intent, it is not a defence

**Specific v. General Intent**

- Generally, we do not consider intoxication for General Intent offences
- Courts still struggle to make this distinction
- Specific Intent require crown to prove a more sophisticated intent than General Intent
- general intent offences - can presume mens rea from actus reus (bernard p901)

General Intent	Specific Intent
<ul style="list-style-type: none"> <li>• Assault – applying force without consent, simple, general intent</li> <li>• Sexual Assault – general intent because its assault, but has many characteristics of a specific intent offence</li> <li>• Manslaughter – general intent offence</li> <li>• B&amp;E – General intent</li> <li>• B&amp;E with intent to commit a general intent offence – general intent</li> </ul>	<ul style="list-style-type: none"> <li>• Murder – requires awareness of the probability of death, specific intent</li> <li>• Robbery –Specific intent</li> <li>• B&amp;E with intent to commit a specific intent offence – specific intent</li> </ul>

**For the exam you will be told whether general or specific**

- Can't argue that you were too drunk to know you were drunk
- Intoxication can sometimes be a consideration in general intent offences (see EI below)
- Otherwise, in general intent offences we ignore the fact that the accused was intoxicated, as a matter of law we deem the defendant to have been sober
- Only applies to self induced intoxication, if you are unknowingly intoxicated and do not have the required *mens rea* you will be acquitted for both general or specific

**(2) Extreme Intoxication**

- There is now a new defence of extreme intoxication (*daviault p912*)
  1. drunkenness akin to automatism - such an extreme degree of intoxication that they were in a state akin to automatism or insanity that might expect to raise a reasonable doubt as to their ability to form the minimal mental element required for a general intent offence
  2. We can negative *mens rea* and possibly *actus reus* in cases of extreme intoxication
- Applies even in cases of self-induced intoxication
- Applies a reverse onus on the defendant, BOP
- Relies on expert evidence, corroborating evidence etc.
- This is actually been very hard to prove

**Self-induced Intoxication - When defence not available**

**33.1** (1) It is not a defence to an offence referred to in subsection (3) that the accused, by reason of self-induced intoxication, lacked the general intent or the voluntariness required to commit the offence, where the accused departed markedly from the standard of care as described in subsection (2).

**Criminal fault by reason of intoxication**

(2) For the purposes of this section, a person departs markedly from the standard of reasonable care generally recognized in Canadian society and is thereby criminally at fault where the person, while in a state of self-induced intoxication that renders the person unaware of, or incapable of consciously controlling, their behaviour, voluntarily or involuntarily interferes or threatens to interfere with the bodily

integrity of another person.

### Application

(3) This section applies in respect of an offence under this Act or any other Act of Parliament that includes as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person.

- Amendment was passed in the wake of the SCC decision in *daviault p912*
- Self-induced intoxication cannot be a defence to show a lack of the general intent or involuntariness where the offence is an interference or threat of interference with the bodily integrity of another(s. 33.1(3)) and the accused departed markedly from the standard of care in sub s. (2)
- Marked departure when accused voluntarily consumed an intoxicating substance
- Very broad, not really a marked departure
- objective, so doesn't apply to stigma offences - counter argue the standard is absolute, not objective
- doesn't apply to specific intent offences

### Summary

- In any case where an accused is charged with a general intent offence involving violence, the defence of extreme intoxication is NOT valid by s. 33.1
- can't use intoxication as a defence to an element of the offence that includes intoxication - Penno p911
- *daviault p912* applies to everything else
- However, s. 33.1 may not survive a constitutional challenge, remains to be seen

### Justifications & Excuses

- Defences that can be invoked by the accused
- CC, s. 8(3)

8(3) Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of Parliament except in so far as they are altered by or are inconsistent with this Act or any other Act of Parliament.

### Proof

- D has only evidentiary burden, i.e. must raise AOR
- No reverse onus on Defendant, Crown must disprove BRD

### Justification v. Excuse (*perka p927*)

(3) Justification is a defence that morally justifies a crime

1. Eg. Self-defence

(4) Excuse only legally justifies a crime

1. Eg. Breaking into a cabin to avoid dying

(5) Penney says this distinction is arbitrary

(6) Both Justification and Excuse have same legal significance

## Necessity

- Most other defences are variations of necessity
- Recognition that human beings can be compelled by circumstance to commit a criminal offence, but in those circumstances we would view these actions to be justified or excused
  - Duress is Necessity compelled by another party
  - Self-Defence is similar

### Requirements (*perka p927, latimer p933*)

- Imminent peril or danger
  1. Uses a modified objective standard, same age, same sex, education, experience
    - only consider non-idiosyncratic characteristics
    - would this person reasonably have thought they were in imminent peril?
  2. disaster must be imminent, or harm unavoidable and near. It is not enough that the peril is foreseeable or likely; it must be on the verge of transpiring and virtually certain to occur (*latimer p933*)
    - will probably be interpreted flexibly in order to satisfy the requirements of s. 7 of the Charter
    - You don't have to wait until the last absolute moment, ex lost hiker ex.
  3. note Wilson's dissent in *perka p927* - imminent risk/emergency not required necessarily
- No reasonable legal alternative (*perka p927*)
  1. Again, there is a modified objective standard (see above)
  2. If a reasonable person (same age, sex, etc.)
    - reasonableness, not perfection
    - reasonable person is not a criminal, no special treatment for members of criminal groups (*perka p927*)
- Proportionality - must be proportionality between the harm inflicted and the harm avoided.
  1. Plain objective standard
  2. If by committing offence, you would cause more harm than if you hadn't, the defence of necessity will fail

### *Application*

- Basics
  - If it is another person threatening you, duress
  - If it is another person beating you, self-defence
  - If it is due to the environment, necessity
- Importation of Narcotics - *perka p927*
  - Second step, would it have been reasonable to dump the drugs
    - If it was, then you should have, necessity fails
    - Is it ever reasonable to dump drugs (They'd hunt you down)?
      - This is not the standard applied, reasonable people are not drug smugglers, we don't look at what a reasonable criminal would do
- Abortion – *Morgentaler p921*
  - No air of reality to necessity of doctors providing abortions
  - There was a reasonable legal alternative
- Murder – *latimer p933*
  - In UK, murder is eligible to necessity (Re A(*Children*)
    - Contrary to *Dudley and Stevens*
  - None of the three requirements were present
  - is it ever NOT a reasonable alternative to murder?
  - note: Re A Children - operation to separate conjoined infant twins may be rare case where

killing justified

- Engaged in criminal activity does not disentitle the defendant

## Duress

- Two important categories
  1. S. 17 CCC
  2. Common Law defence
- doesn't negate fault, but excuses (hibbert p951 p426)
- Can't use to negate fault elements in s. 21(1)b or 21(2), but may be used to excuse conduct through operation of common law duress (hibbert p951 p429)

### S. 17

#### S. 17

A person who commits an offence under compulsion by threats of immediate death or bodily harm from a person who is present when the offence is committed is excused for committing the offence if the person believes that the threats will be carried out and if the person is not a party to a conspiracy or association whereby the person is subject to compulsion, but this section does not apply where the offence that is committed is high treason or treason, murder, piracy, attempted murder, sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, aggravated sexual assault, forcible abduction, hostage taking, robbery, assault with a weapon or causing bodily harm, aggravated assault, unlawfully causing bodily harm, arson or an offence under sections 280 to 283 (abduction and detention of young persons).

#### Requirements

1. Applies only if the defendant is the perpetrator
  1. If D is a party the common law defence applies (*paquette p946*)
2. Cannot be one of excluded offences treason, murder, piracy(?), sexual assault, hostage taking, robbery, assault with a weapon, arson...
  1. Limitations of s. 17 may not survive a Charter challenge.
3. Distinct from common law in that:
  1. Requires belief in threat of death or bodily harm on the part of the defendant - common law has an objective standard
  2. doesn't require that there is a reasonable legal alternative (*mena p949*)
4. Cannot be a part of a conspiracy, eg. gang member etc.
5. Requires immediacy and presence in the statute, but this has been rendered unconstitutional (*Carker, ruzic p958 p958*)
  1. note: only unconstitutional when elements are not present and the accused is morally involuntary - thus if the facts line up, use these elements
6. if stuck w/ s. 17, could make charter arg that unfair to convict when in morally involuntary position, also arbitrary (may work for robbery/assault)

#### Common Law Defence

#### Requirements

- Use if have principal offender, or when s. 17 violates charter (*ruzic p958*)??
- No safe avenue of escape
- Modified objective standard (*hibbert p951 p951 p426*)
- Did the accused reasonably perceive that there was no safe alternative (look at personal circumstances - ex. his perceptions of the surrounding facts)

- ex. D didn't have authorities to go to (ruzic p958)
- Third parties included - i.e. threat to 3rd parties, ex. mom - (*ruzic p958*)
- Proportionality/excluded offences - arguably no excluded offences
  - Similar requirement as necessity
  - Not entirely clear, no explicitly excluded offences
  - As long as the threat of harm to ones self is great enough it can possibly be used to excuse murder
  - Never available to perpetrators (paquette p946)
  - no immediacy required (ruzic p958)
  - Can't be used to negate s. 21(1)b or 21(2), but can be used to excuse conduct under the common law defence of duress (hibbert p951 p429)

## Self-Defence

- Where successful, leads to a full acquittal
- We are only dealing with two forms of self-defence 34(1) & 34(2)
- no common law

### S. 34(1)

**34. (1)** Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.

- Applies where death or grievous bodily harm are not intended
- Requirements
  - i. Unlawful assault s. 265
    - i. Does not require actual force, only threat of force
    - ii. People are not often charged with this type of assault, but it is relevant for self-defence
    - iii. If the accused reasonably perceived that they were about to be assaulted they satisfy the requirements for SD (petel p1002)
    - iv. Reasonable apprehension of unlawful assault
    - v. Does not apply in consensual fights (*paice sp108*)
    - vi. Consent is vitiated where NTBH is both intended and caused (Jobidon)
    - vii. Applied to SD, if the accused consented, then NTBH must be intended **and** caused by the Victim
  - ii. No Provocation
    - i. If accused provoked the fight or assault they are disentitled to the defence of SD
    - ii. note that provocation not always made out in a consensual fight
  - iii. Not intended to cause grievous bodily harm
    - i. Therefore, if you are otherwise guilty of murder, SD s. 34(1) cannot be applied - GO TO s. 34(2) if this isn't present
      1. 34(1) will not apply to murder because it requires an intent to cause death
    - ii. *Intend* – even if the victim dies, SD can still apply if accused did not intend - doesn't matter if victim died
  - iv. Proportionality
    - i. Accused must believe the force they used to defend themselves was required
    - ii. Reasonable person must also believe the force to be required (kong sp102)
    - iii. You are expected to use a minimal amount of force
      1. Though we do not expect perfection or exactitude

iv. Not required to retreat

**S. 34(2)**

**32(2)** Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if

(a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and

(b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

**Requirements**

- Applies when accused caused grievous bodily harm, or s. 34(1) doesn't apply
- Requires unlawful assault (or apprehension of)
  1. Where consent, same process as s. 34(1)
- Requires a reasonable apprehension of grievous bodily harm
  1. battered women
    1. women in a situation, particularly under a history of abuse, do not necessarily have to wait until an assault by their partner is imminent before they defend themselves. (lavallee p993/malott p1012)
      1. victim of ongoing violence (accused) may be able to reasonably sense the onset of violence
      2. women are in disadvantaged situation if they wait for guy to attack them, thus if you require imminence, you are condemning women to death by instalment
    2. Where evidence exists that an accused is in a battering relationship, expert testimony can assist the jury in determining whether the accused had a reasonable apprehension of death when she acted by explaining the heightened sensitivity of a battered woman to her partner's acts. The issue is not what an outsider would have perceived but what the accused reasonable perceived, given her situation and experience. (lavallee p993)
    3. Prior evidence of abuse is relevant to accused reasonable belief in the existence of the assault, and the reasonable apprehension of danger and the belief that there is no alternative but to kill.(petel p1002 p1002)
- Reasonable belief that there is no alternative
  1. No proportionality requirement, but is built into reasonable requirements
  2. Excessive force does not disentitle
  3. Air of Reality must be established
  4. Judge does not question credibility, only trier of fact
  5. if can go to authorities, you should, even if a criminal (cinuous p986)
- **Do not** have to intend to cause death or grievous bodily harm
- No provocation exclusion, unlike s. 34(1)

**Reasonable Requirements**

- Accused is allowed to make mistakes
- Modified version of the objective standard, person history, experience, capacities etc.
- Reasonable person cannot be intoxicated

**Battered Woman Syndrome**

- There is not an independent discreet defence known as Battered Woman Syndrome

- What is accepted is that women in a particular situation do not necessarily have to wait until an assault from their spouse is imminent before defending themselves (*Lavalle, Mallet*)
  - Context is important
  - Accused may be able to reasonably infer the onset of violence
  - Also, the reasonable person standard can be based on women
  - Hasn't been particularly successful