CRIMINAL LAW

LAW 420

University of Alberta, Faculty of Law

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I. INTRODUCTION TO THE CANADAIN CJS AND CRIMINAL PROCEDURE

Sources of Criminal Law in Canada

- **The Constitution Act, 1867 = BNA Act**
  - Criminal law is **exclusively** within the domain of Parliament
  - Section **91(27)** – gives federal government the criminal law power
  - Section **92(14)** – gives provinces power over administration of justice
- **The Constitution Act, 1982**
  - Part I – Canadian Charter of Rights and Freedoms
- **The Criminal Code / Other Statutes**
  - Includes the **Controlled Drugs and Substances Act** (formerly the Narcotics Control Act)
- **The Common Law**
  - Forms the basis for outlining evidence

Charter

- **April 17, 1982 – *Charter* came into force**
  - Prior to *Charter*, criminal law governed by parliamentary supremacy
  - Post *Charter* – Constitutional supremacy – section 52: Parliament has the power to pass laws, but Part 1 in s. 52 of the Charter says that the Charter is the "supreme law of Canada"
- **Laws or statutes that violate the *Charter* are "of no force or effect"**
  - Ex. Sections of *Controlled Drugs and Substances Act* (see *R v Oakes*
  - Anything inconsistent with the Charter **cannot** be upheld

Key Sections of the Charter

- S. 2: Fundamental freedoms
- SS. 7-14: Legal Rights
- S. 15: Equality Rights
- S. 24: Remedies for breaches
- S. 1: Balancing provision (Limitations)

Brief History of the Criminal Code

- CC = Main collection of statutory rules, establishing prohibitions, duties, penalties, and procedures
- History
  - **1867-1892**
    - Statutes and common law derived from English Law
    - Criminal law mostly **common** law
  - **1892-1955**
    - **CC** enacted, based on English and Canadian sources (in force July 1, 1893)
  - **1955-Present**
    - Major **revisions** to CC
    - Many common law **offences** eliminated
      - If it didn't make it into the final revisions, it is not a criminal offence
      - 1 left: "**contempt of court"** (failure to follow a Court order, speaking out against a judge)
    - Common law **defences** were largely **preserved**
  - **1985**: CC renumbered (in force 1988)

Zombie Laws

- Problems with Criminal Code Revisions
  - It can take a long time for cases to move through courts
  - There's a lag time between disuse and actual deletion from the CC
  - Unannotated CC don't mention which laws have been declared unconstitutional
- Eg. S. 230 "Constructive Murder"
  - If you're committing a crime and someone dies while committing a crime, you are guilty of both crimes
  - Eg. You rob a store, and also happen to kill the clerk in the process → guilty of theft **and** murder
  - Declared unconstitutional in ***R v Martineau***
  - Clarified *mens rea* requirement for murder
- Recent example: Travis Vader case → judge used zombie law

Development of Criminal Law

- Branches of Government → Roles in Law
  - Legislative → create the law (elected MPs)
  - Executive → enforce the law (police, RCMP, Crown prosecutors)
  - Judiciary → interpret the law (judges)
- Common law
  - Case law/precedents
  - "Judge-made" law
    - It used to be that judges could create criminal law, **but not after 1955** (true criminal law is passed by Parliament)
    - Judges make laws by **interpreting existing laws**
    - Eg. **"Contempt of court":** common law offence created by judges to force respect for court proceedings, punish breaches

Federal Criminal vs. Provincial Laws That Look Like Criminal Laws

- A provincial law = **regulatory law**
  - Passed in the **domain of its jurisdiction only**
  - As long as they're passing laws that deter within their jurisdiction, they are **not going outside the scope of their powers**
  - Eg. Road safety is provincial, whereas dangerous driving and criminal negligence fall under Parliament → it's on a spectrum

The Adversary System

- The "**accusatorial model**" of dispute resolution
- **Trier of fact**: judge or jury
  - Decides the facts of the case
  - Once they've heard all the evidence, they decide whether the allegations made are true or not
  - Juries → only in the most **serious** offences, and therefore constitute a very small portion of criminal trials
- **Trier of law**: judge
  - Making rulings/interpretations
  - Decides whether evidence is admissible or not

- **Adversaries**: Crown/Defence Counsel
    - Accused don't always have representation → can't afford it, try to defend themselves
    - This is why we have the Legal Aid System
- 4 main features
    - **Triers of fact and law** are mostly **passive/neutral**
    - **Counsel** for each litigant are **active** players, arguing strongly for their client's positions
    - The **accuser** (Crown) must establish case **beyond a reasonable doubt**
    - **Trial by jury** is available for **most serious** cases

The Inquisitorial System

- 4 main features
    - **Triers of fact and law** have **active role in litigation**
    - **Counsel** are relatively **passive**
    - **No formal burden of proof** set on any party and **few formal rules restricting the admissibility of evidence**
    - **No trial by jury, only judges**

Key Roles in Criminal Law: Judges

- 5 key roles of the judiciary (* = could also be done by a jury)
    - Decide questions of fact*
    - Decide questions of law
    - Create and maintain common law
    - Apply the law to the facts*
    - Interpret and apply the Charter

Classification of Offences

- 2 types of procedure by which offences may be prosecuted
    1. **Summarily**
        - **Summary conviction** offences are tried by a "**summary conviction court**", which in AB means a **provincial court**
        - Penalty range is lower in summary convictions
    2. **Indictment**
        - 3 types of Indictable offences
            1. Offences under **exclusive jurisdiction** of the **superior court** of **criminal jurisdiction**
                - These offences MUST be tried by jury, unless the Crown + accused consent to waive
            2. Offences **under absolute jurisdiction of the provincial court**, which are usually tried by the court
            3. Offences which may, at the **election** of the **accused**, be **tried** by
                - Provincial court judge alone
                - Superior court judge alone
                - Superior court judge and jury
- 3 types of offences
    1. Offences prosecutable by **summary conviction ONLY**
    2. Offences prosecutable by **indictment conviction ONLY**
        - Eg. Aggravated assault
    3. **Hybrid**/dual procedure or "**Crown-elected**" **offences**

- Eg. Impaired riving is a hybrid offence, could proceed both ways
    - If you had someone who had 10 convictions of impaired riving, the Crown may want a higher sentencing range, so they will proceed by indictment

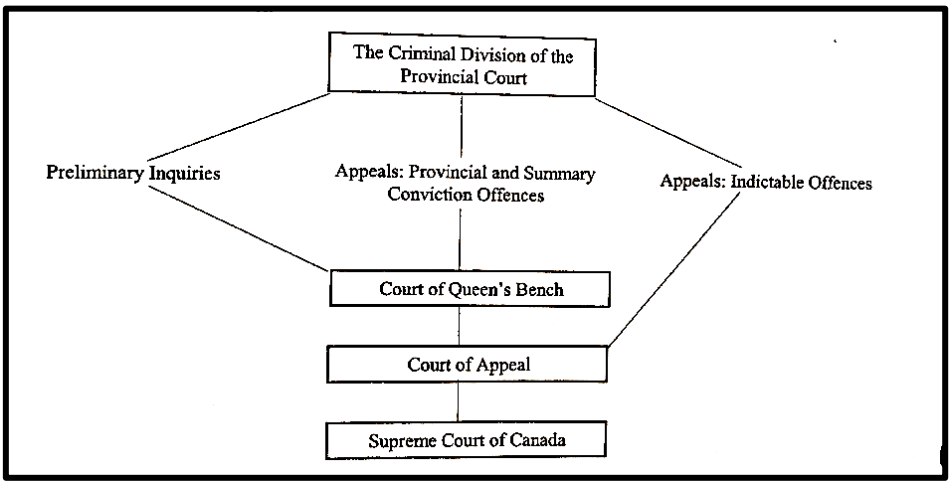
Canadian Courts and Their Structure

- Criminal law is **federal**, but **much of the court system is provincially-administered**
- Courts (* = Superior court judges, federally-appointed and paid, per **s. 96** of the Constitution)
    - **Provincial Court**
        - **Court of statutory jurisdiction**
        - Established under ***Provincial Court Act (Alberta)*** under **s. 92(14)** of the Constitution
        - Hears criminal, youth, family, and civil claims (up to $50K)
        - **Provincial Court, Criminal Division**
            - Adjudicates provincial offences
            - Disposes of certain matters in initial stages of prosecutions
                - Elections, bail, hear preliminary inquires
            - Hears trials of certain CC offences/CDSA offences/federal statutes if:
                - Offence is an **absolute jurisdiction** offence
                - Offence is **hybrid** or **Crown election** to proceed **summarily**
                - Offence is **indictable** but **accused** has **election** to have charges **tried** in **provincial court**
        - Criminal Appeals
            - Appeal of **summary** conviction → heard by QB
                - Eg. Typical impaired driving case
            - Appeal of **indictable** conviction → heard by ABCA
                - Eg. Aggravated assault
    - **Court Queen's Bench***
        - Court of **inherent jurisdiction/**superior trial court of AB
        - Hears criminal and civil matters (over $50K)
        - Hears summary conviction appeals
        - The **only AB court that has jury trials**
        - Administered by province under **s. 92(14)**
        - **S. 469 offences** can only be heard in QB
            - Eg. First-degree murder
    - **Court of Appeal* (ABCA)**
        - Highest court in AB
        - Hears **appeals only (no trials)**
        - Administered by province under **s. 92(14)**
        - Judges sit in panels of 3 or 5
    - **Federal Courts***
        - Trial and Appellate division
        - Established in 1875 as the Exchequer Court, later reconstituted as Federal Court in 1971
        - Responsible for non-criminal government matters, some civil matters, cases arising under federal statutes (*Income Tax Act*), review of certain administrative law decisions
        - Generally **does not hear criminal matters, but has supervisory jurisdiction** over **federal penitentiaries**
    - **Supreme Court of Canada***
        - Established by Parliament in 1875 by ***Supreme Court Act***
        - **S. 101** of the Constitution: Parliament may from time to time provide for the constitution, maintenance, and organization of a General Court of Appeal, and for the establishment of any additional Courts for the better administration of the laws of Canada

- Court of **last resort** for Canadian appeals (since 1949, before that you could still go to the JCPC)
- You don't just get an appeal to the SCC, there are only 2 ways:
    - **Appeal as of right**
        - If there's a dissent in Court of Appeal, where 2 justices rule one way, and 1 rules another
    - **Leave to appeal**
        - Court of Appeal decides unanimously, "please hear this, it's a matter of public interest"

Precedent and Stare Decisis

- Decisions of higher courts **bind** lower courts **within the provincial hierarchy**
    - Higher court's decision **binding only on precise legal issue in question**
- Decisions from other provinces are **persuasive**, but **not binding**
- **Differing judgments** from judges at the **same level of court** must be **resolved by a higher court**
- The **SCC binds all lower courts in all provinces**



Lawyering in AB/Canada

- Lawyering falls under **provincial jurisdiction** (***Legal Profession Act*** in AB)
- Legal profession → self-governing (via provincial law societies)
- 24 "Benchers" (20 lawyers, 4 non-lawyers) oversee disciplinary issues
- Lawyers are generally admitted to the bar in 2 ways
    - Graduates complete 1 year of articles and complete CPLED
    - Lawyers from other jurisdictions complete Law Society requirements for bar admission in that province
    - There are now treaties between law societies that allow lawyers to practice a certain amount of cases/year in another province without having to be a part of that province's Bar

Crown Prosecutors/Crown Counsel

- Part of the **executive branch**
- **Government-employed** lawyers that prosecute criminal matters

- Can be **provincially** or **federally** employed/hired
    - Federal prosecutors handle **CDSA offences**
- Crowns are typically **not involved in evidence gathering**, except through questioning witnesses
- Crowns and police **cooperate** in criminal investigations; Crowns will **sometimes advise** police regarding searches / warrants
- Typically in Alberta, the **police make the primary determination** of the offences an accused will be charged with; an officer will swear the Information that commences criminal proceedings
    - Once charges have been laid → Crown prosecutor starts exercising their authority on the file
- Crowns have **wide discretionary powers** regarding
    - Detention of accuseds in custody
    - Utilization of police to investigate alleged offences
    - Whether to proceed or stay charges
    - Negotiation of pleas
    - Preferring indictments and by-passing of preliminary inquiries
    - Election of modes procedure (summarily or by indictment)
    - Appeals of adverse decisions

Defence Counsel

- They are not the fixers, and are not there for the community's interests
- It's for the accused's rights to be respected
- Persons charged with an offence have a **constitutional right to counsel**
    - **S. 10(b) of the Charter**
- Protects the **rights of the accused** in the legal process
    - Right to remain silent / not incriminate self
    - Right against unreasonable search and seizure
    - Right to make a full answer and defense
    - Right to a fair trial
- The **3 strict walls that the defence counsel must stay within:**
    - Rules of ethics
    - Rules of evidence
    - Rule of law
- Role of the Defence:
    - Ensure the Crown provides full disclosure of evidence regarding case
    - Ensure evidence was collected legally
    - Put forward all evidence supporting accused's case at trial
    - Cross-examine Crown witnesses
    - Identify errors (if necessary) and appeal when required
    - The "last friend" of the accused
    - Abide by ethical considerations
    - Defense has obligations to their clients, the Court, the legal profession, and the administration of Justice

Legal Aid in AB

- Legal Aid Society established on July 1, 1970
- Low income accused may apply to Legal Aid for coverage (criminal and some civil matters)

- If coverage granted → a **certificate** is issued to a member of the Defence bar
    - This limits fees and disbursements charged by lawyer
- Members of the Defence bar submit their names to Legal Aid
    - Accused can request a specific lawyer, otherwise they're assigned counsel

Adversarial Ethics

- Law society of Alberta – **Code of Professional Conduct**
    - Law as a self-governing profession
    - Contains directions regarding:
        - Maintaining public confidence in the justice system
        - Commitment to improving access to justice
        - Client confidentiality
        - Code applies to both Crown and Defence
- Civility in Court
    - ***R v Felderhof***
        - Professionalism is not inconsistent with vigorous and forceful advocacy on behalf of a client and is as important in the criminal and quasi-criminal context as in the civil context
    - ***Groia v Law Society of Upper Canada***
        - A lawyer's duty exists in concert with a series of professional obligations that both constrain and compel a lawyer's behaviour
        - Care must be taken to ensure that free expression, resolute advocacy, and the right of an accused to make a full answer and defence are not sacrificed at the alter of civility
- Ethical position of the Crown – Main Duties
    - To represent Her Majesty and to put the case before the court
    - Dispassionately and objectively put all of the facts before the court
        - It's not about seeking to convict, but ensuring that justice is done **through a fair trial on its merits**
    - Provide timely disclosure to defence counsel **whether tending towards guilty or innocence**
    - ***Boucher v The Queen***
        - The purpose of a criminal prosecution is not to obtain a conviction
        - The role of the prosecutor excluded any notion of "winning and losing: his function is a matter of public duty"
- Ethical position of Defence Counsel – Main Duties
    - To advance the client's cause resolutely and to the best of lawyer's ability
    - Zealous advocacy
    - "Last friend" of the accused

R v Nixon

- **Facts**
    - Accused charged with dangerous driving, driving causing bodily harm, and impaired driving
    - Crown and Defence agreed to **joint submission of guilty plea to careless driving** and a fine of $1800
    - Acting ADM higher up reviewed decision and felt it was not appropriate → instructed to the Crown to withdraw the plea agreement and proceed to trial

- Accused brought a s. 7 Charter application alleging abuse of process, and sought to have plea agreement restored

- **Issue**
  - Did the trial judge err in concluding that the Crown's repudiation of a plea agreement was an abuse of process in breach of the appellant's s. 7 rights?
- **Decision**
  - Yes, the trial judge erred
  - To **repudiate** is part of **prosecutorial discretion** – this discretion includes:
    - Laying of charges, additional charges, withdrawing charges
  - What is **prosecutorial misconduct**?
    - Improper motive or bad faith in the approach
  - What is an **abuse of process**?
    - Whether compelling an accused to stand trial would violate the fundamental principles of justice which underlie the community's sense of fair play and decency, or where the proceedings are oppressive or vexatious
  - **Until the plea is actually made in court, either party can back out**

Criminal Procedure – Overview

- Classification of offences
  - **Summary** – least serious
  - **Indictment** – most serious
  - **Hybrid** – deemed indictable until Crown election (Most CC offences are hybrid)

Types of Indictable offences

- **469 offences**: exclusive jurisdiction of the superior court
  - Must be tried by Judge + jury, unless Crown and accused consent to waive jury
  - E.g. murder – s. 229/235 of CC
  - E.g. aggravated assault – s. 268
- **Absolute Jurisdiction offences**
  - S. 553 of CC gives list of offences
  - Tried in **provincial court only**
  - E.g. theft under $5000 – s. 332/334 of CC
- **Accused election**, has 3 choices
  - Provincial court trial, by judge alone
  - Superior court trial, by judge alone
  - Superior court trial, by judge + jury
  - *EXCEPTION: if it's a s. 469 offence → must be a trial by judge + jury

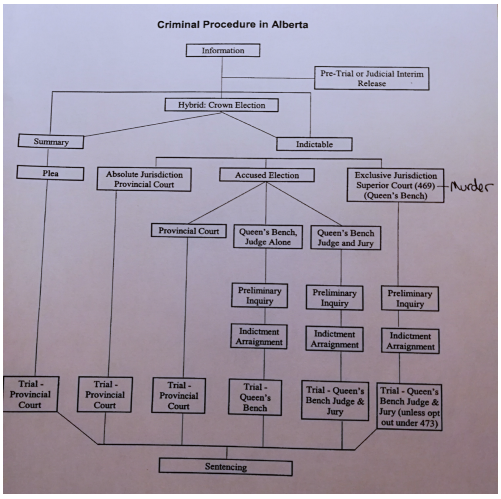
Commencement of Proceedings

- **Complaint/Investigation**
  - Occurs when a person makes a complaint to police, either as a complainant or witness
  - In Canada, there is **no statute of limitations** when it comes to Criminal offences only → you could come forward 40 years later if you wanted
  - Police may initiate an investigation themselves for a number of reasons
  - Laying of the Information
    - Within a short period of time after, the police have to swear/lay an information

        - Sworn by an informant/police officer in front of a justice
        - Includes: name of informant, name of accused, alleged offence, date ("on or about"), jurisdiction, DOB of accused
        - The information can have **endorsements on it** (attached as extra sheets to the information → brief descriptor of what happened that day)
        - If the matter **stays and finishes in Provincial Court** (e.g. a summary or absolute jurisdiction offence) → the **Information** is the **foundational document**
- **Apprehension/Arrest**
    - At this stage, an information may or may not be laid
    - **Upon arrest, an accused's s. 10(a) and 10(b) Charter rights are engaged**
    - **Section 10:** Everyone has the right on arrest or detention
        - (a) To be informed promptly of the reasons therefor
        - (b) To retain and instruct counsel without delay and to be informed of that right, and
        - (c) To have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful
    - In many cases, arrested persons are released on an **Appearance Notice/"Promise to Appear" [PTA]/Undertaking** → if you fail to show up to court, it's a criminal offence
- **Bail/Judicial Interim Review**
    - Police don't have to let the accused go if it's a serious enough crime
    - Sometimes they have to go to a Justice of Peace within 24 hours
        - Hears from the accused and why they're asking for bail
        - The onus is on the police to prove why the accused should be denied bail
    - If an accused is not released on an Appearance Notice, they may have their counsel assist with bail
    - **S. 11(e)** of the Charter: any person charged with an offence has the right not to be denied reasonable bail without just cause
- Alternatives for some accused persons – helps unclog the court system
        - AMP – Alternative Measures Program
        - Mental Health Court (new)
        - Other diversion programs
- **Preliminary Inquiry** (for some indictable matters)
    - Serves 2 purposes
        1. Initial test for whether there is sufficient evidence to commit an accused to stand trial for an offence
        2. Defence's reason: to discover and test the evidence
            - Witnesses may be cross-examined and something might be discovered → thus even if the accused has to stand trial, the defence now has something to use at trial as a defence
    - An accused does **not** have to enter a plea at this time
    - All of what the police and Crown have gathered must be disclosed
        - If they hold back → prosecutorial misconduct (***Stinchecombe***)
    - **Test for committal:** a preliminary inquiry judge must commit the accused to trial if there is any evidence upon which a properly instructed jury, acting reasonably, could find guilt
    - After committal, an **indictment is prepared for trial**
        - Information and endorsements cease → **the Indictment becomes the new foundational document**
        - In some cases, the Crown can proceed by **direct indictment → no preliminary inquiry**
- **Trial**
    - Accused is arraigned and enters a plea of "not guilty"

- If an accused elects a jury trial → **jury selection process**
  - Judge addresses jury, saying what they're there for
- When a trial begins, there may be opening arguments
- Crown will present their case first, because it bears the onus of proof BARD
  - Gives 5-10 minute brief, theory of prosecution
  - Crown may begin bringing up witnesses (who are outside until they're called)
  - Defence may cross-examine witnesses
- Defence may present their case, **or choose not to call any evidence at all**
  - Can bring own evidence and witnesses
- Closing arguments
  - Crown makes first closing statement, followed by the Defence's
- Charge to the jury to find proof BARD

- **Voir Dires**
  - A "trial within a trial"
  - Often used when a judge needs to make a **ruling on admissibility of certain evidence**, such as a confession
  - In the case of a jury trial, the jury is not present for this portion of the proceeding
- **Verdict**
  - For jury cases, it **must be unanimous**
- **Sentencing**
  - If a verdict of "guilty" is delivered, there is a **sentencing hearing**
  - For **Aboriginal offenders → Gladue Report**
    - Could there may some ameliorating sentence, to assist them in rehabilitation?
- **Appeals**
  - Grounds of appeal are of **2 kinds:**
    1. **Questions of law**
    2. **Questions of mixed fact and law**
  - In some cases, there may be several grounds for an appeal
    - E.g. If the judge errs in some aspect of the case, misapplies the law, inappropriately considers certain evidence, etc.
  - **Appeals are not trials *de novo*** – they are based on the record formed at trial (e.g. transcripts, exhibits, etc.)
    - Not allowed to say that facts are wrong
    - You are stuck with the findings of facts that could be reasonably inferred by the jury



II. EVIDENCE, THE COMMON LAW CONFESSION RULE, AND THE CHARTER

Evidence and the Common Law

- **Sources** of **rules of evidence**:
  - **Criminal Code**
  - ***Canada Evidence Act***
    - Passed by Parliament or federal statutes
    - *AB Evidence Act* has nothing to do with criminal law (has to do with civil litigation)
  - **Common law** (e.g. Hearsay rule)
    - Judge-made rules
    - These rules can be quite archaic
  - **Charter of Rights and Freedoms**
    - Since 1982, the first 3 sources have to be compliant with the Charter
    - S. 52 of the Charter says that its supreme law of Canada
    - Any law inconsistent with it is without force and effect
    - Some common law rules have taken constitutional status post-Charter
    - Eg. Right to remain silent under s. 7
- **Complying** with rules of evidence → how you get things **admissible** in trial
- When evidence is **tendered** by one party → court must **consider** its **admissibility**

Admissibility

- Evidence is admissible at trial if:
  - **Relevant to a fact-in-issue**
    - Something that **tends to make a fact or issue more or less likely**
    - Example: if the Crown is trying to prove the guilt of the accused, they should prove that a convenient store had been robbed, that the clerk of that store was beaten up, that money was stolen, believe that the accused is the person who robbed the store:
      - Anything that the Crown has at its disposal to show that the accused is guilty will be **relevant**, including the clerk's description
      - Overall, does it **tend to prove** what the robber would like?
      - Another good piece of evidence could be if the police stopped someone who looked like the robber
      - D would argue if there was any cash found on the accused, or the route he took after leaving the convenient store
  - **Probative value exceeds prejudicial effects of the evidence**
    - How strong an inference can be made between the known fact and the fact you're trying to prove/disprove
      - Eg. Found wearing blue jeans: not that probative
      - But, found wearing canary-yellow running shows: highly probative fact
    - **Probative:** how strong is the evidence
    - **Prejudicial effect**: the other side of the scale
      - Comes in various forms: **reasoning prejudice** for example
        - Jury or trier of fact might become distracted over a piece of evidence, and causes them to reason against a person in a way that's not proper
        - A form of reasoning prejudice is **moral prejudice**
          - Eg. Might be prejudiced if the accused is a repeat offender

            - What's wrong with this? It **proves nothing about this specific crime**
            - Thus, a person's **criminal record tends to NOT be admissible** for this reason
            - However, there are **exceptions** to this
                - Eg. on the stand he says that "it wasn't me, I'm not the kind of a guy who would do this"
                - If you claim you have a good character, now the Crown can bring up your past record
        - Is it relevant to the issue? (Eg. Beating up your wife before committing a crime) **For any piece of evidence, you have to determine is it more probative than prejudicial?**
        - Court has to weigh these two things against each other
    - **Cannot be excluded by a common law or statutory exclusionary rule**
        - One of these is the **Hearsay Rule**
            - **Hearsay:** an out of court statement introduced to prove the truth of its contents
            - A classic situation has **4 elements**: declarant, recipient, statement itself, and the purpose
            - **Why do we exclude it?** Because the trier of fact is not able to see/hear the declarant in court to assess their credibility, reliability on what is being asserted by the declarant
            - Whenever a witness testifies, there's **already potentially errors** in their evidence
                - **Perception problems** (e.g. they don't have very good eyesight or saw it from far away)
                - **Memory problems** (could be a major problem if identity of the accused is a big deal)
                - **Communication problems** (person may not be able to articulate what they saw, different language for example)
                - **Honesty/Sincerity problems** (person is completely lying, purposely exaggerating/minimizing an event, forgetting something you should have remembered)
            - If the **declarant isn't even in the witness box**, then **how can we accurately know these things happened given all these potential errors**
            - Therefore, **hearsay is inadmissible**
                - Eg. A police officer, when taking the stand, can only talk about what they saw
                - They cannot say that they were zig-zagging over the road (what the declarant/concerned citizen saw who called the officer), the officer DIDN'T see this happen
                - **If the citizen doesn't appear to court from their subpoena, and as a witness talk about what they saw, then it's not admissible**
                - It's only admissible on the grounds for the police's belief to look for the red car
                - An **exception** to the **hearsay rule → dying declaration** ("I'm not going to make it, but I saw a red car weaving through the road"), and it would be **admissible**
    - **Cannot be excluded under the *Charter***

- Some pieces of evidence could be highly relevant/probative but could still be excluded because of the Charter
- *Eg. S. 10(b), everyone upon detention has the right to be told of the reasons of that arrest, and a right to counsel immediately*
    - Eg. Accused arrested and confesses after some time into an interrogation, but was **never given the right to counsel** by officer before any discussion
    - You'd find a breach of s. 10(b), and would be **excluded under s. 24(2)**
    - Before 1982, the officer's conduct would have been fine, and confession would have been admissible

Overview: Common Law Confession Rule

- **Prosecution can introduce admission/confession into evidence that an accused made to a third party, either through that third party or through another witness who overheard the confession**
    - **Exception to the common law "hearsay rule"**
    - A **statement made by declarant to a recipient for the truth of its contents, but** it was **made by someone other than the witness, against the state's interest**
    - Allowed if it involves state interests, or is a statement made to someone in authority
    - When a person is speaking to someone of authority, the Crown has to prove that that statement was **voluntary**, beyond a reasonable doubt
    - The Crown can tender the used statement and use it to prosecute the accused
    - Statements can be **inculpatory** or **exculpatory**, thus it doesn't need to be a true confession but just a statement, and can be used at the Crown's discretion
    - If its inculpatory statement (something that makes the person look guilty), the Crown will probably use it
- **If made to a police officer/agent of the state, Crown must show:**
    1. **Must be to someone who is a person of authority, who is that?**
        - When that person would be able to control the prosecution of the matter
        - Eg. Individuals in a law enforcement capacity (guard, sheriff, officer, school principal)
        - If it's your typical case, it's going to be a police officer, but it could be other people as well (like a store manager)
    2. **Was the statement made voluntarily?**
        - Analysis is contextual, and you have to look at the entire circumstances
        - **Need to show it was voluntary BARD**
        1. **Doesn't count if it was made under threats/inducements/promises or quid pro quod ("tell me you did it and you can go…")**
        2. **Can't be the product of oppression**
            - If there is some deprivation of human needs (food, water, clothing, heat) or mental oppression
        3. **Has to be the product of an operating mind**
            - Has sufficient capacity to understand what they're saying
            - It's a very low threshold though, someone very drunk/high, who has FAS would not pass this base level
        4. **Police trickery – has to be very bad/shock the courts**
            - **Allowed**: "the evidence is pretty solid against you…"

- **Not allowed:** "lawyer is here to see you" and lawyer goes to speak to the accused asking what they did and the accused tells them, BUT actually the lawyer is an undercover officer
- **The Common law Confession Rule does not apply to Mr. Big Operations** → accused does not know officers were authority figures

- **This common law confessions rule predates the Charter**
- **At common law**: if the statement is excluded but led to the finding of evidence, that **statement was admissible and tenderable into evidence**
- **Today:** the **common law confession rule has gained constitutional status under s. 7 of the Charter**
    - Therefore, **not only is the statement excluded, but any derivative evidence** (knife found for example) **MAY also be excluded, since it derived from that original confession**
        - If trying to **exclude** the derivative evidence, the **accused bears the responsibility to show it should be excluded on the balance of probabilities under s. 24(2)**
    - Determining the **evidence's admissibility** happens during the **voir dire** (trial within a trial), so the jury isn't involved

The Hebert Rule

- Hebert while under arrest, said he didn't want to speak to anyone, was placed in a cell
    - Placed in a cell with an undercover police officer
    - Purposely engaged Hebert in dialogue concerning offence (Hebert didn't know he was speaking to an officer); told the undercover officer what happened
- That ended up being excluded by the SCC, because the **police breached Hebert's s. 7 right to choose to speak to the police or not**
- Though he said didn't want talk to the police, he was **placed in a cell that he couldn't leave**
- S. 7 breaches can lead to s. 24(2)
- Exception: Barton
    - When a detainee says they don't want to talk and then they put him in a van for a few hours with an undercover officer
    - If the accused chooses to talk without prompting, then it's Mr. Barton's fault for talking to the so-called inmate, he was the **one who started the conversation**
    - **Whatever is said by the detainee is admissible**

Right to Counsel – s. 10(b)

- S. 10: *"Everyone has the right on arrest or detention:*
    - *(a) to be informed promptly of the reasons therefor*
    - ***(b) to <u>retain and instruct counsel without delay</u> and to be informed of that right"***
- Starting in 1982, there was a whole a new way to exclude evidence, and that was if Charter rights were infringed
    - S. 10 is a **very common way to exclude evidence** during a trial
- This applies upon arrest **or** detention
    - Arrest means when a State actor says, "you're under arrest", although they don't have to say this **and** they use some form of physical restraint over the person
    - Also applies immediately upon detention, **therefore s. 10 doesn't apply if you're not**
- **2 components** to s. 10(b) rights
    1. **Informational** – accused must be informed promptly upon arrest or detention:
        a. right to counsel

b. availability of counsel through Legal Aid and the means of access
c. availability of immediate, temporary legal advice through Brydges duty counsel
d. the means of access to free preliminary legal advice (ex. 1-800 number)

- If they choose not to speak to a lawyer, the officer has to **read out a Prosper warning**, explaining what they're about to give up
- **Major exception:** the administration of **roadside tests** → you do not have a right to counsel for these (***Thompson***)
  - The point of these tests is to be quick, and if there was a right to counsel every time it would get very long
  - During a check stop test though, once you fail a breathalyzer test and are detained → **trigger s. 10(b) rights**
- **Major exception:** when you're coming from another country and going through Canadian customs → you do not have a right to counsel

2. **Implementational** – triggered when accused says they would like to speak to a lawyer → police are obliged to:
   a. Provide the accused reasonable opportunity and means to contact counsel
   b. Refrain from attempting to elicit evidence from the accused until they've had that reasonable opportunity

Right to Counsel - Exceptions

- Accused's rights under s. 10(b) may be defeated if:
  - **The accused not reasonably diligent in exercising their right**
    - E.g. police puts them into a phone room, but they don't really do anything; after a few minutes the police tells them to get going but they don't → didn't exercise their right in a reasonable time
  - **Exigent circumstances (urgent or dangerous) exist that act against allowing the accused the opportunity to consult counsel → rare**
    - If the police trying to save someone's life/property, the officer does not have to worry about the detainee's right to counsel

Common Law Confessions Rule vs. Charter (middle column not examinable)

	Common Law Confessions	Sec. 7 of the *Charter*	Sec. 10 of the *Charter*
Detention based?	**No**. Applies anytime the accused speaks to a "person in authority".	Certain aspects of s. 7 require detention while other do not. The *Hebert* rule requires detention, while the exclusionary rule in Mr. Big operations does not.	**Yes**. The right is triggered only upon detention or arrest of the accused.
Onus of Proof	Persuasive/legal burden on prosecution. **Crown** must prove **beyond a reasonable doubt that the statement was voluntary**.	Persuasive/legal burden on the accused. Must prove a s.7 Charter breach on a balance of probabilities.	Persuasive/legal burden on the accused. **In a voir dire, Defence must prove that they were detained, and prove Charter breach on a balance of probabilities**.
Remedy	**Automatic** exclusion.	Persuasive/legal burden on the accused. Must prove exclusion is necessary pursuant to s.24(2) on a balance of probabilities.	Persuasive/legal burden on the accused. Must prove exclusion is necessary pursuant to s.24(2) **on a balance of probabilities. (not automatically excluded just because you've shown a breach)**
Derivative Statement	**Inadmissible** if tainting features from first continued, or if first statement is a substantial factor in making the second statement. (If first statement was extracted in contradiction to common law confessions rule, the derivate statement would also be excluded **if it was a product of the first statements)**	Persuasive/legal burden on the accused. Must prove exclusion is necessary pursuant to s.24(2) on a balance of probabilities.	Persuasive/legal burden on the accused. Must prove exclusion is necessary pursuant to s.24(2) on a **balance of probabilities**. **Also has to show it emanated from the first statement**
Derivative Physical Evidence	Persuasive/legal burden on the accused. A confessions rule breach is also a s.7 breach and subject to exclusion under s. 24(2). (Opens up possibility of it being excluded under s. 24(2))	Persuasive/legal burden on the accused. Must prove exclusion is necessary pursuant to s.24(2) on a balance of probabilities.	Persuasive/legal burden on the accused. Must prove exclusion is necessary pursuant to s.24(2) on a balance of probabilities.
Proceeding	Applicable at preliminary inquiry and trial.	Applicable at trial only.	Applicable at trial only.

R v Grant – Issue 1: Detention Test

- **Facts**
  - Grant was stopped by 3 officers patrolling an area known for trouble after they noticed him staring at them and fidgeting with his clothing
  - Police stood in his path and **asked him to "keep his hands in front of him"** because he was behaving nervously
    - Not only is there a surrounding, there was a **direction** by the police officer
    - What does this do? It starts to create a **psychological detention**
    - He is psychologically feeling that he doesn't have a choice not to comply
  - One officer asked Grant if he had anything on him that he should not have
  - Grant **admitted** to having a small amount of marijuana and a gun
  - Police arrested Grant and advised him of his right to counsel
  - Grant argued that his section 8, 9, and 10(b) rights had been violated
- **Issue**
  - What constitutes detention?
- **Decision**
  - Court clarified the **test for detention**:
    - **Would a reasonable person, placed in the position of the accused, conclude that their right to choose how to act has been removed by the police, given their conduct?**
  - Given the **direction** to put his hands out, the **positions** of the officers, and the **relative power imbalance**, the Court found this was a **detention**
  - Now that detention is in effect, you've established grounds for s. 10 rights
    - The accused has to prove detention on the BOP
    - E.g. When detained at a police check, you are detained

- This case is important for 2 reasons
    1. Definition of detention updated
    2. The new rules for establishing exclusion under s. 24(2)

R v Sinclair – Further Consultations with Counsel

- **Ratio: It is up to the accused to exercise their right to counsel diligently, not an ongoing right**
- **Facts**
    - Sinclair arrested for murder, had 2 brief calls with lawyer
    - Lawyer gave bad advice ("don't talk about anything important", should have just said "don't talk")
    - As officer starts putting issues of the murder to Sinclair, he says that he doesn't want to talk, and wants to speak to a lawyer again
    - Officer said no, saying he gave Sinclair that opportunity already
    - After furth questioning, Sinclair makes inculpatory statements used against him
- **Issue**
    - Does a detainee who has been properly informed of their s. 10(b) right to counsel, and whom has exercised their right, have a constitutional right to **further consultations with counsel** during the course of an interrogation?
- **Decision**
    - **S. 10(b) does not give right to have defence counsel present throughout interrogation,** and more fundamentally does not provide secondary access to counsel
    - There are **3 situations** where you can have a **right to counsel again:**
        1) **New procedures involving the detainee**
            - To fulfil the purpose of s. 10(b) of providing the detainee with the information necessary to make a meaningful choice about whether to cooperate in these new procedures, further advice from counsel is necessary
            - E.g. Officer asks detained accused to take them to where the gun is → accused gets a 2nd right to counsel
            - E.g. Non-routine procedures like a lineup or polygraph will not generally fall within the expectation of the advising lawyer at the time of the initial consultation
        2) **Change in jeopardy**
            - The accused's charge has been changed
            - E.g. Accused charged with aggravated assault for stabbing in a bar, gets legal advice; 2 hours later, the victim dies and the officer changes charge to murder → detainee gets a 2nd right to counsel
        3) **Reason to question the detainee's understanding of his s. 10(b) rights**
            - Detainee didn't understand/appreciate his right to counsel
            - Or, the police undermine the legal advice that the detainee has received, which may have the effect of distorting/nullifying it
    - Sinclair was **not entitled** to another consultation, because he was **satisfied with the initial advice he received**

R v Willier – Limits to Counsel of Choice

- **Ratio: No duty on the police to ensure "quality" of accused's right to counsel**

- **Facts**
  - Willier initially contacted Legal Aid, then was given another opportunity to contact a specific lawyer who was away from the office
  - Willier wanted to wait for the lawyer of choice, but accepted a police suggestion to call Legal Aid again
  - Willier **expressed satisfaction** with Legal Aid advice, and despite **numerous** police **offers** to **contact** a lawyer again, he confessed
- **Issue**
  - Does an accused have the right to counsel of choice, and what are the limits of this right?
- **Decision**
  - An **accused has the right to contact and retain their counsel of choice prior to police questioning**
  - If their **chosen counsel** is **unavailable**, the **accused** can **wait** for a "**reasonable**" amount of **time** (case-specific)
  - An **accused** must be "**reasonably diligent**" in **exercising their right to counsel**
  - If **chosen counsel is unavailable after a reasonable time, the police duty to "hold off" from speaking to the accused no longer applies** (although the accused can choose to contact other counsel at this time)
  - **Willier accepted a police suggestion to contact Legal Aid rather than wait for his preferred lawyer, therefore, no violation of 10(b) occurred**
  - You have the **right to choice of counsel**, **but** you **cannot wait beyond** a **reasonable time** to **contact** them
  - Reasonableness **depends** on the **charges** themselves (drunks driving vs. murder)

R v Taylor – Implementational Component

- **Ratio: Until access to counsel is given, police must delay questioning or obtaining evidence**
- **Facts**
  - Taylor was the driver in a crash that injured 3 passengers; Taylor asked to speak to a lawyer and was transported to hospital for examination
  - Taylor was not provided with a phone at scene or hospital
  - Blood samples were drawn which later showed Taylor had been intoxicated; tendered into evidence
- **Decision**
  - In addition to informing a detainee of their rights under s. 10(b), **police must also provide a reasonable opportunity and means to exercise this right**
    - E.g. providing a phone/phone numbers to the accused
  - There was **no implementational component,** the police needed to facilitate the phone call
  - Therefore, **anything that happened from that point forward, including the analysis of blood, was ceased from Taylor without his right to counsel → evidence is inadmissible**

Right to Counsel – Summary

- **Accused** has the **burden of proof** when asserting a **Charter violation** on a **BOP**
- Accused **does not have right** to have **counsel present during questioning**
- The **police must provide** a **reasonable opportunity and means** to **access counsel** (Taylor)
- If an **accused's jeopardy changes** (e.g., an assault charge becomes a murder charge because the victim dies), they **must be allowed another opportunity to contact counsel**
- An **accused can waive their right to counsel, but must do so knowingly with an understanding of the implications** of doing so (clear and unequivocal waiver)

- **Crown** bears **burden of proof** for **demonstrating waiver** on a **BOP**

Search and Seizure – s. 8

- S. 8: "Everyone has the right to be secure against unreasonable search or seizure"
- "**Or**" = disjunctive
    - Have right against unreasonable searches, and right against unreasonable seizures
    - You can have one without the other
- If you can establish a breach of s. 8, you're only halfway through the analysis
    - Need to get the evidence deemed inadmissible, **s. 24(2)**
- **Collins**: 1st generation of exclusion cases
    - Talks about s. 8 rights and s. 24(2) exclusion
- **Grant** has taken over the modern analysis
- **S. 8 is a personal right**, it protects **people**, not places
    - You don't have a right against unreasonable search and seizure if the police have found something at your friend's house that is inculpatory against you; no privacy interest here, you gave up your privacy right to someone else
    - **Only places under your control** (your car, locker, bedroom)
    - If you have a privacy right in something, you can turn to s. 8 breach
- It is up to **the accused to prove on a BOP that they had the right to privacy and that it was breached** (typically by police)
    - When the accused proves that, then you go to **s. 24(2), which also needs to be proven on a BOP that it should be excluded**
- **Police can search all kinds of receptacles** (someone's car, clothing, cavities in the body), **provided they have the grounds**
    - Conducted by way of a **search warrant** (a judicially authorized power to go in and search a certain location)
        - **Court views** these searches as **presumptively reasonable**, since they **came to get** the **permission** to search
        - Officer goes to a judge and gives an **affidavit** that the **certain location will afford evidence of an offence** → court gives **ITO**
        - Accused will say that the grounds in the ITO were false or misleading; must prove on a BOP that they had a privacy interest
- Notable cases in the development of section 8 law:
    - R v Collins
    - R v Patrick
    - R v Cole
    - R v Vu
    - R v Fearon
- If a **search is not conducted by way of search warrant**, it is **presumptively** an **unreasonable search**
- However, there could be a **search incidental to arrest**
    - When the officer searches someone, they put them into custody and pat them down (**police officer safety**); police have a right
    - When they're legitimately searching, they may find other stuff like drugs
    - Not only is the person under arrest for the original offence, **but a second charge of possession of a controlled substance**
- When it's shown that there's been a **search not by way of warrant**, the **Crown needs to prove on a BOP that is was reasonable**

R v Collins – First Generation of s. 24(2) and s. 8 Reasonable Search Definition

- **Ratio: Officers need reasonable and probable grounds to conduct search (not a hunch)**
- **Facts**
  - Ms. Collins was under surveillance because of her suspected involvement in Vancouver's "heroin problem"
  - An officer approached her in a pub and grabbed her forcefully by the throat to prevent her from swallowing "any evidence that may be there."
    - On a hunch, he saw something in her mouth
    - Suspected she might have drugs on her
    - Didn't find anything in her mouth, but as she hit the floor drugs come out of her hand…
  - Ms. Collins was arrested for possession of heroin for the purpose of trafficking after a balloon of heroin was found in her hand
- **Issues**
  - Was the search by the officer reasonable?
  - If so, having regard to all the circumstances, would the admission of the evidence bring the administration of justice into disrepute?
- **Decision**
  - **The officer did not disclose reasonable grounds supporting his search and his "flying tackle" and "throat hold" were unreasonable in the circumstances**
  - **Warrantless searches are presumptively unreasonable**
    - If a search is conducted without a warrant, the crown must prove on a balance of probabilities that the search was reasonable
  - **"A search will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable" – that is the law to this day in s. 8**
    - What this search authorized by law → **No**
    - Was the law itself reasonable → **When an officer thinks that a certain location will afford evidence, he may search**
      - S. 10 of the *Narcotics Control Act* is not being challenged
    - Was it conducted in a reasonable fashion → **No**
  - She clearly had a privacy interest, but that isn't the issue
    - All of the officer had was a hunch, and **that is not enough for a police officer to search**
    - Just because someone looks like they have something in their mouth and are in a dive bar doesn't give them the right
    - As said above, the **search was not conducted in a reasonable manner**
  - It was the Crown's onus to prove it was reasonable, and they **did not**
  - The appeal was allowed, and a new trial was ordered
  - The Court: **if the officer did not disclose additional information for his behaviour, that the heroin evidence must be excluded**
  - NOTE: current test for exclusion under section 24(2) comes from: *R v Grant* (2009)

R v Patrick – When Do We Lose a Privacy Interest in Our Garbage?

- **Ratio: No right to privacy over our garbage (abandoned property)**
- **Facts**
  - Police suspected that the accused was operating a drug lab in his home

- On several occasions, the police took bags of garbage from the accused's property by reaching over the property line
- Police were trying to build grounds to get a search warrant
- The garbage contained several items that indicated drugs were being manufactured in the home, police got a warrant

- **Issues**
  - Did the police breach the accused's s. 8 rights?
  - Does garbage have a reasonable expectation of privacy?
- **Decision**
  - No breach—evidence properly admitted
  - "The appellant had abandoned his privacy interest in the contents of the garbage bags gathered up by the police when he placed them in the garbage alcove open to the laneway ready for collection. **The taking by the police did not constitute a search and seizure within the scope of section 8,** and the evidence (as well as the fruits of the search warrant obtained in reliance on such evidence) was **properly admissible**."
  - Accused argues he still has a privacy interest in the garbage
    - You're putting it out for the garbage collectors, not for your neighbours or for the police to look at
  - **SCC**: you've done everything consistent with disposing of your privacy interest, so you've **abandoned your privacy interest**
  - The tipping point is when abandonment has taken place
  - Would a detached garage search be unreasonable?

R v Cole – Do You Have a Privacy Interest in a Work Computer?

- **Ratio: Reasonable expectation to privacy over work computers (level varies);**
- **Facts**
  - An IT technician was performing maintenance on a high school teacher's work computer
  - The technician found nude/partially nude photos of a female student
  - The computer (school's computer, assigned to Mr. Cole) was given to police, who searched it **without** a warrant
    - Officer thought that since IT got to search it anyway as it was a school computer, the teacher didn't have a privacy interest to begin with
  - Accused was charged with possession of child pornography
- **Issue**
  - Is there a reasonable expectation of privacy in a work computer?
  - Did the search of the computer constitute a breach of s. 8?
  - If so, should the evidence be excluded under s. 24(2)?
- **Decision**
  - We have a high degree of privacy for computers since they have our whole lives on them
  - There is a **reasonable expectation of privacy/a privacy interest in a work computer**
  - Thus, since they didn't have a search warrant, the police **breached Cole's section 8 right**
  - Court **ultimately decided that the evidence would not be excluded and ordered a new trial** → officer didn't know this rule, it was an innocent breach
- You can **negate this right to privacy** though if the employer made you **sign a document** saying they're allowed to search it when they want

R v Vu – Additional Search Warrants for Computers

- **Ratio: Separate search warrant required to search computers (heightened right of privacy)**
- **Facts**
  - Accused was suspected of having a grow-op and stealing electricity
  - Police obtained a warrant to search the home
    - During search, police seized computers and a cell phone
    - The warrant did not specifically authorize the police to search computers and electronic devices
  - Accused said his section 8 rights had been violated
    - Argued the officers needed a 2nd search warrant
  - Crown said no, we already have a warrant for everything in the house
- **Issue**
  - Do computer searches require additional/distinct authorization by police?
- **Decision**
  - **Yes**: computers are **highly personal devices with unique privacy interests** and police wishing to search them must obtain **prior authorization** (warrant) that **specifically mentions** those devices → computers are different class of privacy
    - **A search warrant for a home does not automatically include authorization to search electronic devices found in the home**
  - **However,** in this case: the **officers didn't know this rule at the time and they were acting in good faith → so evidence obtained was admissible**

R v Fearon – Searching a Cellphone Incidental to Arrest

- **Ratio: Scope limited for cellphone search; search incidental to arrest must follow certain parameters**
- **Facts**
  - Fearon arrested shortly after an armed robbery of a jewelry store
  - Police found his phone during arrest, which contained incriminating text messages and photos (**SITA =** search incidental to arrest)
    - They didn't have a warrant to search his cellphone, but did so anyways
- **Issue**
  - Was SITA/warrantless search of the cellphone unreasonable and in violation of s. 8?
- **Decision**
  - **Police** have a common **law power** to **search** a **lawfully arrested person and** their **immediate surroundings "properly incident to arrest" without** a **warrant**
  - **Search** must be **reasonably undertaken** in **pursuit** of a **valid law enforcement objective connected to the arrest** (e.g. public or police safety, preservation of evidence, or the discovery of evidence)
  - The exception recognizes that in some cases, the **immediate needs of law enforcement authorities may outweigh an arrested individual's privacy interest**
  - A **warrantless cell phone search must be reasonable,** not simply "routine browsing through a cellphone in an unfocussed way"
  - Officers must take **detailed notes** about search duration and **areas** of the phone that have been accessed

-Police officers will not be justified in search a cellphone incidental to every arrest, and instead **such a search will comply with s. 8 where:**

1. The **arrest was lawful**

2. The search is **truly incidental to the arrest** in that the police have a **reason based on a valid law enforcement purpose** to conduct the search, and that **reason is objectively reasonable**. The valid law enforcement purposes are:
    a. Protecting the police, the accused, or the public
    b. Preserving evidence
    c. Discovering evidence, including locating additional suspects, in situations where the investigation will be stymied absent the ability to promptly search the cellphone incident to arrest
3. The **nature and the extent of the search** are **tailored to the purpose of the search**, and
4. The police take **detailed notes** of what they have examined on the device and how it was searched

Remedies – Section 24(2)

- **Exclusion of evidence bringing administration of justice into disrepute:**
    - (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 (on a **BOP**) that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

3 Generations of s. 24(2)

- **First Generation**
    - ***R v Collins***
        - Chokehold case, drugs in her hand
        - Breach of s. 8, as the search manner was not authorized by law
        - Court in 1987: were creating Charter law from scratch by interpreting the text
        - Court figured out that there was several considerations that went into the circumstances of the case:
            1. Fairness of a trial → most important
                - Was the evidence conscriptive, was the evidence created from a Charter breach?
                - Unfairness usually meant exclusion of evidence, so other 2 weren't necessary to show
            2. Seriousness of the breach. How did the officer act?
                - An innocent breach isn't too bad
            3. Factors that would bring the administration of justice into disrepute
                - Could the evidence have been found by non-breaching conduct?
                - If excluded, the public may be outraged if a killer were to go free
                - Or, would a right thinking member of the public say "what good is the right if you cannot exclude?"
- **Second Generation** – still looks to *Collins*, but starts to expand what factors impact on the fairness of a trial
    - *R v Mellenthin*

- Accused is pulled over, and is in a detention; if a police officer doesn't Charter him on s. 10(b), then whatever the person says in detention might be in breach of s. 10(b)
- Mellenthin gets nervous; and officer gets sense that he's hiding drugs in the car; sees vials in the car and asks what's in there
    - Charged with possession of drugs
- SCC: conscriptive evidence was created as a result of a s. 10(b) charter violation
    - If you find drugs (real evidence) but you found it as a result of conscriptive evidence, **that should also go towards the fairness of a trial**
    - Collins indicates that 3 sets of factors must be considered for whether evidence should be admitted
        - If it affects the fairness of trial, this is the **most important and should be given the most weight**
        - The 2 others are secondary in consideration
    - **Thus, if you can prove that fairness was affected, you could exclude both pieces of evidence (real and conscripted)**
    - At a voir dire, If Crown could prove that the evidence would be found anyways on the BOP, that would be a rebut to the fairness being affected

▪ *R v Burlingham*
▪ *R v Feeney*
▪ *R v Stillman*

- **Third Generation**
    - ***R v Grant*** – time to re-evaluate the "fairness of a trial"
        - **Trial fairness is better served** as an **overarching goal, not a distinct stage of the analysis**
        - **Fairness** may not be as important as we thought, so it **should not be part of the analysis anymore…**

R v Grant – The New S. 24(2) Exclusion Analysis

- **Facts**
    - Grant was stopped by 3 officers patrolling an area known for trouble after they noticed him staring at them and fidgeting with his clothing
        - Police stood in his path and asked him to "keep his hands in front of him" because he was behaving nervously
    - One officer asked Grant if he had anything on him that he should not have
        - Grant admitted to having a small amount of marijuana and a gun
        - Police arrested Grant and advised him of his right to counsel
    - Grant argued that his section 8, 9, and 10(b) rights had been violated
- **Issue 2**
    - Were Grant's ss. 8, 9, 10(b) rights violated?
- **Decision**
    - Grant's Charter rights were breached
    - Assessment was required as to whether evidence should be excluded under s. 24(2) of the Charter
- **Issue 3**

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

- **Decision: The Grant Test** → test to assess whether evidence obtained from a Charter breach should admitted (3 parts):

1. **The seriousness of the Charter-infringing conduct**
   - The more severe the state conduct that led to the Charter violation, the greater the need for the courts to dissociate themselves from that conduct by excluding evidence linked to it, in order to preserve public confidence
   - In *R v Cole*, officer breached s. 8 but it was a more innocent breach since he didn't know you needed a warrant to search
     - Now though, the SCC because of *R v Grant* says the officer **does** have to know certain parts of the CC that affect the daily parts of procedure
     - The longer a law from a case has been out, the less innocent "not knowing" will be
     - Eg. Case where officer pulled over a car for not having a front license plate
       - In AB, front license plates are not necessary, and officer should have known that
       - Lo and behold, officer found 3kg of cocaine in car
       - However, the officer should have known the law, so the evidence was excluded

2. **The impact on the Charter-protected interests of the accused**
   - The more serious the impact on the accused's protected interests, the greater the risk that admission of the evidence may signal to the public that Charter rights are of little actual avail to citizens
   - Certain breaches **don't affect you as badly** (hair, breath)
     - Cars are expected to have a lower degree of privacy than your house (doesn't mean 0, just less)
     - Locker in a school has a lower degree of privacy
     - Computer issued by a schoolboard has a lower degree of privacy compared to a personal laptop
   - Certain breaches are **highly invasive though** (body cavities, a person's house, computers, phones)
   - **Breaches of ss. 8, 10(a), and 10(b) are considered highly impactful**
3. **Society's interest in an adjudication on the merits**
   - Whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion
   - Real evidence (cocaine, a gun): society has a **great interest** in it being admissible in trial, so it's at the high end of the admissibility spectrum

   - And whether the admission of the evidence obtained would bring the administration of justice into disrepute

- Through the test, the **court favoured admitting the evidence of the gun**
- **For each piece of evidence → Do the Grant Test**

III. ONUS OF PROOF IN CRIMINAL CASES

What the Crown Has to Prove on Every Case

1. **Offence occurred in the jurisdiction of the court**
2. **Identity of the accused as the perpetrator of the offence**

3. ***Actus reus***
    - The guilty act
    - Most crimes are acts
    - Some can be omissions (e.g. failing to show up for court, failing to provide necessities of life to a child)
4. ***Mens rea***
    - The guilty mind
    - Has to be a **temporal coincidence between the guilty act and the guilty mind**
    - If you didn't intend to do it, it is not a crime
    - These have to be proven by the Crown **beyond a reasonable doubt**
    - **The accused never have to prove anything BARD**, the highest it can ever be for the accused to prove something is on a BOP

Charter s. 7

- "Everyone has the right to life, liberty, and security of person and right not to be deprived thereof except in accordance with the principles of fundamental justice"
- People can lose their liberties provided they are aligned with the principles of fundamental justice

Principles of Fundamental Justice:

- **Presumption of innocence and Crown's burden to prove guilt BARD**
- ***Nullen crimen*** principle
    - Conduct must not be punished unless it constituted an offence at the time of commission
    - The law must be sufficiently clear and determinate to intelligibly circumscribe the conduct of persons and the authority of the state to enforce the law
- **Conduct must have a sufficient connection to the interests of the prosecuting state to support prosecution by that state (Jurisdiction)**
- **Accused must be sufficiently morally blameworthy to warrant conviction and punishment for a particular offence, which entails that:**
    - The accused have committed a culpable act or omission (actus reus), accompanied by:
    - The fault requisite for conviction and punishment (mens rea)
    - E.g. This is why pure accidents are not crimes, unless you fall within a certain standard (e.g. dangerous driving)

Burdens of Proof

- In criminal law offences, there are special issues
    - Crown: "this person has committed a crime and we want to put them in jail"
    - They need to prove guilt BARD
    - But there are several things you need to go through first
- **6 issues:**
    1. What is the nature of the burden?
    2. Who bears the burden?
    3. How is the burden set? (Common law, statute, Charter)
    4. Who decides whether the burden is satisfied? (Trier of fact or law?)
    5. What evidence is considered in determining whether the burden is satisfied?
    6. To which standard of proof? (E.g. BARD, BOP, evidence to the contrary)

Legal Burden of Proof

1. Nature
    - **"Ultimate" burden to prove/disprove a fact in issue**
    - **Party bearing the legal burden bears the "burden in persuasion" on the issue in question**
2. Who bears the burden?
    - In criminal cases → the Crown bears the burden of proof to show **BARD**
        i. Jurisdiction
        ii. Identity of the accused as being the perpetrator
        iii. *Actus reus* (including causation when applicable)
        iv. *Mens rea*
    - The legal burden **never shifts**
3. How is it set?
    - **Common law (*Woolmington*), statute (CC), and Charter**
4. Who decides?
    - **Trier of fact** (judge in judge-alone trial, or jury in judge and jury trial)
5. On what evidence?
    - The **evidence as a whole** as presented during the trial
6. What standard of proof?
    - BARD
    - BOP: **exception for defence to prove something:** need to prove Charter breaches in a voir dire
        - Defence bears the onus of proving the breach on a **BOP**
        - Then, the defence needs to prove that it should be excluded pursuant to s. 24(2)
        - There could be 2 voir dires at the same time
            - E.g. Breach of a common law confession rule and then also a breach of s. 10(b)
                - Crown has to prove the accused voluntarily BARD
                - Defence has to prove the s. 10(b) on a BOP
        - REMINDER: What if a knife was found during a breach of the common law confessions rule?
            - Pre-Charter: if a threat led to the finding of a weapon, the confession would be excluded **except** any part of the confession that led to the finding of the knife would be admissible
            - Not admissible anymore because of s. 7: breach of this can lead to **exclusion under s. 24(2)**
    - Evidence to the contrary
        - Accused burden to rebut certain statutory presumptions
    - "Some evidence"
        - E.g. On Crown to justify an offence going forward for the trier of fact's consideration of an accused's guilt
        - E.g. On the accused to justify a defence going forward for the trier of fact's consideration for an acquittal of the original charge

Case-to-Meet: Burden of Going Forward

1. Nature
    - **Burden on a party to adduce sufficient evidence to raise an issue as to the existence/non-existence of a fact-in-issue**

- **The burden to get past the judge**
- E.g. **To present sufficient evidence to warrant the trier of fact's consideration of that issue**
- If the party **fails to adduce sufficient evidence on the issue, the trier of law (judge) does not give the issues over to the trier of fact for consideration under the *legal burden of proof***
    - E.g. There's a deceased who has been stabbed to death, no knows who did it
        - Police think they know since they saw an accused running away and they have a 2 witnesses whose descriptions (canary yellow running shoes) match the person they arrested
        - It's not the guilt that is the hardest part, but the person who is the stabber
        - 2 eye witnesses don't show up to court that day
        - Court seeks adjournment, and at next trial they still don't show up
        - After 1 adjournment, that's it; if the witnesses don't show up who said he was "wearing canary yellow running shows", then there is no case anymore
        - **You need some evidence to put your case into play before a jury**
        - If the legal burden is comprised of 2 or 3 other burdens, and you bring 0 evidence on of those, then they jury never gets to decide because the trial judge has taken the case away, since the Crown has failed to prove one of the points
        - You need some evidence on every element in order for the jury to consider the case
    - E.g. Self defence
        - Is there evidence to give it the air of reality?
- However, **satisfying the CTM burden may permit (not compel) the trier of fact to make a determination favourable to the party**
    - E.g. Just because a complainant testifies that he did not consent to a fight with the accused, it does not mean that a jury will ultimately agree, but the assertion itself constitutes "some evidence" to warrant the jury's consideration
- **The CTM burden needs to be passed before the ultimate (legal) burden**
- **CTM burden needs to be met in a voir dire as well**

2. Who bears the burden?
    - Generally: **the party bearing the legal burden on an issue bears the CTM burden on that issue as well**
    - In criminal cases: **the burden is most often on the Crown**
        - **Exception:** Charter-based breaches and remedies
3. How is the burden set?
    - **Common law, statute (CC), and the Charter**
4. Who decides?
    - **Trier of law**
5. On the basis of what evidence?
    - **The CTM burden is assessed at the conclusion of the party's case** (or, voir dire when one is required)
        - The evidence may arise during direct or cross-examination
        - E.g. At the conclusion of the case for the Crown, an accused may apply for a directed verdict of acquittal on the basis that the Crown has failed to discharge its CTM burden
6. What standard of proof?
    - **The trier of law should determine whether there is some evidence on which a reasonable jury, properly instructed, could find that the fact-in-issue was established** (e.g. Whether there is sufficient evidence to warrant putting the evidence to the jury)

Tactical Burden

- **Not determined by law**
- The **burden on each counsel when they decide how best to run their case**
    - Where are the strengths and weaknesses of the opposing side, and can they be exposed?
    - What are the strengths and weaknesses of our case?
- Will be better informed of your tactical burden if you ask: **why am I going to trial?**
    - For Crown, tactical burden might include not just witnesses, but that he was drunk or angry
    - For defence, maybe it's a self defence issue, so you want to tactically draw that kind of evidence out when examining witnesses → showing that he was scared
- Refers to the **practical "burden" falling on a party when adverse evidence is adduced by an opponent**
    - E.g. Accused is under no compulsion to adduce any evidence in their defence, but in some cases, this may be a poor choice
- If an **accused asserts a defence that is not merely a denial of an element of the offence → the accused has the CTM burden of adducing sufficient evidence to raise the issue**
    - E.g. For a judge to instruct a jury on a particular defence, that defence must have an "air of reality"
- The tactical burden is **decided by each counsel based on their respective strategies in the trial**
    - E.g. Crown may wish to lead evidence of an accused's anger and/or intoxication in an assault case
    - E.g. Defence may wish to counter that by eliciting evidence that the accused was clam and sober

Proving an Offence

Items / Elements of Offence	Case to Meet / Evidentiary Burden		Legal Burden	
	ONUS ON	STANDARD	ONUS ON	STANDARD
Jurisdiction	Crown	Some Evidence	Crown	BARD
Identity	Crown	Some Evidence	Crown	BARD
Actus Reus	Crown	Some Evidence	Crown	BARD
Mens Rea	Crown	Some Evidence	Crown	BARD
Disproof of any Defence raised by the evidence Exceptions: - Defence of "NCR" (Insanity). The party that wishes to prove it must do so on BOP.	N/A – effectively, there is no threshold for Crown to meet. Once a defence passes the air of reality test, the only matter left to decide is the Legal Burden.		Crown	BARD

Note re: Defences

If the defence wants the jury to consider a defence, it must first convince the Trier of Law that the defence has an air of reality. If the Trier of Law determines that the evidence shows that a defence has an air of reality the Crown then has to disprove that it applies (E.g. prove that it should not succeed) BARD

	Cast to Meet / Evidentiary Burden		Legal Burden
	ONUS ON	STANDARD	ONUS ON / STANDARD
Defence (E.g. self defence)	Defence to show the defence has an "air of reality" (this can arise from either the Crown's own evidence or the Defence's evidence, or both.	Some Evidence (Air of reality)	If the Trier of Law has determined the defence has an air of reality, burden falls on the Crown to disprove that the defence should succeed BARD.

Woolmington v DPP – Golden Thread Case

- **Ratio: Golden thread runs through common law: burden remains on Crown to prove accused's guilt BARD**
- **Facts**
  - Mr. Woolmington was charged with murdering his wife by shooting her
    - Wife was staying with her mother, and Mr. Woolmington went to the home with a gun concealed under his coat
    - He said he intended to scare wife by threatening suicide if she did not come home, but the gun fired accidentally and she was killed
  - The trial judge instructed the jury that Mr. Woolmington was presumed to be guilty unless the jury was satisfied that the shooting was an accident
    - Once the actus reus has been proved BARD by the Crown, one can infer that the accused meant to do it…this is not right
    - This means the defence had to prove his innocence, instead of the Crown having to prove his guilty
  - At trial, he was convicted and sentenced to death
- **Issue**
  - Did the trial judge err in his instruction to the jury?
- **House of Lords Decision**
  - Yes, the trial judge did err
  - **One golden thread:** it is the duty of the prosecution to prove the prisoner's guilt (AKA the presumption of innocence), not the prisoner to prove his innocence
  - If the jury has a **reasonable doubt** to the accused's guilt → there must be an acquittal
  - **The Crown must prove guilt BARD**
  - Appeal allowed, conviction quashed – new trial

R v Lifchus – Explaining Reasonable Doubt to a Jury

- **Ratio: Proof BARD inextricable from presumption of innocence; proper explanation of "reasonable doubt" is essential element of jury charge**
- **Facts**
  - Accused was a stockbroker facing fraud and theft charges
  - Accused argued that the trial judge erred in instructing the jury on the meaning of proof "BARD"
- **Issue**
  - Should the expression "BARD" be explained to the jury, and if so, in what manner?
- **Decision**
  - **Jurors must be provided with an explanation of what BARD means**
  - The onus resting upon the Crown to prove guilt BARD is inextricably linked to the presumption of innocence
    - That jurors clearly understand the meaning of the term is of fundamental importance to our CJS
  - Appeal dismissed, order for a new trial confirmed

What Language Should/Should Not Be Used to Explain BARD?

Acceptable Language	Unacceptable Language
- A real doubt, a doubt that is not imaginary or fanciful	- Ordinary / an ordinary concept
- A doubt based on the evidence	- "Proof to a moral certainty"
- A doubt that does not arise from pure speculation	- "Haunting", "Substantial", "Serious"
- A reasonable possibility that the issue is not as the party bearing the burden claims	- A doubt which keeps one from sleeping
- Jury must be "sure", provided BARD is explained at the same time. "Sure" = most accurate description of BARD	- "Certain", "Probably guilty" or "Likely guilty"
- Although proof BARD does not mean proof to an "absolute certainty", proof BARD is a lot closer to "absolute certainty" than it is to BOP standard - Starr modifier	- For which one must give a logical reason - reasonable doubt can exist in situations where it cannot be articulated (you may have a reasonable doubt but don't now how to explain it)

- A judge could explain BARD 2 different ways: with or without the **Starr modifier**
    - **Without the Starr modifier:** proof has be higher than a BOP, but not as higher as an absolute certainty → it's somewhere in the **middle**
    - **With the Starr modifier:** although proof BARD does not have to be as high as an absolute certainty, **proof BARD is a lot closer to "absolute certainty" than a BOP** → not in the middle anymore
        - Defence counsel would prefer this obviously

R v W(D) – Do Not Place the Accused on the "Same Plane"

- **Ratio: Can't tell a jury to believe what they want because it puts the accused on the same plane; need to maintain the presumption of innocence**
- **Facts:**
    - A "he said"/"she said" sexual assault case
    - Trial judge gave a secondary "recharge" to the jury on the issue of credibility
    - During this recharge, judge gave the impression that the core issue → whether the jury believed the accused or the complainant
- **Issue:**
    - Did the trial judge err in the recharge by placing the accused and the complainant on the same plane when viewing the charges as a whole?
        - Did he leave the jury with the impression that they must accept the accused's evidence in order to acquit him? (Instead of the presumption of innocence?)
- **Decision**
    - The trial judge erred in his recharge to the jury, **however, given that the main charge was correct and fair, in the circumstances the charge "as a whole" was adequate**
        - **When an error is made in the instruction on the burden of proof, the fact that the trial judge correctly instructed on the issue elsewhere in the charge is a strong indication that the jury were not left in doubt as to the burden resting on the Crown**

- "In a case where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue." → **It is incorrect to frame the issue of BARD as a "credibility contest" between the accused and the complainant**
- A trial judge should instruct the jury on the question of credibility along these lines:
    1) **If you believe the evidence of the accused, obviously you must acquit**
        - If the accused takes the stand and says, "I didn't do it", and if what they say would constitute grounds for an acquittal, then you must acquit
    2) **If you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit**
        - You don't believe what the accused is saying but still are doubtful that they're guilty
    3) **Even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused?**
        - You don't believe anyone or anything the Defence has brought forth
        - You also must ask yourself, "Do you believe the story from the Crown's witnesses?"
            - If you don't, you are left with a reasonable doubt
- A judge does not tell a jury, "it's up to you to believe who you want"
    - You're placing the accused on the same plane → that is wrong

R v Layton – Jury Asking for Clarification on the Standard of Proof

- **Ratio: Where jury asks for clarification on standard of proof, a judge must assist them in understanding what is required of them**
- **Facts**
    - Young complainant was drinking and smoking marijuana with friends in a park
        - Complainant says she passed out and awoke to the accused having sex wit her
    - Trial judge used *Lifchus* standard to explain BARD
    - Jury asked for clarification, **the judge repeated the initial instruction but did not offer additional clarification**
- **Issue**
    - How should a trial judge respond when the jury asks for clarification on the standard of proof?
- **Decision**
    - **A trial judge must answer a jury's questions in a manner that goes beyond repeating the instructions they have already received**
    - Trial judge's have a **responsibility** to **clarify** issues and concepts **when** a **jury says** they're **confused**
    - Court of Appeal was upheld → conviction quashed, and new trial ordered

Presumptions - Introduction

- The common law and some legislation have created "**presumptions**" through which some facts may be proved
    - If certain presumptions were to offend the Charter though → struck down
- A presumption **operates to "presume" a fact to have been proved, when it has not**

Presumptions – No Basic Fact

- Some presumptions require proof of a "basic fact", **while others do not**
- **No Basic Fact**
    - E.g. **Presumption of innocence**
        - Crown has the burden of rebutting this presumption by proving case **BARD**
    - E.g. **Presumption of sanity**
        - An accused is presumed sane unless they prove on a **BOP** their mental state was disturbed or "not sane" at the time of incident
        - We are all presumed sane under s. 15 of the CC

Presumptions – Basic Fact

- **Basic Fact**
    - If the "basic fact" is proved, some other fact (**presumed fact**) is deemed presumed in the case
    - Basic fact → presumed fact
    - Presumptions that require proof of a basic fact are usually **statutory**
    - E.g. Proceedings under s. 255 – Impaired driving law
        - *258 (1) In any proceedings under subsection 255(1) in respect of an offence committed under section 253 or subsection 254(5) or in any proceedings under any of subsections 255(2) to (3.2),*
        - **(a)** where it is proved that the accused occupied the seat or position ordinarily occupied by a person who operates a motor vehicle, [...] the accused shall be deemed to have had the care or control of the vehicle, [...] unless the accused establishes that the accused did not occupy that seat or position for the purpose of setting the vehicle, [...] in motion [...]
            - **Impaired driving is not just while driving, it is also impaired control**
            - S. 255: In driver's seat → deemed to have care/control of the vehicle
            - Seated in the driver's seat with the keys in the ignition still means your guilty even if you're not driving – **presumption of guilt if police can show they were in the seat and impaired**
            - **Unless**: the accused can establish they were not in the seat of the driver

Presumptions – Permissive

- **One that allows,** but does not require, the **drawing of an inference to a presumed fact**
- Basic fact →(may infer) presumed fact
    - **E.g. Common law – Doctrine of Recent Possession**
        - If an accused is found in unexplained possession of recently stolen property, an inference may (not must) be drawn that the accused has the guilty knowledge (mens rea) required for conviction for theft or possession of stolen property
        - Eg. If there's a house then been burgulared at 10PM, and then the accused is seen at a convenience store at midnight, and is arrested and get him to empty his pockets
            - Find a gold watch from the house that was stolen from
            - The Crown could seek a conviction for not only possession of stolen property, but also for breaking and entering
    - **E.g. Causation**

- A jury may (not must) infer that a person intends the natural consequences of his or her actions
- Eg. If you punch someone, it is presumed that you intended to hurt them
- Eg. Michael Kearney shooting Ferguson with a shotgun
    - First defence: provocation – didn't work
    - Second defence: that they were both significantly intoxicated and couldn't have known their consequences – worked

Presumptions – Mandatory

- One that **requires**, as a rule of law, the **presumption of a presumed fact**
- Basic fact → (must be) presumed fact
    - On the proof of a basic fact, the trier of fact **must** presume that the presumed fact is true
    - Most mandatory presumptions are **statutory**
    - Mandatory presumptions **limit s. 11(d) rights** (presumption of innocence) because they **remove the burden of the Crown to prove some elements of the offence**
        - **It has to be a reasonable limit**

Presumptions – Conclusive/Rebuttable

- **Conclusive** = cannot be rebutted by any evidence
    - These presumptions are **rare**, because they **likely violate s. 11(d)**
- **Rebuttable** = requires proof of a basic fact, but can be rebutted with evidence tendered by the accused
    - E.g. On a BOP or "evidence to the contrary", depending on the presumption
    - If the presumption is rebutted, the **Crown must prove the fact in another way**
    - These presumptions **impose a legal burden on the party against whom the presumption operates**

Limitations – Charter s. 1

- S. 1: *The Charter 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*
- This section has **2 functions:**
    - 1. Guarantees the rights and freedoms set out in the provisions which follow it
    - 2. States explicitly the exclusive justificatory criteria against which limitations on those rights and freedoms may be measured*
        - *Outside of s. 33 of the Constitution Act 1982 – "Notwithstanding Clause"

R v Oakes – The Oakes Test for s. 1 [NOT EXAMINABLE ON THE MIDTERM]

- **Facts**
    - Oakes was caught with several vials of hashish oil worth about $150 and $620 in cash; he claimed the drugs were for personal use only
    - Section 8 of the *Narcotics Control Act* [replaced by the *CDSA*] established a "rebuttable presumption"
        - Once the Crown had proved the accused had a narcotic → presumed that they had it for the purposes of trafficking

        - Accused had to prove that they weren't possessing for the purposes of trafficking (reverse onus)
- **Issues**
    - Did the reverse onus of proof created by section 8 of the *NCA* violate section 11(d) of the *Charter*?
        - If yes, is this a '**reasonable limit** prescribed by law' under s. 1 of the *Charter*? (The limit has to be reasonably justified in a free and democratic society)
- **The Oakes Test**
    - **1)** Government must establish that the law under review has a goal that is **"pressing and substantial."** The law must be both important and necessary.
    - **2)** The court then conducts a **proportionality analysis** using three sub-tests.
        - **a.** The government must first establish that the provision of the law which limits a Charter right is **rationally connected** to the law's purpose. If it is arbitrary or serves no logical purpose, then it will not meet this standard.
        - **b.** Secondly, a provision must **minimally impair** the violated Charter right. A provision that limits a Charter right will be constitutional only if it impairs the Charter right as little as possible or is "within a range of reasonably supportable alternatives."
        - **c.** Finally, the court examines the law's **proportionate effects**. Even if the government can satisfy the above steps, the effect of the provision on Charter rights may be too high a price to pay for the advantage the provision would provide in advancing the law's purpose.
- **Decision**
    - Oakes' **s. 11(d) and s. 7 Charter rights were violated**, **and** this was **not justifiable under s. 1**
    - There was no **"rational connection"** between simple possession and intent to traffic
    - Onus of showing limitation of a Charter right is reasonable on the party seeking to uphold the limit (the Crown)

R v Keegstra – Applying the Oakes Test

- **Facts**
    - Keegstra was a high school teacher in small-town Alberta
    - He was a holocaust denier and taught anti-Semitic lessons to his students, describing Jewish people in highly negative terms
    - Students were graded on their ability to reproduce these lessons on their exams
    - He was charged with promoting hatred against an identifiable group [*Criminal Code* sec. 319(2) – formerly 281.2(2)]
    - Keegstra's lawyer argued 2 things
        - 1. This infringes on Keegstra's s. 2(b) freedom of speech rights
        - 2. The defence of truth requires a reverse onus, and this goes against s. 11(d) presumption of innocence
- **Issues**
    - Is the hate speech law [section 319(2)] of the *Criminal Code* an infringement of s. 2(b) of the *Charter*?
        - If yes, can the infringement be upheld under s. 1 of the *Charter* as a reasonable limit prescribed by law and demonstrably justified in a free and democratic society?
    - Does the hate speech law offend an accused's right to be presumed innocent under s. 11(d) of the *Charter* because it places the onus on him to prove the truth of his hate speech?
        - If yes, can the infringement be upheld under s. 1 of the *Charter* as a reasonable limit prescribed by law and demonstrably justified in a free and democratic society?

- **Decision**
  - Mr. Keegstra's teachings:
    - 1) Qualified as a form of expression, and;
    - 2) The government (via the *CC*) was attempting to limit that expression
      - Accordingly, the Court found that **Mr. Keegstra's 2(b) right had been infringed**
  - **Section 319(2) and (3) have the effect of offending section 11(d) of the *Charter*** because it permits a conviction despite a trier of fact having a reasonable doubt as to the guilt of the accused
- **Can either infringement be justified under s. 1? – The Oakes Test:**
  - **1) Pressing and substantial? :** Yes, Preventing hate speech is a pressing and substantial concern in a free and democratic society
    - It is not merely offensive—hate speech causes "very real harm"
  - **2) Proportionality Analysis – For s. 2(b)**
    - **Rationally Connected** – Hate speech laws are rationally connected to the objective of protecting identifiable groups from harm
    - **Minimal Impairment** – Statements made in private conversation are exempt; the hate speech must be "wilful"; "promote" indicates active support or instigation; defences exist in the Code
      - Overall, the law was crafted in a way that should only capture true hate speech, and is not too vague or overbroad
    - **Effects of Limitation** – the effect of limiting hate speech does not impair freedom of expression in "a most serious nature."
      - The effects of the limitation are reasonable and acceptable
  - **2) Proportionality Analysis – For s. 11(d)**
    - **Rationally Connected** – Hate speech laws are closely connected to the objective of protecting identifiable groups from harm
      - Harm is created whenever statements are made with the intention of promoting hatred, whether or not they contain an element of truth
      - If the defence of truth is too easily used, Parliament's objective under s. 319(2) would suffer unduly [Truthfulness must be proved by accused on BOP – reverse onus]
    - **Minimal Impairment** – The impairment of the presumption of innocence is minimal / reasonable
      - By requiring the accused to prove that his statements are true on BOP, Parliament made a concession to the importance of truth in freedom of expression values without excessively compromising the effectiveness of s. 319(2)
    - **Effects of Limitation** – The effect of the reverse onus is reasonable
      - To require that the state prove BARD the falsity of a statement would excuse much of the harmful expressive activity caught by s. 319(2) despite minimal proof as to its worth
- **Holding**
  - S. 319(2) of the CC infringes on s. 2(b) of the Charter
    - However, given the importance of Parliament's purpose in preventing the dissemination of hate propaganda and the weak connection such expression has with s. 2(b) values, it is held that the narrowly drawn parameters of s. 319(2) are justifiable under s. 1 of the Charter
  - S. 319(3)(a) of the CC infringes on s. 11(d) of the Charter

        - However, it can be seen as a justifiable means of excusing truthful statements without undermining the objective of preventing harm caused by the intentional promotional of hatred
        - Therefore, it's also justifiable under s. 1 of the Charter
    - Appeal allowed

IV. ACTUS REUS

Introduction to Actus Reus

- **2 key elements** to a criminal offence: *actus reus* and the *mens rea*
- ***Actus Reus*** = Guilty Act
    - An act **or** omission prohibited by legislation
        - There are more guilty acts than guilty omissions
    - Must be **voluntary**
    - Must **overlap at least temporally with the *MR***
    - It's the "act" element of an offence (what, where, when)
    - Can be determined for offences by **reading statutory provisions**
    - **Type 1: Acts**
        - E.g. Application of force without consent = ***actus reus* for assault or sexual assault** (violation of person's sexual integrity)
    - **Type 2: Omissions**
        - When the accused is under legal duty to act, but fails to do so
        - E.g. Neglecting a child ("failing to provide the necessities of life")
        - E.g. Accused on bail may be required to abide by certain conditions (attending for counselling, making court appearances, fingerprints, etc. = **the guilty omission is the *failure* to do this)**
- ***Mens Rea*** = Guilty Mind

R v Dunlop – Standing and Watching a Crime Take Place

- **Ratio: Mere presence at the scene of the crime is not enough to ground liability**
- **Facts**
    - Appellants: Dunlop and Sylvester (gang members)
    - Complainant was gang raped as part of an "initiation" ritual
    - She recognized the accuseds, but was **unsure** if they had participated
    - Jury asked: "Would accuseds be guilty by being aware of the rape taking place and doing nothing to prevent it?"
        - "We're not accepting her testimony that they were 2 of the perpetrators, but would they still be guilty if they were standing there watching?"
    - Judge gave a confusing recharge regarding parties to an offence
        - Instead of just saying "no", he went into a long explanation…
- **Decision**
    - The trial judge **should have answered** the jury's question with an emphatic "**no**"
    - If all they were doing was standing there watching, **they would not be guilty**
    - **"Mere presence at the scene of a crime is not sufficient to ground culpability. Something more is needed"**

        - E.g. This is **not the same** thing as 3 people going into a 7/11 where 2 people go inside to rob it and 1 is **outside looking to see if anyone is coming to interrupt the robbery → standing the six → they are contributing to the criminal offence**
        - E.g. if Dunlop and Sylvester had been blocking the view of the sexual assault going on in front of them → that would be something more

R v Moore – Refusing to Give Officer Identity

- **Ratio: When a person is seen by an officer committing any offence, they have a duty to provide their name and address for the purpose of identification**
- **Facts**
    - Accused rode bicycle through red light, observed by Peace Officer
    - Moore refused to provide name and address to officer for the ticket
        - Obstructing a peace officer → s. 129 of the CC
    - **Side issue:** whether Moore was driving a Motor vehicle
        - If you're pulled over in a motor vehicle → must give your license and registration
        - *Motor Vehicle Act* – bicycle not a "motor vehicle", but there is still a duty on cyclists to comply with rules of road under the *Traffic Safety Act*
            - Part of the privilege of being on the road is pulling over if an officer stops you
        - Moore's argument: "I'm not driving a car, so I don't have to do that"
- **Majority**
    - Moore's refusal to ID self-constituted obstruction of a peace officer in the execution of his duties (sec. 129 *CC*)
        - It's true that you're not in a vehicle, **but you still rode through a red light** on your bike → you've **committed an infraction**
        - Officer saw it happen, so they're entitled to ticket you
        - If you don't comply, then you've obstructed a police officer
    - Applies to situations when officer **directly observes offence, or has reasonable grounds to believe** an offence has occurred
- **Dissent**
    - Cyclist had **no duty** to **identify** himself to officer
    - Officer **could have arrested** accused to determine identity
    - "The **criminal law is no place** within which to **introduce implied duties**, unknown to statute and common law, the breach of which subjects a person to arrest and imprisonment"
    - The *Traffic Safety Act* says that you need to give this information to the officer
        - Moore was on a bike though
        - There is nothing that says that when you commit a bylaw offence you need to provide your license and registration
        - Therefore, we should not be creating common law duties to provide one's name, unless it's a statutory duty
        - Why? Because it offends the right to silence
- **This case is Pre-Charter, but is still the law**
    - If a police officer sees a person commit an infranction (little or big), then that person has to commit their name and date of birth
        - If you don't, you are failing to comply with a police officer's duty to investigate offences, and therefore you'd be guilty of obstructing a police officer
    - Outside of a police officer witnessing an infraction or having reasonable grounds to think an infranction has taken place, the officer doesn't have the right to ask for your name and license
        - All he has is a suspicion and nothing else

- If you're a witness, you don't have to answer any questions if the officer asks you
- (Make sure to distinguish between reasonable grounds and not)

Actus Reus: Voluntariness

- From ***Theroux*** (McLachlin J) – **some cognition is required for there to be an *actus reus***
  - ***Mens rea* does not "encompass all of the mental elements of a crime** [because the] '***actus reus*' has its own mental element […] the act must be the voluntary act of the accused for the *actus reus* to exist."**
    - A voluntary act (an act resulting from the operating mind) must be present to constitute actus reus
  - There are **situations where there is no operating mind going on**
    - E.g. **Sleep-walking** has been recognized as one of them → if someone is truly sleep-walking, there is no voluntary action because the mind is disengaged from the body
      - There has to be concscious activity
    - E.g. **Automatism** → person is no longer acting without any conscious cognition goin on
      - Person is acting robotically
    - E.g. **Reflex action** → not a conscious action
    - E.g. **Extreme intoxication**…(exceptions apply)
    - E.g. **Heart attack, seizure and you turn into oncoming traffing** → not voluntarily
  - Was the act committed voluntarily? → **A culpable act MUST be voluntary.**
  - **Was the act compelled by some external force or physical infirmity or constraint that severely disrupts the actor's capacity or cognition → may not be voluntary**

Physiological Involuntariness vs. Moral Involuntariness

- **Physiological involuntariness**: E.g., heart attack, bee sting, sleepwalking, reflex, etc.
  - There is **no *actus reus***
- **Moral involuntariness**: E.g., accused has a gun to head and is told to detonate a bomb or be shot
  - There **is actus reus** even though you're forced to do it, but some came over your morals
  - Cognitive capability not eliminated / incapacitated
  - Act is still physiologically voluntary, but morally involuntary
  - This type of situation **gives rise to defense of DURESS** (covered later)
- E.g. 2 men walking from opposite directions meeting at a building corner and collide
  - This is a **voluntary action** constituting an *actus reus* → assault?...
  - **But there is no *mens rea*** since they didn't intend to do it → so there is no crime

R v Daviault – Extreme Intoxication Negating the Actus Reus?

- **Ratio: If established that the accused is at the level of an automaton from self-induced intoxication, this rebuts the voluntariness mental element of the *actus reus*, even for general intent offences**
- **Facts**
  - Accused drank 7- 8 beer and 35 oz of brandy, sexually assaulted woman in a wheelchair
  - Had no recollection of events; BAC was likely in the 500-600 mg/100 mL range (fatal for most) → extremely intoxicated
    - Legal BAC limit for driving is <80 mg/100 mL (for reference)
  - Accused was a 'seasoned drinker', but likely in a state of 'diluted reality'
  - "Brain temporarily disassociated from normal functioning" / "not aware of his actions"
  - Evidence for defence: Daviault didn't know what he was doing

- It didn't just prevent the *mens rea*, but his body was detached from his mind
- He committed the sexual assault *automatically* (like an automaton)
  - Argued it negated the *actus reus* mental element

- **Issue**
  - Can extreme intoxication equal to a state of non-insane automatism negate the intent required for a general intent offence?
- **Majority (4-3 split)**
  - "The mental aspect of an offence has long been recognized as an integral part of crime, and to eliminate it would be to deprive an accused of fundamental justice" (offending *Charter* secs 7 and 11d)
  - "The presumption of innocence requires that the Crown bear the burden of establishing all elements of a crime, including the mental element of voluntariness"
  - He's not insane because of a psychological disorder, he's a normal functioning human being who drank a large amount of alcohol
  - If you **can't prove the *actus reus*** → there is no guilty crime
- Subsequent to this case, the CC was **amended** to include **s. 33.1 – restricted the defence of intoxication**
  - **The lack of basic voluntariness when committing an offence produced by self-induced intoxication is NOT a defence** to an offence involving **assault**, if the accused **departed markedly from the standard of care** generally recognized in Canadian society
  - **Assault** = the **application of force without consent** (general intent offence)
    - If you do this and you know that person hasn't consented, that's an assault
    - Sexual assault is the same thing, except your **violating the sexual integrity of someone**

R v Wolfe – Reflex → Not Voluntary → No Actus Reus

- **Facts**
  - Appellant was part owner of hotel in Kingston, Ontario
  - Complainant was told "for good reason" not to enter hotel premises, but returned anyway
  - Appellant went to call police and was struck by complainant while on the phone
  - Appellant quickly turned and hit complainant with the telephone receiver, inflicting a serious cut to his forehead
  - Trial judge assessed phone strike as a "**reflex** action", however, appellant was found guilty of assault causing bodily harm at trial
    - Reflex actions are **not** voluntary → therefore **no *actus reus***
      - This is different though than walking on the street and walking into someone → it's voluntary so there is an *actus reus*
- **Decision**
  - Court of Appeal: "No offence was committed because some intent is a necessary ingredient in an assault occasioning bodily harm" (agreed with "reflex" assessment of trial judge, **but not the outcome**)
  - Essentially, **Crown failed to prove that phone strike was voluntary (no *actus reus*)**
  - Appeal allowed, finding of guilt set aside, acquittal entered
- **Bottos' Explanation**
  - There must be at least some cognition that makes the act voluntary; a pure reflex is not voluntary.

De Minimis Non Curat Lex – Trifling Matters

- The *De Minimus* principle is addressed in two ways in criminal law:
    - **1) The law does not concern itself with matters of a merely "trifling" or trivial nature**
    - **2) The threshold of contribution required for guilt in causation cases**
        - "What exactly did the accused do to contribute to the end result?"
- For "trifling" matters:
- Although an offence may technically have been committed, it may **not** be worthy of prosecution
- **Conduct should rise to a level of moral seriousness before falling within the scrutiny of the criminal law**
- E.g. 2 people arguing in a bar
    - One person pokes the other in the bar saying "you don't know what you're talking about" → person who was poked calls the police
    - A charge of assault is laid, and is given to a Crown Prosecutor
    - Defence: that is so trifling in nature that the court should not deal with the matter
- Lecture Examples: taking sugar packets from Starbucks or an argument with minor pushing
    - You take 2 packets, 1 for your coffee now and 1 for a coffee you will later that day
    - If it happened once or twice → *de minimis*
    - If it happened everyday → probably theft
- Prosecutors have to consider **2 things**: is there a public interest in the matter, and is there a reasonable likelihood of conviction?
    - They probably apply the *di minimis* principle from time to time too then

R v Kubassek – Is it De Minimis?

- **Facts**
    - Appellant was a Christian woman who held very strong views about same-sex marriage
    - She attended a church, intending to disrupt a same-sex wedding ceremony
    - She pushed the Reverend when he asked her to leave
    - He stumbled and nearly fell, but was not injured
    - At trial and summary conviction appeal court, the charge of assault was dismissed on the *de minimis* principle
- **Decision**
    - Appeal granted, entered a finding of guilt and absolute discharge
    - Kubassek's conduct was not "trifling" based on the context in which it occurred
    - This was not just a mere push, her conduct went **beyond** *de minimis*
    - There are public interest/policy reasons to deter this type of conduct

Causation

- In Causation matters:
    - Does the unlawful act contribute beyond the de minimis range toward the resultant harm or injury?
    - One's contribution to the end result of a crime
    - **When someone has committed a crime, sometimes the crime is not just the original act, sometimes you're prosecuted for having caused the result**
        - E.g. Person punches another man in the nose and breaks their nose
            - The punishment rises because you committed a higher crime (bodily harm)
        - E.g. Person punches someone and they die **(think skull)**

- This would be manslaughter, even if this person was quite susceptible
- You take your victim as you find them

- There are **3 issues**
  - How significant was the act to cause the result?
    - It's got to be a significant contribution to the end result (beyond the de minimis range)
  - What is the legal effect of the unreasonable actions of the victim which caused their harm?
    - None, there is no legal effect if the person acts unreasonably → it's still on you
  - What's the effect of 3rd parties that contributed?
    - None to very little
- Example of thin skull doctrine from final about man slashing woman's face with ring
  - This would be manslaughter
  - She chose to kill herself because of the injury that he conflicted
- Example of man attacking a Jehovah's Witness who later dies because refusing blood transfusions
  - Attacker still liable for manslaughter
  - The think skull → her own religious beliefs
- **Threshold Test**
  - **Factual causation**
    - Can the act of the perpetrator be said to be the cause in fact of the consequence?
    - Was the act a NC for the occurrence of the consequence
    - "But for" this particular act, would the consequence have occurred **("But-for" test**)
      - This is a very inclusive consideration → wide range of determination
  - **Legal causation**
    - If the perpetrator factually caused the consequences, can they be held legally responsible for causing the consequence?
    - Has no mechanical/mathematical equation to figure it out (not as simple as but for test)
    - For an act to be legally considered a "cause", it must be a contributing cause outside the *de minimis* range
    - Moral consideration where the court is now deciding if accused's conduct was blameworthy enough to cause the consequence
    - These are very low thresholds
    - 3 cases to show this (***Smithers, Nette, Maybin***)
- In a given case, the jury does **not** engage in a 2-part analysis
  - Rather, in the **charge** to the jury, the judge seeks to **convey** the requisite degree of factual and legal causation that must be found before the accused can be held criminally responsible for the victim's death
- While **causation** is **distinct** from mens rea, the proper standard of causation expresses an element of fault that is in law **sufficient**, in addition to the requisite mental element, to **base criminal responsibility**

Smithers v The Queen – The Smithers Test

- **Ratio: If unlawful act contributes beyond the de minimis range to resulting harm, unlawful act legally caused it**
- **Facts**
  - This was back when you could be criminally liable at the age of 16
  - Smithers was a black player on a hockey team
  - Members of opposing team called him racial slurs
  - After game, Smithers approached victim and struck him in head, kicked his stomach
  - Victim fell over and died of "aspiration by vomit"
  - It was later discovered that the victim had a malfunctioning epiglottis
    - It did not close his windpipe, and so he ingested his own vomit
  - The kick to the stomach likely caused the vomiting; the vomiting wouldn't be so bad if you had a functioning epiglottis
    - Smithers didn't intend kill (so not murder), but he is guilty of an assault (application of force on a person without their consent)
  - Smithers argued: I'm guilty of assault, but don't find me guilty of manslaughter (unlawful act with a consequence of bodily harm that is reasonably foreseeable)
    - Force without consent of Cobby = actus reus
    - Intention to apply force = mens rea
- **Issue**
  - Was there enough evidence of a causal connection between the kick to the stomach and the victim's death upon which the jury was entitled to convict?
- **Decision**
  - Shows a very **low threshold** for legal causation → this is a test of sweeping accountability
  - They made **3 important rulings on causation (Smithers Test)**
    - **1. The factual determination of causation was to be made by the trier of fact by considering all the evidence**
      - They could look at laypersons evidence
      - Doctors: "can't say for sure that this caused the vomiting, but it *likely* did"
        - Just because they say "likely" doesn't stop a trier of fact from finding causation
        - If they conclude that *this* caused *that*, that is good enough
    - **2. It only needs to be a contributing cause beyond the de minimis range**
      - As long as the act of the accused contributed beyond the de minimis, then he has legally caused the death and thus responsible
    - **3. The Thin Skull doctrine applies to Canadian Criminal Law**
      - You take your victim as you find them
      - E.g. if they have a malfunctioning epiglottis
  - Smithers was found guilty of manslaughter
    - Kick was an unlawful act
    - That act caused the vomiting
    - That vomiting together with the malfunctioning epiglottis caused the death of Cobby
  - The test is appropriate: it started with the crime (in this case of assault)
    - If you commit a crime, then you should live with the consequences
    - The more likely your actions were to cause death, the higher your sentence will be
  - Appeal dismissed, conviction for manslaughter upheld
    - Kick to stomach caused the vomiting, which caused death (causal connection close enough) – "beyond the *de minimis* range"

- Thin skull rule: "you take your victim as you find them"
- It does not matter that the victim had an unusual medical condition that increased the likelihood of death, it does not absolve the accused of liability
- Unlawful act → beyond the de minimis range → legally causative

R v Nette – From "Beyond De Minimis" to "Significant Contributing Cause"

- **Ratio: If an act contributes in a significant way to resulting harm, liability is established**
- **Facts**
  - Accused robbed 95-year-old woman and left her on her bed bound with electrical wire
  - Sometime over the next 48 hours, she died of asphyxiation
  - Accused confessed involvement to an undercover RCMP officer, but later recanted/said it was false
  - Jury didn't buy that, but the questions was whether he was the cause of the death, and to what degree?
  - Accused was found guilty of second-degree murder at trial and Court of Appeal
- **Issue**
  - Was the charge to the jury regarding causation correct?
- **Decision**
  - Jury charge was appropriate
  - Jury agree that there was second degree murder, but disagree with language used in *Smithers* test
  - **Majority** → let's update the language
    - Preferable: did the actions contributed in a significant way?
    - Were the actions of the accused a "significant contributing cause"?
    - The but-for test remains the same → usually easy to answer
    - But the legally causation aspect has changed from "beyond de minimis" to **"would it contribute in a significant way"** → same test, but different language is all
  - **Minority** → you're changing the test making it harder to prove for the Crown
    - Beyond de minimis is a low threshold, but when you are talking about a "significant contributing cause" you've created a higher threshold and a different test…
  - Most judges tell juries now in the way *Nette* describes, it's **still the same test though**
  - Separate causation test for second degree murder not required
  - Smithers standard applies: "more than a trivial cause"
  - New accepted formulation: "a significant contributing cause [of death]"
  - Second degree murder verdict upheld, appeal dismissed

R v Maybin – Intending the Result and Leaving the Victim in a Vulnerable Position?

- **Ratio**
  - **1. Smithers-Nette test MUST be used for determining causation**
  - **2. Reasonable foreseeability and intervening actor can help apply test BUT not replace it**
  - **3. Start with the factual causation analysis, then for legal causation ask: "were actions a significant contributing cause?"**
  - **4. Thin-skull doctrine is *not* intervening act or condition – part of taking your victim as you find them**
- **Facts**

- Appellants, Timothy and Matthew Maybin (brothers) were playing pool at a bar
  - The victim touched a pool ball on their table
  - T. Maybin was the first to hit deceased, followed by M. Maybin
  - Victim fell unconscious on the pool table
  - Bouncer arrived and struck unconscious man in the head several times; victim subsequently died
- Medical evidence was inconclusive regarding <u>which</u> blow caused death
- Trial judge acquitted Maybins and bouncer – could not conclusively state <u>which</u> punch had killed victim
  - Medical examiner can't determine whether it was the Maybins or the bouncer that caused the death → as a result, you are all not guilty
- Court of Appeal: accuseds' assaults were a factually contributing cause of death ("but for their action…", intervention of the bouncer was reasonably foreseeable)
  - The pathologist did agree that the deceased could have been mortally wounded from the Maybins
    - The victim was going to **die** most likely **before** the bouncer stepped in, so the **bouncer fails** the **factual causation part** (but-for test)
    - Thus the bouncer's acquittal remains and he is no longer part of the appeals to the SCC

- **Issues**
  - Did the trial judge err in failing to address whether the appellants' assaults were, in fact, a cause of death?
  - Was it open to the trial judge to find that the appellants' assaults remained a significant contributing cause of death, despite the intervening act of the bouncer because (a) the intervening act was reasonably foreseeable; or (b) the intervening act was not an intentional, independent act?
- **Decision**
  - **Did you intend the result, and did it leave them in a vulnerable position?**
    - E.g. punch someone in the face, they stagger off and walk into the street and get hit by a car → you would be liable
  - In this case: the Maybins left the victim in a **vulnerable position**
    - That vulnerability left him unconscious to further attack
    - Thus, there is a blameworthy link between their actions and his death
  - **Legal causation is about fixing moral blame and asking did the consequence in question flow from the original actions of the accused? Or, were the consequences overwhelmed by a new intervening act?**
  - Appeal dismissed; convictions for manslaughter upheld
  - **<u>Factual causation</u> is not limited to the direct and immediate cause, nor is it limited to the most significant cause**
  - **"It is the general nature of the intervening acts and the accompanying risk of harm that needs to be reasonably foreseeable. <u>Legal causation</u>** does not require that the accused must objectively foresee the precise future consequences of their conduct. Nor does it assist in addressing moral culpability to require merely that the risk of some non-trivial bodily harm is reasonably foreseeable."
  - "Rather, the **intervening acts and the ensuing non-trivial harm must be reasonably foreseeable in the <u>sense that the acts and the harm that actually transpired flowed reasonably from the conduct of the appellants</u>.** If so, then the accused's actions may remain a significant contributing cause of death."

- Here, by incapacitating the victim they left him vulnerable to another's attack on him, and thus causation was proved.

- **Takeaways:**
  - The SCC looks at CA's decision and reveal**s 2 tools of analysis for legal causation**
    - **The reasonable foreseeability test**
      - Their analysis was proper and helpful, but it does **not** replace with the *Smithers* test
    - **The intervening actor tool**
      - In the right circumstances, you may consider the independent actions of others
      - But, if you consider that tool, the intervening actor has to be **so overwhelming** so as to make the original assault inconsequential
        - E.g. punch to a face causing a bloody nose and on the way to the hospital you get t-boned vs.
        - Eg. being stabbed and on the way to the hospital you get t-boned
  - **These tools are helpful, but at the end of the day you still use the *Smithers* test with the *Nette* language**

Sections of the CC that are important

- SS. 224, 225, 226, and 228 → **statutory causations rules related to death**
- If you got a death, you must look at these first → if the answer isn't there, **then you turn to the *Smithers* test**
- **S. 224**
  - E.g. Person gets stabbed, but a young doctor fails to save life → the doctor's actions aren't going to absolve criminal liability
- **S. 225**
  - E.g. People are trying to save person's life and they in good faith end up causing the death → it is still on the dangerous act of the original actor
- **S. 226**
  - Acceleration of death
  - If you hurt someone who is already sick and dying but you cause the acceleration of their death → you are liable
- **S. 228**
  - Influence of the mind
  - No person commits homicide by any influence on mind alone, or any disorder or disease resulting from mind alone; doesn't apply to frightening child or sick person
  - However, if you frighten someone to death → you are guilty of their death

V. MENS REA

Introduction to Mens Rea

- Criminal liability requires more than just committing a prohibited act or omission
- The "morally innocent" should not face criminal charges
- Types of Fault
  - Mens Rea - subjective intention/mental state to commit crime
  - Penal Negligence (objective fault) - Failure to act in accordance with relevant standard of care

- Subjective orthodox
    - It's not what a reasonable person was thinking, it's what the person actually was thinking
    - Parliament has made changes to this though, by having some offences fall below a certain standard
        - E.g. Dangerous driving
        - E.g. Criminal negligence

Mens Rea Overview

- Crown must establish beyond a reasonable doubt:
    - Date (when relevant), jurisdiction, identity of being the perpetrator of the alleged offence
    - *Actus reus* of the offence
    - *Mens rea* for the offence
        - Intent to perform AR, including intent to cause consequences that are part of AR
        - Or, knowledge of the relevant facts/circumstances
- When an accused confesses that they're the perpetrator, and that they committed something intentionally, it makes the Crown's job to prove the *mens rea* easier
- One way they can prove the *mens rea* is through a confession
- When the Crown doesn't have a confession, they have to convince the trier of fact that the accused meant to commit the offence
- Evidence of *Mens rea*:
    - What accused said about their mental state at the time of the offence
    - Any confession or admission
    - Inferred from circumstantial evidence (what accused did before/during/after act)
    - If MR cannot be proven, accused is entitled to an acquittal

Proving Mens Rea

- Trier of fact ***may*** (but not "must") infer that a person intended the natural consequences of their act [Permissive inference]
    - E.g. person punches someone in the face and breaks their nose
        - Trier of fact: well he intended that, since it was a consequence of his action
- In absence of circumstances giving rise to a reasonable doubt, a person intended to do what they have done
- Presumption ≠ Permissive Inference

R v Bernard – Sexual Assault = General Intent Offence

- **Ratio: Sexual assault = general intent offence, intoxication is not a defence**
- **Facts**
    - Accused sexually assaulted victim causing bodily harm
    - At the time of the offence, the accused was highly intoxicated
- **Issue**
    - Should evidence of self-induced intoxication be considered by the trier of fact, along with all other relevant evidence, in determining whether the prosecution has proved BARD the *mens rea* required to constitute the offence?
- **Decision**
    - Sexual assault is a general intent offence

- Intoxication may not be used as a defense for general intent offences (policy reasons)

Recklessness and Willful Blindness

- **The highest form of intention is true knowledge of the facts**
  - If the accused knows something or truly intends something → highest form of mens rea
  - This can come from a confession, or a text message to someone else, or it can be inferred from the circumstances
  - E.g. Shooting someone very up close → anyone would understand/infer that you intended to kill
- Sometimes things aren't so easy
  - E.g. People who possess stolen property
- There's a claim of moral innocence, but the police want to show some other way of proving the mens rea
  - They can argue willful blindness, or recklessness
  - 2 additional routes to establishing mens rea that are below true knowledge
- **Recklessness** and **Willful Blindness** are "routes" to proving mens rea
- Alternatives when evidence may not support "full" mens rea (E.g. true knowledge; true intention)
- **Willful Blindness** – subjective / two elements: → almost the same as true knowledge (like 1a)
  - Awareness of the need for inquiry **and** choosing deliberately not to make the inquiry in order to maintain ignorance
    - They deliberately fail to inquire when they know there's a reason to inquire
    - E.g. Accused is found to have stolen property
      - Police interrogates, and accused says that he bought Rolex for $300
      - Officer says "you know they're worth $1000s"
      - Accused says "yes"
      - Officer says, "don't you think you should have asked when you bought it where did it come from?"
      - Accused says yes → willful blindness
      - This is just as bad as truly knowing it was stolen
      - There is a foundation of guilt
  - Applies to knowledge of facts, is equivalent to knowledge
  - Briscoe, SCC 2010 definition of willful blindness
    - Requires that the D intended to cheat the administration of justice
    - There has to be a subjective suspicion of fact, realized its probability, and refrained in order to maintain a claim of innocence
    - If all you think is that it is "possible" and not "probable", you're not in willful blindness anymore
  - Even though WB isn't mentioned often in the CC, it still counts
- **Recklessness** – subjective (unless statute says otherwise) / two elements:
  - Awareness of risk **and** proceeding regardless
    - The accused has to be thinking "there's a risk that this prohibited consequence might occur, and even though I'm subjectively aware of that risk, I'm going to proceed anyway; I don't care what the result is"
  - Applies where there's a consequence-based offence
    - Cannot be used to establish knowledge of the facts
    - Should NOT be applied to knowledge-based offences, but can count as *mens rea* is some places…
  - For some offences, only true knowledge and willful blindness will suffice, but for other offences (assault / sexual assault) recklessness will also apply.

- Both WB and R start with subjective awareness (need to inquire vs. awareness of a risk)
- But there's an important distinction between the 2
  - WB is almost as good as true knowledge
    - When there's a knowledge-based offence, you can use WB
  - R does not get to the level of knowing the fact and realizing its probability
    - It is not appropriate to be applied to certain offences where the offence needs to be established by true knowledge or WB only
  - A knowledge-based offence will have the term "**know**" or "**knowingly**"
    - E.g. Possession of stolen property → true knowledge is required, and a substitute can only be WB
    - If you were to impute R, you'd be watering down
  - Sometimes the terms "know" or "knowingly" aren't there, leading to either WB or R being useful for establishing liability

R v Sandhu – R vs WB vs Actual Knowledge

- **Ratio: When an offence requires knowledge on the part of the accused, it is improper to instruct the jury that a finding of R satisfies that**
- **Facts**
  - Accused returned from India with two jackets that contained about one pound of heroin in the lining, as well as two grams of heroin in his wallet
  - Accused claimed that he was duped into bringing drugs back to Canada by a woman he had an affair with
  - Trial judge
    - You can find him guilty if you find he actually knew, he was WB, or that he was reckless
  - ON CA
    - Can't do this, you're applying R to a knowledge-based offence
    - This is watering down the *mens rea*
    - If you don't distinguish between WB and R, you run the risk of importing negligence into knowledge
    - For knowledge-based offences, waters down the *mens rea*
      - Why? One of the defences is called "mistake of fact" → believing something to be true, but in fact you're wrong about it
        - Common to sexual assault cases when it comes to consent
        - Mistakes of fact can be unreasonably based, so long as the accused honestly believed it
        - Thus, they don't have to be reasonably held
      - If you were to impute R to a knowledge-based offence, you're saying "you should have realized that it was stolen/counterfeit"
- **Issues**
  - What is the difference between R, WB, and actual knowledge (was jury charge at the trial sufficient)?
- **Decision**
  - Leave to appeal granted, convictions quashed, new trial ordered
  - Jury charge at trial was **not** appropriate (judge did not indicate that actual knowledge and willful blindness are equivalent), **recklessness was improperly explained**
  - Jury should have been directed to consider whether there was a point during his travels in India where he became aware of the need to inquire and declined to do so (willful blindness)

- R imports an element of negligence into the provision, and is something less than WB

R v Vinokurov – R Cannot be Elevated to a Form of Knowledge

- **Ratio: R will not satisfy knowledge requirement on charge for possession of stolen property**
- **Facts**
  - Appellant, owner of a pawn shop, was charged with 7 counts of possession of stolen property [*CC* - sec 355(b)]
  - Appellant called mother prior to accepting merchandise
  - Was told to get ID from the guy, the person showed his federal prison ID card
  - Testified saying he didn't know watches/rings were stolen
  - Also convinced the judge that he was not WB, since he didn't know probability
  - Trial judge
    - You're still guilty by way of R
    - The accused was conscious of the risk attached to the transaction
    - You should have been aware
      - **But this isn't what you do in criminal law, it's whether HE was aware**
- **Issues**
  - Was it open to the trial judge to consider recklessness to fulfil the *mens rea* requirement of the offence after he found that the Crown had not made out the requirements for wilful blindness?
- **Decision**
  - WB not proven, and R is not sufficient for offence
    - If not aware of the need to inquire, can't be guilty because "you should have been aware of the risk" – it is subjective
  - Appeal allowed, convictions quashed, new trial ordered
  - It was inconsistent of the trial judge to find that the Crown had not proven willful blindness, but that appellant was "fully conscious of the risk" and therefore reckless
  - If a criminal offence uses the term "**willfully**" to characterize the commission of the act (in the CC or statute), mere recklessness is excluded from the *mens rea* for that offence.
  - The *mens rea* may still be established on proof that the accused had foresight that the consequence was certain or substantially certain to result from the conduct in question
- **Judgment – This is how you write a good judgment**
  - Cites section (don't need to copy out entire section)
    - Confirms that the onus is on the Crown to prove that the accused committed the crime
    - Explains that WB will fulfil the requirement for a knowledge-based offence
    - Addresses the level of suspicion required
    - Before the doctrine of WB applies, it must be probable
    - What other cases are out there (Sandhu → improper to impute R as a form of *mens rea* in knowledge-based offences)
    - **If you're not subjectively aware of the need to inquire, you're not subjectively aware of a risk either**
  - WB will almost apply, but there has to be a subjective awareness of a probable fact
  - R is something less than that, it's foresight of a risk
    - This isn't the same thing as the possibility of a fact
  - Look at the CC provision itself
    - Does it say "know" or "knowingly" → only true knowledge or WB will apply
    - If it doesn't (and says "willfully" or "intentionally") → R applies

- E.g. Husband and wife have a major argument, cool off period, then husband goes in to kiss her, but she doesn't want to
    - WB and R apply to that scenario
    - Provision in s 256 (assault): intentional application of force (not "knowingly")
- **Bottos' explanation**
    - Given this was a **knowledge-based offence**, then only true knowledge, true intention or willful blindness could apply—not recklessness
    - If Vinokurov did not "know", nor was he willfully blind to the probability the goods were stolen, then then recklessness cannot be elevated to a form of knowledge
- **Methodology**
    - 1. Determine if the offence is knowledge-based or consequence-based
    - 2. See if other routes to *mens rea* exist in circumstances
        - Will WB suffice? ("knowingly", "know")
        - Will R suffice? ("intentionally, "willfully")
        - Some offences lend themselves to an application of both

R v Buzzanga & Durocher – Defines What the Mens Rea is for the Willful Promotion of Hatred

- **Ratio: For willful promotion of hatred, a consequence-based offence, a HEIGHTENED form of R (virtual recklessness) is required**
- **Facts**
    - The accuseds (French Canadians) were charged with "willfully promoting hatred" (hate speech) against an identifiable group (French Canadians)
    - They distributed "satirical" pamphlets with the intent that it would spur action from "apathetic" French Canadians regarding a troubled French school project
    - Trial
        - Testified that they were just trying to cause a stir and being ironic, there was intention to promote hatred
        - Convicted
    - ON CA had to decide what the term "willful" in the willful promotion of hatred meant
- **Issues**
    - What does "willfully promote hatred" mean?
    - Does "willfully" mean accidentally or intentionally?
- **Decision**
    - Appeals allowed, convictions set aside, new trials ordered
    - Based on context, judge concluded that "willfully" did NOT mean accidentally
    - "It is evident that the use of the word "willfully" […] reflects Parliament's policy to strike a balance in protecting the competing social interests of freedom of expression on the one hand, and public order and group reputation on the other hand."
    - **Given the political nature of the speech, recklessly was not defined as merely proceeding in the face of an awareness of a risk to bring about the prohibited consequence, but that the accused must forsee that the prohibited consequence was certain, substantially certain or morally certain to occur.**
    - R is too low a bar for "willful"
    - There needs to be a heightened form called **virtual recklessness**
    - s. 319(2), and compare it to s. 319(1)
        - **S. 319(2) says "wilfully", s. 319(1) does not**
        - All CC offences have to have mens rea

- There has to be a guilty mind is (1)
- What happens when (2) says "willfully promoted is"
- The one that says "willfully" has some super-added mens rea that (1) didn't have
- If R can apply to (1), (2) means **something more** is required, because we're talking about the term "willfully" and political speech
- Because the 2 provisions side-by-side, (2) requires a **heightened** form of mens rea
- If it isn't basic recklessness, like in (1), and we want to protect political speech, those should be convicted if they intended to promote hatred
- The appellants didn't want to promote hatred, they were being satirical
- Even if they dind't want to promote hatred, they would be found gulty if they foresaw the consequences from promoting hatred
- **Virtual recklessness is limited to codes like promoting hatred**

Hebert v the Queen – What Does Perjury Require?

- **Ratio: Perjury requires more than a deliberately false statement; it must also be made with the intention to mislead**
- **Facts**
  - Accused admits he lied while giving testimony
  - Said he did not "intend to mislead" the court
  - Hoped to attract the judge's attention so he could advise him privately that he had been threatened
    - Lied in order to attract attention
  - "If you believe the accused at the perjury trial didn't intend to mislead, then he's not guilty"
- **Issues**
  - Did the accused have the *mens rea* to support perjury?
- **Decision**
  - Appeal allowed, new trial ordered
  - Perjury requires more than just giving a false statement; must also "intend to mislead"
  - Have to have the **intention** to lie, the act itself is not enough

R v Mathe – Mens Rea for Attempted Robbery

- **Ratio: If evidence raises a reasonable doubt about accused's intention to commit the offence, he must be acquitted**
- **Facts**
  - Accused drunkenly entered a bank and told teller he had a gun and wanted money
  - When teller started to hand over money, he said he was joking and left bank
    - "That's not what I want", explains he as only joking, and walks out
  - Police arrested accused and charged him with attempted robbery
- **Issues**
  - Did the accused have the *mens rea* to support a charge of attempted robbery?
  - Was attempt to commit a robbery properly proven by the Crown?
- **Decision**
  - Appeal allowed, conviction set aside
  - Judge had reasonable doubt that accused ever actually intended to commit a robbery and therefore should have been acquitted

- "The incident could be properly characterized as a drunken and senseless prank"
- The accused at all times was protected by the presumption of innocence
- This is **rare**, but in this case the evidence was believed and there was no *mens rea*
- Probably would've been successful for the Crown if the charge laid was "uttering a threat"

Mens Rea Overview – Types of Mens Rea Offences

- *Mens rea* for an offence is inferred by the courts based on the wording outlining the offence in the *Criminal Code*
- **Presume** (as a starting point) all offences require **subjective** *mens rea* unless statute says otherwise
- **General Intent** – intention to commit the act (the actus reus)
  - Lower form of intention
  - E.g. Assault – "I know this person isn't consenting but I touched them anyways"
  - IT IS NOT simply doing the actus reus
    - E.g. Walking into someone without knowing/seeing them is not an offence → no mens rea
  - IT IS the **intention to doing the actus reus**
- **Specific Intent** – intention to commit the act for a higher or particular purpose (E.g., "shoot to <u>kill</u>")
  - Has **2 things**
    - **The intention to commit the actus reus**
    - **But for an ulterior or specific purpose**
  - E.g. You're not just shooting someone, you're shooting to kill
  - E.g. ***Smithers***
    - Smithers never intended to kill the deceased
    - If he had, that would have been murder (not manslaughter which was the actual conviction)
- *Code* will also, by inference, specify whether offence is general / specific intent
- (**<u>Motive ≠ *Mens Rea*</u>**)
  - Specific and general intention are mens rea, MOTIVE IS NOT
- **Motive** – purpose/objective/reason for committing an act that is **<u>not</u>** included in the *mens rea* for the offence
  - E.g. Assault
    - Punch (actus reus) + intention to touch (general intent mens rea) + anger/jealousy (motive)
    - The motive is **not** essential to *mens rea*
  - E.g. Theft
    - Actus reus = taking of an object
    - Mens rea = intent to deprive
  - E.g. Robbery = theft with violence/application of force
  - **Motive though can be helpful in 2 ways**
    - **Can prove/better establish the identity of perpetrator**
    - **Or it can prove that the person intentionally did the act instead of accidentally**

Specific Intent Offences

- **All offences break down into 2 kinds: general intent or specific intent offences**
- Part of the multi-leveled, statutorily-dictated *mens rea* of certain offences
- McIntyre J:

    - "A **general intent offence** is one which the only intent involved relates solely to the performance of the act in question with no further ulterior intent or purpose"
    - "A **specific intent offence** is one which involves the performance of the actus reus, coupled with an intent or purpose going beyond the mere performance of the questioned act"
- *Criminal Code* form for **specific intent offences** (generally):
    - *"Everyone who does X, with the intent to do Y, commits an offence"*

Specific Intent Offences – Examples

- Aiding and Abetting (*R v Fraser*)
- Assault with Intent to Resist Arrest (*R v Tom*)
- Attempt at Any Offence (*R v Colburne*)
- Attempted Murder (*R v Kireycbuk*)
- Murder (*DPP v Beard*)
- Possession of Stolen Property (*R v Vinakurov*)
- Receiving Stolen Property (*R v Bucci*)
- Robbery (*R v George*)
- Sexual Exploitation (*R v Audet*)
- Theft (*Ruse v Read*)
- Willfully Causing a Fire (*R v Swanson*)

General Intent Offences – Examples

- Arson (*R v Tatton*)
- Assault (*R v George*)
- Assault causing Bodily Harm (*R v Penney*) – but objective foresight only is required for any resultant bodily harm
- Aggravated Assault (*R v Godin*) – but objective foresight only is required for any resultant bodily harm
- Sexual Assault (*R v Bernard*)
- Assault of a Peace Officer (*R v Tom*)
- Incest (*R v B (SJ)*)
- Indecent Assault (*R v Resener*)
- Manslaughter (*R v Mack*)
- Mischief (*R v Scbmidtke*)
- Rape (*R v Leary*)
- Unlawful Confinement (*R v B (SJ)*)
- **NOTE: This list is non-exhaustive.**

Motive

- A purpose or intention which may be causally linked to the performance of an act
- Motivation, object, or purpose
- Does NOT form part of the *mens rea* of an offence
- Intent ≠ Motive
- *Mens rea* ≠ Motive
- Motive: "always relevant, never essential"

- **Crown does not need to present *any* evidence of motive, however, it may help case**
- E.g. Accused committed a murder BECAUSE they want to obtain an insurance pay out. The insurance money is the motive for murder. The *mens rea* for murder is a separate concept → He intended to kill. The reason for doing so (motive) was to collect the insurance money.
- **Absence of Proved Motive** – proving a motive is not required to produce a conviction; up to the judge's discretion.
    - E.g. No evidence of a motive (but unproven motive may still exist).
- **Proved Absence of Motive** – always an important fact in favour of the accused and ordinarily worthy of note in a charge to a jury.
    - E.g. Evidence of the absence of a motive (Compelling evidence that accused had no motive to commit the offence). These cases are uncommon.
- **Presence of Proved Motive** – may be an important factual ingredient in the Crown's case, notably on the issues of identity and intention, when the evidence is circumstantial; judge should inform a jury.
    - E.g. Proof that the accused had a certain motive in committing an offence.

R v Lewis – Motive is Not Essential

- **Ratio: Where there is absence of proved motive, it is the judge's discretion whether to refer to the lack of motive in jury charge → no obligation**
- **Facts**
    - Appellant (Lewis) and Tatlay jointly charged with the murder of Tatlay's daughter and her husband
    - Tatlay was distraught by his daughter's choice of husband
    - Crown alleged that Tatlay and Lewis conspired to make a bomb out of an electric kettle
    - Lewis said he mailed package, but was "an innocent dupe" unaware he was mailing a bomb
        - He said he did it at the request of Tatlay, who he did not before the request, and that he did not know the contents
    - Tatlay's motive was clear (parent whose daughter married against his wishes)
    - For Lewis, he said that he had no motive against these people
- **Issue**
    - Did the trial judge fail to explain the concept of "motive" to the jury, which would have shown the Crown had no evidence of such?
- **Decision**
    - Appeal dismissed
    - Trial judge did not err by failing to charge jury on concept of motive
        - There are many cases where the Crown can't point to motive because they don't know/there's no evidence → these are considered motive-less crimes
            - The jury should be told that motive is not what the Crown has to prove, and they shouldn't be faulted for not proving it
            - Just because the motive hasn't been shown doesn't mean the mens rea cannot be proved
        - There are cases where motive is available
            - Has to be told to the jury "this is the motive behind the offence"
    - **"Motive was not proven as part of the Crown's case, nor was absence of motive proven by the defense. There was, therefore, no clear obligation in law to charge [the jury] on motive"**
        - If there was a proved absence of motive, the judge has the discretion to tell jury to consider that there is proved absence of motive, but they're not obliged to

Levels of Cognition Review

- **Actus reus**
  - **1. Person has to have sufficient cognition to make the actus reus voluntary**
    - Usually fairly easy to prove, unless it's a reflex action, epileptic action, sleepwalking, etc.
- **Mens rea**
  - **2. The lowest form is the general intent offence (intention to commit the actus reus)**
    - Intention to do the basic act is the sufficient mens rea
  - **3. Specific intention offences are next**
    - You do the act not for the act itself, but to achieve a higher form of offence
    - E.g. You apply force **in order to kill**
    - E.g. Robbery = theft + violence
    - You're doing something for the purposes of doing something else
      - That "something else" is the goal
    - The connection between the original action and achieving the ulterior purpose can be severed **when someone is highly intoxicated**
      - Alcohol myopia – you're lacking subjective foresight
      - If you lack the needed foresight for murder, there is no longer intent
    - In the case of ***Daviault***
      - He was so drunk his actions weren't even part of the actus reus → at the level of an automaton
      - For policy reasons, we want a distinction between general and specific intent offences
        - There needs to be some form of liability for those who are drunk
        - It can **only** be a **defence** for **specific intent offences**
  - **4. Motive (optional)**
    - What induces the offender to act?
    - Can induce a general or a specific intent offence
    - If proven by the Crown, it can help establish identity of the perpetrator or showing intention instead of accident

R v ADH – Mens Rea Requirement for s. 218 (Child Abandonment)

- **Ratio: Child abandonment requires subjective fault and there is a presumption that parliament intends a subjective fault element for crimes**
- **Facts**
  - Accused was unaware that she was pregnant and gave birth in a Wal-Mart bathroom
  - Believing the child was dead, the accused left the baby in the restroom toilet
  - If this lady was under the belief that child was dead, it ceases to be a child, it is then just a body
    - If you abandon a body, you're not abandoning a child (s. 218)
    - Not only does the AR need to be there (abandoning), there has to be the MR (accused had to know that the child was alive)
    - If she was honestly mistaken that the child was dead, then there is no abandonment
- **Issue:**
  - Is the fault element for child abandonment to be assessed subjectively or objectively?
- **Decision**
  - Appeal dismissed

- Crown argued that fault element should be assessed objectively (penal negligence standard)
- Absent language to the contrary, Parliament intends a **subject fault element** for crimes (the **subjective orthodoxy**)
  - Begins with the presumption the subjective orthodoxy → This is not the same as negligence, it's the opposite
    - There are different states of MR (True knowledge, WB, and R if it's not a knowledge-based offence)
  - Then, look at the provision itself and provisions immediately surrounding it
    - S. 215: requires **objective fault**, however the **language** used here is **not present in the s. 218 provision**
    - S. 218: those terms describe subjective foresight on the part of the accused to at least see the risk of doing something
      - There is no language which shows it to be an objective fault situations (as opposed to the classic subjective orthodoxy) such as "dangerousness, carelessness, or reasonable, unreasonable"
  - For policy reasons, you don't want to cast the net too wide
    - If it was objective fault, we'd be punishing a lot of people who "ought to have known"

- **Minority**
  - This is child-protection legislation, so we need to protect children through **objective measures**
  - However, accused not guilty because not even the **AR** was met

R v Tatton – Mens Rea Requirement for s. 434 (Arson)

- **Ratio: In determining general or specific intent, a 3 part test should be used**
- **Facts**
  - Mr. Tatton was an alcoholic staying with his ex-girlfriend
  - He decided to cook bacon and set pan of oil on "high"
  - L: eft house to get coffee, returned 20 minutes later to the home on fire
  - Stated that fire was an accident
  - When you damage property, it is usually called mischief
  - But if you use fire as the mechanism, it is **arson**
  - Trial judge
    - Arson requires specific intention (lightning a fire with an ulterior purpose)
      - Key feature for specific intent offences is that you need the mental element to achieve that higher purpose
- **Issue**
  - Is arson a specific or general intent offence?
  - Does the self-induced intoxication serve as a defence for arson
- **Decision**
  - Trial judge determined that arson was a specific intent offence
  - Trial judge allowed intoxication defence and acquitted Tatton, Court of Appeal upheld acquittal
  - SCC agreed with Crown that arson is a general intent offence and that intoxication short of automatism could not be considered (see analysis in the case – paras 10, 20-39)
  - Appeal allowed, acquittal set aside, new trial ordered
  - **Sets out 3-part test for determining specific vs general**
    - **1. Determine the appropriate mental element of the offence in question**
      - Is it objective fault or subjective fault

- There's a presumption that it's subjective fault
- Even when you're in subjective fault, you can be into general intent or specific intent

- **2. Look at existing jurisprudence**
  - Shows it to be general intent
  - If it wasn't there, look at other jurisdictions
  - How important the mental element is to the crime?
    - What exactly must be going through the mind of the accused to perpetrate this offence?
    - General intent → intention to perform the legal intent
    - Specific intent → a heightened mental element, must act with ulterior purpose
- **3. If that doesn't help, turn to policy considerations**
  - How prevalent does alcohol/self-induced intoxication go with the offence in question ?
  - Alcohol has been seen to correlate with crimes of damage
  - For policy reasons we don't want to be letting people off the hook for offences that are usually being perpetrated by people who are intoxicated
  - Thus, if they are perpetrated by drunks, we shouldn't be giving them a pass

- Here
  - If you're reckless about your use of fire, and you say to yourself as a sober person "this could cause a fire if I leave", that's all it takes
  - Therefore, on both of those grounds (simple cognition required to foresee damage by use of cooking oil in a pan, and the fact that arson is often committed during times of self-induced intoxication) it is a **general intention offence**
  - Self-induced intoxication is **not** a defence for general intent offences

VI. PENAL NEGLIGENCE

Introduction

- Usually the violation of a "legal duty", "duty imposed by law", or an "unlawful act"
  - Everyone is criminally negligent who in doing or omitting anything that is his duty to do shows reckless disregard of the lives or safety of others
- Conduct of the accused is compared with **what a reasonable person would have done in the circumstances**
  - Objective; the reasonable person is not personalized but it is contextualized (e.g. in the same circumstances)
  - **Conduct that is a "marked departure" from the normal standard of care**
    - Reasonably foreseeable risk of non-trivial, non-transitory bodily harm, compared to civil negligence
- **Dual fault offences** have both mens rea and penal negligence elements
- ***Sault St. Marie:*** "No negligence in true criminal law"
  - Penal negligence does not include the "guilty act" or guilty mind" (subjective intent)
  - When analyzing crimes of negligence, look at the **wording** of the Code to determine a basic standard, then look at how the case law interprets that wording/standard
- **Examples of penal negligence offences**

- Often include dangerous activities such as firearms/weapons, driving, flying, boating, railroad engineers, skydiving, scuba diving, fighting, vulnerable persons
- S. 86 – **Careless use**: Using in a careless manner without reasonable precautions for the safety of other persons; wording deals with allegations of careless use
- S. 219 – **Criminal negligence causing death**: A way individuals commit manslaughter
  - Criminal negligence = wanton or reckless disregard for the life/safety of others
- S. 215 – **Necessities of life**: Can be part of a criminal negligence charge
  - Everyone is under a legal duty to provide the necessities of life
  - It is a legal duty that gives rise to a standard of care (subject of endless jurisprudence)
  - There is a duty on the accused to explain/excuse conduct (reverse onus)
- S. 269 – **Unlawfully causing bodily harm**: Usually involves doing something that isn't directly related to eventual danger, but objective foresight of the danger is present
  - E.g. Man throws bottle against a wall during a fight; bottle shatters, shards of glass severely cut the victim; no assault, but **bodily harm caused by an unlawful act: the mischief and destruction of property**
- S. 249 – Dangerous **driving**: 3 sections of punishment
  - 1) Simpliciter
  - 2) Causing bodily harm
  - 3) Causing death

R v Sault St Marie – Justice Dickson

- **Facts**
  - City was dumping sewage into lake, and were charged with negligence of putting this into the lake
- **Analysis**
  - There's no place for negligence in the criminal law
  - Penal negligence does not include "guilty act" or "guilty mind" (subjective intent)
  - There are certain public welfare offences
- Following this, the concept of reasonable person into criminal law to bind negligence and criminal sanction was implemented
- **Ratio**
  - **When looking at a case involving circumstances leading to a charge, you have to look**
    - **1. The wording of the CC**
      - What does it say about that particular conduct?
    - **2. Then look at how the case law interprets the provisions of the CC you're dealing with**
      - What you read in the CC isn't always what you get from a judge

R v Hundal – Modified Objective Test for Penal Negligence

- **Facts**
  - Driving a dump truck, pass maximum weight
  - Stopped perpendicular to the deceased
  - Accused entered intersection, T-boning person killing him
  - Deceased made no attempt to break, as was unaware of the approaching truck
  - Trial
    - Accused was acquitted
    - This was before the concept of penal negligence
    - The appellant's actions represented a gross departure from the standard of care expected of a prudent driver

        - A gross departure could be anything from checking your cellphone
    - BCCA
        - But was this a marked departure?
        - Proof of a marked departure was sufficient without any expressed finding of advertent negligence
- **Issues**
    - Is the accused guilty of dangerous driving?
    - Whether dangerous driving requires subjective negligence or a standard of reasonableness?
- **Analysis**
    - There is a licensing requirement for drivers, meaning everyone is trained or has qualifications to drive reasonably to a certain standard
        - There is an automatic and reflexive nature of driving
        - Wording of section: "In all circumstances present", including traffic
        - What is the modified objective standard? **Departure must be marked or significant**
        - Can't ignore the actual mental state of the accused; look at the context surrounding the incident
            - The Trier of Fact should be satisfied the conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's situation
    - Does "all the circumstances" include the accused's personal circumstances, medical condition backed by a doctor's confirmation, weather, whether he saw a red light, if he believed the truck was loaded properly, brakes being in good order, etc.?
        - He knew he had a stroke problem, so maybe he should not have been driving
        - **Awareness of risk** (very important): Risk to individual and risk of events itself
        - If onset of a disease or disability makes an act of losing control of a motor vehicle involuntary, then there is no actus reus
- **Holding**
    - Hundal convicted
    - Established the **modified objective test**, not just a straight civil objective test
        - **Actus reus**: Manner of driving (how did the driving pattern emerge?)
            - In this case, he was driving in excess of the speed limit and went through a red light
        - **Mens rea**: Was there a marked departure from the standard a reasonable driver in those circumstances would employ?
- **Dissent**
    - The Crown must find subjective negligence
- **Ratio**
    - Modified objective standard for penal negligence offences: conduct expected of a ***reasonably prudent person in the circumstances*** (departure must be marked or significant)

R v Beatty – Mental Requirement for Objective Mens Rea Offences

- **Facts**
    - Accused driving a pickup on the curb
    - For some reason, he crossed over the line, killing approaching people in the car
    - There was nothing wrong with the accused's vehicle, and was driving normally prior to crossing the line
    - Accused claimed to have lost consciousness
    - Trial
        - Was acquitted
        - Beatty's momentary lapse of attention could not support a marked departure from the standard of reasonable care

    - BCCA
        - There was a marked departure from the standard of care
- **Issue**
    - Was the momentary act of negligence sufficient to constitute dangerous driving?
- **Analysis**
    - Unlike civil negligence, penal negligence is aimed at punishing blameworthy conduct; degree determines if conduct merits punishment ("**marked departure**")
        - Onus lies on the Crown to prove the AR and MR
        - Modified objective test remains the appropriate test to determine the MR for negligence-based criminal offences; it doesn't obviate the MR requirement
            - No one disputes the D's driving fell below the standard of care a reasonably prudent driver
            - **Modified objective test:**
                - **1) Was there a marked departure from the civil norm in the circumstances?**
                - **2) Was there an absence of the requisite mental state of care?**
    - The licensing requirement impacts the MR in 2 ways:
        - 1) Driver's capacity and awareness can be inferred from the licensing requirements
        - 2) Those choosing to engage in dangerous (voluntary) activities who fail to meet the standard of care cannot be said to be "morally innocent"
    - Criminal fault is based on the voluntary undertaking of activity, presumed capacity to do so properly, and the failure to meet the requisite standard of care
    - If a reasonable person in the position of the accused would not have been aware of the risk or unable to avoid creating the risk, the accused is innocent despite the objectively dangerous conduct
    - The test is **contextualized but not personalized**
        - Short of incapacity to appreciate risk or avoid creating it, personal attributes (age, experience, education) are irrelevant
    - **Actus reus**: Viewed objectively, was driving dangerous to the public within the meaning of s. 249?
    - **Mens rea**: Was objective conduct accompanied by the required mental state? Was the conduct a marked departure from the standard of care? Would a reasonable person in the circumstances be aware of the risk?
        - Subjective mens rea/intent not required, but will suffice
        - Fault based on doing proscribed act with the absence of the appropriate mental state of care
        - D clearly perform the actus reus **but not** mens rea; insufficient evidence to find a market departure from the standard of care of a prudent driver
- **Charron J**
    - A reasonably held mistake of fact may provide a complete defence, if the accused's reasonable perception of the facts measured up to the requisite standard of care
    - Mistake of fact has to be reasonable
- **Holding**
    - McLachlin
        - The AR is all encompassing concept
        - The first question is whether the AR is established
            - Requires the negligence be a marked departure in all circumstances of the case
        - Marked departure is part of the AR
        - Once established, the MR is inferred
        - **Bottos likes McLachlin's analysis here**
    - Charon
        - The AR is based on the wording of the code
        - The MR is the marked departure

- **Ratio**
  - Mental requirement for objective mens rea offences: Determine where conduct amounted to a marked departure from the standard of care of a reasonable person in the circumstances

R v Gunning – Case of "Careless Use"

- **Facts**
  - Man pointed shotgun at someone who wasn't invited to the party, and killed him
  - There was a marked departure from the standard of care of a reasonable person
- **Trial**
  - Was there any proof that Gunning deliberately shot this guy?
    - Gunning argues it was accidental
  - New trial was ordered

R v DeSousa – Liability for Unlawfully Causing Bodily Harm

- **Facts**
  - Accused charged for throwing glass bottle at wall in bar fight; bottle shattered; shards of glass injured victim
  - Constitutional challenge to s. 269 of the CC
  - **S. 269** – Everyone who unlawfully causes bodily harm to any person is guilty of
    - **(a)** An indictable offence and liable to imprisonment for a term not exceeding ten years; or
    - **(b)** An offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

- **Issues**
  - Does s. 269 violate ss. 7 and/or 11(d) of the Charter?
  - Is the mental element constitutionally sufficient, and is foresight of the consequences comprising the actus reus a minimum requirement for s. 7?
- **Analysis**
  - There are 2 requirements for the mental element of s. 269
    - 1) Mental element of the underlying offence must be satisfied
    - 2) Additional fault requirement supplied by the wording of the offence must also be satisfied
  - Unlawful act = office must be at least objectively dangerous
  - Underlying offence must have a sufficient causal connection to the injury
  - Penal negligence case as the underlying offence contributes to the harm
  - All but absolute liability offence, but contributes to significant harm

- **Holding**
  - There was sufficient causal connection
  - There was a liberal meaning of "underlying offence"
- **Ratio**
  - To determine liability for unlawfully causing bodily harm, test is the objective foresight of bodily harm
    - Would a reasonable person realize the underlying unlawful act would subject another person to the risk of harm?

R v Tutton – Why Have Marked and Significant Departure?

- **Facts**

    - Diabetic 6 year old denied insulin; parents thought he'd be divinely cured; doctors put him back on insulin, then in 1981 withdrew him again and he died
    - Parents had an honest but mistaken belief in divine intervention
- **Analysis**
    - Subjective standard
- **Minority**
    - Objective standard
        - This is what ***Hundal*** relied upon → objective standard applied in determining reasonableness (honest and reasonably held belief in existence of certain facts may be relevant)

VII. REGUALTORY OFFENCES

Introduction to Regulatory Offences

- These are not criminal offences
- There's a lot of statutory law that governs us on a day to day basis
- Also called quasi-criminal, public welfare or statutory offences
    - Public welfare is the best description
    - They're there for the public good
- Criminal law tends to go towards governing safety and ensuring certain moral standards, and it typically has a prohibition (in the CC or CDSA) and a penalty
    - But there's 100s of laws out there that are not per se dealing with morality or the preservation of the public peace, which is what criminal law is all about
    - E.g. Getting a driver's license is not really criminal law → there are regulations that guide your conduct for the purpose of road safety
        - You can't have laws governing that unless you have the stick as well
        - The stick: if you don't get a license and don't follow the rules of the road, then you will be punished
- Can be passed by the federal or provincial government per section 91 and 92 of the Constitution Act respectively
    - Each have 1000s of laws that are there for compliance with order and safety in their own jurisdiction
- Criminal law: public safety, morality, and preservation of public peace
- Regulatory law: for some public benefit, and incidentally require compliance
- Bylaws: enacted pursuant to a municipality's jurisdiction (under s. 92, province delegates to a city)
    - If offended, people are prosecuted like they're in criminal law, except when it's a provincial offence or bylaw, you see it in **provincial court**
    - Speeding offences can be in traffic court
- Legislatures enact regulatory offences in areas where a lack of regulation could have deleterious or negative impacts on society (intended to protect people and maintain order)
    - E.g. Consider the potential impact of allowing unlicensed doctors to practice medicine; or unlicensed drivers of motor vehicles
- There are no "common law" regulatory offences, they are all statute based
- Can be considered "standards of conduct" for citizens
- Encompasses a wide variety of offences not within the Criminal Code
    - E.g. Less serious driving offences—E.g. speeding (Traffic Safety Act in AB)
        - E.g. Speeding and weaving in and out of traffic which officer sees
            - Get a ticket for speeding and reckless driving

        - E.g. Going 91 in a 50 zone → dangerous driving
            - Marked departure from what was expected
            - The officer can lay a criminal charge because the driving was so bad
            - Same conduct, but when it gets bad enough → criminal offences may kick in
        - Even worse than dangerous driving: criminal negligence
            - E.g. Driving 100k going through stop signs → wanton disregard for the safety of other people
        - Careless driving (provincial) → Dangerous driving (now criminal) →Criminal negligence
    - E.g. Health and Safety offences (Occupational Health and Safety Act)
        - Many times people get killed on the job because the employer allows them to cut corners and tells them to get the work done now
        - In order to protect people from that abusive conduct, we have occupational health and safety regulations
    - E.g. Practicing a regulated profession like medicine or law without a license (Medical Profession Act; Legal Profession Act)
    - Many other types of offences: environmental, competition, certain business practices, etc.
- Regulatory offences may appear to overlap with criminal offences, but are distinct (E.g. Careless Driving ≠ Dangerous Driving)
- If it's a public welfare offence, it's in a **statute** (not the CC or CDSA)
    - That statute will to tell you, or you have to figure out, what kind of offence is it
    - What kind of mental cognition is required?
    - This methodology began with **Sault St Marie**
- Punishments for regulatory offences are often fines, but can also include imprisonment and other punitive measures (forfeitures, etc.)
- Charges can be against individuals or corporations
- Types of Liability
    - Absolute Liability – lowest burden on the Crown
    - Strict Liability – partial reverse onus on the accused to prove reasonable care
    - Subjective Fault / Mens Rea – highest burden on the Crown

R v Sault Ste Marie – First Case in the History of Regulatory Offences

- **Facts**
    - A construction company obtained permission from the city of SSM to dispose of waste near a river and it leaked into the water supply causing pollution / issues with water quality
    - Section 32(1) of the *Ontario Water Resources Act* stated that every person or municipality that discharged, deposits or causes or permits the discharge or deposit of pollution into water is liable under summary conviction at the first offence for a fine of not more than $5000, and on subsequent offences of a fine not more than $10,000 or to imprisonment for less than a year
    - The courts below were divided on whether this offence required *mens rea* or another standard of liability
- **Issue**
    - Which standard of liability should be applied to "public welfare offences"?
- **Decision** (Dickson J)
    - **Historically, there were only two categories of offences:**
        - Criminal offences requiring proof of *mens rea* – "true crimes"

        - Absolute liability offences requiring only proof of the prohibited act WITHOUT requiring proof of any mental element (i.e. the mere completion of the *actus reus* was the basis for liability)
    - In reviewing the jurisprudence, the Court found that three categories should be formally recognized, including a middle or "halfway house" category called "strict liability" which would be a middle ground between *mens rea* offences and absolute liability offences
    - **MR-based Offences**
        - Recall first principles: the criminal law exists to punish morally blameworthy conduct; an accused person is not obligated to prove their innocence (proving guilt is a burden on the Crown)
        - "In the case of true crimes there is a presumption that a person should not be held liable for the wrongfulness of his act if that act is without *mens rea*"
        - "Where the offence is criminal, the Crown must establish a mental element, namely, that the accused who committed the prohibited act did so intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them"
        - Mens Rea can also be required for some Regulatory Offences
        - Key words and phrases include: "**wilfully**", "**with intent**", "**knowingly**" or "**intentionally**."
    - **Strict Liability Offences** – the middle ground
        - "Public Welfare Offences" will *prima facie* fall into this category absent express statutory language to the contrary
        - The words "**cause**" or "**permit**" are often used in public welfare statues and don't clearly denote either a *mens rea* or absolute liability offence – strict liability is a more appropriate "half-way house"
        - Offences in this category have a partial reverse onus: once the Crown has proven the *actus reus* BARD, the accused / defendant can furnish evidence of their due diligence or absence of negligence to negative the fault element on BOP. The Crown is relieved of proving *mens rea* / the mental element
        - "[The accused may] avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be 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"
    - **Absolute Liability Offences**
        - "In sharp contrast [to criminal or *mens rea* offences], "absolute liability" entails conviction on proof merely that the defendant committed the prohibited act constituting the *actus reus* of the offence. There is no relevant mental element. It is no defence that the accused was entirely without fault. He may be morally innocent in every sense, yet be branded as a malefactor and punished as such"
        - Arguments in favor of absolute liability offences tend to focus on the need for "protection of societal interests" and "administrative efficiency" and the notion that people are more likely to observe a higher standard of care if there are no "loopholes" [the Court was highly critical of these arguments]
    - Effect of the decision:
        - Public welfare offences would prima facie be in the second category
        - Look at statute
            - Step 1: Prima facie, it is an offence of strict liability

        - This means the Crown has the legal onus BARD to show the AR, jurisdiction, identity
        - But, once the Crown has done that, the Defence needs to show on a BOP they took all reasonable precautions to avoid this from happening, or were operating under a reasonable mistake of fact
        - If they fail, liability results
    - Step 2: look at language that would take it out of strict liability, up towards MR (intentionally, knowingly, wilfully), or down towards absolute liability (has to be clearly said)
  - The legislature's language will signal whether it remains in the second category or would be under the first or third categories
  - Legislature must make it clear that guilt follows "mere proof" of proscribed act (accordingly, absolute liability offences are uncommon)
  - Strict liability and Mens Rea have become the most common regulatory offences
- **Notes**
  - Not in reading list, but still need to know
  - If asked about history of regulatory offences, need to start with this case
  - For true criminal offences, we've always required the mental element of fault
    - This is typically the intention to do something
    - This is typically the subjective orthodoxy (not what a reasonable person should have done, but what the accused subjectively intended)
      - Exceptions: criminal negligence and dangerous driving
  - Even for some regulatory offences, there is still a requirement of a MR of true knowledge
  - However, we can't have too much of that for regulatory offences, otherwise there would be too many ways for the accused to avoid culpability
  - So, MR can be required for some regulatory offences, but not all
  - Then, there are **absolute liability offences**
    - The mere commission of the AR is all that is required for guilt
    - There are no excuses, you're paying a penalty, which is typically a fine
    - If people know that there are no excuses to absolve you of an offence, then they will be even more careful not to screw off
    - However, this is impossible to prove; and once a person has taken care to avoid consequences, they may give up trying to be so perfect if they see that they'll still be liable even when trying the best they can
    - Also, there's problem here with them because fault is not required to prove, so you're found liable just for committing the AR
  - There's also a middle ground → not necessarily full MR or pure liability, where the accused can avoid liability by showing that they took care all reasonable precautions to avoid the result from occurring, or was operating under a reasonable mistake of fact = **strict liability offences**
    - Dickson J creates strict liability offences
    - It emanates from fairness to the prosecution and the defence
    - The Crown doesn't have to prove MR, R, or WB; all they must prove is the AR
    - But, instead of liability being automatic, the defence has the ability to show that they took all reasonable precautions to avoid it from happening, or that there was a mistake of fact
      - If they **show** this, they will be absolved of liability
      - The Defence has the onus of proving this, on a **BOP**
      - **Public welfare offences** are prima facie strict liability offenses

Reference Re: Section 94(2) of the Motor Vehicle Act – Do Absolute Liability Offences Offend the Charter?

- **Facts:**
  - The Government of BC wanted to crack down on people who drive while suspended or were subject to other driving prohibitions
  - The *Motor Vehicle Act* in BC was amended to make driving while suspended or prohibited an absolute liability offence that would be punished by imprisonment for up to six months less a day
  - The Lieutenant-Governor in Council of BC referred a question to the BCCA: Was the amended section 94(2) of the *Motor Vehicle Act* consistent with the *Charter*? [BCCA said NO]
  - The Attorney General of BC appealed to the SCC
- **Issues:**
  - Does an absolute liability offence which imposes imprisonment offend the *Charter*?
- **Decision:**
  - Yes – imprisonment for absolute liability offences offends section 7 of the *Charter* [cannot be saved by section 1]
  - However, not all absolute liability offences will offend the *Charter*
  - The Court acknowledged that exceptions may exist in certain circumstances such as natural disaster, outbreak of war, epidemics, or other extreme situations
  - Other exceptions may exist when the accused is a corporation, not an individual (corporations can't be jailed)
- **Ratio**
  - If an absolute liability offence has the potential of depriving the accused of life, liberty, or security of the person, fundamental justice requires some fault element to be proven for conviction

R v Chapin – Strict Liability Offence Example

- **Facts**
  - Ms. Chapin and a friend were duck hunting, "talking a lot and not paying attention to anything but the beautiful day"
  - They wandered into a restricted area where duck feed (bait) had been laid and shot two ducks
  - A nearby conservation officer arrested her for contravening section 14 of the *Migratory Birds Regulations*, which prohibit hunting for birds within ¼ mile of a place where bait has been laid
  - Ms. Chapin testified she was unaware of the bait
- **Issue**
  - What kind of offence is this violation? (Absolute liability, strict liability, or subjective/mens?)
- **Decision**
  - Not a *Mens Rea* Offence
    - Section 14 did not use usual "signal words" for *mens rea* such as "willfully" or "with intent", yet these phrases were present elsewhere in the statute
    - Purpose of the offence was both public and animal welfare which is not "criminal in the true sense", and therefore not a *mens rea* offence
  - Not an Absolute Liability Offence
    - The offence was not worded as a strict prohibition on hunting, but merely about controlling the conditions, *etc*. of hunting
    - Hypothetically, if the offence were classified as absolute liability, an innocent hunter could be convicted by accidentally hunting near an area where someone else illegally

laid bait and would be unfairly left without a defence, essentially punishing someone for another person's illegal act
        - The penalties available for breaching section 14 were potentially serious and included fines of up to $300 or up to 6 months' imprisonment or both; mandatory prohibition upon conviction to holding a game bird hunting license; possibility of losing all hunting / fishing licenses; potential forfeiture order for any gun or equipment used in the commission of the offence
    - **Strict Liability Offence**
        - Approach from *Sault Ste. Marie*: "Public welfare offences are *prima facie* in the second category (strict liability)"
        - "Difficulty of enforcement is hardly enough to dislodge the offence from the category of strict liability, particularly when regard is had to the penalties that may ensue from conviction"
        - It is an "untenable position" that a person who makes reasonable efforts to determine whether bait is present should be subject to the punishments that would flow form conviction
        - "An accused may absolve himself on proof that he took all the care a reasonable man might have been expected to take in all the circumstances"
        - Court held that it would be unreasonable to convict Ms. Chapin and dismissed the appeal (no new trial was ordered)

Summary: Strict Liability Defences

- Elements of the Due Diligence Defence
    - 1) **Mistake of Fact** - Mistake must be reasonable in the circumstances (unlike MR offences where mistake can be unreasonable)
    - 2) **Reasonable Care**
        - Strict Liability – Accused must show on a BOP that they took every reasonable precaution
        - Contrast with:
            - Penal Negligence – Accused can avoid liability by merely raising a reasonable doubt that they did not fall below the objective standard, Crown onus is BARD

R v London Excavators – Not Meeting the "Mistake of Fact" Defence

- **Facts:**
    - London Excavators (LE) was a subcontractor on a hospital building site
    - The general contractor said the area was "clear" and LE began digging
    - LE's backhoe struck a buried cement block, but continued to dig after the general contractor said the block was just an old "footing" that posed no threat
    - The cement clock actually contained a hydro duct which caused an explosion (nobody was injured)
    - Both LE and the general contractor were charged under the *Occupational Health and Safety Act* following the incident
    - At trial, LE was convicted for failing to follow safety procedures required by the *Act* and its regulations
    - Conviction was affirmed on appeal
- **Issue**

- Was the defence of mistake of fact established?
- **Decision**
  - No, the defence failed because it was not "objectively reasonable" for the backhoe operator to act on second-hand information from the general contractor "without further inquiry" in the circumstances
  - The Regulations stated that all underground services on a construction site must be accurately located and marked before beginning excavation
  - Once an "unexpected concrete obstacle" was found during excavation, it was no longer reasonable to continue to dig without looking into it further
  - The appellant could have asked to see a site plan, a certificate from the utility company, or otherwise halted work until more information was known (as it turned out, the site plan showed the hydro duct)
  - The appeal was dismissed

VIII. PARTIES AND OTHER FORMS OF SECONDARY LIABILITY

Introduction to Parties/Secondary Liability

- Criminal liability is not always limited to the person who directly commits the crime
- The law distinguishes between principal offenders and "second degree" parties
- Examples of activity that can attract secondary liability:
  - Encouraging or counseling an offence
  - Assisting in the commission of an offence
  - Helping someone avoid detection after the fact
- You can be liable for a crime even if you have not committed it yourself
- You can be party to an offence
- All of these things are criminally liable, and you get the same conviction as the person who actually committed the crime
- The only difference may be: if you're a party, you may be sentenced differently, or slightly less
- You are charged the same as the principal

s. 21(1) – Parties to Offence

Parties to offence

21 (1) Every one is a party to an offence who

(a) actually commits it;

(b) does or omits to do anything for the purpose of aiding any person to commit it; or

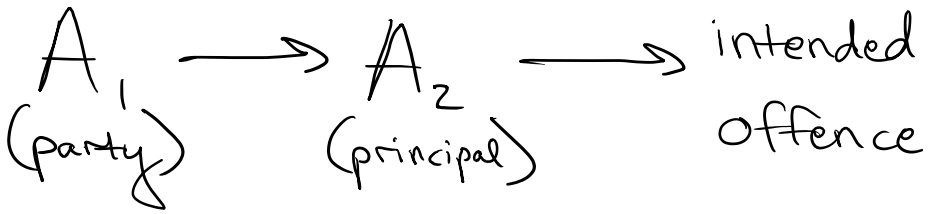
(c) abets any person in committing it.

Common intention

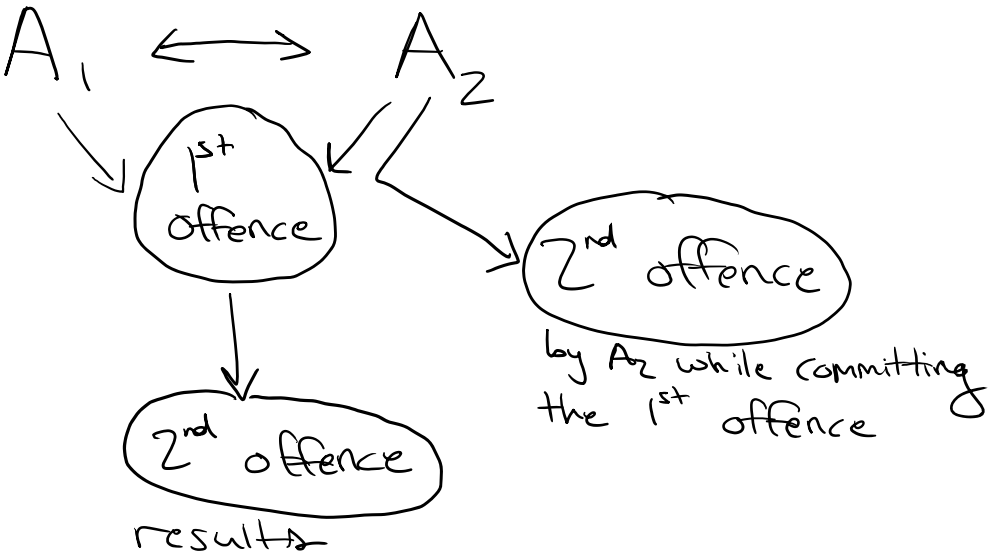
(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable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

- **S. 21(1)**
  - (a): if you're a principal to an offence, you're also a party to an offence
  - **(b):** aiding: ulterior facilitation, includes providing assistance
    - Aiding
      - E.g. Principal says: wants to rob a convenient store and asks you for a ride
      - You would be aiding in the robbery
    - Omitting
      - Not fulfilling a duty under law to do something positively or a duty to someone else
      - E.g. Employee of Mac's keeps door open (omitting to do something for the purposes of aiding)
      - Parents have duty to their children, and omitting to do something is an offence
  - **(c):** abetting: encouragement; could be before or during the offence itself → **encouraging someone's idea** (contrast with s. 22 and 464)
    - E.g. See a friend beating up someone and it's not a fair fight, and you encourage them to continue, that is abetting
    - E.g. Principal is thinking of robbing a store, and you tell him let's do it
  - You must **intend** to aid or encourage though
    - Simply giving a ride to someone not for the purpose of committing is not the same for example
- **S. 21(2)**
  - A person is liable for an offence committed by an accomplice, even if it wasn't expected of the person
  - You're looking for 2 offences essentially
  - E.g. 2 people plan to rob a store and arm themselves with bats
    - Plan is buddy #1 is to threaten the clerk, and the clerk is supposed to give money…but the clerk doesn't and says that it is his money
    - Buddy #1 then takes bat and hammers clerk across chest, fracturing ribs
    - Whether the clerk opens the till or not (AKA whether the robbery is successful or not), buddy #2 would have known or ought to have known that violence would be a probable consequence of carrying out the robbery in the first place
    - They both went in with bats, and knew that if the clerk didn't comply, violence would have erupted
  - **"Ought to have known" = usually the standard in partyship but may be inoperable in some circumstances (See IX. Culpable Homicide)**
  - **The Crown must prove each of these elements BARD**
    - 1) The accused and the principal formed an intention in common to carry out an unlawful purpose to commit offence Y and to assist each other to carry out that unlawful purpose
    - 2) The principal committed offence X
    - 3) The principal committed offence X while carrying out the unlawful purpose
    - 4) The accused knew or should have known that the commission of offence X by the principal would be a probable consequence of carrying out the unlawful purpose of committing offence Y

- **21(1)(b) or (c)**



- **21(2) Common Intention**



  - These offences have to have occurred fairly close in time
  - The more time between them, the less likely the Crown can prove BARD the 2nd offence was connected

s. 22 – Person Counselling Offence

Person counselling 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.

- That person is **talking to someone who didn't have the idea** of doing the crime (contrast with s. 21(1)(c)), and that person who counsels the subject/principal is liable for trying to get him/her to do something that is a crime
- Includes soliciting

- The principal may have had undeveloped ideas to commit a crime, and then someone comes along to get them to do it
- It moves someone from not doing anything to going out and trying to commit a crime
- The subject doesn't need to actually have committed a crime for you to be liable
- This is not the same as encouragement
- In 22(1): Principal's ideas are very undeveloped, whereas in 21 they already had some idea to commit a crime

s. 464 – Counselling Offence that is Not Committed

Counselling offence that is not committed

464 Except where otherwise expressly provided by law, the following provisions apply in respect of persons who counsel other persons to commit offences, namely,

(a) every one 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

- If the offence has not been committed, no crime has been committed
- However, the counsellor is liable under s. 464
    - If it had been committed, the counsellor is liable under s. 22 instead
- Example
    - A1 has no money and wants to get some ASAP
    - A2 knows this and tells A1 to rob a convenient store, and tells him how
    - If so, A2 is thus a counsellor and it's an offence under s. 22
    - If he didn't, it's still an offence under s. 464
    - If A3 **drives** them to a store, and says "can't wait to spend the money tonight"
        - This is aiding and abetting under s. 21(1)
        - You don't have to be both to be liable, it really is "or"
    - A3 **waits outside**, and he gets back in and they drive away
        - This is **still aiding**
        - For every moment, the robbery is still being perpetrated

- If the accused all by himself, and doesn't tell his girlfriend about any of it, and was supposed to get a ride but that ride disappears; now phones his girlfriend and tells her to come pick him up **because the police are coming**
    - She is now an accessory after the fact → s. 23

s. 23 – Accessory After the Fact

Accessory after the fact

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.

(2) [Repealed, 2000, c. 12, s. 92]

R.S., 1985, c. C-46, s. 23; 2000, c. 12, s. 92.

Where one party cannot be convicted

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.

- E.g. The girlfriend has come on board after the offence has been perpetrated, and has helped him escape
- Assisting but not part of the original offence
- Back to robbery example
    - Girl drops off boyfriend and another male friend; they both go do the robbery; plan is for the girlfriend to wait outside while they get the money; except one is with a metal bar and one with a bat
    - Clerk doesn't give money; person with bar hits him over head smashing his skull, and dying
    - Baseball bat guy is guilty not just of robbery, but homicide
        - He knew/ought to have to known that violence could have been perpetrated
        - S. 21(2)
    - The girlfriend would also be liable for homicide
        - She also had an intention to perpetrate the robbery; and should have known that violence could have ensued
        - S. 21(2)
    - They would all be liable for at least manslaughter, so long as you can prove the causation rules (from Smithers-Nette)
- For accessory after the fact, it is usually **half of the sentence of the original offence**

Aiding and Abetting – Actus Reus

- Aiding and abetting are separate concepts.
- **Aiding** – material facilitation of the offence, including provision of prior aid to a perpetrator or failure to perform a positive duty in the situation
    - E.g. Providing a vehicle, keeping watch, holding back rescuers
- **Abetting** – encouraging someone during the commission or attempted commission of the offence
    - E.g. Provoking or instigating a person or group to commit an offence

Aiding and Abetting – Mens Rea

- **Aiding** – party must KNOW they are aiding or have some knowledge of the offence or be willfully blind to the commission of an offence
- **Abetting** – party must intentionally encourage the commission of the offence
    - Passive observation of a criminal act/mere presence at the scene do not engage criminal liability

Aiding and Abetting – Factors to Consider

- **Factors used to determine whether a person has aided or abetted:**
  - Presence at the material times (but presence alone NOT sufficient)
  - Prior knowledge that the offence was to occur
  - Attendance for the purposes of encouragement
  - Control over the location or the medium through which the principal offender acted (E.g. a room or a vehicle)
  - Control over the person of the principal offender (E.g. employee)
  - Facilitation of the offence (E.g. keeping watch, luring a victim)
  - Prevention or hindering of interference with a criminal act

Common Intention

- Note: Under section 21(2) of the *Criminal Code*, a person may be liable for an offence committed by a confederate, even though that offence was not one planned or subjectively expected by the person, if the person and the confederate had formed an intention in common to carry out an unlawful purpose and the person ought to have known that the offence would be committed in carrying out that purpose.

R v Dunlop – Mere Presence is Not Enough to be Aiding or Abetting

- **Facts**
  - Appellants Dunlop and Sylvester were gang members
  - Complainant was gang raped as part of an "initiation" ritual
  - She recognized the accuseds, but was unsure if they had participated
  - Jury asked: "Would accuseds be guilty by being aware of the rape taking place and doing nothing to prevent it?"
  - Judge gave a confusing recharge regarding parties to an offence
  - Started talking about aiding and abetting, but should not have gotten into that
  - If all they were doing was standing there, then they should not be liable
- **Decision**
  - The trial judge should have answered the jury's question with an emphatic "no"
  - Dickson J:
    - "Mere presence at the scene of a crime is not sufficient to ground culpability. Something more is needed: encouragement of the principal offender; an act which facilitates the commission of the offence, such as keeping watch on enticing the victim away, or an act which tends to prevent or hinder interference with accomplishment of the criminal act, such as preventing the intended victim from escaping or being ready to assist the prime culprit."
  - There is no positive duty at law to assist a person who is being sexually assaulted, so no liability arose when D&S didn't assist
  - The accuseds were ultimately acquitted by way of directed verdict
  - Something more: standing watch, blocking the view of the crime
    - If so, you may be aiding or abetting
    - If the crown can prove BARD that is was something a little more, it's going to be enough to find liability

- **Ratio**
  - A person cannot be convicted of aiding or abetting in commission of the offence which he doesn't know may be/is intended; mere presence at a crime scene does not ground liability

R v Jackson – A Lot More Than Mere Presence

- **Facts**
  - J is found sleeping in a camouflage tent with fertilizer bags near a secluded marijuana grow-operation in a forest; he emerges wearing rubber boots that fit him; there was evidence he had been there at least two days
  - J claims he was just sleeping there and the boots weren't his—the trial judge rejected J's evidence
    - If he had been believed, he would have not been found guilty
    - With all of those circumstances, there was more than just mere presence
    - It looked like the production required two people anyways, and this was a very remote area
    - In essence, he was either aiding, or abetting
    - His presence was enough to be encouragement
  - At trial, J is found guilty of illegal production of marijuana
  - On appeal, the conviction was upheld, but there was a dissenting judgement so there was an appeal as-of-right to SCC
- **Issue**
  - Was the verdict unreasonable within the meaning of s. 686(1)(a)(i) of the CC?

Powers of the Court of Appeal

Powers

686 **(1)** On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

(a) may allow the appeal where it is of the opinion that

(i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,

- **Decision** (Majority – 5)
  - No – the verdict was not unreasonable and there was enough evidence to support J's conviction.
  - "Mere presence at the scene of a crime does not prove culpable participation in its commission" (recall *Dunlop*)
  - However, the collective physical and circumstantial evidence against the appellant showed far more than "mere presence at the scene", and the appellant's explanation for his presence at the scene was unbelievable
  - Appeal dismissed, conviction affirmed
- **Dissent** (2)
  - "The state benefits from broad investigative powers. This is necessary for the prevention and suppression of crime. The police investigation is essential to the work of prosecutors, who must prove beyond a reasonable doubt that alleged crimes have been committed. They cannot do so by means of vague allusions or associations; not even the cumulative effect of many such

allusions or associations can turn a lack of evidence into evidence that a properly instructed judge, acting judicially, might rely on to convict the appellant. In my opinion, there is a lack of evidence in the case at bar."

- A large project is different than something impromptu like a beating/stabbing
  - An impromptu offence is less likely to lead to being a party to an offence
- **Ratio**
  - Presence at the scene of a crime will ground culpability **if** the presence is consistent only with culpable involvement in the offence

Agents

- Why is someone who wants to buy drugs not guilty of aiding and abetting, as aren't they technically a party?
  - The vendor may get 2-3 years in prison
  - The purchaser would be guilty of possession, and receive a small fine and criminal record
  - Huge gap between purchaser and the vendor
  - Technically speaking, the purchaser is a party, since they aided, abetted, or both
  - So why do we distinguish from this?
  - ***Greyeyes*** refers to the case that explains why, and goes further
- **Agent**: acting on someone's behalf
  - If you're the agent for the purchaser: fine
  - If you're the agent for the vendor: jail

R v Greyeyes – When Is Someone an Agent for the Purchaser or an Agent for the Vendor?

- **Facts**
  - Mr. Greyeyes (G) sold 5 marijuana joints to an undercover officer
  - The officer asked G if he knew where to buy cocaine
  - G had the undercover officer drive him to an apartment building, where G spoke to a seller through the intercom and led the officer to an apartment door
  - The occupant of the apartment said the door would not open, so G slid $40 under the door and a pink envelope containing 1/5 of a gram of cocaine was passed under the door and G picked it up and gave it to the officer
  - The officer paid G $10 for his role in facilitating the transaction
  - G was acquitted of trafficking in cocaine at trial, but the Saskatchewan Court of Appeal overturned the acquittal and substituted a conviction
  - At trial, G was convicted of trafficking in marijuana, but this was not revisited on appeal
  - G argued that he was acting on behalf of the purchaser, not the vendor
- **Issue**
  - When is a person who assists another person in purchasing drugs a party to drug trafficking? (i.e. when is one merely an agent for the purchaser rather than an agent for the trafficker?)
  - The answer comes not from statute, but from policy
- **Decision** (there were 2 judgments concurring in result)
  - **Majority (4)**
    - The distinction between a vendor and purchaser in drug transactions is important - possession and trafficking are unique offences, with the latter being more serious and subject to much harsher sentences

- Simply purchasing drugs is not sufficient to support a charge of trafficking (but would support a possession charge), and the same logic should apply to third parties who provide incidental assistance to someone who wishes to buy drugs
- It would be unfair to call the purchaser just as guilty as the trafficker in this circumstance
    - The end users are the victims who lose their lives, and need to be treated differently
    - The distinction ends there though for pure purchasers
    - If you go out and help someone buy drugs, you shouldn't get protection
    - We shouldn't expand the Neston protection of the purchaser to the purchaser's agent
        - ***Neston**:* by purchasing alone, a purchaser should not be guilty of trafficking
        - This should not extend to an agent…
- **However**, consider this hypothetical: A tells her boyfriend, B, that she is going to walk through a bad neighbourhood to buy drugs, so B drives her to buy drugs to ensure her safety, but does nothing else. Would it be fair that A would be liable for a less serious possession charge, while B would be liable to the more serious charge of aiding and abetting trafficking?
    - According to this hypothetical, that doesn't make sense that B gets jail time while A gets just a fine
    - So, an agent for the purchaser should not be convicted of trafficking
    - The agent doesn't escape liability completely though
        - They're still guilty of aiding and abetting of possession
        - The conviction would read "possession of a substance"
    - As little as passing the drugs back and forth is enough to be guilty of trafficking (e.g. girlfriend in passenger seat example)
- In some cases, the proper charge for a person who assists incidentally with a drug purchase would be aiding and abetting the possession of a narcotic, not the trafficking of a narcotic
- However, in this case, G provided much more than "incidental" assistance to the officer:
    - G introduced the parties, negotiated the price of the drugs, handled payment and the drugs, and accepted money for his assistance
    - Collectively, these acts are more than those of a "mere purchaser"
- The appeal from conviction was dismissed—G's actions were sufficient to support a conviction for aiding and abetting the trafficking of cocaine

- **Dissent**
    - The minority rejected the appellant's argument that an agent / person who enables a drug purchase should not be liable as a party to trafficking since the principal purchaser could only themselves be liable for possession
    - Drug trafficking is a business that relies on "middle men" to facilitate transactions / sales
    - "By bringing together the source of supply and the prospective purchaser, these persons obviously assist in the sale of narcotics. Acting as a spokesperson for a purchaser has the effect of assisting both the purchaser and the vendor to complete the transaction. It follows that an agent for a purchaser or one who assists the purchaser to buy the drugs can properly be found guilty as a party to the offence of trafficking under s. 21(1) of the *Code*."
- **Ratio**
    - If you're truly an agent only for the purchaser and not vendor, you are guilty of possession and not as a party to trafficking

R v Roach – Recklessness Cannot Be Used as the MR Route for Aiding?

- **Facts**
  - Appellant was involved in a phone fraud that "misrepresented to persons that they had won valuable prizes"
    - Would take the first $100 of each sale and put into a prize fund
    - The remainder of the money went into a bank account that was split 60-30 between D and R
    - R would give out instructions to contest winners
  - R said that he did not know this phone scheme was illegal
    - Thought D's telemarketing scheme was legal, and said if he didn't he wouldn't have opened the bank account in his own name
    - Although there was no motor vehicle, he had faith that the scheme would result in a pool of cash that would be enough to pay the winners
  - Crown's theory
    - R is not telling the truth, clearly he was aiding D in fraudulent scheme
    - R was hired, opened a bank account, etc.
  - He was found guilty of fraud over $5,000 and conspiracy to commit fraud
    - Used recklessness as the route to MR (aware of the risk, and proceeding on the face of that risk)
  - ONCA had to grapple on whether R could be used as a form of MR
    - Can recklessness be used for aiding and abetting?
      - They focus on the key phrase "for the purpose of"
- **Issue**
  - Does recklessness constitute a basis for the MR of an accessory to the commission of a crime?
- **Decision**
  - No - "In summary, the *mens rea* for party liability requires that the aid given by the accessory to the principal be 'for the purpose of aiding' the principal to commit the crime of which the accessory has been charged. To be convicted as an aider, the defendant must not only assist the principal in the commission of the offence, but must intend to do so, although it is not necessary that the aider know all the details of the crime committed. It is sufficient that the aider was aware of the type of crime to be committed and knew the circumstances necessary to constitute the crime that he or she is accused of aiding […] knowledge will include actual knowledge or wilful blindness, but will not include recklessness"
  - 21(1)(b) refers to the mental element
    - "For the purpose of aiding another to commit an offence"
    - Purpose is synonymous with intent, and doesn't include recklessness
    - Purpose has a very specific meaning, and means "truly intentional", not merely being reckless
    - Thus, a higher level of MR is required
    - When capturing liability by way of parties, what we're saying is "you're guilty because you did something to help make it happen"
      - There's a lot more of connection between guilt and the principal, rather than guilt and the party that assisted in some way
      - If you're not the actual doer, there has to be a sufficiently higher MR to capture you

            - R is not that strong, and we could be capturing a lot of innocent people who are not even the doers
        - It's not necessary that the aider know all the details of the crime, but there must be intention
        - Must be true intention, or WB, but not R
        - This also all applies to abetting (21(1)(c))
            - Encouraging someone requires true intention obviously (yes, commit this crime)
        - Appeal allowed; new trial ordered
    - Note: Section 21(1) (a) and (c) require the party to know or be willfully blind to the criminality of the principal's conduct. Recklessness does not apply to s. 21(1) (a) and (c).
- **Ratio**
    - Recklessness does not satisfy the mental element of a party liability for fraud; only actual knowledge or wilful blindness will suffice for party liability under s. 21(1)(b); to be guilty as party of crime, one must know he is helping someone commit a crime

Counselling

- Counselling takes 2 forms
    - Counselling an offence that does take place – 22(1)
    - Counselling an offence that has not occurred – 464
- Either way, you as the counsellor have committed an offence
- A person who counsels an offence that is committed is liable under section 22(1) of the Criminal Code
- If the offence is not committed, the counsellor is liable under section 464 of the Code
- Counsel includes:
    - Procuring
    - Soliciting
    - Inciting
- The offence of counselling / soliciting is complete when the act of solicitation occurs, even if the solicitee has no intention of carrying out the offence, rejects the solicitation, or subsequently renounces the solicitation

R v Hamilton – MR Element for Counselling an Offence

- **Facts**
    - The accused sent email blasts and created a website advertising a "credit card number generator"
        - Capable of generating working credit card numbers
    - Within the zip files, there were also bomb "recipes" and tips for committing burglaries (H denied having read these documents)
    - Sold the files to 20 people, and was caught
    - H was charged with counselling 4 indictable offences that were not actually committed
    - The trial judge acquitted H because she was not satisfied that he had the requisite *mens rea*; CA dismissed the appeal
        - He had not actually read the files he was selling
        - He just resold these things to 20 other people, without reading how to do the crime that was inside the file
        - H argues he was just trying to make some money

- The Crown appealed to the SCC on the basis that the trial judge had erred in her interpretation of the *mens rea* requirement for counselling an offence (they argued that that recklessness was sufficient; in the alternative that it was an error to require a motive as part of *mens rea*)

- **Issue**
  - What is the MR for counselling an offence?
- **Decision**
  - "The *actus reus* for counselling will be established where the materials or statements made or transmitted by the accused *actively induce* or *advocate* — and do not merely *describe* — the commission of an offence."
  - The meaning of "counsel" includes to "procure, solicit or incite"
  - Those who encourage the commission of crimes are secondarily liable because they increase the likelihood of a harmful act occurring
  - "The *mens rea* consists in nothing less than an accompanying *intent* or *conscious disregard of the substantial and unjustified risk 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"
    - Note: this is a **heightened** form of recklessness.
  - The trial judge appeared to have accepted H's evidence that he did not know about the bomb and burglary documents and had not read them; accordingly, this finding of fact was not reviewable
  - The trial judge conflated the concepts of intent and motive and committed a legal error by considering H's motivation as a part of whether he had subjective *mens rea*
  - The wording of the email advertisement showed that H had subjective knowledge that using false credit card numbers is illegal
  - Crown appeal allowed – new trial ordered for counselling fraud, but the other three charges were dismissed
    - Dismissed: 1) making explosive substances with intent; 2) doing anything with intent to cause an explosion; and 3) break and enter with intent.
- Takeaway
  - Anything that increases the likelihood of a crime should also capture liability
  - If you counsel an offence to be committed, whether you've succeeded in getting your client to commit the crime or not, you've increased the likelihood of the crime being committed
  - If you intended for your words to be taken seriously, that's all that is required
    - Why would someone give you their money if the didn't take you seriously?
  - It's a step higher than mere recklessness
    - The doing of the action (AR) with the intention of recklessness
  - Here, counselling takes on a more intentional definition, but not a pure intentional requirement like true intention or WB
  - So you have the base R, then virtual R (***Buzzanga***), now we have the **counselling R (true intention or being aware of the unjustified risk)**
  - The trial judge failed to distinguish between motive and intention
    - H had a motive for money, but that is different from MR
    - Once something is labelled motive, it's not relative to MR
- **Ratio**
  - Mens rea for counselling: The accused either intended the offence to be committed or knowingly counselled the commission of the offence while aware of the risk that the offence was likely to be committed (heightened form of R)
    - Motive and intent not to be confused

Conspiracy

- A conspiracy is simply an agreement between 2 or more people to commit a crime (s. 465)
    - E.g. You could have a conspiracy to steal bikes, it doesn't need to be as serious as murder
- Collusion is not a term in criminal law
    - There's no offence of collusion
    - It is simply an agreement to cooperate, usually in secret, to gain an advantage over somebody else, usually in a dishonest way but could be honestly
    - There is no crime of collusion
    - Collusion to commit a crime is a conspiracy
- How can a 3rd person be a party if it all, when 2 people conspire to commit a crime? That is what JF is all about
- Conspiracy is a crime in itself
    - If they go out and commit the crime, that is the 2nd crime
    - E.g. Conspiracy to murder a mom is 1 charge, and actually doing it is another
- So, how do you become a party to a conspiracy
    - **When you either firstly assist in the formation of the agreement**
        - E.g. If Dino knows that his buddy wants to start stealing bikes, and sell them off for a discounted price, and Dino knows that a 2nd buddy has a garage that he's not using
            - If Dino says to buddy #1 to go to see buddy #2, and the two of you can cooperate, you can start a bicycle theft ring
            - Once buddy #1 meets buddy #2 and they agree to split the proceeds → that's the conspiracy between the two of them
            - But Dino **aided** it to happen, and potentially **encouraged** it
    - **The second way is when there's an ongoing or existing conspiracy, and the aider or abetter tells *another* person to join the conspiracy, AKA a 4th person (NOT ON THE SLIDES)**
        - E.g. buddy #1 and #2 are doing the bike thefts; business is going well and they need help
            - Dino finds buddy #3 who says "If you're looking for more money these guys have something going on"
            - Dino has committed aiding and abetting, because he encouraged and showed Buddy #3 how to get in touch with buddies #1 and #2
            - Buddy #3 **actually has to go and see** buddies #1 and #2
- Remember:
    - In conspiracy, there are technically 2 principals
    - The other time there are 2 principals is under s. 21(2)
    - Most times there is just 1 principal, and then layers of catching other parties who didn't commit the crime per se, yet are convicted of committing the same offence
    - Don't forget to mention the AR and MR for the offence on an exam

R v JF – Party to an Offence of Conspiracy

- **Facts:**
    - The appellant JF, a youth, was convicted of conspiracy to commit murder after talking to friends T and R about plans to kill their mother by giving her alcohol and drowning her in a bathtub
    - Online chat logs revealed that JF told T and R to give their mother Tylenol 3 pills (containing codeine) to "knock her right out"
    - Crown presented evidence that JF had supplied the Tylenol 3 pills to R and T

- The deceased was found to have 3.5 times the "therapeutic" level of codeine in her blood

- **Issues:**
  - 1. Can a person be a party to the offence of conspiracy as a matter of law?
  - 2. How and under what circumstances can a person be found liable as a party to the offence of conspiracy?

Conspiracy

465 (1) Except where otherwise expressly provided by law, the following provisions apply in respect of conspiracy:

(a) every one who conspires with any one to commit murder or to cause another person to be murdered, whether in Canada or not, is guilty of an indictable offence and liable to a maximum term of imprisonment for life;

- **Decision on Issue 1**
  - Conspiracy is a form of inchoate liability
  - Inchoate = not fully formed or developed; anticipating a further act
  - The offense of conspiracy is complete when parties agree to kill someone; it does not matter whether any positive steps are taken to commit the murder
  - In a 2006 case called R v *Dery*, the SCC found that "attempted conspiracy" was "not an offence known to law" because it "stacked" two forms of inchoate liability, and so JF argued by analogy that being a party to conspiracy was also "not an offence known to law"
  - **Court held that party liability is not inchoate and there are no legal barriers to a charge of party to the offence of conspiracy**
- **Decision on Issue 2**
  - To be a party to an offence, a person must aid or abet the principal(s) in the commission of the offence
  - The agreement to commit a criminal act is a central element to the offence of conspiracy
  - "Party liability should be restricted to conduct that aids or abet the formation of the *agreement* that comprises the essence of the crime of conspiracy"
  - "Membership" in the conspiracy is essential; JF's conduct clearly made him a member of (not a party to) the conspiracy to kill T and R's mother
  - Despite a "significant" defect in the jury instruction about partyship to conspiracy, the evidence supporting that JF was part of the conspiracy was "overwhelming" and "could not have possibly affected the verdict"
  - Appeal from conviction was dismissed
- **Ratio**
  - 1) Conspiracy is an inchoate crime, but partly liability is not an inchoate crime
  - 2) Party to conspiracy is restricted to conduct that aids/abets the formation of the agreement
    - The party's conduct must clearly also make him a member

IX. CULPABLE HOMICIDE (MURDER, MANSLAUGHTER, AND INFANTICIDE)

s. 222 - Homicide

- (1) A person commits homicide when, directly or indirectly, by any means, he causes the death of a human being
- (2) Kinds of homicide
    - Homicide is culpable or not culpable
- (3) Non-culpable homicide
    - Is not an offence
    - Not culpable: homicide during times of war, executions
- (4) Culpable homicide
    - Culpable homicide is **murder**, **infanticide**, or **manslaughter**
        - Manslaughter is a catch-all (if it isn't murder or infanticide, then it's manslaughter)
- (5) A person commits culpable homicide when he causes the death of a human being,
    - (a) By means of an unlawful act
        - E.g. Punch someone (assault) and they die (causation) → manslaughter
    - (b) By criminal negligence
        - S. 219: criminally negligent shows wanton or reckless disregard for the safety of others
            - Duty = duty imposed by law; if you don't fulfil it and you do so in a way that shows a wanton disregard, it's criminal negligence
            - E.g. A parent owes a duty to child to provide necessaries of life
                - There's a CC offence failing to do this imposed on parents
            - Criminal negligence is even **worse** than failing to provide necessaries of life
                - E.g. Locking a child in a room
                - E.g. Knowing that the child was sick, and purposely doing nothing
                - This requires a wanton disregard for the life of the child; much worse than failing to provide the necessaries of life
            - E.g. You can have dangerous driving, and then have criminal negligence which is worse than that (requires wanton disregard)
            - Criminal negligence is thus quite bad, and requires this wanton disregard
            - If it results in death → manslaughter
                - Why? If you go back to S. 222(5), it has to be culpable homicide, and if it isn't the other 2 it must be manslaughter
    - (c) By causing that human being, by threats or fear of violence or by deception, to do anything that causes death; or
    - (d) By wilfully frightening that human being, in the case of a child or sick person

s. 223 – When a Child Becomes a Human Being

- (1) A child becomes a human being within the meaning of this Act when has completely proceeded, in a living state, from the body of its mother, whether or not
    - (a) It has breathed
    - (b) It has an independent circulation; or
    - (c) The navel string is severed
- (2) Killing child – A person commits homicide when he causes injury to child before or during its birth as a result of which the child dies after becoming a human being
    - Homicide example
        - Very pregnant mother is assaulted very badly, and the child was all good before that

        - Boyfriend assaults her badly and causes the death of that child
        - That would be culpable homicide
    - E.g. Or if the child was born and severely damaged because of an act and that can be proven, that would lead to culpability as well

ss. 224, 225, 226 – Causation Rules

- S. 224, 225, 226 are causation rules we've covered (make sure to review these)

s. 228 – Killing by Influence on the Mind

- No person commits culpable homicide where he causes the death of a human being
    - (a) By any influence of the mind alone, or
    - (b) By any disorder or disease resulting from the influence of the mind alone
- But this section does not apply where a person causes the death of a child or sick person by wilfully frightening him

s. 229 - Murder

- Culpable homicide (blameworthy 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 or ensues or not
            - The Crown will often to turn to this route if they can't prove BARD in the first route
            - This recklessness must be interpreted subjectively, and is the moral equivalent of full mens rea
        - These 2 routes are referred to as **subjective foresight of death**
    - (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
        - If a person goes to shoot someone intending to kill, misses that person, and kills another person → the murder is of the person as well
        - This is called **transferred intent**
        - Even though you hit someone else
        - This is the same thing if you killed two people → 2 counts of murder
    - (c) Where a person, for an **unlawful object**, does anything that he **knows our 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
        - Note: "ought to know" = is **inoperable** now, due to the constitutional parameters requiring a strict definition of the mens rea for murder

s. 230 – Murder in Commission of Offences (ZOMBIE LAW)

- Was called the **felony murder rule**
- When you commit a crime, and somebody dies while you're committing the crime, you're guilty

    - They died on you're watch
- E.g. Rob a store and you hit the clerk over the head trying to stun them and they die → guilty of murder
- This is what *Vader* was charged with
- This was struck down in the 80s, and is no longer applicable

s. 231 – Classification of Murder

- (1) Murder is first-degree or second-degree murder
- (2) – Planned and deliberate murder
    - Murder is first degree when it is planned and deliberate
        - Crown has to prove this BARD
        - This is worse than second-degree because not only do you get life in prison, but you're only eligible for parole after **25 years**
    - Second-degree murder also has an automatic life sentence, but parole eligibility is possible anywhere from **10-25 years (flexible)**
    - If you kill multiple people, you can have sentences stacked on top of each other
        - E.g. A plan and deliberate killing of 3 people, the judge has the discretion to give you "life and 25", or "life and 75"
        - They didn't have to be exact increments of 25 either (e.g. could be "life and 45")
        - You can also stack 2nd degree murders too
- (3) – Contracted murder
    - Without limiting the generality of (2), murder is planned and deliberate when it is committed pursuant to an arrangement under which money or anything of value passes or intended to pass from one person to another, or is promised by one person to another, as consideration for that other's causing or assisting in causing the death of anyone or counselling another person to do any act causing or assisting in causing that death
- (4) – Murder of a peace officer
    - **Irrespective** of whether a murder is planned and deliberate on the party of any person, murder is **first-degree** murder where the victim is
        - (a) A Police officer, constable, sheriff, or other person employed for the preservation and maintenance of the public peace, acting in the course of his duties
        - (b) A warden, guard, or other officer, or a permanent employee of a prison, acting in the course of his duties; or
        - (c) A person working in a prison with the permission of the prison authorities and acting in the course of his work therein
    - Why do we have that? It's for deterrence → they need extra protection
    - In order to provide enhanced protection, we provide enhanced deterrence
    - They must be in the course of the execution of their duty though
    - The accused has to know it's a police office, and the crown has to prove that the accused knew this BARD
        - So, you need the AR, MR, and that they knew that they were an officer
        - Thus, undercover officers don't count
        - But, if the accused knew that the officer was undercover, that counts
- (5) – Hijacking, sexual assault or kidnapping (offence of domination)
    - **Irrespective** of whether a murder is planned and deliberate on the part of any person, murder is first degree murder in respect of a person when the death is caused by that person while committing or attempting to commit an offence under one of the following sections
        - section 76 (hijacking an aircraft);

        - section 271 (sexual assault);
        - section 272 (sexual assault with a weapon, threats to a third party or causing bodily harm);
        - section 273 (aggravated sexual assault);
        - section 279 (kidnapping and forcible confinement); or
        - section 279.1 (hostage taking).
    - E.g. If a person has a hostage and kills them, even without planning and deliberation it's first-degree murder
        - E.g. Unlawful confinement → very basic, could be as simple as just locking the door
- (6) – Criminal harassment
    - **Automatically** first-degree murder
- (6.1) – Terrorist activity
    - **Automatically** first-degree murder
- (7) – Second-degree murder
    - All murder that is not first-degree is second-degree murder

s. 232 – Murder Reduced to Manslaughter

- (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**.
- (2) – What is Provocation
    - Conduct of the victim that would constitute an indictable offence under this Act that is punishable by **five** or more years of imprisonment and 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 their passion to cool.
- This is the cause of much litigation
- S. 232 is the only section that moves murder down from manslaughter

s. 233 – Infanticide

- A female person commits infanticide when by wilful act or omission she causes the death of her newly-born child, if at the time of the act or omission she is **not** fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequent on the birth of the child her **mind is disturbed**
    - A special class of homicide basically
    - Limiting factors
        - Must be a female
        - Of her **own child**
    - If the evidence is that her mind was disturbed by the effects of the child birth or lactation, then she is not guilty of murder, manslaughter; but she is guilty of infanticide
    - Infanticide is both an offence **and** a defence
    - If the Crown is charging her with murder, her best defence is infanticide
        - Why? The sentence is much lower
        - The punishment is not life, but **5 years** in prison
        - When you see a guilty plea, it's usually a sentence of probation
        - Even if it's second degree murder, it can be infanticide

s. 239 – Attempt to Commit Murder

- Dong everything possible to trying to kill someone, except doing it
- It does not have an automatic life sentence

Methodology for Culpable Homicide

- **1.** Was there a death of a human being (not merely brain dead or in a coma)?
  - Look at s. 223 for definition of when a child becomes a human being
- **2.** Was the human being in an infant?
  - Usually talking days – not a precise time frame
  - If it's a newborn and the accused happens to be the **biological mom** → infanticide potentially – s. 233 (come back to it at the end)
- **3.** If it's not a newborn child or if that newborn child is killed by someone other than the biological mother, you remain still in culpable homicide (s. 222), but now it's either going to be murder or manslaughter
- **4.** Decide if the Crown can establish murder – s. 229
  - **(a)** Both (i) and (ii) have **subjective foresight of death**
  - **(b)** Transferred intent; trying to kill one person and end up killing another
  - **(c)** Rare; "ought to know" is no longer operative
  - ***DO NOT use s. 230 (felony murder rule is a zombie law)
- **5.** If the Crown can establish murder, is it **first-degree or second-degree**?
  - First degree includes
    - i. Planning and deliberation (prove BARD)
    - ii. Contract killing
    - iii. Death occurs during terrorist activity or other special act
    - iv. Special employee/kidnapping
- **6.** If not murder, is it **manslaughter or infanticide?**
  - If Crown cannot prove subjective foresight of death for murder, culpable homicide falls to **manslaughter** (e.g. High degree of intoxication can prevent foreseeing natural consequences of actions; may raise reasonable doubt)
  - S. 232: If murder emanates from a sudden provocation of law; that can reduce the verdict from murder to manslaughter
  - If killing of a child by mother, you must prove a "disturbance of mind" to reduce to infanticide

Constitutionalization of Mens Rea

- In ***Vaillancourt*** and ***Martineau***, the SCC declared s. 230 unconstitutional, because there was no requirement for the Crown to prove the killer had the subjective foresight of death
- The **mens rea for murder** (most serious offence) requires the **subjective foresight of death**
  - Within s. 230:
    - (a) struck down and not repealed
    - (b) struck down
    - (d) struck down and repealed
  - Only one provision remains, but commentators agree it would suffer the same fate; all of s. 230 fails to make the grade of requiring the subjective foresight of death

R v Vaillancourt – Murder Should Have a Strong Mens Rea

- Note s. 213 is s. 230 today
- **Facts**
  - V and an accomplice (A) plan to rob a pool hall using knives
  - A arrives at the scene with a loaded gun
  - V tells A to take the bullets out of the gun; A gives V 3 bullets, which he puts into his glove (V believes the gun is now unloaded)
  - During the robbery, A shoots and kills a customer during a struggle
  - V is caught by police at the scene and charged with murder under section 213 (d); A is never found
  - Following a trial by judge and jury, V is convicted of second degree murder; because A was guilty of murder by virtue of section 213(d), V was guilty of murder by virtue of section 21(2)
  - V appeals to the SCC to challenge the constitutionality of 213(d)
- **Issue**
  - Does section 213(d) offend sections 7 and 11(d) of the *Charter*, either alone or in combination with section 21 of the *Criminal Code*?
- **S. 213** - 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), 76 (piratical acts), 76.1 (hijacking an aircraft), 132 or subsection 133(1) or sections 134 to 136 (escape or rescue from prison or lawful custody), 143 or 145 (rape or attempt to commit rape), 149 or 156 (indecent assault), subsection 246(2) (resisting lawful arrest), 247 (kidnapping and forcible confinement), 302 (robbery), 306 (breaking and entering) or 389 or 390 (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;
  - (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; or
  - **(d) he uses a weapon or has it upon his person**
    - (i) during or at the time he commits or attempts to commit the offence, or
    - (ii) during or at the time of his flight after committing or attempting to commit the offence, and the death ensues as a consequence.
- **Analysis (Lamer J)**:
  - Section 213 broadens the definition of murder by requiring only proof of the commission of any act specified in (a) through (d) without proof of the subjective foresight or even objective foreseeability of the likelihood of death
  - In the historical context, "malice aforethought" (premeditation, intention and / or recklessness) was used to distinguish murder from manslaughter
  - Over time, the "felony murder" rule developed and made any death that occurred during the commission of an unlawful act murder, even if the death was unintended or accidental
  - **S. 7 of the Charter**
    - Prior to the *Charter*, section 213 could not have been challenged successfully
    - Post-*Charter*, the powers of the provincial and federal legislature are restricted to comply with the *Charter*, which is the "supreme law of Canada"

        - Section 213 of the *Code* offends section 7 of the *Charter*
            - "As a general rule, the principles of fundamental justice require proof of a subjective *mens rea* with respect to the prohibited act, in order to avoid punishing the 'morally innocent'"
            - "The punishment for murder is the most severe in our society and the stigma that attaches to a conviction for murder is similarly extreme […] There must be some special mental element with respect to the death before a culpable homicide can be treated as a murder. That special mental element gives rise to the moral blameworthiness which justifies the stigma and sentence attached to a murder conviction"
    - **S. 11(d) of the Charter**
        - "Any provision creating an offence which allows for the conviction of an accused notwithstanding the existence of a reasonable doubt on any essential element infringes sections 7 and 11(d)"
        - The wording of 213 would allow juries to convict someone for murder, even if they had a reasonable doubt about whether the accused knew or ought to have known that death would likely ensue, so it is *prima facie* unconstitutional
        - Section 213 of the *Code* cannot be saved by section 1 of the *Charter* because Parliament has other ways of punishing people who commit crimes with weapons that do not impair rights to such a high degree
        - In addition, a conviction for manslaughter will still be available when death occurs because of an unlawful act
            - Note: there is a wide sentencing range for manslaughter and this range can be used to address the specific situation / facts
    - **Holding/Conclusion**
        - Murder is highly stigmatized offence and we should not label people as murderers unnecessarily
        - Murder requires a degree of subjective *mens rea* and proof thereof BARD
        - It is a Principle of Fundamental Justice that, before a person is convicted of murder, there must be proof BARD of at least objective foreseeability of death
            - Lamer J. had to compromise on this ruling in order to be in the Majority
        - Section 213(d) was declared unconstitutional and of no force or effect
        - Appeal allowed—murder conviction quashed, new trial ordered
- **Ratio**
    - It is a principle of fundamental justice that before a person is to be convicted of murder, there must be proof BARD of at least objective foreseeability of death

R v Martineau – We Need the Subjective Foresight of Death to Have Murder

- **Facts**
    - Martineau (M) and his accomplice Tremblay (T) planned to commit a crime together, which Martineau thought would only be a "break and enter"
    - M had a pellet gun and T had a rifle; they entered a trailer occupied by two people and robbed it
    - As they were leaving, T shot and killed both occupants
    - M was 15 at the time, but was tried as an adult and convicted of second-degree murder at trial under section 213(a) of the *Code*
    - Applying the decision in *Vaillancourt* to another portion of section 213, the Court of Appeal quashed the convictions and ordered a new trial

- The case went to the Supreme Court to determine whether 213(a) was also unconstitutional

- **Issue**
  - Does section 213(a) of the *Criminal Code* infringe or deny the rights or freedoms guaranteed by section 7 and / or 11(d) of the *Charter*?
  - If yes, is section 213(a) saved by section 1 of the *Charter*?
- **Analysis – Lamer CJC**
  - Parliament has the power to define the elements of a crime, but post-*Charter*, they must do so in a manner that accords with the Principles of Fundamental Justice (PFJ)
  - The Court must "measure the content of legislation against the guarantees in our *Charter*"
  - Subjective foresight of death is required before a conviction for murder can be sustained
    - This represents a step beyond the decision in *Vaillancourt*, where the minimum threshold was objective foresight of death
  - "A conviction for murder carries with it the most severe stigma and punishment of any crime in our society. The principles of fundamental justice require, because of the special nature of the stigma attached to a conviction for murder, and the available penalties, a mens rea reflecting the particular nature of that crime"
  - Canadians value free will. Thus, offenders should be liable and punished according to their exercise of free will in bringing about the offence / consequences.
- **Holding**
  - S. 213 infringes ss. 7 and 11(d) of the charter, and it not saved by s. 1
- **Ratio**
  - Principle of fundamental justice demands that proof BARD of **subjective** foresight of death is required before a conviction for murder can be sustained

R v Logan – Party to An Offence and Removing "Ought to Have Known" From s. 21(2)

- **Facts**
  - Hugh Logan (HL) and several accomplices were charged with a series of robberies in the Toronto area
  - On one occasion, HL entered a convenience store wearing a mask, armed with a revolver; his accomplice W was with him
  - HL shot the clerk in the neck and robbed the store
  - Evidence also showed that HL's brother, **Sutcliffe Logan (SL)** helped plan the robbery, and confessed to undercover police officers
  - W admitted that he was involved in the robbery, but said he didn't intend to shoot anyone and they hadn't discussed the use of guns
  - "In his charge to the jury with respect to [W], the trial judge said that "you may well have considerable doubt whether he knew or should have known that one of his group would probably shoot somebody with the intention to kill".
  - With respect to [SL], he stated that "you would then have to consider whether he knew or should have known that one of the group would probably, in the course of the robbery, shoot someone with intent to kill".
  - In his explanation of s. 21 of the *Criminal Code*, the trial judge instructed the jury that "[i]t must be established beyond a reasonable doubt that the accused knew or ought to have known that someone would probably shoot with the intention of killing".
  - W and SL were convicted of a number of offences, including attempted murder
  - The Court of Appeal allowed their appeal in relation to the attempted murder convictions
- **Issue**

- Does section 21(2) of the *Criminal Code* infringe or deny the rights or freedoms guaranteed by section 7 and / or 11(d) of the *Charter*?
- If yes, is section 21(2) saved by section 1 of the *Charter*?

- **Analysis – Lamer CJC**
  - "The question whether a party to an offence had the requisite *mens rea* to found a conviction pursuant to s. 21(2) must be answered in two steps.
    - "Firstly, is there a minimum degree of *mens rea* which is required as a principle of fundamental justice before one can be convicted as a principal for this particular offence? This is an important initial step because if there is no such constitutional requirement for the offence, the objective component of s. 21(2) can operate without restricting the constitutional rights of the party to the offence.
    - "Secondly, if the principles of fundamental justice do require a certain minimum degree of *mens rea* in order to convict for this offence, then that minimum degree of *mens rea* is constitutionally required to convict a party to that offence as well.
  - "I would, therefore, as did the Court of Appeal, declare inoperative the words "or ought to have known" when considering under s. 21(2) whether a person is a party to any offence where it is a constitutional requirement for a conviction that foresight of the consequences be subjective, which is the case for attempted murder. Once these words are deleted, the remaining section requires, in the context of attempted murder, that the party to the common venture **know** that it is probable that his accomplice would do something with the intent to kill in carrying out the common purpose"
- **Holding**
  - Appeal dismissed
  - Result: "Ought to have known" is inoperative for partyship under section 21(2) for murder, attempted murder and theft because they are all stigmatic offences"
- **Ratio**
  - As a constitutional requirement, attempted murder cannot require of the accused a *lesser* mental element than that required for murder under s. 212(a)(i) which is subjective foresight of the consequences
  - The same minimum degree of mens rea is required to convict a party to the offence

s. 234 – Manslaughter – Introduction

- Culpable homicide that is not murder or infanticide is **manslaughter**
  - Unlike murder, manslaughter is an objective fault offence
  - That is, **once the accused has been proven to have committed one of the forms of prohibited conduct under section 222(5)*, then the accused is liable for the resultant harm (or death) if bodily harm was objectively foreseeable**
    - Consider: **would a reasonable person intentionally performing the *actus reus* and *mens rea* required for fault under section 222(5) perceive a risk of non-trivial, non-transitory bodily harm to the victim?**
  - If yes (and death results), the accused is liable for manslaughter
- *Before you jump to objective foresight and the accused being liable for the resultant harm or death, **remember** that the Crown still has to prove BARD the actus reus and the mens rea for the **original unlawful act** – **subjective**
  - E.g. The mens rea for assault is subjective (true knowledge, willful blindness, or recklessness of intention of application of force without consent)
    - Once this is proven, the **objective** component kicks in

- Has the Crown proved BARD that a reasonable person in the accused's shoes would foresee the bodily harm?
- If so, and the harm did take place, then the **mens rea** is established

R v Creighton – The Mens Rea for Manslaughter: Objective Foresight of Bodily Harm

- **Facts**
  - The accused (C) and deceased (M) consumed a large quantity of alcohol and cocaine together over an 18-hour period
  - C obtained 3.5 grams of cocaine and "without determining the quality and potency", injected himself, another person (F), and M (with her **consent**)
  - M began to convulse and stopped breathing
  - Expert evidence was presented that M had gone into cardiac arrest and later asphyxiated on her stomach contents
  - C and F tried to revive M and failed; C told F not to call 911
  - C put M (not yet deceased) on his bed and cleaned the apartment
  - C and F left the apartment; F later returned to the apartment and called 911
  - M was pronounced dead when emergency services arrived
  - C gave different evidence at trial, which was not believed
  - C's counsel conceded that injecting M constituted trafficking, per section 4(1) of the *Narcotic Control Act* (now the *Controlled Drugs and Substances Act*)
    - This was not an assault, since there was consent
    - The unlawful act here was the **trafficking of cocaine** – injecting someone with cocaine with their consent counts still as trafficking
      - Injected it, intended to inject it
    - C conceded at trial that this was the unlawful act; argued though that he shouldn't be guilty of manslaughter unless there was **objective foresight of death**
      - Lamer agreed with this, the majority disagreed
  - The Crown's position was that C was guilty of unlawful act manslaughter, contrary to section 222(5)(a) of the *Code*
  - C was convicted of manslaughter; this was upheld on appeal
- **Issues**
  - Is section 222(5)(a) of the *Criminal Code* constitutional?
  - Does section 7 of the *Charter* mandate subjective *mens rea* for the crime of manslaughter?
- **Decision**
  - The fact that an offence depends on a predicate offence does not render it unconstitutional, provided that the predicate offence involves a dangerous act and is not an offence of absolute liability
  - Once the unlawful act has been proven, a conviction for manslaughter requires that the **risk of bodily harm be only reasonably foreseeable**
  - **Test**: objective foresight of bodily harm, the unlawful act must be one likely to harm another person and the harm must be more than trivial / transitory
    - This is a low bar, but it is still a bar
    - A reasonable person has to foresee the harm in the circumstances
  - An objectively dangerous act requires more than "mere inadvertence"
  - The trial judge properly found that C committed an unlawful act (trafficking); a reasonable person would have foreseen the risk of bodily harm / death to M

- At the very least, C had a duty to determine the quality/potency of the cocaine to know the "precise risk" before administering it to another person
- Appeal dismissed; manslaughter conviction upheld

- **Dissent (Lamer)** – wants to raise the bar for manslaughter
  - Once the Crown has proven the unlawful act (own mens rea which is subjective), then there should be for manslaughter **objective foresight of death**
  - He couldn't say it should be subjective, because that would be murder; it has to be something less
- Remember
  - You have to be guilty of the original unlawful act (*Smithers-Nette* test for causation)
  - After that, the mens rea for manslaughter here is **objective foresight of bodily harm**
- **Ratio**
  - The mens rea for unlawful act manslaughter (in addition to mens rea of underlying unlawful act) = objective foreseeability of the risk of bodily harm, which is neither trivial nor transitory, in the context of the dangerous act (standard should not be individualized for the particular accused)

R v Nygaard and Schimmens – First-Degree Murder by Planning and Deliberations

- **Facts**
  - Nygaard (N) sold a stereo to a man and the cheque bounced
  - N and Schimmens (S) went to the man's hotel about the money
    - Planned and deliberate
  - S hit one man in the head and arm, breaking his arm
  - S hit another man who had signed the bad cheque several times in the head [Note: the witnesses were somewhat inconsistent about who was swinging the bat]
  - The second man died from his injuries
  - N and S were charged with first-degree murder under section 212(a)(ii) [now section 229(a)(ii)]
  - N was the party, S was the principal
  - S was alleged to have intended to cause the victim bodily harm knowing it could cause death and being reckless about whether death ensued; N was charged as a party
  - **Defence**
    - First-degree murder is the most serious, and it should one the planning and deliberation of the killing
  - **Crown**
    - Argued that that s. 229(a)(ii) can also lead to planned and deliberate killing (used to be s. 212)
- **Issues**
  - Is the element of planning and deliberation required by section 214(2) (now s. 231) of the *Criminal Code* incompatible with the requisite *mens rea* for section 212(a)(ii)?
- **S. 212 (now s. 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
- **S. 214 (now s. 231) – Classification of Murder**
  - (2) Murder is first degree murder when it is <u>planned and deliberate.</u>

        - It's not planned **or** deliberate
        - The Crown has to prove **both**
    - Crown believes accused saying "we're going to plan this murder and I don't care if we succeed or not" → still guilty of first-degree murder
- **Planned vs. Deliberate**
    - **"Planned":** means that the scheme was conceived and carefully thought out before it was carried out.
        - You're thinking it through, but it doesn't have to be a complicated plan
        - It can be simply "I'm going there to beat him", or "I'm going there to kill him", or "I'm upset with those people, I'm going to get my gun and kill them"
    - **"Deliberate"**: means considered, not impulsive.
        - Intention essentially, but you need something more
        - The accused must of have considered the pros and cons to some degree while the planning was going
        - An impulsive killing would be a second-degree murder
        - You can have a planning **but** no deliberation, that would be second-degree murder
        - You can also have deliberation **but** no planning
        - The Crown has to succeed in proving **both BARD**
- **Decision**
    - N argued that the crime described by s. 212(a)(ii) was not murder because the *mens rea* was "less grave" than the *mens rea* for s. 212(a)(i); the Court disagreed and held that the recklessness described in the section was "indistinguishable" on a "culpability scale" when compared to section 212(a)(i) where a person "means to cause his death"
    - The Court held that ss. 212(a)(ii) and 214(2) were not incompatible and that the elements of planning and deliberation described by s. 214(2) could be "properly applied" to the intent to cause bodily harm described in s. 212(a)(ii)
    - If you intentionally commit the AR and you do so causing bodily harm, and you know that death is likely and still proceed, then that's reckless → this subphrase is merely an afterthought to the whole process
- **Ratio**
    - Murder can be classified as first-degree (planned or deliberate) on the basis of the secondary intent (reckless whether death ensued) in s. 229(a)(ii)

R v Pritchard – First-Degree Murder by Way of Unlawful Confinement

- **Facts**
    - M and his wife (S) had a large stash of marijuana hidden on their farm
    - M went away for a few days, and returned to find S was missing
    - P committed robbery holding her up; they take the marijuana (stealing with force = robbery)
    - S's body was never found, but circumstantial evidence pointed to P, and the Crown's theory was that P had killed S during a robbery and had unlawfully confined S and killed her
        - P gets found out, and concedes that they did kill the wife while there
        - However, he argues he wasn't confining her, he was robbing her
        - Robbery is not on the list in s. 231(5)
        - "I'm not guilty of first-degree murder, but second-degree, since I committed robbery"
    - At trial, the jury was instructed that they could return a verdict of guilty of first-degree murder pursuant to section 231(5)(e), which elevates murder that is committed during a forcible confinement or kidnapping to first degree murder regardless of whether it was "planned and deliberate"

- Jury convicted on first degree murder; upheld by Court of Appeal

- **Issue**
  - P conceded that the evidence was sufficient for a conviction for second-degree murder, but insisted that S was killed during a robbery, not an unlawful / forcible confinement
  - Since robbery is not a predicate offence under section 231(5), P argued that the evidence did not support a conviction for first-degree murder
- **Analysis**
  - For s. 231(5) to raise murder from second-degree to first-degree, the Crown must prove the killing occurred as part of continuing series of events constituting a **single transaction** that establishes not only the killing but also the distinct offence of unlawful confinement
    - "While committing or attempting to commit" requires killing to be closely connected, temporally and causally, while enumerated offence (crimes of domination)
    - First-degree murder is not a distinct substantive offence; it's an aggravated form of murder
    - After concluding the accused caused the death of the victim, the trier of fact must determine whether such circumstances under s. 231(5) exist; high degree of blameworthiness beyond murder
    - Transitory restraint inherent in threatened violence of every robbery does not trigger this; however, unlawful confinement may be established with events also disclosing robbery
    - Q: Whether a crime of domination was separate from the act of killing; **if an act of confinement and killing are co-extensive (one in the same), you cannot convict for first-degree**
    - Brief physical struggle will not suffice; must be a significant period of time of unlawful confinement
    - Here, there is ample evidence of unlawful confinement; the fact that the accused confined the victim for the purpose of committing a non-enumerated offence (robbery) does not alter the operation of s. 231(5)(e)
    - Open for the jury to conclude offences were **linked temporally and causally**, but the confinement was independent of the killing
- **Decision**
  - Section 231(5) elevates a second-degree murder that is "causally and temporally linked" to a predicate offence during a "single transaction"
  - Parliament intended that murders committed along with certain "crimes of domination" should be punished more severely
  - There was sufficient evidence that P had confined S and restricted her movements during the robbery
    - Confinement has to be more than trifling in the circumstances
      - Has to be an exercise of domination in the circumstances
      - It doesn't have to be much more than that though; it could be as simple as closing the door behind you and not letting a person leave
    - P is guilty of first-degree because of this forcible component
  - The fact that P had used a gun to make S submit to his requests before killing her created a sufficient causal and temporal connection between the acts to constitute a single transaction
  - The appeal was dismissed
- **Ratio**
  - S. 231(5)(e): Second-degree murder will be elevated to first-degree where murder and predicate offence are **distinct** but **linked** together both **causally** and **temporally** in circumstances that make the entire course of conduct a **single transaction**

Intoxication and Homicide

- First-degree murder, when planned and deliberate, takes more cognitive function than when it is simply impulsive
    - Intoxication can be relevant to raising a reasonable doubt about this planning and deliberation
- Even if the accused is proved to have had the intent to murder, intoxication evidence may raise a doubt about whether it was planned and deliberate
- If there is a doubt about whether the murder is planned and deliberate, then the conviction must be for second degree murder (not first degree)
- Evidence of a lower level of intoxication may suffice to rebut the inferences of planning and deliberation (P&D) than is required to rebut the inference of specific intent to murder
    - **Lower level of intoxication** – may rebut inference of P&D to reduce culpability to second degree murder rather than first degree
    - **Higher level of intoxication** – may rebut the inference of specific intent to murder, reducing culpability to manslaughter rather than murder
- Intoxication is relevant in planning and deliberating a killing in 2 stages
    - It can first raise a reasonable doubt for if there was planning and deliberating
    - And if that is the case, then it isn't first-degree murder and would be second-degree
    - E.g. if someone had a BAC of 250
    - If the Crown can prove that he had the ability to foresee death, you can still be guilty of second-degree murder
- However, someone may be so intoxicated that it may raise a reasonable doubt on second-degree murder
    - If a reasonable doubt can be raised to the subjective foresight of death, then it is now manslaughter
        - The only way you wouldn't be guilty of manslaughter is the Daviault route, but that has been overruled by Parliament

R v Wallen – Distinguishing the Intoxication Level Needed to Negate First Degree vs. Murder

- **Facts**
    - W and his wife were going through a divorce/custody battle
    - On a number of occasions, W had confronted his estranged wife by phone, at her home, and at her office
    - W believed his wife, a legal assistant, was having an affair with a lawyer from the law office where she was employed
    - On the day of the killing, W consumed a combination of prescription tranquilizers, rum, beer and possibly marijuana
    - Near closing time, he entered his wife's office and shot her to death in front of her co-workers
    - W was convicted at trial (by jury) of first-degree murder; this was upheld on Appeal
    - W appealed on the basis that the instructions to the jury about intoxication were deficient and the trial judge refused a request from the jury to distinguish (in writing) first- and second-degree murder
- **Issue**
    - Were the trial judge's instructions to the jury about the effect of intoxication on intent deficient?
- **Decision**:
    - Yes, the jury charge on intoxication was deficient

        - "[…] the trial judge's charge was deficient in two respects: first, **he did not explicitly, as he is required, tell the jury that a lesser degree of drunkenness than is required to negative the intent to commit murder can still negative planning and deliberation**, and second, **his charge as a whole did not, in any event, make the distinction clear to the jury."**
        - First degree murder is, in terms of punishment, the most serious offence in the *Criminal Code […]* It is imperative that the jury be explicitly and clearly instructed on the distinction between the effect of intoxication on intent to kill as opposed to planning and deliberation.
        - Appeal allowed: first degree murder conviction set aside, new trial ordered
- **Result**
    - The higher the cognitive functioning used to establish the *mens rea* to commit the offence, the less impaired one has to be to raise a reasonable doubt as to the *mens rea*
- **Ratio**
    - A jury charge must distinguish between the degree of intoxication necessary to negate the intent to kill (moving murder to manslaughter) and the degree of intoxication necessary to negate planning and deliberating (moving first-degree to second-degree murder)

Parties to Homicide

- Recall from Lesson Plan 8 that a person can be a party to an offence by aiding or abetting the principal offender
    - So, a person may be guilty of murder or manslaughter, even if they do not directly participate in the killing
- For murder, there is a subjective *mens rea* requirement
    - This subjective *mens rea* requirement can be met by proving that the party aiding or abetting had actual knowledge or was willfully blind that the principal intended to commit murder and aided or abetted for that purpose, regardless of the party's true desire.
- You can be found guilty of murder if the principal is found guilty of murder, by aiding and abetting of that killing
    - E.g. "Here's a knife" → Aiding
    - E.g. "Here's a knife, go kill them" → Aiding and abetting
- Under s. 21(2), and one commits a second offence
    - If the offence was foreseeable by the party, then he is guilty of the murder
    - The "knew or *ought to have known*" doesn't apply though if he didn't know
- *Davy*
    - If you know as the result of committing the first offence that death is likely, then you're still captured by s. 21(2) for murder; but it is the **subjective knowledge**
    - If it's an offence than murder, other than attempted murder, other than theft, and the **second offence is a general intent offence**, then the "known or ought to have known" is still in effect

R v Briscoe – The Mens Rea Requirement for Partyship to Murder

- **Facts**
    - All participants were charged with kidnapping, aggravated assault and first degree murder
    - B and L were tried jointly by judge alone

- B tells the police his role, saying he didn't want anyone killed; knew what could be happening but told the other thugs "I don't want anything to do with it"
- B was acquitted, as the trial judge found that B had completed the *actus reus* of being a party to the killing, but did not have the requisite *mens rea* / knowledge that L intended to kill
  - Looks at the actus reus and mens rea and partyship to murder
    - BARD, there were various elements of the actus reus here; B drove the group to a place and selected a place to stop for commission of the crime; opened the truck of the car for L; provided tools; told victim to be quiet; any one of these things alone could satisfy the AR
    - However, he did not want to assist in killing; and therefore he is not guilty of murder by partyship
- The Court of Appeal overturned the acquittal and ordered a new trial; holding that the trial judge had erred by failing to consider willful blindness
- B appealed to the SCC

- **Issue**
  - Did B have the sufficient *mens rea* under section 21(1)(b) to be party to the murder?
  - Did the trial judge err in law by failing to consider whether B was willfully blind to L's plan to kill, and therefore guilty as a party to the offences?
- **Decision**
  - In his own statement, B admitted that he knew something bad was going to happen at the golf course and that some of the group were carrying weapons
  - B made statements to the group such as, "whatever you guys wanna do just do it. Don't do it around me I don't want to see nothing I don't know what the f*** you're gonna do"
  - "Canadian criminal law <u>does not distinguish between the principal offender and parties to an offence in determining criminal liability</u>."
  - First, look at the components of partyship under s. 21
  - It breaks down into an equation
    - "Purpose" in section 21(1)(b) or (c) = "intention" + "knowledge"
    - "Intention" → intent to aid (or abet); it does not mean anything further (not desire)
      - They don't have to desire the outcome they're assisting or encouraging in
    - "Knowledge" → true knowledge **or** willful blindness that the principal intends to commit the offence
      - Not recklessness
      - The party has to know that the principal is setting out to commit a **particular** crime
        - B had to know that L intended a homicide; if B was just wilfully blind to thinking L was going to just commit assault, his liability would only go as far that assault
        - "As for knowledge, in order to have the intention to assist in the commission of an offence, the aider must know that the perpetrator intends to commit the crime, although <u>he or she need not know precisely how it will be committed</u>"
  - In this case
    - B intended to drive the car, hand the tools; tell the victim to be quiet
    - "Whatever you do I don't want to know" → B's comments made him willfully blind when he was aiding
    - Since the trial judge didn't get to this route to liability, he committed an error of law; acquittal overturned

- Willful blindness can be a "substitute for actual knowledge whenever knowledge is a component of the *mens rea*"
- Sopinka J. in *Jorgensen* described the issue as follows: "[a] finding of wilful blindness involves an affirmative answer to the question: Did the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge?"
- Appeal dismissed, order for a new trial affirmed

- **Ratio**
  - WB substitutes for true knowledge when knowledge is a requirement of the MR of the offence
    - Under s. 21(1)(b) or (c), one can be guilty as a party to an offence if he **knew** (or was **WB**) that the principal intended to commit the offence
    - Party need **not** desire that the offence happen (probability, not just possibility of offence occurring)

Infanticide

Infanticide

233 A female person commits infanticide when by a wilful act or omission she causes the death of her newly-born child, if at the time of the act or omission she is not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequent on the birth of the child her mind is then disturbed.

Punishment for infanticide

237 Every female person who commits infanticide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

R v Borowiec – Re-Establishing What Infanticide Is

- **Facts**
  - In 2010, a crying infant was found in a dumpster and was traced back to B
  - B admitted she had given birth to other babies in 2008 and 2009 and had left them in dumpsters
  - B was charged with 2 counts of second-degree murder for the 2008/2009 infant deaths
  - The trial judge found B of 2 counts of infanticide
  - The Court of Appeal dismissed the Crown's appeal
  - The Crown appealed to the SCC (appeal as of right, as there was a dissenting opinion at the Court of Appeal)
- **Issue**
  - What is the meaning of "her mind is then disturbed" in the context of the Infanticide provisions?
- **Decision – Cromwell J**
  - Infanticide operates both as a stand-alone offence (if these conditions are met) and as a partial defence to the charge or murder or manslaughter
  - The *mens rea* for infanticide is the same as for manslaughter: **objective** foresight of bodily harm

        - It is the subjective intention to commit the unlawful act, but once that is proven BARD, objective foresight of the risk of bodily harm takes place
    - "The question of the meaning of the phrase "her mind is then disturbed" is one of statutory interpretation. To answer it, we apply the often reiterated "modern" approach which requires that we read the words in their "entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."
    - "I cannot accept the conclusion of the dissenting judge in the Court of Appeal that Parliament intended to restrict the concept of a disturbed mind to those who have "a substantial psychological problem"
    - Rather, I conclude that the phrase "mind is then disturbed" should be applied as follows:
        - **(a)** The word "disturbed" is not a legal or medical term of art but should be applied in its grammatical and ordinary sense.
        - **(b)** In the context of whether a mind is disturbed, the term can mean "mentally agitated", "mentally unstable" or "mental discomposure".
        - **(c)** The disturbance need not constitute a defined mental or psychological condition or a mental illness. It need not constitute a mental disorder under section 16 of the *Criminal Code* or amount to a significant impairment of the accused's reasoning faculties.
        - **(d)** The disturbance must be present at the time of the act or omission causing the "newly-born" child's death and the act or omission must occur at a time when the accused is not fully recovered from the effects of giving birth or of lactation.
        - **(e)** [However], there is **no requirement** to prove that the act or omission was <u>caused</u> by the disturbance. The disturbance is part of the *actus reus* of infanticide, not the *mens rea*.
            - To make that connection, you'd be in another defence known as insanity/not criminally responsible
            - It just requires the disturbed mind is present during the time of the killing
        - **(f)** The disturbance must be "by reason of" the fact that the accused was not fully recovered from the effects of giving birth or from the effect of lactation consequent on the birth of the child.
    - When the Crown only charges the offence of infanticide, they only need to prove that the mother killed the child
        - The don't have to prove that the mind is disturbed
        - But when the Crown charges murder or manslaughter then it has to prove BARD that the mind was **not** disturbed by the effects of birth or lactation
    - Appeal dismissed
- **Ratio**
    - Mens rea for infanticide: Objective foresight of the risk of bodily harm (just like manslaughter)
    - "Disturbance of the mind" for infanticide carries its ordinary meaning: the disturbance must be connected to the effects of birth or lactation, **but** no causal connection is required between the disturbance and the decision to cause the death of the child (just needs to be present during the time of the killing)

R v Effert – Infanticide Example

- **Facts**
    - E became pregnant at 19 and hid her pregnancy from her family, friends, and the baby's father (E was not in a relationship with the father and received no support from him)

- She gave birth to the baby secretly in her parent's basement, strangled the newborn with a pair of underwear and threw the body over the fence into a neighbour's yard
- When the body was found, E initially denied knowing anything, but later confessed and was charged with murder
- She was convicted at her first trial, but appealed (with Crown consent) on the basis of errors in the jury charge
- At the second trial, E offered to plead guilty to the lesser offence of infanticide, but the Crown declined to accept the plea, and the jury found E guilty of second degree murder
- E appealed again, on the basis that no reasonable jury could have found her guilty of anything other than infanticide

- **Issue**
  - Should the verdict of guilty for second-degree murder be set aside because it isn't one that a reasonable jury, properly instructed, could reach on the evidence?
- **Decision from CA**
  - An expert witness had testified that E was suffering from "an acute stress disorder at the relevant time" and in their opinion "the events in question occurred within the context of a mental illness […] that was the direct result of child birth."
    - She was suffering from a disturbed mind at the time
  - The expert withstood extensive cross-examination
  - Juries do not give reasons, so it is not possible to know why they convicted for second-degree murder
  - The Court of Appeal held that the evidence could **not** support a conviction for murder
  - Where the facts support both a conviction for murder and infanticide, the jury should be instructed to enter a verdict of guilty to infanticide
  - The appeal was allowed and the conviction for second-degree murder was substituted for a conviction for infanticide
  - The Court was very critical of the Crown Prosecutor's conduct in inflaming the passions of the jury against the accused → they should have taken a more measured approach
- **Ratio**
  - If evidence leaves the TOF with a reasonable doubt that the accused's mind was not disturbed in killing of the child, must convict of infanticide instead of murder

X. ASSAULT

Introduction to Assault

- **Actus Reus**
  - As with other offences, the accused's act must be voluntary (the product of a conscious mind) to attract criminal liability
    - Epileptic shock, seizure, etc. doesn't count
  - The most common formulation of assault is the non-consensual application of force (directly or indirectly) to another person
    - See all three kinds at s. 265(1)
- **Mens Rea**
  - Assault is a mens rea offence; its fault requirement is not satisfied by proof of negligence
  - The intention to commit the AR (applying force without consent)

Assault Provisions in the Criminal Code Overview

- **S. 264.1**
    - Uttering threats is basically making a statement to intimidate another person; you cause them or close to them death or bodily harm or damage to their property
- There are various levels and forms of assault in the Criminal Code
    - **Assault simpliciter (section 265)** – simple assault if it's one of the ways in 265
        - **(1)** A person commits an assault when
            - **(a)** without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
                - This is the most common
            - **(b)** he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
                - E.g. Cocking your hand into a fist to make it likely is assault
            - **(c)** while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.
                - E.g. A street person begs for money openly holding a weapon is a form of assault
        - **(2)** This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.
            - Assault is an umbrella term
        - **(3)** For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of
            - **(a)** the application of force to the complainant or to a person other than the complainant;
            - **(b)** threats or fear of the application of force to the complainant or to a person other than the complainant;
            - **(c)** fraud; or
            - **(d)** the exercise of authority.
    - **Assault with a weapon (section 267(a))**
        - Assaulting while using or hiding a weapon or imitation thereof
        - Crown has to prove BARD that you intended to use the weapon as weapon
        - Have to have the intention to use the weapon (stick, knife, gun, pillow)
        - What about a prosthetic?
            - If on their arm, and uses it as a weapon, it is not a weapon; it's part of their body
            - However, if they take it off their arm and use it with the other arm that it is a weapon now
    - **Assault causing bodily harm (section 267(b))** – one step up from assault simpliciter is assault causing bodily harm
        - Very low threshold, and is very blind in nature
        - Has to be more than merely trifling
        - E.g. a broken nose would be; a bloody nose alone wouldn't be
    - **Aggravated assault (section 268)**
        - **(1)** Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.
        - Highest form of assault before killing someone

        - Usually the breaking of a bone
        - **(2)** Every one who commits an aggravated assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.
        - What separates these 3 levels is a level of degree
    - **Manslaughter (unlawful act manslaughter – section 222(5)(a))**
    - **Sexual assault (section 271-273 – note: this is covered in a separate lesson plan)**

Assault Simpliciter

- **265 (1)** A person commits an assault when
    - **(a)** without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
    - **(b)** he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
    - **(c)** while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.
- **(2)** This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault

Assault – With Weapon, Bodily Harm, Aggravated

- **Assault with a weapon or causing bodily harm**
    - **267** Every one who, in committing an assault,
        - **(a)** carries, uses or threatens to use a weapon or an imitation thereof, or
        - **(b)** causes bodily harm to the complainant,
    - is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.
- **Aggravated assault**
    - **268 (1)** Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.
- **Unlawfully causing bodily harm**
    - **269** Every one who unlawfully causes bodily harm to any person is guilty of
        - **(a)** an indictable offence and liable to imprisonment for a term not exceeding ten years; or
        - **(b)** an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

Introduction to Assault – Bodily Harm

- "Bodily Harm" is defined in section 2 of the Criminal Code
    - "**Bodily harm** 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"
    - For a recent discussion of bodily harm, see:
        - R v Bulldog, 2015 ABCA 251 – know it's a low threshold for bodily harm
            - Facts: an inmate was beaten up by three other prisoners

- Para 44: "Section 2's definition of 'bodily harm' states a low threshold […] Indisputably minor injuries have been found to constitute bodily harm"
- In this case, bodily harm was found. The victim received treatment in a hospital for: multiple abrasions, cuts, lacerations, and a swollen cheek

Assault – Unlawful Act Manslaughter

- **Homicide**
  - **222 (1)** A person commits homicide when, directly or indirectly, by any means, he causes the death of a human being.
- **Culpable homicide**
  - **(4)** Culpable homicide is murder or manslaughter or infanticide.
  - **(5)** A person commits culpable homicide when he causes the death of a human being,
    - **(a)** by means of an unlawful act
      - Assault, assault with bodily harm, etc.

Vitiating Consent

- Under s. 265, there are ways of **vitiating consent**
  - **(3)** For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of
    - **(a)** the application of force to the complainant or to a person other than the complainant;
    - **(b)** threats or fear of the application of force to the complainant or to a person other than the complainant;
    - **(c)** fraud; or
    - **(d)** the exercise of authority.
  - These forms of vitiation also carry forward to **sexual assault**

Routes to Liability for Bodily Harm, Aggravated Assaulted & Manslaughter: DeSousa / Jobidon

- There are two routes to criminal liability for resultant bodily harm during an assault (or aggravated assault/unlawful act manslaughter)
- First route: De Sousa / Second route: Jobidon
  - [Note: these routes are not mutually exclusive. i.e., Crown may sometimes be able to argue both routes – E.g. R v Barton]
- **R v Barton**
  - **De Sousa route:** Crown argued that the predicate offence was a sexual assault (victim was not consenting to the sexual activity)
    - Most common route for liability of bodily harm
    - There first has to be an unlawful act proven BARD by the Crown
      - The predicate offence has its own MR that needs to be proven BARD
      - E.g. Crown has proven the application of force to the complainant without consent, and the intention to commit this (true knowledge, WB, R)
        - This mens rea is subjective
      - Once this is proven, the Crown has proven one crime
  - The Crown now wants to prove not only the predicate offence (assault), but something else (bodily harm, aggravated, manslaughter) → need to prove more

        - They need to prove the actus reus (bodily harm, aggravated assault, manslaughter)
        - When it comes to the mens rea, the Crown has to prove merely **objective foresight of the risk of bodily harm**, and this is the mens rea for bodily harm, aggravated assault, AND manslaughter
    - **Jobidon route:** Even if there was consent, Mr. Barton foresaw the risk of bodily harm from the sexual activity (E.g. inserting a hand into Ms. Gladue's vagina)

Routes to Liability – DeSousa

- ***De Sousa* Route*:***
    - First, there must be an unlawful act [the "predicate offence"] such as an assault that is proven BARD
        - Recall here that the predicate offence has its own *mens rea*
    - Second, it must be determined whether the accused should be found guilty for the resultant harm of the unlawful act
        - There must be objective foreseeability of bodily harm (a reasonable person observing the conduct of the accused would foresee the risk of bodily harm)
        - The bodily harm that results does not have to be the bodily harm that was reasonably foreseeable
        - It is not required that the accused subjectively foresaw the risk of bodily harm

R v DeSousa – Mens Rea for a s. 269 – Unlawfully Causing Bodily Harm

- **Facts:**
    - During a New Year's party in 1987, the accused threw a broken bottle and it ricocheted off a wall and caused a serious injury to a woman's arm
- **Issue:**
    - What are the mental elements required of offences that breach section 269 (unlawfully causing bodily harm) of the *Criminal Code*? (subjective vs. objective)
- **Decision:**
    - Here the predicate offence was unlawfully causing bodily harm (s. 269) since the act of throwing the bottle wasn't an offence on it's own
    - The mental element of the underlying offence for s.269 must be satisfied
    - Additional fault requirement from wording of s. 269 must be satisfied ("unlawfully")
    - To be "unlawful", must prove that act was "likely to injure another person"/objectively dangerous
    - Test = objective foresight of bodily harm
        - Could a reasonable person forsee that this would cause bodily harm?
    - Appeal dismissed – section 269 of *Code* does not violate section 7 of the *Charter*

R v Dewey – Objective Foreseeability is the Objective Foreseeability of the Risk of Bodily Harm in General

- **Facts**
    - Dewey (D) tried to break up a fight between the complainant and another person
    - D came between the parties and shoved the complainant, who fell and hit his head on a jukebox and was seriously injured

- At trial, D was convicted of assault causing bodily harm because the push "was proceeded by significantly more force than would cause a stumble"
- D appealed his conviction

- **Issue**
  - On appeal, D raised the question of whether objective foreseeability was required for a conviction of assault causing bodily harm
  - Was it reasonably foreseeable that pushing someone forcefully in a bar would create a risk of bodily harm which is neither trivial nor transitory?
- **Decision**
  - Recall *Creighton*: unlawful act manslaughter required an objective foreseeability of bodily harm which is neither trivial nor transitory
  - Objective foreseeability is objective foreseeability of the risk of bodily harm in general, not of a specific type of harm
    - It's any objective foresight of any bodily harm
    - Since D pushed the complainant with more force than would cause a stumble, then that came with the risk of bodily harm
    - Why do we think that's fair?
      - There was a predicate offence that took place, and it led to something else
  - It doesn't matter whether D could have objectively foreseen the specific injury caused by the complainant's fall into the jukebox
  - The fact that the trial judge found that the push was more forceful than one that would cause a stumble meant that the risk of bodily harm was reasonably foreseeable
  - Appeal dismissed; conviction upheld
- **Ratio**
  - Objective foreseeability of the risk of bodily harm in **general** (not a specific type of harm) is included in the mental element for assault causing bodily harm

Routes to Liability – Jobidon

- ***Jobidon* Route*:***
  - This route <u>does not</u> necessarily start with an <u>unlawful act</u>
    - In fact, an unlawful act isn't even required
  - Rather, this analysis begins with a scenario where the complainant is consenting to the physical or sexual activity (or, at least the Crown has failed to prove BARD that the complainant was not consenting)
  - Liability is based on the accused's intention to commit or subjective foresight of bodily harm (or worse)
  - ***Analysis:***
    - Was there an application of force <u>with or without consent</u> of the complainant resulting in BH or worse? (**actus reus**)
    - Did the accused subjectively intend to cause BH or at least subjectively foresee the risk of BH? (**mens rea**)
    - Was it objectively foreseeable that there was a risk of BH to the complainant? (**mens rea**)
  - In this case, the Supreme Court's decision was based on policy: although the victim may have consented to the fight , the law steps in to establish liability against the accused for resultant bodily harm, aggravated injuries, or death <u>if the accused subjectively intended or foresaw the</u>

risk of these injuries. This came from a concern for bodily integrity and a lack of social utility in consensual fights between adults.

R v Jobidon – New Route for Establishing Liability That Vitiates Consent

- ***Know the minority decision as well***
- **Facts**
  - J was charged with unlawful act manslaughter following a bar fight in which H was killed
  - H approached J and started a fight; H was a larger man with training as a boxer
  - Initially, H was winning the fight, but a manager broke up this first fight and asked J and his brother to leave
  - J waited outside until H left the bar and the fight resumed in the parking lot
  - J hit H several times, knocking him onto the hood of a car
    - This was all part of one single transaction; happens very quickly
  - Trial judge found that H was likely unconscious at this stage (after the first blow), but J said he thought H was merely "stunned" and would continue to fight
  - J continued to hit H another 4-6 times on the hood and H eventually rolled off the car and lay limp on the ground; H later died
  - At trial, J was found not guilty of manslaughter
    - H consented to the fight, since he wanted to lay blows on J
    - Consent is so important because of s. 265: application of force **without consent**
      - The Crown needs to prove not only the force for the actus reus, but also the non-consent aspect
      - The Crown failed to prove the non-consent aspect → thus there is no crime
    - J acquitted at trial
  - The Court of Appeal unanimously overturned the acquittal and substituted a conviction for manslaughter, disagreeing with the trial judge's interpretation of the role of consent in assault
  - J appealed to the SCC
- **Issues**
  - What is the role of consent in the offence of assault?
  - Is the absence of consent an essential element of assault, in particular during a consensual fight where bodily harm is intentionally caused?
  - Could Jobidon be convicted of manslaughter by a route other than "unlawful act manslaughter"?
- **Majority**
  - J argued that consent is an essential element to the offence of assault, and the fact that H had consented to the bar fight served as a bar to conviction, and this was consistent with parliament's intent
  - J argued that in other sections of the *Criminal Code*, *Parliament* has specified limits on consent
    - S. 14 – cannot consent to have death inflicted on oneself (pre-*Carter*)
    - SS. 150.1 / 159 – children cannot consent to sexual acts
    - S. 286 – a child cannot consent to abduction
  - The Crown argued that the common law supports the position that one cannot consent to bodily harm
    - The Crown also argued that there is no social value in fist fights
    - Parliament did not intend to erase common law limitations on consent in the Criminal Code provisions

        - In the alternative, even if the SCC adopted the trial judge's rigid position on consent, J could still be liable for manslaughter by the unlawful act of "causing a disturbance by fighting"
    - In reviewing the common law and the development of the offence of assault and the role of consent, the Court noted that there have been limitations on consent in the context of assault for a long time
        - There is a nexus between the offences of assault and manslaughter
        - Unlawful act manslaughter (s. 222(5)(a)) can be made out if the unlawful act is an assault; however, if consent is a complete defence to assault, then it would not be possible to prove manslaughter
        - Problem: section 265 of the Code "does not attempt to define the situations or forms of conduct or eventual consequences which the law will recognize as being valid objects of consent for the purpose of the offence"
    - In the 1983 revisions of the Criminal Code, Parliament defined 4 situations where consent would be vitiated in an assault: (s. 265(3))
        - Application of force, threats of force, fraud, or the exercise of authority
        - However, defining these categories did not invalidate / completely replace how consent has been interpreted in the common law
        - The Court of Appeal was correct when, for policy reasons, they held that H's consent was nullified
        - Mixed treatment of consent by appellate courts warranted intervention by the Supreme Court
    - "Although there is certainly no crystal-clear position in the modern Canadian common law, still, when one takes into account the combined English and Canadian jurisprudence, when one keeps sight of the common law's centuries-old persistence to limit the legal effectiveness of consent to a fist fight, and when one understands that s. 265 has always incorporated that persistence, the scale tips rather heavily against the validity of a person's consent to the infliction of bodily injury in a fight."
    - Policy Considerations:
        - Adults should not harm each other without good reason – the Court provided several reasons:
            - There is "precious little utility in fist fights or street brawls"
            - "Our social norms no longer correlate strength of character with prowess at fisticuffs"
            - Without limits, fist fights could develop into "larger brawls and breaches of the public peace"
            - "The sanctity of the human body should militate against the validity of consent to bodily harm inflicted in a fight"
    - How should consent be limited?
        - The limitation demanded by s. 265 as it applies to the circumstances of this appeal is one which vitiates consent between adults intentionally to apply force causing serious hurt or non-trivial bodily harm to each other in the course of a fist fight or brawl.
        - This limit on consent "will not affect the validity or effectiveness of freely given consent to participate in rough sporting activities, so long as the intentional applications of force to which one consents are within the customary norms and rules of the game."
            - Unlike fist fights, sporting activities and games usually have a "significant social value"
    - In sum
        - Majority goes through the history of English and Canadian law on assault

- Judges could always inform/interpret what the laws should be
    - S. 9: there's no criminal offences other than the offences in the CC and the CDSA, except the offence of criminal contempt
        - Sopinka would agree with this
    - S. 8: There are additional **defences** that can be created by courts
        - Sopinka would agree with this too
    - There's defences created at common law (by judges); Parliament has taken these and tinkered with them and put them into the criminal code; but there are still defences that are available to the accused if the Court wants to create them
    - Since we can create defences, we should also be able to **limit** defences → we should **limit the defence of consent**
        - Sopinka would disagree with this; he said that consent is part of the actus reus and part of the offence
    - "Technically, it's part of the offence; but that's just a technicality"
        - The substance of it is a defence
        - Since it's a defence; we get to **limit** defences
        - The minority basically says that they've "created an offence" by doing this
- What you need for liability for ***Jobidon*** is something different for ***DeSousa***
    - 1. Actus reus → There has to be application of force with or without consent, that results in bodily harm or worse (***Smithers-Nette***)
    - 2. Mens rea (tricky) → Accused's subjective intention to cause bodily harm **or** subjective foresight of risk of bodily harm
    - 3. Objective foresight of the risk of bodily harm
- When there's an application of force (with or without consent), and that application caused some form of bodily harm, then if the Crown can also prove the mens rea (accused intended or foresaw the risk of bodily harm), and a reasonable person would have foreseen the risk of bodily harm, you have a whole new route to liability
    - It didn't start with a predicate offence
    - It started with consensual activity, but that activity is limited by policy reasons
- Majority realizes what they've done; so, it's limited to fist fights and brawls where the accused has intended **and** caused bodily harm
    - If he caused **but** didn't intend the bodily harm, then he is not guilty
    - It's limited because there's a deterrence value, and there's precious little social utility

- **Minority**
    - The Majority's decision exceeded the bounds of the judicial branch of government
    - By making a complainant's consent irrelevant when an accused has intended or foreseen the risk of bodily harm, the Majority has created a judge-made criminal offence—something exclusively reserved for Parliament to do
    - In sum
        - Sopinka: we can't be coming up with a new route to liability; the judicial branch of government doesn't get to create new criminal laws; that's exclusive to Parliament in s. 91
        - Sopinka reasoned through this in the traditional way; he'd be guilty anyway under the *DeSousa* route
        - When H hit the hood with the first punch, he was rendered unconscious

        - When you are rendered unconscious, you cannot be consenting
        - If H had died on the first blow, this would have been an acquittal
            - He consented to the first blow
            - The subsequent blows 2-6 though → **no consent**
        - **Application of force without consent → actus reus proven**
        - It was also foreseeable to a reasonable person
            - Dangerous, and could result in **bodily harm → manslaughter**
- **Ratio**
    - Consent is vitiated between adults intentionally applying force causing serious/non-trivial bodily harm to each other in the course of a fist fight or brawl

R v McSorley – 3 Levels of Rules

- **Facts**
    - During an NHL hockey game on February 21, 2000, Marty McSorley (M) struck Donald Brashear (B) in the head with his hockey stick
        - Earlier in the game, B had beaten M in a fight
        - For the rest of the game, M had been trying to get B to fight again, but B refused to engage
        - After being struck by M with his stick, B lost his helmet and hit his head on the ice
        - B also suffered a seizure on the ice and a severe concussion
        - M testified that he had only intended to hit B in the shoulder
        - M was charged with assault with a weapon (i.e., his hockey stick)
    - The Crown argued that the charges were necessary because of strong public policy considerations, namely that millions of people watch hockey and the criminal law "has a place in the hockey rink" when players commit serious assaults "way beyond the scope of [the] game"
- **Issue**
    - Should the criminal law process be pre-empted where discipline procedures have been taken by hockey authorities (i.e., the NHL)?
    - Was M's conduct in slashing B "within the customary norms and rules of the game"?
- **Decision**
    - Just because the NHL has internal disciplinary procedures, it does not shield the game from the purview of the criminal law
    - There are 3 levels of rules
        - 1. Rules of hockey
            - There's no slashing allowed
            - McSorley's first problem
        - 2. An unwritten code of conduct among NHL players
            - Impliedly agreed by players and officials
            - Slashing is permissible as long as it's during play and not to the head
        - 3. The discretion given to the referees
            - Every ref is like a judge
            - They are human beings, and have different tolerance levels for what you can get away with
        - There's 3 rules are at play in any sporting event, and it's within these rules that a player plays the game
        - ***This case is good model for how to write an analysis on an exam
    - Hockey has both written and unwritten rules governing conduct

    - Referees use discretion when assessing penalties or allowing minor physical confrontations between players without punishment
    - The Crown's theory was that:
        - They presented evidence that this type of slash was not a typical or accepted norm of playing hockey
        - Either M deliberately struck B on the head without his consent, or
        - In perhaps aiming for B's shoulder, M was reckless about the risk of hitting B in the head
    - After a lengthy analysis, the trial judge concluded that M had intended to strike B in the head
    - Given M's abilities as a hockey player and athlete, the trial judge did not accept that M had struck B in the head by accident
        - "A child, swinging as at a Tee ball, would not miss […] An NHL player would never, ever miss"
    - M was found guilty
- **Ratio**
    - Consent to assault in the context of a game can be vitiated if the assault goes beyond the rules and customs of a game

R v Bertuzzi – Example of Jobidon Route

- Jobidon route used to convict Bertuzzi
- 1.
    - AR: Application of force (with or without consent)
    - MR: Subjective intention to cause bodily harm or subjective foresight of risk of bodily harm
- 2.
    - AR: Resultant bodily harm that's more than trifling
    - MR: Objective foreseeability of the risk of bodily harm

XI. SEXUAL ASSAULT

Two Main Areas of the Criminal Code Dealing with Sex Crimes

- "No means no"
    - Misses the point, and doesn't go far enough
- The law is "yes means yes"
    - The person needs to obtain the content of that other person in a sexual way
- Up until the 90s, one defence/way to discredit a woman was to suggest that because they slept with others, they were less truthful and more likely to have consented to this sexual occurrence
- There are 2 main areas of the CC dealing with sex crimes
    - The first area is in the 150s → children
    - The second area is in the 270s → sexual assault/consent

s. 150.1 – Consent No Defence

- No consent if the complainant if the child is under the age of 16
    - 16 is thus the age of consent
    - Went up from 14 to protect
- Close in age **exceptions**

    - If complainant is 12 or 13, they're allowed to consent provided that the older person is less than **2 years** older than you
    - If complainant is 14 or 15, they're allowed to consent provided that the older person is less than **5 years** older than you
- These exist because these things happen

s. 151 – Sexual Interference

- Touching a child under 16 for "sexual purposes"
- Reason it says "for sexual purposes" is to protect non-sexual touching/purposes
    - E.g. A parent innocently touching their child for bathing/cleaning purposes

s. 152 – Invitation to Sexual Touching

- Where an older person invites someone 16 or younger to touch them

s. 153 – Sexual Exploitation

- Need to read in conjunction with one of the subparts (young person under 18)
- The young person is 16 or 17 – age of consent
- But, if they're 16 or 17 and they are subjected to a **position of trust** underneath a person who has sex with them, they may be guilty of sexual exploitation
- E.g. High school-teacher scenario
- This offence does **not** apply at 18 though
    - There's no sexual exploitation when they're 18
    - **Instead,** you go to other provisions, but then the other person has to be using their position to manipulate the victim in some way
        - E.g. Doctor-patient relationships

s. 155 – Incest

- Self-explanatory

s. 159 – Anal Intercourse

- Now deemed unconstitutional

s. 162 - Voyeurism

- E.g. Setting up a camera in a bedroom or locker room, and recording what's going on there, even if the person recording is in the room itself

s. 271 – Sexual Assault

- Punishment section for sexual assault, but doesn't actually define sexual assault
- Sexual assault is just 1 form of assault
    - You have assault as the umbrella

        - Sexual assault is under that as 1 form
    - The application of force without consent of the complainant = actus reus
    - The intention to touch while at the same time knowing or WB or being R whether the complainant is consenting or touching = mens rea
- ***Chase*** and ***KBV*** - adds something extra for sexual assault
    - "Which violates the victim's sexual integrity"
        - This depends on the context, and is quite important
- Everyone who commits a sexual assault is guilty of
    - **(a)** an indictable offence and is liable to imprisonment for a term of not more than 10 years or, if the complainant is under the age of 16 years, to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or
    - **(b)** an offence punishable on summary conviction and is liable to imprisonment for a term of not more than 18 months or, if the complainant is under the age of 16 years, to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.

S. 272 – Sexual Assault With a Weapon, Threats to a Third Party, or Causing Bodily Harm

- **(1)** Every person commits an offence who, in committing a sexual assault,
    - (a) carries, uses or threatens to use a weapon or an imitation of a weapon;
    - (b) threatens to cause bodily harm to a person other than the complainant;
    - (c) causes bodily harm to the complainant; or
    - (d) is a party to the offence with any other person.

s. 273 – Aggravated Sexual Assault

- **(1)** Every one commits an aggravated sexual assault who, in committing a sexual assault, wounds, maims, disfigures or endangers the life of the complainant.

s. 273.1 – Meaning of Consent*

- Subject to subsection (2) and subsection 265(3), ***consent*** means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.
- **(1.1) – Consent**
    - Consent must be present at the time the sexual activity in question takes place.
- S. 265 is the assault section
    - S. 265(3) lists ways consent can be vitiated
        - **(a)** the application of force to the complainant or to a person other than the complainant;
        - **(b)** threats or fear of the application of force to the complainant or to a person other than the complainant;
        - **(c)** fraud; or
        - **(d)** the exercise of authority.
    - These also apply to sexual assault as well
- **(2) - No Consent obtained** - These are in addition to s. 265(3)
    - For the purpose of subsection (1), no consent is obtained if
        - **(a)** the agreement is expressed by the words or conduct of a person other than the complainant;

        - Somebody can't say "go ahead, she's consenting"
    - **(a.1)** the complainant is unconscious;
    - **(b)** the complainant is incapable of consenting to the activity for any reason other than the one referred to in paragraph (a.1);
        - E.g. Incapacitated due to drugs or alcohol
        - However, a drunken consent is still consent according to the CA
            - The line is drawn though when the person is **incapacitated**, and doesn't know what's happening
    - **(c)** the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
        - This is not adult-on-child, this is adult-on-adult
        - E.g. An officer pulling over a driver, and using his authority to result in getting out of a speeding ticket
    - **(d)** the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
    - **(e)** the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.
        - "No" can be expressed at any time
- These are just forms of non-consent, because these need to be read in conjunction with the first part of s. 273.1
    - There has to be voluntary agreement, and has to be ascertained beforehand

s. 273.2 – Where Belief in Consent is Not a Defence

- Recall mistake of fact
    - It is the negation of the mens rea
- In sexual assault cases, Parliament says that you cannot claim mistake of fact as easily for this offence as it is for other offences like simple assault
    - Instead, there are more hoops to jump through before honestly claiming mistake of fact
- It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where
    - **(a)** the accused's belief arose from
        - **(i)** the accused's self-induced intoxication,
            - Some guys go in to see the police after an alleged sexual assault, and say "I was so drunk I didn't know she was consenting"
                - This is not a defence
            - Self-induced intoxication can still be an offence for assault, but that is limited as well
        - **(ii)** the accused's recklessness or wilful blindness, or
            - This doesn't technically need to be written, because WB and R are routes to the mens rea already for this
        - **(iii)** any circumstance referred to in subsection 265(3) or 273.1(2) or (3) in which no consent is obtained;
    - **(b)** the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting; or
        - The **reasonable steps requirement**: when people have sexual activity, there are visual and audible cues/statements that people can accept and infer consent; these cues are usually translated into reasonable steps
        - E.g. If at trial, the accused says "I thought she was consenting", they cannot say this baldly

                - They will be asked "why" do you think this
                - If these steps do not exist and there is a serious allegation of sexual assault, then the accused will be convicted since he didn't take reasonable steps to ascertain consent
        - **(c)** there is no evidence that the complainant's voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct.

s. 276 – Evidence of Complainant's Sexual Activity (The Twin Myths)

- In proceedings in respect of an offence under section 151, 152, 153, 153.1, 155 or 159, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant
    - **(a)** is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or
        - "Because a complainant has had sex with other people, she is more likely to have consented to you"
            - This doesn't make any sense
        - "Because 2 people have had sex in the past, that means that she was more likely to have consented *this time*"
            - This is also prohibited to infer
            - Just because someone consented before to the same person doesn't mean they're consenting today
            - This doesn't mean that prior sexual activity is completely irrelevant
                - E.g. If someone had sex earlier that day which was the reason for certain bruising that didn't happen from the sexual conduct of the accused, this might be an **exception**, but you need to prove this
            - Another **exception** is the mistake of fact
                - If two people have sexual history, and it shows a particular pattern of conduct, the accused **might** be able to say that "because we did it in the past like *this* in this pattern, the night in question we were just following the exact same pattern and I took the reasonable steps"
            - An exception that has fallen out of favour is sexual activity *after* the fact
                - The complainant claims sexual assault, but then further admits to having sex with him later
                - "Why did you sleep with him again?" is not a valid rebuttal
    - **(b)** is less worthy of belief.
        - Since Victorian times, a woman who had sex outside of their marriage was less of a credible person
        - This one makes no sense at all
    - These are called the **twin myths**

s. 268 (3) – Aggravated Assault – (3) Excision

- For greater certainty, in this section, "wounds" or "maims" includes to excise, infibulate or mutilate, in whole or in part, the labia majora, labia minora or clitoris of a person, **except** where
    - **(a)** a surgical procedure is performed, by a person duly qualified by provincial law to practise medicine, for the benefit of the physical health of the person or for the purpose of that person having normal reproductive functions or normal sexual appearance or function; or
    - **(b)** the person is at least eighteen years of age and there is no resulting bodily harm.
- This is a form, and another route to aggravated sexual assault

R v KBV – What Makes an Assault a Sexual Assault

- **Facts**
  - Appellant convicted of sexually assaulting his 3 year old son; grabbed his genitals and squeezed them for punishment purposes
  - ONCA dismissed accused's appeal from conviction of sexual assault charge
- **Issue**
  - Was the assault a sexual assault within the meaning of s. 271(1) of the CC?
- **SCC**
  - This is a sexual assault
  - Go back to ***Chase:*** it's the violation of sexual integrity
    - It's not the accused's subjective motive that counts, it's an **objective** test: would a reasonable person think that this was a violation of sexual integrity?
      - Factors include: part of body, nature of contact, situation, words/gestures including threats or force, intent or purpose, motive of sexual gratification
    - The Crown has to prove however that it was a sexual assault BARD
- **Holding**
  - Appeal dismissed
- **Dissent**
  - He should have been committed of assault, not sexual assault
  - The **motive** is important
    - The Majority disagreed and that it should be objective
    - The accused's motive is more likely to get him in trouble for sexual assault than out of trouble
- **Ratio**
  - To determine if assault was a sexual assault, an objective test must be used: would a reasonable person, in light of all the circumstances, view the assault as being of a sexual nature?
    - Motive is only one factor; and is not determinative

R v Ewanchuk – Established That "Yes" Means Yes

- **Facts**
  - Accused charged with sexual assault; touched complainant, 17, in sexual way in his trailer during purported job interview; complainant said "no" 3 separate times as intimacy escalated; each time, he immediately stopped but then resumed; she tried to appear calm to avoid violent assault; afraid to resist
  - Trial judge
    - Found that the P was not consenting to any of the touching
    - However, the way she acted gave off a sense of implied consent
  - Court of Appeal
    - "This was not criminal, this was hormonal, look at the way she was dressed"
    - "For a major sexual assault, the conviction is usually 3 years, should we really do that here?"
- **Issue**
  - Did the trial judge err in his understanding of consent in sexual assault was the conclusion the defence of implied consent existing in Canadian law correct?

- **SCC**
  - Overturns acquittal
  - You have to look at the provisions of the CC, and you have to understand the actus reus and the mens rea
    - The **actus reus** for sexual assault: 2 objective and 1 subjective part
      - The touching, the sexual nature of the touching (***Chase***), and these 2 are objectively determined
      - **The third** part of the actus reus is the absence of consent, but this isn't determined objectively but **subjectively**
        - This 3rd part is established more in ***JA***
      - If the complainant at a trial says that they were non-consenting, the jury if they accept that testimony will conclude that there was an actus reus then
    - The **mens rea** = the intention to touch and the knowledge that the complainant is not consenting, or willfully blind that they were not consenting, or being reckless that the complainant was not consenting or (from ***JA***) the failure to ascertain positive communication of consent
  - Thus, there is **no implied consent**
    - There is no in-between
    - To be legally effective consent must be legally given
    - There is no requirement to say you're not consenting
  - The doctrine of implied consent has been recognized, **but it is no defence for sexual assault**
  - A belief that silence is consent is a mistake of law and is no defence
    - The accused can't say that "no" meant yes
  - Justice Major agreed with CJ Fraser of the CA
    - The conduct can be an articulation of "yes", it doesn't need to be a specific verbal utterance; thus conduct can still be taken into account
- **Concurring**
  - L'Heureux Dube J
    - This is not about consent, but rather myths and stereotypes
  - McLachlin J
    - The law is opposite; constant state of non-consent until YES is obtained
- **Holding**
  - Appeal allowed, conviction entered
- **Ratio**
  - There is NO defence of implied consent to sexual assault in Canadian law
  - Actus reus: Consider
    - i) Application of force/touching (objective)
    - ii) The sexual nature of the touching (objective)
    - iii) Absence of consent (subjective)
  - Mens rea: Consider
    - i) Intention to touch complainant, and
    - ii) Knowing, be willfully blind, or reckless to the lack of consent of the person touched

The Defence of Implied Consent

- This is a defence, but **only** for minor forms of assault
  - E.g. 2 people are having an argument and one pokes the other in the chest
    - This is likely to not be an assault, and would be below the *de minimis* range

R v JA – Unconsciousness and Consent

- **Facts**
  - Husband and wife were long-time partners, engaging in foreplay; JD choked her until unconscious, awoke on her knees, hands tied, with JD inserting a dildo into her anus followed by vaginal intercourse; break up sometime later; KD testified that she consented to choking and loss consciousness
  - Trial
    - Not guilty of aggravated assault (KD consented to the choking); guilty of sexual assault (KD had not consented to the dildo; in the alternative you cannot consent to an activity while unconscious)
  - Court of Appeal
    - There is insufficient evidence to conclude KD did not consent to dildo
    - Majority held that individuals could consent in advance to sex while unconscious
    - Dissent held that an individual must have an active mind throughout sexual activity and that prior consent is not effective (***Ewanchuk***)
- **Issue**
  - Can an unconscious person give consent?
- **SCC**
  - The CC requires an individual to be conscious throughout sexual activity (= actual subjective consent in the mind of the complainant at the time of the sexual activity in question)
  - The mistake of law by the accused
    - "I thought you could have sex with an unconscious person"
    - Mistakes of law are no excuse
  - McLachlin takes on 5 arguments of the **dissent**
    - 1) Her prior consent should be good enough to fill the gap while she's unconscious
      - Answer: ***Ewanchuk***: consent is established **during** the touching, and must be ongoing
    - 2) The law should carve out an exception to the requirement of consciousness
      - E.g. You give consent prior to surgery
      - Answer: These exceptions are highly regulated activities
        - This is a bedroom, and the complainant stands completely vulnerable
        - So, the two don't compare
    - 3) Analogy that suppose that 2 friends agree to assist each other to go to a party, and whoever is least drunk will drive the other home; giving prior permission to take him home, throw him on a couch when they get; there is touching
      - Answer: This is not touching of a sexual nature, so it's not a good analogy
    - 4) Kissing your sleeping spouse before you leave in the morning
      - Answer: You got a point here, but for the vast majority of cases this doesn't happen
    - 5) This was not just strangers, this was in the context of a loving long-term relationship; the strict applications of the sections of the CC have no place here
      - Answer: The idea of ongoing consent that Parliament laid out works in the vast majority of cases
        - The rules for consent are the same regardless if you're on a first date or 10 years into marriage
- **Holding**
  - This clearly is a sexual assault
  - McLachlin: an unconscious person cannot give consent, even if the person says "choke me and do sexual things while I'm unconscious"
    - Prior consent cannot displace current consent

- The controversy is that the accused did exactly what the complainant wanted
- It is accepted that consent existed in the mind of the complainant; but that consent is gone when she's unconscious

- **Ratio**
  - A complainant must provide active consent through every phase of sexual activity
  - Any sexual activity with an individual who is incapable of **consciously consenting** is not consensual

R v Darrach – The 4th Route to Mens Rea for Sexual Assault: Reasonable Steps

- ONCA decision, but considered good law across Canada
- **Trial**
  - The mens rea: Crown has to prove BARD that the accused knew they were not consenting, were willfully blind, or were reckless
    - But there is a **fourth way**: If the accused failed to take reasonable steps known to the accused at the time to ascertain consent, then the Crown can prove the mens rea that way
      - This way conjures up the notion that the accused's intention is no longer subjective, **but** an objective test
        - Objective mens rea's aren't usually great...
  - When this "reasonable steps" came into effect, there was a concern that we were now introducing an objective test, which may be a recipe for conviction of a lot more purposes…
- **Analysis**
  - It's not that simple, and it's **not really an objective test**
  - It's still a subjectively held belief, but it has to go through the scrutiny of reasonable steps
  - Stigmatic offence test problem
    - To be a sexual assailant is highly stigmatic
    - This label of stigmatic offence is not a helpful test though (it had been criticized a lot since ***Martineau*** and ***Logan***) - can't most crimes be labelled as stigmatic?
    - Murder, attempted murder, and theft are frozen in time as "stigmatic offences"
  - Reasonable steps provision
    - The mens rea remains largely intact
    - The accused must take **reasonable steps in the circumstances known to accused at the time to ascertain complainant's consent**
      - This does **not** require ALL reasonable steps be taken (what is needed in the s. 150 crimes of the CC, like ascertaining the age of someone in s. 150.1(4))
        - Thus, it's not as onerous a test
      - Belief need not be reasonable; accused could come to unreasonable conclusion and still be acquitted (no mens rea), as long as he took reasonable steps
        - Accused has to take reasonable steps; if they have to ascertain consent and their subjective belief was consenting though this is found to be unreasonably held, they are entitled to an acquittal
        - E.g. An accused who is 18 who hasn't gone on many dates goes on a date with someone who is 18
          - Asks 21 year old brother who says that if you hold her hand and if it sweaty that means she wants to have sex
          - Accused goes on date and holds her hand which was sweaty, leading him to make a sexual advance
          - Since he honestly believed it, and this would be an unreasonably held belief, he would be entitled to an acquittal

- When it comes to sexual assault, it still is subjectively held belief, **but having gone through the reasonable steps requirement**
- S. 265(4): Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.
  - In a typical assault case, like sexual assault, if the accused takes the stand and says "I believe she was consenting", the judge would charge the trier of fact in assessing the credibility of the claim, also consider whether there are reasonable grounds for his belief
  - Thus, the more reasonable his belief, the more likely you can trust his truthfulness

- **Ratio**
  - Sexual assaults carry sufficient social stigma to require subjective fault requirement
  - Accused must take reasonable steps in the circumstances known to the accused at the time to ascertain the complainant's consent
    - Not all reasonable steps need to be taken, just some
    - Accused has to take reasonable steps; if they have to ascertain consent and their subjective belief was the complainant was consenting, though this is found to be unreasonably held, they are entitled to an acquittal

R v Malcolm – Trial Judge Failed to Consider the 4th Route to Mens Rea for Sexual Assault

- **Facts**
  - Complainant and accused kissed at least once at NYE party; complainant went to bed when her husband left, accused came in and engaged in sexual activity; she turned to face him, realized it was not her husband, ordered him to get out
  - Accused said that complainant kissed him and that when they were in the bed they fondled each other for a bit before she said "get out"
  - Trial judge
    - Acquitted Malcolm, reviewing ***Ewanchuk***, but also believed that the complainant was not truly consenting to the sexual activity
      - From ***Ewanchuk***, the actus reus is established if it is believed that the complainant was not truly consenting
- **Analysis**
  - The Crown proved the actus reus, but did they prove BARD that Malcolm had the mens rea?
    - The accused honestly believed she was consenting, the accused was not too drunk to be prevented from making that claim, nor was he wilfully blind or reckless
    - However, the trial judge failed to look at the **fourth option:** did he take reasonable steps to ascertain consent?
  - E.g. Two very drunk people have sex
    - Wake up next morning, and see that there was a tape
    - Both can't remember what happened that night
    - If the complainant says "they were not consenting" and the trier of fact believes that, and the accused says "I don't know what happened", the accused could be convicted
      - The accused can't remember, so there's a lack of reasonable steps
  - To rely on **honest mistake**, the accused must have taken reasonable steps to ascertain if consent exists
- **Holding**
  - Acquittal overturned, new trial ordered

- **Ratio**
    - Reasonable steps analysis (s. 273.2(b)) must be considered when there is an air of reality to the accused's assertion of honest belief in consent, and the accused is neither wilfully blind or reckless, but circumstances call into question the reasonableness of the accused's actions

s. 273.1 – Sexual Activity in Question (Hutchinson)

- ***Hutchinson*** 2-part analysis for analyzing consent to sex: At first stage of consent analysis, the Crown must prove the lack of subjective voluntary agreement to
    - **1) The act itself**
        - Kissing, sex, use of sex toys, petting, oral sex
    - **2) The sexual nature of the touching**
        - The partner has to be consenting in a sexual nature
        - As opposed to something medical for example
    - **3) The identity of the partner**
        - E.g. Twins example, the twins cannot swap
- Consent must be given to each and every sexual act
- Agreement to sexual touching to one part of the body is not an agreement to sexual touching anywhere
- Consent must given at the time of the activity, and must be the product of a conscious mind

Pat and Terry Sexual Assault Hypothetical

- Was consenting to the touching all the way up until Pat touched his crotch, then he no longer was consenting
- The sexual assault would be for the touching of the crotch
- Dialogue theory - from Major J in ***Ewanchuk***
    - One "no" will put the accused on notice that he cannot proceed unless he gets a "yes"
    - However, this "yes" may come by way of words or conduct
        - This could be body language
    - The Trier of Fact may say that Terry took the steps when sliding his hand down towards the crotch
        - It may have been up to Pat at this point to know where this was going
    - Or, perhaps jumping from the ear to the crotch is too far a leap and this is a sexual assault
- Circumstances thus are important, and may be in future jurisprudence

Sexual Assault Analysis

- **Actus reus**
    - 1. Application of force (obj)
    - 2. Violation of sexual integrity (Chase, with obj-KBV)
    - 3. If established BARD there no consent, the AR is established (subjective)
- **Mens rea**
    - 1. Intention to touch
        - The accused does **not** need to have the **motive** of sexual gratification in mind
    - 2. Did the accused touch the complainant **knowing** she was not consenting?
        - True knowledge, WB, or R that the complainant was not consenting
        - Failure to take reasonable steps to ascertain consent (Darrach)
            - Must show **some** reasonable steps taken to ascertain consent (unlike mistake of fact or age, where **all** reasonable steps must have been taken)

- If accused subjectively honestly believed he took reasonable steps and it's held that this was unreasonably held, they still may be entitled to an acquittal
    - The accused cannot have formed belief due to self-induced intoxication, WB, R, or reliance on one the twin myths
    - Consent must consciously be positively given at every stage (JA)

Vitiating Consent

- The Crown has to prove the absence of consent as part of the actus reus BARD
- When it comes to sex crimes, Parliament has built in additional ways to proving non-consent
- One of the ways is in ***Audet***

R v Audet – Consent Vitiated by Someone with a Position of Authority Having Sex with a Young Person

- **Facts**
    - Audet was a teacher, and had a grade 8 female student
        - After the year ends, they encounter each other at a night club
        - One of them suggests going to a cottage to continue partying
        - Audet went into a bedroom and fell asleep; the 14 year old joins voluntarily in bed
        - She falls asleep, and they both wake up and engage in oral sex
        - The complainant becomes increasingly uncomfortable, asking him to stop which he does
        - This all seems consensual
    - Audet's lawyers says he's not guilty of exploitation, since he didn't use his position of authority to manipulate the teenager
        - This works in the trial and CA, but there was a dissent
- **SCC Majority**
    - Takes place under the old regime where a person could consent when they were 14 or older (not what it is currently is which is 16)
    - What is still the law though is the exploitation of a young person - **s. 153**
        - **(1)** Every person commits an offence who is in a position of trust or authority towards a young person, who is a person with whom the young person is in a relationship of dependency or who is in a relationship with a young person that is exploitative of the young person, and who
            - **(a)** for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of the young person; or
            - **(b)** for a sexual purpose, invites, counsels or incites a young person to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the young person
        - **(2)** In this section, ***young person*** means a person 16 years of age or more but under the age of eighteen years.
    - Parliament passed s. 153 to protect people who are in vulnerable positions
        - The acts are criminalized, **irrespective** of consent
        - What these cases on s. 153 turn on is whether the person stood in a position of authority or trust
        - Even when the person is consenting, they cannot be consenting under s. 153, and the adult will be guilty as long as they stood in a position of authority or trust
    - In most cases, teachers will be in a position of truth or authority towards students

- The Crown must prove BARD that the complainant is a young person within the meaning of s. 153(2); accused engaged in one of the activities listed; at one time was in a position of trust, position of authority, or young person in relationship of dependency

- **Ratio**
  - For the offence of sexual exploitation, the Crown need not prove that the accused actually abused a position of trust or authority in order to obtain consent to sexual activity → just that they had the position itself
    - Even when the person is consenting, they cannot be consenting under s. 153, and the adult will be guilty as long as they stood in a position of authority or trust

R v S(DG) – Consent Vitiated by Extortion

- **Facts**
  - Accused had a two-year sexual relationship with the complainant
  - At the termination of it, the accused said he would release photos of them having sex if she didn't continue having sex with him
  - She reported him to the police
- **SCC**
  - S. 273.1(2) lists ways to vitiate consent
    - A, B, C, D, and E did **not** include extortion
    - (3) says that this is not an exhaustive list though
  - He extorted her into having sex with her
  - She was not truly consenting, she was consenting only out of duress
  - Therefore, extortion can be a route to vitiate consent
- **Ratio**
  - Accused need not be charged with fraud or extortion for act to vitiate consent to sexual activity
    - Although fraud isn't a way of vitiating a consent under s. 273.1(2), this list is not exhausted according to s. 273.1(3)

R v Faulkner – Only Alcohol to the Level of Being Incapacitated Can Vitiate Consent

- **Facts**
  - Female was 15, but at the time she could consent (back then the age of consent was 14)
  - She consumed drugs and didn't feel well, and the accused drove her home as they arranged
  - On the way home, they drove to an isolated place and engaged in sex
  - Complainant said that she wasn't consenting, but on the other hand she does say that she may have said/did things that may have led the accused to believe that she was consenting; she was just too frightened to say something
  - Trial judge
    - Given her age of 15 and that given that she had taken some drugs and was frightened, she was *incapable* of consenting
- **ONCA**
  - We cannot do that
  - Incapable of consent via alcohol means you must have been **incapacitated**, meaning there was a lack of cognition; the complainant was not incapacitated
    - Incapacity amounting to non-consent is something the Crown has to prove BARD
      - The more cognition the defence can show (e.g. walking, talking, recalling sex in detail), the less likely this is possible to prove by the Crown
  - Her age isn't a problem here
  - Conviction overturned
  - There may be evidence of true incapacity, but it wasn't viewed here properly….

- **Ratio**
    - Generally age and location of sexual activity are not factors that vitiate consent
    - In order to find consent vitiated due to alcohol, the complainant must have been incapacitated (lack of cognition)

R v Cuerrier – Defining the Terms of Fraud Which Can Vitiate Consent

- At the height of the HIV scare
- **Facts**
    - Cuerrier found to have had HIV
    - Nurse told him to refrain from having sex, or to tell the partner and whatever you do use a condom
    - Nevertheless, he had unprotected sex with 2 women, not telling them about his HIV
    - Both said they consented to the activity, but said they would not have had they known he had HIV
    - Crown: This fraud vitiates consent
    - Trial judge
        - Accused endangered the lives of the complainant
        - In s. 268 there are 4 ways of getting aggravated assault
            - Crown: He endangered the life
        - He endangered the lives by putting them at risk, but they were consenting to sex, and therefore the nature and quality of the act
- **SCC**
    - The definition of fraud was changed by Parliament, and is now more expansive
    - So is there vitiation by fraud?
    - **Fraud = Dishonesty and Deprivation**
        - **Dishonesty**
            - Objective
            - What would a reasonable person think is a dishonest representation, or non-disclosure
                - Here, Cuerrier is guilty of a non-disclosure, he didn't tell them he had HIV
        - **Deprivation**
            - The traditional view is this: risk of economic harm (*Theroux*)
                - We're not talking about economics here though but more medical
            - So the deprivation here is: **the significant risk of serious harm** (*Cuerrier*)
- **Ratio**
    - An individual who knows he is HIV-positive and has unprotected sex without disclosing this to a partner may be guilty of sexual assault (fraud vitiating consent) **if there is a significant risk of serious harm**
    - Fraud can vitiate consent where the Crown can prove BARD that there was
        - Dishonesty
            - Objective: Would a RP think this was a dishonest representation or non-disclosure?
        - Deprivation
            - Was there a significant risk of serious harm?
    - This would be towards aggravated sexual assault because you're endangering the complainant's life
- Criticisms after the case
    - With the advancement of technology, people thought that this should not be an automatic conviction anymore

R v Mabior – Defining the Significant Risk of Serious Harm in Relation to HIV

- **Facts**
  - Accused goes out and has sex with 9 women (some with a condom some without), not disclosing he had HIV
  - Although he had HIV, he had a "low viral load"
- **SCC**
  - Definition tweaked
  - "Significant risk of serious harm" is rather nebulous, so this will be updated
    - = **a realistic possibility of transmission of HIV**
      - The defence can show **two things to raise a doubt on this:**
        - 1) If he had a low viral load
        - 2) He used a condom
      - Some say that this new way of being absolved of liability is prejudicial
  - Remember, that the Crown still needs to show that there was the Dishonesty aspect though
- **Ratio**
  - A person is guilty of aggravated sexual assault if he fails to disclose HIV-positive status *before* intercourse and there is a *realistic possibility* that HIV will be transmitted

R v Hutchinson – Defining the Significant Risk of Serious Harm in Relation to Unwanted Pregnancy

- **Facts**
  - She doesn't want to get pregnant, but the accused pokes holes in his condom, and she gets pregnant
  - She was consenting to sex, but wanted him to wear a condom and didn't expect that to happen
- **Issue**
  - Was this vitiation by fraud?
- **SCC**
  - Yes, there is vitiation of consent by fraud
  - Dishonest act
    - Yes, the poking of holes would be seen as dishonest by a reasonable person
  - Deprivation
    - "Significant risk of serious harm" definition here?
      - = Risk of unwanted pregnancy
- **Ratio**
  - Where the complainant has chosen not to become pregnant, deceptions depriving her of her choice by making her pregnant (or increasing the risk of becoming pregnant by removing effective birth control) may constitute sufficient deprivation for purposes of fraud vitiating consent
  - 2 step process for analyzing consent to sex
    - 1) No voluntary agreement to engage in the “sexual activity” (s. 273.1(1))
      - Defining the sexual activity in question – Crown must prove lack of subjective voluntary agreement to
        - 1) The act itself
        - 2) The sexual nature of the touching
        - 3) Identity of the partner
    - 2) Any circumstances that vitiate apparent consent

Fraud Vitiating Consent Analysis

- Fraud vitiating consent towards aggravated sexual assault (endangering life of complainant)
    - Dishonest (objective)
        - Would a reasonable person think that this was a dishonest representation/non-disclosure?
    - Deprivation
        - Significant risk of serious harm (Cuerrier)
            - Realistic possibility of transmission of HIV (Mabior)
                - Defence can show two things to raise a doubt on this
                    - 1) Accused's low viral load
                    - 2) Wore a condom
            - Risk of unwanted pregnancy (Hutchinson)

Vitiation of Consent Quick Summary

- **Audet** – Position of authority/trust on young person, irrespective of consent (s. 153)
- **S(DG)** – Don't need to be charged with extortion/fraud for the act to vitiate consent (s. 273.1(3))
- **Faulkner** – Complainant's alcohol level must be at a level of incapacitation (lack of cognition) for it to vitiate consent
- **Cuerrier** – Fraud = Dishonesty (objective) + Deprivation (significant risk of serious harm)
- **Mabior** – Significant risk of serious harm for HIV: realistic probability of transmission of HIV (although Defence can try to raise a reasonable doubt either by low viral load or if they wore a condom)
- **Hutchinson** – Significant risk of serious harm for unwanted pregnancy: risk of unwanted pregnancy

Consent to Sexual Activity

- Consent must be
    - Directed to each and every sexual act (***JA***)
    - Communicated by the complainant to accused by words or conduct
    - Provided only while conscious and during time of the application of force (***JA***)
    - Whether consent is given or not is wholly within the mind of the complainant (must be believed)
        - No defence of implied consent no mature the nature/length of relationship
        - No time limit to bring forward a complaint
    - If the AR is proven BARD, the accused is guilty of the MR if they
        - Intended to touch while
        - Knowing/WB/R to the complainant not consenting or failing to take reasonable steps to ascertain consent (***Ewanchuk***)
    - Agreement to sexual touching of one part of the body is not an agreement to another part (***Hutchinson***)

XII. DEFENCE: OF SELF, OF ANOTHER, OF PROPERTY

The 2 Categories of Defences

- Defences can be classified into 2 categories
    - **Justifications**

        - Denies the wrongfulness of an action which would otherwise be a crime
        - "I did this, but I was justified in doing so because I was defending myself"
        - E.g. Self-defence, defence of property = justification
    - **Excuses**
        - Concedes the wrongfulness of the action, but asserts that circumstances are such that it outright not be attributed to the perpetrator
            - The act is morally wrong but is not criminal
        - E.g. Necessity, duress, provocation, infanticide (remember that this one is both an offence and defence)
- If the evidence at the trial shows that there is an "air of reality" to the defence, then the Crown has to prove that the defence does not apply, BARD
    - The Crown always has to prove BARD jurisdiction, identification, AR, MR
    - Now, if at the trial the defence raises a defence, the Crown **also** has to disprove the defence BARD
- The "air of reality" test
    - Explained and updated in ***Cinous***

Self-Defence

- Parliament put self-defence into 2 sections:
    - 1) The defence of person - s. 34
    - 2) The defence of property - s. 35

s. 34 – The Defence of Person

- **(1) – Defence – Use or Threat of Force**
    - **A person is not guilty of an offence if**
        - **(a)** they believe on **reasonable grounds** that force is being used against them or another person or that a threat of force is being made against them or another person;
        - **(b)** the act that constitutes the offence is committed for the **purpose** of defending or protecting themselves or the other person from that use or threat of force; and
            - The accused would have to say "I did it to defend myself/them, not out of anger"
        - **(c)** the act committed is **reasonable** in the circumstances.
- **(2) – Factors**
    - In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:
        - **(a)** The nature of the force or threat;
        - **(b)** The extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;
        - **(c)** The person's role in the incident;
        - **(d)** Whether any party to the incident used or threatened to use a weapon;
        - **(e)** The size, age, gender and physical capabilities of the parties to the incident;
        - **(f)** The nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;
        - **(f.1)** Any history of interaction or communication between the parties to the incident;
        - **(g)** The nature and proportionality of the person's response to the use or threat of force; and
            - This doesn't meant that proportionality is the be-all end-all, it's just a consideration
        - **(h)** Whether the act committed was in response to a use or threat of force that the person knew was lawful.

    - This is **not** an exhaustive list
- Self-defence is an all-or-nothing: there is no in between in terms of liability, only in terms of the sentence
    - There is no defence if the force used by the accused is excessive
    - If the Crown is able to prove BARD that any one of these three steps does not apply, then self-defence is not made out
    - **Caveat** to the all-or-nothing: second-degree murder
        - If you're in a fight and you think it's a fight for your life, you may not have the mens rea to kill

R v Cinous – Outlining the Air of Reality Test

- **Facts**
    - Accused found guilty of second-degree murder for killing criminal accomplice M; believed accomplices were planning to kill him from rumors; there were no threats in the form of overt words or actions, but "signs"; on the way to theft, pulled into gas station to get wiper fluid; came around back of van and shot M in the back of the head
- **Issue**
    - Should self-defence have been left to the jury (did it possess an "air of reality")?
- **Analysis**
    - Before the jury can consider the defence, the trier or law has to consider whether there's an air of reality
    - **Air of reality test**
        - Whether there is
            - 1) Evidence
            - 2) Upon which a properly instructed jury acting reasonably could acquit if it believed the evidence to be true
        - Why it's important: If the defence is actually raised to the level of air of reality, then the jury has to consider it; the Crown has to disprove it BARD
        - It's not a qualitative test
            - There must be some evidence on which the jury *could* acquit
            - In determining the air of reality, the trial judge must review evidence to consider whether inferences required for defence to succeed can reasonably be supported; but they cannot consider credibility or weigh evidence
        - If any of the 3 elements of self-defence lacks an air of reality, it should **not** be put to the jury
        - Each element has a subjective and objective component; it's accused's belief but also reasonable → **modified objective test**
            - Accused's subjective conviction that he had no choice but to shoot his way out of a dangerous situation is not enough; must point to a reasonable ground for that belief
            - This is taking the perceptions, physical and mental attributes of the accused, and applying the reasonableness standard to their conduct, based on those subjective factors of the accused
            - "Taking this person into account with their attributes and their history, was it reasonable for that person to act this way?"
            - If the accused makes a bald claim with very little circumstantial evidence to back it up, it might pass the air of reality test, but at the same time the jury would be told "were those actions reasonable in the circumstances"?
            - **What isn't taken into account**: a bad temper or self-induced intoxication

        - This test began to obtain favour in ***Lavallee***
    - Application of the air of reality test to self-defence
        - 1) Air of reality that the accused believed he was going to be assaulted (subjective component) and the perception was reasonable (objective component)
        - 2) Accused's testimony shows that he reasonably believed he was facing death or grievous bodily harm from attack (subjective) and perception was reasonable (objective)
        - 3) Air of reality to accused's claim that at the time of the shooting he believed he had no alternative; **but there is no air of reality that this belief was objectively reasonable**
            - No evidence for the jury to infer reasonableness of believe in absence of alternatives; he could've fled or called the police
- **Holding**
    - Since there is no evidential foundation for the 3rd element, the defence as a whole lacks an air of reality
- **Ratio**
    - Where any elements of self-defence lack an air of reality, it should not be put to the jury

R v Doe – Justice Thomas Reasons for Judgment – 4 Different Repetitions of the Air of Reality Test and Self-Defence Analysis

- **Facts**
    - Paul Doe (accused) charged with 5 offences
        - Count 1: assault
        - Count 2: assault causing bodily harm
        - Count 3: assault
        - Count 4: choking to overcome resistance to an indictable offence
        - Count 5: assault
- **Analysis**
    - Count 1
        - "Yes I bruised her, but she had a knife in her hand"
        - Consent is not truly a defence: it's just the negation of the actus reus
            - For assault, the complainant is saying "I did not consent to this application of force"
                - If they do consent though, then there is no actus reus
        - Here the judge said that if you come at someone with a knife in your hand, it is expected that the other person will use physical force on you
            - If you can expect that, then you are consenting to the physical force, and it's to be expected
            - If you enter a fight, one can expect to receive physical force
            - So the "first defence": no actus reus
            - However, even if this wasn't the case, the "second defence" is self-defence: 3 steps
                - 1. There was air of reality that he was going to be assaulted
                - 2. The accused perceived the threat
                - 3. His actions were reasonable in the circumstances
                - The defence just needs to show this air of reality, then it's up to the Crown to disprove any one of these (which they weren't able to do)
        - On the question of whether the Crown has disproved consent on the part of the complainant to the assault, the Crown has failed
            - The complainant threatened the accused with a weapon (knife) and was disarmed

        - It has not been proven that the complainant did not consent to the measures taken by the accused to disarm her and to restrain her in an attempt to calm her down
    - On the question of self-defence, the Crown has failed to prove BARD that the force used by the accused was not justified
        - Self-defence exists in the circumstances, namely the accused believed that the complainant posed a threat of force against him
            - By punching him in the arms
            - By attempting to kick him in the genitals
            - By picking up a knife which caused the accused to retreat into the second bedroom
        - The complainant stabbed the knife into the door twice
        - The accused believed he was under threat of force from a weapon which belief was honestly and reasonably held by him within the meaning of s. 34(a) of the CC
    - The accused's actions were done for the purpose of defending himself against a threat of an ongoing assault
    - The actions of the accused were thus reasonable in the circumstances
    - The struggle did end, and the accused did not pursue her, beat her, or otherwise prolong the confrontation
    - In conclusion: the actions of the accused in these circumstances were undertaken by him to repel blow emanating from the complainant
        - In mounting this defence, he used only his hands to grasp the complainant's wrists and upper arms
- Count 2
    - On the consent issue, the law is unclear as to whether a person who has suffered injuries in the nature of bodily harm could consent to receive such harm
        - Here, it does not matter, as the defence of self-defence is present in these circumstances
        - The Complainant pushing the Accused down the stairs as he was retreating from her amounts to an assault on her part.
            - His belief that she was coming down the stairs to continue the assault upon him was honestly held and reasonable in the circumstances.
            - It was reasonable for him to conclude that the Complainant would continue to assault him.
        - The Accused repelled the approaching Complainant by kicking her for the purpose of defending himself.
    - In summary: the actions of the Accused in these circumstances were undertaken by him to stop the apprehended and ongoing assault from the Complainant
        - In mounting his defence, he used only his feet to defend himself.
            - This was reasonable in the circumstances.
- Count 3
    - On the actus reus issue, the Crown has not proven the lack of consent by the complainant BARD
        - The complainant could expect that the accused, the target of her assault, would take measures to defend himself from her blows and such measures could reasonably include him pushing back against her in a forceful manner with an open hand
    - On the question of self defence, the accused was justified in defending himself
        - Firstly, when the Complainant pursued him into the bathroom and first hit him in the media room, it was reasonable for him to conclude that he was being attacked.

- Secondly, pushing back forcefully on her after waiting for a short period was for a defensive purpose, and it effectively terminated the assault.
- Finally, given the history of her assaults of him, pushing back hard with an open hand and not a closed fist was reasonable and proportionate in the circumstances.

- In summary: the actions of the Accused in these circumstances were undertaken by him to stop the assault by the Complainant
  - The use of an open hand to push back and push her away was reasonable

- Counts 4 and 5
  - The Accused denied choking the Complainant at any time
    - There is little evidence on the photographs to confirm injuries typical of an attempt to choke someone.
    - He did not choke the Complainant to overcome any resistance.
    - Any injuries to her throat areas occurred as a result of defensive measures being taken by the Accused
      - This probably happened during her fourth visit to the bedroom when most of the violent assaults occurred
    - The Accused denies choking the Complainant for the purpose of overcoming resistance, and I accept his denial
      - It follows that the Crown has not proven that the act of choking occurred and, in any event, has not proven the requisite intent on the part of the Accused to choke the Complainant for this purpose.
  - On the question of the actus reus, it is common ground that the Complainant made multiple visits to the second bedroom to confront the Accused about his adulterous affair and the end of their marriage
    - She was the one who was upset; the Accused simply withdrew from the discussions which she wanted to hold in respect to the ending of their relationship.
    - He did not want to discuss these problems with the Complainant and sought to defer any action in terms of ending the marriage until she calmed down.
    - I find that she was literally out of control and assaulted him several times, including climbing onto his back as he lay prostrate on the bed and was essentially defenceless.
      - On that occasion, she struck him on his head with the cordless phone
      - Even after he fended her off and caused her some injuries, she returned multiple times to the bedroom to carry on the fight, and it seemed she was unafraid that he would retaliate or pursue her and beat her; in fact, that never happened.
    - In conclusion: the Crown has failed to prove that she did not **consent** to the force which he applied to rebuff her many assaults upon him.
  - On the self-defence issue, clearly, on all of the other the occasions when there was physical confrontation on these dates, it has been shown that he knew force was being applied against him
    - Firstly, on Visit Number 2 when she threw a bottle at him and struck him with her hands; secondly, on Visit Number 3 when she struck him after he took her cell phone away from her; thirdly, when she straddled him on his back and started striking him with the cordless phone; finally, by biting him on his elbow on the stairway.
    - All of these actions on part of the Complainant, in addition to her past history of violent assaults on him, gave the Accused a reasonable basis for fearing that force might be inflicted on him.
  - Finally, the actions of the Accused were proportionate and reasonable in the circumstances

- He was in a very vulnerable position during the fourth visit to the bedroom when she struck him repeatedly with the cordless phone
    - That is when he struck back and most of her injuries were probably suffered at that time
    - He did not continue the fight on this occasion and did not pursue her after she left the room
    - His actions throughout were proportionate and reasonable
- **Holding**
    - The accused is not guilty on all counts; acquittals be entered

R v Lavallee – Expert Evidence, and the Ushering in The Defence of the Battered Woman

- You don't just get to claim it as a battered woman, it still has to fit the self-defence requirements
    - In this case, to fit in the requirements, the defence called a psychiatrist who specialized in battered women
    - From his evidence, the defence was able to convince the court that self-defence did apply, even though you may not think so on the surface
- **Facts**
    - Appellant, 22, had been living with R (deceased) for a few years; frequent victim of physical abuse at hands of R; during party at their house, R grabbed and hit her, handed her a gun and said "you'll get it once everyone leaves, either you kill me or I'll get you"; L shot R in the back of the head
    - Forensics: shot in the back of the head; pretty hard to claim self-defence when shooting someone in the back of the head
    - Trial
        - Jury acquits
    - MBCA
        - Acquittal overturned, self-defence doesn't apply
- **Issue**
    - Utility of expert evidence is assisting jury on plea of self-defence to murder by common law partner who had been battered by deceased
- **Analysis**
    - **Expert evidence**
        - *Abbey*: Expert opinion is admissible to furnish the Court with scientific information outside of the experience and knowledge of the trier of fact
        - If it's something that can be formed within a layperson's expertise, it shouldn't be the subject of expert testimony
        - Dr. S was going to testify as to what goes on in the mind of a battered woman
            - Judges and jurors tend to think they understand human nature, that's why it's harder to get psychiatrists called as experts
            - This is wrong though, battered relationship is subject to many myths and beyond scope of average juror; therefore, suitable for explanation through expert testimony
    - 2 fundamental aspects of self-defence that are operable here
        - 1) **Temporal connection:** Accused was under reasonable apprehension of death/harm
            - Before passed in 2013, **imminence** was read into s. 34
                - The threat must have been imminent, otherwise there is technically time for alternatives
            - Was the perceived threat of force by R imminent?
                - How can you claim this if R was walking away?
            - Dr. S
                - There was a reasonable apprehension of death in the circumstances
                - There are **3 distinct phases in the cycle of violence**

                        - 1) Tension building
                        - 2) The acute battering incident
                        - 3) Loving contrition
                            - The batterer immediately apologizes, provides gifts and promises never to do this again
                    - There is a degree of predictability that is absent from isolated violent encounter between two strangers; there is a heightened sensitivity of battered woman to partner's acts
                        - The nuance is lost on other people
                    - What did the accused reasonably perceive given her situation and experience?
                        - This is employing the **modified objective test**
                        - The accused perceived it (subjective) and what could have been reasonably perceived (objective)?
                    - This all made the issue of imminence established
                        - She was in a closet on the top floor
            - 2) **Magnitude of force**: Accused's belief that she could not otherwise preserve herself from death/harm except by shooting was based on reasonable ground
                - **Lack of alternative to self-help:** it is not for the jury to pass judgment on the fact that the woman stayed in the relationship; doesn't forfeit her right to self-defence (analogous to a hostage situation)
            - **Modified objective test**: Definition of "reasonable" must be adapted to circumstances of battered woman
                - Consider personal attributes of the accused to respect to ability to perceive and act
                - Particularly negative attributes like bad temper not considered; diagnosed psychological disorders usually will be
            - In this case: Given history, circumstances and perceptions of appellant, her belief that she could not preserve herself from death by R that night except by killing him first was reasonable
            - Jury should be instructed to consider reasonable person with any characteristics and experience that are relevant to the accused's ability to perceive and respond to harm/threat (includes age, gender, past experience with person presenting threat, financial dependency)
- **Holding**
    - Acquittal restored
- **Ratio**
    - In the context of a battered relationship, expert evidence can be useful in determining whether the accused had reasonable apprehension of death when she acted
        - **Modified objective test:** what the accused reasonably perceived, given her situation and experience (jury must decide whether the accused's perceptions and actions were reasonable)

Back to R v Cinous – Distinguishing the Expansive Imminence from *Lavallee*

- Defence was trying to use the more expansive version of imminence that came out in ***Lavallee***
    - "Imminence isn't just in the moment, but what was expected to come"
    - Except, it didn't work
- **Facts**
    - Accused found guilty to second degree murder for killing criminal accomplice, M; believed accomplices were planning to kill him; heard rumours; no threats in form of overt words or

actions, but "signs" (hands in jacket, tense atmosphere, rubber gloves); on the way to theft, pulled into gas station to get wiper fluid; came around back of van and shot M in the back head; a knife was found on M's person
    - Trial
        - Charged jury on self-defence, but screwed up the charge
    - Court of Appeal
        - Yes the judge screwed up the charge, and orders a new trial
        - Crown: this screwup shouldn't amount to a new trial because self-defence can't be used in the first place
- **Issue**
    - Did Cinous's evidence meet the (old) three-part test of self-defence?
        - Remember: each part has a subjective and objective component
- **Analysis**
    - For the 3 components, there's both a subjective and objective component to each
    - **Air of reality**: whether is 1) evidence 2) upon which a properly instructed jury acting reasonably could acquit if it believed evidence to be true
        - If any of the 3 elements of self-defence lacks an air of reality, it should not be put to the jury
    - Application of air of reality to self-defence
        - 1) Air of reality that the accused believe he was going to be assaulted (subjective) and the perception was reasonable (objective)
        - 2) Accused's testimony shows that he reasonably believed he was facing death or grievous bodily harm from attack (subjective) and perception was reasonable (objective)
        - 3) Air of reality to accused's claim that at the time of the shooting he believed he had no alternative; **but there is no air of reality that this belief was objectively reasonable**
        - There is an air of reality to the **subjective** components of each of the 3 elements of the test
        - But, was your conclusion on the 3rd part of the test a reasonable conclusion (**objective**) → **No**
            - Cinous got freaked out and went to get washer fluid; and then **came back and shot him**
            - He could have run away
            - It was **unreasonable** for Cinous to come to that subjective conclusion
        - Inconvenience won't justify such drastic measures
        - **Since no evidential foundation for the 3rd element, defence as a whole lacks an air of reality**
    - Under the current framework (post-2013), we see the subjective and objective components in the 1st and 3rd element of the test
        - The 2nd (purpose of defending themselves) is just a credibility issue
        - You can have a defensive purpose and still be angry

s. 35 – Defence of Property

- **(1)** A person is not guilty of an offence if
    - **(a)** They either believe on reasonable grounds that they are in peaceable possession of property or are acting under the authority of, or lawfully assisting, a person whom they believe on reasonable grounds is in peaceable possession of property;
        - Peaceable possession?
            - True belief that no one else has a proprietary interest in that property
            - E.g. A couple that is married and throwing dishes at each other
                - They're sharing the property with the other person
            - Honest belief that you alone hold that property, not your spouse

    - **(b)** They believe on reasonable grounds that another person
        - **(i)** is about to enter, is entering or has entered the property without being entitled by law to do so,
        - **(ii)** is about to take the property, is doing so or has just done so, or
        - **(iii)** is about to damage or destroy the property, or make it inoperative, or is doing so;
        - Instead of self-defence where there is a threat on a person, this is a threat on the property
            - They're entering the property/about to destroy it
    - **(c)** The act that constitutes the offence is committed for the purpose of
        - **(i)** preventing the other person from entering the property, or removing that person from the property, or
        - **(ii)** preventing the other person from taking, damaging or destroying the property or from making it inoperative, or retaking the property from that person; and
    - **(d)** The act committed is reasonable in the circumstances.
    - The last 3 conditions (b, c, and d) match the defence of person
    - Other than peaceable possession, another difference is that imminence, size, and gender aren't considered
        - Parliament did this because otherwise there would be too many variables to take into account
        - There's no particular statutory guidelines; this allows Courts to interpret it themselves
    - What can be taken into account is value of the property, and imminence
    - Another is breaking in to someone's house; there are two threats here
        - 1) Threat to property
        - 2) Threat to oneself
        - There may be a claim to both offences (ss. 34 and 35)
- **(2) – No defence**
    - Subsection (1) does not apply if the person who believes on reasonable grounds that they are, or who is believed on reasonable grounds to be, in peaceable possession of the property **does not have a claim of right** to it and the **other person is entitled to its possession by law**.
- **(3) – No defence**
    - Subsection (1) does not apply if the other person is doing something that they are required or **authorized by law** to do in the administration or enforcement of the law, **unless** the person who commits the act that constitutes the offence believes on **reasonable grounds** that the other person is **acting unlawfully**.

R v Szczerbaniwicz – The Replaceability of the Property Being Defended

- **Facts**
    - Colonel in military having argument with his wife after 30 years of marriage; wife threw diploma on floor; accused pushed her; had bruising on elbow, legs, and finger
    - Charged with assault causing bodily harm, and was convicted
    - He conceded that he applied force without consent, but then argued under s. 35 that it was justified since he was protecting personal property
    - Trial
        - Air of reality to defence of protecting property, **but** not made out because he used more force than was necessary, so it was not justified
        - Conviction of simple assault
- **Issue**
    - Did the trial judge fail to properly apply relevant facts to s. 39(1) (now s. 35) which protects the accused from criminal responsibility for defending personal property if used no more force than necessary?
- **Analysis**

    - Trial Judge accepted the value of the diploma and considered the risk of harm to the diploma and what took place
        - The judge also considered the force used by the accused and how he went too far
            - The fact that the accused said he "ragdolled" her and that he might have gone too far are not very good for his side...
    - Subjective belief about what force is necessary is relevant, but that **belief must be based on reasonable grounds**
    - **Proportionality approach:** Whether force used was reasonable in all the circumstances
    - Trial judge correctly determined whether S used no more force than necessary to defend diploma in all circumstances based on both the subjective and objective criteria
        - Judge accepted sentimental value of diploma but also the fact that it could be **replaced**
        - Use of force for defensive purpose (to prevent further damage) vs anger/retaliation
    - Found use of force to be disproportionate; conclusion is justified in law and facts
- **Dissent**
    - Military judge's reasons fell short of standard in not explaining **why** accused convicted (how force was excessive in circumstances; connected between "what" and "why")
        - The Colonel gave a statement to the military police; said he got caught up in the anger of the moment
            - You can be angry when you're defending your property; **it's just that it has to be for the purpose of defending**
            - We should have heard from the military judge *what* was too far
        - Trial judge used term "manhandle", but simply means to push or pull - doesn't help
        - S was acting in defence of property of considerable importance to him
        - Not required to "weigh to a nicety" exact measure of defensive action or consequences
        - Improper to determine degree of force used by looking at end result (injuries), then reasoning backwards to determine force was excessive
        - It's not just the words used, it's what the Trier of Fact interprets from those words
- **Holding**
    - The military judge saw that this piece of property could be replaced
    - This is a big factor; if there's only one of something/uniqueness/replaceability needs to be considered
- **Ratio**
    - A property owner in peaceable possession may use physical force to defend property **if** the force used was **reasonable** (proportional) **in the circumstances**
        - Subjectively honest belief, but based on objectively reasonable grounds

XIII. INTOXICATION

Introduction

- Intoxication is technically not a defence, but can negate the AR/MR or support other defences
- Courts have devised this defence depending on the circumstances
- Relevance of intoxication:
    - The **general effect** on all of the parties: complainant, accused, bystander witnesses on the **outcome of the trial**

The Dubowski Chart

- Used to describe the stages of intoxication by alcohol
- The higher up you are, the less conscious you are

- Used by experts in Courts
- **BAC**
    - Compare this to .08 (legal driving limit)
    - The higher you go up, the lower your judgment is
    - These all depend on one's tolerance level
- **Confusion**
    - Very intoxicated at this point
    - This as high as most people want to get
- **Stupor**
    - Where it starts becoming lethal

Intoxication is Important to Everyone in the Case

- Why? Alcohol consumption and impairment is relevant to **credibility**
    - The more you drink, the more it adversely it affects your memory
    - For the TOF to decide guilt or innocence, they have to hear witnesses
    - Witnesses are re-counting the story of what happened
    - If you're very intoxicated, your story is subject to being incorrect
        - You might not be remembering things right
- It also affects **loss of inhibition**
    - It is relevant to know BAC in sexual assault cases for this reason
- It also affects a **person's emotional state**
    - You may become happier or angrier
- More importantly, for the complainant it might be important for **confusion and incapacity**
    - This is relevant in assault and sexual assault cases
    - Incapacity is a route to **non-consent**
    - The higher form of incapacity is **loss of consciousness**
    - It is not a defence for the accused to say that the complainant chose to drink that much on their own
        - If the complainant drinks a lot and become incapacitated, that's it; they can no longer consent
        - If the P cannot be consenting, they weren't consenting (***Ewanchuk***)
- What about the accused?
    - The same things all apply
- This all becomes very real in determining whether the Crown can prove the **mens rea** of the case
    - This is where the divide between general intent and specific intent offence is

Mens Rea Inferences

- Mens rea is proved through evidence
- One type of evidence relevant to mens rea is the actus reus
    - **(A)** From the commission of the act, the TOF might infer that the accused intended to perform the act (general intent)
    - **(B)** From the commission of the act, the TOF might also infer that the accused intended to produce any prohibited consequences (specific intent)

General vs. Specific Intent Offences

- For **general intent offences** (intention to commit the AR)
    - E.g. "I see, I touch"
    - Intoxication is **not** a defence
    - Assault and sexual assault are general intent offences

        - If someone claims intoxication then, it won't work
- For **specific intent offences** (intention to commit the AR **for an ulterior purpose**)
    - E.g. "I shoot, to kill"
    - If the Crown wants to prove murder instead of manslaughter, the Crown has to prove the specific intention of murder
        - Either of 2 prongs will do: Either he means to cause death, or he means to cause bodily harm and was reckless as to whether death ensues
        - The TOF is told to infer the mens rea of the accused in that case by the **accused's actions**
            - The more likely the actions would result in the ultimate consequences, the greater the inference drawn that he actually meant it
            - E.g. If the accused has a pistol
                - Sees a person from 20m away, picks up the gun and fires quickly at other person; happens to hit him in the head and kill him
                - At the end of the trial, the judge would tell the jury they have to decide whether the accused intended to kill
                - If they meant to cause death, it's 2nd degree murder
                - If they meant to cause bodily harm knowing it was likely to cause death and were reckless as to whether death ensues, it's also 2nd degree murder
            - However, if the accused walked closer and closer to the victim
                - With every metre closer to that victim, the **greater** the inference that is drawn that there was a truly intentional killing
                - The jury will have no difficulty that the accused truly intended to cause death
                - Under the second prong, the closer you are, the less likely the excuse of "I didn't mean to do it" is going to be believed
                    - This is important because murder is a **specific intent offence**
            - A jury is told that a person intends the natural consequences of their actions
                - **But**, if there is intoxication, the **less that inference can be drawn**
                - This inference is meant for a **sane and sober person**
                    - A very drunk person doesn't necessarily intend the natural consequences of their actions

Alcohol Myopia

- The more you drink, the less you are aware of your surroundings
    - You become short-sighted, and capture less cues of what's around
- E.g. In ***Cairney***
    - May not have understood that the relationship between doing something and its consequences was there
    - When he fired the shotgun from 10 feet away, he may not have known what a person would have thought: that death was likely
    - When highly intoxicated, you do not necessarily intend the natural consequences of your action anymore
    - Jury: had a reasonable doubt that he intended the natural consequences of his actions

Intoxication and Jury Charges

- When a judge charges a jury with specific intent offences and intoxication, **they are not supposed to talk about the accused's capacity to intend the natural consequences of their actions**
    - Incapacity is too high a bar for the defence to prove
    - Incapacity shouldn't be something that the Defence has to show

    - **Except, in extreme cases**
        - In cases where the "natural inference" is very strong, extreme intoxication could prevent the accused from having the capacity to form intent
        - The jury may be asked to consider whether intoxication is sufficient to prevent the accused from forming specific intent
- The SCC has said that the **higher the intoxication level, the lower the natural inference applies**
- However, the **higher the inference to be drawn that the person intended this, the higher the alcohol/impairment has to be to negate the inference**
    - If the accused can be shown to have shot the victim at close range (like in ***Cairney***), then it is more likely the judge will tell the jury that the accused must have to be incapacitated not to have foreseen the natural consequences of those actions
    - If you shoot someone from a metre away, there needs to be strong evidence that you were borderline stupor to even have a plausible claim
    - The further you physically are (less likely a sober person would have drawn that natural inference), the less drunk you might need to be for the defence to apply

Spectrum of Intoxication Chart

- A little bit of impairment = irrelevant
- Significant impairment = relevant to potentially negating specific intent offences
- Then you can get into unconsciousness, then death

R v Daley – 3 Legally Relevant Degrees of Intoxication

- There are 3 legally relevant degrees of intoxication
    - 1) **Mild:** Never a factor in determining whether accused possess the requisite mens rea
    - 2) **Advanced:** There is intoxication to the point where the accused lacks specific intent, to the extent of an impairment of the accused's foresight of the consequences of their actions sufficient to raise a reasonable doubt about the requisite mens rea
        - A defence based on this level of intoxication applies only to specific intent offences
        - Intoxication required for the defence to succeed depends on the type of offence
    - 3) **Extreme intoxication akin to automatism:** Negates voluntariness
        - See ***Daviault***
- **Ratio**
    - Trial judge is only required to charge the jury on intoxication if they're satisfied that the effect of intoxication might have impaired the accused's foresight of consequences sufficient to raise a reasonable doubt as to the lack of specific intent

R v Daviault – Extreme Intoxication Akin to Automatism and s. 33.1 In Response

- **Facts**
    - Accused was acting like an automaton; raped the complainant
    - Defence: Extreme intoxication amounting to automatism
    - Automatism is not a mens rea issue, it's voluntary issue; there was no **actus reus**; no crime
- **Analysis**
    - The Court made a limit to all of this
        - If you're going to claim that you're so drunk you're an automaton, the **onus is now on the accused** to prove that they were an automaton, and there needs to be psychiatric evidence
        - If they can prove on the BOP that they were an automaton, they are acquitted
- **Aftermath**
    - There was strong backlash to this by the general public

- Within 6 months, **s. 33.1** was enacted specifically to limit ***Daviault***
  - If you **violate someone's personal integrity** (crimes of violence like assault), it's **not going to be a defence**
  - It still exists for property crimes
- S. 33.1 has been struck down recently in a Ontario Provincial Superior Court
- S. 33.1 only talks about general intent offences
  - It doesn't touch specific intent offences

XIV. PROVOCATION

Introduction

- We all as humans can be pushed beyond a limit, and can lose the power of self-control
- We are all emotional, and act on that from time to time
- If you were convicted of murder back in the day, you were executed
  - A new body of law was developed to excuse killing in certain circumstances
    - E.g. Killing in the context of a duel
  - It led to the defence of provocation
- Nowadays, murder isn't punished the way it used to be
  - There is no death sentence in Canada
  - You get life in prison, with certain parole times
- The defence though has its limits
  - It used to be that in infidelity in marriage, that a man could kill his wife or her paramour; but not the other way around
    - Not around anymore
  - You could used to use provocation if you received a homosexual advance
    - Not around anymore
  - One place we look for these new values to allow is in the Charter
- Parliament has re-restricted the defence even further, but the cases we'll look at still apply

s. 232 – Murder Being Reduced to Manslaughter

- Manslaughter = unlawful act resulting in death
- **This defence kicks in after the Crown has proved BARD in this jurisdiction committed the actus reus and intended to kill; there is no defence of provocation for lesser crimes**
  - The Defence will try to raise this defence, which tries to bring it back down to manslaughter
  - Murder: life in prison, with mandatory minimum for parole depending if it's 1st or 2nd degree
  - Manslaughter: max sentence is life, but no mandatory minimum for parole
- **(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.
  - "Heat of passion" and "sudden provocation" are important
- **(2)** – What is Provocation
  - **Conduct of the victim** that would **constitute an indictable offence** under this Act that is **punishable by five or more years of imprisonment** and 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 their passion to cool.**
    - Used to read that provocation was a "**wrongful act** or insult"
      - This was changed in 2015 to eliminate "insult"
      - Thus before 2015, you could plead provocation if you were insulted
        - It had to have been an insult that was really bad

        - "Wrongful act" remains a source of provocation
        - Whether conduct of victim amounted to provocation and whether accused was deprived of power of self-control are **questions of fact**
        - Indictable offences?
            - It has to be a criminal offence which is indictable (straight or hybrid)
                - You don't have to prove that they would have gotten more than 5 years, but at least 5 years
            - E.g. A simple assault is an indictable offence because it's a hybrid offence, and therefore is punishable by 5+ years in prison
            - Mischief to property valued at more than $5000 is also an indictable offence
                - S. 430(3)
                    - Every one who commits mischief in relation to property that is a testamentary instrument or the value of which exceeds five thousand dollars
                        - **(a)** is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or
                        - **(b)** is guilty of an offence punishable on summary conviction.
- **(3)** - Questions of Fact
    - For the purposes of this section, the questions
        - **(a)** whether the conduct of the victim amounted to provocation under subsection (2), 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.**
        - It is not true provocation though if you were instructed to do something
            - E.g. In ***Cairney***, if you start a conversation by pointing a gun at someone, provocation can't really be used
- **(4)** - Death During Illegal Arrest
    - 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.
        - If an officer arrests an accused, and the accused should not have been arrested, it's not necessarily automatically provocation when the officer arrests them
            - **But** it is a consideration to be put into the equation

General Principles

- The defence first developed in the 1800s
    - Derived from the law's compassion for humanity
- Partial defence; only reduces a charge from murder to manslaughter
- Considered to be an **excuse**, not a justification; it was a wrongful act but committed under terms that excuse conduct to some degree
- Loss of control due to anger is **not** enough for provocation; you must show more than sheer anger, and meet the test in s. 232
    - However, anger does form part of most fact scenarios

4 Part Test for Provocation

- First 2 elements are objective, last 2 are subjective
- **1. Criminal indicatable act punishable by 5 years or more**
    - Remember that insults don't count anymore post-2015
- **2. Which is sufficient to the deprive the ordinary person of the power of self control**
    - Notice it says **ordinary person**, not reasonable person
        - A reasonable person never loses their self-control
    - This is a governor on the offence applying too widely
- **3. The wrongful act must *occur* on the sudden**
    - The act must strike upon the mind unprepared for it
- **4. Accused must have *acted* on the sudden *before* regaining power of self-control**
    - Both steps 3 and 4 need to have occurred within seconds
- This test is sometimes described as a 2-part test, as in ***Thibert***
    - Before defence of provocation is left to jury, the trial judge must be satisfied there is
        - 1) Some evidence to suggest particular wrongful act/insult alleged by accused would have caused the ordinary person to be deprived of self-control, and
        - 2) Some evidence showing accused was actually deprived of self-control by act/insult (both objective and subjective elements)
- The **ordinary person is not drunk**
- The ordinary person was dealt more specifically in ***Tran***
    - An ordinary person reflects normative dimensions of defence; standard must be informed by contemporary norms of behaviour and fundamental values (Charter, equality)
    - It's an ordinary person with a mid-level temper
        - History of the accused is important though, and needs to be taken into account

Thibert v The Queen – 2 Step Test of Provocation (Just the 4 Steps Into 2)

- **Facts**
    - Man shots his wife's lover during confrontation in parking lot; wife was leaving accused for co-worker; accused distraught over news; on day in question had not slept for 36 hours; kept trying to talk to her; followed her to work, not sure if he would kill himself or her; told her he had non-loaded rifle in car; deceased intervened; accused testified that he was taunting him with wife, kept advancing, ignored appellant's instructions to stay back and gun discharged
- **Issue**
    - Was the trial judge correct in leaving the defence of provocation with the jury?
- **Analysis**
    - Was entitled to provocation, and sent back for a new trial
    - **Objective element**: in assessing evidence on objective test, the entire factual situation (including characteristics of the accused) must be considered
        - Rationale: objective element of test ensure criminal law encourages responsible behaviour, but to be applied sensitively, **ordinary person must share with accused sex, age, and such factors as would give the act/insult in question a special significance and have experienced the same series of acts/insults as those experienced by the accused**
        - Propensity to drunken rages or short temper cannot be taken into account, but background of the relationship between the deceased and the accused (including earlier insults) can
        - Take personal circumstances of the accused into account and both objective and subjective phases
            - Here, ordinary person is sleep-deprived man wanting to have a private conversation with his wife before she leaves him for another man, being unexpectedly interrupted by her lover
            - An ordinary person would have lost self-control

- **Subjective element**: “Sudden provocation” means act/insult must make an unexpected impact, taken you by surprise and set passions aflame
  - Affronts over long period of time do **not** preclude the defence of provocation, as long as immediately prior to the last one, accused did not intend to kill
  - Prior history of relationship may be taken into account

- **Holding**
  - The accused was entitled to defence of provocation; sent back for a new trial
- **Ratio**
  - Before defence of provocation is left to jury, the trial judge must be satisfied there is
    - 1) Some evidence to suggest particular wrongful act/insult alleged by accused would have caused the ordinary person to be deprived of self-control, and
    - 2) Some evidence showing accused was actually deprived of self-control by act/insult (both objective and subjective elements)

R v Tran – No Provocation If There’s No Air of Reality, and the Contextualized Ordinary Person

- **Facts**
  - Accused and wife estranged for some time; suspected she was having sexual affair with another man; confirmed by a private investigator; pretended to give back his key but kept a copy; gained entry to apartment; found them together in bed; goes back to kitchen, finds a knife, and stabbed deceased boyfriend 17 times, 6 of which were lethal
    - Whenever there is an air of reality to a defence, the Crown has to disprove it BARD...
  - Where is the wrongful act?
    - Tough to find...
  - What about insult?
    - Trial judge found an insult since this woman was not fully detached from her husband
  - Court of Appeal
    - Defence of provocation had no air of reality; substituted for second-degree murder
      - If this had been a jury trial, then a new sentence could not be done; would've been sent back for a new trial
- **Analysis**
  - No wrongful act, no insult
  - An ordinary person is the reasonable person with normative features (e.g. With values)
  - There was no air of reality to this defence in anyway
  - The appellant argued that this was an "insult"
    - When you insult somebody in the ordinary meaning of the word, you're seeking to communicate your insult with the agreed party...*that doesn't happen here*
    - The couple were not expecting him in the bedroom, so this **cannot** be an insult
  - No wrongful act, no insult → no air of reality
  - On the subjective aspects of the case, Tran was not truly struck upon this failed insult as if he wasn't expecting it because he was **expecting** to find them
    - He knew about this relationship until it was finally confirmed
    - Therefore, you **cannot** claim that it struck you “on the sudden”
  - The Trial judge failed to go through whether Tran acted before his passions cooled
    - There was a return to the kitchen to grab a knife and then came back
      - This might be too long of a time period for you to have acted on the sudden
  - SCC finds in favour of the Crown
  - **The history/evolution of the defence of provocation**
    - In the old days, there was an invasion of privacy or property (including your wife who was considered a chattel)
    - It went from that, to serving one's honour
      - If a man was sufficiently insulted, you could kill someone to preserve your honour

                - It wasn't a bombastic release of passion, but controlled violence
                - Emotions had very little do with it
            - Then it evolved into our CC, defined as being a wrongful act or insult
                - It had to deprive the ordinary person of the power of self-control
                - This ordinary person is **different** though than the ordinary person today
                    - Re-definition of the ordinary person happened in ***Tran***...
    - What used to be used for provocation
        - Men or women being betrayed by their spouse
        - A man receiving a homosexual advance from another man
        - Or it could be a member of a minority group receiving a racial slur
            - This last one still would have been part of the ordinary person, **however** we don't have insults anymore
    - Majority here
        - The ordinary person has changed with the times
        - Social context has always played an important role in defining what amounts to provocation at law
        - An ordinary person and a reasonable person are really the same, **except** the ordinary person has **human weakness/infirmity**
            - The ordinary person is infused with whatever general personal characteristics the accused finds themselves in at the time; that they had little choice over
                - This goes back to ***Thibert***
                - These are all aspects that need to be considered
                - Being drunk or having a bad temper though is not part of the ordinary person; idiosyncratic choices won't be injected into the ordinary person
                - It's contextualized, **not** individualized
                - Thus, the ordinary person is the reasonable person with **real human attributes**
                - **Wealth** will also be a factor injected into the ordinary person
                - It's infused with **modern Canadian values**
                    - Not homophobic, not overly possessive over their spouses
                    - **However**, that doesn't mean that friends, children, and spouses don't play a role

- **Ratio**
    - What amounts to provocation at law and the “ordinary person” standard must be informed by contemporary social norms including Charter values

R v Cairney – Self-Induced Provocation, and the “Rolled Up” Defence

- The evidence was basically the same between ***Cairney #1*** and ***Cairney #2***
- ***Cairney #1***
    - **Facts**
        - Accused shot and long-time friend Ferguson, who had history of drinking and physically abusing Rosenthal, his common law spouse and accused's cousin; Ferguson and Cairney went out and were drinking on day of killing, with Ferguson taking some T4s; Ferguson was on the phone when Cairney came in with a gun; Cairney smashed phone; gave him lecture with gun pointed at (you can't treat her that way); Ferguson said "fuck you, goof, I'll do with Fran what I want" and walked out into stairwell; Cairney followed him, and Ferguson says "you going to do something stupid?"; Cairney shoots and kills him
        - Trial judge
            - Granted ability to argue provocation to the jury

                - Jury found them not guilty
        - **SCC Majority**
            - Who started this confrontation though?
                - It was Cairney
                - Since he started the confrontation, he could expect that the person might tell him to "fuck off" and leave the room
            - There was no air of reality to provocation
                - Cairney, the one who introduced the gun and starting the confrontation, committed *self-induced* provocation
                    - This is important for the air of reality test
                    - If Ferguson's reaction could fall within what could be reasonably be anticipated by the accused (the ordinary person in the shoes of the accused), then you can't claim that it struck his mind all of a sudden
                        - You're the one starting the confrontation, so you can't say you're acting on the sudden
                - Ferguson was no longer a threat since he was leaving the apartment
            - When you start something like this, **with a gun**, you're not going to get much support for your air of reality of provocation
                - The law does not condone the initiation of gunpoint lectures
                - *If he had confronted with just his hands, the Majority's decision may have been different*
                - Starting something or trying to protect someone with a **gun**, even though it was for a benevolent purpose, will not qualify you as an ordinary person
        - **SCC Dissent**
            - The "who started it" thing is always fraught
                - It can always be backdated one step, so it's artificial
                - If you want to do this, Ferguson started it by holding Rosenthal by her arms and threatening to throw her against the walls had she not had a back injury
            - You have to look at the whole history of this matter, and not just that night
- ***Cairney #2* – Failed Provocation That Might Assist in Raising a Reasonable Doubt**
    - Compared to Ferguson who died with a BAC in excess of 300, Cairney was very **drunk**
    - Cairney was skinnier and lighter, so by matching the drinking of Ferguson, it was going to hit him higher
    - The main defence at this trial was **intoxication**
        - Raising a reasonable doubt about the foresight of death
    - What about s. 229(a)(ii)?
        - Cairney wasn't a sane sober person though
        - He was very impaired
        - He was suffering alcohol myopia, and couldn't have appreciated the consequences of his actions
    - If this was to fail, there was still the "**rolled up defence"** of the **residual assessment of intent**
        - If you find that his impairment by alcohol doesn't raise a reasonable doubt to his foresight of death (AKA you still find him guilty of murder), you have to consider **whether that impairment combined with other factors (excitement, anger, or fear) together would have raised a reasonable doubt about his intent**
            - Multiple elements are rolled up together to be greater than the sum of their parts
            - This rolled up defence is from ***Nealy***
        - Even if you find Cairney had the sufficient mens rea and proceeded anyway in killing Ferguson, it must also be considered that: Cairney was drunk, Ferguson leaving, Cairney being upset for over 10 years
            - Together, this might cumulatively raise a reasonable doubt
- **Ratio**

- 1) Where the accused is prepared for an insult or initiates a confrontation and receives a predictable response, this is a factor which **may** deprive provocation of an air of reality
- 2) Where all other defences fail, if a reasonable doubt exists that the accused had subjective foresight of death, the accused be acquitted under the "**rolled up**" defence (cumulative effect)
  - Even if satisfied BARD that the accused was not intoxicated enough to an extent that if affected his awareness that death or serious injury would result, you must re-examine the evidence for anything that suggests he acted instinctively or without the necessary intent
  - Whether, taken collectively, the whole of the evidence raises a reasonable doubt about the accused's intent

Bill S-7: *Zero Tolerance for Barbaric Practices Act*

- Provocation is now:
  - Conduct of victim that would constitute an **indictable offence punishable by 5 or more years** of imprisonment, that is of a nature **sufficient to deprive the ordinary person of the power of self-control**, is provocation if the accused **acted on it on the sudden and before time for the passion to cool**

R v Nealy – Provocation as Relevant Evidence, Not as a Defence

- **Facts**
  - At a gay bar with girlfriend, Nealy got into an altercation with C (deceased); upset by what he said about his girlfriend and afraid of C (larger, drunker), Nealy grabbed a knife and stabbed C several times
- **Issue**
  - Should the trial judge have instructed the jury to take into account *cumulative effects* of evidence of drinking and provocation to determine whether the accused possessed the requisite intent for murder?
- **Analysis**
  - Jury were told to consider issues drunkenness, self-defence and provocation (separately), but *not* the effect of alcohol coupled with fear and anger on the issue of whether he formed the intent to murder
    - In some cases, provocation afforded by victim, when considered in relation to **totality of evidence**, might create reasonable doubt in the mind of the jury as to whether accused had the requisite intent
      - In this sense, **provocation does not operate as a defence but rather <u>relevant evidence</u> for intent**
    - Preferable in most cases, and essential in some, that the jury be instructed to consider all the pertinent facts in resolving the issue of intent
    - The trial judge described it as 3 distinct defences in charge to the jury, but must consider all together in the moment → should be put to the jury as a **cumulative charge**
- **Holding**
  - Appeal allowed, new trial ordered
- **Ratio**

- 1) In some cases, provocation may not operate as a defence but rather as relevant evidence for intent: considered with the *totality of evidence*, is there a reasonable doubt in mind of the jury whether the accused had the requisite intent?
- 2) All the circumstances surrounding the act of killing must be taken into account in determining whether or not the accused had the intent required for commission of murder (including provocation, consumption of alcohol/drugs)

XV. INSANITY AND AUTOMATISM

Introduction

- What we typically talk about is the capacity to stand trial, or the capacity for the commission of the offence

Fitness to Stand Trial

- S. 2: "Unfit to stand trial" means a person is **unable on account of mental disorder** to:
  - A) Understand the nature or object of proceedings
  - B) Understand possible consequences of proceedings, or
  - C) Communication with council
- The person has to understand the very basics
  - E.g. There are prosecutors, there's going to be a verdict of not guilty/guilty, there's a judge...
- You don't have to know this going in, but you have the capacity to know it when it's explained to you
  - E.g. If someone gets beat into a vegetative state, this person would be incapacitated
  - E.g. Someone could suffer from a natural mental disorder and won't be able to understand the basics
    - This is more common
- This is the one time where Defence owes a duty to the Court, more so than his client, to tell the Court about their unfitness
  - They have to come to an honest belief that this person is unfit to stand trial
- If there is an unfitness issue, there is a mini trial to determine if they are fit to stand trial
  - If they are unfit, the proceedings are halted
    - This can take place anytime up until the verdict
  - The jury/judge determines if they're fit to stand trial
  - Psychiatric and layperson's evidence both may be used
- S. 672.31 – Verdict of Unfit to Stand Trial
  - Where the verdict on trial of the issue is that an accused is unfit to stand trial, any plea that has been made shall be set aside and any jury shall be discharged.

Insanity at the Time of the Offence

- Was this person insane or not acting as an automaton or not?
- It has to be kept in mind that individuals with very serious mental disorders are not actually capable of forming criminal intent
  - They don't have the ability to choose one way or the other what's right from wrong
  - If they're truly under the dysfunction of a mental disorder, they don't have the choice
    - That's why we shouldn't punish them as criminals
  - Free will is key to criminal liability (***Martineau***)

    - If you can't intend a crime at all because you have a serious mental disorder, we shouldn't be punishing the morally innocent
- Parliament has the jurisdiction to pass criminal code legislation on the mentally disordered, and has had the power ever since the BNA Act
    - Although health issues are in the realm of s. 92 of the provinces, this is more than just a health issue
    - This is within Parliament's power to protect the public and ensure fair treatment
- **History**
    - From the 19th century until 1991, an accused suffering a disorder could have 1 of 3 verdicts
        - 1) Pure/sheer acquittal
        - 2) Pure conviction
        - 3) Acquittal by insanity (automatic infinite detention)
    - Since 1991, the new CC provision does **not** talk about insanity, but talks about **not criminally responsible on the account of mental disorder** (NCR)
        - State has jurisdiction over NCR individual; might still be in danger
        - When accused is found NCR under s. 16, they go to the Alberta Psychiatric Hospital for assessment, monitoring, and usually at least for treatment
- S. 2: “mental disorder” means a **disease of the mind**
    - This is a medical-legal decision
        - A doctor will inform the court, but it's up to the TOL and the TOF to decide whether this disorder meets with the definition, and further whether the accused was suffering from a disease of mind at the **time** of the alleged offence
        - How does this happen?

s. 16 – Defence of Mental Disorder

- Derived from an old HOL case called *M’Naghten*
- **(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.
    - You are not guilty nor are you free to go, it’s an **exemption to liability**
    - The first key element to s. 16(1) is there is a "mental disorder"
        - In NA, most psychologists subscribe to the DSM
            - It's how you diagnose a mental disorder
            - So, it should be found in here if you're going to raise a s. 16 defence
            - This doesn't mean that all disorders allow for the s. 16 defence
    - 2 branches
        - "Appreciate the nature and quality of the act"
        - "Wrong"

- **Marginal note: 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.
        - In any prosecution, the accused is **presumed to be sane**
        - This is a rebuttable presumption
- **Marginal note: 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.
        - Notice it doesn't say the "burden is on the accused"
        - The Crown thus can raise the issue

- The Crown fulfills a quasi-judicial role
- If they honestly believe that the accused is suffering from a mental disorder that renders him NCR, the Crown will argue that
- **However, there are strict parameters when the Crown can do that, and can do it in 2 situations**
    - **1) After the verdict of guilty, but before the sentencing**
        - You cannot let the Defence get hijacked the prosecution
    - **2) If the Defence puts his sanity in issue first by claiming automatism**
        - The Crown can then say "you weren't an automaton, you were insane"
        - Why is this something the Crown would want?
            - If you're arguing automatism, you're arguing there is no actus reus and thus no guilt/crime
            - The Crown wouldn't be happy with this, especially if there is a potential that the person might act that way again
        - If the Crown gets that verdict, that's when the person becomes hospitalized until they get better

Cooper v The Queen – Defining "Disease of the Mind" and "Appreciating the Nature and Quality of the Act"

- **Facts**
    - At time, C was an out-patient at Hamilton Psychiatric Hospital (long history of psychosis); while drinking at a dance for patients he met with the deceased (H); they left the dance together; unsuccessful attempt at sexual intercourse; C strangled deceased to death; phoned his father saying he killed someone
    - Trial
        - His long psychiatric history was exhibited and that he suffered from seizures since he was 7; was seeing a psychiatrist since that age; he had a long history of psychiatric illness
        - Defence raised a reasonable doubt about his potential, but not insanity
        - The trial judge raised insanity, but didn't do it very well
- **SCC**
    - **"Disease of the mind"**
        - It embraces any illness, disorder, or abnormal condition, which impairs the human mind and its functioning, **excluding** self-induced states caused by alcohol/drugs and transitory mental states such as hysteria or a concussion
            - Very wide net
            - E.g. If someone got a concussion and hurt it wouldn't be NCR
                - However, it might be automatism...
            - What about people who are long-term drug users?
                - In those cases, provided that person wasn't drunk at the time, they may suffer from a true mental disorder because of the long-term effects of the drugs
        - Disease of the mind is a legal concept although it includes a medical component: **legal-medical term**
            - Therefore, it's **up to a judge to determine if there is one**, not up to a psychologist or psychiatrist
            - The judge can ask the expert if this qualifies as a disease of the mind though
            - E.g. A psychiatrist assesses the accused; they determine that the person meets the definition of X; suggests that X is a mental disorder and that it's a disease of

the mind; now up to the trial judge to agree/disagree if there's a mental disorder
        - It's usually accepted though
    - Then, it is up to the **jury** to decide whether the **accused** was suffering from this mental disorder on a BOP
        - Usually the Defence that is the one trying to raise it
- Once a mental disorder is proven you're halfway there; you now need to show that there was a failure to appreciate the nature and quality of the act
- **"Appreciate the Nature and Quality of the Act"**
    - Parliament used the term "appreciate" instead of "known"
    - This term is one way to get you the defence; the other is that they're incapable of knowing what was wrong
        - The "knowing" applies to the wrongfulness, not the nature and quality of the act
    - Additional requirement beyond the mere "knowledge" or awareness of the physical act: **must appreciate not only the nature of the act but that natural consequences would flow from it**
        - When you're doing something, you have to know that it will result in doing something
    - "Appreciating" is higher level thinking than "knowing"
        - The accused may have known he was choking the deceased, but did he appreciate that it would result in death?

- **Holding**
    - In this case, the doctor formed the opinion that the accused was not suffering a disease of the mind at the time of the offence; he knew he was causing bodily harm, but was incapable of forming intent to kill
    - Appeal allowed, new trial ordered
- **Ratio**
    - 1) Once evidence is sufficient to indicate the accused suffers from conditions which could in *law* constitute a disease of the mind, the judge must leave it with the jury to determine as a *matter of fact* whether the accused had a disease of the mind at the time the act was committed
    - 2) Test for Branch 1 ("appreciate the nature and quality of the act"): Whether the accused at the time of the event by reasons of disease of the mind was unable to appreciate not only the *nature of the act* but the *natural consequences that would flow from it*
    - For s. 16, you need 2 elements
        - 1) Mental disorder
        - 2) Failure to appreciate **OR** failure to know that you did was wrong

Kjeldsen v The Queen – Physical Consequences of One's Actions, Not the Emotional Consequences

- **Facts**
    - Appellant convicted for sexually assaulting and murdering female taxi-driver; patient at mental hospital (given a day pass) after having been found not guilty for reason of insanity on previous rape and attempted murder charges; flew to Calgary, hired taxi-driver; on way to Banff he raped and killed her with several blows to head with rock
    - Caught; his defence was "I'm suffering from a mental disorder: psychopathy"
        - Psychopaths do not appreciate the quality and nature of their act emotionally; since he's a psychopath they claim that he should fit within the s. 16 defence
- **SCC**
    - Given our expansive definition of mental disorder, psychopathy will qualify

- **However**, that is only the first part of what is required
    - Now you have to show that there was a failure to appreciate or failure to know what you were doing was wrong
- There is a floodgates concern; too many people would claim s. 16 by being a psychopath
    - It would be too commonplace amongst criminals
    - Further it doesn't fit within the definition of s. 16
        - "Failure to appreciate the nature and quality of the act" is the failure to appreciate the **physical** nature and quality of the act/consequences
        - Remember that "appreciate" is higher-level thinking than merely "knowing"
        - S. 16 thus will not stand to defend psychopaths
- In this case
    - On the question of whether the accused had an appreciation of the nature and quality of the acts or knowing they were wrong, the trial judge correctly limited the scope of the term to **physical consequences** of the act
    - S. 16(2) **does not** extend to one who has the necessary understanding of the nature and consequences of the act, but merely lacks feelings of remorse or guilt for the victim
    - **To appreciate the nature and quality of the act, you must have the capacity to know what you are doing (hitting a person on the head) and estimate the physical consequences**
        - **The act does not need to be accompanied by emotional feelings**

- **Ratio**
    - The failure to appreciate goes to the **physical** consequences of one's actions, **not** the emotional consequences associated with it

R v Chaulk – Constitutionality of Burden, Nature of NCR, and Defining "Wrong" in the 2nd Branch

- Important for 3 reasons
    - 1) Discusses constitutionality of burden of proving mental disorder
    - 2) Nature of the NCR defence
    - 3) Defining what "wrong" means in the 2nd branch of the defence
- **Analysis**
    - **The constitutionality of s. 16 goes up to the SCC in this case**
        - There is an onus on the accused to prove on the BOP that they were suffering from a mental disorder and that they are NCR
        - This is a true reverse onus (legal burden of persuasion is on the accused)
        - Should this be struck down?
            - No, it's upheld by s. 1 of the Charter
            - It is breach of s. 11(d), however it remains lawful because it's within the purview of the defence to prove that they are not sane; it would also be too much if every time you had to prove you were sane and there was no presence (time-savings argument)
            - The accused always has a right to silence; it doesn't make sense to put the onus on the Crown to prove that the accused was suffering from a mental disorder at the time
    - **The nature of the defence**
        - When is it used?
            - 1) It can be a denial of the MR
            - 2) It can be a denial of the AR
            - 3) It's an excuse for what would otherwise be a criminal offence

        - 2 branches: appreciating the nature and quality of the prohibited act **or** knowing that the act was wrong
            - "Appreciating" requires capacity to comprehend nature, character, consequences
            - "Knowing it was wrong" is not only knowledge of the illegality, but also that the action is wrong according to moral standards of society
        - If a mental disorder is made out on a BOP, the verdict is that the accused is NCR; disposition hearing is held
            - If mental disorder is not made out on a BOP, evidence **cannot** be used to raise a reasonable doubt concerning capacity, but **can** be considered on issue of whether the accused in fact had the relevant mental state at the material time
    - **Definition of the word "wrong"**
        - In *Schwartz*, "wrong" meant legally wrong (fairly narrow definition)
        - Here, "wrong" means legally wrong **OR** morally wrong
            - *Schwartz* overruled
        - If you're incapable of knowing that what you did was morally wrong, you fit within the definition
        - Question to ask: "Would the accused have known that he would be condemned by society for what they are doing?"
        - Therefore, if you're suffering from a mental disorder, and you don't qualify under the first branch (failure to appreciate), but you don't know what you were doing was wrong, you do qualify for the **second branch**
- **Ratio**
    - Accused with a disease of the mind will be protected under s. 16(2) if he is incapable of understanding that the act was wrong according to the moral standards of a reasonable member of society

R v Oommen – Distinguishing Right from Wrong at the Time of Committing the Offence

- **Facts**
    - Accused suffering paranoid delusions (mental disorder); believed members of conspiracy had surrounded his house with intention of killing him; convinced the deceased was part of it and he had to kill her; fired shots at her from rifle while she lay sleeping in his apartment
- **SCC**
    - General ability to determine right from wrong was not the issue
        - The question was whether the accused could distinguish between right and wrong **at the time of committing the offence**
    - In this case
        - Accused possessed the general capacity to distinguish right from wrong, but at the time of the killing, delusions affected interpretation of the events so he would believe killing was justified under the circumstances
        - Accused believed he had no choice but to kill; yet, in view of general knowledge of right and wrong, the accused couldn't be relived of criminal responsibility
        - However, the inquiry focuses not only on the general capacity to know right from wrong, but whether the accused **possessed the ability to apply that knowledge in a rational way to the alleged criminal act**
        - Accused accepted society's view of right vs wrong, but was unable because of delusion to perceive the act of killing as wrong in the circumstances
            - This is **not the same as someone who is a psychopath who follows a deviant moral code**
    - NCR v self-defence

        - Not necessary for the accused to establish self-defence; s. 16 is an independent condition of liability (not merely a vehicle for bringing other defences to court)
    - **You just need to be incapable of knowing that *at this time* what you were doing was wrong**
    - **Sometimes, evidence which fails to prove on a BOP that the accused was NCR can still be used by the defence to prove a lack of mens rea**
        - E.g. Accused brought evidence to prove schizophrenia and detachment from reality; jury may not accept on a BOP that she failed to appreciate under NCR, however they may consider that evidence in whether the accused formed the specific intent to kill (foresaw the natural consequences of her actions)
- **Ratio**
    - Inquiry for s. 16(1) is whether the accused possessed the capacity present in an ordinary person to know the act in question was wrong by everyday standards (appreciated the wrongfulness of the particular act he was doing at that particular time and able to make a rational choice)

R v Longridge – Application of s. 16

- **Facts**
    - Christine had suffered from a mental disorder, starting when Michael was born 18 years earlier
    - She went into depression and was hospitalized a lot
    - In his first year of birth, she believed that Michael was the messiah
    - It's found that she is bipolar, and is on medication for the next 18 years
    - Her husband Erin was always there to make sure she took these medications
    - A year before the murder, Erin died of cancer
        - Very strong psychological blow to Christine
        - He wasn't there anymore to make sure she took her meds
    - Within that year, she started to fall apart psychologically
    - She's still under the care of the psychiatrist, but all they can do is help people that want to help themselves
    - In October 2016, Christine became very unstable; police come and call Michael to come take her home; later hospitalized for 5-10 days
    - Released from the hospital, and it appears that when she was released she was prescribed only half her dosage of lithium (to stabilize mood) that she normally had been taken
    - Starting in mid-December, she starts suffering delusions again that Michael was the messiah; thinks she had to save him to save the world; she thought she had to kill Rachael and herself
        - Sits Michael and Rachael down and tells them this
        - They call her Aunt to come over; she comes over and talks her down
    - Next day, Rachel decides to take Mom to hospital; halfway there, Christine says she's feeling better so they go home
    - Rachael killed by Christine; Michael walks in seeing Christine decapitating Rachael
    - Michael stops Christine from killing herself
    - Police arrived, Christine is arrested
- **Trial judge**
    - Pure application of s. 16
    - Christine was detached from reality, and thought she had to fulfill the mission
    - She knew right from wrong in a general sense, but she had no ability to know that what she was doing was "wrong" in this specific sense
    - Falls under the 2nd branch of the s. 16 test
- **Holding**
    - Christine is NCR
        - 1. She had a mental disorder (disease of the mind)
        - 2. She was incapable of knowing the act was wrong at the time of the offence

Elements of the Mental Disorder Exemption – Summary

- Legally relevant time = **time when the act was committed** (***Oommen***)
- **1.** Mental disorder = caused by a **disease of the mind** (s. 2)
    - Defined widely: Any illness, disorder, or abnormal condition that impairs functioning of the mind; organic or psychological (***Cooper***)
        - This does **not** include **self-induced alcohol or drug highs, transient mental states, high emotion or lacking normal emotion, a transient state resulting from an external cause** (e.g. a blow to the head)
    - It must render the accused **incapable** of performing relevant mental operations
    - Legal determination made by trial judge, evidence not determinative; left up to the jury to decide if there is disease of the mind
        - Helps if the disorder is classified already in the DSM, but the s. 16 defence isn't over if it's not
- **2.** After the disease of the mind is established, there are **2 branches**
    - **1) The person is rendered incapable of appreciating the nature and quality of the act or omission**
        - They didn't know what they were doing **physically** (***Kjeldsen***)
        - Some form of analysis or cognition is needed; you **don't** have to understand the broader emotional consequences of the act
        - Requires the mental capacity to foresee and measure the physical consequences of the act
    - **2) Person rendered incapable of knowing that the act was wrong**
        - Legally wrong **OR** morally wrong (standards or notions held by society) (***Chaulk***)
            - E.g. If a person is killing someone because there are voices inside saying that the Messiah would be saved, you are incapable of knowing the wrongness of the act
        - It's not whether the accused can generally distinguish right from wrong, but whether they were incapable of discerning between the two at the time of the commission of the offence (***Oommen***)

Certain Kinds of Wrongness

- For mental disorders, you're only going to be absolved if it's a certain *kind* of wrongness
- In ***Oommen***, it wasn't a divine order that made him kill, it was a claim of self-preservation
    - In his delusion, he needed to kill her in order to preserve himself
    - That was good enough for the SCC
- In ***Longridge***, Christine did have a divine order
- If your mental disorder is not so divine, you may not get NCR
- E.g. You have delusions about the ghost of Adolf Hitler to kill Jewish people won't qualify as NCR
- E.g. Hearing from God, telling you to kill Muslims would not qualify as NCR either
- At the end of the day, that clearly does not reflect the morals of our society
- You have a lot of mental disorders, but only a few will trickle down/qualify as NCR

Automatism – Introduction

- Negation of the actus reus
- From ***Rabey*** to ***Stone*** to ***Fontaine***, it evolves

    - Know the evolution of the defence
- The SCC grapples with the defence to make sure that not too many people can claim it (floodgates concern)
- Automatism is similar to insanity in that the accused didn't have sufficient control over their actions

Definition of Automatism and the Three Types

- Automatism refers to an **unconscious, involuntary act;** state of a person, who though capable of action, is not conscious of what he is doing (**mind does not go with what is being done**)
- 3 Types
    - **1) Mental disorder automatism**
        - Governed by mental disorder rules under s. 16
    - **2) Non-insane automatism**
        - If proven on a BOP, acquittal for all offences
    - **3) Automatism caused by voluntary intoxication**
        - If proven on a BOP, acquittal for all offences
        - Now severely restricted by s. 33.1
            - Can't be used as a defence for crimes violating a person's personal integrity
    - Current State of the law
        - If automatism is not from a mental disorder or voluntary intoxication, the accused must establish the requisite facts on a BOP to have the benefit of non-insane automatism defence
        - Available to all offences
        - A successful defence is a complete acquittal, **not** a verdict of NCR

Non-Insane Automatism vs. Insane Automatism vs. Mental Disorders

- Non-Insane automatism
    - Not caused by mental disorder
    - E.g. Hit on the head with a brick, for the next 5 minutes you're not acting voluntarily
    - E.g. Sleepwalking
- Mental disorder (s.16)
    - Failing to appreciate the nature and quality of the act/omission; failing to know what was wrong
- Hybrid: Insane automatism
    - Because of a mental disorder you're actually acting without voluntary action
    - You're failing to commit the actus reus because of the mental disorder, not because of an external force

R v Rabey – First Case to Truly Distinguish Mental Disorder and Non-Insane Automatism

- **Facts**
    - R was a 3rd year geology student at university; infatuated with young woman in his class; after finding a letter she had written saying she found other men attractive, appellant hit victim on head with a rock he had been carrying and choked her; had minimal amount of sexual experience;
    - Advanced defence of non-insane automatism
        - Argued that at the relevant time the accused was in a state where he was not conscious of what he was doing, and that he wasn't suffering from a disease of the mind (not insane)
    - Victim testified at trial that accused was also just a friend to her
    - Bystander saw this and accused said "I killed and her and now I'm going to kill you"
    - Additional character witnesses testified that he was well-behaved and never showed signs of anger

- In medical evidence, Rabey was in a dissociative state that results from the nervous system shutting off
  - Performing physical acts without consciousness
- There was also no history of psychosis or organic brain disorder
- Crown argued that if Rabey was in a dissociative state, he suffered from disease of the mind and not automatism
- Trial judge
  - Found Rabey found not guilty because he had a reasonable doubt that Rabey had the actus reus and thus wasn't acting voluntary
- ONCA
  - Set aside acquittal and instead convicted for "causing bodily harm with intent to wound"

- **SCC**
  - The TOL decides whether something is a disease of the mind under s. 16; then it goes to the TOF to determine if that is the case here
  - Martin JA started us on the path for distinguishing between NCR and automatism, and keys on a factor: internal/external
    - If the cause is **externally-based → non-insane automatism**
    - If it's **internally-based→s. 16**
      - Doesn't qualify here
  - Between s. 16 and automatism, the majority adopted the judgment of JA Martin on why this was **not automatism**
    - Transient states don't qualify for mental disorder and aren't part of the "disease of the mind"
    - So, if it's a transient state, you're into potentially automatism; but what kind of transient state is needed?
    - **The typical experiences and disappointments of life aren't going to be severe enough to cause you into an involuntary state**
      - The ordinary stresses and disappointments of life do not constitute an "external cause" explaining the malfunctioning of the mind
      - A broken heart is part of ordinary life; these things are not severe enough to cause someone to go into automatism
      - Emotional stress suffered by the accused as a result of infatuation was not an external factor producing automatism; it must be something more significant
    - **However**, something highly shocking (e.g. Seeing your toddler being run over by a car) may cause you to go into a transient state and, without any history of mental disorder, acting as an automaton can happen
  - If Rabey was suffering from anything, it was a disease of the mind; otherwise he is guilty of aggravated assault
- **Holding**
  - Appeal dismissed, ONCA judgment upheld
- **Ratio**
  - In deciding between the defences of mental disorder automatism and non-insane automatism, ask: Was the accused suffering from a disease of the mind under s. 16 (was the source primarily internal or external)?

R v Parks – Sleepwalking is Non-Insane Automatism

- **Facts**
  - Respondent had been suffering stress and personal problems, having trouble sleeping; one night, got up and drove 23 km; attacked his parents-in-law with kitchen knife while they were both asleep; beat father-in-law near to death and killed mother-in-law; drove immediately to police station

    - Trial judge only put defence of automatism to jury (not a case of insanity)
        - Acquitted of first-degree, second-degree, and attempted murder
    - Court of appeal affirmed trial judgment
- **Issue**
    - Is sleepwalking properly classified as non-insane automatism, or does it stem from a disease of the mind (insane automatism), leaving only the defence of insanity for the accused?
- **Analysis**
    - The external/internal cause theory is **too narrow**; we **need to consider more than just this test**
        - We should also be looking at other factors in this contest between a mental disorder vs. automatism
    - Other factors
        - **1. Internal cause theory:** Stems from common concern for public safety
            - Was it internally or externally based?
        - **2. Continuing danger theory:** Does the condition pose possibility of recurrence?
            - Is this something that the accused would continually do?
                - You need to look at the accused's track record and whether he may do it again
            - If he poses a continuing danger, that favours a mental disorder
            - The duration and impermanence of the condition is not relevant if prone to recur
                - Recurrence suggest insanity, **but** the absence of recurrence does not preclude it
                - The absence of continuing danger does not mean an absolute acquittal should be granted
        - **3. Feigning potential:** Can the defence be easily faked?
        - **4. If not properly monitored, could this bring the administration of justice into disrepute?**
            - It would impact the reputation of justice if people could too easily claim this
        - **5. Floodgates**
            - If this is too easy to fit into, many people will try to claim automatism for losing it just one time without having a prior history
    - The internal/external test is a forensic test
    - The continually danger theory is also a forensic test
    - The others are **policy** tests
- **Holding**
    - Appeal dismissed and acquittal upheld
- **Ratio**
    - 1) Disease of the mind is a legal concept; a medical opinion is highly relevant but not determinative
    - 2) A likelihood of recurrence suggests insanity, but the absence of recurrence does not preclude it (continuing danger theory is just one of many factors)

R v Stone – Further Addressing the Distinction Between NCR and Automatism

- **SCC**
    - **Old law**
        - Insanity (NCR)
            - The accused bears the onus of proving the defence on a BOP
                - Very unique, usually they have to raise a reasonable doubt about a defence not applying
                - Here: Presumption of sanity

- If you succeed, you're probably going to the psychiatric hospital until you get better
    - Need to make sure you're no longer a danger to anybody
- NCR is highly regulated then, and something the accused has to prove

- Automatism
    - Simply raising a reasonable doubt to the AR
    - The Crown has to prove this BARD

- SCC: This incongruency between the 2 has to be changed...
    - Now, we're going to **impose the same requirements for automatism that was on the accused for insanity under s. 16**
    - If you **claim automatism (whether insane or non-insane), you bear the onus of proving it to a BOP**
        - If it's **insane automatism**, you remain under the jurisdiction of a hospital
        - It's only if you prove **non-insane automatism** that you're not under the jurisdiction of a reviewing hospital
    - **Whenever there's a claim of non-insane automatism, there's a rebuttable presumption that you are in the *insane* automatism camp**
        - AKA, there's a presumption you're in the insane camp
        - If you don't rebut this, you're considered an insane automaton and are under the jurisdiction of a reviewing hospital
        - When there's this contest, the Crown will want to keep this presumption intact and fight the accused on their attempt to make it non-insane (so they can walk)
    - A mere assertion of automatism will not suffice
        - It has to be a claim put in evidence by the accused, and secondly it has to be corroborated by psychiatric evidence
            - This **remains the law today**

- **General 2-step test for all automatism claims**
    - **1) Assess whether a proper foundation for the defence of automatism has been established**
        - Voluntariness, rather than consciousness, is the key legal element of automatism
        - He who alleges automatism must prove involuntariness on a BOP to the TOF
            - Minimum requirements:
                - 1) Assertion of involuntariness at the time of the offence
                - 2) Expert psychiatric evidence confirming the claim
            - The trial judge must recognize that the weight/persuasiveness given to expert evidence may vary from case to case (*This was rejected in **Fontaine*** since it goes beyond the air of reality test)
                - Severity/nature of the alleged "trigger"
                - Corroborating evidence of bystanders or documented medical history of similar dissociative states
                - Evidence of motive
                - Whether the alleged "trigger" is also a victim of automatism
    - **2) Determine whether the condition alleged by the accused is insane or non-insane automatism**
        - "Mental disorder" is a legal term; whether the accused actually suffered from a disease of the mind at the time is a **question of fact** for the jury
        - Trial judges start from the proposition that the **condition is a disease of the mind, then determine whether evidence in the particular case takes the condition out of that category** (some external cause which explains the malfunctioning of the mind)
        - **New holistic approach takes account of:**

        - **Internal cause factor**: Was the trigger such that a normal person in the same circumstances might have reacted to it by entering an automatistic state, as the accused allegedly did?
            - Generally must amount to extreme shock
            - Contextual objective test
        - **Continuing danger factor:** Any condition likely to present recurring danger to the public should be treated as a disease of the mind; not mutually exclusive to internal cause; 2 relevant issues = psychiatric history and likelihood that the trigger causing the episode will recur
        - **Other policy factors:** Where factors above are not conclusive on the disease of the mind question, trial judges may consider other policy concerns in determining whether society requires protection from the accused
    - If the judge concludes that the condition is **not** a **disease of the mind**, only **non-insane automatism** will be left with the TOF to decide whether the acted involuntarily on a BOP
    - If the judge concludes that the condition is a **disease of the mind**, only **insane automatism** will be left with the TOF
- **In sum**
    - If automatism has been established, start with presumption that it's insane automatism
        - Accused can rebut this presumption
    - But before this can be rebutted, both internal cause and continuing danger theory need to be passed
        - The TOL has to decide whether there is a claim for non-insane automatism or if it'll remain as insane automatism
        - Jury comes back, and TOL lets them decide if they're guilty of murder or s. 16 NCR, or if there is a possible non-insane automatism then also not guilty instead of NCR

- **Dissent**
    - Automatism and provocation are distinct concepts, and depends on the triggering event of the accused
        - When raising the defence of non-insane automatism: The triggering external event was so severe that it caused you to lose voluntary control of your body; therefore no AR
        - Provocation: You do have sufficient control of losing your temper because of the wrongful act perpetrated by the victim, but because of provocation being a merciful defence, it comes back to manslaughter as the proper verdict
            - It's for the person who had voluntary control, meant to kill, but acted in the heat of passion
- **Ratio**
    - 1) The focus for automatism is “involuntariness” rather than “unconsciousness” of actions
    - 2) Evidentiary burden for claims of automatism: Some evidence on which a properly instructed jury could find the accused acted involuntarily on a BOP
        - Minimum requirements: Assertion of involuntariness at the time of the offence **and** expert psychiatric evidence corroborating the claim
    - 3) Legal burden: He who alleges automatism must prove involuntariness on a BOP to the TOF
    - 4) In determining which type of automatism to leave with the jury, the trial judge should start with the rebuttable presumption that the condition from which the accused claims to suffer is a disease of the mind, then consider whether evidence take the condition outside of that (holistic approach)
- **Notes**
    - Majority may have been gone too far in making automatism possible to get
        - In ***Fontaine***, this was changed slightly

- *What's wrong with **Stone**: It didn't just keep it down to the air of reality, but the evidence needs to be qualitatively believable*
  - *This being too far is what the dissent said*
- 2 important tools from ***Stone:***
  - Internal cause analysis
  - Continuing danger analysis

R v Fontaine – Updating What Was Said in *Stone*

- **SCC**
  - Given ***Cinous***, the state of the law is that the trial judge must **not** qualitatively weigh the evidence
  - Trial judges are not prohibited to suggest an analytical framework though
    - However, the factors set out in ***Stone*** can no longer inform the judge's legal determination of whether the evidential burden has been met, **but can be taken into account by the TOF**
      - They are factors, but they are things the trial judge should tell the jury in determining their verdict
        - Severity/nature of the alleged "trigger"
        - Corroborating evidence of bystanders or documented medical history of similar dissociative states
        - Evidence of motive
        - Whether the alleged "trigger" is also a victim of automatism
  - ***Cinous*** came out with the **air of reality test for all defences**
    - "It's not a believability test, it's a quantitative test": **Whether there is some evidence upon which a properly instructed jury could acquit**
      - This is the same test for the Crown to get past a preliminary inquiry and committal to stand trial
- **Ratio**
  - 1) For "reverse-onus" defences such as insane automatism, the accused bears both persuasive and evidential burdens
  - 2) The defence of insane automatism must be put to the jury if there is some evidence on which a properly instructed jury acting judicially could acquit (**quantitative**, not qualitative test – ***Cinous***)

Automatism Analysis Post-*Fontaine*

- **1. Is there an air of reality for the judge to put forward an automatism defence to the jury?**
- **2. Which one of the 2 branches goes to the jury: NCR (usually what Crown is arguing) or Non-insane automatism (usually what Defence is arguing)?**
  - Start with the presumption of s. 16
  - Look at the internal cause and continuing danger factors which keep it at s. 16
  - Then look at evidence to see whether this presumption is rebutted by the accused (e.g. truly external cause)
  - At this stage of the analysis, the judge still assumes that all evidence is true – **always up to the jury to determine credibility**
    - Judge isn't prohibited from suggesting an analytical framework; things for the TOF to consider:
      - Severity/nature of the alleged "trigger"

- Corroborating evidence of bystanders or documented medical history of similar dissociative states
- Evidence of motive
- Whether the alleged "trigger" is also a victim of automatism

R v Luedecke – Important for Internal Cause and Continuing Danger Factors

- **Facts**
  - Complainant and accused fell asleep at house party on same couch (didn't know each other); she awoke to find him having intercourse with her; pushed him off; he went home, wakes up, realized he was wearing a condom; charged with sexual assault; claimed he was asleep, unaware of what was happening and unable to control actions
  - Trial
    - Advanced defence of non-insane automatism, calling it a sleep disorder
      - Had an expert come to court to say that this was a sleep disorder
        - ***Park*** is the sleepwalking case to show non-insane automatism
      - Had 4 prior instances of "sexsomnia" and had the witnesses testify that this was the case
    - Judgment: This is an isolated evidence and the previous incidents were distinguishable because of consent; the woman here was not consenting since she was sleeping
- **ONCA**
  - The Court focused on the continuing danger theory
    - It should have left the trial judge to conclude that the accused was a continuing danger
    - The presumption is that it's a mental disorder and the continuing danger theory **kept** it there
    - This blocked the claim that this was non-insane automatism
- **Ratio**
  - 1) Judges should presume a disease of the mind (s. 16), then look for evidence to remove it from that category (policy factors including continuing danger should be considered)
  - 2) Whether something is a mental disorder is a **legal** issue (with a medical component)
- **Bottos' Takeaways**
  - Reminds lawyers that just because an expert says something doesn't mean the courts need to buy it
    - The expert wasn't wrong in calling it a sleep disorder, but it's not just about curing sleep disorders, it's about the legal implications too; it's a medical-legal issue
  - The straight application of the continuing danger theory which kept the presumption from being rebutted

R v Bouchard-Lebrun – What to Do When the Accused is Suffering from Intoxication and is Making a Claim of s. 16

- **Facts**
  - Accused seriously assaulted 2 individuals while in psychotic condition caused by chemical drugs; stomped on D's head leaving him disabled
    - Victims did not die, so this was aggravated assault
      - General intent offence with 2 components
  - Says he isn't guilty of aggravated assault because of mental toxicity which made him not know what he was doing was wrong
- **SCC**
  - If this is the claim, then remember s. 33.1 denies this claim, **unless** you prove s. 16
    - **There are 2 components to s. 16**

                - 1) Identifying the mental state of the accused; is there a mental disorder
                - 2) Determining whether the accused on account of the mental disorder failed either to appreciate the nature and quality of the act, or knowing that it was wrong
        - **In this case**
            - SCC understands that accused didn't understand what was wrong, **but did he have the first component to qualify him for the test: Did he have a mental disorder?**
                - Remember: Mental disorders **do not include transient states, including from self-induced intoxication**
            - Was his mental state at the time due to the drugs?
                - Go to the analytical tools: Internal cause theory and continuing danger theory (before a s. 33.1 analysis)
                    - **Internal cause theory**
                        - Involves the comparison of the accused to a normal person, and is an objective test
                        - If we took a normal person and gave them these drugs to this extent, could you create a situation where this person also wouldn't know what was wrong?
                            - **Yes** → This shows it was more likely that the drugs (external) caused what was happening, not something internal
                    - **Continuing danger theory**
                        - Relates to public safety
                        - If he hadn't taken the drugs, he would have posed no continuing danger drug-free
                            - This shows that it was the drugs that made him think this way
- **Holding**
    - It was the drugs that caused this behaviour
    - There is no mental disorder found, both theories have been failed → **first part of s. 16 has not been found → s. 33.1 kicks in to say that there is no defence and that you're guilty**
- **Ratio**
    - Always start with the s. 16 analysis before going to s. 33.1
    - 1) Malfunctioning of the mind resulting *exclusively* from self-induced intoxication cannot be considered a disease of the mind in a legal sense (not a product of inherent psychology)
    - 2) ss. 16 and 33.1 are mutually exclusive
        - You must identify the source of psychosis (self-induced intoxication or disease of the mind)

XVI. NECESSITY

Introduction

- Some violations of the law may be excused or justified, if
    - A) Circumstances demanded act in violation of the law (necessity)
    - B) Accused coerced into act by threat of injury by others (duress)
    - C) Accused defended himself or property against attack (self-defence and defence of property)
- **Necessity** is one of the defences of overriding personal interest classified as "**excuses**"
    - **"Extrinsic"** defence

- Even if the Crown proves the actus reus and fault necessary for conviction, if the accused can show certain circumstances were present satisfying criteria, they're entitled to an acquittal
- The accused bears only the **tactical burden** respecting the defence of necessity
  - Normally lack of necessitous circumstances can be inferred from the facts
  - The accused need only raise a reasonable doubt about whether the facts support the defence
- A judge must decide if there is some evidence on which a reasonable jury properly instructed could acquit (**air of reality**); the judge is not to weigh the evidence
- The defence **excuses** an accused who otherwise would have been convicted
  - The law recognizes that in certain emergencies, complying with the law is not a real option; the **accused's act was not "morally voluntary"**
  - The defence concerns threats produced by **nature or external causes**, vs duress which concerns threats produced by *other individuals*

History of Necessity

- Philosophers in history
  - Aristotle: any sensible man does so
  - Kant: Although an act of self-preservation through violence is not inculpable, it still is unpunishable
- England: Blackstone's "Choice Between Two Evils"
- Canada
  - *Morgentaler*: Clear and imminent peril
  - Law Reform Commission: To avoid a greater harm, or to avoid an intolerable burden
  - Became part of the law: CC s. 8(3)
    - **(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.

The Three Main Elements (3 P's)

- **1. Peril**: The accused is faced with an emergency, **situation of "clear and imminent peril"**
  - Normal human instincts cry out for action and make patient unreasonable
  - Circumstances constituting emergency **could not have been actually foreseen by the accused or reasonably foreseeable**
  - If not, it is **irrelevant** that the accused was involved in an **illegal act** before emergency (but may be charged and convicted for prior transgression)
- **2. (Im)possibility:** In circumstances, compliance with the law was not a real or practical option (**demonstrably impossible**); breaking the law was a *necessity*
  - **No reasonable legal alternative**: Was there a course of conduct available that did not involve breaking the law?
- **3. Proportionality:** Conduct engaged in breaking the law caused harm that was proportional to the harm avoided (generally **less** than the harm that would have been caused if the law was not broken)
  - Generally, an emergency should also constitute an **immediate** threat, virtually certain to occur; otherwise, the accused probably had a legal alternative course of conduct available
- #1 and #2 are **subjective and objective**: Accused must actually have known he was in an emergency and believed there was no option but to break the law to escape danger; the accused must also have **reasonable grounds** for those beliefs → **modified objective test**

- #3 is **objective** (not modified): Proportionality based on “community values standard”

Who Bears the Onus?

- Defence manages to disclose **some evidence** relating to "necessity"
    - Some evidence on all of those 3 elements (3 Ps)
- Onus then falls upon the Crown to establish no necessity
    - You just have to negate one of the 3 elements, but it has to be **BARD**

What is the Judge’s Role?

- Judge must decide if there is some evidence on which a reasonable jury property instructed could acquit ("air of reality"); the judge is not to weigh the evidence
    - The amount of evidence doesn't even need to come from the D, it can come from the circumstances outlined in cross-examination
    - It doesn't have to be a substantial amount, it just has to show those 3 P’s
    - Defence or Crown case
    - No critical assessment
    - "Judge and Jury" election is assumed

R v Perka – Necessity is an Excuse, Not a Justification

- **Facts**
    - 33 tonnes of marijuana were being shipped; no intentions of being sent to Canada
    - Drug smugglers arrested for importing cannabis into Canada; claimed they were forced to come ashore because of series of problems with ship and bad weather; planned to make repairs and leave
    - Trial
        - Acquittal, based on defence of necessity
    - BCCA
        - New trial ordered, for unrelated reason
        - Necessity not dealt with
- **Issue**
    - Did the trial judge err in charging the jury with respect to the necessity defence?
- **SCC**
    - **Dickson, J (Majority)**
        - It's an excuse rather than a justification
            - **Justification**: Challenges wrongfulness of action which technically constitutes crime – considered *rightful*
                - Rejected → To recognize “greater good” formulation (entitling person to violate the law because of belief it conflicted with a higher value) would import undue subjectivity into criminal law
            - **Excuse**: Concedes wrongfulness of action but asserts circumstances are such that it ought not to be attributed to actor
                - Accepted → Recognition of human weakness in emergency situations where instincts of self-preservation or altruism impel disobedience of law; preserves objectivity
        - The excuse of necessity does not go to involuntary actus reus, but to “**moral involuntariness**”
            - The act was wrong, but it was excused because it was realistically unavoidable

            - His choice to break the law is not a true choice at all: it is remorselessly compelled by normal human instincts
        - **For necessity to apply you need**
            - 1. Urgent situation
            - 2. No reasonable legal alternative
            - 3. Proportionality (harm inflicted is less than harm sought to be avoided)
        - **The accused being engaged in illegal conduct at the time the emergency arose is not relevant per se to voluntariness of subsequent conduct**
            - Unless there's "**contributory fault**": Actor contemplated or ought to have contemplated actions were likely to create an emergency requiring breaking law (then the actions are not involuntary)
        - The Crown bears the burden of proving voluntariness of the act; often presumed, unless the accused places evidence sufficient to raise the issue of emergency situation where compliance is impossible
        - The trial judge did not err in instructing the jury on necessity based on the evidence
            - The charge was adequate to bring to jury's attention all relevant considerations **except** reasonable alternative; usually the most important question with defence of necessity
            - The lack of a "legal way out" was a serious error going to the heart of the defence; justifies a new trial
                - "No reasonable opportunity for an alternative course of action that does involve a breach of the law"
                - "Was there any reasonable legal alternative to the illegal response open to the accused?"
    - **Wilson, J (Minority)**
        - Concurred in the result
        - Explored the difficulties in assessing necessity as a **justification** (obiter)
        - "Where necessity is invoked as a justification for violation of the law, the justification must be restricted to situations where the accused's act constitutes the discharge of a duty recognized by law"
- **Holding**
    - Appeal dismissed, new trial ordered
- **Ratio**
    - 1) Necessity only **excuses** conduct, never *justifies* it, and only in limited situations where the requirements are met (all of which must be put to the jury) – moral involuntariness is the key
    - 2) Legality of preceding actions is not relevant per se to necessity, but contributory fault relevant

R v Latimer – Example of Defence of Necessity Not Being Allowed

- **Facts**
    - Appellants' daughter (T) had severe cerebral palsy; quadriplegic, complete dependent, was in frequent pain; due to multiple "mutilating" surgeries upcoming, Latimer decided T's life was not worth living; took her life with carbon monoxide poisoning, charged with first-degree murder
    - Multiple trials
        - Convicted both times
        - No "air of reality" to defence of necessity
            - Therefore, jury not charged on necessity
        - Granted constitutional exemption from mandatory minimum:
            - 1 year prison and 1 year prison
    - SKCA
        - Conviction appeal dismissed, sentence appeal allowed, life-10 imposed
- **SCC**
    - Trial decision as to necessity upheld

        - No air of reality
        - Didn't meet any of the 3 P's
            - There was no imminent peril – child's ongoing pain didn't constitute an emergency
            - There were reasonable legal alternatives – helping the child and minimizing her pain
            - The "harm avoided" (child living with pain) was disproportionate to "harm caused" (death)
    - *Modified* objective test (peril and alternative)
    - Proportionality must be objectively determined
        - "The harm avoided must be either comparable to, or clearly greater than the harm inflicted"
            - **It's not who's better, if they're equal that is okay**
                - Kerry: This is a slight easing of the test in favour of the Defence
- **Ratio**
    - For necessity to apply, the accused must at the time honestly believe, on (objectively) reasonable grounds, they're in a situation of imminent peril that leave no reasonable legal alternative open
- **Notes**
    - Did the judge mishandle the necessity defence?
        - No: There was no "air of reality"
    - Was the trial unfair because the judge misled the jury into thinking the jury would have some input on the sentence?
        - No: He was spot on, on this issue
    - Is the mandatory minimum cruel and unusual punishment?
        - No

R v CWV – Contributory Fault (The Exception to Illegality) Requires the Standard that the Accused "Ought to Have Known"

- **Facts**
    - Youth + alcohol = stupidity; young man returned to party to get keg of beer (hotly contested); dangerous threats made to him over phone beforehand; surrounded by mob; backed car away, hit a few pedestrians and a tree, caused minor injuries
    - Defence of necessity advanced
    - Trial
        - Necessity elements established
        - But he "willingly walked into the jaws of the lion" = "contributory fault"…
- **ABCA**
    - **Majority (Berger JA)**
        - New trial ordered
        - **TJ applied the wrong standard**
            - "He made no finding that the appellant foresaw, or ought to have foreseen, the necessitous situation"
                - You have to apply the standard of "ought to have known that you were going to have serious problems that would endanger life"
    - **Dissent (McClung JA)**
        - The evidence is clear that while the Appellant could not have known with nicety the fullness of the response, he voluntarily resorted to self-help to recover the stolen property, courting a predictable reason
- **Ratio**
    - 1) If the emergent situation is reasonably foreseeable on the modified objective test, the accused cannot claim moral involuntariness going to necessity; it depends on the facts of the case

- 2) The illegality of actions does not automatically dismiss the defence of necessity

XVII. DURESS

Introduction

- Duress is an **extrinsic defence** like necessity: Where the accused can show additional circumstances were present that satisfy certain criteria, the accused is entitled to an acquittal
  - Duress involves a **third party threatening death or bodily harm to the accused or another individual**
    - Unlike necessity which concerns "compulsion by the circumstances"
  - Duress **may** support the inference that the accused did not have the mens rea for the offence, but **not always** (distinction between motive and mens rea)
  - The accused bears only the **tactical burden**
    - They may or may not choose to raise the defence of duress
    - For the defence to succeed, need only a raise a reasonable doubt about whether the facts support it
  - The trial judge decides whether there is an air of reality to the defence; they don't weigh the evidence
  - The defence operates as an **excuse** recognizing human frailty
    - Although the act may conscious and voluntary in the actus reus sense, because of duress there is no real or practical choice

Two Legal Sources of Duress

- **1) S. 17 of the Criminal Code**
  - 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).
- **2) The common law defence** applies to persons not covered by s. 17 (parties to an offence)
- In ***Ruzic***, SCC struck down two elements of s. 17 for being inconsistent with s. 7 of the Charter
  - 1) The requirement of immediacy of threat, and
  - 2) Presence of person issuing threat
- Elements of s. 17 were clarified in ***Ryan***: 4 elements + 2 aspects of the common law defence to replace immediacy and presence requirements
- The Court also held that **proportionality** is a crucial part of the defence of duress
  - It's not an additional requirement but as **part of the moral involuntariness test**
    - Proportionality depends on 2 elements
      - 1) Difference between the nature and magnitude of harm threatened and offence committed
      - 2) General moral judgment regarding the accused's behaviour

        - It's a **modified objective test**, unlike necessity

The Statutory Defence of Duress

- Applies to **Principals** and is comprised of 7 elements:
    - A) Threat of bodily harm of death directed against the accused or third party
    - B) Reasonable belief that the threat will be carried out*
    - C) No safe avenue of escape*
    - D) Close temporal connection*
    - E) Proportionality*
    - F) Accused was not part of a conspiracy or association (and subject to compulsion)
    - G) The offence is not the list of excluded offences
- * = **modified objective standard**: Whether a reasonable person similarly situated would have acted in the same manner as the accused

The Common Law Defence of Duress

- Applies to **parties** to offences and is comprised of 6 elements
    - Includes elements A-F above
        - The only difference is who the defence applies to and that there is **no list of excluded offences like in s. 17**
    - The list is arguably no longer of any legal/practical significance after ***Ryan*** established proportionality as central to the moral involuntariness analysis

R v Ruzic – Striking Down Two Elements of s. 17 of the CC that Are Inconsistent With s. 7 of the Charter

- **Facts**
    - Toronto airport; heroin importation; 21-year-old female arriving from Belgrade; 2kg strapped to body
    - Duress defence raised
        - "Mirko Mirkovic" - warrior who had forced her in her evidence to do this
        - Expert evidence was tendered as to the nature of the Serbian legal situation and the number of gangs in Serbia
            - Helped support her evidence
    - There are 2 things missing though:
        - 1) Immediacy of the threat
            - She was in Canada by this time
            - She could have just dumped the drugs?
        - 2) Mirko wasn't going to be present when she landed
- **Analysis**
    - S. 17 requires:
        - Immediate death or bodily harm
        - Person present during commission of offence
    - Charter invocation
        - S. 7 is infringed
        - S. 1 does not protect the decision
    - **Lebel J**
        - **Are statutory defences owed special deference by reviewing courts?**

- A statutory defence, like any other legislative provision, is not immune from Charter scrutiny
- The courts would be abdicating their constitutional duty by abstaining from such a review
- **Subject to constitutional review, Parliament retains the power to restrict access to a criminal defence or to remove it altogether (*Penno*)**

▪ **Is it a PFJ that only morally voluntary conduct can attract criminal liability?**
- Yes, this is based on necessity
- A person acts in a morally involuntary fashion when, faced with perilous circumstances, she is deprived of a realistic choice whether to break the law
- Conduct that is morally involuntary is not always intrinsically free to blame
- **We're not dealing with an analysis of the mens rea (since this is an excuse defence not a justification defence)**
  - **Duress simply says that it's wrong, but we understand the predicament you were in**
- Only voluntary conduct should attract criminal liability

▪ **Do the immediacy and presence requirements in s. 17 infringe this principle?**
- The Court has in the past construed s. 17 in a narrow fashion
- **The immediacy and presence requirements, taken together, clearly preclude threats of future harm**
- **Section 17 breaches s. 7 of the Charter because it allows individuals who acted involuntarily to be declared criminally liable**
- The words of s. 17 do not dictate that the target of the threatened harm must be the accused

▪ **What can the common law tell us on the defence of duress?**
- There are no constraints of immediacy and presence and thus appears more consonant with the values of the Charter
- Like necessity, the common law rule of duress evolved from attempts at striking a proper balance between those conflicting interests of the accused, of the victims, and of society
- For duress, proportionality has a subjective element
  - This is different than necessity which is objective solely

▪ **If there is a violation of s. 7 can it be justified in s. 1?**
- No

○ **The edited requirements for the defence of duress**

▪ 1) Air of reality - Accused
- Threat of harm (accused or third party)
- Believed
- Not on the excluded list
- Not in conspiracy or criminal association
- **Close temporal connection**
  - This **replaces** the immediacy and presence requirements
- No safe avenues of escape
- Proportionality

▪ 2) Reasonable doubt - Crown
- Disproving one of these elements

- **Ratio**
  - 1. Only voluntary conduct – product of free will and controlled body, unhindered by external constraints – should attract penalty and stigma of criminal liability (PFJ)
  - 2. Immediacy and presence requirements in s. 17 infringe this principle

R v Li, Chen, and Liu – "No Safe Avenue of Escape" Doesn't Work Here

- **Facts**
  - Home invasion by 4 individuals, including the 3 appellants and one "Tsang"
  - Residents tied up or kidnapped
  - Objectives?
    - Capture informant
    - Seek ransom
  - 22 days as hostages before freed
  - Appellants admitted involvement, raised defence of duress
    - Debts forgiven for participation
    - Threats to their families in China
  - Trial
    - Convicted for kidnapping, forcible confinement
    - Sentence: Life imprisonment
- **Ontario Court of Appeal**
  - Not comparable to ***Ruzic***
    - **In evaluating the appellant's claim that they had no safe avenue of escape**, it is **important to take into account their voluntary decision to get involved with the Snakehead organization in the first place**
      - The appellants freely and without coercion placed themselves in the clutches of alleged tormentors; it would be a mockery of justice to place the issue of duress before the jury (matter of policy)
    - They didn't get past the air of reality
    - Doesn't seem to be proportionality
  - What about s. 17?
    - Doesn't s. 17 exclude forcible abduction or hostage taking?
      - However, forcible abduction means under the age of 14
        - This is a different provision than kidnapping
      - Hostage taking also is a different section
    - So, neither of these apply
- **Ratio**
  - Where the accused put himself in a position likely to be subjected to compulsion, such as voluntarily joining a criminal organization, he cannot avail himself of the defence of duress

R v Ryan – Elements of the s. 17 Defence Clarified

- **Facts**
  - Abused wife counseled another person (undercover police officer) to murder her husband
  - Husband had threatened to kill her and her daughter; evidence of long-term spousal abuse
  - Trial
    - Duress defence advanced, found to have "air of reality", acquitted
  - Nova Scotia CA
    - Duress defence once again accepted
    - Comparing to self-defence
    - "No principled basis to justify a distinction between the aggressor as opposed to a third party being the targeted victim"
      - *There's a difference though*
        - *Self-defence: Justification*
        - *Duress: Excuse*
- **SCC (Lebel and Cromwell JJ)**

- The defence of duress was not available to her, not matter how compelling her situation was viewed in a broader perspective
- **Self-defence is distinguished**
  - 1. Meet force with force
  - 2. Motive for threat is irrelevant in self-defence
  - 3. Completely codified in the CC, as opposed to being a companion to the common law
  - 4. Rationale
    - While in a case of duress we excuse an act that we still consider to be wrong, the impugned act in a case of self-defence is considered right
- **Duress is, and must remain, an applicable defence only in situations where the accused has been compelled to commit a specific offence under threats of death or bodily harm**
- **4 requirements of statutory defence of duress** (post-***Ruzic***)
  - Threat of harm (accused or third party)
  - Believed that threat would be carried out (reasonably) - Modified objective test
  - Not on excluded list
  - Not in conspiracy or criminal association
- **3 elements of common law defence of duress which operate alongside s. 17**
  - Close temporal connection
  - No safe avenue of escape - modified objective
  - Proportionality - modified objective (unlike Necessity)
- The more flexible common law elements of duress cannot be used to "fill" the gaps created by the defined statutory limitations on self-defence
- **6 common elements of statutory and common law defence of duress:**
  - Threat, reasonably believed threat would be carried out, no safe avenue of escape, close temporal connection, proportionality, accused not party to conspiracy or association
- **Major differences between statutory and common law defence of duress:**
  - The **statutory** defence applies to **principals** has a lengthy **list of exclusions**
  - The **common law** defence applies to **parties** to an offence, and it's not clear whether any offences are excluded

- **Ratio**
  - 1. Duress is available **only** in situations where the accused has been compelled to commit a specific offence under threats of death or bodily harm
  - 2. The more flexible common law elements of duress cannot be used to "fill" the gaps created by the defined statutory limitations on self-defence

R v Aravena – Duress Remains Available to People Charged as Parties to Murder

- **Facts**
  - 8 members of gang shot and killed on a farm; culmination of internal strife within gang organization
  - Mather, Aravena, and Gardiner charged with aiding and abetting
  - Trial
    - Ruled duress not available as a defence to murder and is not applicable to this case
- **Analysis**
  - The statutory defence of duress applies to principals; the common law defence applies to parties
    - The 6 elements of both defences summarized in ***Ryan***
    - Based on the case law at the time, the trial judge erred in holding that the common law of defence was not available to persons charged as parties to a murder
  - Are there any offences excluded from the common law defence of duress?
    - The analysis presumes that a person advancing the defence has the full mens rea required of an aider and abetter to murder

        - Criminal liability requires voluntariness; extended beyond physically voluntary conduct to explain the rationale underlying the defences of Necessity and Duress (**moral involuntariness**)
            - It doesn't mean the conduct was morally blameless (the defence **excuses**, not justifies)
            - Voluntariness (moral and physical) is a **PFJ**
- **Holding**
    - Conviction upheld
    - Duress didn't begin until the second person was already killed
- **Ratio**
    - Defence of duress, as strictly defined in the jurisprudence, remains available to persons charged as parties to murder

XVIII. MISTAKE OF LAW

Introduction

- Basic rule = ignorance of the law is no excuse
- **S. 19 – Ignorance of the Law**
    - Ignorance of the law by a person who commits an offence is not an excuse for committing that offence.
    - A person can be convicted even without knowing their actions were illegal
- Contested in 3 major ways:
    - 1) How is "mistake of law" differentiated from "mistake of fact"?
    - 2) Do some offences require, as part of mens rea, that the accused know his conduct is contrary?
    - 3) May error be relied on a defence if induced by the state ("officially induced error")?

R v Campbell and Mlynarchuk – Mistake of Law is Not a Defence to a Crime

- **Facts**
    - Campbell convicted at summary conviction for unlawfully taking part in an immoral/indecent performance; danced nude on stage before audience at nightclub
    - Campbell argued they lacked the necessary mens rea for the offence; engaged to do the performance because they relied on (incorrect) statement that judge had ruled they could go ahead with that type of dancing
- **Analysis**
    - **Mistake of fact** is a defence to a criminal charge (where facts believed by the accused, if true, would have afforded her a defence); mistake of **mixed** fact and law is also a defence
    - In this case
        - The appellant made no mistake of fact
        - Rather, there was a **mistake of law in misunderstanding the significance of a decision or reasons of a judge**
    - In some situations, **mistake of law can negate malicious intent required for a crime** (i.e. willful intent or malice)
        - This is **not applicable here**, as no special intent was required for this offence (only mens rea required is that Campbell intended to perform the dance)

    - **Excuse, or legal justification, is a defence where the act complained of was authorized by some other law**
        - S. 19 essentially says that this is not available when a person has made a mistake as to whether this act is excused or authorized by another law
    - As a matter of **public policy** (and necessity), the defence of mistake of law cannot be allowed
        - However, it should be considered in the **mitigation of the sentence** (here: absolute discharge)
- **Ratio**
    - A mistake of law does not afford a defence to a crime, but can be considered in mitigating a sentence

R v Whelan – Relying on Solicitor's Advice

- **Facts**
    - Landlord entered property and seized assets, charged Whelan with breach of court order and theft; W testified he was aware of order but went ahead only after consulting with solicitor who advised him "an argument could made" that order was limited to month of July
    - Trial acquitted – no mens rea
    - Court of Appeal overturned acquittal
- **Analysis**
    - The most common argument from people relying on solicitor's advice is that the person was unaware that their actions were unlawful; to accept this would be to accept mistake of law as a defence
        - **Knowledge that one's actions are contrary to law is not a constituent element of mens rea for most offences**
        - Must distinguish mistake of fact and law; the accused cannot rely on the decision of the lower court **or** advice of lawyer to criminal charge
- **Ratio**
    - 1) Accused can't rely on the advice of their lawyer as a defence to a criminal charge
    - 2) Mistake of fact, which includes ignorance of fact, exists when an accused is mistaken in his belief that certain facts exist when they do not, or that certain facts do not exist when they do
        - Ignorance of fact exists when an accused has no knowledge of a matter and no actual belief or suspicion as to the true state of the matter
    - 3) By contrast, a mistake of law exists when the mistake relates not to the actual fact but rather to their legal effect

Defence of Officially Induced Error

- **Strict liability offences**: There is a defence available if the accused can show
    - Relied on erroneous advice from office and accused's reliance was reasonable (with reference to: efforts to ascertain proper law, complexity of law, position of official, clarity, definitiveness, and reasonableness of advice given)
- **Criminal offences**: Defence *may* be available for mens rea offences if:
    - Agent of state advises or otherwise causes accused to commit offence or represents that contemplated acts are legal, and accused relied on the agent's expertise and performed prohibited acts

R v Jorgenson – Defence of Officially Induced Error is an Excuse and the Six-Part Test

- **Facts**
  - Though ON Film Review Board had approved all tapes, officers concluded obscene; accused charged with knowingly selling obscene materials without lawful justification or excuse
  - Trial – Found 3 films were obscene within meaning of the Code due to portrayal of sex coupled with violence
  - ONCA – Upheld convictions
    - Board approval is not a lawful justification or excuse
- **Issue**
  - Did the accused knowingly sell obscene material?
    - If so, was it without lawful justification or excuse?
- **Analysis**
  - **Majority (Sopinka J)**
    - Vendor lacked specific knowledge of content of the film (**mistake of fact**) = **no mens rea**, conviction overturned
  - **Concurring (Lamer CJC)**: Agreed with Sopinka on the first issue; disagreed on the second
    - The Crown is required to prove the accused knew of specific set of facts which lead the court to conclusion that material was obscene (no that he knew it was obscene in law)
      - Approval by the Board **cannot** negate the mens rea of the offence
    - An accused can be excused from conviction on the basis of an **officially induced error of law**
      - Reasonable reliance on the Board's approval of film (official advice) is sufficient for judicial stay of proceedings of be entered (**exception from "ignorance of the law is no excuse)**
    - **Steps for officially induced error defence:**
      - 1. **Error of law or of mixed law/fact** was made
      - 2. Accused **considered legal consequences** of actions
        - It's insufficient for an accused who wishes to benefit from the excuse to simply *assume* conduct was permissible
      - 3. Advice obtained came from an **appropriate official**
        - From a reasonable person in the position of the accused, the agent is normally considered responsible for advice about particular law in question
      - 4. Advice was **reasonable** in the circumstances (not usually difficult to meet)
      - 5. Advice was **erroneous**
      - 6. Accused **relied** on advice in committing the act
    - Defence can only be raised after the Crown has proven all elements of offence
- **Holding**
  - Accused acquitted
- **Ratio**
  - The defence of officially induced error is an **excuse**, not a justification, and only where the 6-part test is met

R v Levis (City) v Tetreault – Adding the Objective Element to 2 Parts of Lamer's Framework

- **Facts**

    - Accused advised that registration renewal notice would be sent in mail; incompletely addressed, post office returned; charged with driving unregistered vehicle; thought date on his license was payment due date for renewal
    - Accused argued defences of due diligence and misled by erroneous information obtained from official (to avoid conviction on charge of operating a motor vehicle without paying registration fees)
- **Issue**
    - Nature and availability of defence of officially induced error
- **Analysis**
    - This court has never clearly accepted the defence of officially induced error, although several Canadian Courts have
        - S. 19 (ignorance of the law is no excuse for committing an offence) applies to regulatory offences created by Quebec legislation
        - But inflexibility of this rule causes concern where the error of law of the accused arose from the error of a state gent, and the state demands that criminal law be applied strictly to punish conduct
    - ***Jorgenson***: Defence of officially induced error (Lamer CJ)
        - Excuse with effects similar to entrapment
            - Wrongfulness of act established, but because of circumstances leading up to the act, the accused is not held liable for the act in criminal law (entitled to stay)
        - Adopted Lamer's 6-step framework, **with an addition:** necessary to establish **objective reasonableness of not only advice, but also reliance on advice**
        - Must be considered from perspective of a reasonable person in a situation similar to that of the accused
    - The charge of operating a motor vehicle without registration is a **strict liability offence**
        - **Due diligence defence available but not made out**; accused should have been concerned when it failed to receive notice, but did nothing (they had a duty to do more)
        - **Not all conditions for defence of officially induced error have been met**; respondent could not have considered legal consequences on the basis of advice from official, or acted in reliance on opinion (since no info regarding nature/effects of legal obligations requested)
- **Holding**
    - Court overturned acquittals and substituted convictions
- **Ratio**
    - Defence of officially induced error constitutes a **limited but necessary exception** to the rule that ignorance of law is no excuse; **advice** and **reliance** on advice must be assessed from perspective of **reasonable** person in **circumstances of accused**

Mistake of Law in Drafting of Offence Provision

- The drafting of a small number of offences, however, indicates that a mistake of law may support an acquittal
    - E.g. If a statute provides that a person is liable for actions committed "without colour of right" (i.e. without a belief in the legality of his actions), a mistake of law supporting "colour of right" will support an acquittal

R v Howson – Colour of Right

- **Facts**

- Appellant and his brother operated Ace Towing Service; letter signed by superintendent of parking lot appeared to give them "sole authority to tow any cars parked in private lot without proper consent"; Haines' car towed and only released on payment; appellant charged with the theft
- Trial
  - Convicted (but judge did not think Howson was trying to steal the car)

- **Analysis**
  - **Porter CJ**: Evidence shows there was no legal right to withhold the vehicle
    - However, if a jury properly instructed were satisfied that accused honestly but mistakenly believed he had a right in law or in fact, they should acquit
      - Test for honest belief is **subjective**, not objective
    - S. 19 only applies when there is an offence, **no offence if there is a colour of right**
      - Everyone commits **theft** who fraudulently without colour of right takes and commits to use the property of another
      - Case where innocence of law affects legality of acts
    - If accused did **not** have a colour of right, under circumstances, that was sufficient to justify his refusal to release vehicle, he would be guilty of theft
    - Accused acted on instruction from his brother; believed he had right to retain car
    - Clear that lower court judge did not believe accused was intending to steal car; misdirected himself by failing to consider question of colour of right
  - **Laskin JA:** Colour of right embraces matters of law or fact, but must be an **honest belief** (although mistaken one)
    - Unreasonableness of belief, objectively considered, can be considered but cannot alone establish no colour of right; nothing in evidence to suggest belief anything other than honest
    - **But** colour of right can no longer be invoked to avoid conviction for theft by accused; he is now put on notice that his actions are illegal
- **Holding**
  - Appeal allowed; conviction quashed, and verdict of acquittal entered
- **Ratio**
  - There is no offence if there is a colour of right – where the accused acted under a genuine mistake of law (honest but mistake belief)
    - S. 19 only applies when there is an offence

R v Klundert – Mistake of Law Can Apply to Tax Evasion

- **Facts**
  - Optometrist formed opinion that the federal government did not have legislative power to collect income taxes; stopped filing and paying; charged with making false statement and tax evasion
- **Issue**
  - Can the Doctor's belief constitute a mistake of law and negate the fault requirement for tax evasion?
- **Analysis**
  - *Income Tax Act*; every person who **wilfully** evaded or attempted to evade compliance with act or payment of taxes imposed is guilty of offence
    - "Wilfully" means
      - I) Accused must know taxes are owing under act, and
      - II) Accused must attempt to avoid payment of taxes

        - The mistake of law defence is applicable in Income Tax prosecutions under this section
        - Part of act that is necessarily complex; it's accepted that people will act on the advice of professionals which will often turn on meanings given to words in the act that are open to interpretation
        - **Mistake MAY negate the fault requirement in provision, regardless whether factual mistake, legal mistake, or combination of both**
    - In this case
        - Klundert knew he owed taxes imposed by acts; mistake did not go to knowledge of his obligations to pay taxes but rather governments authority to request taxes (believed law was invalid)
        - **This is a mistake of law which is irrelevant to fault requirements in the provision** ("the laws don't apply to me" cannot constitute free standing excuse for non-compliance)
- **Holding**
    - The Doctor's belief cannot constitute a mistake of law
- **Ratio**
    - Mistake of law defence can apply to certain provisions such as tax evasion, but only in very narrow circumstances (where relevant to fault requirement)

R v Watson – Jurisdiction Does Not Give Rise to a Colour of Right

- **Facts**
    - Watson's ship was registered in Canada under the Shipping Act; therefore, any offences committed on it could be prosecuted in Canada
    - Accused: Honest belief that Canadian law did not apply outside 200-mile limit; argued trial judge defined scope of colour of right too narrowly (should encompass such a belief)
- **Issue**
    - Does colour of right extend to jurisdiction?
- **Analysis**
    - Whether one uses colour of right as limited exception to s. 19 or as a negation of mens rea, it does **not** extend jurisdictions of the criminal law
- **Ratio**
    - Jurisdiction is a mistake of law which does **not** give rise to a colour of right defence