CRIMINAL

Contents

SOURCES OF CRIMINAL LAW

Criminal law is enacted by *federal* Parliament in Canada. It derives this power from s 91(27) of the *Constitution Act, 1867*. Under s 91(27), federal Parliament controls both **(a)** substantive law, i.e., defining crimes, and **(b)** procedural dimensions, i.e., how the law is actually enforced. Criminal laws are designed to denounce and punish *inherently wrongful behaviour* and to deter people from doing things that present a *serious risk of harm*.

The *Criminal Code* contains most criminal offences, and the *Charter* places limits on the criminal law. Most offences are *regulatory* (i.e., not criminal) and SDKGJS

The codification of criminal law is significant, because it facilitates different aspects related to certainty (i.e., lack of vagueness) that are fundamental to the rule of law:

(1) fair notice to the citizen partially comprised of the formal aspect of notice (acquaintance with actual statutory text)

(2) limitation of law enforcement discretion; "a law must not be so devoid of precision in its content that a conviction will automatically flow from the decision to prosecute."
(Gonthier J in *R v Nova Scotia Pharmaceutical Society* 1992 SCC)

R v Heywood 1994 SCC (CB 34)

***Ratio* (Cory J)**: A provision is overly broad where its means are too wide-ranging in effect, such that "in some applications the law is arbitrary or disproportionate."
F: s 179(1)(b) of the *Code* said it was an offence for a person with a past sexual violence conviction to be "found loitering in or near a school ground, playground, public park or bathing area." D had such a conviction and was found photographing children playing in a playground.
I: Is s 179(1)(b) overly broad?
A: The provision is overly broad in (a) geographic scope, (b) temporal application and in (c) the population it applies to. It violates s 7 of the *Charter*.
Diss. (Gonthier J)*:* The provision can be interpreted in a way that is not vague or overbroad (i.e., we can read 'loitering' as connoting an ulterior purpose), and it should be interpreted in that way. *[The Supreme Court is now generally willing to take this dissent's approach to save legislation, as in CFCYL v Canada, infra]*

Canadian Foundation for Children, Youth and the Law v Canada (AG) 2004 SCC (CB 36)

***Ratio* (McLachlin CJ)**: In order to avoid vagueness, a law must 'set an intelligible standard' for citizens and officials by delineating legality, illegality, and a reasonably narrow risk zone. s 43 should be interpreted as setting such a standard.
F: s 43 of the *Code* is a defence creating section that protects the use of force "by way of correction toward a pupil or child … if the force does not exceed what is reasonable under the circumstances." Applicant contends that this is vague or overbroad.
I: Is s 43 vague? What must a law do to be appropriately narrow?
A: s 43 clearly defines who it applies to, and less clearly defines what constitutes reasonable correction. This is OK—we should refer to societal consensus on what is reasonable. s 43 can be interpreted such that it is consistent with empirical evidence about the risk of harm to children.
Diss. (Arbour J): s 43 gives inadequate notice to parents and teachers. The majority's interpretation could not have been anticipated.

THE ADVERSARIAL SYSTEM

The Role of Crown Counsel (CB 271)

Rand J in ***Boucher v The Queen*** 1955 SCC (CB 271): "It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; *it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime*" (emphasis added).

Prosecutorial Discretion (CB 273)

"Prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it." (The Court in ***Krieger v Law Society of Alberta*** 2002 SCC, quoted in ***Anderson***, *infra*)

R v Anderson 2014 SCC (CB 274)

***Ratio* (Moldaver J)**: Prosecutorial discretion "is reviewable by the courts only for abuse of process."
F: **A** is an Aboriginal man charged with an offence with a mandatory minimum sentence. The Crown was able to lay this charge because **A** had prior conviction 21 years prior. Under s 7 of *Charter*, judges must consider an **A**'s Aboriginal status when sentencing.
I: Should the Crown be obliged to consider Aboriginal status when charging defendants with crimes with mandatory minimum sentences?
A: The abuse of process doctrine is only available where there's evidence that the Crown's decision "undermines the integrity of the judicial process", "results in trial unfairness", is made for "improper motive" or in "bad faith" (from *R v Nixon*).

R v Stinchcombe 1991 SCC (CB 281)

***Ratio* (Sopinka J)**: The Crown has the duty to disclose all relevant information (whether or not it is part of their tactical approach) to the defence.
I: Must the Crown disclose information to **A**?
A: Results of the Crown's investigation are "property of the public to be used to ensure that justice is done." **A** has the constitutional right to the disclosure of all relevant information under s 7 right to full answer and defence. [**NB**: the differing roles of prosecution and defence means this isn't reciprocal.]

Plea Bargains (CB 283)

Rosenberg JA in ***R v Hanemaayer*** 2008 ONCA: "to constitute a valid guilty plea, the plea must be voluntary, unequivocal and informed".

However, according to ***R v Kumar*** 2011 ONCA, even if a plea meets that threshold the Court can overturn it at its discretion if new evidence explains the circumstances under which it was elicited. (In that case, a prominent pediatric forensic pathologist had recently been shown to be a fraud—the guilty plea was made because there did not appear to be a way to overcome expert testimony that was later shown to be false.)

The Role of Defence Counsel (CB 287)

No case law about this for obvious reasons. CBA *Professional Conduct* says that a defence lawyer must 'protect the client as far as possible' from being convicted except in a court of competent jurisdiction and upon sufficient evidence. Defence lawyers cannot rely on false or fraudulent strategies—esp. important where the client admits some or all of the elements of the crime to counsel.

Where the **A** has admitted to defence counsel the factual and mental elements necessary to constitute the offence, counsel may take objection to the jurisdiction of the court, to the form of the indictment, or to the admissibility or sufficiency of the evidence, but must not suggest that some other person committed the offence, or call any evidence that the lawyer believes to be false.

It is improper for counsel to disclose privileged communications or to undermine their client with insinuations or suggestions. Not clear if a lawyer can disclose that his or her client has committed perjury.

BURDEN & QUANTUM OF PROOF

Burden of Proof (CB 313)

The burden of proving the **A**'s guilt falls on the Crown at all times, and never shifts to the **A**. Every element of the crime (both *AR* and *MR*) must be proven by the Crown (***Woolmington v DPP***, 1935 HL). [Crown responsible for movement from presumption of innocence (0%) to BRD (close to 100%)]

Quantum of Proof (CB 324)

In Canada, BRD is considered a term of art of which juries must be given a definition. BRD is not comparable to everyday doubt, even the most important decisions in ordinary life. BRD is inextricably connected to the presumption of innocence. It should not be characterized in moral language (Cory J in ***R v Lifchus***, 1997 SCC).

Iacobucci J in ***R v Starr***, 2000 SCC: TJ's instruction to jury should characterize BRD as "much closer to absolute certainty" than BoP. BRD standard is unique to the legal process.

L'Heureux-Dubé J's dissent in ***Starr***: TJ's instruction to jury should be read as a whole, and its message read holistically. It should not be treated like a checklist.

When credibility is important (i.e. where we want to avoid a "credibility contest"), use Cory J's ideal jury charge in ***R v WD***: **(1)** If the jury believes **A**, they must acquit; **(2)** If they jury does not believe **A** but are left in RD by it, they must acquit; **(3)** Even if the evidence of the **A** does not leave the jury in RD, they must ask themselves whether the evidence they do accept leaves them convinced BRD of **A**'s guilt. **(4**—added by Binnie J in ***R v JHS***) If the jury does not know whether to believe **A**'s testimony or not, they must acquit.

Woolmington v DPP 1935 HL (CB 313)

***Ratio* (Viscount Sankey LJ)**: The prosecution must prove **A**'s guilt. This burden never shifts to **A**.
F: **A** killed his wife and testified that it was accidental. Statement **A** made to police and other behaviour suggested it was an intentional killing. TJ instructed the jury that once it is proven that **V** died through the act of **A**, it is assumed to be murder unless **A** can prove it is not.

R v Lifchus 1997 SCC (CB 325)

***Ratio* (Cory J)**: BRD is a term of art of which criminal juries must be provided a definition.
F: TJ instructed jury that "reasonable doubt" should be understood in its "ordinary, natural every day sense". SCC held that this was an error.
A: "The standard of proof of BRD is inextricably intertwined with…the presumption of innocence". A RD is based on reason and common sense, and is logically connected to evidence or its absence. A RD is not an imaginary doubt, nor must the jury be completely certain.
Avoid moral language, comparisons to everyday life, and adjectives other than "reasonable".

R v Starr 2000 SCC (5-4 decision) (CB 326)

***Ratio* (Iacobucci J)**: BRD should be described as "much closer to absolute certainty" than BoP.
F: TJ instructed jury that "reasonable doubt" had no special connotation. TJ said that BRD did not require absolute certainty.
A: BRD does not require absolute certainty, but it is unique to the legal process.
Diss. (L'Heureux-Dubé J): TJ's charge to jury, when examined in its entirety, properly communicated the concept of BRD. *Lifchus* does not provide a checklist that TJs must read off of. It tells us to read TJs' instructions holistically.

CONSTITUTIONAL DIMENSIONS OF THE BURDEN OF PROOF

Charter Provisions

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.
s 7: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
s 11: Any person charged with an offence has the right…**(d)** to be presumed innocent until proven guilty according to law in a fair and public hearing by and independent and impartial tribunal.

Oakes Test (CB 320)

Apply Oakes test whenever proving that a limit on a Charter right is justified under s 1.
1. The limit must secure an objective which is pressing and substantial in a free and democratic society.
2. The means adopted must be reasonable and demonstrably justified:
- **(a)** The measure adopted must be carefully designed to achieve the objective (i.e. rationally connected to the objective). (**NB** w/r/t s 11(d), changed to rational connection between the limit of presumption of innocence and the legislative objective in *R v Laba* at CB 321.)
- **(b)** The means chosen by the legislature should impair the right as little as possible in order to achieve the objective (**NB** this requirement is v. watered down at this point).
- **(c)** There must be proportionality between the effects of the measure which limits the *Charter* right or freedom and the objective identified in stage 1.

Dickson CJ in ***R v Whyte,*** 1988 SCC: Distinction between elements of the offence and other aspects of the charge are irrelevant to s 11(d) *Oakes* inquiry. The real concern is whether an accused may be convicted despite the existence of a RD. So reverse onus re: a defence subject to same inquiry.

Dickson CJ in ***R v Keegstra,*** 1990 SCC: Placing a reverse onus on **A** to prove the truth of statements proven BRD to wilfully promote hatred passes the *Oakes* test.

McLachlin J (ASTW) diss in ***Keegstra***: Reverse onus places burden on the party least able to meet it and undermines Parliament's intention to make falsehood a part of the crime of wilfully promoting hatred.

R v Oakes 1986 SCC (CB 316)

***Ratio* (Dickson CJ)**: To prove that a limit on a *Charter* right is justified under s 1, the party seeking to uphold the limitation must show on BoP that it passes the *Oakes* test.
F: s 8 of *NCA* says once possession of narcotic is proven, **A** is assumed to be trafficking unless **A** establishes otherwise. **A** was found with 8 vials of hash oil and $619.45. **A** alleged that hash was for personal use and $$$ was from worker's comp.
I: (a) Does s 8 of *NCA* violate s 11(d) of the *Charter*? (b) If so, is it saved under s 1 of the *Charter*?
L: s 8 *Narcotic Control Act* & ss 1, 11(d) *Charter*.
A: (a) s 8 of the *NCA* establishes a rebuttable mandatory presumption upon Crown proof of possession BRD. Mandatory because provision says **A** 'shall' establish otherwise. Rebuttable because **A** can rebut it by establishing otherwise. (NB: establish means 'prove on BoP'.) This shifts the burden of (dis)proving an important element of the crime to **A** and thus violates s 11(d) of *Charter* because it raises the risk of there being a conviction despite the existence of a RD.
(b) *Oakes* test, *supra*, determines whether limitations of *Charter* rights are saved under s 1. In this case, stage **1** is satisfied, but **2(a)** is not. The provision is over-inclusive, as there is no rational connection between the proven fact of (potentially) negligible possession and the presumed fact of trafficking. (**NB** altered in *R v Laba*).

R v Downey 1992 SCC (CB 324)

Cory J: List of principles from s. 11(d) jurisprudence:

I. Presumption of innocence is infringed if A is liable to be convicted despite the existence of a reasonable doubt.
II. If A is required to prove or disprove on BoP an element of the offence or an excuse [defence], that provision violates s. 11(d) for the reason given in I.
III. Even a rational connection between the established fact and the presumed fact is insufficient to make the presumption valid.
IV. Where the proven fact is such that it would be unreasonable for the trier of fact to be unsatisfied BRD of the presumed fact, there is no violation of s. 11(d).
V. A permissive presumption does not violate s. 11(d).
VI. A provision that offers a minor path to relief from conviction may nonetheless violate s. 11(d).
VII. Statutory presumptions that violate s. 11(d) may still be justified under s. 1 (*Keegstra* supplies an example).

ACTUS REUS

Voluntariness (CB 334)

Voluntariness is the conscious control of action and is required for someone to be responsible for their conduct. Physical voluntariness is necessary under s 7 of the *Charter*, per LeBel J in ***R v Ruzic*** 2001 SCC.

Voluntariness is part of *AR*, per Taschereau J in ***R v King*** 1962 SCC (in which **A** was found innocent of impaired driving because his dentist had given him an anaesthetic **A** didn't know would cause impairment) and Woodhouse J in ***Kilbride v Lake*** 1962 NZSC (in which **A** didn't have to pay a ticket for driving without a warrant of fitness because it had become detached when **A** was away from the car).

Omissions (CB 340-2)

Criminal law will only punish someone for failing to act if the person was under a legal duty to act in those circumstances. Legal duties can be imposed by statute or CL.

"Undertaking" in s 217 (criminal negligence) generally requires that someone relied on the commitment to undertake in order to trigger a legal duty, per Abella JA (ASTW) in ***R v Browne*** 1997 SCC.

Underlying duty can come from CL (***Thornton***—duty imposed by tort)

Status (CB 355)

Problematic under s 7 of *Charter*. Usually require some underlying offence or omission.

R v Browne 1997 ONCA (CB 343)

***Ratio* (Abella JA (ASTW))**: "Undertaking" in s 217 generally requires that someone relied on the commitment to undertake. (VERY BROAD: When an omission is criminalized, our threshold definition for the duty omitted must be high enough to justify the penal consequences.)
F: **A**'s partner swallowed a bag of crack to avoid detection by police. She tried to throw up but couldn't. **A**'s partner began to shake and **A** said "I'm going to take you to the hospital" and called a taxi. The taxi arrived after 10-15 minutes. Partner died at the hospital. TJ found that **A** had undertaken to take his partner to the hospital, and thus was under a legal duty to complete that act under s 217 of *CC*. Fell short of duty by calling taxi instead of ambulance. Based on **A**'s words and on underlying relationship between **A** and partner.
I: What constitutes "undertaking to do an act" in *CC* s 217?
L: *Code*, ss 217 (persons undertaking acts have legal duty to continue undertaking if omission may be dangerous to life) & 219 (OCS: criminal negligence).
A: TJ erred in finding that this constituted an undertaking. Criminal negligence causing death can result in life imprisonment. Threshold for 'undertaking' should reflect those possible consequences. With that in mind, 'undertaking' should be a "commitment, generally, though not necessarily, upon which reliance can reasonably be said to have been placed." Criminal standard higher than civil standard. Test: was there an undertaking in the nature of a binding commitment?

R v Thornton 1991 ONCA (upheld at SCC on different grounds) (CB 347)

***Ratio* (Galligan JA)**: Legal duties / duties imposed by law can stem from common law.
F: **A** donated blood to Red Cross, knowing he'd tested HIV+ twice. **A** aware that HIV transmitted by blood and that the Red Cross wouldn't knowingly accept blood from people who had tested HIV+. Charged with common nuisance under s 180 of *CC*.
I: Did **A** have a legal duty to either disclose HIV+ status or refrain from attempting to donate blood? [Can a legal duty in criminal law be one imposed by the common law?]
L: *Code*, s 180 (OCS: common nuisance).
A: Tort law imposes duty to refrain from conduct that could harm another person.

Causation (CB 361)

When *AR* has a consequence element, the Crown must prove that **A**'s conduct caused the consequence. This requires proof of both factual and legal causation.

Factual causation is an inquiry into how the consequence came to be medically, mechanically, or physically, and how **A** contributed to that consequence (***Nette***), and requires that there be a logical link between the act and the consequence (***Winning***).

R v Smith (*Private **A** stabbed **V** from another regiment; **V** given bad medical treatment; **V** died; **A** still guilty of manslaughter*) & ***R v Blaue*** (Lawton LJ, *A stabbed **V**; **V** refused blood transfusion because **V** was Jehovah's Witness; **A** guilty of manslaughter*) & ***Maybin*** **(**Karakatsanis J**,** ***infra*****):** The independent actions/decisions of another person are not enough to sever the causal chain between conduct and consequence. Question is whether **A**'s actions were an operating and substantial cause at the time that the prohibited consequence came to be.

Use Karakatsanis J's 'analytical aids' in ***Maybin*** for questions with intervening acts: **(1)** Was the intervening act foreseeable? If **A** could have foreseen the intervening act (as the **A**s did in *Maybin*), then the act is less likely to break the chain of causation. **(2)** Was the intervening act independent of **A**'s actions? If **A**'s actions were completely separate from the intervening act (unlike in *Maybin*), then the act is more likely to have broken the chain of causation.

Smith, Blaue and ***Smithers*** stand for the thin-skull rule in criminal law. (Although in different ways: in ***Smith*** it was an action by a person other than **A** and **V** that was out of **A**'s control; in ***Blaue*** it was an action by **V** that was out of **A**'s control; in ***Smithers*** it was a physical fact that was out of **A**'s control.)

Smithers v The Queen 1978 SCC (CB 361)

***Ratio* (Dickson J (AHTW))**: For manslaughter, the test for causation is 'were **A**'s actions a contributing cause of the prohibited consequence outside the *de minimis* range?' (low threshold).
F: **A** and **V** on opposing teams in hockey game. **V** made racist taunts at **A**. Both ejected from game. **A** challenged **V** to fight and **V** declined. **A** sought out **V**, punched **V** in the head and kicked **V** in the stomach. **V** died as a result of aspirating foreign material. His epiglottis likely failed to protect his windpipe when he vomited. Doctors who testified suggested that the vomiting was probably caused by kick to stomach.
I: Did **A**'s kick cause the (unlikely) prohibited consequence?
L: *Code*, s 222(5)(a) (unlawful act manslaughter) + 236 (OCS: manslaughter).
A: Unlawful act manslaughter only requires that unlawful act cause death. Doesn't matter if the death was unforeseeable. You take your victim as you find them. The cause need only be 'not insignificant'. Factual and legal causation are different. Factual causation is about things in time and space; legal causation is about whether **A**'s contribution is serious enough to warrant legal consequences.

R v Nette 2001 SCC (CB 372)

***Ratio* (Arbour J)**: For homicide, the test for causation is whether **A**'s actions were a contributing cause outside the *de minimus* range. The *Smithers* standard has stood the test of time. Factual causation is concerned with how the consequence came to be physically or medically.
F: **A** broken into **V** (old lady)'s apartment and bound and robbed her. **V** died of asphyxiation. Pathologist found that there were a number of contributing causes, including **V**'s asthma.
I: Post-*Charter* (and *Harbottle*), should the standard for causation in second-degree murder be higher than 'outside the *de minimus* range'?
L: *Code*, s 229 + 231(7) + 235(1).
A: Legal causation is a policy question ('should **A** be responsible in law for **V**'s death, and if so, to what degree?'). F Jury should be told to ask 'whether **A**'s actions were a significant contributing cause of **V**'s death'—intended to be the same as *Smithers* standard.
L'Heureux-Dubé J (concurring minority): Jury instruction should be worded more carefully to avoid connoting a higher standard than in *Smithers*. It should be 'Was **A**'s action a contributing cause that is not trivial or insignificant?'

R v Maybin 2012 SCC (CB 387)

***Ratio* (Karatkatsanis J)**: When determining legal causation, we can use analytical aids, but the question remains whether A's actions were a significant contributing cause of the prohibited consequence.
F: **A1** and **A2** (brothers) punched **V** in the head several times in a bar. **V** was unconscious on pool table when a bouncer punched **V** again in the head. Pathologist unsure which blow had been fatal.
I: What does it take to sever a chain of legal causation?
L: *Code*, s 222(5)(a) (unlawful act manslaughter) + 236 (OCS: manslaughter).
A: Legal causation narrows 'factual causes into those sufficiently connected to a harm to warrant legal responsibility'. **A**s' actions were a factual cause of death.
Reasonable foreseeability and whether intervening acts severed the impact of **A**'s actions are helpful as analytical aids in determining legal causation, but key question is whether **A**'s actions were a significant contributing cause of death. RE: reasonable foreseeability—generic risk must be foreseeable even if particular results are not. RE: independent acts—did **A**'s actions 'set the scene' that allowed other independent acts to coincidentally intervene, or if **A**'s actions actually triggered other actions. In this case **A**s' actions triggered bouncer's actions.

Contemporaneity of *AR* & *MR* (CB 395)

In ***Fowler v Padget*** 1798 Eng KB, the court said it is a "principle of natural justice" that *AR* and *MR* must coincide in time. Courts have been more flexible since then.

May LJ's 3 step analysis in ***Miller***, for determining whether **A** has a legal duty to ameliorate her act: (1) Did **A** create some danger? (2) Did **A** become aware of that danger? (3) Did **A** fail to ameliorate that danger when it was within her power?

If ***Miller*** analysis satisfied, then **A**'s initially unintentional act takes on the intention of her later omission.

Cooper analysis: *MR* must coincide with *AR* at some point, but when *AR* constitutes a continuing transaction, *MR* can overlap with *AR* at any point to fulfil contemporaneity.

Fagan v Commissioner of Metropolitan Police 1969 Eng CA (CB 396)

***Ratio* (James J)**: Some conduct can be seen as an ongoing act, which overlaps with *MR* when it begins to be intended.
F: **A** accidentally parked his car on **C** (a cop)'s foot. **C** told **A** to move car. **A** swore at **C**, turned off ignition and stayed in car, then **A** moved car off **C**'s foot. **A** charged with assault.
I: Were *MR* and *AR* contemporaneous? If so, are we criminalizing an omission?
L: CL assault—intentional physical touching.
A: This is not an omission, this is an act that continued until **A** moved his car. *MR* began to be present before he moved his car, so *AR* and *MR* were partially contemporaneous.
Bridge J (diss.): Unfortunately, that just ain't right.

R v Miller 1982 Eng CA / 1983 HL (CB 399)

***Ratio* (May LJ)**: There is a legal duty to ameliorate one's unintentional act if that act would be illegal if intentional, and that amelioration was within one's power.
F: **A** fell asleep holding a lit cigarette. He woke up and the mattress was smoldering. He didn't put it out. He went into another room and went back to sleep. **A** rescued from fire and charged with arson.
I: Were *MR* and *AR* contemporaneous? If so, are we criminalizing an omission?
L: *Criminal Damage Act* 1971 (UK) s 1, 3 – arson. (Property destroyed – conseq. By fire – circ.)
A: "Time travel theory of intention"—unintentional act + intentional omission = intentional act. 3 questions: **(1)** Did **A** create danger? **(2)** Did **A** become aware of danger? **(3)** Did **A** fail to ameliorate danger?
House of Lords 1983 (Lord Diplock): Affirming, basically: "I see no rational ground for excluding from conduct capable from giving rise to criminal liability, conduct which consists of failing to take measures that lie within one's power to counteract a danger that one has oneself created, if at the time of such conduct one's state of mind is such as constitutes a necessary ingredient of the offence."

R v Cooper 1993 SCC (CB 401-402)

***Ratio* (Cory J)**: *AR* and *MR* need not be completely concurrent. When the *AR* is part of a 'continuing transaction', *MR* need only be concurrent with part of that transaction.
F: **A** became angry with **V** while drunk and began to strangle her. **A** blacked out and when he regained consciousness, **V** was dead. **A** charged with murder by manual strangulation.
I: Must *AR* and *MR* be completely contemporaneous?
L: *Code*, s 229(a)(ii) (reckless murder)
A: A series of acts can form part of the same transaction. When MR coincides with any part of a transaction that together constitutes AR, contemporaneity is established.
Lamer CJ (diss.): The intention required by s 229(a)(ii) ('means to cause him bodily harm that he knows is likely to cause his death and is reckless whether death ensues or not') can only be formed once the act becomes likely to cause death.

R v Williams 2003 SCC (CB 403)

***Ratio* (Binnie J)**: Contemporaneity absent in this case. **A** can only be convicted of attempted aggravated assault.
F: **A** was in a sexual relationship with **V** for several months before learning he was HIV+. **A** continued to have unprotected sex with **V** after that time and **V** subsequently tested HIV+.
I: Were *AR* and *MR* sufficiently contemporaneous?
A: There is RD about whether **V** was already HIV+ when **A** learned he was HIV+. Before **A** was tested, there was endangerment (*AR*) but no intent (*MR*). After A was tested, there was intent (*MR*) but a RD about endangerment (*AR*). **A** can't be convicted of aggravated assault because of a lack of contemporaneity.

MENS REA

MR Assumptions

Estey J in ***Gaunt & Watts v The Queen*** SCC 1953: *MR* is an essential element of most criminal offences. Parliament may create a crime in which *MR* is not essential, but this requires clear words or necessary implication (no existing instances of latter).

Cromwell J in ***R v ADH*** SCC 2013: True crimes should be interpreted under the assumption that Parliament intended them to have subjective *MR*. Parliament knows courts do this.

Martin JA in ***R v Buzzanga and Durocher*** ONCA 1979: Generally reasonable to assume that people intend the likely consequences of their actions (except where there is evidence of the contrary—***Gaunt & Watts***) (common sense inference), but the point of this assumption is to determine what the *particular* **A** intended, not to turn subjective *MR* into objective *MR*. Assumption endorsed as jury instruction by Moldaver J in ***R v Walle*** SCC 2012.

In ***R v Tennant and Naccarato*** 1975, the ONCA noted that the 'common sense inference' is to be used as a *heuristic* in subjective *MR* offences, whereas for objective *MR* offences, it is the actual *test*.

Doherty JA in ***R v Bottineau*** ONCA 2011: Whether conduct is an act or an omission is irrelevant when it comes to intention or foreseeability. An omission can be intended to lead to a prohibited consequence, and it can be reasonably foreseeable that an omission will likely lead to a prohibited consequence.

Intention & Motive (CB 456)

Dickson J (AHTW) in ***R v Lewis*** SCC 1979: Intent and motive are distinct in criminal law. Intent is "the exercise of a free will to use particular means to produce a particular result". Motive is "that which precedes and induces the exercise of the will".

Lamer CJ in ***R v Hibbert*** SCC 1995 lowered the standard for intent: the exercise of will to bring about a particular result. Identified with purpose.

R v Lewis 1979 SCC (CB 456)

Dickson J (AHTW): Some things about motive:

1. Motive is "always relevant" and thus evidence of motive is admissible.
2. Ordinarily, proof of motive is not an essential element of an offence.
3. Proved absence of motive is a factor in favour of the accused and should be included in charge to jury.
4. Proved presence of motive may be a factual ingredient in the Crown's case, notably for issues of identity and intention.
5. Motive is always a question of fact and evidence.
6. Each case will turn on its own circumstances.

R v Steane 1947 Eng CA (CB 458)

Ratio **(Lord Goddard CJ)**: The particular wording of the offence makes motive relevant to determining intention. In this case, the fact that **A**'s motive was not to assist the enemy is relevant to determining whether the *MR* requirements of the offence were met.

F: **A**, British, read news on German radio and helped with production of Nazi films during WWII. **A** claimed that he participated under duress. **A** charged with "doing acts likely to assist the enemy with intent to assist the enemy."

A: Whether **A** intended to assist the enemy is a live question because of **A**'s claim that he was participating under duress.

R v Hibbert 1995 SCC (CB 460)

***Ratio* (Lamer CJ)**: 'Purpose' sometimes means 'intention' rather than 'motive'. s 21(1)(b) of the *Code* is one of those times. Intention is 'the exercise of one's will to bring about a particular result' **cf** *Lewis* required that will be *free*.)
F: **A** testified that he was forced by principal offender (**P**) to accompany **P** to **V**'s home and was forced to lure **V** to the lobby.
A: Carrying out the *AR* of an offence in response to threats does not necessarily mean **A** lacked the *MR*. It depends on the specific *MR* of the relevant offence, and the facts of the case. Most offences cannot be negated by duress. Duress operates as a CL defence, operating through 'excuse' rather than 'negation'.

s 21(1)(b) of the *Code* creates liability for anyone who "does or omits to do anything for the purpose of aiding any person to commit" an offence. In this instance, 'purpose' does not require a desire that the consequence come about. It merely means 'intention', here.

Subjective *MR*

Martin JA in ***R v Buzzanga and Durocher*** 1979 ONCA: In the absence of specific *MR* language in a section, intention or recklessness as to the prohibited consequence will be enough.

Defining CL states of subjective *MR*:

Word	Associated AR	Defined
Intention	Conduct	Synonymous with *voluntariness* in *actus reus* – ie a conscious decision to act or refrain from acting (see ***Ruzic***)
Intention	Consequence	"The exercise of a free will to produce a particular result" (***Lewis***)
		Intention can be shown whether the underlying conduct is an act or an omission (***Bottineau***)
Reckless	Circumstance or consequence	Shown where A knew of the "likely consequences" and chose to proceed anyway (***Théroux***)
		"One who, aware that there is danger that his conduct could bring about [the prohibited consequence] … nevertheless persists, despite the risk." (***Sansregret***)
		"Conscious disregard of substantial and unjustified risk [that the offence will be committed]" (***Hamilton***)
Wilful blindness	Circumstance or consequence	Arises where A's "suspicion is aroused to the point where he or she sees the need for further inquiries, but deliberately chooses not to make those inquiries." (***Briscoe***)
		"[A] person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth." (***Sansregret***)
Motive	Consequence	**Rarely required, always relevant** "That which precedes and induces the exercise of the will" (***Lewis***)

R v Buzzanga and Durocher 1979 ONCA (CB 464)

***Ratio* (Martin JA)**: 'Wilfully' can be 'intentionally', 'voluntarily' or 'recklessly' depending on context. In the context of wilfully promoting hatred, it means 'intentionally' with foresight that the prohibited consequence was certain or morally certain to come about.
F: **A**s published a pamphlet intended to galvanize the Francophone community in Ontario town. Pamphlet appeared to be authored by anti-Francophone people. **A**s charged with wilfully promoting hatred.
I: What does 'wilfully' mean in the context of s 319(2)?
L: *Code*, s 319(2).
A: 'Wilfully' does not have a fixed meaning. 'Wilfully' in this context refers to the promotion of hatred, which means that being reckless to whether hatred would be promoted is not enough. In the absence of specific language to the contrary, crimes include a *MR* component. The general *MR* that suffices when no mental element is expressly mentioned is intention or recklessness with respect to the prohibited consequence. The insertion of the word 'wilfully' in this provision should be taken to raise the *MR* requirement above the presumptive minimum.

Interpreting specific statutory language re: subjective *MR*:

Section	Case	Phrase	Interpretation
s. 21(1)(b)	***Hibbert***	"does or omits to do anything for the purpose of aiding any person to commit an offence"	Purpose does not import an element of desire to bring about the commission of the offence. It is synonymous with intention (the exercise of will to bring about a particular result).
s. 21(2)	***Hibbert*** *(obiter)*	"intention in common"	"two persons must have in mind the same unlawful purpose"
s. 319(2)	***Buzzanga & Durocher***	"wilfully promoting hatred"	Insertion of 'wilfully' means suggests Parliamentary intention to elevate *mens rea* above presumptive minimum. Only intention to promote hatred will suffice (A "foresaw the promotion of hatred against an identifiable group was certain or morally certain to result," and decided to proceed).
s. 380(1)	***Théroux***	"by deceit, falsehood or other fraudulent means … defrauds"	Recklessness is enough re the prohibited consequence of defrauding. Subjective knowledge that this act could have as a consequence the deprivation of another, including placing another person's pecuniary interests at risk.

<u>*R v Briscoe* 2010 SCC (CB 470)</u>

***Ratio* (Charron J)**: 'Wilful blindness' applies when **A** sees the need for further inquiries, could have made those inquiries, but deliberately chooses not to. WB substitutes for knowledge.
F: **A** charged as participant in 1st-degree murder. **A** drove group to the crime scene, provided a weapon, held **V** and told her to shut up. TJ acquitted on the basis that **A** did not know the crimes would occur.
A: Per **Sopinka J** in *R v Jorgensen* SCC 1985: 'Did the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge?'

<u>*R v Sansregret* 1985 SCC (CB 471)</u>

***Ratio* (McIntyre J)**: Recklessness consists in disregard of risk, whereas WB consists in refraining from inquiry one knows he must make.
I: How do recklessness and WB relate?
A: Negligence is a civil concept tested by an objective standard—the RP. Recklessness must have a subjective element. Being <u>reckless</u> is being "aware that there is danger that [one's] conduct could bring about the [prohibited consequence], nevertheless persists, despite the risk." <u>WB</u> is where "a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth". Culpability in recklessness arises from conscious disregard of risk, whereas in WB it comes from deliberately refraining from inquiry where one knows inquiry is necessary.

R v Théroux 1993 SCC (CB 466)

***Ratio* (McLachlin J (ASTW))**: Subjective *MR* is not about **A**'s values or whether **A** thought the act was wrong. It is enough that **A** had subjective knowledge of the act or was reckless toward the consequences.
F: **A** convicted of fraud for accepting deposits for a building project after telling investors he had purchased deposit insurance when he had not.
L: *Code*, s 380(1) (fraud).
A: The function of *MR* is to prevent the conviction of the morally innocent 'who do not understand or intend the consequences of their act'. Typically, it is concerned with the consequences of *AR* [**NB**—not always true]. The test for *MR* is subjective, but subjective *MR* is not about whether **A** thought he was doing anything wrong (i.e. **A**'s values) but about whether **A** knew or intended what he did, and whether a RP would consider what **A** did wrong. In the case of fraud, the *MR* is (1) subjective knowledge of the prohibited act, and (2) subjective knowledge that this act could cause the deprivation of another. **A** had both.

CC s 380(1) (fraud)	***AR***	***MR***
conduct	represents as a matter of fact	intentional
circumstances	either past or present / false / words or otherwise / any person / etc	(actually/subjectively) known to be false
consequences	defrauded of property, money, valuable security or any service (deprivation)	fraudulent intent to induce person to act on representation reckless to person's deprivation

Objective *MR* (CB 472)

Cromwell J in ***R v ADH*** 2013 SCC (*supra*): "Dangerous", "[criminal] negligence", "unlawful act" connote objective *MR*.

McLachlin J (ASTW) in ***R v Creighton*** 1993 SCC: Objective *MR* isn't necessarily symmetrical to *AR*; it doesn't always correspond to the actual *AR*—it is not a principle of fundamental justice under s 7 of the *Charter* for *MR* and *AR* to be symmetrical (in *Creighton*, manslaughter doesn't require that a RP would foresee death, it requires that a RP would foresee bodily harm). And the RP test must not consider personal characteristics of **A**, because that would just make the test subjective.

Sopinka J in ***R v DeSousa*** 1992 SCC: s 269 (unlawfully causing bodily harm) requires objective foresight of the consequences of the accused's unlawful act. The underlying offence committed by the accused must not be an absolute liability offence (per ***Motor Vehicle Reference***).

R v Hundal 1993 SCC (CB 472)

***Ratio* (Cory J)**: The *MR* for driving offences should be an objective test that takes all non-personal circumstances (weather, traffic, etc.) into account.
F: **A** drove overloaded dump truck through an intersection against a red light and killed **V**, who had driven into the intersection legally. **A** charged with dangerous driving causing death.
I: What should the *MR* for driving offences that carry serious penalties be?
L: *Code*, s 249(4) (dangerous driving causing death).
A: Operating a motor vehicle is done with very little conscious thought. Requiring subjective MR for driving offences "would be to deny reality". An objective test that takes all the circumstances that are not personal should be used for driving offences, including "the nature, condition and use of such place and the amount of traffic that at the time is or might reasonably be expected to be in such place" (e.g. RP driving in the rain). The lack of imported personal factors is justified by uniform licencing requirements.

R v Creighton 1993 SCC (5-4 decision) (CB 474)

***Ratio* (McLachlin J)**: The *MR* of manslaughter is objective foreseeability of a risk of bodily harm that is neither trivial nor transitory. Manslaughter does not carry such a stigma that subjective *mens rea* regarding consequences is required. *AR* and *MR* need not be symmetrical.

F: **A** accused with unlawful act manslaughter for accidentally killing **V** (his girlfriend) with a cocaine overdose. Underlying offence was trafficking drugs.

I: What is the MR requirement for unlawful act manslaughter w/r/t its consequence?

L: *Code*, s 222(5) (unlawful act manslaughter).

A: Objective *MR* tests whether the **A** failed to direct his mind to a risk which the RP would have appreciated. The objective test for manslaughter should not import personal characteristics into the RP. Taking 'human frailties' into account just turns the objective test into a subjective test. Peculiarities of the **A** are considered only when they reach the relatively high standard of *incapacity*. The *MR* for manslaughter is objective foreseeability of bodily harm (that is neither trivial nor transitory).

Lamer CJ (minority, concurring in result): The *MR* for manslaughter should remain objective, but should take into account 'human frailties' like experience in drug use, or knowledge of firearms. The *MR* for manslaughter should be objective foreseeability of death.

R v Beatty 2008 SCC (5-4 decision) (CB 480)

***Ratio* (Charron J)**: In s 249(4) of the *Code* (and, by analogy, all provisions concerning criminal negligence), "marked departure of the standard of care expected of a RP in all the circumstances" is a *MR* requirement—not *AR*.

F: **A**'s pickup truck, for no apparent reason, crossed the solid centre line and crashed head-on with a car in the oncoming lane. All 3 **V**s in that car died. Witnesses behind **V**s' car observed that **A** was driving properly prior. **A** probably lost consciousness or fallen asleep. **A** charged with 3 counts of dangerous driving causing death.

I: Can a momentary act of negligence constitute 'dangerous operation of a motor vehicle'? (i.e. How do we distinguish between the *AR* and *MR* of s 249(4)?)

L: *Code*, s 249(4) (dangerous driving causing death).

A: Both civil and criminal negligence are based on departures from the standard of behaviour expected of a RP, but whereas civil negligence is concerned with apportionment of loss, criminal negligence is concerned with the punishment of blameworthy behaviour. Since the marked departure is what makes the conduct blameworthy (i.e. worthy of criminalization), "marked departure from standard of care expected of a RP in all the circumstances" must be a *MR* requirement.

McLachlin J (minority, concurring in result): As alluded to in *Hundal* and held in *Creighton*, the "marked departure" is properly a part of *AR*.

R v Roy 2012 SCC (unanimous) (CB 490)

***Ratio* (Cromwell J)**: Unanimously upholding *Beatty*. The objective standard of 'marked departure from the standard of care expected of a RP' is modified by the circumstances the **A** was in, although not by the personal characteristics of the **A**.

F: The **A** stopped at a stop sign in bad weather conditions when turning off a minor unpaved road onto a highway. He then turned left onto the highway, colliding with a tractor-trailer and killing pedestrian **V**. He had no recollection of the accident.

I: Can we all be friends now?

L: *Code*, s 249(4).

A: The MR analysis for dangerous driving proceeds in 2 steps. (1) Would a RP have foreseen the risk and taken steps to avoid it? (2) Did the **A**'s failure to do so constitute a *marked departure* from the standard of care expected of a RP in all the circumstances? Step (2) serves to narrow civil negligence into negligence worthy of criminalization.

CONSTITUTIONAL DIMENSIONS OF *MR* (CB 492)

Constitutional minima

Lamer J in ***Re BC Motor Vehicle Act*** 1985 SCC: Some level of fault (objective or subjective *MR*) is required prior to the loss (or potential loss) for an **A**'s liberty (demanded by s 7 of *Charter*). [**NB** also means underlying offences of offences that lead to jail time must not be absolute liability.]

Subjective MR & stigma

There are some offenses for which the stigma is so great that subjective MR is required under s 7 of the *Charter*. Per ***Logan*** 1990 SCC, these offenses are very few.

As of now they are murder (subjective foresight of death required, per ***Vaillancourt*** 1987 SCC, ***Martineau*** 1990 SCC), attempted murder (intention to kill required, per ***Logan*** 1990 SCC) and war crimes (knowledge or WB that the facts or circumstances bring the crimes within the definition of crimes against humanity, per ***Finta*** 1994 SCC, CB 496).

Cory J in ***Finta***: the offence of crimes against humanity is "far more grievous" than the offences that underlie it. The minimum MR is thus subjective knowledge or WB re: the facts or crics. That would bring the crime within the def. of crimes against humanity.

When objective MR will do

s 222(5)(a)—SCC ruled out extending the necessity of subjective foresight of death to manslaughter (McLachlin J (ASTW) in ***Creighton*** 1990 SCC*, supra*).

s 86(1) & (2)—using a firearm in a careless manner or without reasonable precautions for the safety of others (Arbour JA (ASTW) in ***Durham*** 1992 ONCA, approved of by Lamer CJ in ***Finlay*** 1993 SCC).

s 434(a)—wilfully setting fire to certain things requires only objective knowledge that property is inhabited (provision repealed, reasoning valid—apply by analogy to s 433(a)) (McEachern CJBC in ***Peters*** 1991 BCCA.)

s 269—unlawfully causing bodily harm requires objective foresight of the consequences of A's unlawful act. Per ***Motor Vehicle Reference***, the underlying offence must not be an absolute liability offence. (Sopinka J in ***DeSousa*** 1992 SCC)

PARTICIPATION (CB 525)

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.

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

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.

Sections **21** and **22** provide for 5 modes of participation in an offence sufficient to ground liability. For all of these offences, the offence has to actually be committed, so begin by parsing the offence and showing that it has been proven BRD.

Thatcher tells us that where all members of the jury are satisfied BRD that the **A** either participated in or committed the offence, then they need not be unanimous w/r/t which mode of participation the **A** is guilty under. Consider extending this by analogy to a trial judge who is satisfied BRD that the **A** either participated in or committed the offence, as well as to ss 21(2) & 22.

Definitions

'Aiding' is to help or assist the actor. 'Abetting' is to encourage, instigate, promote or procure a crime. (Both from Cory J's minority in *Greyeyes.*)

Tests

The *MR* for aiding is EITHER 'intent that the **P** commit the principal offence regardless of desire that the **P** commit it' (*Hibbert*) OR 'intent to aid the **P** in commiting the offence' combined with 'knowledge/WB that **P** intends to commit it' (*Briscoe*).

Wilson J's diss. in *Kirkness*: 2 steps to establishing liability under common intention—**(1)** Did the **A** form an intention in common with others to carry out an unlawful purpose, and to assist them in achieving that purpose? **(2)(a)** Was the commission of the ultimate offence probable? and **(b)** Did the **A** know of, or *ought* the **A** have known of, its probability?

Policy

We criminalize aiding and abetting because they increase the risk that harm will materialize (*Hamilton*, *infra*, citing Law Reform Commission). That is why we criminalize them whether or not the crime is committed.

Where an act seems to equally aid multiple offences (because those offences are committed in the same transaction), L'Heureux-Dubé J's decision in *Greyeyes* tells us to consider which of those offences the action seems 'designed' to aid

in considering which the **A** should be liable for.

We recognize the defence of abandonment to **(1)** encourage people to abandon their crimes and **(2)** to avoid punishing the morally innocent (*Gauthier*).

R v Thatcher 1987 SCC (CB 527)

***Ratio* (Dickson CJ)**: A jury need not be unanimous w/r/t which mode of participation the **A** is guilty under. As long as they are unanimous that the **A**'s guilt has been proven BRD under some mode, the **A** must be found guilty. You can only directly apply this reasoning w/r/t s 21(1).
F: The **A** was charged with first-degree murder. Evidence at trial was ambiguous as to whether he committed the offence himself, or whether he aided and abetted someone else to commit it. TJ instructed the jury that the verdict need not be unanimous w/r/t mode of participation.
I: Must the Crown separate the different forms of participation into separate charges?
L: *Code*, s 21(1) (parties to offence/aiding and abetting).
A: The point of s 21(1) is to avert the injustice of acquitting an **A** who is guilty BRD but for whom it is not clear whether his/her guilt stems from acting as principal or aider/abetter. In other words: every member of the jury was satisfied BRD that the **A** was *not innocent*, and so it makes sense to find him guilty.

R v Pickton 2010 SCC (CB 530)

***Ratio* (Charron J +5)**: The judge must instruct the trier of fact on any path to conviction (including modes of participation) that is reasonably open on the evidence, regardless of the Crown or defence's stated theories.
F: The **A** was charged with 6 counts of first-degree murder. The Crown theory at trial was that the **A** actually committed the murders. The defence theory was based on the proposition that others were involved in the deaths. TJ gave misleading instruction to the jury w/r/t participation, which he later remedied. Ultimately, the instruction was that the jury must convict if they are all convinced BRD that the **A** was either the principal or a participant.
I: Should the *Thatcher* principle apply when the Crown theory at trial seems to centre on a particular mode of participation?
L: *Code*, s 21(1) (parties to offence/aiding and abetting).
A: The instructions were ultimately correct in law. Both parties would have known that these instructions would be given.
Min. (LeBel J +2): TJ did err in charging jury that participation not sufficient to convict, but the evidence was overwhelming and so we should apply the curative proviso to uphold the conviction.

Aiding & Abetting (CB 536)

R v Greyeyes 1997 SCC (CB 537)

***Ratio* (L'Heureux-Dubé J +3)**: Cory J's minority opinion misarticulates the scope of liability for aiding, such that it lacks the proper conceptual symmetry. An **A** whose acts are designed to aid a purchaser, yet incidentally benefit the seller, assists more in the purchase than the sale, and so it is fitting that that **A** share the culpability of the purchaser.
F: An undercover cop bought weed from the **A**, and asked him if he knew where he could get cocaine. The **A** took the cop to an apartment building, negotiated entry, and negotiated the purchase. The **A** charged with aiding trafficking of cocaine.
I: What's the deal with aiding and with abetting?
L: *Code*, s 21(1) (aiding and abetting), *Narcotic Control Act* s 4(1).
A:

(aiding trafficking)	***AR***	***MR***
conduct	act or omission selling	intentional / intentional
circumstances	(designed to assist selling) narcotic included in a Schedule	knowledge/WB that **P** intends to sell coke OR intent that **P** sell coke (*Briscoe*) knowledge/WB
consequences		

Minority (Cory J +2): Acting as a spokesperson for a purchaser has the effect of aiding both the purchaser and the seller. Thus, an agent for a purchaser of an illegal narcotic can properly be held liable for aiding the trafficking of that narcotic. 'Aiding' is to assist or help the actor. 'Abetting' is to encourage, instigate, promote or procure a crime. For either, the *MR* is intention to aid in commission of the offence or to abet the offence.

R v Briscoe 2010 SCC (CB 542)

***Ratio* (Charron J)**: The *MR* of s 21(1)(b) (aiding) has 2 elements: **(1)** intent to aid the principal in committing the offence, and **(2)** the knowledge that the principal intends to commit the specific offence. WB to the offence itself will satisfy (2).
I: What is the *MR* of aiding?
L: *Code*, s 21(1) (aiding and abetting).
A: 'Purpose' in s 21(1)(b) reflects 2 *MR* components: intent and knowledge. What is required is that the **A** intend to aid the principal in committing the offence, and that the **A** know that the principal intend to commit the offence.
NB: This likely would not extend to abetting, since the point of abetting is that the **P** was convinced to commit the offence by the **A** (and thus did not yet intend to commit it). The *MR* of s 21(1)(c) is **(1)** intent to abet and **(2)** intent that the **P** commit the specific offence.

Dunlop & Sylvester v The Queen 1979 SCC (CB 546)

***Ratio* (Dickson J (AHTW) +4)**: Mere presence at the scene of a crime is not enough to ground liability as a party to the offence. Prior knowledge can, in some cases, support the inference that the **A**'s presence constituted aiding.
F: Excruciatingly sad facts.
I: What level of participation is required for aiding an offence to be made out?
L: *Code*, s 21(1) (aiding and abetting).
A: There is a distinction between presence with prior knowledge that an offence would be committed, and incidental presence. In this case, there is no evidence of anything more than mere presence and acquiescence.
Diss. (Martland J +2): There was enough evidence of prior knowledge on the part of the **A**s for jury to reasonably convict.

R v Nixon 1990 BCCA (CB 551)

***Ratio* (Legg JA)**: In certain limited circumstances where the **A** has a positive duty to protect a **C**, omitting to act in accordance with that duty, if done so with the purpose of facilitating the commission of a crime, can be enough to ground liability in aiding or abetting. Recall def. of purpose from *Briscoe*.
F: **A** was cop in charge of lockup. Other cops beat up a prisoner who had lied about his name. The **A** was convicted as a party to the aggravated assault.
I: Can an omission be sufficient to ground liability as a party to an offence?
L: *Code*, s 21(1)(c) (abetting).
A: The **A** had a positive duty to protect the **V**. In this case the **A**'s lack of action implied encouragement.
N.B.: this is analogous to the caretaker who omits to lock the door of the building he works in for the purpose of facilitating another's theft. This is why the presence of the word 'omits' in s 21(1)(b) is significant—it was meant to apply to that sort of situation. The BCCA here extends that reasoning to abetting where the **A**'s duty to act, coupled with inaction, implies encouragement.

Common Intention (CB 553)

R v Kirkness 1990 SCC (CB 553)

Diss. (Wilson J +1): 2 steps to establishing liability under common intention—**(1)** Did the **A** form an intention in common with others to carry out an unlawful purpose, and to assist them in achieving that purpose? **(2)(a)** Was the commission of the ultimate offence probable? and **(b)** Did the **A** know of, or *ought* the **A** have known of, its probability?
***Ratio* (Cory J +4)**: Of no importance?
F: The **A** and the **P** broke into a house. The **A** stole various items and blocked the door when the **P** sexually assaulted the **V**. The **P** then killed the **V**. The **A** testified that he protested the homicide. **P** convicted of first-degree murder, and **A** acquitted at trial.
I: How does common intention work, exactly?
L: *Code*, s 21(2) (common intention).
A:

common intention (breaking & entering>murder)	***AR***	***MR***
conduct	(breaks and enters) act	intentional intentional
circumstances	2 or more persons commission of murder probable	 knowledge/WB/~~ought to have known~~
consequences	 death of a human (**P** commits an offence—all the elements of murder go in this box, really)	intent (in common) to assist each other in commission of theft (in carrying out unlawful purpose) intent (in common) to commit theft (to carry out unlawful purpose) intent to kill

R v Gauthier 2013 SCC (CB 558)

***Ratio* (Wagner J +5)**: The 4 elements of the defence of abandonment.
F: The **A** and the **P**, **A**'s husband, formed a common intention to kill their children. The **A** provided the **P** with the pills to do so, then communicated that they should not go through with it. The **A** was convicted of aiding and abetting the murders. Defence argued that the **A** abandoned the crime. TJ didn't put it to the jury.
I: Was there sufficient evidence of abandonment?
L: *Code*, s 21(1) (aiding and abetting).
A: There are 4 requirements to raise the defence of abandonment: **(1)** that the **A** intended to abandon or withdraw from the unlawful purpose, **(2)** that the **A** communicated this abandonment or withdrawal to the other(s) that wished to continue in a timely manner, **(3)** that the communication served unequivocal notice upon the other(s), **(4)** that the **A** took reasonable steps in the circs. either to neutralize or otherwise cancel out the effects of her participation or to prevent the commission of the offence, in a manner proportional to her involvement in its commission. (4) is particularly important in the context of s 21(1) (as in this case), as an aider/abettor does more to ensure the offence is committed than someone who forms a common intention.
Diss. (Fish J): As abandonment then stood, there were only 2 elements—**(a)** abandonment of the common intention and **(b)** adequate communication of abandonment. On these elements, there was an air of reality to the defence and it should have been put to the jury. Natural law is wrong and legal positivism is right. Judges create law—they don't 'discover' it.

R v Logan 1990 SCC (CB 561)

***Ratio* (Lamer CJ)**: It is not a principle of fundamental justice that parties to an offence cannot be convicted with a lesser *MR* than the principal offender. It *is*, however, a principle of fundamental justice that the objective *MR* component of 21(2) not overwrite a higher *constitutionally-required MR*, such as murder, war crimes, or (in this case) attempted murder.
I: Can the **A** be convicted as a party to attempted murder on the grounds that he ought to have known its commission was probable?
L: *Code*, s 21(2) (common intention).

R v Jackson 1993 SCC (CB 563)

***Ratio* (McLachlin J (ASTW))**: The appropriate MR for common-intention manslaughter is objective awareness of the risk of bodily harm as a result of the common intention offence.
I: Does *Creighton* extend to party liability for manslaughter?
L: *Code*, s 21(2) (common intention).
A: *Trimeer* 1970 SCC suggests that there is nothing inherent in 21(2) that requires a higher *MR* than would otherwise be required for a manslaughter conviction. Now that *Creighton* has been decided, the *MR* for manslaughter is that a RP would have known that bodily harm was foreseeable.

Counselling (CB 564)

R v O'Brien 2007 NSCA (CB 564)

***Ratio* (Hamilton JA)**: Elements of counselling?
F: eh
I: skjgbsg?
L: *Code*, s 22 (counselling).
A: [Consider arguing that the reasoning in *Hamilton*, *infra* should apply to counselling an offence that was committed.]

Code, s 22 (counselling robbery)	***AR***	***MR***
conduct	active inducement of robbery (see s 2, 322)	intentional
circumstances		
consequences	**P** intentionally stole from any person while knowingly armed with an offensive weapon	intending that **P** commit robbery

Accessory after the fact (CB 566)

R v Duong 1998 ONCA (CB 566)

***Ratio* (Doherty JA)**: Elements of accessory after the fact. WB must be *to the particular offence* **P** committed.
F: The **A** was aware that 2 murders had been committed, and that the **P** had some connection to them when he hid him away in his apartment. The **A** told police that he knew that **P** was connected to the murders, but didn't want to know anything more, because he knew he would be in trouble for helping **P** hide.
I: Must the **A** be aware of the particular crime the **P** was party to?
L: *Code*, s 23 (accessory after the fact).
A: The Crown must prove BRD that the **A** is aware both that the person who was party to the offence: (1) was party to an offence, and (2) was party to that *particular* offence. WB can substitute for knowledge where the **A**'s suspicion was aroused, but he/she chose not to ask what offence the **P** had committed.

Code, s 23 (accessory after the fact)	***AR***	***MR***
conduct	receiving/comforting/assisting **P**	intentional
circumstances	**P** has been party to an offence	knowledge/WB that **P** was party to that *particular* offence (recklessness possible but unlikely because of the stat. language)
consequences		intent to help **P** escape (need not be permanent—abandonment irrelevant)

INCHOATE OFFENCES (CB 573)

Attempts (CB 573)

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

Question of law
24(2) The question of whether an act or omission by a person who has an intent to commit an offence is or is not mere preparation to commit the offence, and too remote to constitute an attempt to commit the offence, is a question of law.

In considering whether an attempt has been made out, first parse the full offence and consider how the A's actions fall short of that offence. Use *Deutsch* to consider whether the **A**'s act constitutes more than mere preparation.

Then, consider whether the **A** had intended to commit the offence, per *Ancio*, *Logan* and *Sorrell and Bondett*.

Actus reus

More than "mere preparation"

To constitute an attempt, there must be some act that goes beyond mere preparation (5th principle of attempt in ***Cline***). To do otherwise would risk criminalizing thought.

24(2) means that the question of whether the act goes beyond preparation is a decision the judge must make in a jury trial, and can be remedied by an appellate level court.

Deutsch: distinguishing between preparation and attempt is a qualitative judgment based in common sense. The trier of fact must consider the *proximity* of the act to what would have been the complete offence.

Mens rea

Intent

s 24 requires that the **A** intend to commit the complete offence to be convicted of an attempt (*Ancio*).

Sorrell and Bondett seems to suggest that more evidence of intent can substitute for a more equivocal act, but this is fairly muddy thinking, imo.

Dynar: It is not relevant that the commission of the offence was impossible, even where that makes a 'knowledge' component of the *MR* impossible. 'Knowledge' is true belief, and for an attempt what is relevant is the belief.

R v Cline 1956 ONCA (CB 573)

Laidlaw JA: List of principles re: criminal attempt:

(1) There must be both *MR* and *AR* but the *MR* is primarily what is blameworthy about a criminal attempt;
(2) *MR* can be established with reference to a pattern of previous similar acts done by the **A**;
(3) …;
(4) The *AR* need not be a tort, crime, or moral wrong in itself;
(5) "**The *AR* must be more than mere preparation to commit a crime**";
(6) When preparation is fully complete, the next step done by the **A** with the intention and for the purpose of committing the crime is sufficient to satisfy the *AR* of criminal attempt.

NB: (6) understates what is now probably necessary.

Deutsch v The Queen 1986 SCC (CB 574)

***Ratio* (Le Dain J)**: Distinguishing between preparation and attempt is a qualitative judgment based in common sense. The trier of fact must consider the proximity of the act to what would have been the complete offence.
F: The **A** was charged with attempting to procure female persons to have illicit sexual intercourse with another person. The **A** placed an ad in the newspaper for a secretary, and at each of 4 interviews he indicated that as part of the job the woman would be required to have sexual intercourse with clients where necessary to conclude a K. The **A** also mentioned that the position could pay up to $100,000 a year.
I: What kind of act is sufficient to constitute the *AR* for attempt?
L: *Code*, s 24 (attempt); 212(1)(a) (attempting to procure, etc.).
A: The distinction between preparation and attempt is essentially qualitative, and depends on the relationship between the nature and quality of the act in question and the nature of the complete offence. The trier of fact must consider, in using her common sense, the relative proximity of the act in question to what would have been the completed offence. Proximity here means time, location and acts under the **A**'s control that still needed to be performed. Application: In this case, the holding out of large financial rewards in the interviews was an important step in the commission of the offence and left very little for the **A** to do to actually commit it. All the **A** had left was to make a job offer.

R v Ancio 1984 SCC (CB 576)

***Ratio* (McIntyre J)**: The intent required for a criminal attempt under s 24 of the *Code* is intention to commit the complete offence, since the blameworthiness lies in the intent. For attempted murder it is the intent to kill.
F: The **A** was charged with attempted murder. He had broken into an apartment building with a sawed-off shotgun to 'speak' to his estranged wife who was staying with another man, K. The **A**'s gun discharged, missing K. TJ used a constructive definition of murder whose *MR* **A** satisfied, but which did not require he have the intent to kill.
I: Can the *MR* be less than the attempt to commit the complete offence?
L: *Code*, s 24 (attempt), 230(d) ('constructive' murder).
A: The criminal element of the offence of attempt arguably lies *solely in the intent*, and s 24 specifically requires that the **A** have the intent to commit the complete offence, not that **A** have the intent to do something that, if it resulted in the offence's *AR* consequences, would constitute that offence.

R v Logan 1990 SCC (CB 577)

***Ratio* (Lamer CJ +4)**: The constitutionally-required minimum *MR* for attempted murder is subjective foresight of death. Although the statute currently requires intent to kill (see *Ancio*, *supra*), it would be open to Parliament to lower the *MR* requirement.
F: The **A**s were charged with offences related to an armed robbery of a corner store and the serious wounding of the cashier. Two of the **A**s appealed their attempted murder convictions to the ONCA, which overturned them.
I: Is there a constitutionally-required minimum *MR* for attempted murder?
L: *Code*, s 24 (attempt), *Martineau* (subj. foresight of likely death required for murder *MR*).
A: As decided earlier today in *Martineau*, the *MR* for murder must include, as a constitutional minimum, the subjective foresight on the part of the **A** that the V's death was likely to ensue. This is because of the stigma and severe penal consequences which result from a conviction. The same holds true for attempted murder. The stigma associated with murder comes from its *MR*—this is why we require a minimum *MR* in the first place. The attempted murderer is considered to have the same 'killer instinct' as the murderer. Further, the penal consequences can be as great.
Min. (L'Heureux-Dubé J): The constitutionally-required minimum *MR* for attempted murder should be the subjective intent to kill. This is because for an attempt, it is intent that is being punished.

R v Sorrell and Bondett 1978 ONCA (CB 579)

***Ratio* (The Court)**: Where there is *no* extrinsic evidence of intent, seemingly equivocal acts may be insufficient to establish the intent to commit the full act, and thus insufficient to establish the *MR* of attempt. Where there *is* extrinsic evidence of intent, an otherwise equivocal act can be considered sufficiently proximate to the commission of the full offence to constitute an attempt.
F: The **A**s, wearing balaclavas and armed with a gun, knocked on the door of a fried chicken shop in Kingston. The manager waved them away because it was closed.
L: *Code*, s 24, robbery.
A: TJ had not found an intent to rob. Where intent is inferred from extrinsic evidence, an otherwise equivocal act can be found to constitute the *AR* of attempt. However, where intent is not so inferred, an equivocal act cannot be found to establish intent.

USA v Dynar 1997 SCC (CB 580)

***Ratio* (Cory and Iacobucci JJ)**: The only kind of impossibility relevant to attempting to commit an offence in Canadian law is in the case of imaginary crimes.
F: The **A** was subject of failed 'sting' operation by the FBI. Undercover agent convinced the **A** to launder money. **A** indicted in USA, charged with attempted to launder money. The **A** argued that since the money was not actually the proceeds of crime (because the FBI came about the money legally), he could not be charged with attempting to launder money.
I: Can an **A** be convicted of attempting to commit an offence that could not be committed?
L: *Code*, s 24(1), and
A: There is no factual/legal impossibility distinction in Canada. An **A** cannot be convicted for trying to commit a crime that is not real, but can be convicted of trying to commit a crime that was not possible in the circumstances. The *AR* of attempts is naturally deficient, and so the *MR* is privileged. For legal purposes, knowledge is *true belief*. What is relevant to an attempt is the belief, and *not* the truth. This is why s 24(1) provides that an **A** can be found guilty of criminal attempt "whether or not it was possible under the circumstances to commit the offence".

Incitement (CB 589)

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
(b) every one who counsels another person to commit an offence punishable on summary conviction is, if the offence is not committed, guilty of an offence punishable on summary conviction.

Just see *Hamilton*, *infra*, I'm tired.

Conspiracy (CB 595)

Conspiracy is at s **465**. **(1)(a)** is conspiracy to commit murder, **(1)(b)** is fraudulent prosecution. In *Dynar*, it was s **465(1)(c)**, which is for indictable offences. **(1)(d)** is for summary offences.

Dynar: Conspiracy requires even less of an *AR* than an attempt, since the fact of *agreement* is the *AR*. This means it is criminalized almost entirely for its *MR*. Impossibility is irrelevant to conspiracy *a fortiori* for the same reasons as attempt—that a risk of harm arises when people conspire to commit a crime. Indeed, an even greater risk of harm arises from conspiracy than from attempt since the amount of harm multiple people can inflict is much greater than what one person can. No cops. No imaginary crimes.

Attempting to conspire is not a crime in Canada, because it only creates "a risk that a risk will materialize" (*Déry*). This likely also applies to attempting to aid, abet, form a common intention, etc. But likely does *not* apply to aiding an attempt, etc., since in that care the 'successful attempt' constitutes a risk that materializes.

R v Hamilton 2005 SCC (CB 589)

***Ratio* (Fish J +5)**: Elements of incitement. The purpose of criminalizing aiding, abetting, attempting, counselling, inciting or procuring offences is the same: those things increase the likelihood of some harm occurring.
F: The **A** skdjgbskjbg. Sjbgskjbg. SLDJKGBSKJG. The **A** was charged with incitement of fraud not committed.
I: What are the elements of incitement of an offence not committed?
L: *Code*, s 464 (incitement of offence not committed), 380 (fraud).
A: The *AR* of counselling requires more than description of the offence; it involves *active inducement* or *advocacy*. Counselling an offence is criminalized whether or not the offence is committed, because it increases the likelihood of harm occurring, whether or not that harm actually occurs. For counselling, the level of 'risk' required for the *AR*, and to satisfy the *MR* recklessness is 'substantial and unjustified', which is a standard lower than that in *Buzzanga & Durocher*, above that in *Théroux*, and thus *much* higher than in *Sansregret*.

Code, s 464 (incitement of fraud)	***AR***	***MR***
conduct	deliberate encouragement or active inducement of fraud (see s 380 & *Théroux*)	intentional
circumstances		
consequences	'substantial and unjustified risk' that fraud will be committed	reckless (knowledge of S&U risk and proceeding anyway) to commission of fraud OR intending that fraud be committed

Diss. (Charron +2): Recklessness should not be enough. REASONS.

USA v Dynar 1997 SCC (CB 595)

***Ratio* (Cory and Iacobucci JJ)**: Elements of conspiracy. Impossibility irrelevant. Entrapment not possible.
F: The **A** was subject of failed 'sting' operation by the FBI. Undercover agent convinced the **A** to launder money. **A** indicted in USA, charged with attempted to launder money. The **A** argued that since the money was not actually the proceeds of crime (because the FBI came about the money legally), he could not be charged with attempting to launder money.
I: What are the elements of conspiracy? Must the **A** perform any actual act toward committing the other offence?
L: *Code*, s 465(1)(c) (conspiracy to commit indictable offence not provided for in (a) or (b)), *Cotroni*.
A: Conspiracy requires even less AR than an attempt. It is criminalized (almost) *only* for *MR*. In *Cotroni*, Dickson J (as he then was) held that the *AR* of conspiracy is the fact of agreement (*AR* consequence). Impossibility is irrelevant to conspiracy *a fortiori* for the same reasons as attempt—that there is a risk of harm—because there is an even *greater* risk of harm. This is because the amount of harm multiple people can inflict is much greater than what one person can inflict.

Code, s 465 (conspiracy)	***AR***	***MR***
conduct		
circumstances	2 offenders (no entrapment) crime is not imaginary	
consequences	agreement on "common design"—"meeting of the minds"	intention to agree intention to act on "common design"

R v Déry 2006 SCC (CB 600)

***Ratio* (Fish J)**: Attempting to conspire is not a crime in Canada.

F: The **A** and his friends talk about stealing from an SAQ. The **A** was charged with conspiracy to commit theft and to possess stolen goods. TJ found that they did not successfully reach an agreement, but convicted of attempting to conspire.

I: Is it an offence to attempt to conspire?

L: *Code*, ss 24, 465.

A: "To conflate counselling and attempt to conspire is to rely on semantics where principle fails." [*Extremely* dank phrase, Fish J.] Counselling has the relatively high *AR* threshold of "the *deliberate encouragement or active inducement of the commission of a criminal offence*", which is a necessary safeguard for an offence that could otherwise suffer from overbreadth. The same is true of conspiracy. Attempts and conspiracy are both criminalized because they create the risk of harm. Attempting to conspire, then, creates "a risk that a risk will materialize." That cannot ground criminal responsibility without Parliament explicitly creating such an offence.

[**NB**: This is probably also the case for attempting to aid, to abet, or to form a common intention, given that Fish J says in *Hamilton* that all of these are criminalized for creating the risk of harm. On the other hand, this is probably *not* the case for aiding, abetting, or forming a common intention to commit an *attempt*, because in that case the attempt actually occurred and so the risk actually materialized.]

New Forms of Inchoate Liability (CB 602)

Legare and *Khawaja* both show that, as Fish J speculated in *Déry*, it is within Parliament's power to criminalize conduct that is preparatory to an inchoate offence.

Legare in particular makes the point salient: how else can the practice of 'grooming' be addressed? As a society, we understand the act to be a significant and dangerous step that leads to the physical and psychological endangerment of children, but the act (if it can even be called an 'act', in that it is preliminary to the acts we actually consider blameworthy) is prohibited because of what it so often *leads to*.

R v Legare 2009 SCC (CB 603)

***Ratio* (Fish J)**: Elements of s 172.1(1)(b).
F: The **A** was told the child was 13 years of age when she was actually 12, and later phoned her to "talk dirty" and engaged in a sexual conversation. The **A** did not admit that he intended to commit or facilitate a sexual assault and did not make any efforts to contact her further. TJ acquitted on the basis that the **A**'s conduct had failed to facilitate any of the specified offences, and on the basis that the Crown had failed to prove that the **A** had intended to lure the child for that purpose.
I: What are the elements of s 172.1(1)(b)?
L: *Code*, s 172.1(1)(b) (using a computer to lure a child for the purpose of facilitating a sexual offence including sexual interference and sexual touching with an underage child).
A: This is an inchoate offence. It *precedes* any attempt to commit one of the specific offences and does not require that the **A** intend to meet with the **V**.

Code, s 172.1(1)(b)	***AR***	***MR***
conduct	communication	intentional
circumstances	by computer a person of any age OR (in case of recklessness) a person under 16 years of age	 **A** believes **V** is under 16 years of age OR **A** is reckless to **V** being under 16 years of age
consequences		for the specific purpose of facilitating the commission of a specified offence

"Facilitate" (*MR* consequence) includes "*helping to bring about* and *making easier or more probable*". ["Reckless" should be the *Sansregret* standard because this is a sexual offence.]
[**NB**: Fish J actually parses the age elements into one profoundly confused element in the service of reducing confusion: "with a person whom the **A** knows or believes to be under 16 years of age". Since the definition of knowledge is true belief, this makes 'knows' redundant, which makes the word 'or' in the provision redundant. The version above makes the word 'or' do some work, which, let's not lie to ourselves, is preferable.]

R v Khawaja 2012 SCC (CB 606)

***Ratio* (McLachlin CJ)**: Elements of a terrorism offence.
F: The **A** was convicted of 5 offences under the Terrorism section of the *Code*. He challenged s 83.18 under s 7 for overbreadth and gross disproportionality.
I: What are the elements of s 172.1(1)(b)?
L: *Code*, Part II.1 (Terrorism), specifically s 83.18 (participation in activity of terrorist group), *Déry*.
A: Both of the **A**'s arguments are rejected, but interpretation of the provision is clarified (narrowed). [McLachlin CJ essentially 'finds' an interpretation that is constitutional despite the ambiguity of the provision.] The **A**'s overbreadth argument is that the provision catches those who knowingly but incidentally aid terrorism (but whose motive is to aid charities who work in the region, for example). SCC: This is remedied by the very high MR requirement of 'specific intent to enhance…'
The **A**'s gross disproportionality argument is that terrorism is essentially an offence even *prior* to an inchoate offence. SCC: it is not a principle of fundamental justice that acts prior to attempts or conspiracy can't be criminalized—*Déry* was about interpretation, not constitutional boundaries.

Code, s 83.18	***AR***	***MR***
conduct	participating in [consequence] OR contributing to [consequence]	intentional
circumstances	directly or indirectly of a terrorist group	 knowledge that the group is a terrorist group
consequences	any activity [circ 2] that is capable of materially enhancing the abilities of a terrorist group to facilitate or carry out a terrorist activity (para 51) (per s 83.18(2), it does not have to be a terrorist activity, does not actually have to enhance, and the **A** does not have to know anything specific about the activity)	a RP would think it was capable of materially enhancing… specific purpose of enhancing the ability of any terrorist group to carry out a terrorist activity [This element does much of the work, and per paras 45ff, 'specific purpose' or 'specific intent' is very very similar to motive.]

Definitions

Disease of the mind: "any illness, disorder or abnormal condition which impairs the human mind and its functioning" (*Cooper*). This does not cover transient or self-induced states. It can (and perhaps should) be adapted to advances in medical science, because although it is a legal concept, it is one with a medical dimension (*Bouchard-Lebrun*).

Automatism: "a state of *impaired* consciousness, rather than *un*consciousness, in which an individual, though capable of action, has no voluntary control over that action." (*Stone*, emphasis added).

Procedure

Raising the defence

The NCRMD defence can be raised by the defence at any time before a conviction is entered, *and* can be raised by the Crown where either **(1)** the trier of fact has found that the elements of the offence have been proven BRD but a conviction has not yet been entered, or **(2)** the **A**'s evidence tends to put his or her mental capacity into issue (*Swain*). Lamer CJ explained that this serves the dual policy goals that an **A** not be convicted where he or she is not criminally responsible, and that dangerous persons who require hospitalization are not simply released into the public without treatment. The limitations ensure that the **A**'s s 7 right to direct his or her own defence is not violated.

Burdens and quanta of proof

Where mental disorder is a possible defence, whichever party raises the issue bears the burden of proving the defence on a balance of probabilities (*Code*, s 16(3); *Chaulk*).

In *Chaulk*, there was disagreement among the members of the Court as to whether the assumption of sanity in s 16(2) violated the presumption of innocence enshrined in s 11(d) of the *Charter*, and, if so, whether that violation was saved under s 1. The majority held that it did engage s 11(d), but was saved by s 1 because it avoids placing an impossible burden of proof on the Crown to prove sanity BRD.

Drawing on *Chaulk*, in *Bouchard-Lebrun*, LeBel J wrote that the criminal law views individuals as autonomous and rational beings, and thus relies on the presumption that their actions can attract criminal responsibility. Thus, whichever party raises the issue of mental disorder must prove on BOP that the **A** suffered from a disease of the mind, and that that disease of the mind caused an incapacity in the **A** that satisfies one of the two arms of the NCRMD defence.

Legal aspects

Disease of the mind

The mental disorder defence is contained in s 16 of the *Code*. It provides that where a mental disorder *rendered* the **A** either incapable of appreciating the nature and quality of his or her act or omission or incapable of knowing the act or omission was wrong, the **A** is not criminally responsible. Mental disorder is defined in s 2 of the *Code* as "a disease of the mind", which preserves the pre-1992 jurisprudence on the issue.

Dickson J (AHTW) wrote in *Cooper* that whether something is a disease of the mind is a question of *law*, and should not include transient (e.g. concussion) or self-induced (e.g. intoxication) states.

In deciding whether substance-induced psychosis (or, by analogy, any dissociative state potentially induced by either a substance or a mental disorder) should be considered a disease of the mind or self-induced intoxication, assume that it was the latter, per the assumption of sanity in s 16(2) and *Chaulk*. Whichever party raises NCRMD can then displace the assumption based on the *Stone* framework, *infra*.

Appreciating the 'nature and quality' of the act

The first arm of the NCRMD defence requires that the **A** lack the capacity to 'appreciate the nature and quality of his act or omission' to have access to the defence. Dickson J (as he then was), in his judgments in *Cooper* and *Abbey*, clarified

that the word 'appreciates' connotes that the **A** must have had the capacity to appreciate the *physical* consequences of his or her act at the time that it was committed. This is more than a merely cognitive requirement (as the word 'know' would connote), but extends to the **A**'s *perception* of the conduct's natural consequences. By specifically relating the defence to the *MR* of the offence in *Abbey*, Dickson J seems to suggest that the consequence the **A** had to be able to appreciate would need to be an element of the offence, but that isn't really clear, so you can probably argue it either way depending which one seems more interesting.

Knowing that the act is wrong

The second arm of the NCRMD defence requires that the **A** lack the capacity to 'know [the act or omission] was wrong'. This means that the **A**'s disease of the mind must have caused him or her to lack the capacity to understand that his or her *particular act* (including circumstances—*Oommen*) was contrary to the 'ordinary moral standards of reasonable people' (*Chaulk*).

Automatism or NCRMD?

Where there is evidence upon which a properly instructed jury could reasonably conclude that dissociation has been proven on BOP, the judge must determine what defence to leave to the trier of fact. Per *Stone*, we assume that the dissociation was caused by a mental disorder. The **A** then bears the legal burden of persuading the trial judge that it should *not* be treated as a mental disorder. We do this using a holistic approach, using two analytical tools and residual policy considerations. First, we consider whether the dissociation had an *external cause* (*Rabey*), which is a cause that would *not* have made a normal person dissociate (suggests DOTM). Next, we consider whether the **A** presents a continuing danger to society (*Parks*)—that is, whether the trigger that caused them to enter into the automatistic state is likely to recur (*Stone*, *Luedecke*). A couple examples of residual policy concerns are faking and floodgates.

Where the **A** discharges that burden, the trial judge must put the defence of non-NCRMD automatism to the trier of fact, who decides whether dissociation has been shown on BOP.

Where the **A** fails to discharge that burden, the trial judge must consider whether s 16 applies, per *Cooper*, *Abbey*, *Chaulk*, *Oommen* and *Landry*, *supra*.

Policy considerations

Part XX.1 of the *Code* is meant to address the twin goals of **(a)** fair treatment of the **A**, and **(b)** the safety of the public by creating an alternative to conviction and acquittal for NCRMD offenders (*Winko*). It does so by diverting the individual into a special stream wherein they are assessed individually as to whether they should be kept in a secure institution, released on conditions, or unconditionally discharged. The latter possibility protects their s 7 rights. The point of such a scheme is to take an approach that combines the assessment of risk and treatment of illness rather than assessing guilt and punishment. [**NB**: Use this as justification where you think a condition is not adequately addressed by the test in *Cooper* and should be considered a disease of the mind.]

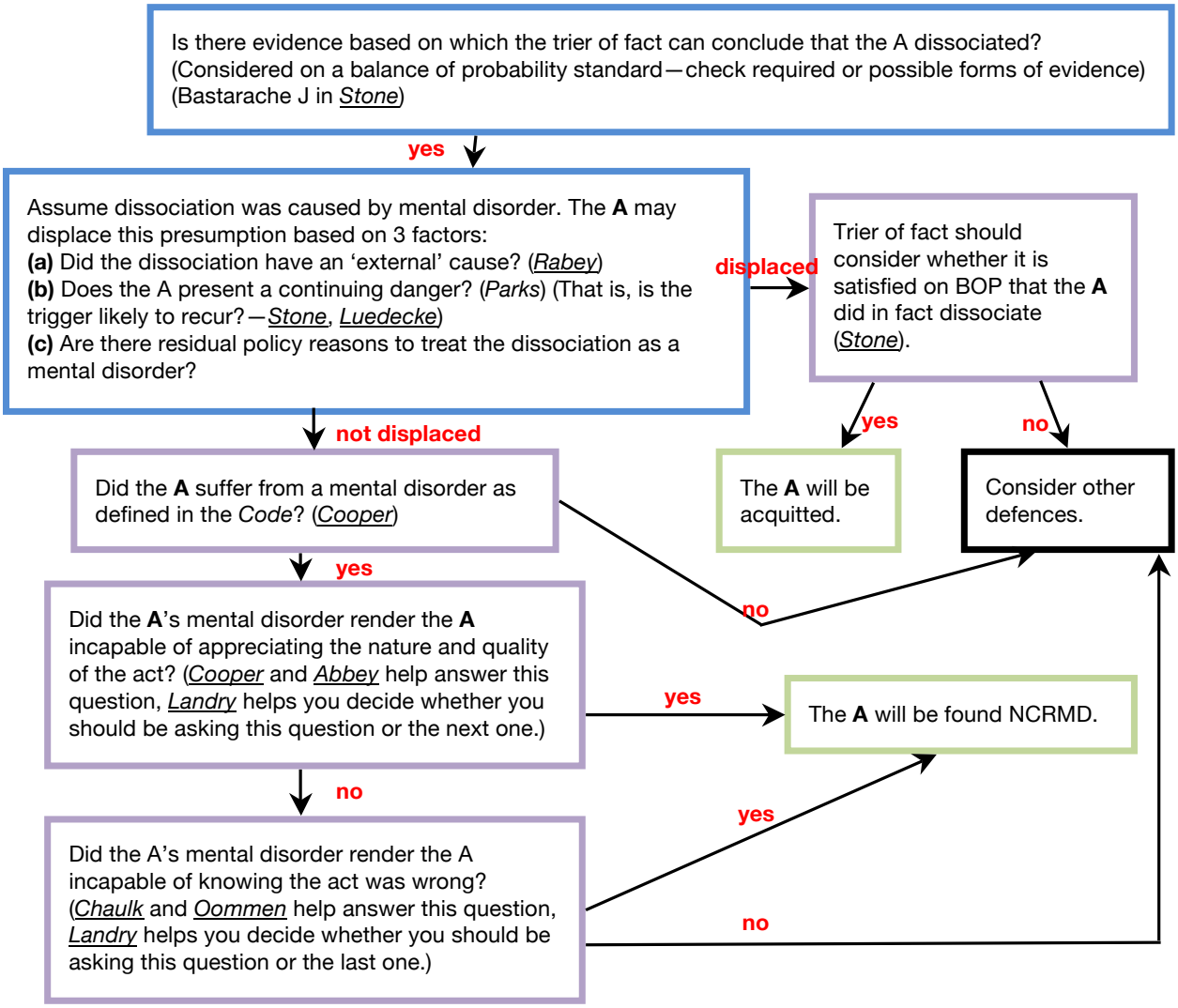
"Mental Disorder and the Instability of Blame in Criminal Law" by BL Berger (CB 792)

Reference to a "disease of the mind" does not defer to psychiatric authority. It is a *legal* question whether something constitutes a disease of the mind. The "*M'Naghten* paradigm" is reflected in the Canadian legal test for mental disorder, which emphasizes *cognition* and *practical reasoning* and excludes volitional and emotional impairments recognized in psychiatry. The latter serves to 'screen out' those suffering from a severe personality disorder like psychopathy.

The level of cognitive disruption required is very high, and is primarily responsive to extreme forms of paranoid schizophrenia.

The core of the defence turns on 2 possible cognitive branches: **(1)** incapacity to appreciate the nature and consequences of the act, or **(2)** to know that the act was wrong. The legal defence has not evolved with our societal understanding of mental disorder. Indeed, the defence is beginning to appear actively hostile to mental disorders that are found with great frequency in our penal population. Q: "**What is the function of a criminal law doctrine so unconcerned with facts that bear on its own theoretical preoccupations?**" Possible A: "the under-inclusive doctrine of mental disorder serves as a mechanism for the elision of collective blame for a complex social problem." [By leaving them at the mercy of the criminal legal system, do we avoid the difficult socio-political responsibility of caring for and protecting the most vulnerable among us?]

Flowchart for relationship between automatism and mental disorder where the A may have dissociated



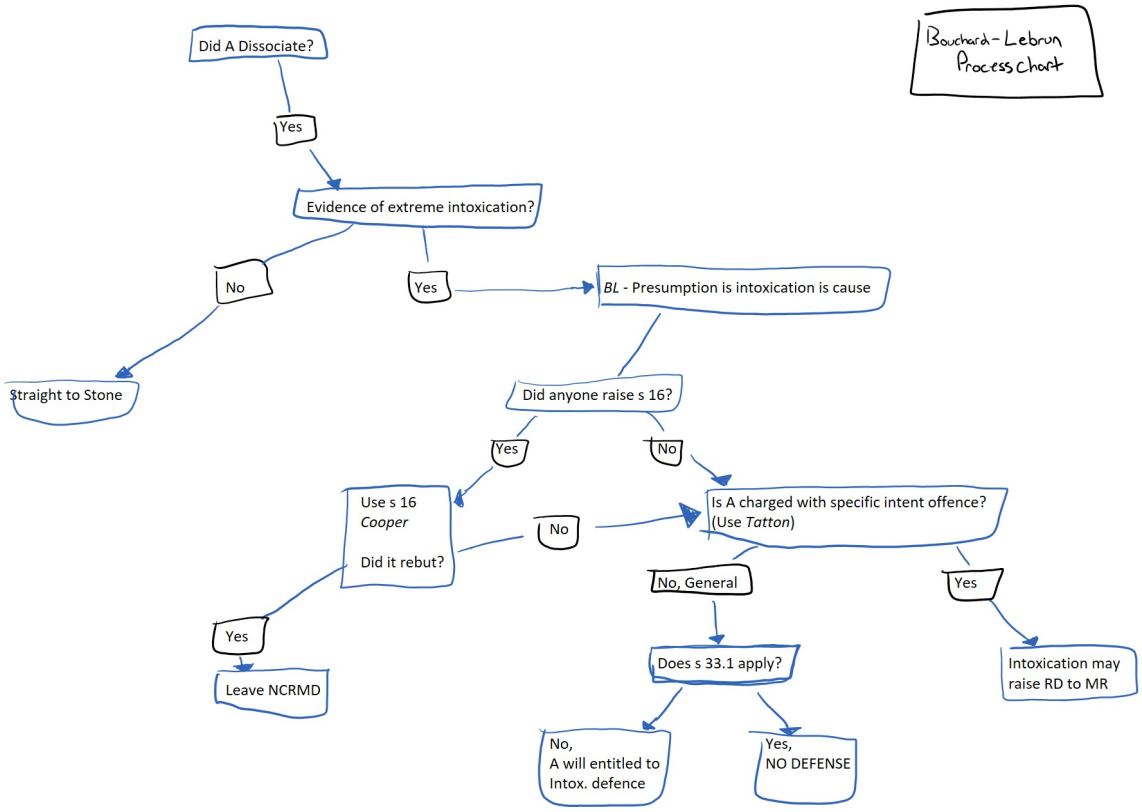
R v Whittle 1994 SCC (CB 794)

***Ratio* (Sopinka J)**: The test of fitness to stand focuses on the ability of the A to instruct counsel and conduct a defence. It only requires the limited cognitive capacity required to understand the legal process and communicate with counsel. It is not a requirement that the **A** be able to make rational decisions.

I: What is the test for 'fitness to stand trial'?

L: *Code*, ss 672.22ff (fitness to stand trial), and 16 (definition of 'mental disorder').

A: The test for fitness to stand trial is distinct from the definition of mental disorder in s 16. Where s 16 serves to protect the mentally ill from liability on the grounds that they are sick rather than blameworthy, s 672.22 simply requires that the **A** meet the limited capacity necessary to proceed through the trial, wherein a claim for the NCRMD defence under s 2 would be assessed. There would be no point in having the defence if every **A** that satisfied it was also unfit to stand trial.



R v Swain 1991 SCC (CB 795)

***Ratio* (Lamer CJ)**: Allowing the Crown to raise mental disorder does not violate the **A**'s s 7 right to direct his/her own defence. There are 2 occasions when the Crown can do so (**(a)** & **(b)** below).
I: Can the Crown raise the mental disorder defence?
L: *Code*, s 16; *Charter* ss 7, 15, *Simpson* (ONCA).
A: There are 2 objectives of the CL rule that allows the Crown to raise evidence of mental disorder even where the **A** does not wish that such evidence be raised: **(1)** where the **A** refuses to bring evidence that he is NCRMD despite the fact that he is, and **(2)** to protect the public from **A**s who are presently dangerous and require hospitalization. In order to safeguard the **A**'s right to control his own defence, we only allow the Crown to argue NCRMD where either: **(a)** a verdict of guilty has been reached, but a conviction has not yet been entered, OR **(b)** the **A** has put mental capacity into question somehow (in this case the Crown can raise NCRMD before a verdict of guilty has been reached).
Min. (Wilson J): We should allow the Crown to raise the defence where the offence has been proven BRD, but allowing the Crown to raise mental disorder during the trial (as **(b)** would allow) infringes on the **A**'s s 7 right to control his own defences, and on the equality rights of the mentally 'disabled' under s 15 "under the guise, putting it at its best, of a benign paternalism".

R v Chaulk 1990 SCC (CB 798)

***Ratio* (Lamer CJ +4)**: The presumption of sanity (now contained in s 16(2)) violates the presumption of innocence, but the displacement of the burden is justified under s 1.
I: Does the presumption of sanity violate s 7 of the *Charter*? If so, is it saved under s 1?
L: *Code*, s 16(2) (16(4) in 1990); Charter ss 1, 11(d); *Oakes* test.
A: s 16(2) of the *Code* engages s 11(d) of the *Charter*, but it is saved under s 1. The objective of the provision is to avoid placing a burden of proof on the Crown which is impossible for it to meet. Putting the burden on the **A** to prove mental disorder on a balance of probabilities is proportional to this objective.
Min. (McLachlin J (ASTW) +2): s 16(2) does not violate the presumption of innocence at all. Conceiving of the NCRMD defence as an essential part of all offences confuses *true* acquittals (the absence of an essential element or the presence of a defence, i.e., innocence) with *formal* acquittals under NCRMD, which come with their own coercive measures. The principle at stake in s 16(2), then, is not really *innocence*.
Min. (Wilson J): s 16(2) violates the presumption of innocence protected by s 11(d) of the *Charter* and is not justified under s 1. The Crown has failed to show that there is a real social problem (a "pressing and substantial objective") of sane persons escaping criminal liability by dubious mental disorder pleas.

Winko v BC 1999 SCC (CB 800)

***Ratio* (McLachlin J (ASTW))**: The Review Board provisions of the *Code* do not violate either of ss 7 or 15 of the *Charter*. They are tailored to *protect* those interests by taking an individualized approach, and by allowing the Review Board to unconditionally discharge an individual.

I: Do the Review Board provisions of the *Code* violate the **A**'s ss 7 or 15 rights?

L: *Code*, Part XX.1, s 672.54; *Charter* ss 7, 15.

A: Part XX.1 of the *Code* is meant to address the twin goals of **(1)** fair treatment of the **A**, and **(2)** public safety. It does so by creating an alternative to conviction and acquittal, diverting the individual into a special stream. In that stream, either a court or Review Board conducts a hearing to determine whether the person should be kept in a secure institution, released on conditions, or unconditionally discharged. The latter possibility protects individuals' s 7 rights. The very point of such a scheme was to take an approach that combined assessment of risk and treatment of illness rather than assessment of guilt and punishment. Its individualized approach is the antithesis of the kind of law that would violate the s 15 rights of the mentally ill.

[**NB**: s 672.54 was amended in 2014 such that it now notes that the safety of the public "is the paramount consideration". Does this upset the balance identified above? Is this still constitutional?]

Cooper v The Queen 1980 SCC (CB 805)

***Ratio* (Dickson J (AHTW))**: A mental disorder is a disease of the mind, which should be broadly interpreted, but should not include self-induced or transitory states. Whether a condition is a mental disorder is a question of law.

I: What is a disease of the mind?

L: *Code*, s 2 (definition of mental disorder as "a disease of the mind"), 16.

A: Whether the **A** suffers from a disease of the mind is a *legal* question, not a medical one, and is thus properly resolved by the TJ. It includes a medical component, and does not include intoxication, passion, or "transient states attributable either to the fault or to the nature of man" (citing Dixon CJ of the Aus HC). The definition should be broad and liberally interpreted, but should exclude self-induced states like intoxication, and transitory states such as concussion or hysteria.

R v Bouchard-Lebrun 2011 SCC (CB 807)

***Ratio* (LeBel J)**: In order to establish a defence of NCRMD, the **A** must prove on the balance of probabilities that **(1)** he or she was suffering from a mental disorder (in the legal sense) at the time the offence was committed, and **(2)** that due to the mental condition, he or she was incapable of knowing that the act or omission was wrong, OR of understanding the nature and quality of his or her act. The legal definition of mental disorder presumptively excludes self-induced and temporary conditions.

F: The **A** assaulted 2 **V**s while in a psychotic condition caused by drugs he had deliberately ingested earlier. The **A** had never before experienced toxic psychosis. The **A** argued that since toxic psychosis is an uncommon reaction to a drug, it should be presumed that someone who experiences such a reaction has an underlying predisposition that constitutes a disease of the mind.

I: Can 'toxic psychosis' constitute a disease of the mind?

L: *Code*, s 16, *Cooper*.

A: The criminal law's traditional presumptions of autonomy and rationality can be rebutted if the **A** proves that he or she did not have the necessary level of autonomy or rationality at the relevant time. In order to do so through the NCRMD defence, the **A** must prove on the balance of probabilities that **(1)** he or she was suffering from a mental disorder (in the legal sense) at the time the offence was committed, and **(2)** that due to the mental condition, he or she was incapable knowing that the act or omission was wrong, OR of understanding the nature and quality of his or her act. In this case, **(2)** is clearly met. There are significant policy considerations involved in determining whether **(1)** has been met. The legal definition of mental disorder presumptively *excludes self-induced and temporary* conditions. This presumption can be rebutted, but the **A** has failed to do so in this case.

Cooper v The Queen 1980 SCC (CB 805)

***Ratio* (Dickson J (AHTW))**: The first arm of the NCRMD defence requires that the **A** lack the capacity to 'appreciate the nature and quality of his/her act or omission'. This means that the **A** must not be able to perceive the consequences of his/her action.

I: What does it mean to 'appreciate' the consequences of one's actions?

L: *Code*, s 2 (definition of mental disorder as "a disease of the mind"), 16(1), *Simpson* (Martin JA: provision does not extend to those who lacked the appropriate feeling about the effect of the act on others, e.g. guilt).

A: The *M'Naghten* rules that define the mental disorder defence at English CL required that the **A** have the capacity to 'know' the nature and quality of his/her act, which is a purely cognitive requirement. The NCRMD defence in the *Code* was deliberately written such that it deviates from that rule, and requires something more: that the **A** have the capacity to '*appreciate*' the nature and quality of his/her act. This requires that the **A** have the capacity to have both *emotional* and *intellectual* awareness of the conduct's natural consequences at the time it was committed.

R v Abbey 1982 SCC (CB 816)

***Ratio* (Dickson J (AHTW))**: The first arm of the NCRMD defence requires that the **A** lack the capacity to understand the *physical* consequences of his/her act.

F: The **A** bought cocaine in Peru and tried to bring it into Canada. He was caught at customs. The **A** was changed with trafficking cocaine. An expert testified that the **A** was hypomanic. TJ found that the **A** was under a delusion that he had received power from an external source and was protected from punishment for his actions. [TJ also referred to a related delusion that the **A** thought the mysterious force was irrevocably compelling him to commit the offence, but this is absent from Dickson J's (AHTW) reasons.]

I: What consequences must the **A** not be able to appreciate for the first arm of the NCRMD defence to apply?

L: *Code*, s 16.

A: His inability to understand that his act had penal consequences was not enough for the **A** to gain access to the NCRMD defence. The first arm of the defence requires that the **A** lack the capacity to understand the *physical* consequences of his/her act, since the NCRMD defence serves to negative the *MR* of an offence.

NB: leaves open the possibility that the consequence that the **A** couldn't appreciate either is or is not an element of the offence. Perhaps implies that it has to be an element of the offence by specifically relating the defence to the *MR* of the offence.

R v Chaulk 1990 SCC (CB 818)

***Ratio* (Lamer CJ +5)**: The second arm of the NCRMD defence requires that **A** have a disease of the mind that *causes* him/her to lack the capacity to understand that the act is contrary to the 'ordinary moral standards of reasonable people'.

F: TJ instructed the jury that the **A**s need only understand that their acts were contrary to law in order to be denied access to the second arm of the NCRMD defence.

I: What does 'wrong' mean in the second arm of the NCRMD defence?

L: *Code*, s 16(1), *Schwartz* (Dickson J (AHTW)'s dissent).

A: In his dissent in *Schwartz*, Dickson J (AHTW) argued that 'wrong' as used in s 16 should be interpreted to mean morally wrong, partially on the basis that if they have intended for it to mean legally wrong, Parliament would have used the word 'unlawful'. More fundamentally, he argued that the *object* of the provision was to protect individuals who don't have the capacity to judge right from wrong, and that this would not protect amoral persons because any incapacity would have to be *caused by* a disease of the mind. We should adopt his reasoning. This will not open the floodgates to amoral offenders both because of the necessary causal link between the inacapacity and a disease of the mind, and because morality should be judged based on the standards of reasonable members of society rather than the standards of the **A**.

Min. (McLachlin J (ASTW) +2): If the **A** was capable of knowing the act was *either* morally *or* legally wrong, then he or she should not have access to the second arm of the defence. We do not exempt offenders with morally impoverished upbringings from penal consequences, so why should mental disorder be any different?

R v Oommen 1994 SCC (CB 824)

***Ratio* (McLachlin J (ASTW))**: The second arm of the NCRMD defence focuses on whether the **A** had the capacity to know that his/her *particular* act was morally wrong.

F: The **A**, suffering a paranoid delusion, thought that the woman he repeatedly shot was coming into his house to kill him. TJ held that he didn't have access to the NCRMD defence because he had the capacity to know that society would consider his actions wrong. The **A** was convicted of second degree murder.

I: Should the second arm of the NCRMD defence consider whether the **A** knew the act was wrong generally, or in the particular circumstances?

L: *Code*, s 16.

A: Although the **A** had the capacity to distinguish right from wrong generally, he lacked the capacity to discern that killing the **V** in *particular* was wrong. Based on the circumstances that the **A** *thought* were the case, his actions were justified, and thus were not wrong. The second arm of NCRMD inquiry focuses on the capacity of an **A** to know that his/her *particular* act was wrong in the circumstances and at the time it was committed, because it centers on the **A**'s ability to make a rational choice about whether to carry out that action or not. The **A** cannot make such a choice if unable to appreciate whether or not that particular act was wrong.

R v Landry 1991 SCC (CB 830)

***Ratio* (Lamer CJ)**: The **A** was incapable of appreciating that his action was morally wrong under the second arm of NCRMD.

F: The **A** was charged with first degree murder for killing a former friend. The **A** was schizophrenic, and had become convinced that the **V** was Satan and that he was God. He thought that he had to kill the **V** in order to save the world. QCCA held, before *Chaulk* was decided, that the **A** was incapable of understanding the nature and quality of his act by virtue of his delusion.

R v Parks 1992 SCC (CB 831)

***Ratio* (La Forest J)**: Where the cause of automatism is not a disease of the mind, it will lead to an acquittal.
F: The **A** killed his mother-in-law and severely injured his father-in law in the wee hours of the morning. He then drove to the police station and told police he'd killed 2 people. The **A** had been under considerable stress due to a gambling problem which had led to stealing at work, culminating in criminal charges. Evidence showed that he had a good relationship with his inlaws, and expert testimony was adduced that the **A** was sleepwalking at the time, including that there was a history of sleep disorders in his family.
A: Sleepwalking (somnambulism) is not a disease of the mind. The **A** should be acquitted with no conditions on the grounds that his automatistic state made voluntary action impossible.
Lamer CJ (diss. on this point): Conditions should be imposed on the **A** to prevent recurrence of the behaviour.

R v Stone 1999 SCC (CB 833)

***Ratio* (Bastarache J +4)**: Where there is evidence that **A** dissociated, assume that it was caused by a disease of the mind. The **A** may displace this presumption based on 3 factors: (a) that the dissociation had an external cause, (b) that the A does not present a continuing danger, and (c) that there are no residual policy reasons to treat their dissociation as though it were caused by a disease of the mind.
F: The **A** killed his wife after she had insulted him over a period of some hours. The **A** argued both automatism and mental disorder automatism.
I: How can an **A** demonstrate that words alone caused him/her to enter an automatistic state?
L: *Code*, s 16
A: Automatism is a state of impaired consciousness in which an individual is capable of action but cannot voluntarily control that action. Automatism can stem from a disease of the mind, or can have no connection to a disease of the mind. In the latter case, it leads to an acquittal on the grounds that the conduct was not voluntary. In the former case, it leads to a result of NCRMD, and referral to the review board per s 16.
Diss. (Binnie J +3): Where experts on both sides agree that there is no disease of the mind, and the reason for allocating the case to s 16 is the absence of an external cause, there is insufficient basis for shifting the persuasive (legal) burden to the defence to show that non-NCRMD automatism should be put to the trier of fact. Where the Crown fails to prove mental disorder, the trier of fact should consider whether it has proven voluntariness BRD.

R v Luedecke 2008 ONCA (CB 833)

***Ratio* (Doherty JA)**: When the **A** has been shown to have acted while in an automatistic state, begin from the presumption that it was caused by a disease of the mind, then consider whether the evidence refutes that assumption. This also holds for parasomnia/sleepwalking, effectively overruling the decision in *Parks*.
F: The **A** had a history of parasomnia. At a party, while very drunk, he fell asleep on a couch near the **C**, who woke up to find him having sex with her.
I: Where does the law currently stand on automatism and NCRMD?
L: *Code*, s 16, *Stone*, *Parks*, *Winko*.
A: Reading *Stone* and *Winko* together gives us a comprehensive framework for considering automatism claims. Before a verdict is rendered, our concerns are primarily those of public safety. *Stone* tells us that where automatism is present, to begin from the premise that it was caused by a disease of the mind, and then to turn to the evidence to determine if it refutes the assumption. The nature of the criteria we use to determine whether that assumption is refuted means that concerns about the risk posed by potential recurrence of the behaviour are central. *Winko* tells us that after a verdict of NCRMD, we shift our emphasis to an assessment of the particular individual's circumstances and illness and consider whether he or she should be discharged.

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

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

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

Intoxication flowchart in words

In determining whether the **A**'s intoxication is relevant to his or her criminal liability, and thus whether the trier of fact must consider it in assessing whether the offence has been proven BRD, we begin by asking how intoxicated the **A** was. In Canadian criminal law, distinctions are drawn between mild intoxication, advanced intoxication, and extreme intoxication (*Daley*, *Daviault*). Mild intoxication, which is where the **A**'s inhibitions were relaxed by alcohol but his or her ability to form complex thoughts was unaffected, is not relevant to *MR* and should not be put to the trier of fact (*Daviault*). Advanced intoxication, which affects the **A**'s ability to form complex thoughts and to reason with acuity, *can* be relevant to *MR* where the **A** has been charged with an offence that requires specific intent (*Bernard*). This means that it should be put to the trier of fact, who should consider whether it raises a reasonable doubt about an element of the offence. Extreme intoxication is intoxication that is akin to automatism. Where the offence is *not* one that includes threatened or actual physical interference with the **V**'s bodily integrity (*Code*, s 33.1), the **A** will be entitled to the defence (*Daviault*). It must be proven on a balance of probabilities with recourse to expert evidence as to whether the **A**'s drunkenness would likely have been comparable to a dissociative state.

Where the **A** was in a state of advanced intoxication, Moldaver J's reasons in *Tatton* govern how to determine whether the offence is one of specific or general intent, and thus whether intoxication should be put to the trier of fact. He notes that this is an exercise in *statutory interpretation*, and that we should not be influenced by the facts in the case before us in making this assessment. First, we look to precedent. Some offences have already been classified as specific or general intent. [Specific: murder (*Cooper*), robbery (*George*), possession of stolen property (*Tatton*, *obiter*), assault resisting arrest (*Tatton*, *obiter*), terrorism (*Khawaja*). General: sexual assault (*Leary*, *Chase*), arson (*Tatton*), assault *simpliciter* (*George*).] Where there is no precedent, we must parse the offence and consider the relative complexity of the thought and reasoning processes that make up the *mens rea*. This will often be enough to classify an offence as either general or specific intent, but where it is not, we consider policy. There are two questions to ask: first, if alcohol consumption is habitually associated with the offence in question, and second, whether there is a lesser included offence of general intent. Where alcohol consumption is habitually associated with the offence, this suggests we should consider it an offence of general intent. Often, but not always, violent or unruly conduct and damaging property are associated with the consumption of alcohol. Where there is a lesser included offence that the **A** may be convicted of, this should make us lean toward classifying the offence as specific intent.

NB: think *quite hard* (with your brain) about how this would interact with mental disorder where the **A**'s drunkenness was caused by his or her alcoholism. How this works (including how it interacts with *Bouchard-Lebrun*) should probably be considered in the section on NCRMD, *supra*, but isn't because the exam starts in like two-and-a-half hours.

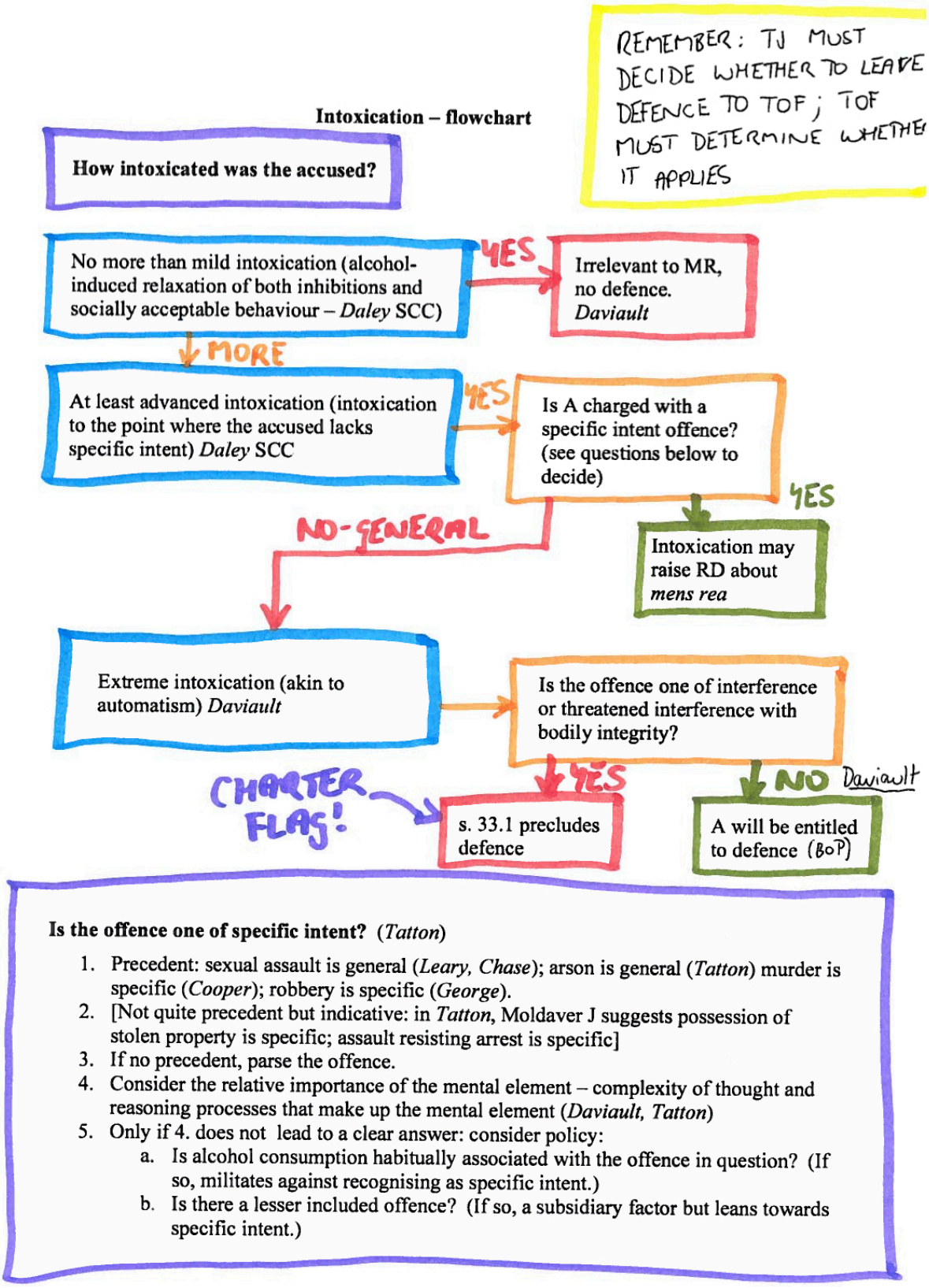
~Constitutional Interlude~

Where *Charter* rights conflict, **(1)** define the specific area of conflict (*Dagenais*/*Mentuck*), then **(2)** consider what policy reasons there are for each impairment. There is no hierarchy of rights (*Mills*), so we should find a solution that impairs those rights as little as possible, i.e., a solution that gives greatest scope to both rights.

Summary

There are **3** variations on intoxication. **(1)** There is a CL rule that restricts the defence of intoxication to offences of

specific intent (*Beard*, *Bernard*). **(2)** Sections 7 and 11(d) of the *Charter* require that the defence of extreme intoxication (which requires expert evidence to establish on BOP) apply to offences of general intent (*Daviault*). **(3)** *Code*, s 33.1 denies the defence of extreme intoxication to an **A** who committed an offence of general intent that involved threatened or actual interference with the **V**'s bodily integrity, where the **A**'s drunkenness displayed a marked departure from the standard of care defined in 33.1(2) as *self-induced* and causing the **A** to be in an automatistic state.



DPP v Beard 1920 HL (CB 850)

***Ratio* (Birkenhead LC)**: 3 rules.
I: Is intoxication a defence in criminal law?
A: When the **A** voluntarily became intoxicated and then committed a offence, his/her drunkenness can substitute for the voluntariness required for the offence itself (not true in Canada, per *Daviault*). For crimes that include a specific intent, evidence that the **A** was so drunk that he/she could not form that intent will lead to an acquittal. In such circumstances, the **A** can be convicted of general intent offences. 3 rules emerge from cases. **(1)** Insanity arising from drunkenness is a defence (disagreement in English law w/r/t whether insanity must be permanent to act as a defence; see *Bouchard-Lebrun* in Canada). **(2)** Where the **A**'s intoxication rendered him/her incapable of forming specific intent, this should be taken into account along with the other evidence in determining whether the **A** *actually had* that intent. **(3)** Where drunkenness falls short of incapacity to form intent, this does not rebut the presumption that the **A** intended the natural consequences of his/her actions—decreased inhibition is not enough.
NB: Written at a time when drunkenness was considered a moral failing.

R v Bouchard-Lebrun 2011 SCC (CB 852)

***Ratio* (LeBel J)**: When the **A** raises evidence of both mental disorder *and* intoxication, consider NCRMD under s 16 first, and intoxication under s 33.1. Where evidence shows that the **A** was at a level of advanced intoxication, although less than a level akin to automatism, the court must ask whether there is a RD that the intoxication prevented the A from forming the *actual specific intent* to commit the offence.
I: sjdbg?
L: *Code*, ss 16, 33.1; *Beard* (1920 HL); *Daley* (2007 SCC); *Robinson* (1996 SCC); *Leary* (1978 SCC); *Daviault* (1994 SCC).
A: The 3rd rule in *Beard*, which was based on capacity to form intent, violates ss 7 and 11(d) of the *Charter*. Instead, the Court tells us in *Daley* (citing *Robinson*) that the question must be about the *actual* specific intent, and whether the **A**'s intoxication raises a RD about whether it was present. The suggestion in both *Beard* and *Leary* that voluntarily getting drunk can substitute for voluntarily committing an offence also violates the *Charter*, according to a majority of this Court in *Daviault*.

R v George 1960 SCC (CB 854)

Min. (Ritchie J +1): There is a distinction between acts done "to achieve an immediate end" and those with specific motives. General intent offences are the former, and specific intent offences are those with an additional causal step. Only *extreme* intoxication can negate general intent.
Min. (Fauteaux J +1): Robbery is a specific intent offence (the specific intent of theft). Common assault is a general intent offence.
F: The **A** was acquitted of robbery after TJ had a RD about whether the **A** had formed the necessary specific intent. TJ convicted the **A** of common assault even though the Crown did not refer to it at trial, and the BCCA overturned that conviction.
I: Can an **A** acquitted of a specific intent offence be convicted of an lesser included general intent offence?

R v Bernard 1988 SCC (CB 858)

Min. (Wilson J +1): Sexual assault is a crime of general intent. It is first and foremost an assault, sexual only because objectively viewed, the violent contact is sexual. Self-induced intoxication cannot substitute for the mental element required to be present at the time the offence is committed, because As should be protected from punishment that is not proportionate to their degree of culpability (taken up in *Daviault, infra*).
Min. (McIntyre J +1): Intoxication is not a true defence to a criminal act. It can merely create a reasonable doubt about the presence of the proper *MR* of an offence. The distinction between general and specific intent does not relieve the Crown of its obligation to prove the presence of general intent. That distinction is based on criminal law theory on sound social policy.
F: The **A** was charged with sexual assault causing bodily harm. The only question left to the jury was consent. The **A** gave a statement to police indicating that he was intoxicated when he carried out the offence, and stopped when he realized what he was doing.
I: Is sexual assault a crime of specific or general intent?
L: *Leary* (1978 SCC—held that sexual assault is a crime of general intent).
Diss. (Dickson CJ +2): As long as intoxication is not an element of the offence, it should be considered by the jury in addition to all other evidence related to *MR*, regardless of whether the offence if specific or general intent.

R v Daviault 1994 SCC (CB 867)

***Ratio* (Cory J +5)**: ss 7 and 11(d) of the *Charter* require that extreme intoxication akin to automatism lead to an acquittal for even general intent offences. The **A** must establish it on a balance of probabilities with the help of expert evidence.
F: The **A** was an alcoholic who became extremely drunk and sexually assaulted the **C**. An expert witness testified that A's blood alcohol content was likely to put him into an automatistic state.
I: dank?
A: ss 7 & 11(d) of the *Charter* demand that extreme intoxication comparable to automatism negate the *MR* of even general intent offences. Self-induced intoxication is not sufficient to ground liability for any crimes—not even those of general intent. Voluntary intoxication is not a crime, and thus it does not make sense for the volition of that action to ground blameworthiness. Even if voluntary intoxication were reprehensible, it does not make sense to say that a person intending to drink can be said to intend to commit an offence. There should be some link (even though symmetry is not required) between the minimum *MR* of an offence, and the prohibited act itself [**NB**: is this a constitutional minimum?]. Since the state is comparable to automatism, it should be proven on BOP by the **A**.
Diss. (Sopinka J +2): No symmetry between *AR* and *MR* is constitutionally required, per *Creighton*. Voluntarily depriving oneself of the ability to form *MR* is morally blameworthy and thus can substitute for *MR*.
NB: In *Penno* 1990 SCC, the court found that intoxication cannot be a defence to a crime for which the Crown must prove intoxication BRD as an element of the offence.
NB: s 33.1, *supra*, was passed after *Daviault* was decided. It precludes the application of the extreme intoxication defence for general intent offences that involve interference with the **C**'s bodily integrity. It does so in an interesting way.

R v Tatton 2015 SCC (Supplement)

***Ratio* (Moldaver J)**: Procedure for determining whether an offence is one of specific or general intent, below.
I: Is arson a crime of specific, or general intent? What should we do about specific and general intent?
A: The distinction between specific and general intent offences lies in the complexity of the thought and reasoning processes each requires, and in the social policy underlying the offence. To determine whether a crime is one of specific or general intent, proceed as follows.
(1) Has the SCC or a CA already categorized this offence? If so, follow precedent. If not, continue.
(2a) (Statutorily) interpret the *MR* requirement of the offence. Take care not to turn this into factual analysis of the particular case before you.
(2b) Consider the complexity of the thought and reasoning processes that make up the *MR*. Does it include the intent to bring about certain consequences? Does it require actual knowledge of circumstances or consequences, where that knowledge is the result of complex reasoning? Does it require proof of an ulterior purpose? If so, it is likely a specific intent offence.
(2c) If, after statutory interpretation of the *MR*, it is still unclear how best to categorize the offence, then consider policy dimensions. In particular, consider whether the consumption of alcohol is habitually associated with the commission of the particular offence. Generally, alcohol consumption is associated with violent and unruly conduct and with damaging property. The presence of lesser included general intent offences and judicial sentencing discretion are also relevant.

The Three 'Threat' Defences

Choosing between the 'threat' defences (from LeBel and Cromwell JJ's judgment in *Ryan*)

Especially since the self-defence provision was amended, self-defence, necessity and duress are hard to distinguish from one another. They all apply in situations where what would otherwise be criminal conduct is excused or justified because the **A** acted in response to an external threat. There are 4 significant differences. First, self-defence is a justified action because the person against whom it is directed is "the author of his or her own deserts" (*Hibbert*). By contrast, 'excused' offences are generally performed against an innocent third party. Second, when self-defence applies, the V has simply attacked the **A**, and the **V**'s purpose in doing so is irrelevant. For duress, the *purpose* of the threat is to compel the **A** to commit an offence.

Third, self-defence is completely contained in the *Code*, where duress is partly codified and partly CL. Fourth, the underlying rationale of duress is moral voluntariness, which is a principle of fundamental justice (*Ruzic*), and is thus an excuse. Self-defence, on the other hand, is a justification, which should be more readily available than an excuse.

[**Editorializing**: choose necessity where the reason the **A** committed the offence was not the action of another person. Choose self-defence where the reason the **A** committed the offence was the action of another person, who was also the **V**. Choose duress where the reason the **A** committed the offence was the action of another person, whose purpose in acting was to compel the **A** to commit that offence.]

Self-Defence (CB 883)

Defence of Person
Defence — use or threat of force
34(1) A person is not guilty of an offence if
(a) they **believe** [*Reilly*] on **reasonable grounds** [*Cinous*, *Lavallee*, *Nelson*/*Kagan*, *Reilly*, *Pétel*, *Malott*] 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
(c) the act committed is **reasonable in the circumstances** [*Kong*].
Factors
(2) 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 [*Cinous*, *Lavallee*];
(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 [this consideration is a direct adoption of *Lavallee*];
(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 [*Kong*]; and
(h) whether the act committed was in response to a use or threat of force that the person knew was lawful.
No defence
(3) Subsection **(1)** does not apply if the force is used or threatened by another person for the purpose of 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.

Rob Nicholson, who was Minister of Justice at the time, said that these provisions were intended to preserve the existing jurisprudence, but there are some differences. The first is that self-defence was traditionally a defence to assault, but now it appears to apply to any offence. This seems to blur the line between self-defence and duress. Further, the provision previously said that the person was 'justified', where now it says that they are 'not guilty of an offence'.

Procedure for 'air of reality' defences

In *Cinous*, McLachlin CJ and Bastarache J explain the A trial judge must put all defences available on the evidence to the trier of fact. In considering whether a defence is available on the evidence, the trial judge must consider all the evidence, assume that all the evidence brought by the A is accurate, and consider whether there is an *air of reality* to every element of the defence. This means considering whether a properly instructed jury, acting reasonably, could acquit the A on the evidence presented.

Once the **A** raises an air of reality about every element of the defence, the Crown has the burden of disproving one of those elements beyond a reasonable doubt. If the Crown does not discharge this burden, the **A** is entitled to an acquittal.

"Reasonable grounds" & "Reasonable in the circumstances"

In *Cinous*, a majority of the Court thought there was an AOR to the **A**'s contention that he reasonably believed he was in danger when his criminal associate snapped his gloves in a weird way that gave him the heebie jeebies. They thought there was *no* AOR to his contention that he could not reasonably have escaped—self-defence meant as a last resort.

In *Reilly*, the Court thought that intoxication could be relevant to assessing the **A**'s subjective perception, but not to assessing whether the **A**'s belief was reasonable.

In *Nelson* and *Kagan*, courts of appeal thought that an **A**'s intellectual impairment should be taken into account in assessing the reasonableness of the **A**'s perceptions and responses.

In *Kong*, proportional force in s 34(2)(g) was assessed on a relatively permissive standard.

R v Cinous 2002 SCC (CB 889)

***Ratio* (McLachlin CJ and Bastarache J +2)**: The legal test for an AOR is whether there is **(1)** evidence on the record that **(2)** a properly instructed jury, acting reasonably, could acquit the **A**. This means that there must be an AOR to *every element* of the defence for it to be put to the trier of fact.

F: The **A** and the **V** had been engaged in criminal activity together. The A shot the V while their van was stopped at a gas station. The **V** was sitting in the van and the **A** was standing outside of it. The A testified that he believe that the V and a friend were planning to kill him and that he had no alternative but to shoot **V** first.

I: What is the legal test for an AOR? Is there an AOR to self-defence in this case?

L: The old self-defence provision, elements drawn from *Pétel*.

A: Elements of self-defence (where the offence is murder): **(a)** the existence of an unlawful assault, **(b)** a reasonable apprehension of death or GBH, and **(c)** a reasonable belief that it is not possible to preserve oneself from harm except by killing the adversary. On the old self-defence provision, each of these elements is assessed both subjectively and objectively. There was no AOR to the objective aspect of **(c)**.

***Concurring min.* (Binnie J +1)**: Assessing the reasonableness of the **A**'s belief in the lack of alternatives from the perspective of his criminal subculture is contrary to public policy. This means that the objective aspect of **(c)** has no AOR.

NB: The old element **(a)** is identical to the new **34(1)(a)**. The old objective components of **(b)** and **(c)** are identical to the new **(1)(c)**. The old subjective components of **(b)** and **(c)** are *quite different* from the new **(1)(b)**.

Reilly v The Queen 1984 SCC (CB 896)

***Ratio* (Ritchie J)**: Intoxication may be relevant to whether the **A** subjectively perceived that they were being assaulted, but is not relevant to whether there were reasonable and probable grounds for thinking so.

F: The **A**'s intoxication altered his ability to assess whether there were reasonable and probable grounds to think he was being attacked.

I: Should intoxication be relevant to whether the **A** has reasonable and probable grounds to think they were being attacked?

L: *Code*, s 34(1)(a)

R v Nelson 1992 ONCA (CB 897)

***Ratio* (Morden ACJO)**: An **A**'s intellectual impairment should be taken into account in assessing his or her reasonable beliefs and responses under the *Code*, s 34(1)(a) & (c).

R v Kagan 2004 NSCA (CB 898)

***Ratio* (Roscoe JA)**: Ditto for Asperger's Syndrome.

R v Kong 2006 SCC (CB 898)

***Ratio* (Wittman JA)**: A person is not expected to weigh the measure of defensive action precisely. The **A** may be mistaken about "the nature and extent of force necessary for self-defence provided the mistake was reasonable in the circumstances."

L: *Code*, s 34(1)(c) [**(2)**, most directly (a), (b), (e) and (g).]

R v Lavallee 1990 SCC (CB 903)

***Ratio* (Wilson J +4)**: Expert evidence may be useful in applying the test that follows in order to understand what the **A** would have reasonably perceived the alternatives to be in the circumstances of intimate terrorism. There does not have to be an immediate temporal connection between the **A**'s perception and the **A**'s acts. The **A**'s perception of assault does not necessarily have to be accurate. The test is **(a)** what the **A** reasonably perceived, given her situation and experience and **(b)** whether the **A**'s belief that she could not otherwise defend herself is based on reasonable and probable grounds given the **A**'s history, circumstances, and perceptions.

F: The **A** shot the **V** in the back of the head. Evidence established that the **V** had been repeatedly and seriously violent towards the **A** throughout the duration of their relationship. On the night in question, the **V** threatened the **A**, telling her that 'she would get it later' and handed her a gun threatening to kill her if she didn't kill him first. Expert evidence suggested that the **A** suffered from the psychological effects of battered woman syndrome, and explained that she was likely well attuned to the nature and severity of the **V**'s impending violence, and suggested why she would have disbelieved that she could leave the premises as a way of escaping that violence. The **A** was acquitted at trial.

I: Can expert evidence be used in a claim of self-defence, and if so, to what extent? What is the required temporal connection between apprehension of death and A's use of force in order to rely on s 34(2)? How are we to judge the 'reasonable and probable grounds' required by s. 34(2) in the context of a battered woman acting in anticipation of violence from her partner?

L: *Code*, s 34**(1)(a)** (what counts as 'reasonable grounds'), (2)(a), **(b)**, (e), **(f)**, (f1).

R v Pétel 1994 SCC (CB 912)

***Ratio* (Lamer CJ)**: If the **A** makes a reasonable mistake about whether she is being assaulted, she may still have access to the defence. The question is whether she reasonably believed, in the circumstances, that she was being assaulted. *Lavallee* clearly states that imminence is only one factor to consider in assessing whether the **A** had a reasonable apprehension of danger and a reasonable belief that she could not escape by another means.

F: The **A** killed R. R was in drug trade with E, who lived with the **A**'s daughter in the **A**'s house. E regularly threatened the **A** and beat the **A**'s daughter. On the day of the charged offence, E threatened to kill the **A**, her daughter and granddaughter, and forced the **A** to weigh cocaine. The **A** shot and wounded E, perceived that R was lunging at her, and shot him.

I: Can the A be mistaken about whether she is about to be assaulted?

L: *Code*, s 34(1)(a).

"The Syndromization of Women's Experience" by Isabel Grant (CB 915)

The danger of focusing on the psychiatric dimensions of battering is that it may transform the reality of gender oppression into a psychiatric disorder. This reinforces the irrationality of the woman's response and the need for a medical diagnosis. It is particularly apparent in the concept of learned helplessness. However, a woman may have many reasons why she is unable to leave a relationship of violence.

R v Malott 1998 SCC (CB 916)

Min. (L'Heureux-Dubé +1): The **A** in *Lavallee* did not establish a defence of being a battered woman, but directed the court to consider the situation and experience of a battered woman in applying legal tests of reasonableness. This may equally apply to other defences with 'reasonableness' elements. Taking up a suggestion from Grant's "Syndromization" article, courts should focus on the reasonableness of the A's actions given her personal experiences and experiences as a woman. Other material factors are also relevant. We should not extend the ambit of 'battered woman syndrome' without careful research and expert evidence.

***Ratio* (Major J +4)**: Considers the purposes for which expert evidence may be used in a case in which a woman argues self-defence pursuant to intimate terrorism.

F: The **A** was convicted of 2nd degree murder of her ex-spouse and attempted murder of his girlfriend. The evidence suggested that the **A**'s ex-spouse had abused the **A** and her children violently for many years and that the police had declined to act. When the **A** committed the charged acts, she was no longer living with her spouse but he was still requiring her to participate in his trade in pharmaceutical drugs. The **A** was convicted at trial.

L: *Code*, s 34; *Lavallee*.

Duress (CB 927)

Compulsion by threats
17 A person who commits an offence under compulsion by threats of ~~immediate~~ (*Ruzic*) death or bodily harm from a person ~~who is present~~ (*Ruzic*) 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)~~ (*Ruzic* and *Aravena*, by analogy).

The statutory and CL defences of duress (and their fight to the death)

In *Carker* 1967 SCC, Ritchie J held that even though the *Code* preserved CL defences in (now) s 8(3), the duress provision evacuated the CL defence and exhaustively defined duress.

In *Ruzic*, LeBel J found that the immediacy and presence requirements of s 17 violated s 7 of the *Charter* because they could allow someone who acted without moral volition to be convicted. That moral voluntariness is necessary to found a criminal conviction is a principle of fundamental justice.

In *Ryan*, the statutory and CL versions of duress are exhaustively set out. They share the following **6** elements: **(1)** an explicit or implicit threat of present or future death or bodily harm, directed either at the A or at a third party, **(2)** the **A** reasonably believed that the threat will be carried out, **(3)** the **A** reasonably believed that there was no safe avenue of escape, **(4)** a close temporal connection between the threat and the harm threatened, **(5)** there was proportionality between the harm the **A** reasonably believed was being threatened, and the harm *actually* caused by the **A**, **(6)** the **A** was not a party to a conspiracy or association whereby the **A** was subject to compulsion and subjectively knew would led to coercion to commit an offence.

2 differences between statutory and CL duress are identified in *Ryan*: s 17 is available to principal offenders where CL is available to parties to an offence, and s 17 contains a list of excluded offences where CL duress does not.

In *Aravena*, Doherty and Pardu JJA of the ONCA held that CL duress could not exclude any offences on the ground that that would offend the principle of moral voluntariness and thus violate s 7 of the *Charter*. It remains to be seen whether this should extend to s 17 of the *Code*, but in my expert opinion, it should.

R v Paquette 1977 SCC (CB 928)
***Ratio* (Martland J)**: s 17 of the *Code* is only applicable to cases in which the person seeking the defence actually committed the offence. s 8(3) preserves the CL defence of duress for parties to an offence.
F: During a robbery that the **A** was forced to aid at gunpoint, the **P** shot somebody. The **A** had driven the **P** to the robbery, and refused to let him and his accomplice back into the car. The **A** was charged with murder.
I: Does CL duress exist as a defence in Canadian criminal law?
L: *Code*, ss 8(3) (CL defences preserved) 17 (duress), 21(2) (common intention).
A: s 17 is limited to those who *commit* an offence—that is, who act as principal in an offence's commission. For parties, 8(3) preserves the CL defence, which does *not* exclude murder as an offence to which it acts as an excuse.

R v Ruzic 2001 SCC (CB 932)
***Ratio* (LeBel J)**: The immediacy and presence requirements in s 17 of the *Code* breach s 7 of the *Charter*, because moral voluntariness is a principle of fundamental justice. Adding 2 elements to CL duress.
F: The **A** had been threatened in Belgrade at a time when the rule of law had broken down. She was forced to carry heroin on a plane to Toronto, and was told that if she didn't comply, her mother would be harmed.
A: It is a principle of fundamental justice that only morally voluntary conduct can attract criminal liability. Although s 17 requires that the threat of death or bodily harm be *immediate*, and the threatener be *present*, this case illustrates that those requirements can be absent, and an **A** can still be forced to act in a way that defies their moral volition. Thus, those requirements breach s 7 of the *Charter*. They cannot be saved by s 1. It was proper to allow the jury to consider CL duress.

In future, however, juries should be instructed to consider whether there was **(a)** a close temporal connection between the threat and the harm threatened, and **(b)** that the **A** *reasonably believed* (subjective and objective) that there was no safe avenue of escape from the threat.

R v Ryan 2013 SCC (CB 938)

***Ratio* (LeBel and Cromwell JJ)**: See analysis for elements of s 17 and CL duress, and for how to choose between the 3 'threat' defences. Duress is only available when a third party threatens the A with death or bodily harm for the purpose of compelling him or her to commit a specific offence.

F: The **A**'s husband was violent and abusive toward her. He threatened to cause her and her daughter serious harm or death on many occasions. The **A**'s efforts to get the police to take her fears seriously were unsuccessful. She spoke to several men about having her ex-husband murdered, before agreeing a K with an undercover cop. At trial, she argued duress.

I: What are the elements of CL and statutory duress? How do we decide which of duress, self-defence and necessity is the appropriate defence?

A: *Ruzic* pared s 17 of the *Code* down to 4 elements: **(1)** there must be a threat of death or bodily harm directed against the **A** or a 3rd party; **(2)** the **A** must reasonably believe that the threat will be carried out [reasonably, because it is to be considered holistically with (5) and (6)]; **(3)** the offence must not be on the list of excluded offences [consider how *Ruzic*, *supra*, and *Aravena*, *infra*, together call this element into question]; **(4)** the **A** cannot be a party to a conspiracy or criminal association such that the person is subject to compulsion. It also added 3 more elements, sourced from CL duress: **(5)** the **A** must have had no safe avenue of escape from the threats (judged on the standard of a RP, similarly situated); **(6)** there must be a close temporal connection between the threat and the harm threatened; **(7)** the offence committed by **A** must be proportionate to the threat (judged on the standard of a RP, similarly situated). (2), (5), and (6) must be holistically considered together, since the **A** could not have reasonably believed that the threat would be carried out unless there was no safe avenue of escape, and that harm was temporally close. (7) essentially means that the harm caused must not be greater than the harm avoided.

The CL defence of duress has 6 elements: **(1)** an explicit or implicit threat of death or bodily harm directed against the **A** or a 3rd party; **(2)** the **A** reasonably (in the circs.) believed that the threat would be carried out, **(3)** the **A** did not (reasonably) have a safe avenue of escape; **(4)** there was a close temporal connection between the threat and the harm threatened; **(5)** there was proportionality between the harm threatened and the harm inflicted (modified objective standard); **(6)** the **A** was not a party to a conspiracy or criminal association (etc).

All 3 of duress, necessity and self-defence apply in situations where what would otherwise be criminal conduct is excused or justified because the **A** acted in response to an external threat. But there are also 4 significant differences. First, self-defence is a justified action because the person against whom it is directed is "the author of his or her own deserts" (citing *Hibbert*). By contrast, for offences performed under duress or necessity, the **V** (or potential **V** for attempts) is generally an innocent third-party. Second, when self-defence applies, the **V** has simply attacked the **A**, and the **V**'s purpose is irrelevant. For duress, the *purpose* of the threat is to compel the **A** to commit an offence.

Third, self-defence is completely contained in the *Code*, duress is partly codified and partly CL. Fourth, the underlying rationale of duress is moral voluntariness, which is a principle of fundamental justice (*Ruzic*), and is thus an excuse. Self-defence, on the other hand, is a justification. Justifications should be more readily available than excuses.

R v Aravena 2015 ONCA (CB 950)

***Ratio* (Doherty and Pardu JJA)**: Where the **A** was party to an offence, CL duress can be a defence to a murder charge (or any other offence) on the grounds that moral involuntariness is now a principle of fundamental justice, per *Ruzic*.

F: The **A**s aided and abetted murders that had arisen from internal strife in the Bandidos biker gang.

I: Is the CL defence of duress precluded from **A**s charged with murder or other offences that are hard to conceive of as 'proportionate' responses to *any* threat?

A: Although the HL has held that attempted murder (and other offences like murder and treason) can never be proportionate to threats of harm, and thus cannot attract the defence of duress at English CL, Canada's is a different legal context. There is simply no avoiding the conflict between moral involuntariness as a principle of fundamental justice, and the possibility that an **A** could commit one of the excluded offences involuntarily and not have access to the defence.

Determining proportionality comes as the result of 2 related but distinct questions. **(a)** Was the harm threatened equal to or greater than the harm inflicted? **(b)** Was the **A**'s choice to inflict harm consonant with the societal expectation of a RP's conduct in the same circumstances as the **A**?

R v Hibbert 1995 SCC (CB 953)

***Ratio* (Lamer CJ)**: Duress does not necessarily negate the *MR* of an offence. It usually merely alters the **A**'s *motive*.
F: The **P** forced the **A** to bring the **V**, his friend, down to the lobby of his apartment building. The **P** killed the **V**. The **A** didn't want the **V** to die.
I: How does the defence of duress interact with the *MR* requirements of an offence?
L: *Code*, s 21(2).
A: While threats of death or serious bodily harm can affect an A's state of mind, duress usually goes to motive or desire to bring about consequences rather than intentino. 'Purpose' in the party liability provisions merely refers to intention, and does not require the intent to bring the offence about. Ditto common intention (overruling Martland J in *Paquette*).

Necessity (CB 961)

Burdens of proof and elements

Element (*Perka*)	***MR* (*Latimer*)**
The **A** is in a pressing emergency of great peril.	Subjective (The **A** honestly believes) and modified objective (taking the **A**'s situation and characteristics into account, relying on *Hibbert*, similar principle in *Lavallee*)
Compliance with the law is demonstrably impossible.	Subjective and objective.
The **A**'s response is proportionate to the threatened harm.	Purely objective—no modification. Homicide might never be proportionate.

R v Perka 1984 SCC (CB 966)

***Ratio* (Dickson J (AHTW) +3)**: The defence of necessity exists in Canada at CL, and has 3 elements, set out below. It operates as an excuse rather than a justification.
F: The **A**s were charged with trafficking. $7 million worth of weed was seized from a ship in Canadian waters near Vancouver Island. The **A**s were members of the crew on the ship, which was smuggling the weed from Colombia to Alaska. The **A**s brought evidence that they had to come into Canadian waters so that their ship would not sink in the poor weather.
I: Is there a defence of necessity in Canada?
L: *Code*, s 8(3) (CL defences preserved).
A: The central question for the defence of necessity is about *moral voluntariness*. In this sense, it is very similar to duress. The 3 elements are that **(1)** the **A** be in a pressing emergency of great peril, **(2)** with no legal way out, and **(3)** that the **A**'s response be objectively proportionate to the harm threatened. This must be considered an excuse for immoral conduct, rather than a justification of righteous conduct, because otherwise our beautiful civilized society will descend into ANARCHY.
Min. (Wilson J): Sometimes necessity is a justification rather than an excuse—when the **A** had a legal duty to act in defiance of the law, we actually want him/her to act that way, as long as it is proportionate to the harm threatened by that action.

R v Latimer 2001 SCC (CB 972)

***Ratio* (*per curiam*)**: Necessity has MR elements, *supra* chart. It is very rarely available.
F: The **A** killed his daughter, who suffered from severe cerebral palsy and experienced continual pain. He pleaded necessity in defence to second-degree murder, but TJ refused to instruct the jury on the defence.
I: Should necessity have been put to the jury?
A: None of the elements of necessity identified in *Perka* had an AOR in this case, and the TJ was correct not to leave the defence with the jury. Murder may never be a proportionate response under necessity.

R v Ungar 2002 OCJ

***A* (Lampkin J)**: It was not a reasonable alternative to fail to respond to the call for help. The Crown should never have pressed these charges, and should have withdrawn or stayed them before letting this matter get to trial. I have never seen such a justified use of the necessity defence.
F: The **A** was a volunteer ambulance driver who was charged with dangerous operation of a motor vehicle. He had driven on the wrong side of the road and broken the speed limit with his lights flashing in order to deliver emergency medical assistance to an injured woman who would not have been reached by an ambulance in time.
NB: recall Wilson J's minority opinion in *Perka*, that where the **A** had a duty to act in defiance of the law out of necessity, the defence may actually act as a justification rather than an excuse.