1. **Theories/Principles of Sentencing**:

**Why do we punish people**?

1. *Utilitarian perspective*:

a. **Bentham & Mill**: punishment promotes good consequences: it promotes deterrence (individual & specific), rehabilitates, incapacitates the dangerous and keeps the rest safe.

 -Note: rehab and individual deterrence = accomplish the same thing. Get rid of further crimes, just differently.

 b. **Deterrence** (specific/general): most common justification, but does it work? Little empirical evidence. *Assume* it does: that offenders *rationally calculate* decisions and are/are not deterred, and everything is PLANNED in adv, assumes knowledge of penalties. Lots of literature that it has issues (e.g. death-penalty research in US). Sometimes just being *scared* by system is enough (e.g. shoplifting without being charged, just ‘caught’). **Two main criticisms**: *is it morally justified to punish X to effect behavior of other people*? 1) The punishment does not actually have to fit the crime (be proportionate) because it will still deter anyways; 2) Deterrence works irrespective of person’s guilt.

 c. **Incapacitation** (frequently Utilitarian): can’t commit other crimes if incapacitated, assumes more important to prevent other crimes in community (maybe not *incarcerated community*), and very difficult to assess effectiveness. Where person is *dangerous*, most common justification used.

 d. **Rehabilitation**: variant of *specific deterrence*. Largely discredited: most people incarcerated have *higher risk of re-offending* when released. Need treatment programs. Hard to do in violent penitentiary. Useful rationale to justify *other types of sentence*: e.g. anger management courses /w supervision etc. for more success. Q about indeterminacy: how long do you detain to rehabilitate someone? (US went from indefinite to very fixed).

2. *Retributive Perspective*:

 a. **Purpose**: punishment is a *moral good* in response to the offender’s actions

 b. **Two concepts**: a) Offenders deserve to be punished; b) state has a **duty** or obligation to punish.

 c. **Key value**: Proportionality. Note, this **isn’t the same as ‘tough on crime’** in Canada, because punishment cannot be too higher or too low, given the circumstances. Only punished for what you deserve.

***R v CAM*, [1996] 1 SCR 500**: *Retribution is a purpose of sentencing, what it means*

-Father sexually assaulted children, other violence. TJ imposed global 25 years for few charges, is harsher than murder (CA said excessive) and “no place for retribution in sentencing”.

-SCC: **Yes it is. What it means**: *objective, measured, reasoned punishment*, *proportionate to the harm*. Unlike vengeance, it has a concept of **restraint** built-in: supposed to reflect the *blameworthiness* of the offender.

 -Vengeance = *uncailbrated* act of harm upon another, motivated by emotion of anger.

 -Different from *denunciation* too: retribution requires proportionate sentence, and denunciation is about societal condemnation of the conduct

**No max sentence?**:
 -No limit on fixed-term sentences. Does it make sense in relation to life imprisonment?

 -Problem with Parole elig?

**S718 Codification**:

 -Now sets out all of the principles and justifications for sentencing

 -Not much emphasis on (f) – *‘promoting sense of responsibility*’ and acknowledgement of harm.

 -Courts pick and choose what is appropriate for an offender

 -Primarily does not focus on victim (e.g. restitution does not cover pain & suffering)

**Anthony Doob, “The Unfinished Work of the Canadian Sentencing Commission**” **(2011)**:

 -Principles of sentencing used to never be codified (CL), so large unfettered discretion led to current provisions.

 -Variety of Harper changes to get “tough on crime” restricting judicial authority

 -e.g. mandatory minimum, harder to get parole, accelerated parole abolished, pre-trial credit limited, abolition of faint hope clause, harsher murder sentences

 -Based on the *belief in* the good effects of *deterrence* from incapacitation/separation from society.

 -**Public Perception of Sentencing**:

 -Sentences too low; long incarceration protects us; little discussion about costs; ($ and human); public doesn’t really know what usual sentences are.

**Arcand (Alta) CA: 5 Truths about sentencing**:

1. Sentencing is controversial

2. Doesn’t matter if judges know *all the fact*, would still disagree on sentence

3. Judge shopping is alive

4. In order to accomplish sentencing objectives, *need uniformity* (parity)

5. If courts don’t act, Parliament will

 -Need more structure and appellate review to ensure consistency on one hand, but at same time, **sentencing is very individualized** and CA only to intervene when sentence *unfit*. More review doesn’t necessarily fix the problem. No indication that parliament will act in coherent way (*MM’s*) – judiciary vs parliament pull.

**Justice Melvyn Green, “The Challenge of Gladue Courts” (2012):**

-Overrep: Aboriginals = 3-4% of Canadian pop, but over 20% of the prison pop.

-Aboriginal women = highest increasing rate for incarceration.

-A Men make up 25% of those in custody, and A women make up 41% of those in custody

-Can the sentencing system appropriately deal with this?

* *R v Gladue* – courts must give meaning to section **718.2(e)**
* Courts must consider:
	+ - “all available sanctions **other than imprisonment** **that are reason able in the circumstances**… **with particular attention** to the **circumstances of aboriginal offenders**”
* *R v Ipeelee*
	+ - “application of the Gladue principles is **required in every case involving an aboriginal offender**” (Even to violent crimes, or bail).

-Gladue hasn’t really made much of a difference.. (possibly due to MM’s – no discretion), and CSO’s limited. In fact, **problem is worse now**, **even while *crime level is declining***.

-SCC talked about impacts of colonialism, etc. but we’re still seeing overrep: e.g. A men more often denied bail, given parole later, and imprisoned LONGER. Gladue is *narrow* and looks only at **sentencing**.

-**Ontario’s special courts**: *diversion mechanism* (non-serious offences), or for *sentencing*, and bail hearings – no trials.

**Overrep of mentally ill** [Prof notes]

-Hugely over’repped, lots of deinstitutionalization and criminalization of these people

-Rationales: **rehabilitation**, most of the focus (not always). Assumptions about mental can lead to greater focus on **incapacitation** (dangerous).

-Similarities with Aboriginals: disadvantaged circumstances, social exclusion, economic, unemployment, lack of housing, no higher education, resort to alc and drugs.

-**Harper govt**: focused on *imprisonment* – “us vs them”.

-CJ System: doesn’t have resources to deal with mentally ill -> *only small amount get through on insanity*.

-**Studies on whether people with mental illness greater threat to public**:

 -Bottom line: *THEY ARE NOT*. It’s the incidents to mental illness: unemp, lack of housing, drugs, etc. *Nurr*: Aboriginals and Mentally ill: interveners argued that they are **disproportionately affected by MM’s** -> court didn’t mention them.

-We focus more on imprisonment than other systems (e.g. Scandinvaian). USA still locking up at highest rate in developing world, and 10x our violence.

**Costs of incarceration**:

-4.6 billion, adult .. all Canada

-Custodial: ~69% of budget, and community: 10% (rest is parole, admin, etc)

-2011: avg cost of inmate (male): 111k PER YEAR, 214k for female.

 -Community supervision avg: 31k

-**Crime Rate**: Peaked in 1990’s, and on the decline since. Homicide peaked at 1977 (was 3/100k, now 1.4/100k) .. **not because of HARPER.**

2. **Structure of Sentencing in the Code**:

**Fundamental Tension between two values**:

1. *SENTENCE PARITY* (maybe not predominate approach): like offenders in like circumstances (with similar offences) should be like sentences. Value of **certainty** and **consistency**.
2. *INDIVIDUALIZED SENTENCING*: sentencing must be **flexible**, no two offenders will be exactly the same. Value of **judicial discretion**.

**S718** **Purposes:** The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(a) to denounce unlawful conduct;

(b) to deter the offender and other persons from committing offences;

(c) to separate offenders from society, where necessary;

(d) to assist in rehabilitating offenders;

(e) to provide reparations for harm done to victims or to the community; and

(f) to promote a sense of responsibility in offenders, and

**Additional sections to 718**:

-**Offences against children**: 718.01: *primary objectives* are denunciation and deterrence.

-**Offences against peace officer**/**justice system participant**: 718.02 denunciation and deterrence primary focus.

**Fundamental Principle**: *Proportionality*

-718.1: Sentence must be proportionate to the gravity of the offence and degree of moral responsibility of the offender.

 -**Underlying value** to which *other principles subject to*.

 -**Circumstances of offence**: how much harm done to victims, violence, weapons?

 -**Individual’s circumstances**: first offence, young offender, etc.

 -Proportionality: find principles that apply, and make this offence worse or not as bad. Overall should be fit.

**Statutory Aggravating Factors**:

-718.2: courts REQUIRED to take into account (a)(i)-(v) \*\* among other ones you could argue:

 (i) **Bias, prejudice, or hate based on race, ethnicity, sex, age, mental etc.**

 (ii) **Abused spouse/common law**

 -Also applies to *former* *spouse*

 (ii.1) **Under 18**

 -Repetitive (other section says *denunciation/deterrence* when child)

 (iii) **Breach of trust/authority**

 (iii.1) **Significant impact on victim**: considering *age, financial circumstance*, *health, other personal*

 (iv) **At direction or for benefit of crim org**

 (v) **Terrorism**

**Guiding Principles**:

-718.2(b)(c)(d):

-(b) **Sentence Parity**: sometimes comes second..

-(c) **Totality**: where *CONSECUTIVES* imposed, total should not be **unduly harsh**. Don’t lose sight of TOTAL. You’re supposed to calculate **each individual sentence.** However, **concurrent is supposed to be the norm**.

 -In *R v CAM*: NO UPPER LIIMIT AS LONG AS OVERALL FAIR.

-(d) **Restraint**: if other *appropriate* means of dealing with accused possible, don’t unnecessarily incarcerate (last resort).

-(e) – overlaps with (d): *ALL OTHER AVAILABLE SENTENCES* should be **considered** before incarceration, ***particularly for Aboriginal offenders***.

 -Note: first part “all offenders” not used that much, just the *aboriginal* offenders.

***R v H*:** *OPERATION OF TOTALITY*, *how to do it RIGHT*

-**Totality**: is a review process for judge to consider *AFTER* looking at aggravating/mitigating factors and *other principles* (e.g. deterrence). Arises from **proportionality**: if the sentence is *much higher* than what’s usually available for that crime, or does not take into account offender’s prospects (record/rehab, etc), then **need to adjust**.

-**What TJ did**: applied *consecutive* for few offences, leading to 15 yrs. Said “too much”, so *reduced each one for TOTALITY*. He basically cut sentence in half. Was looking at Gladue at totality stage.

-CA: **How to do it right**: Look at each individual sentence considering everything: what is appropriate for **EACH COUNT**? THEN decide if consecutive or concurrent. \*Gladue should be considered. THEN come up with total, and *if necessary*, reduce for totality.

 -**Note**: not overturned because *although mistakes*, still fit sentence.

**Importance of Reasons**:
-726.2: TJ has to give reasons in sentencing. Important for *appellate review*. Have to understand what is particularly aggravating/mitigating, if mistakes. Also for sentence parity, consistency, etc.

**Appellate Review of Sentence**:

-DEFERENCE: has to be **demonstrably unfit sentence** (significant error and had impact on sentence)

-CA: has important role to play, otherwise there will be **little parity**.

 -You do want some certainty and finality at TJ, who are best placed to make many findings. But, also want the structure and parity from review.

**If sentence NOT specified**:

-Summary 787: max is $5000, or 6 MOs Jail (or both).

 -*Super Summary*: may be higher. E.g. s271(1) sex assault, hybrid - Max of 18 MOs

-Indictable 743: Max is 5 yrs.

**Attempts**:

-463 *based on sentence for completed offence* (**three tiers**):

-**(a)**: If max is **LIFE** -> attempt/accessory after the fact is **14 years** **max** (exception for attempted murder)

-**(b)**: If max is **14 years or less** -> attempt/accessory after the fact is **HALF**.

-**(c)**: If summary conviction -> attempt/accessory = summary (general rule: 6 months/5000$).

**Mandatory Minimums**:

-Variety of sections (e.g. s236, and where firearm used 236(b), MM of 4 yrs)– *most crimes are not*.

-NO JUDICIAL DISCRETION

**RANGES**:

-More common offences CA sets particular ranges.

-Involves principle of parity 718.2(b)

-If fits within the range, less likely to be appealed

-Best to start with CA, and then dig up similar circumstances in other courts

-Might have to *synthesize* (bunch of different decisions) if no range available.

***R v Bernier* – When can TJ disregard range? *Range not conclusive***

-F: charge out of *home-invasion*. TJ went outside of range of 4-9, because of “public urgency” (rising B&E’s based on **no empirical evidence**) Went outside of range to DETER. Gave 14 yrs on B&E + theft.

-CA: ***Ranges are is not conclusive and sometimes principles (e.g. denunciation + deterrence) can take you outside of it***. **Overriding Q:** *IS THE SENTENCE PROPORTIONATE?* Sentence falls outside of the “acceptable range” when it is a **MARKED DEPARTURE** from what other offenders are getting, in similar circumstances. Thus, you can go outside of the range on very **compelling circumstances** (strong rehab, mitigating, etc). Range is a starting point.

 -Range is not equality to min/max: still ask about proportionality

 -Note: CA reduced to 6 yrs. *Going outside range* was not justified (aboriginal, young offender).

***R v MacDonald***: - **Stanley Riots, *Going outside of range***

-Not enough to show appellant is outside of the range; **have to show the sentence is UNFIT because of being outside of the range**.

-Can be outside of the range if **consistent with principles of sentencing**

-**Parity is important**, but **individual circumstances** must be considered.

**Range of Available Sentences**:

Leading case on **Discharges** (A’s best int + public interest): *R v Fallofield*:

 -Stole pieces of leftover carpet, 1973. “Theft under 200”. Member of military, and **career would be hurt** because of 30 days imprisonment, CA imposed discharge.

 -**Best interest of A**: assumed person of *good character*, without previous conviction, not necessary to enter conviction, in order to deter and rehab, and conviction would have *significant consequence for* A.

 -**Public interest**: deterrence of others *must be given weight*, BUT cannot prejudice the use of discharge.

1. **Absolute Discharge** (730):
	1. Convicted, but no criminal record.
	2. Has to have *less than 14 yrs* max.
	3. **Best interest of A**: seems it always would be…
	4. **Not contrary to public interest**: more important
2. **Conditional Discharge** ( ):
	1. Same as AD, but *delayed* – same legal impact.
	2. Includes period of PRO /w conditions. Need to satisfy to enter discharge.
3. **Suspended Sentence and Probation** 731(1)(a):
	1. Different from CD, because you get crim conviction.
	2. As long as **no MM**.. and ‘circumstances’ of offender and offence allow it.
	3. You CANNOT attach PRO to a sentence of *more than 2 yrs*.. but PRO on its own can be 3 yrs (732.2(2)(b)).
	4. **Conditions of PRO** are not supposed to PUNISH you.
	5. 731(1)(b): Can *ADD PRO* to a sentence (not exceeding 2 years)
	6. **When multiple offences**: PRO requirements/restrictions apply to the INDIVIDUAL offences before the court. E.g.: 18 MO Jail + 2 MOs PRO in New West, and then a week later.. you get 10 MOs Jail in Alberta: even though *total* is over 2 yrs, **PRO should err on the side of allowing** (*R v Knott* – SCC)
	7. **Things that *EVERY pro-order has to have*:** 732.1(2) – e.g. moving, address, keeping the peace, appear before the court. Must also consider weapons prohibitions.
	8. **Permissive PRO conditions**: 732.1(3) –
		1. Reporting; remaining in juris; abstaining from drugs/alc; not owning weaps; support for dependents; community service (up to 240 hours in 18 months); anything else
		2. 3.1: Additional for an *ORGANIZATION*: restitution; policies/procedures to avoid offence (communicate policies); update court.
	9. **BREACH OF PRO** (733.1) serious offence – *hybrid*. Indict: 2 yrs max; summary 18 MOs, or 2000$.
4. **FINES** (734-37):
	1. This is a form of imprisonment. Period of time-served if there is a default (you are told). Has to be a fine they CAN pay.
	2. 734(5): formula for calculating period of imprisonment instead of fine.
	3. **Victim Surcharge** (737): basically have to use it.
5. **RESTITUTION** (738-741):
	1. Only for pecuniary loses and not for pain & suffering
	2. It is a *stand-alone* order.. not ‘tacked-on’.
6. **Imprisonment**:
	1. Intermittent Imprisonment – 732(1): for sentence *less than 90 days*… served only at a particular time, like weekends.
	2. Electronic Monitoring: not in the crim code (lol) – at home /w bracelet, connected to phone.
	3. Conditional Forms: 742.1 .. it is a form of imprisonment (although in the community)
	4. Custodial: federal over 2yrs, prov less than.

**Consecutive vs Concurrent**:

-Principle of totality 718.2(c) when consecutive: ***R v CAM, R v H***

-Generally, it’s concurrent. Use common sense. Lots of discretion.

-s719: sentence starts to run the day it is imposed; starting point is that sentences are concurrent.

-*R v Potts* (some factors): nature/quality of acts; temporal/special dimensions of the offences; nature of harm caused to community or victims; how the acts were perpetrated; and offender’s role.

-***R v Berry*** (BCCA):

 -F: Multiple offences in one residence. Two assaults (aggravated) against two victims; went to another house, committed other offences. Total for 5 offences was 14 yrs.

 -CA: **Consecutive is appropriate here, but *reduce for totality***. **Justified when you have different victims, but not required.** 14 is harsh though, so reduce to 10. Whether something is *consec/concur* **gets deference**.

 -“whether the acts constituting the offence were part of a linked series of acts within a single endeavor”

-***R v Kandola*** (BCCA):

 -F: Border guard helped others participate in scheme to import cocaine across border without detection. 14 yrs importation and 1 yrs for *breach of T* – consecutive.

 -Q: Does the 1yr BofT become unduly harsh (totality) because already used as aggravating for importation? + Double Punishment?

 -CA: **Consecutive sentences can be given where there is one transaction**/**series of events, where two different societal urges expressed by the charges**. (**Two different victims –** boss + ‘society’).

-MANDATORY CONSECUTIVE: 85(4) Sentence given for using a firearm in the commission of an offence, **MUST be served consecutively**.

**When can you give the MAXIMUM**?

-**CASE (involving child-porn**):

 -F: Sexually assaulted daughter, distributed CP. There is a 10yrs max for simple sexual assault. Simple = lowest (no weapon or serious bodily harm). Got 3, 5, 5 years concurrent for the CP, but 15 years CONSECUTIVE for the sexual assault (the max). A argued *not the WORST* type of offence.

 -SCC: **rejects the ‘worst offender test’ -> you can always think of something worse**. **It’s about proportionality: is the MAX PROPORTIONATE?**

**Rights Violation and Sentence**:

-*R v Nasogaluak*:

 -F: PO’s used excessive force in arresting him.

 -Q’s: whether charter violation (or something short) can be used to reduce sentence. Where does it fit into proportionality?

 -**Court**: **It is *mitigating. Charter violation helpful, but not necessary***. Also, e.g. 11(d) – if not significiant enough to meet delay, can be still mitigating. **It really just sends a message to the PO’s to stop fucking A’s over**.

 -What if there is MM: Normally you cannot, but in **exceptional circumstances** where *Charter* breach, may go below MM. **s24** **is the jurisdiction** to lower sentence. If not charter violation, not clear where you’d get it from.

**Alternative Measures**:

-716: “diversion” – of person 18+ in a way that is *other than through judicial proceedings* under the Code.

-717: **Conditions**: *must not be inconsistent with protection of society*.

 -Appropriate for offender, society, and victim.

 -Offender must fully consent to participate

 -Must have been advised of right to counsel

 -**MUST accept responsibility** **for offence**

 -Must be *sufficient evidence* to proceed with prosecution

 (2) – cannot deny involvement in crime

 (3) – admission cannot be used in court

**Victim Surcharge**:

-2013 Act.. every offender/discharged pays, money goes to provinces for programs and services for victims.

-737(2): If a fine imposed (a) 30% of the fine or if no fine (b) 100$ for summary and 200$ for indictable.

(3) **Increase**: *can increase*.. offender must be able to pay.

-**Disagreement in lower courts**: *R v Michael* – 900$ surcharge or Inuit offender who was poor & addicted to drugs. **Grossly disproportionate** (would outrage standards of decency – s12 violation). *R v Novielli*: “imposes modest cost on offenders who impose costs on society.. no one would be jailed, unless refused to pay”

**Sentencing Young Person as an Adult**:

-*R v H*

-72(1) *Youth Criminal Justice Act*: Order adult sentence if satisfied that:

(a) *presumption of diminished moral blameworthiness* *or culpability of young persons is rebutted*.. AND.

(b) A youth sentence (in some sections) would not be sufficient to hold them accountable

 -**To hold accountable**, has to do two things: 1) *Long enough to reflect seriousness and offender’s role*; 2) *Long enough to provide* ***reasonable assurance*** *of successful rehabilitation and integration into society*.

 -Reasonable Assurance: not absolute certainty (or BRD).. reasonable prediction of future behavior, based on eval of all the evidence.

 **PRE-TRIAL CUSTODY**:

-719(1) – *sentence commences when IMPOSED*.

-746(a) – *exception is for LIFE sentence*, which starts to run from time in CUSTODY.

-**Credit** **for time served**: before 2010 *“Truth in Sentencing Act*” – judges routinely gave 2:1, sometimes even 3;1.

-**2 rationales *R v SAUNDERS***: 1) Qualitative (shitty conditions, no treatment, etc); 2) Quantitative (don’t get that time towards parole, and giving people different sentences for same crime). Parole elig usually after 1/3. If you’re deliberately trying to delay, get less than 2:1.

-**“Truth in Sentencing Act”**: 719(3) – *LIMITS THE CREDIT TO 1*:*1*. (3.1): if the “**circumstances justify, 1.5:1”**. (2) when *unlawfully* at large, does not go to credit (or released on bail). 719(3.2) Reasons for credit granted. 3.3: State in record the amount of time in custody, term of imprisonment that would have been imposed before credit, and amount of credit.

 -**3.1: Where 1.5:1 Not Allowed**: 1) If you’re in custody (denied bail) *because of your crim record*, and judge endorsed that on the record **s515(9.1)**; 2) If you commited the crime while out on bail **s524(4) or (8)**.

 -> **charter challenges:** -**Implications for PARITY**: *WHETHER YOU ARE DENIED BAIL IS A DIFFERENT CONSIDERATION THAN HOW BLAMEWORTHY YOU ARE FOR AN OFFENCE*. Many reasons to deny bail: lots of it has to do with unfair reasons (Aboriginals), not showing, etc.

***R v Bradbury*** (BCCA): *Parliament’s intention*

 *-***Parliament clearly intended 1:1 to be the norm, not 1.5:1**. Parole remission cannot justify 1.5 credit, because ‘near universal application’.

 ***R v Summers***: *What “Circumstances” justify 1.5:1*? *PARLIAMENT DID NOT INTEND 1:1 ACROSS THE BOARD*

 -**parliament did not intend to do something so drastic without being explicit about it**.. (well, it is fucking Harper). They try to get there through *stretch* of statutory interp (not charter).

 -**Determine that 1.5:1 is the NORM.** **Qualitative/Quantitative rationale**. **Even just not getting early parole is enough reason to get 1.5**, because most people will be eligible for it (1.5 is basically equivalent to letting people out after 2/3 – stat release). You can take into account qual/quan in “exceptional circumstances”.

 -Parliament has the power to *exclude* the two circumstances (denied bail because of crim record, and in custody because of breach).

 **-PARITY:**.. irrelevant considerations leading to different sentences for the *same* offence. Targeting the mentally ill, poor, etc. who can’t get bail and have crim record. Lots of people without supports networks, Aboriginals more likely to be denied bail. And connect to **proportionality**: s7 FJ of charter. Can’t give harsher penalties consistently to the more vulnerable for the same offence. **It’s not because of their guilt or blameworthiness**.

 -**Not everyone will get 1.5**: crown (**effectively)** has to prove why someone doesn’t get 1.5. Argument doesn’t work that “there will be no room to give more to people with terrible circumstances” -> have to leave room at the top. Although onus is technically on accused.

 -**s24 Remedy:** if you have egregious circumstances, 1.5 may not be able to take into account your circumstances. Might argue s7 or s12 breach.

**POST-SUMMERS**:

-*R v Kazakoff*: adv credit can be given even where where offence committed on statutory release, if that fact was already considered aggravating in sentencing.

-*R v Wilson*: A didn’t apply for bail, although *would have* been denied for criminality (and get 1:1). Court: can’t rely on hypotheticals.. must have actually been one of the triggering events to deny 1.5.

\*THUS: **if you have crim record, big disincentive to apply for bail**. If you get denied, you get 1:1. If you don’t, probably an auto-1.5. Doesn’t make sense in juris where reasonable right to bail that we encourage people to do this.

**When 1.5 is not appropriate**:

-When A seen as manipulating the system for extra credit or bad behavior.

-However: *R v Kassa*: A on CSO when commited offence.

 -Don’t deny extra credit because he was already punished by serving the rest of his CSO in detention.

 -**He should not be penalized *again****,* for his breach, by having his “usual enhanced credit”. The time spent for CSO does not have anything to do with the new offence.

 -**Abuse**: CA was not persuaded that A abused or manipulated the system for extra credit, because he expected to be denied bail.

**Mandatory Minimums**:

-Pre-trail credit can take you *below* the MM.. (*R v Wust* - SCC).

-***R v Safarzdeh*-*Markhali***: (ONCA) *GOING TO SCC, 519(9.1) basis for denying 1.5 is IRRATIONAL, fails s1*.

 -F: person denied bail because of previous criminality (endorsed on record). Proportionality = s7 FJ principle.

 -**Proportionality is NOT the test for whether MM violates s7 or 12**. **Has to be GROSSLY DISPROPOTIONATE**. Basically two standards: one when looking at *sentencing process* – simply: proportionate under s7? (FAIR PROCESS). The second is when looking to *total outcome* of sentencing process: **grossly disproportionate** (e.g. MM)?

 -**CA:** why denying someone 1.5 pre-trial credit for their bail denial due to criminality **violates s7**: **two similar A’s, one granted bail, and one not (not related to their sentencing, and not moral blameworthniess)**. **Test for bail & sentencing are functionally/conceptually different. PROPORTIONALITY REQUIRES YOU TO TAKE WHAT IS *RELEVANT INTO ACCOUNT*** ***FOR SENTENCING*** (e.g. blameworthiness). ARBITRARY LACKOF PAIRTY. This is a STRUCTURAL impediment to giving a JUST sentence. They strike down the part of 719(3.1) referring back to 515(9.1).

-***R v Dinardo*:** *addresses the other ‘exception’ in 3.1, denial of 1.5 for offence committed while on bail 524(8)(a)*

 -Following *Safarzdeh*, s7 violation.

 -**Basically, if you’re unable to show cause at bail hearing, you will get disproportionately punished**. **Grossly disproportionate, because irrelevant factor**.

**Immigration Consequences**:

-Generally, people who are not citizens (or maybe even those who have dual citizenship).

-36 *IRPA* **DEPORTATION OF PERMANENT RESIDENTS**.. (or on their way towards citizenship) can potentially make someone inadmissible for criminality

-36(1)(a) – convicted in Canada and offence max is 10 yrs OR sentenced for 6 MOs +.

-36(1)(b) or.. for offence committed OUTSIDE of Canada, which, IF THEY WERE SENTENCED IN CANADA, would’ve had 10 yrs max.

-36(1)(c) or for offence committed OUTSIDE of Canada, which IF COMMITTED IN CANADA, would’ve received 10 yrs max.

-**Loss of appeal rights (of deportation order)** (2012): if offence is 6 MO’s + (used to be 2 yrs). S64: NO APPEAL CAN BE MADE WHEN PUNISHMENT IS OVER 6MO’s. “Serious criminality”. S

***R v Pham***: *When can court take into account immigration consequences for sentence*?

-F: in the case, was still 2 yrs. Would’ve lost right of appeal if 2 years or more. Counsel *didn’t bring immi consequences* at trial for some reason. CA: A is just asking for ONE day less, (2yrslessaday). Refuse to do so – *going against what parliament intended* (circumventing).

-**SCC**: **KEY IS PROPORTIONALITY**. **We can’t give foreigners separate sentencing regime** **for special immigration consequences (e.g lower for foreigners)**, **BUT Sometimes you can take immi consequences into account**. The further from the range, the less likely considered (because proportionality). Plus you have **DEFERENCE**..

**Inadmissibility of Foreign Nationals**:

-e.g. student visas

-36(2), (a)-(d): Essentially, if you commit an indictable offence in Canada, or two summary, or offence while coming into Canada (*Zhao*).. can be ruled **inadmissible in Canada**.

-***R v Zhao***: *Harsh approach to immigration consequences*

-F: tried to smuggle a lot of merchandise w/o paying taxes. “2 offences”.. was on Student visa.. Faced being deported before finished education. Total of 5000$ for each fine. Counsel: already fined 10k, why don’t you give CD, and as one condition, 10k return.

-**CA**: **No, TJ knew circumstances and wasn’t appropriate**. Deference. Lots of evidence she’d do it again. **Not up to courts to amend IRPA**. Brougth-up *PHAM*.. should not misuse immigration consequences to skew process in support or prevent deportation. Immigration consequences **cannot justify a sentence that is not otherwise appropriate**. Don’t avoid a totally fit sentence for a different sanction to avoid the immigration consequence.

-**NOTE:** Couts more sympathetic to ***proportionality than different sentence***. Better to hear how devastating the consequences are for someone.

**Parole Ineligibility**:

-743.6: **Allows judges to impose parole ineligibility** on offender sentenced **2 yrs or more** for a scheduled offence. Delayed for ½ sentence or 10 yrs, whichever is less. Judges basically *aren’t supposed to think about it*.

 -Must be sentence that comes in **scheduled I or II**

 **-**743.6(1.2) **If it’s a terrorism/org-crime**: of 2 yrs or more, *MUST impose* parole ineligibility, unless satisfied that **regular sentence** **adequately expresses denunciation and deterrence.**

**-**743.6(2) *denunciation and specific/general deterrence = primary*. Rehab = subordinate.

-**Two step process**: 1. What is appropriate sentence for this offence; 2. Is delayed parole necessary given seriousness of crime and to further sentencing goals above?

-**Individual counts** **must be 2yrs**.. can’t have multiple and add to 2+ yrs.

-*R v Cam*: Judges should not let parole considerations affect length of sentence. **Does not reduce the sentence, just the *way*****the sentence served**.

\*Two lines of cases, but middle: *don’t use this ALL of the time*, but doesn’t require exceptional circumstances. \*Significant deprivation of liberty in adv. Most often for violent offenders.

**Ancillary Orders**:

-Not supposed to be PUNISHMENT

-Weapons; Driving; DNA; Sex Offender Reg

-**Keep in mind: 1. MANDATORY OR DISCRETIONARY**? (if mandatory must be part of plea-bargain). **2. Longer Prohibition for Subsequence Offence**?

FIREARMS

s101.9: **Mandatory when**…

(1)(a) **violence against person, or threatened or attempted, for which you can get 10 yrs or more**. \*EVEN IF NO FIREARM USED.

(1)(b) **Number of weapons offences**.. for which firearms used.

(1)(c) Certain *Drug Act* offences.

(1)(d) **Firearms type offence while on prohibition of that firearm**/weapon.

**HOW LONG**?
(2)(a) – FIRST OFFENCE: prohibited from having *any* weapon/firearm, ammo, etc. **MIN OF 10 years**.

(2)(b) – SECOND: **life**.

(3) SUBSEQUENT OFFENCES: Life?

 -Time starts running after release from your sentence.

S110(1): **Discretionary When**..

-(a)(b) .. **basically when the person not covered by 101.9(1)(a)-(d)** and it is *DESIREABLE and INTERESTS OF SAFETY OF ANY PERSON..* to prohibit any weapons.

**HOW LONG**?

-(2) 10 yrs. Must give reasons IF NOT MAKING DISCRETIONARY ORDER (3).

S113 **EXCEPTION**:

(1) if person satisfies the court that (a) needs firearm to hunt, trap, fish, etc. and sustain family or themselves; or (b) prohibition would be *virtual prohibition against EMPLOYMENT* (in their only vocation).

(2) **FACTORS** (a)-(c).. Crim record; Circumstances of offence; Safety

DRIVING

259 **Mandatory Driving Prohibition**:

-For either refusing breathalyzer (254) or impaired driving (253).

-First offence: 1-3; Second: 2-5; Subsequent: Min of 3 yrs.

259(3.1) - **Street Racing** **MANDATORY PRO**: convicted under 249.4(1).. First, second and subsequence under (a)-(c)

259(3.2) – **Street Racing/Bodily Harm MANDATOR PRO**: also three degrees.

259 (3.3) – **Street Racing/DEATH MANDATORY PRO**: also three degrees.

259(2) **DISCRETIONARY driving prohibition**: provides *LIST OF TRIGGERING offences*. More serious in a way.. (a)-(c).. if sentenced to life: no limit; if liable to maximum of life: no limit; if max sentence between 5 and life: max 10 years; if sentenced to imprisonment: up to 3 years.

NO-CONTACT WITH CHILDREN FOR SEX-OFFENDERS: s161

-For offences involve children 16 and under

-**DISCRETIONARY PRO**: (1)(a) attending public places where children might be expected; (b) employment around children; (c) having any contact/communication (in any way) – unless allowed by parent and supervised, ok’d from court; (d) internet use.

**HOW LONG?** (2) **Life or any shorter period**.

DNA s487.04:

**Primary Designated Offences**: (lost list, incl sexual offences, serious aasault, robbery, terrorism, homicide, etc)

**Secondary Designated**: (INDICTABLE for which max is 5+ yrs.. CD&SA, bunch of other things like criminal harassment)

-487.051: **MANDATORY** **FOR PRIMARY DESIGNATED**.

-487.051(3): **DISCRETIONARY for someone found NCR** **of primary designated**.

-487.05: **DISCRETIONARY for other designated offences**.. (secondary)

SEX-OFFENDER REGISTRY (SOIRA -Fed):

-In Canada, registry only available to the POLICE. Ont started first in 2002. Feds in 2004.

-**If convicted of criminal sex offence, you get registered for 10 years to life**.

 -When enacted, WAS provision on discretion and required application by crown. Was challenged (charter) failed: **because NOT PUNISHMENT**.

-**MANDATORY** (as of 2011). No exemptions.

-*Retrospective application*: mandatory nature means it can be applie to crimes taking place before changes in force. S11(i) -> not applicable, not punishment.

 3. **Aboriginal Sentencing**:

-Statistics (Men make up higher percentage of total prison population (large), but of women, most are Aboriginal – a much smaller prison population, and almost half YOUTH), post-colonial history.. leading to sentencing reform, which included **718.2(e).. *SPECIAL ATTENTION TO CIRCUMSTANCES OF ABORIGINAL OFFENDERS***.

-**Sentencing policy**: report acknowledged failed acknowledgment of colonialist history and its role in crim convictions, discrimination, etc. and that this could be addressed through *responsive and creative sentencing*

-**Purpose:** Debates showed it was ***remedial in nature***: GET COURTS TO CONSIDER *ALTERNATIVES* WHERE POSSIBLE (consistent with protection of public, and not to resort to jail in every case as the easy answer).

-**Before Gladue:** Some courts saying applies only to A’s only on reserves. Some saying it’s only a reminder, not required. Lots of courts *read-in LIMITS* to 718.2(e) -> e.g. *only when community willing to help* *rehab*, and no new sentencing methodology.

***R v Gladue***:

-F: 19-yo mother, pregnant with second child, pleaded guilty to manslaughter of her CL husband. Brought up in ALBERTA reserve, but lived off reserve in *NANAIMO*. Abusive relationship. Drinking all day, believed he was cheating on her. Apparently finds him & her sister together. Chases him, stabs in chest. “Did not seem to understand what she did”. NO ADULT CRIM REC. Hyperthyroid: extreme moods/reactions. Got substance abuse and upgraded education while on bail conditions.

-TJ - **3 yrs sentence. Living off-reserve**.. **did not have any “special attention”** **under 718.2(e)**. CA: still says 3 years appropriate for non-aboriginal and how is it different for aboriginal? Appropriate for denunicaiton and deterrence. DID AGREE 718.2(e) **applies off reserve**.

-**SCC**: three errors (of TJ) 1) That 718.2(e) does not apply off-reserve; 2) failing to consider systemic or background factors that may influence conduct; 3) Ignoring distinct concept of sentencing held by A, family and community.

 -718.2(e) **REMEDIAL**: requires judges to consider **1) Unique systemic background factors that may have played a role in bringing individual before the courts**; **2) Possibility of imposing ANOTHER SANCTION**, **particularly in light of the offender’s community’s conception**.

 \*If no alternatives to jail exist, just MUST consider the length of sentence.

 -**BACKGROUND FACTORS** (Take Judicial notice of them, linking Aboriginals to crime): low income; irrelevant or lacking education; loneliness; lack of opportunities; substance abuse; community fragmentation; low incomes. The distinctive experience of Aboriginals must be taken into account and warrants **different approach to sentencing**.

 -**GLADUE REQUIREMENTS** (not discretionary):

 -Must take Judicial notice of background factors and aboriginal concepts of sentencing

 -Counsel MUST bring personal circumstances up

 -Judge can request info as required

 -Failure to apply 718.2(e) *may result in appeal intervention*

After Gladue – Still Overrep:

-Last 10yrs, Federal prisons have increase of 56% (compare with 3% for non-aboriginal)

-Provincial: decrease, but much less than non-aboriginals (increased rate of over-rep).

LIMITING GLADUE:

*R v Wells*: yes, 718.2(e) requires **different method**, but **not necessarily different result** (takes away teeth).

 -Courts below used it to exclude Gladue considerations.

Why Gladue isn’t working:

-Old fashioned justice system? Counsel not bringing it up?

-Tail end of the dog? Can’t solve these social problems through sentencing? S

***R v Ipeelee*:** *More clarity*.. *Gladue applies ALWAYS, WHERE LIBERTY INTEREST*

-F: Does Gladue have to be considered for breach of a LTSO (long-term supervision).

-Result: YES, Gladue applies in the **ANY TIME LIBETY OF ABORIGINAL AT ISSUE**, violence offences, CSO breach hearings, bail hearings, sentence hearings, LTO/DO hearings etc. less formalistic approach needed to parity, and failure to apply = appellate intervention necessary.

 -Court: **we’re serious that you have to make arguments about it**.

 -**Fundamental Principles**: Always consider proportionality.

 -**Affecting Sentence**: If you experience the *BACKGROUND FACTORS*, and end up in CJustice system, your responsibility could be lowered. **Might get lesser**.

 -**Don’t be slave to parity**: Lesser emphasis, because it *cannot defeat Gladue*. Be less formalistic.

 -**Apply all of the time**: when liberty at issue.

\***Sentencing vs bail & Gladue**:

 -Primary purpose of bail = protecting the public. It’s not rehabilitative. You can mention G-factors on bail hearing, if you can convince it will show your plan will work (e.g. seeking Aboriginal treatment).. plus trying to show they should not be doubly-punished (for being A and poor, and then not released because of it).

**Gladue Reports**:

-Role of defence counsel to put before crown, and show how G-Factors are part of A’s life and brings them before the court.

-How to get Gladue information before court: 1. Through submissions (info from client, etc. not helpful) 2. Asking for G-REPORT.

-**G-reports**: focus on how G-factors playing role in A’s life. Author interviews people. History, specific info about that Band. Can be good or waste of time (more or less meaningful and depends on circumstances of crim proceedings). TIME CONSUMING (client may not want to wait in custody for one). Depends on community participation/family. Need funding from LSS.

-**Author of report**: knows a lot of resources.

-**What’s in it**? Everything.. education, substance abuse, mental health, history of community, employment, response to corrections, supports in community, process of the community (justice), and sentencing options.

**Sentencing Circles**:

-Rarely used.. RESTORATIVE justice concept.. healing of all parties.

4. **PROVING FACTS AT SENTENCE HEARING**:

-Standard of proof? Who proves what? Specific aggravating/mitigating?

-No clear rules.. basically, the more info J has, the better.

-Rules of evidence relaxed.. hearsay does not apply.

-PSR, Gladue, VIS, Character letters, expert reports, and sometimes testimony.

-**Presumption of innocence gone**.

***R v Gardiner*:** *Lead case on how the rules of evidence work in sentence hearing*

-Strict rules of evidence do not apply, because trying to get as much information as possible in **individualized** process of sentencing. Now codified, but said **balance of probabilities** for D to prove mitigating factors, and **BRD** for crown to prove aggravating.

**Burden of Proof Codified** – 724(3)(e).. BOP for “other facts”.. *unless proven at trial* (3)(d).

**Sentencing Procedure** [720-728]

**Presentence Report (PSR)**

-721(1) If required to by court, PRO officer will prepare written report, helping the court determine whether A should be discharged under 730

 -Really for ***majority*** of cases.

 -Particularly important **where no trial**.

-721(3) Things PSR should include: e.g. age, attitude, willingness to make amends, crim history, history of alt-measures, character, behavior. (4) *Info on anything required by court*

-**What does it do?** Should tell us about the offender, not really about the crime. Paint a picture of their family, employment, education, upbringing, etc.

-**What should NOT be in it**? Have details of A’s involvement; protest conviction; cover facts about victim; give assessment of other witnesses; refer to uncharged conduct; recommend specific sentence.

-**Either side can object to things in it.. or require things proven**.

-**If not contested,** judge can take as proven.

-Crown & defence consult to see if any inappropriate comments.

**Victim Impact Statements** **(VIS)**:

-722: requires court to consider a statement prepared by victim on harm and loss

-722(4): **Definition of victim**.. anyone suffering the loss, and if unable to speak or dead, CL spouse/spouse may make statement.

-\*Some constraints necessary.. can’t go too far: **never say what sentence should be**. **CANNOT DETERMINE OUTCOME**, but can have impact on shaping specific sentence.

***R v Labrash***:

-A got 18 MOs + 18 MOs PRO.. Appealing: should’ve got CSO. VIS said “**stiff sentence would help him deal with it**” (husband) -> the fact that he wasn’t about to be there to help his wife.

-Statement **can ONLY describe HARM DONE/loss suffered** **to victim**. Cannot describe **FACTS** (not to give evidence)or **recommendations on sentence**. Crown should’ve never let this statement get to TJ.

-CA **wouldn’t send it back because of this**, because *TRUST THAT TJ WOULDN’T PUT TOO MUCH WEIGHT ON IT* (if he mentioned in his reasons, different).

***R v Berner***:

-Dangerous driving causing death.. victim young child. Crown stupidly introduced videos of victim singing in a CHOIR with friends.

-**Profoundly emotional experience** -> heightening those emotions in court risks **improper consequences**. May make them believe a greater sentence is required in the ‘tribute’.

-**Have to have statements of EQUAL WORTH**: can’t let one be *worth more*. UP TO CROWN to vet statements.

**Proving Disputed Facts** 724(3)

-(a)-(e) Basically includes the *burden of proof*.. BOP for D and BRD for crown on aggravating. The party alleging fact has to prove it (including the PSR). May call witnesses to prove it, cross witness. Don’t have to prove if *proven at trial*.

-Harder when jury trial -> can’t ask the jury what facts used to reach verdict.

-***R v Poorman***:

 -Inmate fight. Crown arguing *unprovoked, used a knife*. D: proved, no knife. Evidence: not clear what happened at trial.

 -**Court**: *can’t just accept crown’s position* if no evidence against or favoring A. **If TJ not satisfied on necessary standard** (BOP – mitigating and BRD for BOP), **then *has to be proven* on sentencing.**

**Proving Mitigating**:

-TJ not bound to accept most favourable view for A.

-BOP proof, *unless* you can show it was proven in trial finding

**Proving Facts After Jury Trial** 724(2)

(a) TJ can take as proven **anything essential/necessary** (e.g. intent for murder)

(b) Flexibilty on finding evidence: **may make own findings of fact**, or **may find any relevant fact disclosed at trial** OR **hear evidence**.

***R v Templaar***: *Uncertain Facts, Converse of Poorman*

-Sexual assault based on touching, but not clear where? Breasts or penetration? Must reach conclusions regarding facts surrounding offence.

-Penetration is more aggravating than just touching boobs.

-TJ just defaulted in favour of the accused. **WRONG**: have to either **hear more evidence, or figure it out from evidence at trial**. Cannot just be ‘sympathetic to A’.

***R v Brown* –** *Cannot find facts INCONSISTENT WITH JURY VERDICT*

-A charged with *dangerous driving causing death*, but jury convicted on “dangerous driving”… implying that HE DID DIE because of the crash, but not necessary because of the offender – something else? Judge took it ito account for sentencing.

-SCC: **cannot take into account causation for sentencing, since jury did not find it**. **Judge bound by what jury found, or what they necessarily had to find to make their finding**

**Evidence of Other Offences** 725:

-When court is sentencing someone for convicted crime.. *what about other crimes* either CHARGED or UNCHARGED of?

-(a) consider sentence for any other offences offender found guilty of **by the same court** (obvious).

-(b) must consider OTHER OFFENCES if A pleads guilty and wants it all done with in the same court, and they have juris to hear the other offences (**Sentence me on my other offences**).

(B.1) **Tricky**: must consider outstanding charges, unless court is of the opinion that a **separate prosecution** **is necessary** in public interest. Requires consent from A and AG, and court must have juris, and A must admit to having committed the offences.

 -Taking into account outstanding charges.

(C) The court may consider the facts forming part of circumstance of the offence that could constitute the basis for a separate charge: this part does not require consent of A.

 -E.g. committing one crime, facts reveal maybe another offence or could’ve been charged with something else. NOT CONVICTING for those crimes, just for sentencing.

-**Protections in 725(2)**: (a) court notes any outstanding charges in B.1 and (b) .. any facts used in determining sentence under (1)(c).

 -**No further proceedings can be taken with respect to any offence described in those charges or disclosed by those facts, UNLESS, the offender’s conviction he is found guilt of is set-aside** **on appeal**.

*R v Aneglillo*: *Can judges go beyond* 725?

-A given CSO for fraud against ER. D argued A needed to get money, otherwise his family would be killed. Officer doesn’t testify, and he *KNEW* that A had other outstanding charges against ER’s. Crown’ didn’t know at sentencing. Crown wants to bring fresh evidence at CA – pattern of ripping ERs.

-**Court**: *technical* -> “too late” you had access to the info” -> didn’t meet threshold for new evidence (due diligence fail).

-**WOULD IT HAVE BEEN RELEVANT HOWEVER, IF CAME UP AT TRIAL?**: B: no consent. B.1 also not admissible, because no consent. C? **Could argue**, BUT: *the section is basically read as “while committing A, you also did B*” (not two separate incidents) -> not part of **circumstances of offence**.

**-**SCC basically **goes outside of the code**, since none of these provisions can allow it.

 -**Want as much info as possible**: **principles at issue here** -> may not want to focus on *rehab* when info about him being a *serial fraudster*. Makes a big difference in the sentence. Extrinsic evidence could establish it was a “ONE TIME THING”

**Preventing Unfairness**:

 -**You still have to prove the *other stuff BRD*** (that he steals from his new ER).

 -**If prejudicial, you have to show not outweighing probative value** (judges can exclude).

 **-**BRD aggravating

 -Must distinguish between: facts used to prove other offence for the purpose of punishing the A for those offences.. and using them to determine character or risk of reoffending in determining the CURRENT SENTENCE FOR CURRENT OFFENCE.

**Aggravating vs Mitigating**:

-Consider **1) circumstances of offence; 2) circumstances of OFFENDER**

-**Aggravating**: those which make offence worse, and mitigating, less serious.

-Not watertight. Relate to principles of sentencing = good.

-Some Statutory in 718.2(a)

-**NOT ALLOWED TO BE AGGRAVATING**:

 -1. *Not pleading guilty* (constitutional right to trial)

 -2. *Lack of remorse* (can go to weight though)

 -Note: saying something is **not aggravating**, doesn’t mean it’s mitigating. Your lack of remorse + being an asshole may not make your sentence WORSE explicitly, but it doesn’t then help you in reducing it through mitigation. The converse: pleading guilty/remorse are mitigating however.

 -3. *Lack of cooperation* with authorities is NOT aggravating.

-**CIRCUMSTANCES OF OFFENDER**: facts relating to the A.. e.g. criminal record, under court order, planning, post-offence conduct, others. Q is how they relate to principles.

 -MITIGATING: First offence, long period of time since last offence, unrelated history of offences, good character/achievements or family support, guilty plea (TIMELY?), intoxication? Effort to deal with drug or alc problem, psych treatment, efforts at RESTITUTION, DIFFICULT BACKGROUND (gladue, others)

-**CIRCUMSTANCES OF THE OFFENCE**: may tell us also about the offender – unnecessary violence; cruelty, use of weapon, threatening; terrorism (code), gang (code), invasion of home, interfering with access to justice, significant economic loss (code).

 -**Victim related factors**: more than one, *vulnerability* (code), relationship (e.g. spouse or child), vulnerability (kind of by profession – e.g. police, taxi), HARM to victim (VIS).

 -Mitigating: *evidence of PROVOCATION* (*R v Stone*), even if defence fails, lesser involvement (party vs principal), unreasonable delay (trial/prosecution) – may have time to rehab in there.

**NOTE: mental illness tricky** -> can go either way. Aggravating if you become a threat (e.g. psychopath). Aggravating if something like pedophilia.. can also be mitigating if jail would be seriously negative on mental health.

**Home Invasion**:

-s348.1 **AGGRAVATING STATUTORY** for home invasion offences.

-*R v Vickers*: **Deterrence + Denunciation** primary principles, violating safety & security in home.

5. **Conditional Sentence Orders**:

**History**:

-Used to be few limits before Harpercons: a) less than 2 yr sentence; b) no minimum; c) PRO or JAIL not appropriate.

-1996: added “satisfied community would not be endangered and consistent with fundamental principles of sentencing in Code”.

-2007: Started excluding *serious personal injury offences* (+attempts for sexual assault), terrorism, offences, organized crime (with 10 yrs max – both df. in s2).

\*MUCH LESS IMPORTANT NOW BECAUSE OF CHANGES, and bad for Aboriginals.

**Current provisions**:

-2012: 742 Sentence less than 2yrs, no minimum, can be served in community if (a)-(c) .. max is 14 yrs, won’t endanger public, still consistent with principles. **Excluded offences**: (d)(e)(f)

 -(d) Crim org or terrorism with 10 yr max

 -(e) certain offences involving bodily harm, use of weapon, involved with drug importation/trafficking, etc. that have a MAXIMUM of 10 yrs +

 -(f) bunch of different offences listed (serious bodily harm type things).

-**MAKE SURE YOU LOOK AT DATE OF CRIME** (anything after Nov 2012 = new provs).

***R v Proulx***: *Original CSO Provs (1996), and dangerous driving causing DEATH*

-CSO still available?

-**Lamer -> objectives of CSO’s**.

 -1. ***Reduce Over-incarceration***

 -2. ***Increase restorative justice***:

 -Remedy adverse conduct by rehabilitation in the community, promoting responsibility

 -**Differences between CSO and Suspended Sentence With PRO**:

 -CSO supposed to be *REHAB AND PUNITIVE*.. PRO: just rehab. CSO forces treatment, PRO does not (certain drug/alc problems), similar purposes of conditions though: rehab/protect society BUT, CSO is also punitive. **Consequences of breach**: *quite different* -> offence punishable by up to 2yrs (more serious).. whereas CSO: **just spend the rest in jail** **– NO NEW OFFENCE**.

 -CSO **Being more punitive**: should include restrictive conditions like curfew, house arrest, etc. Meant to *avoid prison*, but not PUNISHMENT.

 -**Result** [1996 provisions]: **NO CRIME WAS TOO SERIOUS**. As long as no min and less than 2 yr sentence.

 ->**IMPACT**: the educated, respectable public knows everything, so they hated it (thought abuse). Looks like it may have started to be used for higher crimes than intended.

**Consistent with principles**:

-For this part, consider 718.2(e) – avoid incarceration for all, but in particular, aboriginals.

**Length of CSO**:

-Maybe longer than jail. You don’t just calculate prison term and convert e.g. 9 months jail but 18 months CSO.

-Usually allowing continued EMP as part of conditions..

**Safety of community**:

-Q is about the risk of reoffending and gravity of damage that could ensue: CAN THAT RISK BE **MANAGED BY CONDITIONS**? Economic harm can be considered.

**No burden of proof**:

-no BOP on either side.. but usually offender best situated.

**CONSIDER CSO WHEREVER PRE-REQ’S MET.. (and now all the exculsions)** – might be reversible error on appeal if not.

**Conditions**:

-MANDATORY: 742.3(1) (a)-(e) .. similar to PRO: good behavior, appearing, report to supervisor, remain in juris (unless allowed), notify court of changes

-POSSIBLE: 742.3(2) (a)-(f) abstain from drugs/alc, etc., support care for dep, no weps, treatment program, community service, other reasonable conditions. \*CAN BE RESTITUTION under here.. but then consequence for breach.

***R v Knoblauch***: *Alternative to house arrest*

-A spent time locked in *psych ward* as part of CSO conditions.. A ‘consented’, instead of house arrest. Basically **until psychiatrists made decision to transfer**.

**Breach of CSO** 742.6(9) If court sat on BOP that offender breached condition *without* *reasonable excuse* (proof on defender).. court may:

(a) do nothing

(b) Change optional conditions

(c) Can make certain ALTERATIONS (e.g. make him serve a portion in custody, and then resume)

(d) end CSO, and order jail for rest of sentence

**Conditions Remains in Place**:

-742.6 Clock stops running while breach considered. Suspension of the CSO continues until issue resolved.

-742.6(11) unless in custody, the conditions continue to apply DURING the resolution of the breach.

-Hearing has to happen within 30 days of the offender’s arrest or the breach.

**Burden of Proof on breach**:

-BURDEN OF PROOF ON THE A. This is a form of PUNISHMENT. It’s just a different way of serving. Upheld on charter (*Casey, Whitey*)

-Breach hearing is only to determine whether there should be a variation in how you serve your sentence.

**-Presumption of incarceration**: *Proulx* -> without reasonable excuse, should be presumption of serving rest in jail.

-742.6(9) -> give TJ *OTHER OPTIONS*, when breach is minor or trivial.. court can take no action, or make him serve rest in jail, etc.

*R v Bailey*:

-**NO INTERMITTENT SENTENCE FOR BREACH OF CONDITIONS**

**Pre Trial Custody Relevance**:

-***R v Fice***: *Can judge take into account pre trial custody for granting CSO*?

 -e.g. what if sentence is OVER 2 yrs but pre-trial makes it less?-

-16mos PRE TRIAL custody, 6 MOs House arrest.. the pre-trial would be equivalent of 3 years jail. Got an additional 14 month CSO..

 -SCC: **said NOT OK** –divided. CSO not meant for offenders for whom penitentiary would’ve been appropriate. **FIRST,** determine if CSO is appropriate. Exclude PRO and a Penitentiary term. **SECOND**, determine whether CSO appropriate given sentencing principles and determine duration. ONLY at second stage do you consider *pre-trial custody*.

\*So, for purposes of PRO, you look at time period AFTER pre-trial custody.

\*For purposes of CSO, you look BEFORE pre-trial credit has come off.

***R v Wust*** – *Inconsistent with Fice*?

-Time spent in pre-trial custody could reduce sentence sentence below that required by MM – are these inconsistent?

***R v Mathieu* – *Casting doubt on Fice, DEALS WITH PRO***

-Deal with avail of PRO. A spent a lot of time in pre trial. Would’ve been into penitentiary (2+ yrs) and no PRO. Given the pre trial, sentenced to less than 2 yrs + PRO.

-SCC: **avail of PRO depended on ACTUAL TERM of imprisonment IMPOSED** **after ALL CREDIT for pre-trial.**

**\*\* Davison**: *Mathieu* seems to say that the sentence ACTUALLY IMPOSED is the legal sentence in determining whether PRO is available.. **NOT what it would have been *before pre-trial credit***.

**MIXING CSO’s**:

-*R v Kishayinew:* Like alcohol, DO NOT MIX. Cannot blend with custodial sentence (with PRO you can)

-CSO has to be for total offence.

-Cannot impose CSO for one offence and custody for ANOTHER if the sentence on both is MORE than 2yrs (the TOTAL for all has to be less than 2 yrs). There CAN be blending, if the total is under 2.

**STATS**:

-Significant decline in imprisonment when CSOs introduced for a short time.

-There was again an increase (2000-7)

-Significant rise early 2000’s then rapid decline after 2005/7 (BOTH IN USE OF CSO’s & PRO).

-*Proulx* was responsible for rise in CSO’s in serious crime (public rage).

***R v Glickman***: *Current CSO provisions rule out fraud over 5000$* (not under)

-A got 8 counts of fraud. Manitoba in 2002. Went to BC. Continued to commit. Convicted on many counts, 22 month sentence. 2 yrs later, pleads guilty to MB crimes in BC. Gets 8 Mos and 2 yrs PRO.

-Seeking CSO on appeal

-Fraud motivated by DRUG ADDICTION. Rehabilitated considerably by time of being charged with offences. Had job. Off drugs presumably. There was significant impact on several victims.

-**Tj fucked up in jailing for MB frauds “once a con man..”**.. **where substantial likelihood of rehab, particularly where property offences, look into OTHER things than incarceration**. In particular, he did these things to support addiction, and took steps to fix that.

***R v Greenwood***: *DON’T FUCK IT UP, OR WE’LL FIND A WAY TO FIX THINGS*

-Possession for purpose of trafficking.. max life. JS for 12 month CSO. **Started already serving**.. 4 months of CSO. Was clearly not allowed to have this CSO. **Rest of time converted into PRO order**. (not surprising since CSO provs kept changing).

**TRC**: suggests that lack of CSO and increase in MM’s = *unfair to aboriginal offenders*. Over incarceration.

6. **Mandatory Minimum**:

\*Harper Plan: TOUGH ON CRIME. Increase max, imopose MINIMUMS (decrease judicial discretion), decrease non-custodial (limit CSO), reduce pre-trial custody, make parole tougher to get/remove accelerated, eliminate faint hope clause, make parole ineligibility consecutive.

-*Safe streets & communities act*: NEW MM’s.. most in the CD&SA.

-There are now about 100 in the code.

-**Why MM’s?**

 -Certainty at lower end, parity..

 -Rise of the FLOOR…but you probably see MORE people getting minimum.

**Problems**:

 -Taking away judge’s ability to individualize sentence (cut off many options below the MM – e.g. CSO, Fine, PRO). This seems to be precise PURPOSE.

 -Shift discretion from JUDGE TO PROSECUTRO (for hybrid, where summary not MM – *like in NUR*).

 -Where MM, might cause prosecutor to shift to other charges.

 -Negative impact on Plea Bargainin .. **what’s the point**?

 -**Particularly harsh impacts on Aboriginals & Race** (not netural – certain groups get higher amounts of MM).

 -**How do you reconcile with proportionality? And restraint**?

 -Increase number incarcerated

**Examples**:

-Variety of new MM’s for offences related to CHILD EXPLOITATION.

-CD&SA .. trafficking and importing.

**CHARTER CHALLENGES..**

***R v Smith***: *Importing cocaine or heroin, BROAD HYPOTHETICAL TEST*

-Large quantity. 7 year MM. Challenged as s12 *cruel and unusual punishment*.

-**Test is *gross disproportionality***. **So excessive that it outrages the standards of decency**?

-Court: S was going to get 8 yrs anyways, so it was *not “gd”*.

-SCC: **if you can posit *hypothetical offender* for whom it would be cruel & unusual**, **then cruel for everyone**. Here, they used young inexperienced kid with joint in his pocket – 7 yrs? **Giving crown discretion to go summary does not save MM** (or only going possession).

***R v Goltz***: *post-smith develop*, *retreated from SMITH broad hypo*

-**TWO STEP TO s12 ANALYSIS**: 1. Would penalty be GD for *A*, given his circumstances? If not, 2. Whether it would be GD in **reasonable hypothetical circumstances**.. as opposed to the far-fetched hypo case an A could put forward.

***R v Morrisey***: *Hardest Reasonable Hypothetical test* – *COMMON*

-Challenge to 4 year MM for crim neg causing death. If you do it with firearm = MM.

-**Constrained the *reasonable hypothetical even further***: It’s not just a reasonable hypothetical, but one that could *REASONABLY ARISE*.. **essentially, hypotheticals which are common** (almost an actuality). Rejected even reported cases of *marginal* situations.

-**Only two situations** warranting consideration: i) individuals playing with firearms; ii) hunting accidents. In neither example was 4 yr MM *grossly disproportionate*.

***R v Ferguson*** – Important for charter lit & MM’s

-Officer charged with manslaughter. Shooting suspect in back, who was running away. Argued MM may not be broadly unconstitional, *but it is FOR ME*.

-**SCC**: **DENY THE FIRST STEP of *Goltz* -> NO more exemptions for A**. **If MM is unconstitutional, court needs to *strike it down*.** Weaseling out and saying this MM is not for this A is against parliament’s intention. Judges are not to have discretion, to apply to everyone or not at all.

 -**MM-haters**: Like it. More will be struck down maybe?

 -**MM-lovers**: would rather see *exceptions* than striking.

*R v Nasogalauk*: See above (excessive force for impaired driving arrest). **Reduced MM through s24(1) violation** (sign to police). SCC agreed with overturning the sentence, but left open this possibility in other HORRIBLE cases.

**Recent Challenges to s95**

-Possession of firearm without necessary licenses (prohib or restricted). Hybrid offence. 95(2). Summary = no MM – 1 yr max. Idict: min of 3 yrs, and 5 for second offence.

***R v Nurr***: *NIKKOS CASE YEAH FUCK YEAH NIKKOSSSSSS***,** *URULE <3*

**-**Significant part is the GAP between summary & indictment. MM upheld at Nur’s trial, kind of an asshole, carrying loaded semi-auto outside of mall until cops come, ran, caught. Went with indictment. Threw away gun, police found. No record, could face deportation. Aggravating factors requiring *deterrence + denunciation…*

-***R v Smickle***: TRIAL COURTS REACHING CONFLICTING CONCLUSION. In *Smickle* they struck the min down. **In *Nurr*, upheld s95(2) under s12 *CHarter***.

 -*Smickle* was case where the idiot was taking selfies at his cousin’s place with guns (loaded). Police searched his cousin coincidentally. A little more *sympathetic* than *Nur* maybe. *Smickle* saying that he didn’t really deserve the punishment + can’t rely on crown to **save you through discretion**. *Nurr*: sentence not GD for him, but summary conviction option saves the MM.

-**Back to *Nurr*** – **CA**: agreed with *Smickle*. Overturned Smikle and give him a worse sentence, but agreed it was unconstitional. **Used hypos about mistakes with licensing** (keeping it at your cottage). **BUT ALLOWED NO PERSONAL CIRCUMSTANCES** **TO ENTER HYPO**.

-**SCC**:

 -Part of challenge = *intervener factum* (consider PERSONAL circumstances of aboriginals and mentally ill – these are actually realistic scenarios for the reasonable hypothetical). Disregarded this part in judgment.

 -**Test for infringement**: **1.** *What is a proportionate sentence for the given offence, given principles of sentencing*? (FOR **THIS OFFENDER?)** **2.** Does MM require the judge to impose GD sentence **for the HYPOTHETICAL OFFENDER**?

 -***Retreats from Morissey*** -> It makes sense to look at reported cases, no reason to rule it out. Has to be something **LIKELY TO ARISE**, **SOMETHING REASONABLE**, **\*Limited characteristics** (whatever might be reasonably included). **Only really excludes FAR-FETCHED**.

 -> If you fail for that offence/provision (on second step), *STARE DECISIS*. **Have to show something really new/changed for the reasonable hypo**. However, ANY A can go argue unfair for *THEM* -> uncertainty (first part).

 -**Personal characteristics**: Things that would *reasonably arise* -> but ignores CBA Factum.

 -**APPLICATION**: 1. Not GD for *Nurr* himself; 2. *Reasonable hypothetical SATISFIED* -> Gun licensing scenarios -> GD (*MacDonald* – innocent error of law on gun license)

 -**CANNOT RELY ON CROWN DISCRETION**.

 -**Note: s1 analysis**: Purpose of MM, rational connection.. *NO EVIDENCE MM DETER GUN CRIME*.. but rationally connected to denunciation + ret. **Min Impair**: NO. Could make it more precise to make it more fair (e.g. not cover licensing mistakes).

***R v Lloyd***: *GOING TO SCC,* ***Prov court and unconstitutionality***

-F: three counts of possession for purpose of trafficking (some hard drugs). There is a 1yr MIN if A convicted of another drug offence in last 10 yrs, (of course, he has). IT was not unconstitutional for Lloyd, so judge tried to strike it down for reasonable hypothetical*:* ***RH -> addict with small amount of narcotics to share with his friends***.

-CA: **Prov court judge had no business striking down** (no juris). Can only grant remedies for particular offender. CA didn’t talk about whether *cruel*. Gave him 18 MO sentence – appropriate sentence would’ve been 12-18 MOs.

-**Raises interesting issues about *who is REASONABLE OFFENDER in hypo***. He was on PRO, found with knife and drugs.

 \*Good because drug-case.. more mitigating.

**\*Nikkos talks about use of exemption clauses in other western nations /w MM’s**

-Court didn’t acknowledge this either – told to go argue at Parliament. Nikkos argued **relevant to s12 criteria**: “**VALID ALTERNATIVES TO THE PUNISHMENT IMPOSED”**. Invitation: you can **still get a high amount of people caught** – **just adds some judicial discretion**. Therefore, *LEGALLY* relevant to s12, not just political argument. Also, *minimally impairing*. **Key to argument**: HUGE costs to having MM’s: **time + admin of justice** -> **you get people getting around them** (through *agreements* with crown). Instead of having this outside of court, BRING IT IN (America: people getting exemptions through the back door). Better JUSTICE/perception. Other problem: *everyone going to trial* (nothing to lose).

-You get to increase the *severity* while mitigating injustice for bad cases.

**\*Nikkos also on Reasonable Hypothetical**:

-Aboriginal & Mentally ill. How can you leave these likely characteristics out? –*Unreasonable hypo*.

-If you don’t have *sympathetic facts*, you go RH.

-Juris: Can’t be the most MINIMAL offender.

-**Basically court opened the RH up a little**: *circumstances that might reasonably be there*. Somewhat generic.

7. **MURDER SENTENCING**: