CRIMINAL LAW CAN (FALL 2011)

**CHAPTER 3- PROVING THE CRIME**

*Note on Criminal Procedure*

**The Commencement of Criminal Proceedings**

* 1) complaint- typically from a citizen to the police, or police officer will personal witness
  + Officer will then investigate the suspected offence- if there is believed to be evidence to justify a prosecution- will make a report to Crown Counsel
    - Vancouver- needs a “charge approval” by a senior Crown counsel before proceeding
* 2) swearing out the information- no criminal charge can be commenced without the approval of a Justice of the Peace (ex. provincial court judge)
  + Complainant (usually police officer) will prepare a formal charge document called “Information”, and then appear before the justice of the peace and swear under oath that they have witnessed the offence(s), or has reasonable grounds to believe that they have taken place
    - Officer will then relate a summary of the evidence and the justice of the peace must decide whether or not to proceed- if yes, then “issue process”
      * Formal beginning of a criminal proceeding
* 3) issuing process- only a justice of the peace can compel an accused person to attend in court to answer a charge
  + 4 different ways that this can be done:
    - Confirming an appearance notice- a pre-charge summons usually given by a police officer, but since they have no power to summon a person to attend court, it must be confirmed by a justice of the peace to be effective
      * Ex. a shoplifting case, where there is no problem of identification of the suspect
    - Confirming a promise to appear- if the officer has arrested and taken the person to jail, the jailer needs to decide if continued detention of the suspect is justified
      * If not- then the criminal code requires that the person be released and they are given a promise to appear (also confirmed by a justice of the peace)
        + Ex. case of impaired driving
    - Issuing a summons- if no appearance notice or promise to appear has been used, then the justice of the peace may authorize the issuance of a summons, governed by S. 509(2) of the criminal code
      * “a summons shall be served by a peace officer who shall deliver it personally to whom it is directed or, if that person cannot conveniently be found, shall leave it for him at his latest or usual place of abode with an inmate thereof who appears to be at least 16 years of age”
    - Issuing a warrant to arrest- an order directed to peace officers to arrest the accused and being them before the court to answer the charges
      * Can be local, province-wide, or Canada-wide
      * When brought before the court- they may make a bail application to be released pending trial

**Included Offences-** general rule that an accused can only be convicted of the particular offence with which he or she is charged (in the information or indictment)

* Exception- an accused can always be convicted of any offence that is “included” in the one that is charged
  + Ex. S. 662(2) specifically provides that second degree murder is an included offence of first degree murder
  + Through the operation of S. 662(1)- a count in an indictment is divisible and where the commission of the offence charged, as described in the enactment creating it or as charged in the count, includes the commission of another offence, the accused may be convicted
    - (a) of an offence so included that is proved, notwithstanding that the whole- “as described in the enactment creating it”
      * Ex. if cannot prove assault causing bodily harm- can still just go for assault
      * Ask- “is the lesser offence a necessary step to proving the more serious offence?”
        + If yes- then the lesser offence is included in the serious offence
    - (b) offence that is charged is not provided; or- “as charged in the count”
      * Captures those offences that are included because of the way the charge is drafted by the Crown
      * Ex. if accused is charged with the “attempted murder of X by stabbing him with a knife”- then assault with a weapon is an included offence because that offence is “charged in the count” because of the language of the Crown used to describe the attempted murder
    - (c) of an attempt to commit an offence so included- “an attempt to commit”
      * Ex. charged with “did commit the theft of a motor vehicle”, but on the evidence the accursed was arrested while in the vehicle trying to turn it on- the accused can still be convicted of the offence even though “attempted theft” does not appear on the indictment

**Outline of a Criminal Trial**

* Arraignment- charge is formally read to the accused
* Plea entered
  + Guilty- accused in sentenced
  + Not guilty- moves on in the steps below
* Crown case- calls its witnesses to give evidence which the defence then has the option of cross-examining
  + Direct evidence- ready-made for a jury to use in order to convict, don’t need to draw any further inference in order to use
  + Circumstantial evidence- not ready-made to be used, evidence from which you need to make a further inference from to make it useful
    - Need to be careful not to make an incorrect inference
* Crown case is closed
* 3 options are open to the defence
  + No evidence motion
    - Defence submission
    - Crown submission
    - Judge’s ruling
      * Motion granted- accused not found guilty and the trial is over
      * Motion refused- defence then has the option of either of the 2 below
  + Defence calls evidence
  + Defence case is closed
* Closing arguments- if defence has called evidence, they will make their closing argument first, if didn’t call evidence, then will go last
* Judge’s charge
* Judge’s/jury’s ruling

*Note: The Charge and the Elements of the Offence*

**The Charge: The Information of Indictment**

* Determine what offence is charged in the indictment or information
* Read and interpret the statutory provision describing or defining the offence

Charging Sheet

* Shows what the Crown has to prove
  + Most offences have 3 core elements that need to be proved beyond a reasonable doubt:
    - Identity- prove that the person in court is the person who is the offender
    - Actus reus- person has engaged in the prohibited act
    - Mens rea- the mental awareness/intention of the person
  + Jurisdiction- where the issue happened approximately
  + Date of alleged offence- Crown is given some flexibility in this so that the accused cannot get off on simple technicalities
* Allows the accused to provide a full answer and defence

**Elements of the Offence**

* Actus reus- the prohibited act, omission or state of affairs
* Mens rea- the required mental element of fault
* Must also prove the facts alleged in the charge
  + Ex. the accused named in the charge, stole the property specified in the charge at the time and place alleged, subject to permissible amendments and very flexible rules on proof of time and place
* Crown is required to prove EACH beyond a reasonable doubt

*Note: Introductions*

**Note: The Adversary System- what we have in Canada**

* Judge’s role is relatively passive- not involved before trial in investigating facts

**Note: The Nature of Evidence**

* Most common method of proof under our system is by the oral testimony of witnesses

**Note: The Sequence of Events at Trial**

* If the accused pleads “not guilty”- the prosecution (Crown) has the burden of proving the guilt of the accused
* At the close of the Crown’s case- the defence may make a “no evidence” motion, arguing that the charge should be dismissed because the Crown has not satisfied the evidential burden

**Note: Evidential Burden Distinguished from the Burden of Proof-** general rule is that if party X has the burden of proving fact A, X also bears the evidential burden regarding fact A

* **The Crown’s Evidential Burden-** Crown must introduce at least some evidence on every element that they are required to prove
  + Test- is there any admissible evidence (on each element of the offence) upon which a reasonable jury, properly instructed, could convict?
    - Will be satisfied if the Crown has adduced admissible evidence on each element which could, if believed, result in a conviction
      * Do an assessment of the circumstantial evidence to ensure that at least one reasonable inference could convict the accused
    - The question of “reasonable doubt” does not arise here
    - Reliability and credibility are not considered at this point
  + After- the accused is entitled to make a “no evidence” or “non-suit” motion, arguing that the evidence adduced by the Crown does not satisfy this evidential burden
    - Then entitled to a ruling on this motion at that stage
      * If successful- the accused is entitled to an acquittal, without being required to decide whether to adduce evidence
  + Always a question of law for the judge to decide- never the jury
    - Jury’s task- to determine whether the evidence, later, viewed as a whole, has proved the guilt of the accused “beyond a reasonable doubt”
  + The Crown may successfully appeal if the judge acquits on the ground that the evidential burden has not been satisfied
  + If satisfied- the accused is entitled to decide whether or not to call evidence
* **The Accused Evidential Burden**
  + In cases of reverse onus- the accused bears not only the ultimate burden of proof (on the balance of probabilities), but also the initial evidential burden
    - If not satisfied- the trier of fact must find the accused on the issue covered by the reverse onus provision
  + Other statutes may impose on the accused, not a burden of proof on the balance of probabilities, but merely an evidential burden to introduce some evidence sufficient to raise a reasonable doubt
  + For some defences- ex. drunkenness, self-defence, provocation, duress, etc.
  + Common law that the accused typically does not have to induce evidence
    - BUT if the Crown has a super strong case- then, as a practical matter, it would be a good idea to induce some evidence in order to raise a reasonable doubt

**CHAPTER 2- CRIMINAL CASE OVERVIEW**

**R. v. Sheppard**- assault case where two guys are fighting and another guy steps in to break it up and he gets hit and then the guy who hit him runs away

* Charged with assault contrary to S. 265(1)(a) of the Criminal Code- “without the consent of another person, applies force intentionally to that other person, directly or indirectly”
* Issue- do they actually have the correct identity of the accused?
* Circumstantial evidence- guy who punched him went into a taxi
* What stops the case- female witness who knows the accused really well and that he didn’t hit Thorne
  + Judge also finds some problems with the Crown’s evidence- ID’ing the person in court
    - Concerned that the police officer did not take the statement
* Found- not proved beyond a reasonable doubt

**R. v. Saunders-** accused is charged with various drug charges, Crown specifies that it was heroin, evidence came out however, that it was cocaine and not heroin, but the Crown says that they were basically charging him with drug conspiracies so it shouldn’t matter that they specified heroin in the first place, should just convict on the fact that he was trafficking drugs

* SCC said NO- he was on trial for the specified heroin
  + It is a fundamental principle of law that the offence as particularized in the charge must be proved- to permit the Crown to prove some other particular would undermine the purpose of providing them
    - The whole reason of supplying these particulars is to give the information to the accused

**CHAPTER 1- SOURCES OF THE CRIMINAL LAW AND THE SUPREMACY OF THE CHARTER**

**Constitution Act, 1967**

* Powers of the parliament
  + S. 91(27)- criminal law
  + S. 91(28)- the establishment, maintenance, and management of penitentiaries
* Exclusive powers of provincial legislatures
  + S. 92(6)- the establishment, maintenance, and management of public and reformatory prisons in and for the province
  + S. 92(13)- property and civil rights in the province
  + S. 92(14)- administration of justice in the province
  + S. 91(15)- the imposition of punishment by fine, penalty or imprisonment for enforcing any law of the province

**The Canadian Charter of Rights and Freedoms (1982)-** key provisions to consider

* Guarantee of rights and freedoms
  + S. 1- rights and freedoms in Canada
* Fundamental freedoms
  + S. 2- fundamental freedoms (conscience and religion, expression, etc.)
* Legal rights
  + S. 7- life, liberty and security of the person
  + S. 8- search or seizure
  + S. 9- detention or imprisonment
  + S. 10- arrest of detention rights
  + S. 11- proceedings in criminal and penal matters
  + S. 12- treatment or punishment
  + S. 13- self-criminalization
  + S. 14- interpreter
* Equality rights
  + S. 15(1)- equality before and under law and equal protection and benefit under law
* Enforcement
  + S. 24(1)- enforcement of guarantees of rights and freedoms
    - (2)- exclusion of evidence bringing administration of justice into disrepute

**R. v. Sharpe-** makes it criminal to have your own depictions or pictures of children in sexual acts, even when none were harmed, or you can write your own stories (creativity), even if made and kept in complete private

* Unique Canadian approach that says you can have reasonable violations of the Charter in ordinary laws in the criminal code- this is an example
* Attempt to challenge child pornography laws based on freedom of thought, belief, opinion and express and life, liberty and security
* The law may incidentally catch forms of expression that more seriously implicate self-fulfillment and that do not poses a risk of harm
* Very broad for a legitimate reason- goal of the legislation is to protect against direct and indirect harm that flows from these materials
  + Direct- use of the children in the production
  + Indirect- research says that it still poses a danger to children, the fact that these materials are available
  + Problematic that this also applies to private possession- does not make the exception that they have produced it themselves, without using a child
    - Makes it a crime to write down your own story about children and sexual stuff and keep it locked away
    - No age limit- can criminalize young adults, children who draw themselves, etc.
* Clearly this law is violating freedom of expression- need to therefore go under S. 1 to see if there is a reasonable limitation of these expressive rights
  + So the accused must show on the balance of probabilities that the law in question violates a Charter protected right- then you proceed to S. 1 analysis
* Oakes test- needs to pass each part of the test to be saved under S. 1
  + 1) determine whether government had a pressing and substantial objective in passing the legislature
    - Usually isn’t hard to pass the test here
    - Child porn poses a reasoned risk of harm to children (direct and indirect) and the legislation targets this
  + 2) rational connection test- ask if there is a basic reasonable rational relationship between the objective and the means
    - Doesn’t usually fail here either- unless there are extreme circumstance
    - There is a “reasoned apprehension of harm”
  + 3) minimal impairment- ask if they went farther than they reasonably needed to in order to achieve their objective
    - Could they have achieved their objective through narrower means, with less of an infringement on someone’s rights?
    - LOTS of laws fail here
    - The courts have clearly said- it is no micromanaging, we give some deference to parliament when we make these decisions
      * So it only needs to be reasonably tailed to its objective- not perfectly
    - Proper statutory interpretation with the consideration that the intent is to catch harm related to children will not catch the 2 exceptions presented- almost like thought control in the 2 examples, possible invasion of privacy
  + 4) proportionality- balances the benefits of the law vs. the deleterious effects of it, and on society
    - If it gets to this stage, it has passed minimal impairment- no way to make the law more narrow to achieve our objective
      * So if it makes it past minimal impairment- usually good to go
    - Benefits outweigh the effects except in the 2 examples which are peripheral to the legislation’s objective
* If it isn’t saved by S. 1- the court is given 3 options:
  + Can strike down the whole law- no longer exists
    - Parliament can them come and write a new law
    - Fairly drastic thing to do
  + Reading down- just strike down a limited provision, take out the offending section
    - Doesn’t tie parliament- they can come back and define the specific section
  + Reading in- add something that they think is missing and therefore makes it inconsistent
    - A little more controversial- the court is adding this, not parliament
* Unreasonable to strike down law that is substantially constitutional
  + Based on the twin guiding principle for parliament’s role and respect for the purposes of the Charter, reading in expectations to the to the criminal code is appropriate and parliament will likely do the same
    - Ex. okay if you did not use an actual child, created as the accused, and kept them in private possession, or if you are both underage yourself

*Illustrative Cases on “reasonable doubt”*

**Charemski v. The Queen-** murder case where she was found in the bathtub

* Talking about the “no evidence standard”
  + Flexible for the Crown- assume that all the witnesses will be believed and that all the evidence is flexible
  + Direct evidence- virtually always gets over the no evidence threshold
  + Circumstantial evidence- even if you find it to be reliable and credible evidence, it may not be enough to support a “reasonable inference of guilt”
* Murder case- but there’s no clear evidence that there was actually a murder
* Circumstantial- he was in the building “fairly close to where the death occurred”
  + He offered evidence of stuff before it even became available- said that she often fell asleep in the bathtub
    - This was knowledge of the manner of death prior to it being disclosed by the police
      * Holdback evidence- police will be very careful not to give all the evidence, to see if the suspect will accidently say something
      * One reasonable inference of guilt- possible inference from this that he killed the victim
* If the Crown fails to adduce any evidence to discharge the evidential burden on any of the issues- the trial judge should direct a verdict of acquittal
* Trial judge should have directed the jury according to the requirement that a finding of guilt could only be made where there was no other rational explanation for the circumstantial evidence but that the defendant committed the crime

**R. v. Lifchus**

* Question of how should a judge explain to juries the concept of “reasonable doubt”?
  + Accused is presumed to be innocent
  + Onus is on the Crown to prove- not for the defence to disprove (accused)
  + Make sure that the jury does not have too high a definition
    - Should be based on reason and common sense- logically derived from the evidence or absence of evidence
    - Need to remember that it is virtually impossible to prove anything to absolute certainty, and that the Crown is not required to do so
  + Also, don’t go too low- believe someone is probably or likely guilty is NOT sufficient
    - Then you must acquit
  + Standard is much closer to absolute certainty than to a balance of probabilities- very high standard of proof
    - Not necessary to include this when describing to jury though

**Starr v. The Queen**

* “beyond a reasonable doubt” would like much closer to absolute certainty than to balance of probabilities (used in civil trials)

**R. v. Kyllo**- charged with first degree murder (entails life sentence in prison with no eligibility for parole for 25 years) at the video game place

* Issue- what side of the line does reasonable doubt fall in on this issue?
* Lots of the evidence comes from one particular person- Meier
  + Has specifics to his testimony, BUT also has severe credibility problems- lots of criminal history, drugs problems, etc.
    - Vetrobet witness- need to tell the jury that you need to find corroborating evidence as well since the witness is so bad
      * Therefore, you need supporting evidence- can’t get beyond a reasonable doubt on his testimony alone
        + Testimony from the store owner where they bought the boots- also saw boots evidence at Kyllo’s house
        + Testimony from the drug dealer who was paid in quarters a lot
        + Chewing gum with the defendant’s DNA found at the scene of the crime
  + Concern that maybe Meier was involved in the crime himself and just trying to put the blame on someone else- problems/flaws with the supporting evidence as well
* Can it be proved that these various people and Kyllo were actually involved in the death?
* Lays out some factors to be considered in assessing an informer’s reliability or lack thereof
* “while the principle of proof beyond a reasonable doubt does not apply to each individual piece of evidence, it does apply in a consideration of the credibility of the witnesses and the evidence as a whole”

**Note: C.W.H.-** addressed the reasonable doubt rule as it applies to the issue of credibility

* In cases where credibility is an issue, the trial judge must inform the jury that the rule about reasonable doubt applies to that issue
  + If the jury believes that testimony of the accused- it must acquit
  + If the jury does not believe the testimony of the accused, but is left with a reasonable doubt- it must acquit
  + If the jury does not know how to believe- it must acquit
  + Can ONLY convict if, on the basis of all the evidence, it is convinced beyond a reasonable doubt of the guilt of the accused

**Note: Morin-** awarded a new trial on the basis that the trial judge erred in explaining to the jury how to apply the reasonable doubt standard

* Two-stage process is wrong- the judge should tell the jury to weigh the evidence as a whole and determine whether guilt is established beyond a reasonable doubt

*Guidelines when discussing “reasonable doubt”*

* Presumption of innocence is important
* Burden of proof is on the Crown at all times
* Reasonable doubt =/= doubt based on sympathy or prejudice
* Based upon reason and common sense
* Logically connected to evidence or absence thereof
* Not absolute certainty but also not proof beyond any imaginary or frivolous doubt
* More required than proof that the accused is probably guilty
* Avoid:
  + Describing “reasonable doubt” as an ordinary expression
  + Ask juries to apply the same standard that they use for important decisions
  + Equating it to a “moral certainty”
  + Using words like “reasonable”, “serious”, “substantial”, or “haunting”- misleading
  + Instructing juries to convict when they are “sure” before defining “beyond a reasonable doubt”

**Note: Proving Mens Rea**

* Most of the crimes we will be studying require a subjective mens rea- Crown has to prove, beyond a reasonable doubt, that the accused intended to cause the consequences of their actions, or that they knew the circumstances that made the conduct criminal
* There are generally 2 sources of evidence regarding intention
  + Accused may testify at trial or have given a statement or confession to police
  + Trier of fact may be told that it can infer the accused’s intention by looking at their actions and determining what must have been doing on in the accused’s mind at the time
    - As a general rule- we assume that people intend the natural consequences of their actions
      * But if there is something indicating otherwise- the rule shouldn’t apply

**Note: Appleby and Proudlock-** prior to the Charter, these were the 2 leading cases on legal and evidentiary presumptions

* Appelby- held that legal presumptions require the accused to disprove the presumed fact on a balance of probabilities
* Proudlock- held that when dealing with an evidentiary burden, the accused must point to evidence which is capable of raising a reasonable doubt in the mind of the trier of fact

**Note: The Application of the Presumption of Innocence to Issues other than Elements of Offences**

* Some authority for the proposition that the reasoning in Oakes regarding the presumption of innocence of S. 11(d)- only applies to elements of the offence and not to other factual issues, such as defences
  + S. 11(c) guarantees that the accused does not have to testify
* Ex. S. 16 (“mental disorder”) requires a reverse onus where the accused is required to disprove sanity (or prove insanity) on a balance of probabilities
  + Found to be justified under S. 1 of the Charter

**R. v. Downey-** the law does not make the act of prostitution itself illegal, but it does criminalize certain conduct associated it (ex. living off the avails, taking money that they earn, etc.) to try to prevent them from being exploited

* This case is brought on by someone who is caught living off the avails
* This crime has a mandatory reverse onus- you have to prove that you have NOT been living off the avails of prostitution (because, how else could Crown actually do this?)
  + S. 11(d) of the Charter- presumes the assumption of innocence
  + Mens rea is proven unless you can disprove it
* Court has to engage in its section 1 analysis (Oakes test)
  + Step 1- pressing and substantial objective
    - Trying to prevent exploitive parasitic relationships- such as pimps
    - Need the reverse onus- because of the typical reluctance of prostitutes to testify against their pimps
  + Step 2- rational connection
    - A rational connection does exist
  + Step 3- minimal impairment
    - Don’t have much concern of innocent people being convicted
    - Court here finds that there wouldn’t really be any other enforceable method
  + Step 4- balancing
    - Goal is to target this parasitic relationship so that all the accused has to do is raise a reasonable doubt- relatively low standard
* Held to be saved under S. 1

**R. v. Laba-** if you’ve bought something stolen, the onus is on you to prove that you are not in the possession of something stolen (reverse onus)

* Further illustration of reverse onuses
* Laba challenges the evidential burden in S. 394(1) of the criminal code
* Internal rationality in the sense that there is a logical connection between the presumed fact and the fact substituted by the presumption was an argument in the Downey case and rejected
* Only relevant consideration for rational connection is whether the presumption is a logical method of accomplishing the legislative objective
* Legal burden fails the proportionality test because of the excessive invasion of the presumption of innocence- isn’t “minimal impairment”
* Evidentiary burden violates presumption of innocence but is a justified limitation
* Strike down portions of S. 394(1)(b) which imposes a legal burden- strikes out “unless he establishes that” in the reverse onus clause be struck out, and instead the phrase “in the absence of evidence which raises a reasonable doubt” be read in
  + Still maintains the reverse onus, but lowers the threshold

**CHAPTER 4- THE ELEMENTS OF AN OFFENCE**

*Note: Structure for Analysis of Actus Reus and Mens Rea*

**Structure for Analysis of Actus Reus-** all offences require proof

* Conduct- act or omission required
  + Must be voluntary
* Relevant circumstances
  + Ex. S. 249 crime of dangerous driving requires proof not only of the physical actions involved in operating the vehicle, but also proof of “a motor vehicle on a street, road, highway or other public place in a manner that is dangerous to the public, having regard to all the circumstances…”
* Consequence or result
  + Ex. death is required for any murder charge
  + Whenever a consequence forms part of the actus reus- causation is in issue

**Structure for Analysis of Mens Rea-** general rule is that it is a required element of “true crimes”, unless excluded expressly or by necessary implication in the statute

* Sometimes the statute specifies the mens rea, but frequently, it will be either silent or present an incomplete definition
* General rule- where mens rea is required and it is not otherwise specified in the statute or authoritative case law, it will be satisfied by the following mental states corresponding to the following elements of actus reus:
  + Conduct- no mens rea need be attached
    - But any required act or omission must be voluntary
  + Circumstances- the accused has mens rea is they knew of the existence of the circumstances, was willfully blind as to existence or was reckless to its existence
  + Consequences- the accused has mens rea is they intended the consequences to occur, was substantially certain it would occur, was wilfully blind as to the certainty of occurrence, or was reckless as to its occurrence
* 3 basic forms
  + Intent- one intends a consequence when one foresees the consequence and desires to bring it about
    - Knowledge of substantial certainty of consequences
  + Knowledge
    - Generally agreed that wilful blindness is equivalent- if an accused foresees a circumstance but deliberately closes their mind to avoid confirmation of what is foreseen
  + Recklessness- subjectively foresees that a consequence may result or that a circumstance may exist but proceeds to take the risk in spite of any such foresight
    - If a crime requires the mens rea of intention or knowledge- recklessness will not suffice
* The following do NOT constitute true mens rea
  + Negligence- conduct falling below the standard of a reasonable person in the circumstances
    - Objective test
  + Strict liability- the accused will be guilty of an offence of strict liability (usually a regulatory offence) if they have performed the actus reus, unless able to prove on a balance of probabilities that they exercised due diligence or make a reasonable mistake of fact
  + Absolute liability- established by proof of the (voluntary) actus reus
    - No requirement of mens rea and no defences available

**Concurrence of Mens Rea and Actus Reus-** where mens rea is required, it must occur in point of time with the actus reus

*Note: Use and Interpretation of Statutes-* in criminal law we use the Criminal Code

* Give meaning and effect to each and every word in the relevant provision(s)
* Look at the statutory definitions of key words

*Elements of the Offence: Illustrative Case*

**R. v. Clark-** guy masturbating by his window and his neighbours can see him

* Mistake of law is not a defence- ex. not knowing that it was an indecent act is no excuse
* S. 173 requires proving an indecent act
  + A) requires proving public place and presence of others
    - S. 173(1)(a) does not require the accused to know there are other people present
  + B) requires proving an intent to offend/insult (requires awareness that others are watching)
    - S. 173(1)(b) has additional mens rea, insulting or offending another person- requires knowledge of presence of other people
* Came to statutory interpretation of “public place” vs. “private place visible to the public”
  + S. 150 defines “public place” and it required “access as of right or by invitation”
    - There clearly was no right in this case
    - Merely having the opportunity to view/watch does not give rise to an “access as of right or invitation” because the dictionary definition of “access” requires physical access

**CHAPTER 5- THE REQUIRED ACT OR OMISSION: ACTUS REUS**

*The Principle of Legality*

* Charter S. 11(g) any person charged with an offence has the right not to be found guilty on account of any act of omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations

*Problems of Interpretation*

**R. v. Terrence-** guy who is in a stolen car, but didn’t know it at first

* The knowledge of a stolen car came into place when the police sirens went on- argument that there was knowledge at some time and thus there was possession
* The actus/reus is a bit blurry
* The key is control, S. 34(b)- “where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them”
  + “knowledge and consent” cannot exist without the co-existence of some measure of control over the subject-matter
    - If there is power to consent, there is equally the power to refuse and vice versa
      * They each signify existence of some power or authority called control
  + SCC decided that a further element of “control” is required for “knowledge and consent” in the definition of possession
    - So if you learn that the car is stolen while you are in it- what are you supposed to do then to stop being in “possession”, throw yourself out?!
    - Finding that consent involves having a measure of control over the situation- if the knowledge arises when you’re in a moving car, then this would be beyond your control
* Appeal dismissed

*Omissions*

**R. v. Cooper-** murder case, strangling and then blacked out, came to and found her dead

* Couldn’t have had the mens rea at the point the person died because the accused blacked out
* Principle of law that actus rea and mens rea needs to concur- but not a strictly technical concept
* An act which may be innocent or no more than careless at the outset can become criminal at a later stage when the accused acquires knowledge of the nature of the act and still refuses to change his course of action (an exception for omissions)- continuous
* The mens rea can be inferred by the act of putting hands on the neck- reasonable inference was that he intended to cause death
  + The whole transaction had mens rea at some point
* Mens rea does not need to occur at the time of the actus rea- only requires coinciding at some point (concurrent)

**Moore v. The Queen**- police officer saw someone running a red light on their bike, person wouldn’t pull over and is charged with unwilfully and unlawfully obstructing a police officer in his execution of duty

* Could failing to provide the name to the officer be the actus reus of the offence?
  + Easy solution- if there is a statutory provision that puts a legal duty on the driver to provide license and information (contrary to basic common law right to silence)
* Police officer has a duty to attempt to get the person’s name since there was an offence committed- but if you can’t identify the person, then you can arrest them
* There is a common law right to remain silent
  + Does not apply if there is a statutory duty on the person to provide information
  + Does not apply if there was a duty for the police to get information- also depends on the wording of the statute
* No statutory duty on a cyclist committing a traffic infraction to divulge his name and address
* No common law duty to identify oneself to police- therefore, refusal to identify oneself to the police could not constitute obstruction of the police
* Failure to act is NOT actus reus, unless there is a duty imposed by the law
* What to take away from this case- another example that sometimes the law puts obligations on you to do/say certain things and that a refusal to do these things may result in your violating a statute and a violation in the police officer’s duty to get information from you
* \*\*\*FIX MEEEE

*Mere Presence*

**Dunlop & Sylvester v. The Queen-** both were members of a motorcycle club, one night they were at a party where other members were involved in the gang rape of a teenaged girl, who then testified at trial that they had participated

* Judge provided the jury with 2 ways to convict- principle offender or aiding/abetting
* Crown can have 2 theories but will require reasonable evidence for both theories- neither can be speculative
  + The law for the theories must be correctly provided
  + The juries’ choice of which theory will not be known
* Prior knowledge is a part in determining if it was “mere presence”
  + Prior knowledge will be convincing evidence that it was likely not mere presence
  + If mere presence creates an atmosphere of assistance and that there was knowledge- then it can be an offence
* Question appeal court considers for new trial is “whether error, if it did not occur, would give the same result?”
  + If it will be same result- then no reversal
* Everyone is a perpetrator to an offender who:
  + Actually commits it
  + Does or omits anything for the purpose of aiding a person to commit it
    - So you need knowledge- makes you liable if you act with a purpose
* “mere presence” is not a crime unless there was intent to assist or encourage
  + But like blocking an escape route would sufficient enough
* Law recognizes how much more dangerous it is to work as a group

*Causation*

There are a range of offences that result in a person’s death being caused:

* Non-illegal, non-culpable homicide
  + Ex. driving slowly down the street, and someone jumped out between 2 cars, you responded, but it was too late and they died
* Culpable homicide- various levels of seriousness:
  + Manslaughter- causing the death through an unlawful act, but there was no intent to kill
    - Potentially punishable by life in prison, but no minimum sentence
    - Less serious
    - Ex. someone is bothering you so you push them and they hit their head and die
  + Second degree murder- causing someone’s death with an intent to kill
    - Subjectively foresee their death resulting from your actions
    - A big step up from manslaughter- only real difference is actual intent to kill
    - Automatic life sentence- but can apply for parole after 10, 15, etc. years
  + First degree murder- second degree murder + other things that that make it particularly horrible and more blameworthy
    - Ex. planned out (pre-meditated), murder for hire, occurs in circumstances of domination, confinement, etc.
    - Life in prison- 25 years

**Smithers v. The Queen-** manslaughter case of kicking in the stomach after a hockey game

* Needs to see if there is a causal link
* Causation: accused must be “at least contributing cause of death outside the diminimous range”
  + Either beyond “diminimous” or “not significant”- but still a cause more than a minimum
  + Not a high standard- do not have to be the only, major, etc. cause

**R. v. Blaue**- Jehovah’s witness refusing blood transfusion after being stabbed by the defendant, dies

* Needs to ask if the intervening event (refusal of the blood transfusion) is significant enough to break the chain of causation?
  + Refusing the blood transfusion- likely the major cause of death
  + Court says that it is NOT sufficient to break the chain- just because it is outside of what other people would have likely done, does not make it sufficient
* Intervening causes: will only break the causal chain if it is so overwhelming that it renders the original unlawful act to be a mere part of the victim’s history
  + The accused must “take their victim as they find them”

**Harbottle v. The Queen-** holding down legs while his friend strangled a girl to death after raping her

* Only applies to S. 231(5)- killing in the force of another offence (domination)
  + Concerns HOW you committed the murder- the conduct and the circumstances surrounding it
* Decided that the Smithers test was NOT an efficient standard for this provision- required a higher standard of proof
  + Now- substantial cause of death
    - Typically a physical role played- ex. fighting off people trying to save the victim while your friend kills them
    - Has to be integral/important to the act
    - Can only logically apply and be an issue with an aider and abetter
* Reasons for different threshold
  + First degree murder has a much higher stigma and penalty than second degree
  + Consistent with the statutory language used
* Causation: accused must be a substantial and integral cause of death

**Nette v. The Queen-** old woman murdered in home invasion, hog tied and then died a few days later

* Causation: accused must be a “significant contributing cause” = “significant contribution” = “beyond diminimous”
  + “significant” =/= “substantial”
  + So use the term “significant”
* Technically, this is the “Smithers” test re-applied, but appears to be a higher standard

**CHAPTER 6- MENS REA: GENERAL PRINCIPLES**

*Introduction: The Subjective Approach*

How will we know if it’s a crime that includes needs a subjective mens rea?

* Provision will use a word like “intentionally”, “knowingly”, “willingly”, etc.- expressly indicates
* There may be an interpretative note where its appears unclear in the provision

How can you prove that something was in the person’s mind?

* Infer that people intend the natural consequences of their actions
* May have made an admission before or after the act which shows this
* Evidence of motive

**Note: Beaver-** SCC established the requirement of subjective mens rea for criminal offences here

* Found that there was no possession of a forbidden substance if the accused didn’t know the character of the substance
  + Issue of whether the accused honestly believed that the package contained sugar of milk, not whether he reasonably believed it

**R. v. City of Sault Ste. Marie-** charged with polluting, regulatory offence

* “absolute liability” entails conviction on proof merely that that defendant committed the prohibited act constituting the actus reus
  + No relevant mental element
  + Need a high standard of care and attention to protect societal interests

*Motive*

**Lewis v. The Queen**- package sent to a married couple and they are killed when it explodes, but it wasn’t sent by the disapproving father, but rather by another guy with no motive

* Intent is an exercise of free will, while motive is the broader reason behind this intent
* Shouldn’t there have been an instruction on the pure absence of motive?
  + Defence didn’t even request this however
* Motive: can help establish the accused’s intent, but is never a required element of the offence
  + Presence/absence of motive is circumstantial evidence which may prove identity or intent

*Intention, Knowledge, Wilful Blindness and Recklessness*

**R. v. Briscoe-** rape of a girl at the golf course

* Accused is alleged to be an aider and abetter- ex. drove the group to the secluded golf course
  + But the court says that it is NOT enough to simply aid- need to have knowledge that you’re assisting with the bad act (ex. sexual assault, murder, etc.)
  + Doesn’t seem to be specifically involved in the direct killing- just assisting with some of the preliminary steps
    - But there was talk about killing earlier in the day, knew that there was going to be a sexual assault, gave the guy weapons out of the back of the car, always kept saying “I don’t want to know”- likely had the knowledge
* Aiding and desire are NOT the same- you may prefer it wasn’t happening, but if you’re driving them with the knowledge required, the mens rea has been made up
* Don’t need to know precisely HOW the conduct will occur- just need to have the knowledge or be willfully blind
  + Wilful blindness- “imputes knowledge to an accused whose suspicion is aroused to the point where he or she sees the need for further inquiries, but deliberately chooses not to make those inquiries”
    - Can be a substitute for actual knowledge
  + Trial judge failed to consider this- appeal was dismissed and order given for a new trial

**R. v. Wilson-** accused charged with perjury (lying under oath) and obstruction to justice, he had testified one way in the preliminary trial (gang members did the murder), ended up in jail, and then changed his testimony for the actual trial (I never saw or heard anything)

* Clearly was a case of a blatant change of testimony instead of a head injury- lying
  + Trial judge decides that he was lying at the actual trial- trying to show people in jail/gang members that he wasn’t a rat (trying to change his life)
* Perjury- with intent to mislead, makes a false statement under oath, knowing that the statement is false
  + Really has a double mens rea element- know that it’s false and an intention to mislead the court
    - General intent- giving false testimony and knowing that it’s false
    - Specific intent- the further objective or ulterior purpose of misleading the court
      * Can often infer this from other circumstances

**R. v. Foti-** kid bought a snowmobile, didn’t pay for it right away, so when the person who sold it came over and there was an altercation, the Dad came outside with a shotgun and the victim was shot

* Main issue- did he intent to shoot to scare or hit one of the people?
* Charged with:
  + Aggravated assault S. 268- every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant
    - When it says “assault”- need to also prove this on its own
      * S. 265 assault- a person commits an assault when…threatens
        + No specific intent here though
        + Mens rea- the objective foresight of the risk of bodily harm

The Crown only has to prove that a reasonable person would inevitably have realized that the assault in question would subject another person to bodily harm

The fact that the victim was hit with the shot- shows that it’s likely a person would have known

* + Discharge of a firearm with intent to wound S. 244- therefore, you need the intent to wound, maim or disfigure
    - Need to demonstrate that there was some foresight of the bullet hitting the person- ex. intent to shoot, willful blindness, possibility of subjective recklessness, etc.

**R. v. Buzzanga and Durocher-** French Canadian promoting hatred case, they were French themselves, just trying to show how silly the opposition could look

* Wilfully promoting hatred
  + To communicate these hate statements against an identifiable group in any public place
    - Also a more narrow forum that’s criminalized- do this other than in a private conversation, then you are guilty
* Issue of whether recklessness is generally available to prove a subjective intent requirement for mens rea?
  + Court says that intent and knowledge don’t have to be 100% certain that something is going to happen- just has to be more likely or probably
  + Found that recklessness was not available in this case- 2 critical elements:
    - Use of the word “wilfully”- possibly has a certain force to it in terms of your mental state of mind
    - Looks at the broader purposes of the statute- unlike saying things in public, this is a more narrow offence
      * Has to do with regulating- so parliament would have wanted to create a fairly narrow mens rea
* Says that in certain circumstances, due to the words used and broader context- subjective recklessness will not always be sufficient
* “willful” or “with intent” = recklessness cannot be used

**R. v. Williams-** the mens rea for aggravated assault is the mens rea for assault (intent to apply force intentionally or recklessly or being wilfully blind to the fact that the victim does not consent), plus objective foresight of the risk of bodily harm

**R. v. Roach-** telemarketing scheme where the made $1000s

* Roach claimed a mens rea defence, claiming that he didn’t have enough knowledge of it- thought it was legit
  + Potential aider and abetter
* 2 charges:
  + Fraud- obtaining people’s property though deceit, theft, etc.
    - Subjective mens rea- intend to do the act
  + Conspiracy to carry out a fraudulent scheme- based on the premise that people acting together can do more than people acting alone
    - Limited elements:
      * 2 or more people agreeing to do a certain criminal act
      * Accused was a member of the conspiracy and intended to be a member
        + Doesn’t require for you to have acted on it- the fact that you started acting usually proves this though
* No doubt that he did the actus reus- made a business, opened a mailbox, etc.
* Main issue- if a reckless frame of mind is sufficient?
  + For fraud- YES
    - But what about for the aiding and abetting of fraud?”
      * “if a person does or omits anything for the PURPOSE OF- seems like a pretty strong subjective intent
        + Actual knowledge and wilful blindness are the same in this case
      * Court concludes that recklessness is NOT sufficient
        + The closer you are to the person/thing you are aiding/abetting- need to prove less subjective intent

But if you’re really far away- need to prove a really strong intent

**R. v. Malfara-** guy who delivers “clothing” to jail for $50

* Trial judge thought that it should have altered the guy that there was likely more than clothes in the parcel so he should have inquired- but not doing this, then guilty of wilful blindness
  + Errors with this:
    - Said that he *should* (objective) have been suspicious- not that he *was* (subjective)
    - Finding that the suspicion was “that there may have been more to the parcel than clothing”- didn’t actually reach the degree of specificity of the suspicion required to support a finding of wilful blindness
  + Based on the fact that this crime is subjective, not objective- so NOT based on what a “reasonable person” would think
* A court can properly find wilful blindness only where it can almost be said that the defendant actually knew, he suspected the fact, realized its probability but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge
* Trial judge’s holding was dismissed and a new trial was ordered

**Note: Specific/General Intent Offences-** distinction created in order to limit the offences which permit a defence of intoxication

* As a general rule, an accused may plead intoxication as a defence only when charged with a specific intent offence
* General intent offence- require the minimal intent to do the act which constitutes the actus reus
  + Only intent relates to the performance of the act in question
  + Ex. assault, sexual assault, assault causing bodily harm, manslaughter, etc.
* Specific intent offence- require a mental element beyond that of general intent offences and include “those generally more serious offences where the mens rea must involve not only the intentional performance of the actus reus but, as well, the formation of further ulterior motives and purposes”
  + Failure to prove the added element will often result in conviction of a lesser offence for which the added element is not required
  + Involves the performance of the act along with some other intent or purpose
  + Ex. murder, attempted murder, theft, robbery, touching for a sexual purpose, aiding and abetting, etc.
* Some suggestions on how to tell the difference:
  + Consider the language of the statute itself and look for phrases like “for the purpose of” or “with the intent to”
  + Consider case law interpreting the section

**Note: Transferred Intent**

* General rule and fundamental principle in criminal law- the intention to commit a crime and the act of committing the crime must coincide
  + But in some cases- the accused intends one offence and other occurs because of a mistake or an accident
    - In these circumstances, the intention to commit the first act gets transferred to coincide with the other act that occurs
* Common law doctrine- can apply to transfer the intent only when the harm that arose is the same legal kind that was intended

**CHAPTER 7- DEPARTURES FROM THE SUBJECTIVE MENS REA PRINCIPLE**

*Absolute and Strict Liability*

**R. v. City of Sault Ste. Marie-** chemicals in the water which reduce the water quality

* 2 ends of the extreme:
  + Absolute liability- liable once the actus reus is proven
  + Full mens rea- requires knowledge/intent
  + Parliament can choose either option by using clear language
    - Absent clear language- regulatory offences will be read as strict liability
* Strict liability- actus reus needs to be proven by the Crown beyond a reasonable doubt + onus flips to the accused to establish a defence of due diligence on a balance of probabilities
* Due diligence defense (passive is not sufficient)- fault standard is objective, did the accused take reasonable steps to avoid the conduct?
  + 1) taking reasonable steps to avoid the situation- could be very complex and involve expert witnesses OR
    - Not a matter of perfection- with a reasonableness category
  + 2) accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent
    - Objective quality

**Levis (City) v. Tetreault & Levis (City) v. 2629-4470**- 2 cases where a defence of due diligence has been made

* Mistake/ignorance of law is generally NOT a defence- but what if you ask/search for help and you are given the wrong advice that you follow and it’s wrong/bad
* Confusing passivity with due diligence- NOT an excuse
* Defence of officially induced error:
  + Error of law or mixed law/fact
  + Person who committed the act considered the legal consequences of the actions
  + Advice obtained came from an appropriate official
  + Advice was reasonable
  + Advice was erroneous AND
  + Person relied on the advice in committing the act- objective reasonableness
    - Depends on the efforts made in obtaining information
    - Clarity/obscurity of the law
* Always has to do with reasonableness- fairly high standard

**CHAPTER 8- MENS REA AND THE CHARTER**

**Reference Re: Section 94(2) of the Motor Vehicle Act-** this act created an absolute liability offence for driving with a suspended license, which would result in 7 days in prison no matter what

* The court has to recognize the principle of fundamental justice and then see if it’s contravened
  + Looks at the principle that we don’t punish the morally innocent- don’t put people in jail who do not have a guilty mind
    - Obviously moral innocence is included in other absolute liability crimes- so you can still use it as long as it doesn’t infringe on S. 7
      * Just use massive fines instead so as to not infringe on “fundamental justice”
        + \*\*\*CAN’T COMBINE IT WITH THE POSSIBILITY OF IMPRISONMENT
* Decided that “fundamental justice” is not synonymous with “natural justice”- could go beyond procedural
* Absolute liability offences (no objective/subjective fault) cannot be punishable by imprisonment as that would be disproportional with the lack of fault required and violate principles of fundamental justice

**Vaillancourt v. The Queen-** accomplice killed someone during a robbery (“felony murder”)

* Constructive murder- struck this out
* Issue- does S. 7 require a certain fault standard for murder?
  + Start to see S. 7 acting as a barometer- degree of proportionality between the seriousness of the offence and the fault standard
  + Found that it requires a “subjective mens rea”- because of the stigma and penalties attached
* Principle of fundamental justice that a conviction for murder cannot rest on anything less than proof beyond a reasonable doubt of subjective foresight of death

**R. v. Martineau-** robbery where Martineau thought that they were only going to commit breaking and entering and no one would be killed, but during the robbery, the other guys shot and killed 2 people

* Saying that one could be charged with murder under S. 213(a), despite having neither an intent to kill nor the subjective knowledge that death might ensue from their actions
* Needed to consider whether second degree murder under S. 213(a) violated S. 7 and S. 11(d) of the Charter
  + SCC held that it violated the Charter and could not be saved under S. 1
* Confirms that you need a subjective foresight of death in order to convict

**Note: Logan-** SCC extended the scope of special stigma crimes to include attempted murder

* The mens rea for attempted murder is the same for our most serious form of murder
* Also held this extends to parties to attempted murder- any party to any special stigma crime must be shown to have had the same special fault as the principle

**R. v. DeSousa-** bottle ricocheting off wall at New Years’ party and hitting someone

* Section 7 requires reasonable proportionality between the potential sentence, stigma and fault standard (not perfect symmetry)
  + As one increases- so does the other
  + Note that the courts have been willing to accept partial subjective mens rea for certain general intent offences involving imprisonment
* Assault
  + Actus reus- hitting them
  + Mens rea- subjectively intended to hit someone
* No constitutional requirement to the foresight of consequences- kind of like absolute liability
* Underlying offences cannot be absolute liability and must be objectively dangerous
* Message from this case is 2-fold:
  + Opened the door to objective fault standards for criminal offences
  + Further opened the door to having a limited fault standard for one aspect of the offence, and different for another
* Mens rea applying to the (underlying) unlawful act and not to the causing bodily harm is acceptable under S. 7
  + Lack of stigma attached to assault causing bodily harm
  + Wouldn’t punish the morally innocent

*Penal Negligence*

**R. v. Beatty-** driving across the yellow line

* Penal negligence is aimed at punishing blameworthy conduct, concerned not only with conduct that deviates from the norm but also with the offender’s mental state
* The manner is at issue, not consequence
* S. 249 of the criminal code- parliament intended this on whether the driving WAS dangerous, not whether or not you intended it to be
* Actus reus- look at the manner of driving and ask if it was dangerous to the public
* Hundal test for mens rea:
  + Objective- however, it is more contextualized and can take into account certain subjective explanations provided by the accused
  + “marked departure” from the civil norm in the circumstances of the case
    - Mere departure from the standard of a reasonable person is sufficient for civil negligence ONLY- not for criminal
    - Difference between mere and marked departure is question of degree
      * Lack of care must be serious enough to merit punishment
  + Must look at the state of mind of the accused, unlike civil negligence
    - Can the accused raise a reasonable doubt whether a reasonable person in the person position would have been aware of the risks from the conduct?
    - Allowances are made for defences such as incapacity and mistake of fact
      * Important not to confuse the personal characteristics of the accused with the context of which the events surrounding the incident
      * Accused can raise an explanation, but it must be believed and whether the explanation was reasonable
  + If you have evidence that the accused was knowingly (intent) driving in a dangerous matter- then you’ve met the standard

**R. v. Creighton**- manslaughter challenge under S. 7, guy injected a girl with a drug and she overdosed

* Possible fault standards in manslaughter suggested here:
  + Subjective foresight serious bodily harm- standard for murder
    - Would be inappropriate for manslaughter
  + Subjective foresight bodily harm
  + Objective foresight of death
  + Objective foresight of serious bodily harm
    - This, at first glance, appears to be an acceptable choice and have proper balancing
  + Objective foresight bodily harm- standard adopted for Creighton
    - Effectively limited the high stigma crime to murder and attempted murder
* Manslaughter mens rea requires: objective foresight of non-trivial bodily harm (like DeSousa)
  + Foreseeability of death not required- just have to foresee bodily harm that is neither trivial nor transitory
  + Intent to commit the underlying unlawful act
* Justifications given by the court for the standard:
  + No minimum sentence on manslaughter- very flexible
  + Deterring dangerous conduct- recognizing that objectively dangerous behaviour can lead to serious and deadly results
    - A reason not to engage in these kinds of behaviours then
  + Preserving the “thin skull” requirement- the more you move up the scale, the more likely it won’t be taken into consideration
  + Showing that consequences matter- taking the victim’s perspective
  + Hard to practically differentiate between the foresight of death and bodily harm- court is hesitant to prove “in between” standards
  + Manslaughter has a much lower stigma- especially compared to 2nd degree murder
  + People are rationally autonomous- we shouldn’t be making excuses for people with bad tempers, etc.
    - We have general societal responsibilities

*Abuses of Process*

**Canada (Minister of Citizenship and Immigration) v. Tobiass**- dealing with citizenship issue and the government trying to expel people from Canada because of war crimes allegations

* Principle of judicial independence- needs to be separate from politics, no bias, etc.
* Can be normal bias, or
  + Reasonable perception of bias- a reasonable person in the community, knowing the facts, would naturally feel that a bias would exist
* Big clash of important values- high degree of misconduct in terms of judicial independence vs. really horrible acts of history (Holocaust)
* Prosecutor says that the process is going too slow (witnesses are getting older, statute of limitation problems, etc.- need it to get a move on)- so there’s a private meeting between the associate deputy minister of justice and the chief justice
  + Problematic- went to someone who was NOT the judge in the proceedings (but instead, someone perceived to be above them), and met with them alone
  + Defence counsel finds out about this and goes crazy- attacks the independence of the judiciary
* New judge is appointed to the trial, and an application is made to stay the proceedings
  + Basis- the federal government has been involved in such serious conduct- they have abused the process of the court
    - Argument that the case needs to be thrown out to preserve the integrity of the administration of justice
* Problem- the law of abuse of process has been defined, but not well
  + O’Connor- BC sexual assault case
    - Usually something is thrown out because there cannot be a reasonable search for the trust- something happened so we can no longer have a fair trial
    - If someone engages in such abusive conduct- the court may have to distance itself from this and not allow the trial to go ahead
      * Really depends on the circumstances- only really in the clearest of circumstances will the threshold be met
* If you violate S. 11(d) or 7- go to S. 24(1) which gives a judge a very broad discretion of remedies that would be appropriate in the circumstances
  + This residual category- generally, it is a remedy to protect future abuse from arising
* Found that although the conduct was very serious- wasn’t serious enough to throw out the allegations and trial
  + Highly elevated nature of the test

**United States of American v. Khadr**- US wanted Khadr to be extradited (given) to them as he was accused of all sorts of terrorist crimes

* But while he was being held by Pakistan officials- he was subject to all kinds of really bad misconducts (ex. torture, denied access to counsel, etc.)
* Important because this is typically for the Minister to decide- NOT the courts
  + Judge says NO- not a passive observer, have a basic duty to preserve the integrity of the courts
* Application for a stay of proceedings
* There are a small amount of situations where a trial can be shut down based on the mere fact of the past product alone- don’t necessary need to find a pattern of abuse that is going to continue into the future
* Court looks at some lesser remedies under S. 24(1)
* An example of a case with severe enough conduct to warrant a stay of proceedings