**LAW 205: CRIMINAL LAW**

**Full Year CAN (2005-2006)**

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**CAN does not include**: NCRMD, Automatism and Dangerous Offender Provisions

**Commencing Criminal Proceedings**

When an alleged offence is committed, the police commence a **criminal investigation** (eyewitnesses / physical evidence / admissions / motive / accused background). Police forwards **Information** to Crown for **charge approval.**

**BC Charge Approval Standard: (1) Substantial likelihood of prosecution**

**(2) In the public interest** **to prosecute**

Crown **classifies the offence**: **Summary conviction** // **Indictable Offence** / **Hybrid offence** / **Contravention**. Charges will be laid (multiple charges OK, but each charge needs to be individually proven - i.e. *coked-up crime spree*)

**JP** **issues the charge** (confirm appearance notice / confirm promise to appear / issue summons / issue warrant for arrest). May consider **bail** (basic liberty interests / case preparation / is accused likely to show up for court? / is accused likely to commit further offences? / will bail decrease public confidence in justice system?)

**Crown Disclosure**: must turn over everything found by police to accused (favourable or not). **Gaps in the Particulars may convince Crown to drop charges or reduce sentence.**

**Defense does not need to disclose evidence to Crown** since Crown has burden of proof and Defense does not have police power. However, Defense may disclose information to Crown in order to reduce/drop charges.

**Important Players in the Criminal Justice System**

**Judge (Trier of Law in a jury trial)**

**Actual versus Perceived Bias:** Justice must be done and must be seen to be done.

**Objective Test:** Whether a reasonable observer would perceive that the court was able to conduct its business free from the interference of the government and of other judges (***Tobiass****, immigration-judge-speeds-case-up*).

**Role of Judge:**

* Trier of Law (in a jury trial): Judge cannot make a finding of fact on evidence in a jury trial. Judge may give an opinion, but **never a direction** (***Gunning***, *judge-takes-evidence-away-from-jury*).
* Determine admissibility of evidence
* Hear Charter applications
* Determine exact elements of offense
* Instruct jury
* Rule on No Evidence Motions

**Jury (Trier of fact in a jury trial)**

**Who gets a Jury:** Accused gets a jury if potential penalty is **greater than 5 years** (***Charter, s.11(5)***) or if charged with **1st or 2nd degree murder** (unless both sides agree to judge alone).

**Who's on the Jury:** 12 ordinary citizens (if jury falls below 10, then mistrial).

**Problems with juries:** long, confusing jury instructions // jurors' lives are disrupted // increased drama // jury nullification (jurors decide not to apply legal principles) // **jury bias**.

**Jury Bias:** To combat jury bias, counsel can invoke **preemptory challenges** (12 max; no req't) and **challenges for cause** (unlimited, ***CC s.638***).

* **Challenge for Cause Test**: Whether there is a realistic potential that juror might be biased.
  + Systemic racial bias is an acceptable challenge for cause under "lack of indifference between accused and the Queen (***Williams***, *aboriginal-Accused-challenged-systemic-racial-bias*)

**Crown**

Both Crown and Defense has **2 basic duties**:

* **duty to their client** (to put forth all relevant evidence/arguments to advocate for state or accused)
* **duty to the court** (administration of justice).

**Crown's Quasi-Judicial Role:** The Crown is not seeking a conviction at all costs, but instead should assist the judge and jury to ensure that justice is done (***Boucher*** ***duties***)

* Crown represents the State, not the victim
* Crown has lots of power: controls charge approval // tone of case // police information // primary evidential burden // natural trust of the jury

**Basic duties of the Crown:** accuracy / dispassionate / do not express personal opinion / do not speculate or refer to unproven facts (***Charest***, *in-my-opinion-A's-testimony-seems-weak*).

* **Inflammatory addresses are not allowed** - neither side can bring in broader societal issues beyond "is this accused guilty BARD of this particular alleged offence based on the evidence presented?" (***Munroe***, *Crown-says-if-you-don't-convict-then-murder-and-chaos-will-reign*).
* **Remedy:** If Crown fails to meet basic duties, judge can make **cautionary remarks** (***Munroe***) or defense can apply for **mistrial** (rare).

**Defence Counsel**

Both Crown and Defense has **2 basic duties**:

* **duty to their client** (to put forth all relevant evidence/arguments to advocate for state or accused)
* **duty to the court** (administration of justice).

Defense can be **passionate and zealous**, but cannot make serious unfounded allegations (***Felderhoff***, *defense-counsel-goes-ballistic-on-Crown*).

* **Remedy:** Trial judge is legally required to stop unfounded allegations, otherwise judge can lose jurisdiction.
* Defense must put forth all possible arguments based on evidence presented by Crown, but defense is not the judge/jury - only the trier of fact can evaluate the merits of the argument.

**The Criminal Trial**

**Essential Elements of the Offence** (must be proven by the Crown)

1. Identity of accused
2. Date of alleged offence
3. Jurisdiction
4. ***Actus reus*** (Criminal Code)
5. ***Mens rea*** (Criminal Code)
6. Specific elements set out in charge (i.e. Ford F-150)

Remember that **element ≠ evidence!**

The trier of fact must determine

* **whether each essential element of the offence has been proven beyond a reasonable doubt**
* **whether the evidence, viewed as a whole, has proved the guilt of the accused beyond a reasonable doubt** (***Morin***)

Each element of the offence must be proven **beyond a reasonable doubt,** as well as proof of the accused's guilt BARD. Proof of each element BARD will naturally lead to proof of the accused's guilt BARD. That is, if you can't prove one of the elements beyond a reasonable doubt, then naturally, you can't determine whether the accused is guilty of the alleged offence beyond a reasonable doubt.

**Crown's Evidential Burden**

"**Whether or not there is any admissible evidence (on each element of the offence) upon which a reasonable jury, properly instructed, could convict?**"

(***Charemski***, *estranged-husband-near-murdered-wife's-house*)

**Crown has the main burden of proof**: Accused is always **presumed innocent -** no obligation to put info forward (***Charter, s.11(d)***) unless there is a reverse onus, but the defense may still want to present evidence to counter a strong Crown case.

**BARD: Beyond a Reasonable Doubt**

The burden of proof **beyond a reasonable doubt** balances two conflicting values: **maintaining order in society** versus **protecting against wrongful convictions**. We have chosen a lesser burden in order to favour the accused.

**What does reasonable doubt mean?** It is logically derived from evidence, or an absence of evidence. It is **not** a belief that the accused is "probably or likely" guilty. It is not frivolous or based on prejudice or sympathy. It is stronger than a balance of probabilities, but less stringent than absolute certainty (***Lifchus***). However, reasonable doubt falls much closer to absolute certainty than it does to a balance of probabilities. A high degree of suspicion is insufficient to convict (***Starr***, *rearticulated-Lifchus-standard*).

The reasonable doubt standard must be applied to the **evidence as a whole**. Even if you don't believe one witness's testimony, you must acquit if the evidence as a whole leads to reasonable doubt (***Morin***). The **exception** is if the Crown case is based on one crucial piece of evidence - then the reasonable doubt standard must be applied to that specific piece of evidence.

Remember that **evidence** is different from **elements!** For example, you need to prove each **element** beyond a reasonable doubt, but you don't need to prove each piece of **evidence** beyond a reasonable doubt.

**Direct versus Circumstantial Evidence**

Both sides can present **direct evidence** and **circumstantial evidence**.

**Direct Evidence** has 2 potential errors: incorrect eyewitness testimony // lying witness.

**Circumstantial Evidence** has 3 potential errors: incorrect eyewitness testimony // lying witness // no culpable inference b/t evidence & guilt.

In a circumstantial case, if more than one reasonable inference can be drawn, then a no evidence motion is denied (***Charemski***). **Acquittal in a circumstantial case occurs** **only** if there is **no evidence at all** on which the jury could make a **reasonable inference** that the accused was guilty (***Hodges***).

**All evidence must have its probative value outweigh its prejudicial effect** (i.e. unrelated criminal convictions may be prejudicial). Crown cannot question character of the accused unless Defense **opens the character door**.

**Suspect Witnesses / Vetrovec Cautions**

Note that suspect witnesses may have a **Vetrovec Caution** applied to them so that their testimony must be corroborated by supporting evidence before it will be admitted (***Kyllo***). Jailhouse informants get the strongest Vetrovec Caution possible (***Morin***).

**Credibility Test**

Where the accused is **not credible**, you must apply a **3-part test: (*C.W.H.***, *sexually-molesting-grandfather's-word-against-granddaughter*)

1. If you believe the accused, then you must acquit.
2. Even if you don't believe the accused, but her evidence raises a reasonable doubt, then you must acquit.
3. Even if you reject the accused's evidence, but the other evidence in the case raises a reasonable doubt, then you must acquit.

**Charter Rights of the Accused: *s. 1, 7, 8, 9, 10, 11, 24(2)***

Where possible, the courts should interpret legislation in a manner that is consistent with the ***Charter*** (***Cancoil***).

**Test for Charterright violation**

1. **Has the right been violated**?
   1. Fact-driven Voir Dire which can include examination of contextual factors
   2. Violations can be of specific procedural right (i.e. ***s.8-14***) or general right (***s.7***: individual or societal rights)
   3. **Onus on accused:** In order to establish a Charter violation, the accused must prove the violation on a balance of probabilities
2. **If the right has been violated, should evidence be excluded** (***s.24(2)***)? [**not examinable**]
   1. **Conscriptive Evidence:** Evidence that emanates from the accused due to police pressure & Charterbreaches will presumptively be excluded, including derivative evidence [i.e. evidence emanating from an inadmissible statement]
   2. **Non-Conscriptive (Real) Evidence:** Evidence that existed regardless of the Charterbreach is less likely to be excluded.

**Rule of Voluntariness**

**Common Law Rule:** Where a statement is obtained by a person in authority, it must not be the result of threats, inducement or oppression. If statement is deemed involuntary, then it is excluded. The rule regulates police attempts to elicit statement from the accused

* **Onus on the Crown:** Crown must prove BARD that any statement by the accused is voluntary (***Rhodes***, *police applied threats, inducement & oppression*)
* **Test:** Examine the evidence as a whole to determine whether the statement was voluntary
  + **Threats:** Can be made to the accused, or to people surrounding the accused
  + **Inducement:** offering a lighter sentence in exchange for a sentence
  + **Oppression:** Applying unreasonable pressure on the accused.

***s.7*: Life, Liberty and Security of Person**

Life, liberty and security rights cannot be infringed except in accordance with the principles of fundamental justice. ***s.7*** is automatically engaged if there is a potential infringement of life, liberty or security (i.e. possible jail sentence). ***s.7*** protects both individual rights (see below) and societal rights to a fair justice system. Section 7 does not apply to corporations: corporations don't have standing to argue that a law violates their rights (***Wholesale Travel Group***, *false-advertising-company*).

* **Section 7 Test:** Determining a principle of fundamental justice
  + *Essential long-standing values of our legal system that are integral to the fairness of our criminal justice system*
  + Long-standing legal principle
  + Generally accepted
  + Integral to both procedural and substantive fairness (***Reference Re Motor Vehicle Act***)
  + Articulable standard to determine threshold of right (i.e. needs a legal test)
* **Some PFJ:**
  + **Vagueness:** must give people notice of prohibited conduct
  + **Harm Principle:** cannot criminalize individual actions which do not harm others
  + **Full Answer and Defence:** even in extradition, a Record of the Case and/or certification is required before we will extradite accused
  + **Comparable Criminal Offence:** extradition is only permitted if the accused would've faced a similar offence in Canada
  + **Cannot shock the conscience:** will not extradite to face death penalty without assurances, except in exceptional circumstances (***Burns***)
  + **Morally innocent should not have their liberty infringed** *(****Reference Re Motor Vehicle Act***)
  + **Proportionality Requirement:** Criminal offences require that you weigh the potential sentence and stigma in relation to the fault (mens rea) standard - as one increases, so does the other (***Vaillencourt***).
* **Some Individual Rights under *s.7:***
  + **Right to make free choice to speak to police** (***Rhodes***, *forced to speak to police*)
  + **Right to not be unreasonably pressured into making a statement**
  + **Right of police to seek, within reasonable means, whether accused will make a statement**: Police can only exercise this right after accused has exercised their right to counsel. If accused refuses to make statement, police can employ reasonable means to solicit statement, but cannot do so if it effectively deprives the accused of their right to freely speak to the police. Unreasonable means:
    - Unreasonable pressure on accused
    - Repeatedly ignoring will of accused not to make a statement [will depend on sophistication of accused]
    - Creating confusion as to whether accused is obligated to make statement
    - Undermining advice of counsel
    - Discussing possible sentencing [quid pro quo]
    - Certain fabrications

**Remedies for *s.7* breaches:** (1) **Stay of Proceedings** or (2) **Targeted Remedy**

**Stay of Proceedings:** Trial shut down by judge

* Similar to acquittal, except that no trial has occurred.
* Crown can appeal a stay, but cannot reopen the trial
* Extreme remedy which is invoked in the following situations:

1. **To protect the fairness of the trial**: Something has happened which so fundamentally affects the proceedings that we can no longer guarantee the accused will have a fair trial
   * Example: Relevant evidence has been lost which might have been helpful to the accused (***Carosella***; ***O'Connor***)
   * **Threshold:** Missing evidence must've been the "smoking gun" which would have acquitted the accused
2. **To protect the broader integrity of the justice system**: a state actor has done something so contrary to PFJ that a stay must be imposed to protect integrity of justice system (***O'Connor***)
   * **Threshold:** Must show **repeated, serious abuse** that is so bad that the state is not sure they can stop it (***Tobiass***, *sneaky judge*).

**Targeted Remedies**

Targeted remedies are an appropriate remedy for ***s.7*** breaches where the higher SOP threshold has not been met. Aim for targeted remedies first in ***s.7*** breaches; if targeted remedies fail, then SOP can be considered (***Dorie***).

1. **Fairness of trial** (***Dorie***)
   1. In ***Dorie***, the jury was allowed to hear evidence that car had been destroyed, defence counsel allowed to argue that car's destruction might indicate other crucial evidence had been lost, and jury given instruction that some evidence which may have helped the accused had been lost.
2. **Broader integrity of justice system** (***Caster***, *cops impersonate lawyers*)
   1. **Threshold:** Fairly serious conduct required for targeted remedy for abuse of state power (can look at statutory standards)

**Why are targeted remedies important?**

* You do not need to meet the "repeated, serious abuse" or "smoking gun" threshold in order to obtain a targeted remedy.
* Misconduct in issue need not be specific to the accused (can relate to witnesses, as in ***Caster***). Misconduct is any action which may bring the administration of justice into disrepute (even actions outside Canada).

***s.8:* Search or Seizure**

Everyone has the right to be secured against unreasonable search or seizure. This is a cornerstone of the liberal democratic state which protects (1) privacy and (2) the right of the police to carry out effective police investigations.

* ***s.8*** is engaged if the accused had a reasonable expectation of privacy and that expectation was violated (i.e. home, backpack, car)
* But ***s.8*** does not apply in the following situations:
  + reasonable and probable grounds show that an offence has been committed and that evidence will be afforded through the search
  + exigent circumstances (911 call allows police conduct warrantless search)
  + prior judicial authorization (warrant)

***s.9:* Detention or Imprisonment**

*Everyone has the right not to be arbitrarily detained or imprisoned*

* **Arrest:** In Canada, police require reasonable and probable grounds that the accused has committed an offence before they can arrest (***Rhodes***, *"hunch" not good enough*)
  + **Searches incidental to arrest:** officer safety or to preserve evidence
  + If arrest is unlawful, then the search and any derivative evidence is unlawful
* **Detention:** Police require articulable cause or reasonable suspicion that the accused has committed an offence in order for detention. Lower standard than reasonable and probable grounds, but above a "bare suspicion"
  + **Searches incidental to detention** are limited to concerns for officer safety (i.e. hunch that detainee has a weapon), but only if the officer has reasonable grounds to believe that their safety is in danger. Cannot search for evidence during detention (***Greaves***).
  + Evidence is required to support this reasonable suspicion.
  + Detention must be brief
  + Detainee has no legal duty to answer questions
  + Detainee may volunteer information, or circumstances may change, which allows for an arrest
* In most cases, police require prior judicial authorization (warrant) for a search.

***s.10***: **Rights upon Arrest or Detention**

***s.10(a)***: right to be informed promptly of reasons for arrest/detention (***Rhodes***, *not told of reason*)

* Accused must know their level of jeopardy, so they can make an informed choice
* If accused is arrested for one offence, and voluntarily confesses to another offence, ***s.10(a)*** has not bee violated.
* Specificity of reasons for arrest may not be required, if inferences can be made based on circumstances (i.e. accused arrested while holding gun over victim with bullet holes - okay to say "you're being arrest for the death of Mr. X" rather than "murder")

***s.10(b)***: right to retain and instruct counsel without delay and to be informed of that right

* Purposive interpretation holds that subsidiary rights come with right to obtain counsel
  + Accused must have opportunity to contact counsel within a reasonable time and without delay (***Rhodes***)
  + Provide Legal Aid phone #, if no access to counsel
  + Cease questioning of accused until accused has spoken to counsel
  + Police cannot denigrate counsel (***Rhodes***)
* ***s.10(b)*** not violated by accused's voluntary spontaneous statement before counsel arrives
* Accused must be reasonably diligent about contacting counsel once they have invoked their right
* SCC has yet to rule on right to retain counsel in the event of **detention**

***Section 11(b):* Unreasonable Delay**

Delays can occur for various reasons: limited resources // busy counsel // Charter issues // voir dires // mega trials. No unreasonable delay requirement for civil cases.

***s.11(b)*** requires that an accused in a criminal trial be tried within a reasonable time. The **remedy** for a ***s.11(b)*** breach is a Stay of Proceedings.

* Serves accused's interests: custody // bail conditions // social stigma // financial strain
* Serves society's interests: victim sees trial conducted // prevents further offences by accused // Crown's case may weaken over time

Previously, the SCC held that rigid timelines must be established for trials, but this led to a huge number of stays (***Ascoff***). ***Morin*** (1992, SCC) establishes the **4-part test**: Determine whether an unreasonable delay has occurred by measuring the time period at bar, and then analyzing the particular circumstances of the case

1. **Length of time from charge to trial**: Does timeframe in question realistically constitute an unreasonable delay? If not, the test ends here
   1. **Timeframe:** Time of Charge [not offence] 🡪 End of Trial
      1. Pre-charge delay may be considered only where delay hindered accused's ability to defend herself at trial (i.e. witness has died)
      2. Trials w/ many witnesses may have timeframe measured from charge to beginning of trial.
      3. Make your ***s.11(b)*** motion at least one month before anticipated trial date as courtesy to court & witnesses
   2. **Establish General Danger Time** based on time periods for similar cases in your jurisdiction that have been stayed (12-15 months seems to be current standard)
2. **Conduct of parties**: circumstances which have led to the delay
   1. **Were any time periods waived by the accused?**
      1. Waiver must be clear and equivocal. Silence may constitute an inference of waiver. A waiver that simply acquiesces to the inevitable is not a clear & equivocal waiver.
   2. **What are the inherent requirements of the case?**
      1. Specific cases w/ lots of evidence require more time to bring to trial. But delay might still be unreasonable, even given complexity of case
   3. **Actions of the Accused** (broader than waiver)
      1. Did accused conduct herself in a manner which was consistent with wanting a trial in a reasonable time, or vice versa? Were any general objections to the delay taken (did accused/counsel show concern over delay)? Where multiple accused, did one accused hold up the process? If delay caused by accused, ***s.11(b)*** motion may be denied
   4. **Actions of the Crown / Institution**
      1. Did Crown's actions affect accused's ability to properly defend herself? (i.e. late disclosure/witness on vacation) Did a lack of institutional resources cause the delay? Delay caused by Crown will weigh in favour of ***s.11(b)*** motion.
3. **Prejudice to accused** (subjective test)
   1. How was this particular accused affected by the delay? Were they prejudiced financially, psychologically, etc (i.e. in custody)? Generally proven by a sworn affidavit, but may not be required in a super-long delay.
4. **Seriousness of case**
   1. The more serious the case, the more reluctant the Crown will be to stay the charge. But this doesn't give the Crown an unlimited time period to wait for trial. Note that some murder cases have been stayed on the grounds of both ***s.7*** and ***s.11(b)*** violations.

**Youth Criminal Justice and unreasonable delay**

**Common law rule: *s.11(b)*** timeframes were different for youth, as youth have a different conception of time from adults. Tighter timeframes were allowed for youth on trial [i.e. 12-14 months for adult accused; but 6-8 months for young accused for same offence].

***Youth Criminal Justice Act* (2002)** **principles:**

1. Timely intervention that reinforces the link between the offending behaviour and its consequences
   1. Implies that counsel can argue pre-charge delay issues
2. The promptness and speed by which persons responsible for enforcing this Act must act given young person's perceptions of time.

***s.24(2):* Exclusion of evidence bringing administration of justice into disrepute**

Evidence which was obtained in a manner which violated a Charter right can be excluded if its admission would bring the administration of justice into disrepute. No rigid exclusionary rule: Court examines all circumstances. **Three-part test:**

1. **Would admission affect trial fairness?** 
   1. **Conscriptive Evidence:** Evidence comes from the accused, and is compelled to incriminate oneself [i.e. statement or DNA sample]. Conscriptive evidence obtained unlawfully is presumptively barred.
   2. **Non-conscriptive (Real) Evidence:** Evidence obtained without the "assistance" of the accused. More difficult to exclude.
2. **How serious was the Charter breach?**
   1. Was breach committed in good faith?
   2. Are privacy interests at stake?
3. **Would admission bring the administration of justice into disrepute?**

**Oakes Test: Can a Charter violation be saved by *s.1***?

***Section 52(1)*** of the ***Constitution Act, 1982*** makes the Constitution the **supreme law** in Canada. However, the **reasonable limits** clause in ***section 1*** of the Charter allows the government to violate these Charter rights if it is reasonable to do so (***Oakes***; ***Sharpe***).

* **Onus of Proof:** Accused must show that his Charter right has been violated. Then, onus switches to Crown to prove that the violation is saved by ***s.1*** on a balance of probabilities.
* **Remedy:** If government fails Oakes Test, court can either **strike down // read in (*Sharpe***) **// read down**.

**The Oakes Test:**

1. **Are the objectives of the legislation “pressing & substantial”?**
2. **Proportionality Analysis** (benefits of law vs degree of rights suppression)
   1. Is there a **Rational Connection** between the means and the objectives?
      1. **Internal Rationality:** Reasonable relationship between the established fact and the inference jury is required to make?
      2. **External Rationality**: Does this presumption forward the purpose of the legislation?
   2. **Minimal Impairment:** Are the means reasonably tailored to meet the objectives?
      1. Not the least amount of impairment 🡪 only a **reasonable amount of impairment** based on the circumstances
   3. **Balance of Interests:** Need to balance the benefits derived and the rights being suppressed.
      1. How important is this Charter right? How imp't is the objective?

**Unique Offences**

**Parties to a Crime: How Many Ways Can I Charge Thee?**

No legal distinction between a principal offender and an aider/abetter (***s.21(1)***; ***Thatcher***). The jury need not be unanimous in deciding whether the accused was a principal or an aider/abetter - the jury only needs to decide whether the accused is guilty BARD (***Thatcher***).

***s.21(1):* Parties to an Offence (Aiders/Abetters)**

Accused can be charged as a principal // aider // abetter: No separate charge for aiding/abetting. The Crown Theory will discuss whether an accused is said to have aided/abetted.

* **Principal Offender:** Accused has actually committed the offence
* **Aider:** Accused does or omits to do anything for the purpose of assisting another person to commit the offence. Aiding can occur before or during the offence.
* **Abetter:** Accused does or omits to do anything for the purpose of encouraging another person to commit the offence. Abetting must occur during the offence.

**In order to secure a conviction for aiding/abetting, the Crown must prove** (***Yu***):

* + 1. that an offence was committed
    2. there was an act or omission of assistance concerning the offence
    3. the act or omission took place for the purpose of assisting the principal in the commission of the crime

**Mens Rea:** Accused must have (1) subjective awareness that principal intended to commit offence and (2) subjective intent to assist principal in the commission of that offence (***Woolworth***)

* **What if the offence has no subjective mens rea requirement?** Subjective mens rea still required for aiding/abetting
* **"For the Purpose":** Accused must have subjectively intended to aid/abet
* **Can have different intent from principal:** Aider need not have the "same intent" as the principal (***Yu***). Aider with higher intent than principal can be convicted of more serious crime.
* **Knowledge:** Basic facts of the offence must be subjectively known to the alleged aider/abetter (***Woolworth***, *Woolworth doesn't know crime is being commited*)
* **Recklessness is insufficient** to prove subjective mens rea for aiding/abetting (***OntCA)***, butI think wilful blindness could prove aiding/abetting.
* **High Stigma Crimes:** Aiders/abetters must be shown to have subjectively intended the resulting consequences (i.e. aiding a murder requires subjective foresight of death) (***Logan***)

**Actus Reus:** Mere presence is insufficient actus reus for aiding/abetting: passive observation and non-interference are not crimes. Something more is needed: i.e. encouragement of principal, act facilitating commission of offence, act preventing or hindering interference with commission (***Dunlop/Sylvester***). An omission to do something is sufficient actus reus if there is a legal duty to act.

**Specific Defences to Aiding/Abetting:**

* **Defence of Intoxication:** Because aiding/abetting requires subjective mens rea to assist for purpose of committing offence, intoxication can negate this specific intent (***Fraser***)
* **Didn't act for purpose of committing offence**
* **Mere Presence:** An accused who was simply present, but chose not to do anything to assist is not guilty of aiding/abetting (***Dunlop/Sylvester***)

***s.21(2):* Common Intention** (inapplicable where the parties explicitly set out their plan)

Where two or more people form

* 1. a common intention to carry out an unlawful act, and
  2. commit an offence in the carrying out of that act;

Both parties will charged as parties to that offence if

1. each knew, or ought to have known that the commission of the offence would be a probable consequence of carrying out the original common intention (**objective test**)

*Example:* A and B plan to rob a 7-11 together. During the robbery, B confines the clerk. A is charged with confinement under ***s.21(2)***. Crown theory is that A ought to have known that confinement would occur as a probable consequence of the common plan with B to rob the store.

Common intention cannot be used for murder (requires full subjective mens rea).

**Practical Considerations: Aiding/Abetting, Common Intention & Multiple Accused**

**When to use Aiding/Abetting versus Common Intention:**

**When to use Aiding/Abetting:**

* Where the accused is close to the scene of the offence
* Where accused had actual knowledge of the offence which occurred

**When to use Common Intention:**

* Where the accused was far away from the scene of the offence
* Where parties formed common intention to commit one offence, but another offence occurred
* Where Crown can't prove actual knowledge - they only need to show that accused "ought to have known" that offence would occur

**Practical considerations in presenting double theories:**

1. Crown can run concurrent theories [(1) accused was principal (2) accused was aider/abetter], but evidence must support both theories.
2. Crown cannot run 1 theory throughout the case, then raise 2nd theory at the last minute without giving accused notice. Violates accused's ***s.7*** right to make full answer and defence.
3. Juries may see concurrent theories as a sign of weakness.
4. Multiple theories = multiple jury instructions = increased chance of legal error.

**Multiple Accused** (usually raises issues of aiding/abetting)

**Strong presumption that multiple accused of the same offence will be tried together**

* Practical administration of justice: same evidence/witnesses
* Saves witnesses the stress of testifying more than once
* Danger of inconsistent verdicts, where cutthroat defence is run in different courtrooms
* **Advantages of multiple accused**
* Defence counsel can split up the research and the arguments
* Defence counsel can supplement each other in cross-examination
* The added length of the trial can be a disadvantage to the Crown.
* **Disadvantages of multiple accused**
* One counsel cannot control the proceedings. Another counsel may get into areas that could impact your client, without your permission.
* The cutthroat defence: 2 accused; both claim "the other guy did it". The Crown loves it when this happens, as it tends to result in double convictions.
* ***s.11(b)*** unreasonable delay issues

**Severance**: Accused can apply to **sever** himself from other accused where he believes the other accused will prejudice his right to a fair trial (***CC, s.591(3)***). Judge will consider the following factors to see whether severance is in the interests of justice:

* **Timing**: In-trial severance is far less likely
* **Unique circumstances**: Separate witnesses, time-savings, no inconsistent verdicts
* ***s.11(b)*** issues: Other accuseds' antics may cause unreasonable delay for your accused
* **Evidentiary issues**: Other accused may have given statement which is not admissible against your client, but implicates him - the admission of this statement may prejudice your client.

**Note:** If the accused are tried together, the Crown cannot call the accused as a witness because they have the right to remain silent. When accused are severed, the accused can be called in each other's trials. However, ***s.13*** of the Charter says that a witness cannot have their testimony used against them for the purposes of incrimination, except for perjury.

**Quasi-Criminal / Public Welfare Offences**

Quasi-Criminal Offences are found in both provincial and federal statutes. Sentencing can range from jail to fines. Allows the Crown to protect public interests as these offences are usually hard to prove with full subjective *mens rea*.

* **Actus reus** required BARD
* **Mens rea** requirement depends on whether absolute or strict liability

**Absolute Liability Offences**

No *mens rea* requirement at all. Offence is proven when *actus reus* is proven BARD.

* Examine surrounding statutory context to determine whether specific provision is absolute liability (***Cancoil***, *industrial-accident-cuts-off-fingers*).
* Absolute liability offences cannot be punishable by imprisonment as that would be disproportional with the lack of fault required (***Reference Re: Section 94(2) of the Motor Vehicle Act***).
  + PFJ require proportionality between the fault standard and the seriousness of the offence. The morally innocent should not have their liberty infringed (***Beaver***; ***Sault Ste Marie***).

**Strict Liability Offences**

Where the **statute is unclear**, the court will read the statute **presumptively as a strict liability** offence ( ***Sault Ste. Marie***, *polluting-city*). Court may also consider surrounding statutory context to determine whether offence requires strict or absolute liability ***Chapin***, *bird-hunting-in-baited-area*).

* Actus reus required BARD - creates a presumption that the offence has been committed
* Accused can then bring forth a **defense of due diligence** (either mistake of fact or reasonable care) to rebut the presumption.
  + Reversed burden of proof in strict liability is not contrary to the Charter, either because (1) it doesn't violate ***s.11(d)*** or (2) it's saved by ***s.1*** (***Wholesale Travel Group***, *false-advertising-company*)

**Due Diligence Defence**

**Objective Test:** Did the accused take reasonable care to avoid the conduct which occurred? This objective mens rea test does not violate s.7 (***Wholesale Travel Group***).

* **Burden of Proof:** Accused must prove due diligence on the **balance of probabilities.**

1. **Mistake of Fact:** Accused reasonably believed in a mistaken set of facts, which if true, would have rendered the act innocent (e.g. toxic waste is mislabelled)
2. **Reasonable Care:** Accused took all reasonable standards to prevent unlawful conduct from occurring. Evaluated against industry standards. (e.g. toxic waste is hidden)

* **Defence to Strict Liability for Aider:** Accused must show that he knew he was working on something that would not cause unlawful conduct.

Strict liability encourages quasi-criminal offenders to be "good corporate citizens" since they need to rebut the presumption by raising due diligence.

***s.219:* Criminal Negligence**

**Essential Elements of Operating Motor Vehicle in Manner Dangerous to Public (*s.249(1)(a)***):

* **Modified Objective Test:** Do accused's actions represent a marked departure from the standard of care of a reasonable person, given all the surrounding circumstances of the situation? (***Hundal***)
  + No need to consider personal factors or the intent of the accused
  + ***s.7*** satisfied by modified objective test because of licensing and nature of driving offences: We hold all drivers to a certain standard of care
* **Mistake of Fact Defence invalid on its own:** Accused must also meet objective standard of reasonably prudent driver, given all the circumstances in order to be acquitted. In order to convict, trier of fact must be satisfied BARD that a reasonable person in similar circumstances ought to have been aware of the risk and the danger involved in the accused's conduct. If so, then accused must be convicted.

**Essential Elements of Causing Death by Criminal Negligence (*s.220*)**

* **Modified Objective Test:** Would a reasonably prudent person, given all the relevant circumstances of the situation, consider the accused's actions to show wanton or reckless disregard for life? (***Tutton,*** *parents deny medicine to child*).
* **Actus Reus:** Death caused by conduct which showed wanton/reckless disregard for life
* **Mens Rea:** Accused must have failed to carry out their legal duty, and their failure must show wanton or reckless disregard for the lives or safety of other persons.

**Incompetent Criminals: Incomplete Crimes & Attempts**

Attempted crime is an automatic included offence to every substantially charged crime:

* ***s.660* (Full Offence Charged, Attempt Proved)*:*** "Attempt" need not be charged for Crown to convict accused of attempt if evidence can't prove complete commission of charged offence
* ***s.661(1)*** **(Attempt charged, full offence proved):** Where accused is charged with attempt, but evidence shows that complete offence occurred, the accused may be convicted of attempt, or judge may discharge jury and order indictment for the complete offence. Plead guilty to the attempt before they get you for the complete offence!
* ***s.662(2)*****(First degree murder charged):** Where accused is charged with 1st degree murder, but evidence only shows 2nd degree murder, jury may find accused not guilty of 1st degree murder, and find accused guilty of completed/attempted 2nd degree murder.

**Mens Rea:** Accused must have the intent to commit the underlying substantive offence \*\*\*

* Accused must have intended to commit the underlying substantive offence, whether or not it was possible to commit that offence
* Crown must lead evidence which shows that accused intended to commit completed offence (***Sorrell/Bondett,*** *incompetent donut store robbers*)
* **Unequivocal Evidence**: evidence which does not require any other corroborating evidence (accused yells at clerk: "this is a robbery!")
* **Equivocal Evidence**: evidence which requires corroborating extrinsic evidence before it can be used to support conclusion that accused intended to commit completed offence (accused seen walking away from store with gun)
* **Willful Blindness & Recklessness** can be used to prove mens rea of attempts
* **Same intent as completed offence:** Intent required for an attempt is the same as the intent required for the completed offence (***Ancio***).
* **Intent for Attempted Murder:** Subjective intent to kill and subjective foresight of death (***Logan***).
  + **Lucky Murderers:** Attempted murder usually run in cases of 1st degree murder that have messed up. In those cases, Crown can lead evidence showing the accused’s steps to plan for the murder.

**Actus Reus:** Must be more than “mere preparation” and not “too remote” to constitute attempt

* Acts must be more than “mere preparation” and "not too remote".
* Accused cannot generally be convicted of an attempt without a corresponding actus reus.
* **Conspiracy** (agreeing with at least one other party to carry out a certain offence): unique actus reus because of seriousness of crime. Crown is not required to lead evidence showing that accused did certain acts after agreement formed.
* Distinction between preparation & attempt will depend on the context of how the substantive offence will be committed:

1. The relationship between the nature and quality of the act in question
2. The nature of the complete offence
3. The proximity of the act in question to the completed offence in terms of time, location and acts under the control of the accused remaining to be accomplished.

### Impossible Crimes versus Imaginary Crimes

**Imaginary Crimes:** You cannot be convicted of an imaginary crime (i.e. you think you're smuggling talcum powder, and that talcum powder is illegal)

**Impossible Crimes:** You can be convicted of an attempt even if it wasn't possible to complete the offence (***s.24***; ***Dynar***).

* Court does not draw distinctions between legal and factual impossibilities.
* Law of Attempts exists to prevent people from committing crimes, and to catch people who are morally blameworthy.
* Whether it was possible to complete the crime is irrelevant – the fact that the accused took steps beyond mere preparation, and had the intent to complete the substantive offence, is all that matters (***Dynar***, *fake money laundering*).

**Elements of the Offence: ACTUS REUS**

**Actus Reus:** Conduct that is criminalized (almost always required for conviction)

1. **Conduct:** always required
2. **Circumstances:** may be required, depending on offence
3. **Consequences [causation]:** may be required, depending on offence

Actus reus may contain specific elements, depending on offence:

* **Possession** requires knowledge(subjective mens rea), consentand control (***Terrence***, *unknowing-passenger-in-stolen-car*).
  + Fleeting possession ≠ insufficient actus reus
* **Failure to act = sufficient actus reus** if there is a legal duty to act (***Moore***, *cyclist-won't-give-cop-his-name*).
* **Mere presence ≠ actus reus:** But presence can constitute aiding/abetting if combined with intention to assist or encourage (***Dunlop & Sylvester***, *biker-gang-rape*).

There must be **a nexus** between the actus reus and mens rea

* **Mens rea can be imposed on an ongoing actus reus**. Mens rea need not arise at the start of the actus reus - but mens rea cannot be imposed on a completed actus reus (***Fagan***, *get-off-my-foot*).

**Causation** (may be an element of an actus reus in offences such as culpable homicide)

**Causation:** Physical relationship between an act & a result (***Harbottle***). Divided into factual causation and legal causation. In Canada, we look back from the event and judge whether the actions of the accused were sufficiently proximate to hold them responsible for the final event.

* **Factual Causation:** Did the accused's actions actually cause the result?
* **Legal Causation**: Is there enough **proximity** between the accused's action and the result to find **causal responsibility?**
  + **Causal Responsibility:** The suitability of holding a doer of an act responsible for a certain result

**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 (***Blaue***, *stabbed-Jehovah's-witness*).

**MANSLAUGHTER** is death by means of an unlawful act.

* **Actus Reus:** Accused must have committed underlying unlawful act
* **Causation:** Accused must be "at least a contributing cause of death outside the de minimis range": either "beyond de minimis" or "not insignificant" (***Smithers***, *hockey-fight-results-in-death*)
* **Mens Rea:** Accused must have intended to commit underlying unlawful act (no intention to kill required)

**2nd DEGREE MURDER** is death caused intentionally. Life 10.

* + - **Actus Reus:** Accused must have committed an unlawful act which caused death
    - **Causation:** Accused must be a "significant contributing cause" (***Nette***, *old-woman-murdered-in-home-invasion*). "Significant" ≠ "substantial". Technically, this is the ***Smithers*** test re-applied, but appears to be a higher standard.
    - **Mens Rea:** Accused must (1) have intended to cause death and (2) have objective foresight of death

**1st DEGREE MURDER** is 2nd degree murder with specific **aggravating circumstances** (i.e. forethought, murder for hire, acts of domination, murder of peace officer, etc). Murder which is not 1st degree murder is automatically 2nd degree murder. Life 25.

* **Actus Reus:** Accused must have committed underlying unlawful act and required aggravating circumstances
* **Causation:** Accused must be a substantial and integral cause of death (***Harbottle***, *accused-held-down-legs-while-victim-strangled*)
* **Mens Rea:** Accused must (1) have intended to cause death and (2) have objective foresight of death

**Elements of the Crime: Mens Rea**

**Mens Rea: An Introduction**

Fault is central to our criminal justice system. The morally innocent should not have their liberty infringed (***Reference Re Motor Vehicle Act***). We don't want to convict people who didn't intend to break the law. Mens rea examines whether the accused intended to carry out the unlawful act. Moral fault (*mens rea*) must be present in addition to the impugned conduct (*actus reus*). While we normally impose a full subjective mens rea requirement, the Crown may utilize less onerous requirements for hard-to-prove crimes

Depending on the statutory language, there are **different mens rea requirements:**

* **Absolute Liability:** Public welfare offences. No mens rea required; if actus reus is present, then accused is guilty. An offence punishable by imprisonment cannot be an absolute liability offence. Such offences may rarely be saved by ***s.1*** (***Reference Re Motor Vehicle Act***)
* **Strict Liability:** Public welfare offences. Actus reus must be proved BARD; triggers presumption of guilt which can be rebutted by defence of due diligence to be proved by accused on BOP
* **Objective Test:** Would a reasonable person in the same situation have known that the conduct was criminal? [accused's own intent is irrelevant; e.g. criminally negligent driving]
* **Partial subjective mens rea:** General Intent Offences. Intent required for underlying unlawful act, but not resulting consequences [i.e. intent to assault, but not cause bodily harm]
* **Full subjective mens rea:** True Crimes / Specific Intent Offences. Intent to cause actual consequences of actus reus required [i.e. intent to kill & subjective foresight of death req'd for murder]. Where the statute is unclear, subjective mens reais required (***Beaver***)
  + Whether offence is intent or knowledge-based will depend on wording
  + Where offence does not specify higher intent, basic intention to commit unlawful act will be implied (***Felawka***, *motive-for-gun-concealment-not-important*).
  + "**Willful**" = accused must've intended to commit unlawful act for a higher purpose (***Kirkham***, *willfully-obstructing-justice*).
    - Where statute specifies "willful", doctrine of recklessness cannot be used

**Awareness of Illegality Required:** An accused cannot be convicted of possession of an illegal substance if the accused does not know the illegal character of the substance. There is no intent to commit an unlawful act (***Beaver***, *accused-thought-heroin-pkg-only-had-sugar-of-milk*).

**Intention to Commit Crime Required:** Mens rea exists where the accused intended to commit a crime, even if there was no intention to commit the specific crime charged (***Blondin***, *imported-Japanese-drug-scuba-tank-Subjectively-aware-of-illegal-substance-but-not-specifically-pot*).

**Proving Mens Rea**

*Mens rea* can be proven by direct evidence (i.e. confessions) or circumstantial evidence (***Buzzanga and Durocher; Blondin; Currie; Sansregret***). If only circumstantial evidence exists, Crown can use doctrines of **full intent, willful blindness** or **recklessness** to prove *mens rea*.

* **Common sense presumption**: We intend the natural consequences of our acts [i.e. duct-taping victim's head = death]. Can be rebutted by accused's evidence that he didn't understand consequences of acts.
* **Motive**: Can help establish accused's intent, but never a required element of any offence. Presence/absence of motive is circumstantial evidence which may prove identity or intent (***Lewis***, *mail-bomb-no-motive-found*). If **admitting motive based on accused's comments**, you must weigh these factors: clarity of comments // timing of comments // reasonable cxn b/t comments & nature of crime committed.

**Full Intent / Knowledge**

Accused knew 100% what he was doing and intended for the consequences of his act.

**Willful Blindness**

Accused was suspicious enough to be certain or substantially certain that his act was illegal, but decided to proceed without making inquiries.

* **Always available** to prove subjective mens rea
* Willful blindness is **equivalent to actual knowledge** (***Sansregret***, *accused-was-on-actual-notice-that-victim-was-scared; same-event-occurred-last-week*)**.**
* Works well for **knowledge-based offences** (logical 2nd alternative to full intent)
* **Subjective Test:** What was the knowledge of the accused, and were they willfully blind to the consequences? (***Currie***, *cashed-bad-cheque-claimed-ignorance*).

**Recklessness**

Accused was subjectively aware of a certain unintended risk of an act, but decided to proceed anyway.

* **Do not need "certain or substantially certain" knowledge** - just need to show that accused was aware of the unintended risk and decided to proceed anyway.
* **Not always an option** (depends on the statutory wording).
  + **"Willful"** = Recklessness cannot be used prove to mens rea (***Buzzanga and Durocher***, *French-Canadian-satire-with-no-intent-to-promote-hatred*).
* **Intent-based offences** may be proven by recklessness.
* **Subjective Test:** What did the accused know about the circumstances?
* Subjective standard allows for **defenses of stupidity** (i.e. accused could really be dense!).

**High Stigma Crimes:** subjective mens rea required

Our criminal justice system demands subjective *mens rea* so as not to punish the morally innocent (***Sault Ste Marie***).

**Proportionality Requirement:** Section 7 requires reasonable proportionality between the potential sentence, stigma and fault standard (not perfect symmetry). As one increases, so does the other. As murder is a high stigma crime, it should have the highest fault standard possible. However, the court has held that theft is also a high stigma crime, so it's likely that most criminal offences will require full subjective mens rea. Note that the courts have been willing to accept partial subjective mens rea for certain general intent offences involving imprisonment (***DeSousa***).

**Constructive Murder is Gone:** Unlike the US & its stupid felony-murder-charge, Canada has struck out constructive murder (***s.213(d)***) as being unconstitutional (violates ***s.7***), since it allowed an accused to be convicted of murder even if the accused didn't intend to kill or have subjective foresight of death, so long as the accused was carrying out an unlawful activity (armed robbery) which led to death. Constructive murder can't be saved by ***s.1*** since it more than minimally impairs people's liberty rights - if Parliament wanted to punish people for armed robbery, punish them for the weaponry, not murder.

***s.213* is bad:** Murder requires proof BARD of subjective foresight of death, along with an intent to kill (***Martineau***). This increased the ***Vaillancourt*** standard which had held that murder required at least an objective foresight of death (*accused charged with 2nd degree murder when robbery accomplice kills someone)*.

**Manslaughter**

Different types of manslaughter:

* **Historical manslaughter offence:** absolute liability offence; once actus reus was proven [conduct resulting in death], no need to prove mens rea
* **Homicide by Misadventure** [non-culpable homicide]: "accidental death" - no criminal liability
* **Unlawful Act Manslaughter** [culpable homicide]: an unlawful act, with no intent to cause death, but which results in death

**Essential Elements of Manslaughter** (must be proven BARD):

* + **Actus Reus:** Unlawful act of a certain nature**.** Act must be objectively dangerous (non-trivial bodily harm). Each element of the underlying unlawful act must be proven
  + **Causation:** Unlawful act must be a "not insignificant" or "significant contributing cause" to death, outside the de minimis range (***Smithers***/***Nette***)
  + **Death**: Proven by direct evidence (body, death certificate, etc) or circumstantial evidence (eyewitness, medical expert, etc)
  + **Mens Rea (*Creighton*):**

1. Subjective intent to commit the underlying unlawful act
2. Objective foresight of non-trivial bodily harm resulting from the unlawful act.

**No need to objectively/subjectively foresee death:** Manslaughter does not require the accused to objectively foresee death [too high a threshold] or subjectively foresee death [that's murder].

**Accused's personal characteristics are irrelevant**: except to prove lack of capacity [for underlying unlawful act].

**Why this lower fault standard for manslaughter?**

* **Flexible Stigma:** Manslaughter already has a lower stigma than murder
* **Deterrence:** Higher criminal sentence for manslaughter will deter people from further dangerous conduct
* **Denunciation:** Increased sentence condemns actions resulting in death [rather than aggravated assault]
* **Flexible sentencing:** allows courts to adjust for intentional or unintentional dangerous conduct
* **Thin Skull Rule:** Accused must take victim as they find them - while accused may not have intended to cause death, they should still be held responsible for unlawfully causing death, but not subject to the higher stigma of murder due to lack of intent.

**General Intent versus Specific Intent Crimes**

**General intent offences** require partial subjective mens rea: The accused need only intend to commit the unlawful act which constitutes the *actus reus*, but not cause the resulting consequences (***Da Souza***, *bottle-hits-bystander*). ***s.7*** allows for mens rea to be attached only to the underlying unlawful act, but not the aggravating circumstances as the seriousness of the offence is driven by chance.

* + - Assault: accused must have intended to punch the victim
    - Manslaughter: accused must have intended to commit underlying unlawful act, but need not have intended to cause death
    - Sexual assault: accused must have intended to assault victim; objective test applied to determine whether accused was assaulting for a sexual purpose

**Essential Elements of "Unlawfully Causing Bodily Harm":**

* **Actus Reus:** Underlying unlawful act
* **Causation:** Non-trivial bodily harm must result
* **Mens Rea:**

1. Accused must have subjectively intended to commit underlying unlawful act
2. Objective foresight of non-trivial bodily harm resulting from unlawful act

* Bodily harm caused must be more than merely trivial or transitory in nature

**Specific intent offences** (i.e. murder) require subjective intent to commit the unlawful act for a specific purpose, or to foresee certain consequences of their actions

* Failure to prove the specific intent will result in conviction for the general intent offence (i.e. assaulting a person with the intent to resist lawful arrest).
* Murder: accused must have intended to commit unlawful act for the purpose of causing death, and must have subjectively foreseen that death would occur
* Obstruction of justice: accused must have intended to commit unlawful act for the purpose of obstructing justice

**Transferred Intent**

Where accused intends one offence, but another occurs because of a mistake or accident. Intent can only be transferred when the harm that arises is the same legal kind as that intended.

* **Mistake / error in objecto** (*mistaken gunman*)
* **Accident / aberratio ictus** (*incompetent gunman*)

**The Defence's Case: How to get your client acquitted**

Defense can call eyewitnesses / experts / character witnesses // accused. Defense witnesses can be cross-examined by the Crown.

* **Passive Defenses:** Any evidence that will raise reasonable doubt against the Crown case
* **Positive Defenses:** Defenses that specifically rebut part of the Crown's case (i.e. intoxication, provocation, duress, etc). Requires an "air of reality" on each element to be put to the jury. Crown can defeat a defense by simply disproving BARD one element of the defense.

**No Evidence Motion**

If the Crown has not met their evidential burden, the defense can raise a **No Evidence Motion** (***Charemski***).

* **Test:** Has the Crown presented any direct evidence on each element of the offence on which a reasonable jury could convict, or any circumstantial evidence on each element on which a reasonable jury could draw an inference of guilt?
  + Where circumstantial evidence leads to at least one possible inference of guilt, the NEM will be denied (***Charemski***)
* **No need to consider reasonable doubt:** Judge must only decide whether evidential burden has been met. Judge is not supposed to evaluate evidence (***Gunning***, *judge-takes-away-evidence-from-jury*).
* **Successful NEM:** Acquittal (directed verdict)

**Accused's Evidential Burden**

***Charter, s.11(d)*** protects the accused by presuming them to be innocent until proven guilty. If 2 or more reasonable inferences exist (innocence versus guilt), then the accused must be acquitted.

**General Burden of Proof:** Crown generally has the legal burden of proof to prove guilt beyond a reasonable doubt. In most cases, there is no legal burden of proof on the accused, although the defense may want to present evidence in order to raise a reasonable doubt if the Crown has a strong case for guilt.

**Reverse Onus:** Statutory / common law onuses which make convictions easier by imposing either an evidential burden or the ultimate burden of proof on the accused. Mandatory reverse onuses generally violate the Charter, but may be saved under ***s.1***

* **Permissive Reverse Onus**: Given A, you may assume B
* **Mandatory Reverse Onus:** Given A, you must assume B
  + **Evidence to the Contrary:** If statute requires you to draw inference unless there is "evidence to the contrary", the accused has an evidential burden to raise a reasonable doubt to rebut the presumption (***Downey***).
  + **Prove or Establish Contrary Evidence:** If statute requires you to draw inference unless accused can "prove or establish contrary evidence", the accused must adduce evidence to disprove the presumption on a balance of probabilities (***Laba***). Harder burden.

**Common law presumptions of fact**: These permit (but do not require) trier of fact to infer the existence of fact A from proof of fact B. Reasonable doubt can overcome these presumptions.

* **Recent Possession Presumption**
* **Person intends natural consequences of his acts**

**Defences**

**Introduction to Defences**

Defences are set out in the Criminal Code and the common law. Common law defences can be modified by Parliament or by judges. Criminal Code defences must accord with ***s.7***.

* **Onus of Proof for Offence:** Crown must prove all essential elements of the offence BARD, in addition to disproving any defences BARD. No reasonable doubt allowed!
* **Onus of Proof for Defence:** Defence must raise "**air of reality**" with regards to each element of the defence before it can be put to the jury: Would a reasonable jury acquit based on the evidence? Certain defences (i.e. mental disorder) require accused to prove the existence of the defence on a balance of probabilities in order to meet the air of reality test. At that point, the onus shifts to the Crown to disprove at least one of the elements of the defence BARD. But if the accused has raised a reasonable doubt on each element of the defence, then that defence has defeated the Crown's case (because there is reasonable doubt).
* **Judge must put all relevant defences forward:** The judge must put all relevant defences to the jury, even if counsel has not raised them. Judge has discretion not to allow borderline defences to go to the jury, especially if the accused refuses.

**Types of Defences:**

1. **Positive Defences (excuse-based):** answers a particular element of the offence
   1. Requires an air of reality to be put to the jury (***Cinous***)
   2. Justifies the accused's actions
   3. *Example:* Provocation justifies the accused's assault
2. **Passive Defences**: Explains why the Crown hasn't met their burden of BARD
   1. No air of reality needed
   2. *Example:* Mistake of Fact explains why Crown can't prove mens rea

**Subjective & Objective component for Defences:**

* **Subjective Test:** Did the accused subjectively believe that they were being attacked?
* **Modified Objective Test:** Would a reasonable person in these particular circumstances, given the accused's personal characteristics, perceive that they needed to act in self-defence?
  + Accused must be subjectively acting under the perception in question
  + A reasonable person in those circumstances would also have acted under the perception

**The “Air of Reality” Test**

The accused cannot simply put all and any defences to the already overwhelmed jury. A defence must meet the "air of reality" test before being put to the jury (***Cinous***, *accused kills victims after escaping to gas station; fails air of reality test since he had reasonable means of escape*). Judge determines whether defences have an air of reality *after* hearing all the evidence at trial, and before she charges the jury.

**Air of Reality Test:** Is there evidence on the record [produced at trial] on each element of the defence upon which a properly instructed jury, acting reasonably, could acquit?

* **Translation:** Can the accused raise a reasonable doubt on each element of the defence?
  + Evidence must be of a certain quality in order to pass the air of reality test: enough that a properly instructed jury could acquit
  + **Mere/Bare Assertion Insufficient:** Accused's assertion alone is insufficient to meet air of reality - his testimony (if it occurs) must be supported by other evidence.
* Similar to the ***Charemski*** standard for NEM, but much lower since the air of reality test considers whether jury could acquit, not convict.
* **Judge should not weigh evidence:** Judge is not trier of fact. Judge must assume that evidence is true, even if it's crappy evidence.

**Mistake of Fact**

**Mistake of Fact Defence:** An absence of mens rea based on the accused's **honest** misperception of certain circumstances, which if true, would have resulted in the accused being innocent

* **Onus on Defence:** Accused must raise reasonable doubt on *each element* of the defence in order for the jury to accept the defence.
* **Onus on Crown:** Crown must disprove BARD at least one element of the Mistake of Fact defence, in order for the jury to discard the defence.

*Example:* Accused is charged with importing cocaine. Accused raises mistake of fact as he honestly believed that he is transporting a crucial medicine, rather than an illegal drug.

**MOF Defence for full subjective mens rea offences:** Accused must raise reasonable doubt that he honestly believed in the mistaken facts. Statute may require that the belief be reasonable.

**MOF Defence for general intent offences with resulting consequences (i.e. manslaughter):** Accused must raise reasonable doubt that there was no objective foresight of non-trivial bodily harm. Cannot simply argue that the accused mistakenly believed that his act would not cause non-trivial bodily harm (it's not a subjective test).

* *Example:* Accused gives slight push to victim who falls over invisible ledge to his death. Accused pleads mistake of fact that no reasonable person could've seen the ledge. Acquitted of manslaughter.

**Sexual Assault & Mistake of Fact**

Sexual assault is a general intent offence: Accused must have committed and intended to commit an assault without the consent of the victim (actus reus), then it must be determined objectively whether assault was for a sexual purpose. Running MOF defences against sexual assault is much harder now as the caselaw has narrowed the reasonableness requirement of an accused's beliefs.

**Two Defenses to Sexual Assault (Lack of Consent):**

1. **Actual Consent:** Credibility-based argument which pits accused's testimony versus complainant's testimony
2. **Mistake of Fact Defense:** Accused honestly, but mistakenly believed that the complainant was consenting. Must be supported by more than the accused's "bare assertion" (***Pappajohn***).

**Elements of the Mistake of Fact Defence for Consent to Intercourse (*s.273.2*):**

* 1. Accused took all reasonable steps to ascertain whether complainant was consenting
  2. Accused honestly believed that the complainant was consenting
  3. Accused was mistaken

**Air of Reality Test:** Trial judge must determine if there is any evidence on each element of the defence such that, if believed, a properly-instructed jury could acquit. TJ is not concerned with weight of evidence or with assessments of credibility - he only cares whether there is *any* evidence (that could lead to acquittal).

* **Accused's "Bare Assertion" Insufficient**: Accused's testimony must be supported by complainant's testimony or other extrinsice factors (***Pappajohn,*** *businessman rapes realtor*).
* TJ can consider whether a properly-instructed jury could cobble together the two stories to produce a sufficient MOF defence. Where the two stories are diametrically opposed, no MOF defence can arise.

If the defence passes the air of reality, the jury must consider all the evidence in determining the honesty of the accused's belief, and consider the presence/absence of reasonable grounds for that belief (***s.265(4)***).

* **Complainant must actually consent:** Evidence must show a honest belief that the complainant *did* consent, not simply that she *would* consent (***Park***, *complainant greets accused in bathrobe*)
* **Prior Sexual History:** Relevant only in certain cases in determining MOF
* The **principal considerations** that are relevant to this defence are:

1. the complainant's actual communicative behaviour, and
2. the totality of the admissible and relevant evidence explaining how the accused perceived that behaviour to communicate consent

The defence of mistaken belief in consent is not allowed where such belief arose from accused's (1) wilful blindness or (2) self-induced intoxication (***s.273.2***). Mistake of fact is also not allowed as a defence where the complainant was under 14 years of age, unless accused took all reasonable steps to ascertain complainant's age (***s.150.1(4)***).

**Mistake of Law**

Not a valid defence in Canada. ***Criminal Code, s.19*** specifically abolishes the common law defence of mistake of law: *Ignorance of the law is not an excuse for committing an offence.*

* **Sentencing:** Mistakes of law may be minimize culpability, though not entirely

**Policy Reasons why Ignorance is NOT a Defence:**

1. **Stupidity is bad:** Allowing defence of ignorance encourages people to remain unaware of the law when our system is based on ideas of deterrence.
2. **Ignorant people could do anything:** Those with knowledge would be prohibited from doing things; those without knowledge would have a complete defence to prohibited acts.
3. **Hard to disprove:** Anyone could claim they were ignorant of the law

**Included Requirements**

Mistake of law defence is valid for offences with an included requirement that knowledge of the prohibited conduct be present.

* Accused who unknowingly violates their parole restrictions by committing other offences while on parole can raise a mistake of law defence (***Docherty***)

**Officially Induced Errors** (common law defence)

**Officially Induced Error Defence (Mistake of Law):** Where an accused does their best to obey the law, and has investigated the possibility of illegality, but was led to believe the erroneous, but reasonable advice of an official that he was not acting illegally (***Cancoil***). Generally only arises in regulatory offences. Similar to defence of entrapment - entitles accused to SOP rather than acquittal. The following principles are considered:

* **Reasonable Reliance:** The accused must have reasonably relied on the erroneous advice and acted upon that advice.
* **Official Responsible for Administration of Law:** The advice must have come from a person responsible for the administration or enforcement of the law.
* **Clarity:** Was the opinion clear? Written documents are more clear than oral statements.
* **Extensiveness of Efforts:** Did accused make extensive efforts to solicit official advice?
* **Complexity of Law:** Was the law easy to understand, or clearly posted? Or did the law require an official to explain it?
* **Position of the Official:** The status of the official will matter. Alternatively, the official in question may have been the normal person for these enquiries.

**Defence of Intoxication**

**Defence of Intoxication:** The accused was so intoxicated that there was no mens rea and he could not intend (nor foresee) the consequences of his actions

* Rebuts common sense presumption that people intend natural consequences of their actions
* Applies to both drugs & alcohol
  + Prescription drugs: examine voluntariness (Are you physically in control of your actions? Was the prescription sanctioned by a doctor?)
* Not available for drinking/driving offences ☺
* Generally only available for **specific intent offences**
* **Why not general intent offences?** General intent offences require less mental work - while intoxication may negate the accused's ability to foresee certain consequences or their intent to commit the act for a specific purpose, it does not negate the accused's ability to commit/intend the underlying unlawful act (i.e. you're drunk enough that you didn't intend to kill X, but not so drunk that you didn't realize you were swinging a punch)

**Defence of Intoxication for General Intent Offences**

Defence of Intoxication is only available for general intent offences (with objectively dangerous consequences) where the accused can show on BOP that his intoxication was akin to automatism. This automatism must have negated the accused's ability to form the basic intent to commit the unlawful act (***Daviault*,** *drunk accused rapes old woman*).

* SCC has accepted that it's **factually possible to drink oneself into a state of automatism**
* **Voluntary intoxication ≠ Mens Rea:** Mens rea of voluntary intoxication *cannot* be substituted for mens rea of a high stigma crime, as ***s.7*** requires basic proportionality b/t nature of offence & mens rea
  + There is no objective likelihood that extreme drunkenness would automatically lead to the state of mind where sexual assault would be committed.
  + *Question:* Is it possible that voluntary drinking may substituted as mens rea for a lower stigma general intent crime - i.e. property destruction?
  + Rarely successful
  + **Evidence:** Accused must call expert evidence to establish intoxication-akin-to-automatism on BOP in order to pass the air of reality test (higher threshold than standard AOR test)

Parliament has since created ***s.33.1*** which holds that extreme voluntary intoxication constituting automatism is not a defence to crimes involving assault, interference or threat of interference with another person's bodily integrity. Overturns ***Daviault***, but ***s.33.1*** has not been considered by SCC yet.

**Defence of Intoxication in Specific Intent Offences**

Defence of intoxication can defeat the Crown's case by showing that the accused was unable to form specific intent necessary for offence. Where the specific intent offence has an included general intent offence, a successful defence of intoxication will mean that the accused can be found guilty of the general intent offence. Where the specific intent offence does not have an included offence, the accused will generally be acquitted completely.

If the defence is raised, the following 2 elements must be met:

1. **Air of Reality:** Is there any evidence on each element of the defence on which a reasonable jury could acquit?
2. **Crown's Burden:** Crown must disprove intoxication BARD by proving that accused had requisite intent to commit unlawful act for the specific purpose

**Proper Jury Charge for Intoxication:** The jury must find that the accused *did not* form the required intent *because of* the intoxication. It is not enough for the jury to consider whether the intoxication rendered the accused *incapable* of forming intent. An accused who was physically capable of forming intent might not actually have formed the intent. Crown must prove BARD that accused *did form the intention* (***Robinson***)?

1. **Informational Component:** Judge should generally educate the jury on the effects of intoxication: i.e. significant intoxication can impair your ability to foresee events.
2. **Evidence/Onus/Intent:** The jury should look at all evidence of the case, including intoxication, and make an assessment on whether the Crown has proved intent BARD.
   1. This makes it clear that the onus is on the Crown to prove intent & disprove intoxication.
   2. Forces the jury to determine whether, despite the evidence of intoxication or other factors, the accused *did* form the intent to commit the crime.
3. **Linking intoxication to the common-sense inference**
   1. The common-sense inference that people intend the natural consequences of their acts is subject to the defence of intoxication. However, intoxication will not automatically negate the common-sense inference. The jury must still consider the evidence as a whole to determine whether the accused had the requisite intent to commit the offence for the specific purpose.

In some cases, a **capacity instruction** might be appropriate where accused was so drunk that they were truly incapable of forming the specific intent (different from ***Daviault*** "automaton" rule).

1. Was the accused capable of forming intent?
2. If the accused was capable, did they actually form the intent?

**Defence of Intoxication applied to Murder:** Intoxication can negate the specific intent to kill. Successful intoxication defence will bring accused down to manslaughter. Will not completely acquit an accused of murder. To be acquitted of manslaughter, accused must be intoxicated to the point of automatism so that the general intent to commit the underlying unlawful act is negated (***Daviault***).

* **Significant intoxication required**: Specific amount will depend on circumstances and on particular accused
* **Expert Evidence:** Required to testify on state of intoxication, accused's drinking history and hypothetical impact of intoxication
* **Concede Manslaughter:** Strategic measure which acknowledges that accused's actions were wrong, but that they should not be convicted of murder as they lacked the specific intent to kill and didn't have the subjective foresight of death
* **Multiple defences may be run**: self-defence, intoxication, provocation, etc
* **Motive / Purposeful Conduct:** Useful in disproving intoxication as it can show intent
* **Convenient Memory Loss:** Accused remembers their drinking in great detail, but can't actually remember the traumatic offence.

**Defence of Necessity**

**Defence of Necessity:** Where accused (or someone close to accused) was forced to commit an offence because they (1) were in imminent peril or danger and (2) had no other reasonable legal alternative. There must be at least equal proportionality between the harm inflicted and the harm avoided.

**Excuse-Based Defence:** Where the defence of necessity is successful, the court will "**excuse**" the accused from a criminal conviction (***Perka***, *drug smugglers must save themselves*). So even if the Crown proves every essential element of the offence BARD, the accused can be acquitted if they bring a successful necessity defence.

* Strictly controlled and only valid in exceptional circumstances.
* **Not Justification-Based**: Anarchy would ensue if accused could claim actions were justified
* But it is a real defence, and where it has an air of reality, judges should not shy away from putting defence to the jury.

**Allows Criminal Law to deal with Reality:** Sometimes people are caught in situations where they have no other option but to commit an offence. But certain offences committed in extenuating circumstances may not merit the defence of necessity (i.e. the hungry person who steals food), but can be dealt with via charge approval (is it in the public interest to prosecute this person?) or sentencing.

**3 essential elements of the defence of necessity** (***Latimer***, *dad kills daughter*, *fails AOR test b/c no imminent peril*)

1. **Modified Objective Test:** Imminent peril or danger
   1. Would a reasonable person with all the accused's characteristics have perceived that they (or another person) were in imminent danger?
2. **Modified Objective Test:** No reasonable legal alternative to the course of action
   1. Would a reasonable person with all the accused's characteristics have perceived that there was no reasonable legal alternative?
   2. Means of escape must be reasonable
   3. **Contributory negligence** - Where accused had choice not to participate in venture, defence of necessity may be negated as accused was aware that there was a reasonable legal alternative.
   4. **Illegality:** Necessity is not automatically negated by an accused engaging in criminal activity (***Perka).*** But where criminal activity leads accused to reasonably foresee that a situation will arise, then accused cannot argue that they had no reasonable legal alternative.
3. **Objective Test:** Equal proportionality between the harm inflicted and the harm avoided
   1. **Equal proportionality sufficient**: Harm inflicted does not need to be less than the harm avoided
      1. Defence fails where harm inflicted is *more* than harm avoided
   2. Objective standard: Takes into account societal standards and community morals.

**Duress**

**Duress:** An accused who faces threats of (immediate) death or bodily harm to himself or another person will be excused from a conviction for an offence committed as a result of those threats

* **Excuse-based defence**: a successful defence of duress will acquit the accused even if the Crown has proven all of the essential elements of the offence BARD.
* Common Law defence versus Statutory Defence (***s.17***): ***s.7*** allows accused to access common law defence where their situation doesn't fit the statutory defence (***Ruzic***)

**Common Law Defence of Duress**

**Essential Elements of the common law defence of necessity:**

1. **Explicit or implicit threats of death or serious injury**
2. **No reasonable safe avenue of escape** is available **(Modified Objective Test)**
   1. Would a reasonable person, given the accused's personal characteristics and frailties, and in the accused's situation, have perceived a safe avenue of escape to be available? (***Hibbert***)
3. **Threats** **need not be of immediate death** **or harm**
4. **Threatener need not be present** while the offence is being committed
5. **Threats may be made to the accused or to a third party**

**No excluded offences**: Someone shouldn't be branded a murderer simply because they were subject to horrible duress

**Availability of Common Law Defence:**

* Available to aiders, abetters and those who formed a common intention
* Available to perpetrators who cannot access the statutory defence (i.e. where the threatener was not present, or where the threats were not of immediate death/harm) (***Ruzic***)

**Statutory Defence (*s.17*, Compulsion by Threats)**

**Previous elements of the statutory defence of duress:**

1. Explicit or implicit threats of death or bodily harm
2. Threats must be of ~~immediate~~ death or bodily harm (unconstitutional)
3. ~~Threats must be made by a person who is present while the offence is being committed~~ (unconstitutional)
4. Accused must have subjectively believed that the threats would be carried out
5. Accused may be deprived of defence because of prior contact with the threatener - implies that the defence may not be available where accused has current criminal involvement

***s.17*** was held as unconstitutional in ***Ruzic*** (*drug smuggler under duress but not in presence of threatener*) as it allowed morally involuntary accused to be convicted of crimes.

* + - **Read Down:** no more need for immediate threats or for threatener to be present (***Ruzic***)
    - Statutory defence can still be used for principal offenders who fit w/in req'ts, otherwise principals can access common law defence
    - **Excluded Offences:** Statutory defence is not available for certain offences (i.e. treason, murder, sexual assault, robbery, abduction, piracy, etc). No case has yet challenged excluded offences under ***s.17***.

**Duress versus Necessity**

Duress and Necessity are similar defences. But an accused who wasn't facing imminent harm could plead duress if there was no safe avenue of escape.

* Necessity: higher threshold which requires "imminent harm"
* Duress: lower threshold, since no immediate harm required (only "no safe avenue of escape")

**Self-Defence**

**Defence of Self-Defence:** Where an accused applies force because he is (1) unlawfully assaulted or (2) reasonably apprehends death or grievous bodily harm.

* **Excuse-based defence**: a successful defence of self-defence will acquit the accused even if the Crown has proven all of the essential elements of the offence BARD.
* Codified in the Criminal Code (we focus on ***s.34(1)*** and ***s.34(2)***): Many judges have called on Parliament to simplify the confusing codified defences.

***s.34(1)***: **Self-defence against unprovoked assault** (Less Serious Circumstances)

*Everyone who is unlawfully assaulted, without having provoked the assault, is justified in repelling the force by force, if the force he uses is not intended to cause grievous bodily harm and is no more than necessary to enable him to defend himself.*

* **Translation:** Where the accused does not perceive their life to be in danger, and responds with non-life-threatening force.
* *Example:* X is in a bar. Y goes to punch him, and X punches him in self-defence.

**Essential Elements of *s.34(1)***:

1. **Unlawful Assault:** Accused can either (1) be assaulted, or (2) reasonable perceive that s/he is being assaulted (***Petel***)
   1. Triggering assault must be unlawful (***s.265*** allows both threats or physical force)
   2. **Reasonable Mistake of Fact:** Accused's reasonable (even mistaken) belief of impending assault will suffice
   3. **Past History:** Victim's past history can determine reasonableness of accused's perception of impending assault (was victim aggressor or previously violent?). Accused's past history may only be considered if probative.
2. **No Provocation:** Accused must not have provoked the assault (either via words/gestures)
3. **No Intent to Kill or Seriously Harm:** Accused must have acted only to stop the assault [cannot be in revenge]. Accused must not have intended to kill or cause grievous bodily harm
   1. Court may draw inferences from harm caused or force used - but serious harm does not automatically prove an intent to cause that serious harm (i.e. ***s.34(1)*** can be used where victim ends up dead so long as accused didn't intend to kill)
4. **Proportionate Response:** Accused used no more force "than was necessary". Need not be measured "with nicety". Presence of multiple attackers might increase amount of force that is objectively reasonable.
   1. **Subjective test:** Whether the accused considered the force to be more than necessary
   2. **Objective test**: Whether the amount of force used was objectively reasonable

***s.34(2):* Extent of justification** (self-defence leading to death)

*Everyone who is unlawfully assaulted, and who causes death or grievous bodily harm in repelling the assault, is justified if*

1. *he causes it under reasonable apprehension of death or grievous harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and*
2. *he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.*

**Essential elements of *s.34(2)***:

1. **Unlawful Assault:** Accused must have been assaulted, or must have reasonably perceived that he was being assaulted. Reasonable mistake of fact permitted (***Petel***)
2. **Death or bodily harm:** Accused must have reasonable apprehension of death or grievous bodily harm. Death or bodily harm need not be imminent (***Lavallee***). Past victim-accused history is relevant (i.e. violent background).
   1. **Objective test:** Was the apprehension reasonable?
   2. **Subjective test:** Did the accused actually apprehend death/harm?
3. **Self-Preservation:** Accused had reasonable belief that self-preservation would only occur if he caused death or grievous bodily harm. But accused need not intend to kill, though in many situations, the accused *may* have an intent to kill (***Pawliuk***).
   1. **Modified Objective test:** Would a reasonable person in the same situation with the accused's characteristics have believed that they had no alternate routes of escape?
   2. **Subjective test:** Did this particular accused subjectively believe that they had no alternatives routes of escape?

**Available to initial aggressor: *s.34(2)*** does not have a "no-provocation" requirement. The accused may have provoked the assault, and still claim self-defence (***McIntosh***).

**No Proportionality Needed:** Accused need only have a reasonable belief that self-preservation can only be carried out by causing death or grievous bodily harm. Where accused's actions are absurd, court will reassess whether accused reasonably apprehended death/bodily harm and whether they had the basic intention to kill only for self-defence.

**Battered Woman Syndrome & Self-Defence** (***Lavallee,*** *battered wife shoots husband)*

Battered woman syndrome is underscored by the principle that the objective test to be applied should be that of a "reasonable person" (not "man"). Battered woman syndrome must be considered when determining the reasonableness of the accused's perceptions.

* **Not a License to Kill:** BWS must be proven by expert evidence in order to pass air of reality test to be put to the jury. The jury must then find a reasonable doubt on *each element* of the defence of self-defence in order for the accused to be acquitted. Where the Crown disproves *at least one element* of the defence BARD, the defence has not been met (i.e. accused didn't subjectively believe that their life was in danger).
* **Death/Bodily Harm need not be imminent to cause "reasonable apprehension":** If women had to wait until attack was imminent, they might not be able to defend themselves due to physical differences in size. Battered women have heightened sense of when life is in danger before attack actually occurs, due to prior abuse.
* **Psychological Prison may limit reasonable escape routes:** Escape routes must be reasonable, given accused's characteristics. A battered woman may reasonably perceive that she cannot escape, despite the unlocked door. The closer in time the self-defence occurs to the threat, the more likely a jury will believe the accused acted in self-preservation
* **No Rampage of Killing Spouses:** The fear that more abusive spouses would be killed has not materialized. In fact, we are actually seeing more battered women come forward.

**When to use *s.34(1)* versus *s.34(2)*?** (***Pawliuk,*** *accused squeezes trigger out of fear*)

In situations where either offence could be invoked, you should rely on ***s.34(2)*** because it is more pro-accused (lack of provocation; no proportionality required).

* ***34(1)*** or ***34(2):***  Where you do an action that results in death, and you fear for death
  + ***34(1):*** Where accused uses "no more force than necessary", even if victim dies
  + ***34(2):*** Where accused uses lethal force for self-preservation, and victim dies
* ***34(1)*** or ***34(2):***  Where there is some ambiguity about whether you had an intent to kill
* ***34(1)*** or ***34(2):*** Where accused feared for his life
* ***34(2):*** Where you clearly state that you have an intent to kill (though not required)
* ***34(2):*** Where accused clearly states that he intended to use lethal force

**Defence of Provocation** (available only for **murder**)

**Defence of Provocation:** A limited excuse-based defence that is available only for crimes which would otherwise be murder.

* A successful defence of provocation will reduce an accused's culpability to manslaughter.
* No acquittal allowed.
* **Air of Reality:** Defence must pass AOR test on all 4 elements in order to be put to the jury (***Thibert***, *accused shoots estranged wife's lover*).
  + Objective 2nd element makes it harder for the accused to meet this threshold: They must show that there is some evidence which would show that an ordinary person would have lost self-control.
* **Mens Rea:** Accused must have intended to cause death
* **Masculinity & Criminal Law:** A long-standing common law defence in Canada & England which essentially allows **extreme anger** to be a valid defence: a last vestige of masculinity in criminal law? If Parliament wanted to amend the defence, they could…

**Provocative Conduct:** A "defence" which may be raised by the accused for non-murder offences (i.e. why accused didn't have the mens rea to commit assault).

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

***s.232(2) What is provocation***: *A wrongful act or insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section, if the accused acted on it on the sudden and before there was time for his passion to cool.*

**Elements of the Offence**

1. **Factual Analysis: Wrongful act or insult**

* Can include criminal conduct done to the accused, a regulatory breach, or something less than pure criminal conduct (insult).
* Wrongful act must be illegal, but insult need not be illegal
* For example, disparaging remarks can be sufficient to trigger the insult.
* "Legal Right to Do": Accused cannot claim provocation if the victim was doing something that he had a legal right to do

1. **Modified Objective Test: An act or insult of a certain nature**

* The act/nature must be sufficient to deprive an ordinary person of self-control, given all the relevant personal characteristics & experience of the accused.
* **Last-Straw Principle:** Would an ordinary person, given the experience & history between the parties, have been deprived of their self-control by the provoking act? (***Daniels***, *accused kills the "other woman"*)
* The basic characteristics of accused will be applied to the ordinary person (i.e. age, sex, race, etc). But personal characteristics must be relevant to the provocation in question (***Hill***, *teen kills Big Brother in "gay panic"*). Idiosyncrasies will not be accepted (i.e. hotheadedness)
* Not every act will constitute provocation [the ordinary person is not overly sensitive].
* Most litigation turns on this element

1. **Subjective Test: The accused must have acted on the provocation**

* Did the accused *actually* act on the provocation?

1. **Factual Analysis: The accused acted on the provocation on the sudden, before there was time for passion to cool**

* Did accused actually act *on the sudden* and *before there was time for her passion to cool?*
* An accused who acts after the provocation will not be able to claim the defence.

**Relation of Defences to Mens Rea / "Rolled-up Defences"**

In order to put the defences of self-defence, provocation or intoxication to the jury, you must pass the "air of reality" test on each element of the defence. However, at the end of the trial, the jury may choose to reject each defence, as a reasonable doubt has not been raised on each element of the defence. As a result, the individual defence would fail.

But where an individual defence has failed for **Specific Intent Offences**, the trial judge can direct the jury to consider the **"rolled-up defence"** to see whether the cumulative effect of evidence raised by each defence will negate the mens rea (***Nealy***).

*Example:* In determining whether the accused had the specific intent to kill, the jury can consider all of the factual circumstances to see whether there is a reasonable doubt about the specific intent. This is an evidentiary issue.

*Example:* If the Crown fails to prove BARD that the accused had specific intent to kill, the jury can find the accused guilty of manslaughter rather than murder (self-defence / intoxication). The jury may also acquit the accused of murder (provocation).

**SENTENCING: The accused has been found guilty - now what?**

With few exceptions, most BC cases have met the charge approval standard of a substantial likelihood of conviction: So every criminal lawyer needs to know their sentencing principles!

**The Sentencing Process**

**Sentencing takes work:** More evidence can be presented during sentencing than at trial. The judge is essentially making a judgment call about whether the accused is a decent person who screwed up once, or whether they will be a career criminal. The more background information raised by the defence on the "goodness" of the accused, the more likely the judge will impose a lighter sentence.

During sentencing, the court will examine:

1. **Aggravating or Mitigating Circumstances of the Offence**
2. **Circumstances of the Offender**

Things to show the judge:

1. **Oral submissions** by defence counsel
2. **Character references**: Letters written by various people in the community regarding your client. Effective letters will include reference to the offence, an acceptance of the guilty plea and a statement that this offence was out of character.
3. **Psychiatrist's Report**
4. **Caselaw on Sentencing Range:** You must present caselaw setting out the sentencing range for the particular offence. Your submission should discuss where the sentence should fall in this range, or in exceptional circumstances, why the sentence should fall outside that range.
   1. Examine the Criminal Code for minimum and maximum sentences
   2. Look at BC caselaw for sentencing ranges for that offence

Note that the ***YCJA*** requires that young offenders being released must have a detailed **release plan** which will set out their reintegration into society.

**Early Guilty Plea** (before or during trial)

Advantages of an early guilty plea:

1. Negotiating power with Crown
2. Demonstrates remorse for the offence
3. Frees up court time
4. Crown is assured of a guilty plea [a trial may not result in a conviction]
5. Defence can retain much more control over the process
6. Accused can address the problems which led to the offence [i.e. drug & alcohol counselling]

**Plea Bargaining Rocks:** Trial judges rarely impose sentences greater than what the Crown or joint submission requests.

**Motion to Undo Guilty Plea:** Accused can bring forth a motion to undo their guilty plea, on the grounds that their defence counsel pushed them into it.

**Two things you need before considering an early guilty plea:**

1. **Crown disclosure**(Particulars): Crown may not be able to prove all essential elements BARD
2. **Client must make an admission to the essential elements of the offence** - Client must accept that they are guilty of this offence. Canada does not have the American "no contest" plea: where the accused pleads guilty, but doesn't admit all the essential elements.

Defence counsel should lay out all of the potential options, and the strength of the Crown's case. In the end, it is the client's decision as to what they want to do. Defence counsel cannot force their client to do plead guilty if they do not admit to all the essential elements, or if they don't want to. Be sure to separate your client from the hangers-on.

**Sentencing Principles and Provisions in Criminal Code**

***Section 718:* Fundamental Principles of Sentencing**

1996 Criminal Code codified CL sentencing principles & added new remedial principles. Different weight can be assigned to each principle, depending on circumstances of offence & offender. Defence and Crown will emphasize different principles (or lack thereof) when making sentencing submissions.

1. **Denunciation:** To denounce unlawful conduct
   1. Slightly controversial - announces to society that this conduct is offensive, unacceptable and should be condemned. Denunciation ≠ revenge.
2. **Deterrence:** To deter the offender and other persons from committing offences
   1. **Specific Deterrence:** Creates disincentives for the specific offender to re-offend. Focuses on the need to dissuade this particular offender from re-offending.
   2. **General Deterrence:** Creates disincentives for the general public to offend. Focuses on the need to dissuade the general public from committing this particular offence (offender serves as an example to others).
3. **Separation:** To separate offenders from society, when necessary for safety of society/offender. Usually done via imprisonment. Linked to principle of specific deterrence
4. **Rehabilitation:** To assist in rehabilitating offenders
   1. Non-custodial sentences may help with rehabilitation and prevent recidivism.
5. **Reparations:** To provide reparations for harm done to victims or to the community
6. **Responsibility:** To promote a sense of responsibility in offenders, and acknowledgement of harm done to victims and to the community

***Section 718.2(a):* Aggravating Circumstances**

Higher sentence allowed where offence was (1) motivated by bias or hate, (2) involved spousal/child abuse, (3) involved abuse of trust, or (4) committed to benefit or at direction of a criminal organization.

***Section 718.2(b)-(e):* Other Factors affecting Sentencing**

* ***s.718.2(d)*** (**Jail is last resort):** An offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances.
* ***s.718.2(e)*** (**Aboriginal Offenders):** All available sanctions, other than imprisonment, that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders (***Gladue***).

***Section 721:* Pre-Sentence Reports (PSR)**

Where the offender has plead guilty, the Court can order a **Pre-Sentence Report** (PSR).

* Offender meets with the probation officer who prepares PSR
* PSR is seen as somewhat more neutral than the Crown or defence submissions.
* PSRs are more likely in certain situations: i.e. where Court will be imposing jail for first time
* Defence must prepare client for PSR, so that offender is not flippant/disrespective or admit to other crimes - they must be honest and helpful.
* Could convince judge that PSR is not necessary as defence can provide exact same info

***Section 722:* Victim Impact Statements**

Parliament's attempt at making the criminal justice system more accessible and inclusive of victims. Victim impact statements are not about the victim controlling the system. Their **purpose** is to educate the judge about how the victim was affected in order to balance the sentencing principles properly.

***Section 723-724:* Evidentiary Rules for Sentencing**

Strict rules of evidence do not apply to sentencing, which has both advantages & disadvantages. For example, hearsay can be admitted. ***Section 724(3)*** is important where there are **disputed facts** either about the offence or the sentencing. ***s.724(3)*** may result in a trial at the sentencing hearings to resolve disputed facts.

* ***s.724(3)(a):*** Where there are disputed facts that are relevant to the sentence, evidence must be adduced as to the sufficient fact [unless the evidence was already adduced at trial].
* ***s.724(3)(b):*** Party wishing to rely on relevant fact has the burden of proving it BOP
* ***s.724(3)(c):*** Either party may cross-examine any person called by the other party.
* ***s.724(3)(d):*** Court must be satisfied BOP before relying on the disputed fact.
* ***s.724(3)(e):*** The Crown must establish BARD the existence of any aggravating fact or any previous conviction by the offender before raising it in sentencing

***s.718.2(e):* Aboriginal Sentencing Principles**

In ***Gladue*** (*aboriginal offender kills cheating husband*), the SCC held that ***s.718.2(e)*** did not simply codify the common law - it was a new remedial measured aimed at offenders facing incarceration, and especially aboriginal offenders. The provision has a two-fold purpose:

1. Reducing the number of incarcerated persons
2. Reducing the length of incarceration

**Crisis in Overincarceration:** Canada has one of the highest per capita incarcerated populations in the world (2nd or 3rd amongst industrialized democracies). Aboriginal overincarceration is also problematic. In some cases, incarceration is rehabilitative. However, in other cases, incarceration actually has a negative effect on offenders. Creative punishments (i.e. victim-offender meetings) may decrease recidivism better than incarceration. ***s.718.2(e)*** appears to have some effect on reducing prison populations, and on increasing the use of community sentences.

***s.718.2(e)* does not apply to all crimes:** Certain crimes (i.e. seriously violent offences) will require imprisonment in order to serve the principles of deterrence, denunciation and separation.

***s.718.2(e)* applies to all offenders,** including non-aboriginal offenders. A non-aboriginal offender could also be considered for a non-custodial sentence based on background factors and community sentencing options.

**Test:** Do certain factors allow for deterrence/denunciation to be de-emphasized so that a non-custodial sentence can be considered?

1. **Background factors of offender**: Are there unique circumstances which have brought this aboriginal offender before the court?
   1. Factors such as discrimination, institutionalization, racism, unemployment, poverty, etc may have increased the likelihood that this offender offending. ***s.718.2(e)*** forces society to come to terms with its role in bringing this offender before the court. Multiple negative societally-induced background factors will decrease the weight placed on denunciation and deterrence.
2. **Offender's particular aboriginal cultural background:** Are there unique cultural sentencing practices which may be utilized to prevent recidivism?
   1. **Restorative Justice:** Focuses on restoring society by respectfully bringing the offender back into the community to be educated about the impact of the offence on the victim (differs from traditional values of denunciation/separation)
      1. Specific sentencing options will depend on the particular aboriginal heritage and traditions of the offender.
         1. What is the understanding of criminal sanctions held by the community?
         2. What is the relationship b/t the offender and his community?
         3. Would imprisonment effectively deter the offender from reoffending?

**Mandatory Minimums & *s.12***

***s.12*** holds that everyone has the right not to be subjected to cruel and unusual treatment or punishment. The ***s.12* test** asks if the punishment was grossly disproportionate to the offence. It is the certainty of a disproportionate sentence which offends ***s.12***, not simply the potential. Reasonable hypotheticals are allowed in the ***s.12*** test (i.e. college kid caught with first joint gets 7 years).

Mandatory minimums are unconstitutional where it is inevitable that a verdict of guilt will lead to the imposition of a term of imprisonment that is grossly disproportionate (***Smith***). In ***Smith***, the SCC held that a mandatory minimum 7 year sentence for drug possession violated ***s.12*** and could not be saved by ***s.1*** as it more than minimally impaired the right to liberty. However, the court allowed Parliament the possibility of redrafting the minimum sentence.

Mandatory minimums can only be avoided if the offender challenges the legislation. Mandatory minimums simply increase the prison population while not necessarily decreasing crime. Minimum sentences take away a judicial discretion in considering an accused's background during sentencing.

**Conditional Sentences (CSOs): The Ultimate Grounding**

Prior to 1996 Criminal Code amendments, an offender could receive either a custodial sentence (jail) or a non-custodial sentence (discharges, suspended sentences, probation, etc). The **conditional sentence** is a new sentencing tool which is a jail sentence served in the community.

* If the offender breaches the conditions of their CSO, they can be incarcerated
* Normally imposed for serious offences where CSO would be more beneficial to accused than incarceration
* CSOs therefore allow offender to keep working, continue caring for family, go to school, etc

***s.742.1:* Criteria for CSOs**

* **No CSOs if minimum sentence:** CSOs cannot be given for offences with minimum sentence
* **Less-than-2-years:** CSO only allowed if sentence imposed is not greater than 2 years
* **Requirements:** Court must be satisfied that CSO would (1) not endanger the safety of the community and (2) would be appropriate for the offender
* **Applicable Crimes:** CSO may be imposed for violent crime, if there are no concerns about the offender being a danger to the community (***Proulx***). Serious crimes with mitigating factors may merit a CSO (i.e. manslaughter with clearly no intent to kill, and no previous criminal history). Likewise, less serious crimes with aggravating factors may not merit a CSO (i.e. aggravated assault that doesn't result in death, but offender has long criminal record)
* ***s.742.3(1):*** Mandatory conditions to be imposed for CSO
* ***s.742.3(2):*** Optional conditions to be imposed for CSO
  + Restrictive CSO conditions should be the norm, not the exception (***Proulx***): Conditions should be (1) punitive and (2) a restriction on the offender's liberty
  + Conditions should be imposed in accordance with circumstances of the offence: i.e. if alcoholism led to the offence, then require alcohol counselling

**Test for imposing CSO** (***Proulx,*** *dangerous driver* *causes death*)

1. **Should the offender be incarcerated?**

* If yes, then move to step #2: consider offender's record
* If no, then grant a non-custodial sentence

1. **Consider the offender's record:**

* If offender merits a jail term of more than 2 years: CSO is out of question
* If offender merits jail term of less than 2 years: CSO can still be considered

1. **Is the offender a danger to the community? Would it be appropriate for offender to serve sentence in community?**

* **Two-part test** (***Proulx***):

1. What is the risk of the offender re-offending?
2. What is the gravity of damage in the event of recidivism?
   * If yes, then CSO can be granted
   * If no, then custodial jail sentence must be imposed

**Appeal**

**Errors of law**: Appealable by Crown & Defense

**Errors of fact:** Appealable by Defense only (needs permission).