**CRIMINAL LAW – 2010/2011 – NIKOS HARRIS**

**CHAPTER THREE: PROVING THE CRIME**

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

* **Charge**: Who, when, where, what, contrary to what parts of CC.
* Accused can only be convicted of the offence(s) charged in the indictment/information.
* **Actus reus:** Prohibited act, omission or state of affairs. Criminal or regulatory. Crown may need to prove it was voluntary.
* **Mens rea**: Required mental element of fault.

**The Nature of Evidence**

* Facts are relevant if proof of that fact makes a proposition more likely than it would be if fact didn’t exist.
* Difference between relevant and ***material*** (i.e. relevant with respect to matter that is an issue in the case).
* Evidence can be *direct* or *circumstantial* (i.e. an inference must be drawn for it to be useful).

**The Sequence of Events at Trial**

* **No evidence motion:** argue charge should be dismissed because Crown hasn’t satisfied evidential burden.
	+ Argued by defence before they have to decide whether to present evidence
	+ If accepted, judge should acquit the accused (must withdraw case from jury in a jury trial)
* If no evidence motion is dismissed, defence must decide whether or not to call evidence.
	+ **Right to choose to not call evidence** is a right given by **s. 11(c)** of Charter.
* Judge’s **charge to jury**: explain the law and review the evidence. Explain the burden of proof rules.

**Evidential Burdens**

* Jury trial: **questions of law are for the judge, questions of fact are for the jury**.
* **Test to determine whether evidential burden has been satisfied by Crown**:
	+ Is there any admissible evidence (on **each element**) upon which a reasonable jury, properly instructed, could convict? i.e., if the evidence were to *be believed*  (BARD not necessary here), could it result in conviction?
* Whether evidential burden is satisfied is question of law for judge 🡪 Accused can appeal on this point.
* Burden of proof: **beyond a reasonable doubt** – highest standard because accused presumed innocent.
* **Accused’s Burden:**
	+ ***Reverse Onus Provisions***: Df has ultimate burden of proof (on **balance of probabilities**) & initial evidential burden.
	+ ***Statutory presumption****:* Some statutes cause accused to introduce evidence sufficient to **raise a reasonable doubt**.
	+ ***Presumptions of fact***: allow trier of fact to infer existence of fact A from proof of fact B (e.g. possession=you stole).
* **Defences**: evidential burden is on accused to raise reasonable doubt in favour of accused. Some defences require balance of probabilities (e.g. NCRMD). Once the burden is satisfied, Crown must disprove the defence beyond a reasonable doubt.

**CHAPTER ONE: SOURCES OF THE CRIMINAL LAW AND THE SUPREMACY OF THE *CHARTER***

***Constitution Act, 1867*** 🡪 91(27) = Feds get criminal law. Provs get prisons 92(6), property/civil (13), prov courts (14), penalize (15).

***Criminal Code*, ss. 8, 9 🡪**CC applies across Canada.

**The *Canadian Charter of Rights and Freedoms*** 🡪Key provisions: 1, 2, 7-15, 24, 32, 52 (reproduced in CC)

***R v Sharpe* – Balancing Charter Rights with the Criminal Law**

**Issue**: Child porn – is the definition limitless? Is it immune from Charter protection because of its nature through s. 2(b)?

* S. 163(1) made making, publishing distributing and possession of child porn illegal.
* Criminalized visual and written materials, even if self-created, kept for yourself, or created by youth exploring IDs.
* Issues: Too broad? Criminalization of innocents? Criminalizes thoughts? Degree of harm? Invasion of privacy?
* **No criminal law is immune from Charter scrutiny** 🡪 Balance them through the *Oakes* test.
* Remedy to infringement of non-minimal impairment: read in that certain materials are acceptable in certain circumstances.

**Oakes Test**

1) Is the **objective of sufficient importance** to warrant overriding a constitutionally protected right or freedom?

 🡪Is it **pressing and substantial**?

2) Are the means chosen **reasonably and demonstrably justified**? This involves a **proportionality** test.

 i. Are the measures adopted **rationally connected** to the objective?

 ii. Do the means **minimally impair** the right?

 iii. Is there **proportionality between the effects of the measures and the objective**? (Cost/benefit analysis)

**CHAPTER THREE: PROVING THE CRIME**

***Charemski –* Circumstantial Evidence**

**Facts**: Man accused of drowning wife in bathtub. No direct evidence. Evidence of opportunity, motive, and knowledge of crime.

* **No evidence motion (NEM) with circumstantial evidence**: could *one* reasonable inference be that he is guilty?
	+ Doesn’t have to be the *only* inference.
* But at **end of trial** circumstantial evidence must show that the ***only* reasonable inference is guilt** of accused.
	+ Must be **no other rational explanation** for the circumstantial evidence except that accused committed the crime.

**Result**: Appeal denied, SCC agrees with CA that the case should have passed the no-evidence motion.

***Lifchus –* What is Beyond a Reasonable Doubt?**

* Judge’s **charge to jury on standard of BARD**: need to explain where the standard lies on the **spectrum**.
* **BARD is not**: imaginary/frivolous doubt, intuition, vague thoughts, sympathy, prejudice, etc.
* **BARD is**: reason and common sense, tied with onus of proof, extremely high but not unreasonably so.
* **“Probably” or “likely” guilty is insufficient** - it **does not have to be “absolute certainty” either but close** to it.
* **Defence evidence**: you don’t need to believe it but if it is reasonably possible then you must acquit.
* **Burden of proof is always on the prosecution**.
* Beyond a reasonable doubt is **NOT the same as “moral certainty.”**

***Starr* –Beyond a Reasonable Doubt – Where is it on the spectrum?**

* Judge must be clear that BARD is **not the same as balance of probabilities but is not absolute** **certainty**.
* However, it is **closer to absolute certainty** than it is probable.
* **Judge must define BARD** in the charge – higher than probability standard.

***Kyllo*** – **Reliability and Credibility of Evidence - Witnesses**

**Facts:** Arcade robbery, dirty boots, buying drugs with bags of quarters, gum in trash can.

* **Non-credible witness**: criminal past, drug problems, possible ulterior motive
	+ Must be very careful, cannot believe such a witness without **corroborating evidence**.
* **Unreliable witness**: past blows to head, drug use, felt threatened by police.
* **Vetrovec Warning**: judge has discretion to warn jury about risks of accepting testimony of unsavoury witnesses.
* ***Ways to judge testimony***: confirmation by independent evidence, specificity of statement, level of detail, if statement leads to discovery of evidence known only to perpetrator, degree of informer’s access to outside information, general character of informer, informer’s request for special benefits/promises, past history of giving reliable information, whether informer made records of accused’s statement, circumstances informer’s report was taken, manner in which report was taken by police, any other known evidence that may alter credibility of informer (e.g. relationship between informer and accused).

***C.W.H.* – Accused or Witness: Who to Believe?**

**Facts**: Grandfather accused of molesting his granddaughter. Trial judge said you must believe either her or him.

* **Even if you completely** **reject accused’s evidence**, you **still must be satisfied beyond a reasonable doubt as to the guilt** of the accused before a conviction can be entered.
* Simply believing one person more than another is not enough to convict.
* If you **cannot decide who to believe, you must acquit**.
* As long as accused’s story **raises a reasonable doubt, you must acquit**.

***Morin –* Applying BARD to Evidence**

* Reasonable doubt standard **does NOT apply to individual pieces of evidence** – **only to evidence as a whole**.
* Look at the whole body of evidence to determine if elements are proved BARD.

**Proving *mens rea***

* **Mens rea can be approached circumstantially**: motive evidence, logic, circumstances.
* Crown is required to prove BARD that the **accused intended to cause the consequences of the conduct** and that he or she knew the circumstances that made the conduct criminal.
* Two **sources of evidence** **regarding intention**:
1. Accused’s testimony, confession or statement to police.
2. Infer accused’s intention by looking at his actions and determining what must have been in his mind.
* General rule: **assume that people intend the natural and probable consequences of their actions**.

***Appleby* and *Proudlock –*Legal and Evidentiary Presumptions**

Leading cases on legal and evidentiary presumptions prior to the Charter:

* ***Appleby***: **Legal** **presumptions require the accused to disprove the presumed fact on a balance of probabilities**.
* ***Proudlock***: when dealing with an evidentiary burden, accused must point to evidence which is capable of raising a reasonable doubt.

Application of the Presumption of Innocence to Issues other than Elements of Offences

**Reverse onus of proof offences**:

* If Crown proves certain facts, it is **assumed that another fact is true**. The **burden is then on defence** to disprove that fact.
	+ “In absence of evidence to the contrary” – *must raise a reasonable doubt*
	+ “Unless accused establishes that he or she did not” – *balance of probabilities*
* **Reverse onus cases violate the presumption of innocence**.
* Use the ***Oakes* test** to determine if it is a **permissive presumption**.
	+ Permissive presumption= if X you *may* infer Y.
	+ Mandatory presumption = if X you *must* infer Y (Charter issues here).
* Reverse onus of proof often based on the **difficulty for society to see what is in your mind** and private life.
	+ The accused has access to that information and can testify towards it.
* **If an accused must prove something on BoP to be found not guilty, provision violates presumption of innocence**.

***Downey –* Infringement of s. 11(d)**

**Facts:** Accused charged with living off the avails of prostitution.

* If found to be living with or habitually in the company of a prostitute, must prove you are not living off the avails.
	+ Provision requires that you must raise a reasonable doubt to rebut the presumption.
* **Presumption of innocence violated (s. 11(d)) so s. 1 analysis must occur**.
* Apply ***Oakes* test** 🡪 the provision passes because all you must do is point to evidence raising a reasonable doubt.
	+ It does not require accused to testify himself.
* Protection of vulnerable prostitutes and prosecution of pimps is an important societal issue.
* **To determine if there has been infringement of s. 11(d)**, it must be decided whether the presumption under attack could lead to the result that an accused person would be found guilty even though a reasonable doubt existed as to that guilt.
* This **happens when accused has to prove something on balance of** **probabilities** (i.e. “establish” it)

***Laba –* RationalConnection test from *Oakes*, Reverse Onus**

**Facts**: Df charged w/illegally selling precious metals under CC and challenged validity of it for violating presumption of innocence.

* ***Modifies the rational connection test***, showing that reading out the unconstitutional part is a possible remedy.
* **No general requirement that a presumption be internally rational** to pass rational connection stage of proportionality test.
	+ Only relevant consideration is if presumption is a logical method of accomplishing legislative objective.
* Minimal impairment and proportionality of *Oakes* not met due to excessive invasion of presumption of innocence, lack of balance between impairment/rights violation and advancement of the provision’s purpose.
* This statute required that the defendant prove on balance of probabilities that the metal wasn’t stolen.
* It is justified that accused must prove to some extent that it was not stolen.
* Remedy: read out “unless he establishes that”, read in “in the absence of evidence which raises a reasonable doubt”.

**CHAPTER FOUR: THE ELEMENTS OF AN OFFENCE**

**Structure for Analysis of *Actus Reus***

**Actus reus** consists of:

1. ***Conduct*** – voluntary act or omission (required for all offences)
	* Must be voluntary 🡪 **act or omission directed by the conscious mind of the accused**.
2. ***Relevant circumstances*** (all offences)
	* This is what makes the conduct criminal.
	* Can include positive and negative (e.g. absence of justification or excuse) elements.
3. ***Consequence or result*** (some offences)
	* Specific consequences aren’t always required but some crimes have them in their definitions.
	* This makes them part of the actus reus and therefore the Crown must prove them.
	* **Causation** is an issue here 🡪 Must be proved that accused caused the prohibited result with their prohibited conduct in the relevant circumstances.
	* Common example: Do X **with the purpose** of Y.

**Structure for Analysis of *Mens Rea***

* **General rule**: mens rea is a required element of “true crimes” but not public welfare or regulatory offences.
* **Subjective mens rea**: The **accused’s actual state of mind**, personal fault.
* **Objective mens rea**: what the accused, as a **reasonable person**, ought to have had in mind.
* **General rule for statutes silent on mens rea: proof of intent, knowledge (incl. willful blindness) or recklessness**.
* General mens rea requirements for the actus reus:
1. Conduct: must be **voluntary**, i.e. directed by the accused’s conscious mind.
2. He **knew of the circumstances**, was **willfully blind** as to their existence or was **reckless** as to their existence.
3. He **intended** the consequence, was substantially certain it would occur, was willfully blind or reckless to its occurrence.
* The following are NOT true mens rea: negligence, strict liability, absolute liability
* Two types of intent: **general** (to do the act) and **specific** (subjective foresight of the consequences of the act)

**Concurrence of *Mens Rea* and *Actus Reus***

* Basic principle: ***where mens rea is required, it must concur in point of time with the actus reus*** 🡪 **single transaction rule.**
* However, minor variations between accused’s plan and execution will not prevent a finding of guilt.

***R. v. Clark* 2005 1 S.C.R. 6 – Statutory Interpretation**

**Facts**: Guy who is having a romantic evening with his right hand, blinds open, neighbor is a peeping pervert.

* Provision requires the person ***willfully*** does an indecent act either (a) in a public place in presence of other people or (b) in any place with the ***intention*** to insult or offend any person.
	+ (b) has the extra **specific** mens rea requirement - intent to insult or offend by doing the conduct
	+ therefore (b) has implicit assumption that there is knowledge people are watching
* Trial court ruled Clark didn’t know people were watching so only (a) in question: was his house a *public* place?
* Public place: he was in his house but could be seen from outside 🡪 doesn’t count as public so he is not guilty.

# III. ELEMENTS OF THE OFFENCE: ILLUSTRATIVE CASES

***Kirkam –* “Wilfully” and Double Intent**

**Facts:** Prosecutor gets RCMP to survey jurors, tried to cover it up by excluding surveyed jurors. He didn’t tell judge or df counsel.

* “Everyone who wilfully attempts in any manner to obstruct, pervert or defeat the course of justice” – not specific.
* “**Wilfully**” means that the conduct must be deliberate *and* it was intended to defeat the course of justice.
* Two types of intent: **general** (to do the act) and **specific** (subjective foresight of the consequences of the act)
	+ This is known as **double intent**
* Judge finds that Kirkham had general but not specific intent – mens rea here was **subjective** 🡪 not guilty.
* You can use logical inferences to determine if the person did the conduct with intention of the consequences.

***Felawka –* Double Intent**

**Facts:** Guy takes rifle on Skytrain wrapped up in jacket, jokes he’s going to kill people 🡪 Charged with carrying concealed weapon.

**Issue**: is there a secondary mens rea that the gun is being concealed for a sinister purpose?

* Elements: (1) Carrying (2) a weapon (3) and concealing it. Must it be for unlawful purpose or is just concealing enough?
* Must consider the aim or object of the section – to fill its aim, requisite intent or mental element should be that the accused intended to hide from others an object he knew to be a weapon 🡪 i.e. **general** intent, not specific.
* To prevent conflict with provincial gun laws, judge decides that guns tied in canvas or in cases aren’t concealed.
* Judge decides that evil intent isn’t necessary for this offence – mental element is that he intended to conceal it.
	+ Must charge everyone for the greatest good – can’t have people wandering around w/concealed weapons.

# INCLUDED OFFENCES

**General rule**: accused can only be convicted of offence with which he is charged EXCEPT “included” offences.

* CC can specify included offences or you look to **s. 662(1)** of the CC which gives these 3 ways:
	1. “as described in the enactment creating it” – for offences that are necessarily committed in the commission of the offence charged (e.g. assault is part of assault causing bodily harm) – it is a necessary step
	2. “as charged in the count” – depends on how Crown drafts the charge (e.g. “attempt to murder by stabbing” includes assault through the mention of stabbing)
	3. “an attempt to commit” the charged offence – it is always included through s. 662(1)(b)
* You must also consider the case law to determine if section has been interpreted to include other offences.

**CHAPTER FIVE: THE REQUIRED ACT OR OMISSION: *ACTUS REUS***

***Terrence - Control***

**Facts:** Kid riding in car finds out that car is stolen when cops come but didn’t know before. Charged with possession of stolen goods.

* Judge decides that **there must be an element of control**, which Terrence did not have – therefore not guilty.

***Canadian Charter of Rights and Freedoms*, s.11(g)**

* Gives right to not be found guilty of any act or omission unless it was an offence at the time.
* Parliament can make omission a crime or statutes are set up generally so failing to act is a crime 🡪 ***Moore, Kirkam.***

***Fagan v. Commissioner of Metropolitan Police – Omissions, Concurrency***

**Facts:** Guy who drives the car onto the cop’s foot unknowingly then refuses to move the car for a bit once he knows.

* Judge finds that a **mere omission cannot be an assault**.
* **Mens** **rea can be superimposed on an existing act**.
* Fagan **became guilty when he** **later became aware and refuses to alter his actions.**

***Cooper – Concurrency***

**Facts:** Guy who is super wasted and chokes his girlfriend to death, blacked out while in the act of choking her. Was there intent?

* **Concurrency**: it is the intent of the accused that makes the wrongful act illegal, causes blameworthiness.
* **Simultaneous principle:** mens rea must be concurrent with impugned act OR **superimposed on an existing act**.
	+ Innocent acts become criminal when accused acquires knowledge of nature of act and refuses to change course.
* **Single transaction 🡪Not necessary for mens rea to continue** through commission of act – just **must coincide at a point**.

***Moore – Duty to ID yourself, Omissions***

**Facts:** Cop asks guy for his name, he doesn’t give it. Charge: “unlawfully & willfully obstructed Officer… in execution of his duty”.

* Judge finds it was cop’s duty to get Moore’s name so **refusing to tell cop counted as obstructing**.
* **Dissent**: Omission can’t be criminal, right to remain silent, no CL duty to ID yourself, duties must be express in statute.
	+ Fact that cop has duty to ID someone is not the same as that person having a duty to ID himself.

***Dunlop and Sylvester – Mere Presence***

**Facts:** Biker gang rape – accused said he was there and saw people having sex but did not participate, victim IDs him as a rapist.

**Issue**: Parties to an offence (**s. 21 of CC**) – does it count if they were merely present at the offence?

* **s. 21(1)(b)** – "Everyone is a party to an offence who: omits to do anything **for the purpose of aiding** a person to commit it…”
* Aiding/abetting: **accused must understood what is being done and by some act on his part assist or encourage**.
* ***Mere presence at the scene of a crime is not sufficient*** *to ground culpability.*
* Must make a **distinction between presence with prior knowledge and accidental presence**.
* It is not enough that the mere presence of a person causes encouragement – **encouragement must be intended**.
* **Presence can be aiding in some situations** – e.g. standing to block an escape route or for purpose of intimidation.

**Causation**

* Levels of homicide:
	1. Manslaughter – requires some wrongful conduct but the intent does not need to go beyond that act.
	2. 2nd degree murder – intent to kill or intent to cause severe bodily harm that is likely to result in death.
	3. 1st degree murder – planned and deliberate, or in the course of committing another offence.
* Evidence of causation is key for each, look to intent/causation to determine what level it is.
* **Factual causation**: fairly technical, any link between conduct and death at all.
* **Legal causation:** includes factual causation but is much stronger, required for legal culpability.

***Smithers – Legal Causation – Level Required for Homicide***

**Facts:** Guy kicks other guy in stomach after hockey game, guy vomits and dies because of faulty epiglottis. Manslaughter charge.

**Issue**: Was there was a causal connection between kick and the death? Would this have normally caused death?

* Jurors can look at evidence besides expert evidence to determine if kick caused vomiting, plus common sense/logic.
* Distinction between **legal causation** and **factual causation.**
* **Crown must establish that for legal causation in homicide the conduct must be outside the *de minimis range***.
* *One who assaults another must take his victim as he finds him*.
* Legal cause **does not have to be the only cause nor does it have to have been able to have caused the death alone**.

***Blaue – Intervening Cause, Thin-Skulled Man***

**Facts:** Guy stabs Jehovah girl who refuses to get blood transfusion, so she dies. Blaue charged with manslaughter.

* Blaue’s argument: refusal to accept blood broke chain of causation.
* If you inflict injury leading to death you can’t get off by sayng victim would have lived by taking greater care of himself.
* A **man who does a wrongful act is deemed morally responsible for the natural/probable consequences** of the act.
* **Chain of causation is only broken if the second cause is so overwhelming as to make the original wound merely part of the history** – only then can it be said that the death does not flow from the wound.
* People who use violence must take their victims as they find them – **thin-skulled man*.***

***Harbottle – Causation for First Degree Murder under 231(5) (Aiding and Abetting)***

**Facts:** Harbottle held down a girl’s legs while his friend sliced her up and killed her – his intervention was essential.

**Issue**: Is his conduct enough that he can be found guilty of first degree murder?

* First degree murder of **231(5)**: “when the *death is caused* by that person while committing …”
	+ Judge feels **“caused” includes both perpetrators and those who assist** them.
* Judge rules that it is **unreasonable to require that they be the pathological cause of death** to be liable.
* Judge holds that the **blameworthiness is indistinguishable** here from the guy who actually did the strangling.
* **Substantial cause test for 231(5)**:
	+ actions of the accused must form **an essential, substantial and integral part** of the killing of the victim
* *Smithers* test not useful – 1st degree requires elevated standard – harsher stigma/punishment, language of statute.
* **Accused may be found guilty of first degree murder under 231(5) if Crown has established BARD that**:
1. Accused was guilty of the underlying crime of domination or of attempting that crime;
2. Accused was guilty of the murder of the victim;
3. Accused participated in the murder in such a manner that he was a substantial cause of death;
4. There was no intervening act which resulted in accused no longer being substantially connected to the death;
5. The crime of domination and murder were part of the same transaction.

***Nette – Legal Causation for Homicide Restated***

**Facts:** Guy B&Es into an old lady’s house and ties her up and leaves. She falls down and is too old to get up, suffocates.

**Issue**: Is Smithers test too low for 2nd degree murder?

* **231(7)**: All murder that is not first degree murder is second degree murder.
* **Legal causation**: concerned with question of whether accused should be held responsible in law for death that occurred.
* Judge determines that Harbottle is only for first degree murder, while Smithers covers the other homicides.
* **Smithers test is valid for 2nd degree murder/manslaughter but should be phrased certain ways:** “significant contributing cause,” “more than minimal,” “substantial cause” – **not** “not insignificant” or “not a trivial cause.”
* Court says stay away from double negatives, Latin, etc. – minimize confusion of juries
* Concern: does changing “not insignificant” to “significant” raise the threshold?
* Homicide = a significant contribution, whereas first degree is an essential, substantial and integral part.

**CHAPTER SIX: *MENS REA*: GENERAL PRINCIPLES**

**Note: *Beaver –* Mens Rea Required for Crimes**

**Facts:** Accused sold a cop what he said was heroin (but was morphine), but he thought it was actually lactose.

* **Subjective mens rea is required for crimes unless statute clearly and specifically states otherwise.**
* Act must be done intentionally or recklessly, w/knowledge of circumstances making it criminal, or with willful blindness.
* **Issue is whether accused *honestly* believed** the package had sugar, not whether he *reasonably* believed it.
* Beaver found not guilty since he had to know it was a forbidden substance for it to count.

***City of Sault Ste. Marie –* Absolute and Strict Liability (Defence of Due Diligence)**

**Facts:** City charged with discharging stuff into creek. They hired company to dispose of garbage for them. Is City also guilty?

* **Absolute liability** = conviction on proof merely that the df committed the prohibited act constituting the actus reus
	+ No mens rea required for accused to be found guilty.
* Benefits: protection of social interests, administrative efficiency, saves money and time in courts, ensures compliance with minor regulations, slight penalties, limited stigma.
* Arguments: violates principles of penal liability, rests upon assumptions, no evidence it causes higher care. Causes stigma through legal costs, time, exposure to criminal law, actual conviction.
* **Strict liability** has a defence of **due diligence*.***

***Lewis –*Motive**

**Facts:** Accused charged with making a kettle bomb for victim’s father but issue of whether he had motive.

* **Intent and motive are distinct** in criminal law but **mens rea only requires intent**, doesn’t involve motive.
* Motive is useful as circumstantial evidence (ID) and for time association (reason to have done it at THAT time).
* **Proved absence of motive** can be useful for raising a reasonable doubt 🡪 important to charge jury on it.
* **Proved presence** of motive may be an important factual ingredient in Crown’s case.
* **Necessity of charging jury is a continuum** – must for proved absence or presence but if in middle 🡪 judge’s discretion.
* Charge to jury must make it clear that there is **no obligation on Crown to prove motive**.

***Buzzanga and Durocher –* “Wilfully” – Excludes Recklessness**

**Facts:** French-Cdns hand out anti-French brochures. Charge: “willfully promoting hatred against an identifiable group.”

* **Recklessness**: foresee that the conduct may cause the prohibited result but take a deliberate and unjustifiable risk.
* **Wilfully** has several meanings – can mean intentionally or recklessly, done intentionally and not accidentally.
* Wilfully here determined to mean with the intention of promoting hatred 🡪 doesn’t include recklessness.
* *By* *using “willfully,” Parliament intended to limit the offence* to intentional promotion of hatred (i.e. not reckless).
* **Test of intention** is **not** **if actor desired the consequence, but if he resolved to bring it about**, even if distasteful to him.
* As a **general rule**, a person who foresees that a consequence is certain or substantially certain to result from an act which he does in order to achieve some other purpose, intends that consequence.
* **Recklessness requires actual foresight that the conduct may bring about the prohibited consequences**.

***Blondin -* Wilful Blindness is the Legal Equivalent of Knowledge/Intent**

**Facts:** Guy brings an air tank full of hash into Canada, said he knew tank had something illegal but not that it was drugs.

**Issue**: Did he have to know it was hash specifically? Did he have to know it was a drug at all?

* He just had to know it was a narcotic of any kind 🡪 Not enough to just know it is illegal in general.
* **Wilful blindness**: willfully shut your eyes to something when you infer what it is.
	+ **Equal to subjective intent** in the eyes of the law 🡪 It is the same as having full knowledge.

***Currie –* Wilful Blindness**

**Facts:** Guy paid $5 to cash cheque. He didn’t know it was stolen.

* **Willful blindness is subjective, not objective**. It doesn’t matter if a reasonable person would have been suspicious.
* That fact that a person ought to have known that certain facts existed does not constitute knowledge for criminal liability.

***Sansregret –*Wilful Blindness versus Recklessness**

**Facts:** Ex-bf acts psycho so she has sex with him so he’ll calm down. She inquires into pressing charges but doesn’t. He does it again. This time she pushes rape charges. He claims he thought that she consented and claims the defence of mistake of fact.

* Defence: **mistake of fact is based on subjective belief of accused**, not on reasonableness.
* 143(a) must involve knowledge woman is not consenting, 143(b)(i) requires knowledge consent given bc of threats or fear.
	+ Therefore **honest belief, even unreasonably held, would make him not guilty**.
* **Recklessness** **must have a subjective element** – one who sees the risk and takes the chance.
* **Wilful blindness**: a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth and would prefer to remain ignorant. ***Equivalent to knowledge***.
* In this case, accused willfully blinded himself and made no inquiry to the nature of the consent.
* Defence of **mistake of fact is negated when accused purposely blinded himself** to that fact.

***Malfara –* Suspicion in Wilful Blindness**

**Facts:** Guy delivers a bundle of clothing to the jail for $50, claims innocence in that he didn’t know it wasn’t just clothes.

* In willful blindness, **question** **is not whether the accused should have been suspicious but rather if he actually was**.
* **The level of suspicion must reach a certain level and specificity** to make up willful blindness.
* Df must *suspect* the fact & realize its probability but refrain from confirming because he wishes to deny knowledge.
* **Level of suspicion must be a “probability”**  - not a bare suspicion or tiny matter of contemplation.

**Transferred Intent**

Two situations in which **transferred intent** applies (i.e. accused will be culpable for crime to Y):

1. *Error in objecto* occurs when the gunmen shoots X but believes he is shooting Y (mistake)
2. *Aberratio ictus* occurs when the gunmen shoots at X but by chance or lack of skill shoots Y (accident)

*The common law doctrine can apply to transfer the intent only when the harm that arose is the same legal kind as that intended* .

**CHAPTER SEVEN: DEPARTURES FROM THE SUBJECTIVE MENS REA PRINCIPLE**

***City of Sault Ste Marie –* Strict and Absolute Liability, Due Diligence**

**Facts:** City charged with discharging stuff into a creek. They had hired a company to dispose of the garbage for them.

* Full mens rea not required but **due diligence is a defence** 🡪 **strict liability.**
* **Due diligence:** **all reasonable care was taken** – *burden on accused with balance of probabilities****.***
* **Crown must prove the prohibited act BARD, accused must establish reasonable care on balance of probabilities**.
* For **absolute liability,** Legislature must *make it clear that guilt follows proof of the prohibited act* 🡪 No due diligence.

***Levis –* Mistake of Fact, Strict and Absolute Liability, Officially Induced Error**

**Facts:** Accused charged with driving without a license and driving an unregistered vehicle – permits had expired.

* **In strict liability, conduct is assessed objectively against that of a reasonable person in similar circumstances***.*
* **Mistake of fact: accused reasonably believed in mistaken facts** which, if true, would render the act or omission innocent
* **Test to determine whether an offence is absolute liability:**
1. Analytical approach and presumptions of interpretation (from *Sault Ste Marie*)
2. Did legislation intend to make a due diligence defence available? 🡪**Strict liability needs clear proof of legis intent**.
* **Officially induced error defence**: Exception to “mistake of law is not a defence”. **Six elements** must be **objectively** proved:
1. That an error of law or of mixed law and fact was made;
2. That the person who committed the act considered the legal consequences of his or her actions;
3. That the advice obtained came from an appropriate official;
4. That the advice was objectively reasonable;
5. That the advice was erroneous;
6. That the person relied on the advice in committing the act.
* Also take into account the accused’s efforts to get info, clarity/obscurity of the law, position/role of the official, and clarity/definitiveness/reasonable of the information or opinion – to be assessed **objectively**.
* **Passivity and ignorance cannot be considered diligence**.

***Cancoil Thermal Corporation – Charter* and Absolute Liability**

**Facts:** Cancoil charged with failing to meet safety regulations in the workplace – no guard over machinery.

* Act provided defence of due diligence but this defence not provided for provision 14(a) with which Cancoil was charged.
* However, ***to leave this out would make it absolute liability, and since it could have a penalty of imprisonment, this would violate s. 7 of the Charter***. **Therefore it must have due diligence available and be strict liability**.
* **Other defences are available in absolute liability** (necessity, duress, coercion, etc) except for lack of intention.

**CHAPTER EIGHT: *MENS REA* AND THE *CHARTER***

**Fundamental Principles of Justice:** You can call upon these principles to make arguments under s. 7 of the Charter.

To get court to recognize a principle, it must be a legal principle that is usually long-standing and seen as essential to the administration of justice, and must be fairly precisely defined in a manner that yields some predictability.

***Reference Re: Section 94(2) of the* Motor Vehicle Act**

**Elevates mens rea from presumed element to constitutionally required element** 🡪 **Absolute liability can’t result in jail time.**

**Issue:** Is Motor Vehicle Act inconsistent w/s. 7 of *Charter*? There is minimum imprisonment for an offence for which there is no defence and which may be committed unknowingly and with no wrongful intent.

* **Proper approach to the definition of rights/freedoms guaranteed by Charter is purposive.**
* ***Absolute liability offences offend s. 7 and the fundamental principle of the presumption of innocence if they involve imprisonment – but can be salvaged if justified under s. 1.***(i.e. imprisonment of a few is justified)
* ***Compare effects of it as absolute liability to if it were a strict liability offence****.*
* Charter does not remove all absolute liability offences – public interest requires that some offences remain.
* Administrative expediency can only save an offence under s. 1 in cases from of exceptional conditions (e.g. war).
* Court finds that strict liability would work just as well but let the innocent go free, so it is not justified under s. 1.
* If there is imprisonment, at least negligence is required in that at least a defence of due diligence must be open.

**Note: High Stigma Crimes**

Proof of subjective fault (i.e. foresight of death) is required for “high stigma” crimes.

The following cases deal with killing during the commission of other specified crimes – felony murder.

***Vaillancourt –* Objective Foreseeability for Murder**

**Facts:** Df agrees to rob a place and other guy brings “unloaded” gun, kills someone. Df charged w/2nd degree murder through s. 21.

**Issue**: Is s. 213(d) [cause death while committing another offence with a weapon) in violation of the Charter?

* No subjective or objective foresight of death required – just need to prove that accused did the other offence.
* **Justice requires that the mens rea reflect the stigma/penalty attached** to a crime.
* **Conviction for murder cannot rest on anything less than proof BARD of objective foresight** to satisfy the above.
* Presumption of innocence offended b/c df may be convicted despite reasonable doubt on essential element of offence.
* **A different element may be substituted for an essential element** - only valid if upon proof BARD of substituted element it would be unreasonable for trier of fact not to be satisfied BARD of existence of essential element.
* S. 213 subs proof of certain forms of intentional dangerous conduct causing death for objective foreseeability.
* **Question: can you be convicted despite jury having a reasonable doubt as to whether accused ought to have known that death was likely to ensue**? If yes, it is a prima facie violation of ss. 7 and 11 🡪 Judge finds that here.

***Martineau –* Subjective Foreseeability for Murder**

**Facts:** Accused charged under 213(a), B&E’d into a house and his accomplice shot and killed two people.

**Issue**: Does 213(a) violate s. 7 and 11 like in Vaillancourt? Is it justified by s. 1?

* Lamer decides **murder also requires proof BARD of subjective foresight of death**.
* Reason: proportionality to blameworthiness, high stigma, high penalties.
* Lamer finds that 213(a) violates s. 7 and 11 because it removes subjective foresight 🡪 not justifiable under s. 1.

***Logan***

* SCC extended scope of special stigma crimes to include **attempted murder** 🡪 **accused must have intent**.
* Extends to parties.

***DeSousa –* Section 269 of CC – Underlying offence must be objectively dangerous.**

# Facts: Guy throws bottle, it shatters and glass cuts a random. Charged w/unlawfully causing bodily harm. Claims it violates *Charter* because trial judge rules that “unlawfully” includes fed and prov law, including absolute liability offences.

**Issue**: What mental element does it require? Is this element constitutionally sufficient?

* 2 separate requirements: mental element of underlying offence and additional fault requirement of s. 269.
* **Absolute liability offences are excluded from forming basis of prosecution under s. 269.**
* The **underlying offence must be valid in law and** **objectively dangerous** – objective foresight of bodily harm.
* **The harm must be more than trivial and transitory**.
* **No Constitutional requirement that intention extend to the consequences of unlawful acts in general.**
* One is not morally innocent simply because a particular consequence of an act was unforeseen.

***Creighton –* Unlawful Manslaughter**

**Facts:** Guy injects girl with cocaine and she dies, he is charged with unlawful act manslaughter of s. 222(5)(a).

**Issue**: Does the common law definition of unlawful manslaughter violate s. 7 of the Charter? (answer: no)

* **Appropriate standard to be used is that of the reasonable person in the circumstances of the case**.
* **Individualized excusing conditions are not to be taken into account** –**personal characteristics are irrelevant.**
* Exception: people should *not be punished if they lacked the* ***capacity*** *to appreciate the consequences* of the act.
* Manslaughter requires conduct causing the death of another person and fault short of intention to kill.
	+ The fault comes from committing another unlawful act or from criminal negligence.
* **The predicate offence must be objectively dangerous and not absolute liability to be constitutional.**
* “Marked departure” does not require foreseeability of death – just **objective foreseeability of bodily harm**.
* **The foreseen harm must be more than trivial or transitory**.
* **Flexible penalties** allow for wide variety of circumstances and alteration to match level of blameworthiness.
* Perfect symmetry can’t happen because of the thin-skulled man rule – take victim as you find them.
* Policy: need to deter, hold them responsible for the death, sense of justice, a workable test for courts.
* Principles: uniform standard of reasonableness, morally innocent not punishable, personal characteristics not used.
* **Ways to not meet the standard of care**: (1) undertake an activity requiring special care when you aren’t qualified or (2) a qualified person negligently fails to exercise the special care required by the activity.
* **The legal standard of care for all crimes of negligence is that of the reasonable person.**

# *R. v. Beatty* - Penal Negligence

**Facts:** Accused charged with dangerous operation of a motor vehicle causing death after he inexplicably swerves into oncoming travel and kills people – momentary lapse with no other indication of bad driving.

**Issue**: Is a momentary act of negligence sufficient to fill the meaning of s. 249(4)?.

* For negligence, conduct must amount to a ***marked* departure from standard of care that a reasonable person would have *in the accused’s circumstances*** and that **a reasonable person would have been aware of the risks**.
* In **driving offences**, **objective fault is appropriate** for imposing liability because driving is regulated and voluntary.
	+ You choose to drive and put yourself in a position of responsibility, accept the standard of care.
	+ Driving is an automatic activity so it is very difficult to determine a particular state of mind for driver.
* **There must be allowance for exculpatory defences** – consider the circumstances – e.g. reasonable mistake of fact.
* **Personal attributes are not relevant except incapacity –** the same standard must always be used**.**
* **Objective test**:
1. **Actus reus**: the driving was objectively dangerous BARD, considering the circumstances.
2. **Mens rea**: conduct was a marked departure from standard of care of reasonable person in the circumstances. Trier of fact must be satisfied BARD that reasonable person in circumstances ought to have been aware of risk to convict.
* It is not necessary for Crown to prove a positive state of mind (e.g. intent, recklessness, willful blindness).
* Court must consider totality of evidence – including evidence on accused’s subjective state of mind.
* Mens rea not met: no evidence of deliberate intention, momentary lapse of attention insufficient to be marked departure.

**CHAPTER NINE: ABUSES OF PROCESS**

***Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391**

**Facts:** Former Nazis lie their way into Canada so we try to kick them out. Proceedings are slow so the prosecutor asks ACJ to hurry it up, he influences the CJ, then it is announced trial will push through faster. Trial judge gives a stay for abuse of process. Court of Appeal sets aside the stay. In the end, SCC affirms the CA, agrees trial should go forth.

* **Actual** **independence of judges and appearance of independence need to be maintained.**
* Judge should not bend to demands of one party without consultation of the other party.
* **Purposes of stays**: remedy unfairness to individual from **state misconduct**, or for when **prosecution is conducted in such an unfair or vexatious manner** it contravenes notions of justice and **undermines integrity of judicial process** so misconduct is likely to continue or continuing forward w/prosecution would offend society’s sense of justice.
* **No other remedy but a stay must be possible**.
* **Requirements**: Continuing misconduct likely to keep continuing or single instance of misconduct so bad that the mere fact that the trial could go forward would be a huge miscarriage of justice.
* Stay: for when there can **no longer be a fair trial or reliable search for the truth**, or if integrity is compromised.
* You must **balance society’s interests with the interests of the individuals** involved.
* A stay is a remedy aimed at preventing the perpetuation or aggravation of a particular abuse.
* Here, stay isn’t appropriate – abuse won’t continue, using another judge will fix it, Canada’s interests are too high.
* Also, appearance of independence was affected but no evidence that actual judicial independence suffered.
* Factor: prosecutor’s concern about delay was justified – witnesses were old/dying, it had been taking super long.
* **Test for appearance of judicial independence**: objective: would a reasonable observer see it as compromised?

***United States v. Cobb*, 2001 SCC 19**

**Facts:** Canadians fraud Americans in a jewel scam. US wants to extradite them but they said their s. 7 Charter right would be violated. US judge said they’d get maximum sentence, prosecutor said they’d get raped by large men in prison.

* **S. 7 is engaged when issue in court involves liberty/security interest – requires that proceedings be fair.**
* Courts have inherent and residual discretion in common law to control their own process and prevent its abuse.
* **Stays are only for the clearest of cases and are better dealt with by the court where the abuse occurs**.
* Existence of remedies at executive stage do not oust the jurisdiction of courts to preserve their process’s integrity.
* Litigants are protected from unfair, abusive proceedings through the **doctrine of abuse of process**, which bars litigants (including the state) from pursuing frivolous or vexatious proceedings or abusing the courts’ process.
* ***A stay should be granted where compelling an accused to stand trial would violate fundamental principles of justice which underlie the community’s sense of fair play and decency****”* ***or the proceedings are “oppressive or vexatious.”***
* Judge decides that the stay was good, based on s. 7 right and court’s power to control its own process/abuse.
* It is abuse of process to attempt to influence the unfolding of the Canadian judicial proceedings by putting undue pressure on the appellants to desist from their objections to the extradition request.
* Letting the appellants go to such an ominous climate would violate fundamental principles of justice.

***CHARTER* ISSUES**

**1. *Charter* Rights of the Accused**

***Sinclair* – Limited rights to counsel after initial consultation; No right to counsel throughout interrogation.**

**Facts:** Df consulted counsel, then interviewed by cops, kept asking for lawyer, eventually talked to cops.

**Issue**: Nature and limits of right to counsel under s. 10(b) of *Charter.*

**Held**: Initial warning and reasonable opportunity to consult counsel when right is invoked satisfies 10(b). If case changes significantly, accused must be able to consult again. 10(b) Right to counsel is so detainees can get immediate legal advice so they can make informed choices in their dealing with police, decide whether to cooperate.

**Discussion**:

- 10(a) – right to know reason for arrest right away – not required police do it more than once unless reasons change.

- 10(c) – habeus corpus – a continuing right.

- There is a critical right under s. 7 to choose whether to cooperate with police or not – the right to silence.

- State is not obliged to protect suspect against making a statement but it is obliged to allow suspect to make an informed choice about whether or not he will speak to the authorities 🡪 right to counsel achieves this.

- 10(b) has 2 components: (1) informational component requires detainee be advised of his right counsel, and (2) implementation component requires detainee be given an opportunity to exercise the right to consult counsel.

- Duty on police to hold off questioning until detainee has had a reasonable opportunity to consult counsel.

- Compliance with 10(b) doesn’t necessarily mean statement was voluntary and a voluntary statement doesn’t necessarily mean that there wasn’t a breach of 10(b).

- No right to have counsel present through interrogation but constitutional right to counsel re-arises in 3 situations:

1. If there is a material change in circumstances, may be a constitutional right to further consultation.

🡪 this must be **objectively** clear that as a result of change the initial advice is no longer sufficient/correct

1. Non-routine proceduresmay also require further consultation – e.g. line-up, polygraph, etc.
2. If there is reason to question the detainee’s understanding of his 10(b) right.

- Persistence in continuing interrogation when detainee has asserted right to silence several times may raise argument that a subsequently obtained statement was not given voluntarily.

- Ultimate question is whether the accused exercised free will be choosing to make a statement.

**2. Unreasonable Delay**

***Morin* – What constitutes unreasonable delay of trial?**

- Purpose of 11(b) is protection of accused’s individual rights: (1) security of the person, (2) liberty,(3) fair trial.

- Right to **security**: minimize anxiety, concern, and stigma of exposure to criminal proceedings.

- Right to **liberty**: minimize exposure to restrictions from pre-trial incarceration and restrictive bail conditions.

- Right to **fair** **trial**: ensuring that proceedings take place while evidence is available and fresh.

- Secondary societal interest: seeing that citizens accused of crimes are treated humanely and fairly.

- Factors in analyzing whether a trial delay is unreasonable:

1. Length of the delay (must be exceptional, consists of period from date of charge to end of trial)
2. Waiver of time periods

🡪 Waiver of 11(b) rights must be clear and unequivocal with full knowledge of rights and effect of waiver.

🡪 Waiver can be implicit or explicit but the accused must have been aware of what his actions signified.

🡪 Consent to a trial date can suggest waiver, unless it amounts to mere acquiescence in the inevitable.

1. Reasons for the delay:

🡪 *Inherent time requirements*: preparation time (increases with complexity of the case), local practices/conditions, variation between categories of offences, preliminary inquiries

🡪 *Actions of accused* (must be voluntarily undertaken; action/non-action inconsistent with desire for timely trial must be considered, though accused has no obligation to assert the right) and *Actions of Crown*

 🡪 *Limits on institutional resources*: most common and most difficult to reconcile with 11(b), govt has a constitutional obligation to commit sufficient resources to prevent unreasonable delay. There should be a suggested period given to (1) limit tolerated delay, and (2) avoid trial of govt’s budgetary policy.

*🡪 Other reasons*: includes actions by trial judges.

1. Prejudice to the accused: may be inferred from delay length – stress, damage to reputation.

- Balancing process must consider 11(b) rights.

- Inquiry into unreasonable delay comes from an application under s. 24(1) of *Charter* 🡪 burden on accused.

- Must take into account pretrial delay and restrictive bail terms – acceptable delay may be shortened to reflect these.

**3. Privacy**

 ***Tessling***

**Facts**: cops use thermal imaging device on accused’s house, use image to get warrant; df argues s. 8 violation.

- Section 8 of *Charter* provides right to be free from unreasonable search and seizure (reasonable is ok).

🡪 fundamental to state/citizen relation, essence of democratic state, right to exclude from private domain.

- Purposive approach to s.8: privacy is the dominant organizing principle, must consider totality of circumstances

🡪 Emphasis: 1) existence of subjective expectation of privacy, 2) objective reasonableness of expectation.

🡪 Objectiveness - Was matter in public view, abandoned, confidential, already in 3rd party’s hands? Where did search occur? Was it intrusive? Did it expose intimate details? Was use of surveillance tech reasonable?

- Privacy interests include personal privacy, territorial privacy and informational privacy.

🡪 Territorial: place as an analytical tool to evaluate *reasonableness* of a person’s expectation of privacy.

- S.8 should protect a **biographical core** of personal information (lifestyle and personal choices, intimate details).

- Reasonableness line must be determined by looking at *current* information (not future potential of technology).

- Warrantless searches are presumptively unreasonable, absent exigent circumstances.

- Presumption that information about what happens *inside* the home is regarded by the occupants as private.

- No reasonable expectation of privacy possible if you knowingly expose something to the public (or abandon it).

- Subjective expectation is important but its absence can’t be used to undermine the s. 8 protection.

- Here, FLIR isn’t intrusive, doesn’t reveal intimate details, isn’t in general public use, heat info visible to public.

**MISTAKE**

**1. Mistake of Fact**

***Ewanchuk***

**Facts**: Guy claims implied consent when girl stops saying no to his perving.

- Mistake of law is not a defence.

- Consent is determined on basis of complainant’s perspective 🡪 subjective approach.

- Accused’s view comes in for *mens rea* – defence of honest but mistaken belief in consent 🡪 mistake of fact.

- The consent must be freely given – doesn’t count if victim said yes to avoid physical harm.

🡪 Victim’s fear need not be reasonable nor must it be communicated to the accused.

- Mistake of fact is a defence which prevents accused from having the mens rea required.

🡪 Simple denial of mens rea; it does not put burden of proof on accused or require him to testify.

- Silence, passivity or ambiguous conduct does not constitute consent 🡪 implied consent is **not** a defence.

- If victim said no at some point, accused must have obtained clear, unequivocal consent before proceeding.

- Judge should first see if victim wanted it to occur (credibility) 🡪 if not, actus reus is proven.

- Then accused can claim he believed her to be consenting 🡪 honesty of belief must be considered.

🡪 Belief can’t be reckless, willfully blind or tainted.

🡪 There must be an air of reality to the defence.

**2. Mistake of Law**

***Prue and Baril***

**Facts:** Dfs didn’t know that their licenses were suspended and drove, charged with a criminal offence.

- Inclusion of an offence in the CC must be taken to import mens rea, unless there is a clear indication otherwise.

- Dissent: ignorance of the suspension was ignorance of how the law operates 🡪 mistake of law.

***MacDougall***

**Facts**: Df got license back then lost appeal, still drove b/c didn’t know license revoked on losing 🡪 prov offence.

- Court ruled that failure to understand the legal duty was a mistake of law.

- So, w/*Prue* – if offence is a true crime, requiring mens rea, then mistake as to whether one’s license has been suspended is a mistake of fact. If it is a provincial strict liability offence, it is a mistake law and not an excuse.

**Note: *Docherty***

- S. 19 of CC: **Ignorance of the law** by a person… is not an excuse for committing that offence.

- Accused charged w/*wilfully* violating probation order after getting into car while drunk – believed car was broken.

- Can’t willfully fail to comply if you honestly don’t believe you are breaking the law 🡪 S. 19 doesn’t preclude this.

🡪 Where knowledge is a component of the requisite mens rea, absence of knowledge is a valid defence.

***Cancoil Thermal Corporation and Parkinson***

- **Officially induced error of law**: accused led to believe, by wrong advice of an official, that his act isn’t illegal.

**Facts**: Factory charged w/safety violation, had been told it was safe to remove a metal guard from a machine.

- Officially induced error can’t be raised as a defence to a criminal charge, even if it seems reasonable.

- It is available as a defence to an alleged violation of a regulatory statute if accused **reasonably relied** on erroneous legal opinion or advice of an official who is responsible for the administration or enforcement of the particular law.

🡪 Reasonableness depends on accused’s efforts to get proper law, complexity/obscurity of law, rank of the official, clarity/definitiveness/reasonableness of the advice given.

**PARTIES TO A CRIME**

**1. Aiding and Abetting**

***Thatcher***

**Facts**: Theories: accused killed wife or hired someone to do it. Does jury have to concur on one theory to convict?

- Jury unanimity is not required – otherwise co-accused could escape conviction by confusing jury as to which of them actually performed the act, even though they are all equally liable.

- S. 21 of CC (parties to offence) alleviate necessity for Crown to choose between forms of participation.

- Provided jury is satisfied BARD that accused did one or the other, doesn’t matter which actually occurred.

- There is no legal difference between the two – s. 21 takes away the difference.

***Yu***

- To be convicted of murder, df must have had a subjective foreseeability of the death of the victim.

- For an accused to be convicted of aiding or abetting an offence under **s. 21 of CC**, Crown must prove:

1. An offence was committed;
2. There was an act or omission of assistance concerning the offence; and
3. The act or omission took place *for the purpose of* assisting the perpetrator in the commission of the crime.

- Crown must prove BARD that accused was carrying out these acts for purpose of aiding/abetting in the murder.

- You can’t convict on basis that principal had the intent to kill and the accused’s action had effect of aiding him.

🡪 Jury/judge can convict for manslaughter instead if there was no intent to kill on accused’s part.

***Roach***

**Facts:** Guy helps in a phone/prize scam then claims he didn’t know it was a scam.

**Issue:** Can recklessness constitute a basis for the mens rea of an accessory to the commission of a crime?

🡪 Crown must prove accused *intended* to aid. Is recklessness equivalent to knowledge for aiding?

- The appellant’s state of mind is the sole determinant of whether his conduct was criminal.

- “For the purpose of aiding” – purpose is synonymous with intent and does not include recklessness.

🡪 Only actual knowledge or willful blindness will suffice for party liability under s. 21(1)(b).

- Sufficient if accused was aware of type of crime and knew the circumstances necessary to constitute the offence.

- Defendant must not only assist the principal but must intend to do so (not necessary to know the details, though).

**INCOMPLETE CRIMES**

**1. Attempts (S. 24 of CC)**

***Ancio***

- **Mens rea for an attempted offence is the intent to commit the completed offence.**

- **Actus reus: some step towards the commission of offence attempted going beyond mere acts of preparation.**

- Criminal element of offence of attempt may lie solely in the intent 🡪 must intend to commit completed offence.

- Mens rea for an attempted murder cannot be less than the specific intent to kill.

***Sorrell and Bondett***

**Facts**: Guys go to rob a KFC and are foiled by a closed sign because they are shitty criminals. Attempted robbery?

**Issue**: What does “**acts beyond mere preparation**” mean?

- Finding of intention must be founded on inference drawn from all relevant circumstances proved in evidence.

- Finder of fact must first determine intent (question of fact) before deciding if accused went beyond mere prep.

- If intent is proven, acts that would be insufficient will now be sufficient. If intent not proven, acts that would otherwise by fine may be insufficient to show that the acts were done with intent to commit the crime.

***Deutsch***

- Distinction between preparation and attempt is essentially a qualitative one

 🡪 Look at relationship between nature and quality of the act in question and nature of the complete offence.

🡪 Consideration must be given to the relative proximity of the act in question to what would have been the completed offence, in terms of time, location and acts under control of the accused remaining to be accomplished.

- Beyond mere preparation: accused will not be required to do much else to complete the offence.

***Logan***

- Attempted murder is a special stigma crime which requires a subjective level of fault.

***Dynar***

**Facts:** Guy thinks he’s laundering dirty money but it’s a govt set-up with legal money. Can he be found guilty?

- Canada does not recognize a distinction between factual and legal impossibility.

- Only relevant distinction under s. 24(1) is between imaginary crimes and attempts to do the factually impossible.

- Factually impossible: attempt whose completion is thwarted by mere happenstance (eg gun jam, shoot a dead guy).

- Legally impossible: Even if completed, it still would not be a crime (e.g. stealing your own umbrella).

- No distinction: both have mens rea – mistaken belief can’t be eliminated from your mental state b/c it’s mistaken.

- Imaginary crimes: s. 24(1) requires element of “intent to commit an offence” 🡪 but here, there is no offence.

- S. 24(1) draws no distinction between attempts to do the possible but by inadequate means, attempts to do the physically impossible, and attempts to do something that turns out to be impossible “following completion.”

🡪 All are crimes. Only imaginary crimes are not.

- Knowledge, for legal purposes, is true belief (subjective). Truth (objective) is unimportant to mens rea of accused.

- Law of attempt is engaged only when the mens rea of the completed offence is present entirely and the actus reus of it is present in an incomplete but more-than-merely-preparatory way.

- Motivation is irrelevant to intent. What is important: not what motivated df, but what df believed he was doing.

🡪 Crim law punishes undesirable conduct – doesn’t matter if conduct was done for a good reason.

**DEFENCES**

**1. Introduction**

***Cinous***

- Defences raised by an accused must have an **air of reality** before being put to the jury.

🡪 **TWO-PRONGED TEST**: is there (1) **evidence** on record (2) on which a properly instructed jury acting reasonably **could acquit** if it was believed to be true? 🡪Reasonably capable of supporting an acquittal.

🡪 Judge can’t consider credibility, weigh evidence, make findings of fact, or draw determinate factual inferences.

- Must be supporting evidence for defence to be put to jury – and as long as there is, the judge must put it forth.

🡪 Can’t invite verdicts not supported by evidence or risk confusing the jury.

- Judge must put to jury all defences arising on facts, whether or not they’ve been specifically raised by an accused.

- Trial judge has a positive duty to keep from the jury defences lacking an evidential foundation.

- Air of reality test imposes burden on accused that is merely evidential, rather than persuasive.

🡪 There is no requirement that the evidence be adduced by the accused.

- Judge must consider totality of the evidence and assume that the evidence relied upon by the accused to be true.

🡪 If no direct evidence for an element, can it be reasonably inferred from circumstantial evidence?

- Air of reality test is a question of law – subject to appellate review.

- Air of reality test **must be applied to each element**.

**2. Mental Disorder and Automatism**

***Brown***

**Facts**: Crazy man thinks someone is shooting lasers at his trailer so he shoots his neighbor, gets in shoot-out w/cops.

**Not Criminally Responsible Due to Mental Disorder – s. 16 of CC:**

🡪 Trier of fact must first consider if Crown has proven actus reus, then whether df met onus of proving on **balance of probabilities** that NCRMD applies. If it doesn’t, consider if Crown proved mens rea BARD.

- Issue with s.16: Must prove on BoP that due to mental disorder df was (1) incapable of appreciating the nature and quality of the act or omission, or (2) knowing that it was wrong.

- Df must be incapable of understanding that the act is generally condemned (not of knowing it’s against the law).

🡪 Or believes that it would be “right” according to the ordinary morals of his society.

🡪 If he knows the act would have been morally condemned by reasonable members of society 🡪 guilty.

- To be legally culpable, accused must (1) have ability to know that a particular act was wrong in the circumstances, and (2) possess the ability to apply that knowledge in a rational way to the alleged criminal act.

- Legal principles involved in NCRMD:

1. Df not liable if he commits an act while suffering from a MD that rendered him incapable of knowing that the act was contrary to law, or that the act breaches the standard of moral conduct that society expects.
2. Not sufficient to decide accused’s act was a result of a delusion 🡪 might have still known it was wrong.
3. Inquiry focuses on ability to know that a particular act was wrong in the circumstances. To be sane, accused must possess the ability to apply that knowledge in a rational way to the alleged criminal act.
4. Inability to make a rational choice may be from delusion which makes accused perceive act as right or justifiable, or a condition which deprives the accused of the ability to rationally evaluate what he is doing.

***Leudecke***

**Non-insane automatism versus NCRMD automatism**

**Facts**: SLEEP RAPE.

- Were df’s actions involuntary? If so, were they the product of a MD? Yes 🡪 NCRMD. No 🡪 Acquittal.

- Automatism: involuntary conduct that is the product of a mental state in which the conscious mind is disassociated from the part of the mind that controls action.

- The cause of the automatism is important in characterizing its nature.

- “Mental disorder” is a legal term in the characterization 🡪 not the medical term.

🡪 Policy: intended to control persons thought to be dangerous.

- Judge should start with presumption automatism is part of a MD, then see if evidence rebuts the presumption.

🡪 Judge must also consider policy: (1) scope of exemption from criminal responsibility and (2) the protection of the public by the control and treatment of persons who have caused serious harms.

- Parasomnia may or may not be a mental disorder, depending on the evidence led in a particular case.

- Two approaches to distinguish insane from non-insane automatism:

1. Look to cause of the condition and differentiate between causes internal to accused’s physical or emotional make-up and causes that were entirely external to the accused 🡪 internal more likely to cause recurrence.
2. Examine extent accused, because of nature of condition, posed a continuing danger to the community.

🡪 Both involve concern for recurrence.

- Onus of proof should be on the accused to demonstrate on a BoP that his actions were involuntary.

🡪 Then up to judge to decide if it is non-MD or MD automatism.

- 2 issues are particularly relevant to the continuing danger factor: (1) psychiatric history of accused, (2) likelihood that the trigger alleged to have caused the episode will recur.

- The greater the anticipated frequency of the trigger in the accused’s life, the greater the risk posed to the public and, consequently, the more likely it is that the condition alleged by the accused is a disease of the mind.

- Judges must evaluate both risk of further violence and risk of recurrence of triggering factors.

- At pre-verdict stage, social defence concerns dominate – risk posed by potential recurrence of the conduct.

- At post-verdict stage, emphasis shifts to assessment of actual dangerousness of the person found NCR-MD.

🡪 If there is no significant risk, person receives an absolute discharge (minimize interference with liberty).

**4. Intoxication**

***Daley***

- Accused is entitled to a properly (not perfectly) instructed jury – it is the overall effect of the charge that matters.

- Intoxication can be grounds for an insanity defence if it produces a disease of the mind.

- Drunkenness can render accused incapable of forming the specific intent of a crime.

- Merely establishing you did something you wouldn’t normally when sober doesn’t rebut presumption that you intended the natural consequences of your acts.

- Murder: defence of intoxication will only be available to negate specific intent 🡪 reduce charge to manslaughter.

- Three legally relevant degrees of intoxication:

1. Mild intoxication – never relevant to determination of mens rea.
2. Advanced intoxication – Accused lacks specific intent, raises doubt as to the mens rea.
3. Extreme– akin to automatism, negates voluntariness, complete defence 🡪 non-violent offences only.

- Before judge is required to charge jury on intoxication, he must be satisfied that intoxication’s effect might have impaired accused’s foresight of consequences sufficiently to raise a reasonable doubt.

🡪 Evidential burden is on accused 🡪 df must assert involuntariness and call psychiatric evidence.

**5. Necessity**

***Perka, Nelson, Hines and Johnson*** – **Necessity – s. 7(3) of CC**

**Facts**: Drug smugglers’ boat fails, they dock to avoid ocean death, get charged with importing drugs.

- Necessity: non-compliance with law is excused by an emergency or justified by the pursuit of some greater good.

🡪 Actions are involuntary in that the accused had no other realistic choice.

🡪 **Moral involuntariness** is key criterion – measured by society’s expectation of resistance to pressure.

- Question is ***was there a legal way out***? Act must be inevitable, unavoidable, and have no legal alternative.

- The harm inflicted must be less than the harm sought to be avoided.

- Accused’s fault in bringing about the situation invoked to excuse his conduct is relevant to availability of defence.

- It is not an emergency if the situation was clearly foreseeable to a reasonable observer, or if the actor contemplated or ought to have contemplated that his actions would likely give rise to an emergency requiring breaking the law.

- Mere negligence or engagement in illegal/immoral conduct when the emergency arose doesn’t mean that the person cannot rely on the defence of necessity.

- No onus of proof on accused – he must raise the defence then Crown has burden of proving voluntariness.

- Can be thought of as an excuse (acknowledges wrongfulness of the actions) or a justification.

- Only applies in circumstances of imminent risk where action was taken to avoid a direct and immediate peril.

***Latimer***

**Facts:** Df claimed necessity after killing disabled daughter to relieve her of pain. Held: no air of reality.

- **Three elements** must be present for the defence of necessity:

1. Requirement of imminent peril or danger.
2. Accused must have had no reasonable legal alternative.
3. Harm inflicted must be proportionate to the harm avoided (i.e. avoided must be at least equal to inflicted).

- Not enough that the peril is foreseeable or likely – must be on verge of transpiring and virtually certain to occur.

- First two elements are judged by a **modified objective test**.

🡪 Objective evaluation that takes in account the situation and characteristics of the particular accused.

🡪 But perceptions only remain relevant as long as they are reasonable and accused must honestly believe.

- Third element of proportionality must be judged on an **objective standard**.

- An emergency cannot consist of a long-standing state of affairs.

**6. Duress**

**Note: The Defence of Duress**

- Duress: policy defence that excuses conduct that would otherwise be criminal (i.e. actus reus/mens rea is proven).

- **S. 17 of CC**: excused for committing offence if you believe threats will be carried out (some offences excluded).

- **Carker**: Common law defence of duress no longer available – replaced by s. 17 of CC.

- **Paquette:** Carker rule only applies to actual perpetrator of the offence – s. 21(2) parties can still use common law.

- **Langlois**: S. 17 violates Charter – convicts people who are morally blameless because it is only available to those who were subject to “threats of immediate death or bodily harm made by someone who is present when the crime...”

***Hibbert***

**Facts**: Charged as a party to a shooting, said that he had no choice but to do it and he couldn’t run away.

🡪 Charged as party so using common law defence of duress 🡪 LEADING CASE ON COMMON LAW.

- First question: was the mental element of the offence defined in such a way that either an actor’s motives or immediate desires had any direct relevance?

- Duress can be considered to be a particular application of the defence of necessity.

🡪 Both must be based on **normative involuntariness**.

- **Requirement**: compliance with the law must be demonstrably impossible 🡪 no legal way out.

🡪 judged by a **modified objective standard** (objective w/consideration of accused’s circumstances)

🡪 “Safe escape” – relevant personal circumstances of accused should be taken into account.

***Ruzic***

**Facts**: Guy tells girl he’ll kill her family unless she smuggles drugs into another country.

**Issue**: Do immediacy and presence requirements in s. 17 of CC infringe s. 7? Does it include threats to a 3rd party?

- Moral blameworthiness is essential to criminal liability, is a principle of fundamental justice – protected under s. 7.

- Morally involuntary conduct is not always inherently blameless – if elements of offence are established, accused cannot be considered blameless.

🡪 Duress instead must be thought of in terms in **voluntariness**.

- Strictness of immediacy/presence requirements of s. 17 means people could be convicted for involuntary actions.

🡪 Breaches s. 7 of Charter – so requirements of immediacy and presence must be struck down.

- Common law defence of duress does not have constraints of immediacy and presence.

🡪 Instead, focuses on **safe avenue of escape** through an objective-subjective standard.

- Elements of common law defence of duress:

1. Accused acted solely as a result of threats of death or serious bodily harm to himself or another person.
2. Threats were of such gravity/seriousness that the accused believed they would be carried out.
3. Threats were of such gravity they might well have caused a reasonable person (sharing same characteristics of the accused) placed in the same situation as the accused to act in the same manner as he did.

- Burden of proof: accused must raise the defence and introduce some evidence about it – must have air of reality.

🡪 Burden then shifts to Crown to show, BARD, that accused did not act under duress.

**7. Defence of the Person – S. 34 and 35 of CC**

***Lavallee***

- **Self defence – S. 34(2) of CC –** requires reasonable apprehension of death and no other way to avoid it.

🡪 To be judged objectively – standard of reasonableness.

🡪 Can act on mistaken perception, as long as that perception is based on reasonable/probable grounds.

- Case law has read in a requirement that the threat of harm be **imminent***.*

- Battered women: mental state can’t be understood except in terms of **cumulative effects** of years of abuse.

🡪 Abuse’s **cyclical nature** gives degree of predictability of the violence to come.

🡪 **Expert testimony** can assist jury in determining if the apprehension was reasonable in these cases.

🡪 Woman shouldn’t have to wait for the actual assault to begin before acting in self-defence.

- Question: whether, given the history, circumstances and perceptions of the accused, her belief that she could not preserve herself from being killed that night, except by killing her husband first, was reasonable.

- Expert evidence: assist fact finder in drawing inferences where advanced knowledge is required, help fact finder to comprehend battered-wife syndrome (learned helplessness), assist jury in dispelling myths, help jury understand if perception of imminent harm and belief she must kill to save her life were reasonable, assess nature/extent of abuse.

**Note: *Pétel***

- It is not necessary for accused to actually be assaulted to trigger s. 34(2), as long as she reasonably believed an assault was taking place 🡪 whether accused believed in all circumstances that she was being unlawfully assaulted.

- The assault need not be imminent – imminence is only 1 factor jury should consider in determining if accused had a reasonable apprehension of danger and a reasonable belief she could not escape without killing the attacker.

***McIntosh***

**Facts**: DJ tries to get his stuff back from the victim, victim hits him so accused stabs victim.

**Issue**: If you provoke another person to assault you, can you rely on self-defence when you fail to retreat? S. 34(2).

- Plain meaning approach suggests that 34(2) is available to aggressors – nothing says otherwise.

- Contextual approach: must ascertain Parliament’s intention and give that meaning to the words 🡪 impossible here.

- If two interpretations are available, you must give effect to the one more favorable to the accused.

- **Held**: 34(2) must be available to an initial aggressor 🡪 even if this is an absurd result when contrasted with 35(c).

- S. 37 of CC: self-defence available in any circumstance where force used was necessary and proportionate.

🡪 Serves gap-filling role, providing basis for self-defence when ss. 34 and 35 are unavailable.

🡪 In this case, s. 34 is available, so there is no room for the use of s. 37.

- **Dissent**: Contextual approach, including history of the provision, suggests 34(2) not intended to be available to initial aggressors. Courts should be reluctant to conclude that Parliament legislated illogically.

***Pawliuk***

**Facts**: Guys get in fight over stolen prostitute, one shoots another and claims he didn’t mean to pull trigger.

- **Defence of accident**: must be linked to the concept of absence of intent. Accident = no general intent.

- Guidelines for judges when faced with charging jury on self-defence:

1. Consider evidence to determine which, if any, CC self-defence provisions are available to accused.
2. If one provision is broader, narrower one should only be put to jury if evidence lends air of reality to factual underpinnings of that provision, and it somehow fills a gap unaccounted for by the wider provision.

- If accused apprehended his own death or grievous bodily harm, s. 34(2) is more favorable than 34(1).

🡪 Lack of intention alone doesn’t require judge to put forth both provisions.

🡪 **Differentiating factor** between them is whether accused perceived possibility of death/grievous harm.

🡪 If this perception is at issue, judge should instruct on both provisions.

- 34(1): when force wasn’t intended to cause death/grievous harm and no more force than necessary is used.

- 34(2): when there was an intention to cause death but it was objectively reasonable for the accused to believe he would be killed otherwise. Accused must have subjectively held that belief.

- Not precluded from using 34(2) if you did not intend to kill/cause grievous harm 🡪 available if you did or didn’t.

**8. Provocation**

***Tran***

- Provocation: **s. 232 of CC -** exclusive to homicide 🡪 reduces murder to manslaughter.

- Only applies where the accused had the necessary intent for murder and acted upon this intent.

- 2 elements:

1. Wrongful act/insult of such nature that it is sufficient to deprive an ordinary person of power of self-control

🡪 OBJECTIVE element – question of fact

🡪 Two-fold: (1) a wrongful act/insult (2) sufficient to deprive ordinary person of self-control.

🡪 Can’t be a right sanctioned by law or something incited by accused to give accused an excuse.

🡪 It will account for general characteristics relevant to the provocation in question.

🡪 Particular circumstances accused finds himself in will also be relevant in determining the standard.

🡪 However, accused’s particular feelings NOT relevant – standard isn’t suited to the accused.

🡪 This standard must be informed by contemporary norms of behavior and fundamental values.

1. Accused acted upon that insult on the sudden and before there was time for his passion to cool.

🡪 SUBJECTIVE element

🡪 Two-fold: (1) accused must have reacted to provocation (2) on the sudden before time to cool.

🡪 Accused’s subjective perceptions: what he believed, intended or knew.

🡪 Accused must have killed because he was provoked, not because the provocation existed.

🡪 Suddenness: applies to both the act of provocation and the accused’s reaction to it.

- For provocation to succeed there must be evidence reasonably capable of supporting the necessary elements.

 **9. Relation of Defences to Mens Rea Requirement**

***Nealy***

**Facts**: accused stabs someone – claims self-defence, intoxication, provocation but doesn’t fully meet any defence.

**Issue**: Does a judge have to instruct jury on the cumulative effects of the evidence?

- Provocative conduct of victim may be relevant evidence for the issue of intent (not a defence though).

- Excessive force in self-defence can only reduce murder to manslaughter if related to intent under s. 212 or to provocation 🡪 Meaning that it relates to whether the specific intent for murder was present.

🡪 This doesn’t mean the force was partially justified – it just means that the specific intent wasn’t there.

- All the circumstances surrounding the killing must be taken into account in determining the presence of intent.

- Evidence which may not give rise to a defence alone may, viewed cumulatively, be of great importance in determining the issue of intent 🡪 Must take all the evidence together (e.g. alcohol + provocation).

**SENTENCING**

***R. v. Howitt***

**Facts**: Guy gets caught farming pot, but it’s ok because he got fired from his job and didn’t get rich off it.

- **S. 718 of the CC** – sentencing objectives.

- Principle of proportionality in 718.1 is the overriding element of the sentencing process.

🡪 Punish offender no more than necessary while speaking out against the offence.

- **Conditional sentence**:

1. Offence can’t be punishable by a minimum term of imprisonment.
2. Court must impose a sentence of less than two years.
3. Court must be satisfied that serving sentence in the community would not endanger community’s safety.
4. Must be consistent with the fundamental purpose and principles of sentencing in ss. 718-718.2.
5. Addresses both punitive and rehabilitative objectives.
6. Must achieve objectives of rehabilitation, reparation, and promotion of a sense of responsibility.
7. There is no presumption for or against a conditional sentence.
8. It can, in appropriate circumstances, achieve general deterrence and denunciation. However, for first-time offences (even for low role), it may not be sufficient to achieve these.

***R. v. Morrisey***

**Facts**: Drunk/high guy jumps off a bed, slips, his gun discharges and blasts someone in the face – no intent to kill.

**Issue**: Is 4-year minimum sentence for criminal negligence causing death with a firearm cruel/unusual punishment?

- Standard to be liable for criminal negligence under s. 220(a) is higher than that for civil liability.

🡪 Marked departure from reasonably prudent person as to show wanton disregard for life/safety of others.

- If you have reasonable belief gun is unloaded & you handle it reasonably, you’re not criminally negligent.

- Inquiry into the punishment focuses not only on the punishment’s purpose but also on its effect on the offender.

- If a punishment is merely disproportionate, there is no remedy under s. 12.

🡪 It must be **grossly disproportionate** so that it would be considered abhorrent or intolerable.

- In determining what is grossly disproportionate, court must examine all relevant contextual factors:

🡪 gravity of the offence, personal characteristics of offender, particular circumstances of the case.

🡪 Actual effect of the punishment on the individual, penological goals sentencing principles, existence of valid alternatives, comparison of punishments imposed for other crimes in the same jurisdiction.

- First: evaluate these factors in light of offender’s particular circumstances.

🡪If it is grossly disproportionate, proceed to s. 1 analysis of the s. 12 infringement.

🡪 If it not grossly disproportionate in light of that offender, the court must consider reasonable hypotheticals that could “commonly arise in day-to-day life” 🡪 is it be grossly disproportionate for these?

- Gravity of the offence: look at character of the offender’s actions and the consequences of those actions.

🡪 Greater moral blameworthiness for those who knowingly break the law.

- Particular circumstances of offender/case: mitigating/aggravating factors.

- Punishment’s effect on offender: duration, nature and conditions of the sentence, possibility of day/full parole.

- Penological goals/sentencing principles: Response to pressing problem? Recognized sentencing principles?

🡪Fundamental principle of proportionality is the essence of the s. 12 analysis.

🡪 Presence/absence of any 1 sentencing principle is not determinative in s. 12 analysis.

- Retribution: fundamental requirement that a sentence imposed be ‘just and appropriate’ in the circumstances.

- Hypotheticals: can’t just be existing cases 🡪 must develop imaginable circumstances which could commonly arise

***R. v. Gladue***

**- Facts:** Aboriginal girl gets in fight with husband, stabs him to death.

- **Section 718.2(e) of CC – “particular attention to the circumstances of aboriginal offenders.”**

**-** Mitigating factors: no criminal record, counseling/education, medical condition, remorse, pleading guilty, family.

- Aggravating circumstances: multiple stabbing, chased him down, intent to harm, accused was the aggressor.

- 718.2(e) is not a re-affirmation of existing principles: it alters the method of analysis which each judge must use in determining the nature of a fit sentence for an aboriginal offender.

🡪 Purpose: ameliorate the serious problem of overrepresentation of aboriginal people in prison and encourage sentencing judges to have recourse to a restorative approach to sentencing.

- It requires that imprisonment should be a last resort for all offenders 🡪 must consider alternatives first.

🡪 Goal: reduce incarceration rates, look to restorative justice instead.

- Judges should pay extra attention to circumstances of aboriginals because they are unique.

- 718: gives restorative justice considerations 🡪 restitution, integration into community.

- Aboriginals: there is evidence of racism/system discrimination – they are hardest hit by high incarceration rates.

- Aboriginals have fundamentally different world views, including w/respect to what justice is and how to achieve it.

- Considerations:

1. Unique systemic/background factors may have played part in bringing Aboriginal person before the court.

🡪 Low income, high unemployment, low education, substance abuse, community fragmentation, etc.

🡪These make it so incarceration will be damaging, less likely to result in rehabilitation.

1. Types of sentencing procedures and sanctions which may be appropriate in offender’s circumstances because of his particular aboriginal heritage or connection.

🡪 Different conceptions of appropriate sentencing procedures/sanctions held by Aboriginals.

🡪 Many Aboriginal traditions place an emphasis on restorative justice and community-based sanctions.

🡪 However, they still believe in traditional sentencing goals (deterrence, denunciation, separation).

- Restorative justice considers needs of people closely affected by the crime (victims, community, offender).

🡪 Not necessarily more lenient – may impose a greater burden than a custodial sentence for some.

🡪 Involves offenders taking responsibility for their actions.

- Judge must take into account all circumstances: offence, offender, victims, community, Aboriginal status.

- Accused may be required to put forth some evidence in order to assist judge in arriving at a fit sentence.

- BUT judge must also attempt to acquire info regarding circumstances of the offender as an aboriginal person.

🡪 Can take judicial note of the broad systemic and background factors affecting aboriginal people.

🡪 If this doesn’t occur, a court of appeal can consider fresh evidence relevant to sentencing.

🡪 Judge should give reasons so reviewing court can determine if sentence was appropriate.

- 718.2(e) is NOT an automatic reduction of a sentence – it just tells judges to consider certain factors.

- Application: 718.2(e) counts for all Aboriginals under s. 25+35 of Charter, no matter where they live.

- Even if community support isn’t available, every effort should be made to find a sensitive/helpful alternative.

- Community must be defined broadly to include any network of support available in an urban centre.

🡪 Lack of support network does not relieve judge of obligation to try to find an alternative to jail.

- If there is no alternative to incarceration, the length of the sentence must be considered.

🡪 For the same offence, aboriginal’s length may be lesser than a non-aboriginal’s length.

🡪 For serious/violent crimes, however, sentence length will likely be about the same.

Summary of principles: separation, specific and general deterrence, retribution, rehabilitation

Summary of restorative justice principles: reparations for harm, promoting a sense of responsibility in the offender for the harm done to the victims and the communities.

🡪 SEE S. 718 OF CC.