# Charter Issues

* Remedy can be to exclude evidence under Section 24(2)
  + *Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.*

## Charter Rights of the Accused (Sinclair)

* *Section 10(b) of the Charter (to retain and instruct counsel without delay and to be informed of that right). 5(McLachlin)-1(Binnie)-3(LeBel) split.*
* **No right for counsel to be present during interrogation (no Miranda rights like in the USA)**
* This Charter right ensures the accused is aware of their rights and giving a statement voluntarily
* Section 7 allows the person the right to remain silent. Section 10(b) supplements that by having an informational component and implementational component
  + Informational: advise accused of right to seek counsel
  + Implementational: given an opportunity to exercise right to consult
* 10(b) engaged upon arrest or detention, remedied under s 24(2)
* **Charter rights are not absolute and must be reasonable and balanced against various interests (interest in solving crimes and voluntary statements)**
* Infringement of 10(b) can lead to confessions and statements being inadmissible
  + However, compliance with 10(b) does not necessarily mean the statement is automatically voluntary and admissible. Must look at circumstances as a whole
* McLachlin
  + No right to continuously consult counsel
  + **Right to consult AGAIN in the following circumstances:**
    1. New procedures involving the detainee
       - Non-routine procedures like polygraph, line-up, etc
    2. Change in jeopardy
    3. Reason to believe accused did not understand their 10(b) rights
       - If police undermine legal advice that was given
  + KEY: whether a further opportunity is necessary to fulfill the purpose of 10(b)?
  + Voluntariness: did accused exercise free will in making the statement?
  + Policy reasons:
    - Cannot allow delay in investigating crime, police have a duty to investigate
* Binnie
  + pre-recorded message example and creates legal vacuum for lawyers
  + 10(b) rights will not be given full effect and not meaningful
  + Police not required to stop interrogation when 10(b) is invoked but find justification of providing additional consultation (objective support in the following factors, not closed):
    - Extent of prior contact with counsel
    - Length of interview at time of request
    - Extent of info provided by police
    - Existence of urgent circumstances against delay in interrogation
    - Whether a legal issue has arisen
    - Mental/physical condition of detainee
* LeBel
  + Right to silence, right against self-incrimination and presumption of innocence are core values
  + Need effective assistance of counsel
  + 10(b) provides more than 1 consultation

## Unreasonably Delay (Morin)

* *Section 11(b) rights (to be tried within a reasonable time)*
* Purpose of 11(b)
  + Protect individual right of accused
  + Minimize restrictions on liberty
  + Ensure fresh evidence
  + Speedy trial increase public confidence
  + Societies’ demand for trial of serious crimes
* Remedy is a stay of proceedings
* **Factors to consider for unreasonable delay**
  + Factors are considered **contextually** and balancing the interests protected by 11(b)
  + From issuing of charge to end of trial, excluding waivers
  + Usually evaluated before a trial starts
  + **Accused bears burden of proof**
  1. Length of the delay
     + MUST BE SUFFICIENT LENGTH TO WARRANT ATTENTION BEFORE RAISING IT
     + Period is shorter if person has been in custody
     + Pre-charge time not included but influential in overall determination
  2. Waiter of time periods
     + Explicit or implicit waivers
     + Consent to a trial date gives rise to inference of a waiver
       - Counsel should always present themselves as intending to have a speedy trial
     + Waiver requires clear and unequivocal and FULL KNOWLEDGE of the rights this procedure is protecting
  3. Reasons for delay including:
     1. Inherent time requirement of the case
        + Influenced by local conditions
        + Cases with preliminary enquiry is lengthier
        + Fact dependant and depends on the type/size of case
     2. Actions of the accused
        + Unreasonable applications for adjournments, etc
     3. Actions of the Crown
        + Failure to disclose in time
     4. Limits on institutional resources
        + Most common source of delay
        + Allowance must be made for limited institutional resources
        + ADMINISTRATIVE GUIDELINE IS NOT MEANT TO BE A LIMITATION PERIOD
        + Comparing across jurisdictions can be used as a GUIDE ONLY
        + Changing conditions may place sudden/temporary resource strain
        + Changing conditions should not result in an amnesty
        + Provincial court should be 8-10 months of institutional delay
     5. Other reasons for delay
  4. Prejudice to the accused
     + Longer delay 🡪 more likely of prejudice
     + **Counsel must show willingness to have an early trial** to see if accused actually desired so
     + Must not subvert the principle that the accused has no legal obligation to assert his Charter rights
     + Important factor in determining the tolerated institutional delay
     + CONDUCT OF ACCUSED VERY IMPORTANT
     + Liberty? Personal impacts? (must have evidence)
     + Impact on ability to make full answer and defense

## Privacy (Tessling)

* *Section 8 (Everyone has the right to be secure against unreasonable search or seizure)* – *case involving heat pictures for a grow op*
* Section 8 protects people not places, however places can be a pointer for reasonableness
* Balance between privacy vs protection of society from crimes and law enforcement
* Directing another agency to do the search engages Section 8, but if the agency reports to the police it is not engaged
* No breach of Section 8 if:
  + Warrant is obtained ex parte with full and fair disclosure by the police
    - Must have reasonable and probable grounds in order to obtain the warrant in front of a justice of the peace
  + Person consented to the search
* No freestanding prohibition on technology use without a warrant
* **Key is reasonable expectation of privacy** which involves:
  + Existence of a subjective expectation
  + Objective reasonableness of the expectation
* Personal privacy (strongest protection since it involves bodily integrity), territorial privacy, informational privacy
* Not all information is protected under Section 8. Info on intimate details of lifestyle and personal choice are protected
* **Totality of the Circumstances Test**
  1. Did person have a reasonable expectation of privacy?
     1. What was the subject matter in question?
     2. Did person have a direct interest in the subject matter?
     3. Did the person have a subjective expectation of privacy in the subject matter?
        + Low expectation does not lead to low protection of privacy
        + Absence of subjective expectation does not automatically mean section 8 protection is gone
        + No expectation when exposed to the public or abandoned
     4. Was the expectation objectively reasonable?
        + Major battleground for Section 8 arguments
        1. Place where search occurred
           + Consider nature/quality of information obtained
        2. Public view of the subject matter?
        3. Subject matter abandoned?
        4. Information already in possession of 3rd party?
        5. Was police technique intrusive compared to the privacy interests?
           + Lack of intrusiveness a factor to consider
           + Technology evaluated to its PRESENT capability, not some hypothetical
        6. Use of surveillance technology reasonable?
           + Nature and quality of information?
        7. Exposure of intimate details of the lifestyle? Or biographical data?
           + Exposure of details inside a home?
  2. If there was a reasonable expectation of privacy, did police violate it?
  3. Balancing under Section 24(2): Seriousness of the offence vs reasonableness of the search

# Mistake

## Mistake of Fact (Ewanchuk)

* *Sexual assault case during job interview with repeated advances. Girl too afraid to fight back and did not disclose her fear*
* **No implied consent to sexual assault in Canada**
* Actus Reus
  1. Touching (objective)
  2. Of a sexual nature (objective)
  3. Absence of consent (subjective from victim’s pov, assess credibility of victim. Accused’s mindset irrelevant) – consider 265
* Mens Rea
  1. Intention to touch
  2. Knowing of, reckless, or willfully blind to, a lack of consent on the part of the person touched
     + Honest but mistaken belief in consent is a defence which challenges MR. \*DID THE ACCUSED BELIEVE HE HAD OBTAINED CONSENT?\*
       - In sexual offences, the honest believe MUST BE REASONABLE as well
       - HEAVILY limited by statute 273.1, 273.2
     + Silence, passivity or ambiguous conduct of victim is mistake of law and not a defense
     + Must have air of reality

## Mistake of Law

### Prue and Baril, MacDougall

* CC provisions requires MR
* Mistake of fact under CC could be a mistake of law under regulatory offences (ie. Strict liability offences) because of MR
  + Defense possible under CC but not regulatory offense

### Docherty

* Section 19 – Ignorance of the law – Ignorance of the law by a person who commits an offence is not an excuse for committing that offence
  + Mistake of law not an offence, BUT there is an exception
    - If the provision requires knowledge as part of the MR (ie. Willfully, knowingly, etc), then absence of knowledge is a valid defense.
    - Does not preclude accuse from relying on an honest belief that he/she is not breaking the law

### Cancoil Thermal Corporation and Parkinson

* Mistake of law cannot be a defense to a criminal charge
* Officially induced error *may*, in certain circumstances, constitute a valid defense if it was reasonable in the circumstances and reasonable for the accused to follow it
  + Satisfy ingredients for officially induced error
  + Acts to “excuse” the accused because did not deserve to be punished

# Trials

* Jury trials:
  + Judge provides instructions to jury
  + Judge provides elements of offense/defense
  + Judge assists in pointing out what evidence ties to what element (but does not make factual finding)
  + Brings common sense and community perspectives into the trial
  + Participation on the system leads to legitimacy
  + Counsel usually has input on the judge’s instructions
* Murder trials have to be jury tried unless agreed by counsel
* Trials with multiple offenders create complexities
  + It is more serious and does more damage to society
  + Fair trial issues
    - Evidence against A cannot be used against B
    - Jury might apply the evidence against A if it was not presented for A
  + Separate trials ensures fairness
  + Breaking up a trial is difficult and rarely granted
  + Having separate trials could end up in separate acquittals and the multiple accused won’t be going after each other
  + Separate trials require witnesses to attend multiple times
  + Combined trial allows defense counsel to work together against the Crown and can sometimes lead witness testimony

# Parties to a Crime

## Aiding and Abetting

### Conspiracies

* Only requires an agreement to do an illegal act
* Elements
  1. An agreement existed
  2. Act greed on was illegal
  3. Accused is a member of the agreement
  4. Accused intended to be a member of the agreement

### Thatcher

* *Murder trial when Crown had 2 theories (Thatcher was killer, Thatcher hired someone to do it).*
* Does jury have to be unanimous as to which theory to convict? NO. only unanimous for RESULT. No need to be unanimous on theory or what evidence to believe.
* Aider/abetter and principal is legally irrelevant under the CC
* Crown has no duty to disclose theory to defense counsel
* Charging sheet does not need to specify the theory (ie. Party provision or principle) to avoid escape through technicality
* No need for jury to be unanimous on which theory unless evidence of 1 theory undermines the other theory
* Crown cannot:
  + leave speculative theories
  + throw in another theory at the end of trial
  + change theory if charging sheet specified it
  + change theory on appeal

### Yu

* *2 guys killing a victim. Yu was one of the accused. The other accused ran off. It was clear that Yu played some role (ie. Aiding and abetting).*
* Conviction of aiding and abetting requires requisite intent to be the same as principal
* Crown must prove beyond a reasonable doubt the accused was carrying out the acts for the purpose of aiding and abetting
* Must not convict aider based on MR of the principal
* Best to determine MR of aider and principal independently

### Roach

* *Telemarketing fraud case where Roach was the guy executing the fraud on direction from his “boss”*
* **Can recklessness be used to prove MR under s 21(1)(b)? NO, recklessness does not satisfy MR for aiders and abetters**
  + Even for strict liability offenses aiders MUST have knowledge or willfully blind
  + However, it is sufficient if aider was aware of the type of crime and knew the circumstances necessary to constitute the crime. Aider does not need to know all the facts
* On a policy level, it makes more sense to require a higher form of MR when the role is more peripheral
* Possible for aiders/abetters to argue mistake of fact as a defense (ie. I didn’t know about the fraudulent aspects) to block MR
* MR for aiders are practically more difficult to prove than for principals

# Incomplete Crimes

## Attempts

* Section 24 of CC –
  + *Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out the intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.*
    - Does not matter if the offense could not be ultimately carried out, the culprit is the intent
  + *The question whether an act or omission by a person who has an intent to commit an offence is or is not mere preparation to commit the offence, and too remote to constitute an attempt to commit the offence, is a question of law.*
    - The line between mere preparation to commit the offence vs attempt is a question of law (thus appealable by the Crown)
* Section 660 of CC allows conviction of the attempt if the offence charged is not proven. Thus **attempt is an included offence**
  + **Ie.** when AR not proven, the accused can still be convicted on attempts if MR is proven

### Ancio (sets elements for attempts)

* **Attempts require proving**:
  + **MR**: same as intent to commit offense in question
  + **AR**: some step towards the commission of the offence attempted GOING BEYOND MERE ACTS OF PREPARATION. The AR need not be a tort or moral wrong
* Intent to commit the offense is a basic element of attempt so target is the INTENT
* Recklessness may be used in attempt if available for the substantive offence
  + BUT problem is person can be convicted of an attempt when they didn’t do the AR and was only reckless?
* **MR for attempted murder is a specific/subjective intent to kill**
* MR in such case is harder to prove because in completed offences we infer MR from the AR (in this case there is little or no AR)
  + Use evidence of planning, preparation, etc
  + Motive, admissions 🡪proves intent
  + Draw inferences from activities, circumstantial evidence, outside evidence

### Sorrell and Bondett (how to infer MR)

* *Attempt to rob store but ran away when the person didn’t open up*
* Conduct (AR) can sometimes be used to prove MR because it is unequivocal what the intent was
  + Draw inferences from a guilty face
  + If there can be multiple inferences (ie. equivocal acts) then won’t prove AR
* If MR is proved, equivocal acts may be sufficient to prove AR for attempt
* MR gives context to AR
* Unequivocal acts = usually sufficient to prove MR
* Equivocal acts + no extrinsic evidence = insufficient to prove MR
* Difficult to infer MR from aborted AR
* **Intent is finding of fact**

### Deutsch (how to determine AR)

* **Where is the line between mere preparation and acts sufficient to be attempt? TEST FOR AR?**
* Qualitative distinction involving the relationship between the nature and quality of the act in question and the nature of the complete offence
  + Take into account proximity in terms of time, physical location/proximity and acts under the control of the accused *remaining* to be accomplished
* Case dependant

### Logan

* Attempted murder is a special stigma crime which require subjective level of fault, NO RECKLESSNESS

### Dynar (impossible to complete cannot be attempt?)

* *Person targeted in a sting operation says he cannot be charged under attempt because the crime is impossible to complete*
* **Moral culpability (MR) is key for attempts, not the AR**
* factual impossibility and attempts to do something that turns out to be impossible following completion is sufficient for attempts
* Imaginary crime will NOT suffice for attempts
  + Ie. bringing sugar into Canada believing importation of sugar is a crime
* No such middle ground as legal impossibility in Canada

# Defenses

## Introduction

* Burdens of proof
  + Defenses don’t have to be established beyond a reasonable doubt by the accused
    - Crown needs to disprove defense beyond a reasonable doubt, usually by proving 1 of the necessary elements are missing
    - Some defenses require the accused to prove the elements on a balance of probabilities
      * Usually defenses that counteract societal views and justifiable under the Charter
* **Evidential burden (prima facie test, air of reality test**)
  + Not a burden of proof
  + It is a question of law
  + Judge decides whether the evidential burden has been met before giving it to the jury
  + Some defenses (like automatism) requires the accused to bear persuasive AND evidential burden
    - Discharge persuasive burden on balance of probabilties

### Types of Defenses

1. Justification/necessity/excuse – after the Crown proves all essential elements, the accused meets the elements of a defense
2. Crown cannot prove one of the essential elements due to lack of evidence
3. Crown is blocked from proving one of the elements
   1. Involuntariness 🡪 blocks AR
   2. Mistake of fact 🡪 cannot have the culpable intent 🡪 blocks MR

* #1 and 3 requires judges to instruct juries on these defenses and are defenses put forward by the defense

### Cinous

* Trial judge has duty to put forward all possible defenses, regardless if they were raised by the defense
* Trial judge has NO DUTY to put forward defenses that is not reasonably arising from evidence (“air of reality”)
  + Pre-conference to determine air of reality with the judge
  + Avoids unnecessary jury instruction and confusion
* Could a jury acting reasonably (ie. reasonable inferences can be drawn) acquit based on these defenses? Is there evidence to support each element of the defense?
  + Do not consider reliability and credibility
* *Fontaine* (2004) SCC case (not in curriculum)
  + Changed the test to “is there in the record any evidence upon which a reasonable trier of fact, properly instructed and *acting judicially*, could conclude the defense exists?
  + This case seems to suggest the court may err on the side of allowing the defense, this did not happen in Cinous
  + Uncertain how trial judges will apply this

## Mental Disorder and Automatism

* **Automatism**: commit a criminal act while in a state of impaired consciousness that results in involuntary behavior
* **Must be proven by accused based on balance of probabilities**
  + Medical info + conduct during/before/after offense
  + Motive present = undercuts offense
  + No motive = strong inference it could be MD
* *Swain*
  + Crown cannot force MD defense on the accused unless he opens the door on mental disorder and provides evidence, then the Crown can raise this defense
  + Accused must choose to bring it forward
* Mental disorder is a disease of the mind and a statutory defense under Section 16
  + *16. (1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.*
    - Incapable of appreciating nature/quality of the act/omission OR
    - Incapable of knowing it was wrong
  + *(2) Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities.*
  + *(3) The burden of proof that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party that raises the issue.*
* **Not an acquittal and is still subject to detention (possibly indefinite) or release with some conditions**
* **Whether it is a disease of the mind is a *question of law* and influenced by policy factors (such as danger of reoccurrence)**
  + Absence of continuing danger does not preclude finding of mental disorder
* Rare defenses to bring up
* English law has “diminished responsibility defense” if disorder played some role in committing the crime but not fully satisfied insanity (mental disorder)
  + Canadian law has no such middle ground
  + Canadian law allows evidence of MD/automatism to raise a reasonable doubt on MR and lowers the charge

### Brown (Mental Disorder)

* *Killing of neighbor in trailor/attempting murder of officer because think aliens will attack him*
* Section 16 requires one of the following:
  + Suffer from mental disorder rendering person incapable of appreciating the nature/quality of the act
    - Narrow/rare. Cannot apply if the person believed he was being attached and just reacted based on thinking self-defense was necessary
  + Suffer from mental disorder rendering person incapable of knowing it was “wrong”
    - “wrong” is broadly defined and not only includes legal wrong
    - Includes moral wrongs
    - CAPABLE of knowing it was WRONG will not invoke this defense
    - Usually when people know what they are doing but have a “reason”
    - Perceiving an act was justifiable because of the mental disorder deprives the ability to evaluate what he was doing 🡪 invokes this defense
* Trier of facts may draw the inference that people intend the natural consequences of their act UNLESS NCRMD

### Leudecke (Automatism aka temporary insanity)

* *Sexual assault while sleeping*
* **Automatism**: involuntary conduct that is the product of a mental state in which the conscious mind is dissociated from the part of mind that controls actions (negates AR)
* **Automatism due to mental disorder** 🡪 CC section 16 applies and treated as a mental disorder
  + **Excludes** self-induced alcohol/drugs, concussion and hysteria
* **Automatism due to NON MENTAL disorder 🡪** involuntary, thus AR cannot be established 🡪ACQUIT! (common law defense)
  + Voluntariness is a PFJ under Section 7 and 11D
  + RARE and must have very convincing evidence.
  + Courts are reluctant to apply this
* **Mental disorder** = disease of the mind
  + Question of law. Doctor’s definition cannot be taken at face value. Must be defined LEGALLY
* Trier of facts presumes it is due to mental disorder unless rebutted
* Disease of the mind?
  + Key is whether society requires protection from the accused and whether the accused should be subject to section 16
    - Continuing danger? Consider the following
      * Reoccurrence of the triggering events (not just the likelihood of the reoccurrence of violence)
      * Cause of the condition (external/internal)
      * Policy concerns
      * Administration of justice
      * Possible examples of factual situations? (very persuasive)
* Labeling someone NCRMD does not mean they are crazy and not the same stigma is applied as GUILTY verdict

## Intoxication (Daley) + Jury Charges

* Common law defense
* Jury Charges (appeal courts will review the charge as a whole. Need a properly charged jury, not *perfectly* charged juries)

1. Instruction on the relevant legal issues, including the charges faced
2. Explanation of theories on each side
3. Review of the salient facts which support the theories and case of each side
4. A review of the evidence relating to the law
5. Direct the jury that they are masters of the facts
6. Burden of proof + presumption of innocence
7. Possible verdicts
8. Requirement of unanimity

* Three Levels of Intoxication
  + **Mild:** not a defense (most cases involve this level)
    - **No need to charge jury on defense**
  + **Advanced:** accused lacks specific intent, extent of impairment of the accused’s foresight sufficient to raise a reasonable doubt.
    - **Only a defense for specific intent offenses**
    - Negates mens rea
    - Jury charge
      * Must remind jury if Crown proved specific intent beyond a reasonable doubt
      * Must have a direct link drawn between the effect of intoxication and common sense inference
      * Review evidence of intoxication
      * Remind that mild intoxication is no defense
    - Reasonable common sense inference can be drawn only after assessing all evidence including intoxication
      * Inference cannot apply if intoxication leaves a reasonable doubt
    - Judge not making a link between forseeability and intoxication is not necessarily a reversible error, must look at charge as a whole
  + **Extreme:** very rare and heavily limited by S 33.1 of the CC. acts to negate voluntariness
    - Prove on a balance of probabilities
    - *Daviault* case says that EXTREME intoxication can cause automatism and allowed it as a defense for general intent offences because no voluntariness (and no AR)
    - Parliament responded with s 33.1 to limit to non-violent offenses only
    - S 33.1 never decided on constitutionality but lower courts generally upheld it

## Necessity

* Common law defense
* A broad family of defenses which includes specific applications such as duress and self-defense
* Duress and necessity are directed at third-parties and thus harder to apply
* Self-defense is directed again the attacking party
* Complete defense resulting in an acquittal (attacks voluntariness)
* “no reasonable option for the person”

### Perka, Nelson, Hines, and Johnson

* *Drug smugglers importing drugs into Canada to avoid a storm*
* Crown must disprove beyond a reasonable doubt that one of the three elements don’t apply
  + Must have an air of reality before going to the trier of fact
* Strictly controlled defense which means that if it is border line, judges will err on saying it won’t apply
* **Excuses**: act is wrong but there was a reason to do it so the person should be free
* **Justification**: a challenge against the wrongfulness of an act
* Excuses are more limited than justifications
* **Necessity is an excuse for morally involuntary conduct**
* “it can go no further than to justify non-compliance in urgent situations of clear and imminent peril when compliance with the law is demonstrably impossible”
* **Illegality or contributory fault is relevant but not determinative**
  + Mere negligence of engaging in unlawful conduct when emergency arise will not disentitle the defense
    - But if the harm can be foreseen then too bad…

### Latimer

* *Murder of sick daughter*
* Elements for Necessity
  1. Requirement of imminent peril or danger
     + Modified objective standard
     + Not restricted to immediate threats
     + Harm must be imminent, unavoidable or near
     + Merely foreseeable or likely harm is insufficient
     + Clearly foreseeable circumstance that can be avoided = NO
     + Subjective + reasonable belief
  2. No legal way out of safe avenue of escape
     + Modified objective standard
     + Need not be the last resort imaginable but must have no reasonable legal alternative
     + “demonstrably impossible”
  3. Proportionality between harm inflicted and harm avoided
     + Purely objective
     + Murder is not completely ruled out but is hard to argue it can be proportionate
     + *Harm avoided does not have to always outweigh the harm caused, but 2 harms at a minimum must be of a comparable gravity*
* Modified Objective Standard
  + **Still an objective type of test**
  + Takes into account the surround situation and characteristics of the accused (age, background, experience etc)
  + Accused’s perception of facts relevant BUT must still be reasonable

## Duress

* Common law defense + partly codified by Section 17
* Excuses conduct that are otherwise proven (AR and MR present)
* **Aiders and abettors can use common law defense**
* **Principals can use Section 17 only**
* Similar policy considerations as necessity (actually a specific instance of necessity)
* Closely analogous to necessity since it both involves crimes done to 3rd parties

### Hibbert

* Core elements from necessity must be present in duress (safe avenue of escape/no legal way out)
* Threats of bodily harm can *sometimes* be used to block MR, but only limited to specific intent offenses (depends on the wording of statute, ie. knowledge and desire)
* Person can claim statutory or common law defense even if MR is not blocked
* Mental states in s 21(1)(b) and (2) are not susceptible to being “negated” by duress
  + So this means that aiders and abettors must satisfy the common law defense and cannot simply claim they lack the mens rea

### Ruzic

* *Woman who imported drugs based on duress. Lawyer argued to expand Section 17 defense of duress under the Charter.*
* Crown must disprove duress beyond a reasonable doubt
* MODIFIED-OBJECTIVE STANDARD
* Common Law Defense of Necessity
  1. Threats of death or serious bodily harm to himself *or a third party* (close temporal connection, no need to be immediate)
  2. Belief that the threat will be carried out
  3. Threat were of such gravity that a reasonable person in the same situation would have acted in the same manner
  4. No *safe avenue of escape*
* Common law defense open to aiders and abettors
* Common law and statutory defense open to principals of offences not listed in S17
* Statutory defense open to principals of offences listed in S17
* Statutory Defense
  1. Commit offence under threats of *immediate* death or bodily harm (including 3rd party)
  2. From person *present* when offence committed
  3. Offender believes threat will be carried out
  4. Offence is not listed in S17
  + **Court struck down the “immediacy” and “presence” requirement, substituted with “safe avenue of escape” from a modified objective standard and close temporal connection**
  + **Court did not decide whether the list of offences in s17 should be struck down as well**
  + **“MORAL INVOLUNTARINESS CANNOT ATTRACT CRIMINAL LIABILITY”**
    - Courts connected this to voluntariness in the physical sense and says it should be protected under Section 7
    - Moral involuntary conduct is not always blameless so court did not protect moral blameworthiness

## Defence of the Person

* Statute based justification
* Crown must disprove beyond a reasonable doubt
* An unique form of necessity that is not often used and rarely accepted
* Risk is high because it is in effect admitting to committing of the crime
* No partial defense (ie. missing 1 element will fail, like excessive force)
* Key is to focus on what kind of harm the accused apprehended?

### Section 34(1)

* Harm to self other than D/GBH
* Required Elements
  1. Unlawful assault
     + Includes threats to assaults and gestures
     + Reasonable mistake of fact that an assault will occur is acceptable
  2. Not have provoked the assault
  3. Not intended to cause D/GBH
     + Subjective element
     + Key is that accused did not intend D/GBH, defense can still be used if D/GBH was caused
  4. Force must be no more than necessary

### Section 34(2)

* D/GBH to self (open to initial aggressors)
* Allows intentional infliction of D/GBH
* Open to accused whether he intended death or not, as long as it was caused
* Required Elements

1. Unlawful assault
2. Accused reasonably apprehends D/GBH
   * Modified objective standard
   * Lavallee
3. Reasonable belief he cannot otherwise preserve himself (ie. reasonable way out?)
   * **Not a proportionality requirement**
   * Modified objective standard, including circumstances and attributes of the accused (excluding intoxication)
   * Scopelliti evidence can be lead by the defense to show the character of the victim to see what would have been a reasonable belief

### Section 35

* Virtually useless and subsumed by 34(2)
* Contains a duty to retreat which is not present in 34(2)

### Section 37

* Harm to self or third party (fills gap of 34 and 35)
* Open to initial aggressors and accused who intended D/GBH
* Required Elements
  1. Reasonably believe person is subject to an unlawful assault
  2. Force used must be no more than necessary to prevent the assault
  3. Willful infliction of any hurt must not be excessive
* Fills the gap of 34 and 35. Example is when a person fears D/GBH and responds with D/GBH but fails.
  1. 34(1) cannot apply
  2. 34(2) cannot apply… did not “cause”
  3. 35 fails
  4. 37 fills the gap

### Lavallee

* *Battered woman expert evidence presented at trial (Crown appealed)*
* Expert evidence can be lead for modified objective standards as long as it is highly relevant to the issue (this case confirmed it for battered woman)
  + For any other psychological phenomenon, will require persuading the court on relevancy
* Reasonable apprehension of death and preservation
  + Not legally required to wait until faced with imminent attack (but usually a significant factor)
  + Significant time interval between assault and response may negate self-defense
  + The person’s experience could give them a perception of the level of violence that will occur
  + Modified-objective approach
  + Expert testimony can assist
  + Evidence of prior threats/beatings
  + Being battered does not mean acquittal, must still have an air of reality that it is a self-defense and not just killing due to revenge
* Use of Expert Testimony
  1. Admissible in assisting lay person draw inferences if expert has relevant knowledge/expertise
  2. Difficult for the lay person to comprehend the syndrome
  3. Expert evidence can assist jury in dispelling myths
  4. Expert testimony relating to accused’s ability to perceive danger from mate may go to “reasonable apprehension of D/GBH”
  5. Expert testimony of why an accused remained in relationship relevant in assessing nature/extent of abuse
  6. Expert testimony can assists in assessing “reasonable belief in preservation”

### Petel

* Mistake to the existence of harm is acceptable as long as it is reasonable
* Imminence of assault is a factor to consider but not determinative for reasonable apprehension of danger

### McIntosh

* *5:4 case where 34(1) and 34(2) were interpreted to see if 34(2) was open to initial aggressors*
* 37 is meant to fill the gap between 34 and 35
* 34(2) is open to initial aggressors

### Pawliuk

* When it is unclear whether D/GBH was intended, 34(1) and (2) should be put to the jury
* Difference between 34(1) and (2) is intent
  + 34(2) is triggered on cause, not intent, of D/GBH
  + 34(1) is triggered when D/GBH was not intended (silent as to cause)
* Charging the Jury on Self-Defense
  + consider evidence carefully with a view to determining the essence of the claim to self defense and the CC provision realistically available
  + don’t leave provisions which does not have evidence for each element (air of reality)
  + crown should admit underlying facts if evidence clearly establish constituent elements of a particular provision
  + if there is a wide and narrow provision, only put forth narrow provision if it fills a gap and there is air of reality

## Provocation

* WHAT IS THE STANDARD FOR DISPROVING??

### Tran

* *Cheating wife case*
* **partial defense under statute (section 232)**
* air of reality must be present and is a question of law open for appeal courts to overturn
* defense exclusive to homicide
  + ie. murder 🡪 manslaughter
* not an excuse or justification, partial excuse only
* only applies if accused had necessary intent for murder and acted upon it
* “*insult sufficient to deprive ordinary person of the power of self-control”*
  + Must be interpreted in light of Charter values and social norms
* NOT ALL instances of self-control loss will be excused
* Required Elements
  + Objective: a wrongful act or insult sufficient to deprive an ordinary person of the power of self-control
    - Cases prior to Tran used a modified objective standard
    - **Must be a wrongful act/insult**
      * Excludes cases where accused incited the victim to provoke
      * Excludes cases where victim had “legal right” to do the act
        + The act does not need to be specifically prohibited by law
    - **Wrongful act sufficient to deprive an “ordinary person” of the power of self-control**
      * Objective element in weighing human frailties against protection of society
      * “ordinary person” = informed by contemporary norms of behavior including charter values
        + No place for antiquated beliefs such as “adultery is the highest invasion of property”
        + Appropriate to abscribe to the ordinary person relevant racial characteristics if the accused was recipient of racial slur
        + mental illness can (not certain) possibly be a factor infused into an ordinary person since in *Hill* they said the ordinary person can include particular characteristics that are not peculiar or idiosyncratic
      * Context is relevant in setting the standard
        + **particular circumstances in which the accused finds himself will be relevant in determining the appropriate standard but must take care not to replace this with a subjective standard**
      * Accused’s relationship/feelings towards victim not relevant in the objective element, only in subjective
        + Court took this case to limit the objective test and take out some of the subjective elements
  + Subjective: provocation must have caused the accused to lose self-control and act while out of control
    - **Accused must have acted *in response* to provocation** 
      * Focus on the accused’s subjective perception of the circumstances including what the accused believed, intended, or knew
      * Must have killed because of being provoked and not simply because there was provocation
    - **Whether there was time for his passion to cool**
      * Applies to both act of provocation and accused’s reaction
      * Must be “before there was time for his passion to cool”
      * must strike upon a mind unprepared for it, that it must make an unexpected impact that takes the understanding by surprise and sets the passions aflame
      * must have committed the intentional killing before there was time for his passion to cool

## Relation of Defences to Mens Rea Requirement

### Nealy

* defenses should not be compartmentalized when instructing the jury
* surrounding circumstances and cumulative effect may *itself* raise a reasonable doubt regarding *intent*, EVEN IF it cannot be used to establish a defense independently
  + ie. a mental disorder defense that is unsuccessful
* provocation does not operate as a “defense” but as a relevant item of evidence on the issue of intent
* the judge’s duty is to summarize all the defenses and remind the jury not to compartmentalize

# Sentencing

* often serious offences have a separate sentencing hearing
* guilty pleas allow the accused to have early rehabilitation before the sentencing hearing
* sentencing judge has final word, even if Crown/defense are in agreement for a position
* sentencing judge should give due consideration but has discretion which are not easily reviewable by appeal courts
* should not plea the client guilty if they are not willing to admit guilt
* sentencing hearings are based on submissions by counsel, although evidence can sometimes be called
* documentary evidence is critical
  + ie evidence of rehabilitation, letters of references, etc
* judge needs to take into account the broader circumstances
* pre-sentence report may be ordered if jail sentence is likely (prepared by a probation officer)
  + counsel can present their own research if they disagree
* if there are factual points that cannot be determined, then evidence may be called
* judge will usually focus on victim impact statements
* sentence can range from absolute/conditional discharges
* jail terms usually reach a ceiling at 20 years
* jail terms can possibly be served at home or on weekends
* **fundamental principle**: 718.1 sentence proportionate to responsibility of offender and gravity of offense
  + gives a very broad range of possibilities
* **purposes** of sentencing in 718
  + **denounce unlawful conduct**
  + **specific and general deterrence**
  + etc etc
* judge is duty bound to consider factors in 718.2, but judges can consider other factors as well
  + similar sentence for similar crimes in similar circumstances
  + imprisonment should be last resort
* 742.1 can allow judge to impose conditional sentence for certain types of offenses
  + A jail sentence but not served in custody

## Howitt

* *marijuana grow op case. Conditional sentence?*
* sentencing must take into account the fundamental principle (718.1), sentence must be proportionate to the gravity of the offense and the degree of responsibility of the offender
* Secondary principles (718.2)
* Balance between blameworthiness and gravity of offense
  + A sentence that punishes offender no more than necessary and speaks out against the offense
* Conditional appropriate WHEN following can be realistically achieved (but must keep in mind denunciation and deterrence)
  + Objectives of rehabilitations
  + Reparation
  + Promotion of a sense of responsibility
* Conditional Sentence – 742.1?
  1. No presumption for or against a conditional sentence
  2. Sentence < 2 years appropriate 🡪 consider a conditional sentence
  3. Conditional sentences *may*, in some cases, achieve general deterrence and denunciation
  4. When considering deterrence and denunciation, take note of significant and profitable marijuana industry and impact on the community
  5. Principles of general deterrence and denunciation require jail term for principals of large scale operations even if FIRST OFFENCE, unless there are significant mitigating circumstances
  6. Conditional sentences may not, in some cases, be sufficient to promote general deterrence and denunciation for a 1st time offender, even if the roll was minor

## Gladue

* *Aboriginal sentencing*
* S718.2(2) cannot be used to eliminate minimum sentences
* This can be used **for non-aboriginals as well** if done properly, but will be more difficult than for aboriginals
* Can also consider background & systemic issues for non-aboriginal groups too
* Appropriateness of sanction determined by needs of victims, community, offender
* Sometimes traditional sentencing objectives will be less relevant for aboriginals (ie. more weight to restorative justice and less to deterrence, denunciation, and separation)
* When aboriginal unrepresented, judge needs to acquire info and even request witnesses to be called
* General Principles
  1. CC codifies fundamental principles and purposes of sentencing and factors to consider
  2. S718.2(e) *requires* judges to consider all available sanctions other than jail FOR EVERYONE. BUT pay close attention to aboriginals
  3. S718.2(e) is remedial in nature to resolve overpopulation of aboriginals in prison
  4. S718.2(e) considered contextually with all factors in the CC regarding sentencing 718 and 742.1 (less jail terms)
     + Rehabilitation emphasized more than denunciation
     + Restorative justice rather than punish
     + More use of conditional sentences rather than jail term
     + Over incarceration- not a strong deterrent and only temporary protection
       - Especially aboriginal offenders are representing too big a population
       - This is a crisis that parliament wanted to address via the sentencing provisions
  5. Sentencing is an individual process. Fit sentence for this accused, for this offence, in this community
  6. Aboriginal offenders are unique (2 major factors)
     1. Unique systemic or background factors may play a role in bringing them into court
        + Systemic discrimination, bias, lack of opportunity
        + Discuss specific experiences of the accused
        + Counsel has a duty to bring forth these issues
     2. Types of sentencing procedures and sanctions may differ based on aboriginal heritage/connection
        + If there are other possible options (other than jail), those should be taken
          - Involve the aboriginal community
        + Focus is on restorative justice and the accused to understand what they did wrong
  7. judge may take judicial notice of aboriginal issues
     + priority given in aboriginal cultures to a restorative approach
     + offender may waive gathering of aboriginal information
  8. length of term carefully considered if there is no alternative
  9. s718.2(e) does not automatically reduce a sentence. No jail term does NOT mean leniency
  10. absent specific sentencing programs in the aboriginal community does not mean judge cannot impose sanction taking into account restorative justice and needs of parties involved
  11. s718.2(e) applies to all aboriginals
  12. jail term of aboriginal may sometimes be less
  13. more serious 🡪 more likely sentence will be same as non-aboriginal

## Minimum sentences

* reduces flexibility in extenuating circumstances
* no conditional sentences

## Morrisey

* *charter challenge of 4 year minimum sentence as cruel and unusual*
  + perhaps a challenge under Section 7 (Creighton) will be more successful
    - Creighton decided that manslaughter was flexible thus do not need high mens reas (but now this flexibility is gone…)
* this case is criminal negligence causing death, test is similar to Beatty
  + marked departure from the behavior of a reasonably prudent person *as to show a wanton or reckless disregard for the life or safety of others* (a higher standard than marked departure)
  + criminal negligence may be hard to meet because of available defenses such as mistake of fact
    - ie. hunters. Horseplay while believing the gun is not loaded
* merely disproportionate will not trigger section 12, must be grossly disproportionate such that Canadians will find it abhorrent or intolerable
* Grossly Disproportionate?
  1. Gravity of the offense
     + Understand the “character of the offender’s actions” and “consequences of those actions”
     + Must keep in mind the perspective of the victim
  2. Particular circumstances of the accused and the case
     + Mitigating and aggravating factors
     + Mitigating factors are sometimes assumed (ie. remorse, no criminal record)
  3. Actual effect of the punishment on the offender
     + Nature/duration/conditions of sentence
     + Possibility for day parole?
     + How will the offender be personally affected?
  4. Penological goals and sentencing principles
     + **Response founded on recognized sentencing principles**? Key to section 12 is proportionality (most balancing done without s12, not in s1)
     + **Acceptable under section 12 for having a strong general deterrence principle**
     + Also acceptable for focus on general deterrence/risk to the public, denunciation, retributive justice > rehabilitation and specific deterrence
       - Acceptable under s12 while having a strong and salutary effect of general deterrence
     + Not required for minimum sentences to serve ALL sentencing principles
     + Absence/presence of sentencing principle does not determine constitutionality
  5. Other factors
* Can use test above for offender’s particular case and then section 1 balancing, OR use a reasonable hypothetical and then balance under section 1
* Reasonable Hypothetical
  + Not far fetched or marginally imaginable
  + Cannot be remote/extreme examples
  + Only cases that would reasonably arise
  + Common examples are good enough, does not need to be day-to-day
  + Can be guided by past cases, but not bound by the available cases since not all cases are reported