**VALIDITY OF LAWS**

**Constitutional limitations:**

s. 91(27):

A criminal law must have a valid criminal purpose backed by a prohibition and a penalty.

*Malmo-Levine*:

* There is no principle stating that all criminal laws must adhere to the ‘harm principle’. It is not a fundamental aspect of our justice system. The harm principle is just one of the principles used to pass a criminal law.
* Protecting peace, safety and health can be a valid purpose.
* ‘Harm’ includes harm to one’s self.
* The court must only have a ‘reasoned apprehension of harm’.

**Charter limitations:**

s.1: “…guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be **demonstrably justified in a free and democratic society**.”

1. Is there a **pressing and substantial objective** to the law?
* This is easily met, but how you define the objective is critical to the next three steps.
1. If so, proceed to the proportionality analysis:
2. Is there a **rational connection** between the law and the objective?
* Does the law help solve the problem at hand?
* This is also not a hard test to pass.
* Inferences or reasonable apprehensions are sufficient, there does not have to be a perfect connection between the two.
1. Does the law **minimally impair** the right that has been infringed?
* Does the law go further than reasonably necessary to meet the objective?
* Could the objective have been achieved through narrower means?
* The law must be reasonably tailored to its objectives; it must impair the right no more than reasonably necessary, having regard to the practical difficulties and conflicting tensions that must be taken into account.
* It is not necessary to show that Parliament has adopted the least restrictive means necessary.
1. What is the balance between the **benefits of the law and the infringement of the right**?
* This is a difficult test: deference is inherent.
* Not a standard of reasonable apprehension: the balance must be grosslyout of proportion.
* A good example would be the circumstances surrounding *Insite*.

*R v Oakes*:

Presumption of innocence (s. 11): NCA presumed intent to traffic if found guilty of possession; onus is on D to prove lack of intent to traffic (on a balance of probabilities).

* No rational connection existed: it is irrational to infer intent to traffic on the basis of possession of a negligible quantity of narcotics. There was no minimal requirement, it was over inclusive.

*R v Keegstra*:

Presumption of innocence (s. 11): accused must prove truth on a balance of probabilities if charged with wilfully promoting hatred. The Court found this a valid infringement of s. 11.

* Putting the onus on the Crown would counteract the purpose of the law. The relatively small possibility of truthfulness does not outweigh the harm caused by the wilful promotion of hatred.

*R v Sharpe*:

Freedom of expression (s. 2): at issue is the private possession of ‘products of the imagination’ (i.e. stories and drawings depicting sexual acts with children).

1. Yes: prevention of indirect and direct harms to children, and defending against erosion of societal attitudes.
2. a) Yes: there is a reasoned apprehension of harm to children:
	* grooming, creating a market for child pornography, cognitive distortion

b) The law catches two types of material that have little or nothing to do with the prevention of harm to children:

* + Private works of the imagination by oneself for oneself; and visual recordings of lawful sexual activity made by or depicting the person in possession and intended for private use.
	+ Since the creation came from him or her in the first place one would not expect there to be significant cognitive distortion.

c) The infringement is disproportionate with regard to the two exceptions.

* + Personal writings and journals may be well of importance to self-fulfillment and “…this deeply implicates s. 2(b)”.
	+ The restriction “…regulates expression where it borders on thought”.

s. 7: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof **except in accordance with the principles of fundamental justice**.

* **Vagueness**
	+ The law need not identify its exact scope, but must be precise enough to identify the “zone of risk”.
	+ **Arbitrariness**
	+ Where there is no connection between the objective and the effect of the law.
	+ **Overbreadth**
	+ Where the law goes too far and interferes with conduct that bears no connection to its objective.
	+ **Gross Disproportionality**
	+ Where the effect of the law is grossly disproportionate to its objective i.e. it is so severe it violates our fundamental norms.
* Note: these principles compare the infringement of an individual’s rights with the object of the law and NOT the law’s effectiveness – the test is qualitative, not quantitative

*R v Bedford*:

* + s. 210: being an inmate, keeper, or someone found in a bawdy house.
	+ This law was grossly disproportionate in ‘preventing a nuisance’ while putting safety at risk – it included someone operating out of their own home.
	+ s. 212(1)(j): living off the avails of prostitution.
	+ This law was overbroad in capturing a number of non-exploitative relationships, some of which may increase safety.
	+ s. 213(1)(c): communicating for the purposes of prostitution.
	+ This law was grossly disproportionate in ‘preventing a nuisance’ compared to the harm it may cause.

*R v Heywood*:

“If the means are broader than necessary, principles of fundamental justice are violated as an individual’s rights are limited for no reason.” The accused had prior conviction of sexual assault and was found loitering near a playground. The law prohibited being “at a park where children may be expected to be present”. It was overbroad in geography, time, number of persons it encompasses, and with no notice to the accused.

**s. 7 Limitations to Mens Rea Requirements**

* Absolute Liability offenses that have imprisonment available as a punishment violate s. 7 of the Charter:
* Imprisonment without a defense is contrary to principles of fundamental justice
* The fundamental principle is that the innocent should not be punished
* You could be imprisoned without a guilty mind
* Murder requires **subjective foresight of death** (*R v Vaillancourt, R v Martineau*)
	+ Attempted murder (*Ancio*) and theft also require subjective fault
* There must be **proportionality** between the fault standard and the stigma and punishment
	+ The proportionality is flexible, it need not be perfect
* It is valid to have strict liability with objective foreseeability, and then prove causation:
	+ **Objective foreseeability of** **non-trivial bodily harm**:
		- Unlawful act causing bodily harm (*R v DeSousa*)
		- Manslaughter (*R v Creighton*)
* Common intention under 21(2)
	+ Only exceptions to the objective standard are murder, attempted murder and theft.

**ELEMENTS OF AN OFFENCE**

**Charging Sheet**

Describes the particulars of an offense, and can be more specific than the code provision but doesn’t have to be (limited by distinguishing factors in assault vs. assault causing bodily harm, murder vs manslaughter, etc.). The Court can only modify particulars to match the evidence if it would prejudice the accused, i.e. if the accused would have taken another course of action.

*R v Saunders:*

The Crown charged D with importing heroin; however they gave evidence of importing cocaine. The Court found that **proving particulars is a fundamental principle** and the Crown had not done so in this case.

**Included Offenses:**

Two or more offenses can be charged together provided that all the elements of the lesser offense are included in a more serious offense.

**Interpretation**

“The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”

*R v Par*é

* + - * + Did he commit murder “while committing” the indecent assault?
* Strict construction: the court should adopt the most favourable interpretation for D, but **only if there is reasonable doubt** to the interpretation.
* The court found the narrow interpretation was not reasonable given the scheme and purpose of the provision, and the distinction between beginning and end would irrational. The result is that “while committing” includes a single sequence of events.

*R v Clark*

* Accused was masturbating in his house in front of a window. Charged with “indecent act in a “public place”. Court found that public place requires physical access for the public.
* This makes the provision more coherent; the CC differentiates between “public place” and “exposed to public view” in other provisions.

*R v ADH*

* She gave birth to a baby in a store toilet and thought it was dead. Does “unlawfully abandon or expose a child…so the child’s life is endangered or health permanently injured” require subjective or objective intent?
* Parliament intended subjective intent: it is always presumed (**presumptive principle of criminal justice**); the provision was very broad; objective fault is typically very clear.

**BURDEN OF PROOF**

**Beyond a Reasonable Doubt**

*R v Lifchus:*

More than “probably guilty”

Less than “beyond any doubt” or “absolute certainty”

Not “imaginary or frivolous doubt”

Not “natural ordinary sense”

*R v Starr:*

* It falls “much closer to absolute certainty than a balance of probabilities”
* It has a special meaning that must be explained to juries

Jury instruction:

* Step 1: If you believe the accused, after looking at all the evidence, then acquit.
* Step 2: If you don’t believe the accused, but you find value in the evidence that amounts to reasonable doubt, then acquit.
* Step 3: If you find the Crown’s evidence so credible that you can convict beyond a reasonable

Credibility of testimony:

* Merely believing the victim’s story is more likely to be true than the other is not sufficient to convict, but merely believing the accused’s side is more likely to be true than the other may be sufficient to establish reasonable doubt.

**Evidence**

Not every piece of evidence must be proven beyond a reasonable doubt.

Direct: Something that directly shows the entire crime committed.

Circumstantial: Something not ready to use directly, you must draw an inference from it.

* To convict solely on circumstantial evidence, the evidence must not permit any other rational conclusion besides guilty

“No Evidence Motion”: if there is no evidence that could lead the judge to reasonably convict.

* Take evidence at its highest and assume its credible
* If one reasonable inference is that the accused is guilty, it passes the test.
* *R v Charemsky*: the case was entirely circumstantial but the evidence showed opportunity, motive, and knowledge of the manner death before it was made public.

**Witnesses**

Special consideration must be taken with Vetrovec witnesses: can be accomplices or a "disreputable witness of demonstrated moral lack".

*R v Kyllo:*

The witness has inherent credibility issues (criminal record which includes crimes of dishonesty, history of drug use, and inconsistency in statements). The Court finds reasonable doubt in his testimony: there was not enough corroborating evidence to erase a reasonable doubt.

**Reverse Onus** clauses target a certain aspect of the offense that can be difficult to prove, such as mens rea. Some examples of terminology:

* “You may draw this inference in certain circumstances”
	+ Simply reminds the trier of fact that it may be an inference to draw in certain factual circumstances, it is not a mandatoryinference.
* “The accused shall be convicted, unless there is evidence to the contrary”
	+ The accused only needs to raise **reasonable doubt** on that issue.
* “The accused must establish to the contrary”
	+ Higher requirement – the accused must prove on **balance of probabilities**.
	+ See *Oakes* and *Keegstra*
	+ The presumption of innocence is infringed whenever the accused is liable to be convicted despite the existence of a reasonable doubt.
	+ This can be justified in circumstances where reasonable doubt would almost always be found, such as proving “living off the avails” (*Downey*).

**IDENTITY**

The crown must prove, beyond a reasonable doubt, the identity of the person who committed the offense.

*R v Sheppard:*

Officer was told the accused was in a cab, accused was found in a cab with blood on him. Said he wasn’t sure if he punched the victim. A witness, a friend of the accused, was with him and told the cop he was not the person who punched the victim. This caused reasonable doubt as to the identity of the person who punched the victim. It was circumstantial evidence vs. direct evidence.

**ACTUS REUS**

Physically voluntary, act or omission, sometimes in certain circumstances, sometimes causing certain consequences.

**Concurrence**

This is an essential element.

Mens Rea and Actus Reus must **coincide at some point**.

*R v Cooper*: the accused formed the intent and started to harm victim before he blacked out. Mens Rea did not overlap with the actual death but the two coincided before he blacked out.

**Causation**

Factual causation: “but for” test; not enough to convict.

Legal causation: factual causation plus something more.

* Manslaughter*:* the accused must have been a **significant** **contributing** cause of the victim’s death.
	+ *R v Smithers:* kicked a man who subsequently choked on his own vomit; used the term ‘de minimus’*.*
* Second Degree Murder: the accused must have been a **significant** **contributing** cause of the victim’s death.
	+ *R v Nette:* broke into home, victim bound and left in that position, replaced ‘de minimus’ with ‘significant’.
* First Degree Murder: The accused must have been a **substantial** cause of the death of the victim.
	+ *R v Harbottle –* held down the victim while companion murdered her.

If there are **intervening factors**, the Court looks at:

* **Reasonable foreseeability** of the intervening act**:** not the specific act, but the general nature of the intervening act and the risk of non-trivial harm. The more extraordinary or unusual, the more unreasonable.
* **Indepedence** of the acts: must not ‘by nature’ overwhelm the accused’s actions. Should be a direct response and directly linked. Look at the relationship between the acts and the connections in time, space, circumstance, nature and effect.

*R v Maybin:* the court found the risk of intervention by a bouncer was reasonably foreseeable, and his response was so directly linked and closely connected that it did not overwhelm the accused’s actions.

**SUBJECTIVE MENS REA**

The key is a **basic awareness of the circumstances**. Substantial certainty is enough.

Motive is not an essentially element.

* + - It can be used as evidence to help Crown show identity and intent (*R v Lewis:* kettle bomb).
		- “For the purpose of” means knowledge, not desire; and "intention in common" means that principal and the aider must have the same unlawful purpose in mind, but not the same motives and desires (*R v Hibbert:* the accused aided the principal under duress).

General Intent: you need to prove a fairly general mindset.

Specific Intent: you need to prove a narrow mindset.

* Examples: assault vs. assault causing bodily harm; possession vs. possession for the purpose of trafficking.
* Specific intent is usually written as “for the purpose of” or “with the intent to”

**Wilful Blindness**: If you have a strong degree of suspicion and you deliberately fail to make inquiries.

* Legally, it is the same as actual knowledge (*R v Briscoe:* drove principal to golf course where he murdered a young girl).
* It is not the same as recklessness (*R v Sansregret*).

**Recklessness:** If you subjectively perceive risk and proceed despite that risk.

* Not “should’ve seen risk” but “saw risk”.
* **“Wilfully” does not include recklessness** unless it is explicitly mentioned in the provision (*R v Buzzanaga*: the accused was charged with wilfully promoting hatred against French people; their pamphlets were satire and their motive was to help the French).

**MODES OF PARTICIPATION**

The difficulty here is culpability: while the conduct helped the offence, it does not prove that was the intent of the conduct.

The Crown can charge you as both the principal and the aider, and the jury doesn’t need unanimity either way. As long as all the elements of murder are proved then you are a party and equally guilty in both cases (*R v Thatcher*: politician murdered ex-wife).

s. (21)(1)(a): Principal -actually commits it

* + Person who physically did the act

s. (21)(1)(b): Aiding - does or omits to do anything **for the purpose of aiding** any person to commit it

* + “For the purpose of” means knowledge, not desire (See: *R v Hibbert*)
	+ **Recklessness does not apply** here: “for the purpose of” sets a higher standard for Mens Rea, otherwise a morally innocent person could be convicted (*R v Roach:* did not know the telemarketing scheme was fraudulent).
	+ First degree murder requires substantial causation (See: *R v Harbottle*)
	+ An aider may be found guilty of manslaughter when the principal is guilty of murder, and vice versa; the key is intent and foreseeability.
	+ A **subjective fault standard applies** even if the fault standard for the principal is objective (*R v Helsdon*: journalist did not know about publication ban, the newpaper was liable under an objective fault standard)
* There is a **distinction with buying and selling drugs**: you can merely help the purchaser and only incidentally aid the trafficker, unless you go ‘above and beyond’ in facilitating the purchase (*R v Greyeyes*).
* **Mere presence at the scene of a crime is not enough** to establish culpability for aiding (*R v Dunlop & Sylvester*).
	+ - However there is no need to be physically active; you could be encouraging, blocking an escape, intimidating, etc.
		- The Court can draw an inference of culpability if there is **no other reasonable explanation** for your presence (*R v Jackson*: prolonged and unexplained presence on a secluded marijuana plantation, found in tent with tools, boots, etc.)

s. (21)(1)(c): Abetting

* + “abets any person in committing it”
	+ Encouragement; this is rarely used

s. (21)(2): Common intention

* + This provision is used to convict on what was **objectively forseeable**
		- "Intention in common" means that principal and the aider must have the same unlawful purpose in mind, but not the same motives and desires (See*: R v Hibbert*).

s. (22) Counselling (not discussed in class).

**NON-SUBJECTIVE FAULT REQUIREMENTS**

**Regulatory Offences**

* **Absolute Liability:** If the Actus Reus is proven, then guilt is proven.
* **Strict Liability:** This is presumed unless statute explicitly states otherwise(*R v Sault Ste Marie*).
	+ Onus is on D to prove due diligence, one of two different ways:
		- Reasonable belief in a mistaken set of facts
			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 reasonable
			5. That the advice was erroneous
			6. That the person relied on the advice in committing the act.
		- Took all reasonable steps to avoid the event
		- There is a difference between meeting regulatory standards and taking all reasonable steps: this is where expert witnesses may be called in.

**Objective Fault**

Objective mens rea is a **“marked departure” from a reasonable, prudent person in the accused’s circumstances.**

* This looks at facts and circumstances not taken into account in the Actus Reus
* Subjective explanations; reasonable mistakes of fact; length of departure
* It is a fairly significant departure; allows for flexibility

*R v Beatty:*

Dangerous Driving; momentary lapse of attention

* Actus Reus: driving **in a manner** that is dangerous to the public, given the circumstances.
	+ Consequences are not determinative; often call in an expert witness.
* Mens Rea: the dangerous driving must be a **marked departure** from the standard expected of a reasonably prudent person.
	+ A momentary lapse of attention is not a marked departure

**Stay of Proceedings**

*Tobiass:*

* A stay of proceedings is most often used to remedy state misconduct affecting the fairness of a trial or impairing other procedural rights enumerated in the *Charter.*
* In addition, there is a residual category of cases in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.
* The test for a stay of proceedings has three elements:
1. Ongoing misconduct
* The prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome.
* There may be exceptional cases in which the past misconduct is so egregious that the mere fact of going forward in the light of it will be offensive.
1. No other remedy is reasonably capable of removing that prejudice.
2. Balancing the interests of society in seeing a full trial on the merits, with the interests of society and the accused in seeing a stay of proceedings.
* Weigh the severity of the alleged crime against the harms caused by moving forward with the proceedings.

*Ryan:*

* In exceptional circumstances, state conduct is so bad that it warrants a stay.
* It is a high standard.
* Normally the court would order a new trial despite the difficulties and impact it has on everyone involved. Why wasn’t a new trial ordered here?
* The law wasn’t clear on this issue.
* But this isn’t so unusual; and
* It wasn’t applicable in her case.
* The Crown changed its position on the law of duress.
* The authorities were quicker to help her husband than her.
* If this is true, the standard is probably met.
* But a new trial is required to investigate the facts and bring out evidence.

**Section 24(2)**

*24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.*

*(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.*

A court has the ability to exclude evidence that was obtained during a *Charter* breach.

**Section 10(b)**

*10. Everyone has the right on arrest or detention*

*b) To retain and instruct counsel without delay and to be informed of that right;*

* Can be arrest or detention.
* There is an informational and an implementational component:
* There is a duty to inform the accused of the right to counsel.
* There is a duty to implement the right (assist the accused in obtaining counsel).
* The police must facilitate these duties without delay: they have to stop questioning once the accused asks for counsel (*Manninen*).
* Waiver of this right must be clear and unequivocal and the accused must understand the effect that a waiver will have on their rights (*Brydges*).
* Once the accused has spoken with their counsel, they cannot shut down an interrogation by asking to speak with their lawyer (*Sinclair*).
* An exception to this is when there is a change in circumstances.
* New, non-routine procedures that would not have been expected at the intial consultation (i.e. photo lineup/polygraph/DNA sample/etc.)
* A change in jeopardy (i.e. new charges).
* If there is reason to believe the accused did not understand the initial right to counsel or the advice given to him, or if there is reason to believe the cops are denigrating the legal advice.
* The accused does have an ultimate right to stay silent during the interrogation.
* Note the balance between the need to obtain information and the right of the accused to instruct counsel. To allow this right during an interrogation could effectively shut down the interrogation. One possibility is to have counsel present at the interrogation.

**Section 11(b)**

*11. Any person charged with an offence has the right*

*(b) To be tried within a reasonable time;*

* A major cause of delays is limited resources; there could be huge delays without 11(b).
* Speedy trials could cause issues.
* The effect is to punish the accused before a guilty verdict.
* Conditions in remand are often terrible.
* Bail has a significant impact on liberty.
* This right involves a balance of several different elements:
1. The length of the delay
* Time starts when the charge is brought and ends when the trial is completed.
* If the delay is within general expectations the analysis of 11(b) does not continue (BCPC = 12-14 months; BCSC = 22-24 months).
* This is very context dependent; the more complex the circumstances then the more time is required.
1. Conduct of the accused
* Waiver of time periods
* “Official waiver”
* Subtract from the total length of the delay.
* More general conduct
* i.e. adjournments
* It is very important what the parties state on the record i.e. if they have reasons or concerns.
1. Conduct of the Crown
* If they are responsible for a delay i.e. late disclosure
* Context dependent
* Was the delay caused by an error?
1. Prejudice to the accused (often it comes down to this)
* Prejudice to the trial (ability to make full answer and defence)
* If evidence is no longer available but would have been in a reasonable time frame.
* If evidence degrades over time i.e. a previous statement no longer captures the essence of a story.
* Prejudice to the individual: liberty
* If the accused has been in custody (conditions and incidents in custody)
* Onerous bail conditions (note: did the accused bring an application to change these conditions?
* Prejudice to the individual: personal impacts
* Physical/psychological/social/financial harm.
* Must be in a sworn statement.
* How things got worse because of the delay.
* At some point this can be inferred by the court, but it is a difficult argument and courts are generally tolerant of delays.

**Section 8**

*8. Everyone has the right to be secure against unreasonable search or seizure.*

*Hunter:*

* The basis of this provision is an individual’s right to be secure against encroachment upon their reasonable expectation of privacy.
* i.e. a phone; computer; home; office; etc.
* *Wong:* there is a distinction between the risk that others will hear our words, and the risk that a permanent recording will be made of our words at the discretion of the state (although McLachlin in her concurring judgement notes this distinction diminishes when an individual indiscriminately exposes himself to strangers).
* *Edwards:* lacked authority to regulate access to the premises; the same principle applies to a passenger in a car (*Belnavis*)
* This involves a balancing of factors such as:
* The nature of the information
* The nature of the relationship between the party releasing the information and the party asserting confidentiality
* The place where the information was obtained
* The manner in which the information was obtained
* The seriousness of the crime being investigated
* An infringement of this right requires prior authorization based on an assessment conducted by a neutral arbiter who is capable of acting judicially.
* *Hunter:* a director of investigations at the Combines Investigation Branch had a mandate to gather this information; there was potential for bias when he authorized his officers to enter and office and examine documents.
* There must be reasonable and probable grounds, established upon oath, to believe that:
1. An offence has been committed
2. There is evidence to be found at the place of the search

**Incomplete Crimes**

660.*Where the complete commission of an offence charged is not proved but the evidence establishes an attempt to commit the offence, the accused may be convicted of the attempt.*

* An attempt is always an included offence; it doesn’t have to be on the charging sheet.

*24. (1) 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.*

* You need to have the intent to do the offense.
* *Mens rea* is the same as it would be for the offense.
* Subjective
* Recklessness does not apply
* Wilful blindness could be on the table
* Attempted murder requires an intent to kill (*Ancio*)
* Even in the relaxed standard of 229(a)(ii) – causing bodily harm where you subjectively know death could likely result
* Assault and fraud include recklessness normally, but there is uncertainty for attempt.
* Some acts provide unequivocal evidence of intent.
* Inferred intent: a person intends the natural consequences of their act.
* Look at motives, communication, admissions
* You can use past acts if they show a *modus operandi*
* You can’t do this generally to show “he is a bad person”
* Subsequent acts can show intent i.e. hiding evidence
* Impossibility is not a defence (*Dynar*)
* *Mens rea* does not require knowledge of truth
* Policy: stopping crimes before they happen.
* The exception is “imaginary crimes” where you think you are doing something illegal but it is legal.

*(2) 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 act must go beyond mere preparations.
* Policy: not criminalizing ‘thought crimes’.
* This requires a qualitative analysis (*Deutsch*).
* Look at the facts.
* Assess how they are proximate to, or remote from, actually committing the offense.
* *Deutsch:* the offer of a salary was critical; all that was left was to actually offer the job.

**Conspiracy**

* s. 465: “…every one who conspires with any one to…”’
* People who attempt to commit a crime together
* Policy: the damage to society can be greater when more people are involved.
* Sentences can be close to equivalent as the actual offence
* It needs to be named on the charging sheet
* Can use for any offence
* You don’t need each person before the court.
* This is based on a ‘general agreement’ and a ‘general awareness’ of the details.
* Impossibility is not a defence.
* *Actus reus*: actual agreement
* *Mens rea*: genuine intent to participate

**DEFENCES**

Three categories of defences:

1. Crown cannot prove all the elements
	* This speaks to the quality of reliability of evidence
2. Particular circumstances negate the Crown’s ability to prove one of the elements
* A “unique barrier” to proving an element; for example intoxication with *mens rea*
1. Positive defence: all elements have been proving, but the act was excusable or justified.
* Excuse: automaton; duress.
* Justification: self-defence

First two categories: the onus remains on the Crown to prove the elements b.a.r.d.

Third category: the onus is on the Crown to disprove b.a.r.d. one of the elements of the defense.

Category two and three require an “air of reality”.

* + This is the threshold for a defence to be left with the trier of fact.
	+ There must be some reasonable possibility of success.
	+ The accused must point to some evidentiary foundation.
	+ The evidence must be credible and reliable.
	+ If there is a conflict, or multiple inferences, the judge must go with the inference in favour of the accused.

Whether there is evidence upon which a properly instructed jury acting reasonably could acquit if it believed the evidence to be true. This must be applied to each component of the defence.

Assume the evidence is true. But if it is so overwhelming on one of the elements that a reasonable person would not draw that inference.

If there is an air of reality, the Crown must disprove one of the elements beyond a reasonable doubt.

**Mistake of Fact**

A mistake in fact negates *mens rea* (category 2)

* Example: leaving something in the bottom of a shopping cart.

Sometimes an action leads to a strong inference of intent.

Assault: you apply force without the consent of the person.

* There is a subjective requirement that you were aware the person is not consenting.
* There could be a mistaken belief they are not consenting

History of sexual assault: view of “inherently unreliable accusations”; CC originally required independent corroboration; also required a “human cry” immediately after it happened; otherwise there was a strong inference of false allegations; the sexual history of the complainant was considered; a mistake of fact led to not being convicted.

Now: no corroboration requirement; cannot bring up sexual history unless you have a very good reason (high standard); no inference is drawn from the incident and complaint; the mistake of fact defence was confined.

 Sexual Assault (*Ewancuk*):

* *Actus reus*
* Touching.
* The sexual nature of the contact.
* This is an objective inquiry.
* The *mens rea* is relevant but not required.
* Look at the conduct of the accused.
* The absence of consent
* Look solely to the mindset of the complainant
* S 265(3): consent is not genuine where there is force/fraud/fear/authority.
* Unless the complainant is not credible, this element is met.
* *Mens rea*
* Intention to touch (in a way objectively found to be sexual in nature).
* Knowing of, or being recklessly or wilfully blind to, a lack of consent on the part of the person being touched.
* See s 273.1 and 273.2: consent not a defence where self-induced intoxication; recklessness or wilful blindness; did not take reasonable steps.
* Not a defence in a case of “no means yes”, silence or passivity.
* Once the complainant has expressed an unwillingness to engage in sexual contact, the accused should make certain that she truly changed her mind before proceeding, otherwise this is recklessness.
* A “reasonable and mistaken belief” – not complete subjectivity.
* Only applies to sexual assault.

**Mistake of Law**

This is not a defence: you intended to do the act; it doesn’t matter if you didn’t know the act was illegal (s 19).

There are several exceptions:

* It affects sentencing.
* If there is a very specific *mens rea* i.e. “you must do the *actus reus*/*mens rea* and know it is illegal”; an offence like this doesn’t exist, but some come close:
* Obstruction of justice: “wilfully obstructing the courts of justice”
* Knowingly doing an act which you know is contrary to the ordinary process of the justice system.
* The words “without colour of right”
* i.e. if someone thinks they have the right to do something
* *Howson: employee of a towing service refused to return a vehicle until expenses were paid.*
	+ A “wilful breach of a probation order”
	+ The accused thought he was complying (*Docherty*).

**Self-Defence**

This falls in the third category: justification.

Policy: a fine line between two extremes – individual autonomy and use of force.

The onus is on the accused to show all of these elements: if one fails, the whole defence fails.

It is a statutory defence: the onus is on the accused to show all of these elements: if one fails, the whole defence fails.

**34. (1)** A person is not guilty of an offence if

 **(a)** They **believe on reasonable grounds** that force is being used against them or another person or that a threat of force is being made against them or another person;

* This allows for a reasonable mistake of fact.
* This is objective and subjective.
* Note: for objective parts, don’t include intoxication in your assessment.
* It is modified-objective: experience; level of education; particular attributes such as size, strength; all important.
* But not purely subjective.

 **(b)** The act that constitutes the offence is committed **for the purpose of defending** or protecting themselves or the other person from that use or threat of force; and

* Does not allow for consent in a fight.
* You must be defending yourself.
* Purely subjective.

 **(c)** The act committed is **reasonable in the circumstances**.

**(2)** In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:

 **(a)** The **nature of the force** or threat;

 **(b)** The extent to which the use of force was **imminent** and whether there were **other means** **available** to respond to the potential use of force;

* The court will likely place a lot of weight here.
* You can’t take the law into your own hands.

 **(c)** The **person’s role** in the incident;

* i.e. provocation; prolonging.

 **(d)** Whether any party to the incident used or threatened to use a **weapon**;

 **(e)** The **size, age, gender and physical capabilities** of the parties to the incident;

* i.e. if one of the parties is small and weak.

 **(f)** The **nature, duration and history of any relationship** between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;

* Contextualize what has happened before.
* Prior threats or use of force towards the accused are important.

 **(f.1)** any history of interaction or communication between the parties to the incident;

 **(g)** The nature and **proportionality** of the person’s response to the use or threat of force; and

* Just one factor.
* Lethal force may be justified.
* If it is clearly disproportionate, the judge may throw out the defence on that basis alone.

 **(h)** Whether the act committed was in response to a use or threat of force that the person knew was lawful.

**(3)** Subsection (1) does not apply if the force is used or threatened by another person for the purpose of doing something that they are required or authorized by law to do in the administration or enforcement of the law, unless the person who commits the act that constitutes the offence believes on reasonable grounds that the other person is acting unlawfully.

*Cinous*

* Accused involved in drug world; believes victim preparing to kill him; several signs point to it; stop as gas station; he has two attempts to get away; he didn’t think cops would arrive in time.
* No air of reality – he could’ve gotten away.
* Note: old self-defence provision.

*IAOS*

* Spilling out onto street after a party; intoxicated; fight; knife to face.
* Says he saw the victim reach for a knife; but judge’s finding of fact:
* Victim didn’t have a knife; and
* Hands weren’t close to that area.
* 34(1)(a)
* Yes; but not reasonable that he believed the threat was with a knife.
* 34(1)(b)
* No; he was motivated by anger and not fear.
* 34(1)(c)
* Smaller and younger; but not significantly so.
* The key is that he was willing to come face to face with the victim.
* His role in the incident: aggressive, not fearful.
* He had other options (run away).

*Lavallee*

* Accused was a battered-woman; after a party she was in an argument with her husband; she hid in a closet but he found her, yelled at her and hit her; he gave her a gun and said “kill me or I’ll kill you”; as he was leaving she shot and killed him.
* See comments above on modified objective approach as well as not taking the law into your own hands.
* Was this a viable defence?
* Battered women:
* Cycle of abuse: tension building, acute battering incident, loving contrition.
* This is reinforcing and the violence is predictable; a “heightened sense of what is coming”; there are factors and signs specific to their experience.
* The victim may believe she cannot leave the situation; feels trapped; does not perceive the ability to leave.
* These perceptions become reasonable; expert evidence would support this.
* Note: imminence is not an absolute requirement; if you “know it is coming”
* Hostage situation: one opportunity to get the perpetrator.
* If there is evidence of an abusive cycle, the court will allow this evidence to be incorporated into the modified objective approach.
* 34(1)(a)
* Reasonably perceived her life to be in danger.
* 34(1)(b)
* She is not aggressive; no history of revenge.
* 34(1)(c)
* Take into account the history of the parties including prior instances of force.
* This doesn’t mean you can kill an abuser i.e. driving to their house and killing them.
* It is not a “battered woman” defence; it is modified objective; self-defence; she was reasonably defending herself.

**Necessity**

Sometimes extenuating circumstances mean you can’t hold people to the strict obedience of the law.

* Notion of moral involuntariness; no realistic choice; not in control.

Third category: excused, not justified.

1. Imminent peril or danger
* Reasonable belief: subjective and objective; infuse attributes/circumstances/basic characteristics.
* Not enough to be foreseeable or likely.
* Must be on the verge on transpiring and virtually certain.
* Where the situation of peril should have been foreseen or avoided, an accused cannot reasonably claim any immediate peril
1. No reasonable legal alternative to disobeying the law
* Subjective and objective.
* This involves a realistic appreciation of the alternatives open to a person; the accused need not be placed in the last resort imaginable.
1. Proportionality between the harm inflicted and the harm avoided.
* Objective: based on societal values.
* Doesn’t need to clearly outweigh the other; must, at a minimum, be of comparable gravity.
* Can a person murder out of necessity?
* What about saving a group by sacrificing a life?
* What if a person is suffering so much you have to make a decision for them?

*Latimer*

* None of these elements were met.

**Duress**

Where the accused commits an offence under threat of force by a third party.

Third category: excuse, not justification (excuse defences are read more narrowly; duress is more wrong than self-defence; innocent victim vs person creating a threat).

This is a statutory defence:

**17.** A person who commits an offence under compulsion by threats of immediate death or bodily harm from a person who is present when the offence is committed is excused for committing the offence if the person believes that the threats will be carried out and if the person is not a party to a conspiracy or association whereby the person is subject to compulsion, but this section **does not apply** where the offence that is committed is high treason or treason, murder, piracy, attempted murder, sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, aggravated sexual assault, forcible abduction, hostage taking, robbery, assault with a weapon or causing bodily harm, aggravated assault, unlawfully causing bodily harm, arson or an offence under sections 280 to 283 (abduction and detention of young persons).

The court in *Ruzic* ruled that the immediacy and presence requirements infringe s 7. They preclude threats of future harm and thereby impose obstacles to relying on the defense in hostage and third party situations. This has the potential of causing a person to be convicted for an act that was morally involuntary.

The court in *Ryan* set out the elements of the defence. The common law elements are the same as the statutory elements, however the list of excluded offences still stands.

The statutory defence applies to principals, while the common law defence is available to parties to an offence.

The statutory version of the defence has a lengthy list of exclusions, whereas it is unclear in the Canadian common law of duress whether any offences are excluded. This results in the rather incoherent situation that principals who commit one of the enumerated offences cannot rely on the defence of duress while parties to those same offences, however, can.

[If you are claiming duress for one of these offences, do a *Charter* challenge; look at proportionality]

Common law defence:

* An explicit or implicit threat of death or bodily harm proffered against the accused or a third person. The threat may be of future harm.
* The accused reasonably believed that the threat would be carried out.
* Modified objective.
* The non-existence of a safe avenue of escape
* Modified objective.
* A close temporal connection between the threat and the harm threatened.
* Immediacy is not a requirement; but this is still a factor.
* If the threat is so far removed it would be difficult to conclude there was no option but to commit the offence.
* Must be such that the accused loses the ability to act voluntarily.
* Proportionality between the harm threatened and the harm inflicted by the accused.
* Modified objective standard.
* The accused is not a party to a conspiracy or association whereby the accused is subject to compulsion and actually knew that threats and coercion to commit an offence were a possible result of this criminal activity, conspiracy or association.

**Intoxication**

Second category: the accused did not have the requisite *mens rea*.

This defence is only relevant to specific intent offences: you will be guilty of the general intent (included offence).

* “…with the intent to…”
* “…for the purpose of…”

The idea that is at a specific level, there is a higher level of mental functioning.

At some point intoxication reaches a level where you are an automaton and do not have the general intent: you mind is not controlling your body.

* *Daviault:* heavily intoxicated; sexual assault; successful defence.

Section 33.1: It is not a defence that the accused, by reason of self-intoxication, lacked the requisite general intent for a crime that involves violence.

**33.1** (1) It is not a defence to an offence referred to in subsection (3) that the accused, by reason of self-induced intoxication, lacked the general intent or the voluntariness required to commit the offence, where the accused departed markedly from the standard of care as described in subsection (2)

(2) For the purposes of this section, a person departs markedly from the standard of reasonable care generally recognized in Canadian society and is thereby criminally at fault where the person, while in a state of self-induced intoxication that renders the person unaware of, or incapable of consciously controlling, their behaviour, voluntarily or involuntarily interferes or threatens to interfere with the bodily integrity of another person.

(3) This section applies in respect of an offence under this Act or any other Act of Parliament that includes as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person.

There are three levels of intoxication:

1. Mild intoxication
* Relaxation of inhibitions and socially acceptable behaviour.
* Not a defence.
* May be a mitigating or aggravating factor in sentencing.
1. Advanced intoxication
* Negates specific intent: an impairment of the accused’s foresight of the consequences of his or her act sufficient to raise a reasonable doubt about the requisite *mens rea*.
* i.e. assault; murder
1. Extreme intoxication
* Negates general intent.
* The accused must prove on a balance of probabilities (*Daviault*).
* Requires expert evidence.
* 33.1 blocks it from violent offences.
* Possible grounds for a *Charter* challenge.

How should a jury be instructed here?

* A drunken intent is still intent;
* Describe that the offence has a specific intent;
* Consider the impact of intoxication as an impairment on the accused’s ability to form that specific intent;
* Review evidence of level of intoxication from both sides;
* Note that you can infer or presume someone intended the natural consequences of their act.
* A “sane and sober person” is presumed to intend the natural consequences of their act; this must be tied together with the impact of intoxication concept.

**Provocation**

Category three: after proving all the elements of murder, it reduces it to manslaughter.

* Has a significant effect on sentencing.

Statutory defense:

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

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

(3) For the purposes of this section, the questions

 (a) Whether a particular wrongful act or insult amounted to provocation, and

 (b) Whether the accused was deprived of the power of self-control by the provocation that he alleges he received,

are questions of fact, but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being.

(4) Culpable homicide that otherwise would be murder is not necessarily manslaughter by reason only that it was committed by a person who was being arrested illegally, but the fact that the illegality of the arrest was known to the accused may be evidence of provocation for the purpose of this section.

Provocation has an objective and subjective component:

Objective:

1. Wrongful act or insult.
2. The act must be sufficient to deprive an ordinary person of the power of self-control.

Subjective

1. The accused acted in response to the provocation.
* The act must have caused or triggered the reaction.
1. On the sudden before there was a chance for his passion to cool.
* Acting out of character.
* In the intensity of the moment.

It is a highly controversial defence:

* More associated with a male reaction.
* Often a female victim.
* It protects rage and anger but no other emotions.
* The response is something society wants to deter.

*Thibert:*

* The accused wife was having an affair with the victim; the accused knew and they had been trying to reconcile; accused went to her work to talk with her; he had loaded a gun and had it with him in the vehicle; the victim was with her and wouldn’t leave the two alone to talk; the victim stood behind her and mocked the accused; the accused shot him.
* Majority: says the “ordinary person” takes into account:
* “Inate” general characteristics such as age and sex.
* The background of the relationship between the victim and the accused.
* Duality: helps to contextualize the significance of the insult but makes it less “sudden”.
* The court said final insult caused him to “snap”.
* Circumstances of the taunting.
* Does not include intoxication or the accused’s history of rage or short temper.
* Dissent:
* The breakup of a marriage does not constitute an insult.
* She did not wish to be alone with him; there is no entitlement for him to speak with her in private.
* Not a “mind unprepared”; no element of suddenness.

*Tran*

* The accused had knowledge that his estranged wife was involved with another man; the accused entered her home unexpected and uninvited; discovered the two in bed together; violently attacked them both.
* Nothing “sudden” about this discovery.
* The court talks about the history of the defence:
* In the 18th century, adultery was central to the defence.
* Therefore, provocation is a “product of the times”.
* Times are different now.
* The “ordinary person” should be infused with *Charter* values.
* Limit perspectives which are not in line with *Charter* values such as homophobia.

**Mental Disorder**

Category three: a full defense; not criminally responsible by reason of mental disorder (NCR-MD).

* This necessarily requires medical experts.
* Statutory defence: s 16

A person found NCR-MD is not granted liberty: they may be incarcerated in a mental health facility indefinitely.

Policy: a balance between not punishing a morally innocent person, with protecting society from a person who may be dangerous.

First: determine if the accused is unfit to stand trial (s 2).

* The accused has a right to be present and understand what is going on.
* This is not satisfied if the accused had a “limited cognitive capacity to understand the process and communicate”.
* Doesn’t require you to be able to make rational decisions that are in their benefit.
* There is a strong presumption of fitness and the court must be satisfied otherwise on a balance of probabilities (s 672.22).
* The issue of fitness can be tried on direction of the court, or a motion brought by the accused or the prosecutor, in which case the burden is on the person bringing the motion (s 672.23).
* If one of the three conditions in s 2 is met, the court can wait to see if conditions improve (s 672.32).

**2.** *“Unfit to stand trial”* means unable on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to

 (*a*) Understand the nature or object of the proceedings,

 (*b*) Understand the possible consequences of the proceedings, or

 (*c*) Communicate with counsel.

**672.22** An accused is presumed fit to stand trial unless the court is satisfied on the balance of probabilities that the accused is unfit to stand trial.

**672.23** (1) Where the court has reasonable grounds, at any stage of the proceedings before a verdict is rendered, to believe that the accused is unfit to stand trial, the court may direct, of its own motion or on application of the accused or the prosecutor, that the issue of fitness of the accused be tried.

(2) An accused or a prosecutor who makes an application under subsection (1) has the burden of proof that the accused is unfit to stand trial.

**672.32** (1) A verdict of unfit to stand trial shall not prevent the accused from being tried subsequently where the accused becomes fit to stand trial.

(2) The burden of proof that the accused has subsequently become fit to stand trial is on the party who asserts it, and is discharged by proof on the balance of probabilities.

Second: who can raise a defence of mental disorder?

* The accused, at any time.
* It is often in the accused’s best interest, but they may wish to avoid the label.
* They could be locked up indefinitely.
* The Crown.
* Only after a verdict has been reached.
* To avoid conviction of a person not criminally responsible.
* To protect the public from someone requiring hospitalization.
* Or if the accused has raised the issue in any way, i.e. negating specific intent. The accused has “opened the door to the mental state.”

**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**.

(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**.

Key points:

* Must be suffering from the mental disorder at the time the offence was committed.
* Need to there was a mental disorder.
* Must render the accused incapable of:
* Appreciating the nature and quality of the act; or
* Knowing it was wrong.
* The accused is presumed to be sane, and must show otherwise on a balance of probabilities.
* This could possibly lead to the conviction of an innocent person.
* This is justified under s 1:
* Hard for the Crown to prove sanity every time.
* Worries about faking.

Mental Disorder / Disease of the Mind

*Simpson*

* “A legal concept that includes a medical component”

*Cooper*

* Any illness, disorder or abnormal condition which impairs the human mind and its functioning.
* Very broad
* Precludes self-induced states caused by drugs or alcohol.
* Precludes transitory states (hysteria/concussion)
* Note the distinguishing between internal and external causes.
* Substances/injury/witnessing an event.

Appreciating the Nature and Quality of the Act

*Cooper*

* “Appreciates” is incorporates more than mere knowledge of what you are doing: it is an ability to perceive the consequences of a physical act.

*Abbey*

* Being incapable of appreciating penal sanctions attached to an act is not sufficient.
* An “irresistible impulse” is not sufficient but can be evidence of a disorder that is.

Knowing that the Act is Wrong

Evidence is important: history of the accused (before/during/after); covering it up; the act itself; motive; expert evidence

*Chaulk*

* This can mean the accused is incapable of knowing the act is contrary to the formal law or society’s moral standards.

*Oommen*

* The accused thought his act was justified: felt he was in imminent danger if he did not kill her first.

**Automatism**

Denial of the requisite *actus reus.*

* The act was not physically voluntary: the mind was not directing the action; “dissociative state”
* There is an underlying presumption you are controlling yourself.
* *Actus Reus* is premised on a conscious mind.

*Stone*

* The onus is on the accused to prove on a balance of probabilities.
* Justified under s 1 for the same reasons as s 16(2)
* The accused will need an expert to support the defence.
* The court will be “skeptical” – the trier of fact should approach this category with caution.
* “Feigning”
* There are two categories:
* External: where your automatism has been caused by some external event.
* Must be an “extreme triggering event of such sufficiency that it could cause a reasonable man to lose ability to function.”
* This is a modified objective standard.
* Must be a motiveless crime.
* Policy: you are not an ongoing danger to society.
* Internal: NCR-MD automatism.
* Linked to a mental disorder.
* This includes an external event that triggers a pre-existing mental disorder.
* Have to get into the mind of the accused: look at history of the accused and their family.
* Requires expert evidence
* The court is pushing most cases into this category (public safety).

*Luedecke*

* The expert says people can carry out complex physical activity while unconscious (sleepwalking).
* *Parks:* drove on the highway to his in-laws house.
* Is the mind directing the body? Controversial.
* Factors in this case:
* Past behaviour
* Family history
* Circumstances: sleep deprivation/stress/alcohol consumption
* Lab experiment
* Victim’s testimony
* Acquittal or NCR-MD?
* *Parks:* sleepwalking is non-NCRMD
* *Stone* was after *Parks:*
* Said non-NCRMD is purely external; a rare one-off scenario.
* Public safety is important: look at the chance of repetition by considering both the internal processes and the trigger reoccurring.
* The trier should start with a strong presumption of NCRMD.
* The accused must prove non-NCRMD on a balance of probabilities.
* A finding of NCRMD can still allow for an absolute discharge.
* There must be evidence of a significant risk to the public.
* So NCRMD is broader; but will have a less harsh impact on those labelled as such.
* Labelling is important
* It is important to the integrity of the justice system
* And otherwise could reinforce negative stereotypes.

**Rolled-Up Defence**

Where the cumulative effect of all the evidence supporting several defences, though not sufficient to meet the standard of any one defence, can be taken to negate the specific intent of an offence.

* This is not about sympathy: it is an issue of whether they had the specific intent

*Bakker*

* Addiction; constantly stealing from his parents; they evict him; thinks he can reverse the situation by retrieving their items he had sold to a drug dealer; dealer tells him the items are not for sale; he panics, there is a fight and he violently murders the two victims.
* Specific intent requires some degree of clarity and thinking rationally: he was in a significantly (not absolutely) dissociated state due a combination of all the factors; there was reasonable doubt as to the subjective knowledge of death; his cognitive functioning was impaired by all the factors.
* Automatism
* He doesn’t remember
* He could be feigning, or supressing the memory.
* Experts say he was likely not acting as an automaton at the time of the murder.
* Mental Disorder
* He was at a point of “psychological crises”: to him, this was his last chance disappearing before his eyes.
* Intoxication
* Short, intense high; lowers inhibition and decision making
* Withdrawal is immediate and causes agitation and confusion
* “Explosion potential” – fight or flight response could be extreme; lack of thought and control over his actions
* Provocation
* Not unprepared: he went to the victim’s house and started the argument
* Self-defence
* No proportionality
* Could’ve walked away
* He started it

**SENTENCING**

Sentencing requires its own hearing.

* A second adversarial proceeding, similar to a trial but fundamentally different.
* The trial is about proving the elements of the offence; not a lot is said about the character of the accused.
1. Circumstances of the offender.
* May include a life story.
* Was the act out of character?
* Did certain circumstances push them into committing the offence?
1. Circumstances of the offence.
* Aggravating, either on the part of the accused or the victim.
* Look at the offence: may have its own sentencing provisions; indicated how Parliament views the offence.

Range of sentences:

* Lowest end
* Diversion: root the individual out of the criminal justice system.
* Absolute or conditional discharge: finding of guilt without the technicality of a criminal record.
* Suspended sentence
* Sentenced to incarceration, but suspended if the individual meets certain conditions.
* Will go to jail if they breach those conditions.
* Incarceration
* Various forms:
* Can be served on weekends.
* Conditional sentence: served in the community.
* Must be less than two years.
* Must be a low risk.
* Strict conditions
* Actual incarceration
* Parole
* Must show they are not a risk.
* Must be a reasonable prospect they will improve.
	1. A sentence must be **proportionate** to the **gravity** of the offence and the **degree of responsibility** of the offender.
* This is the fundamental principle.
* Gravity
* The type of offence.
* The circumstances (role of offender; damage caused)
* Degree of responsibility
* The background of the offender
* Free choice? Pressures?

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

**(*a*)** To **denounce** unlawful conduct;

* Not vengeance or revenge
* This is permitting society to condemn certain activity

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

* Specific deterrence: the offender
* Circumstances of the offender: risk or likelihood of reoffending.
* Theory is that punishment will deter them.
* General deterrence: others members of society
* A heavier sentence is more likely to deter others from offending.

**(*c*)** To **separate** offenders from society, where necessary;

* If you are a risk to society; similar to specific deterrence

**(*d*)** To assist in **rehabilitating** offenders;

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

* Look at the harm done; take a victim impact statement

**(*f*)** To promote a sense of **responsibility** in offenders, and **acknowledgment** of the harm done to victims and to the community.

* Punishment should have meaning.
* Give the offender insight into the harm caused.
* Example: painting a fence
* See Aboriginal sentencing

**718.2** A court that imposes a sentence shall also take into consideration the following principles:

**(*a*)** a sentence should be increased or reduced to account for any relevant **aggravating or mitigating circumstances** relating to the offence or the offender, and, without limiting the generality of the foregoing,

**(i)** evidence that the offence was motivated by **bias, prejudice or hate** based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,

**(ii)** evidence that the offender, in committing the offence, abused the offender’s **spouse or common-law partner**,

**(ii.1)** evidence that the offender, in committing the offence, abused a **person under the age of eighteen years**,

**(iii)** evidence that the offender, in committing the offence, abused a **position of trust or authority** in relation to the victim,

**(iii.1)** evidence that the offence had a **significant impact on the victim**, considering their age and other personal circumstances, including their health and financial situation,

**(iv)** evidence that the offence was committed for the benefit of, at the direction of or in **association with a criminal organization**, or

**(v)** evidence that the offence was a **terrorism** offence

shall be deemed to be aggravating circumstances;

**(*b*)** a sentence should be similar to sentences imposed on **similar offenders for similar offences committed in similar circumstances**;

* Predictability
* General deterrence
* Rarely ever exact similarity due to individuality and the infinite number of differences and circumstances.

**(*c*)** where consecutive sentences are imposed, the combined sentence should **not be unduly long or harsh**;

**(*d*)** an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

* Use jail as a last resort
* Prevent making things worse
* May come with harsh conditions

**(*e*)** all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with **particular attention to the circumstances of aboriginal offenders.**

**Conditional Sentences**

* 1. If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender’s behaviour in the community, order that the offender serve the sentence in the community, subject to the conditions imposed under section 742.3, if

**(*a*)** the court is satisfied that the service of the sentence in the community would **not endanger the safety of the community** and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2;

**(*b*)** the offence is **not an offence punishable by a minimum term of imprisonment**;

(*c*) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is **14 years or life**;

**(*d*)** the offence is not a **terrorism** offence, or a **criminal organization** offence, prosecuted by way of indictment, for which the maximum term of imprisonment is **10 years** or more;

**(*e*)** the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is **10 years**, that

 **(i)** resulted in **bodily harm**,

 **(ii)** involved the import, export, trafficking or production of **drugs**, or

 **(iii)** involved the use of a **weapon**; and

**(*f*)** the offence is not an offence, prosecuted by way of indictment, under any of the following provisions:

 **(i)** section 144 (prison breach),

 **(ii)** section 264 (criminal harassment),

 **(iii)** section 271 (sexual assault),

 **(iv)** section 279 (kidnapping),

 **(v)** section 279.02 (trafficking in persons — material benefit),

 **(vi)** section 281 (abduction of person under fourteen),

 **(vii)** section 333.1 (motor vehicle theft),

 **(viii)** paragraph 334(*a*) (theft over $5000),

 **(ix)** paragraph 348(1)(*e*) (breaking and entering a place other than a dwelling-house),

 **(x)** section 349 (being unlawfully in a dwelling-house), and

 **(xi)** section 435 (arson for fraudulent purpose).

*Howitt*

* Tending a medium size grow-op
* Aggravating factors
* Ongoing/long-term role (not a one off occurrence)
* Risk to the community: fire; violence
* Use of police resources
* Need for specific and general deterrence
* Mitigating factors of offender
* Loss of employment
* Family ties
* Not part of the drug dealer “lifestyle”; not in it for profit
* Mitigating circumstances of offence
* Rural location: less risk
* Scale of operation
* Not aware of electrical bypass
* Not high in the hierarchy
* Co-operation with authorities
* Sentence: conditional discharge
* Restrictions: address designated; community service

**Evidentiary Rules**

**24.** **(1)** In determining a sentence, a court **may accept as proved** any information disclosed at the trial or at the sentencing proceedings and any facts agreed on by the prosecutor and the offender.

* The judge can accept what you say (but will likely put more weight on evidence that has documentation).
* The Crown can challenge evidence; it is le a mini-trial.

**(2)** Where the court is composed of a judge and jury, the court

**(a)** shall accept as proven all facts, express or implied, that are essential to the jury’s verdict of guilty; and

**(b)** may find any other relevant fact that was disclosed by evidence at the trial to be proven, or hear evidence presented by either party with respect to that fact.

**(3)** Where there is a dispute with respect to any fact that is relevant to the determination of a sentence,

**(a)** the court shall request that evidence be adduced as to the existence of the fact unless the court is satisfied that sufficient evidence was adduced at the trial;

**(b)** the party wishing to rely on a relevant fact, including a fact contained in a presentence report, has the **burden of proving it**;

**(c)** either party may **cross-examine** any witness called by the other party;

**(d)**subject to paragraph (e), the court must be satisfied on a **balance of probabilities** of the existence of the disputed fact before relying on it in determining the sentence; and

**(e)** **the prosecutor must establish, by proof beyond a reasonable doubt, the existence of any aggravating fact or any previous conviction by the offender**.

**Concurrent vs Consecutive Sentences**

**718.2 (*c*)** where consecutive sentences are imposed, the combined sentence should **not be unduly long or harsh**;

Two critical factors:

1. How closely connected in time and nature were the offences?
2. If they are not closely connected, would a consecutive sentence be unduly long?

*Langthorne*

* 1st: robs store with friend; friend shoots clerk
* 2nd: robbery; knife to throat; dug through pockets; taken to bank machine; victim gets away.
* Exceedingly chaotic and horrific upbringing.
* Long history of prior convictions/
* Substance abuse problems; rehab would be very challenging/
* Deterrence (both specific and general) and denunciation take precedence here.
* High risk to reoffend; risk to public
* Planned and premeditated
* Someone was killed
* “Planned lifestyle”
* For the robbery of Gupta, he is sentenced four and one-half years.
* For the kidnapping of Wall, he is sentenced to four years.  For the robbery of Wall, he is sentenced to three years.  The robbery and kidnapping of Wall arose out of a single, closely-linked in interest, incident and concurrent sentences are appropriate.
* The sentences in the Wall and Gupta offences are to be served consecutively.  After consideration of the totality principle, I decline to apply it.  A total sentence of eight-and-a-half years is not unduly long in all of the circumstances.

**Mandatory Sentences**

Prevent judges from exercising discretion where there are mitigating factors.

Previously it was only for murder; then expanded to target conducted resulting in death; more recently expanded even further (approximately 60).

* Drunk driving
* Offences involving a child
* Grow-ops
* Gun crime where you didn’t use it
* Possession with ammo

Pupose:

* Deterrence; consistency; denunciation
* Society sends a message in a very tangible way

Policy reasons against mandatory minimum sentences:

* More people in prison
* Exceptional circumtances
* No incentive to plead guilty

Lots of countries have presumptive minimum sentences.

* Some limited discretion; or specific “…unless…” clause.

*Charter* s 12: everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

* Key is **gross disproportionality**
* If there is any proximity, its close enough.
* The only remedy is to strike the whole law.
* Two ways to show a mandatory minimum sentence is grossly disproportionate:
1. Individual Approach
* Determine a sentence according to the general sentencing principles
* If it is grossly disproportionate to the mandatory minimum, it violates section 12.
* There should be great disparity between what the sentence would be and what the sentence must be.
* *Latimer: extenuating circumstances; exemplary background; lots of mitigating factors; very sympathetic*
* *Aggravating factors: lack of remorse; vulnerability; premeditated; attempted to cover it up; position of trust*
* *The court was not willing to down a mandatory minimum sentence for murder: the offence requires subjective foresight of death.*
1. Reasonable Hypothetical
* If there are reasonable scenarios caught by the law that would result in sentences that are grossly disproportionate.
* Policy: practicality – it is very difficult to run *Charter* cases; why wait for an individual to fit the circumstances.
* *Nur: had a loaded gun; numerous reasonable hypotheticals where the mandartory minimum would be grossly disproportionate; expired license; not transported properly; different laws in different provinces; etc.*
* *Smith: seven years for importing narcotics; even if a person just had one joint for personal use; the law was way too broad; the purpose of the mandatory minimum sentence was for trafficking but this was disregarded as irrelevant.*

*Adamo*

* Convicted of firearm possession charges.
* Has mental disabilities but they are not sufficient to be NCRMD.
* But sentencing is also based on culpability; his blameworthiness is limited
* Untreated mental illness can create a danger to society
* FASD may fall within this category: impaired judgement; inability to foresee consequences; but not enough to go to prison
* Individuals suffering from FASD are 19x more likely to go to prison; 35% of Aborginals in the system suffer from FASD
* Offence: there was no evidence he was about to use the gun; not readily accessible
* Offender: criminal record; unemployable; living with mother; strict bail conditions; not a reasonable risk
* Has a brain injury from a gang beating; serious cognitive dysfunction
* There was no ongoing treatment or care for his condition; failure of society
* He has been cooperative with treatment since the offence
* Judge concludes there should be a six month sentence; mandatory is 3.
* Section 12:
* Fails on the individualized approach
* Section 15:
* The mandatory minimum sentence has the effect of perpetuating and worsening the disadvantage of mentally disabled persons, who, while criminally responsible for their actions, have a lesser degree of moral blameworthiness due to their mental disability.
* Section 7:
* S 12 gross disproportionality gets incorporated into a s7 overbreadth analysis.
* Here the attack is on gross disproportionality with moral blameworthiness:
* *Vaillancourt: need full mens rea for murder; high level of moral blameworthiness*
* *Creighton/DeSousa: more flexibility in sentencing with regards to culpability*
* Here, because of the significantly lower culpability, the sentence is grossly disproportionate.

**Aboriginal Sentencing**

**718.2 (*e*)** all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with **particular attention to the circumstances of aboriginal offenders.**

*Gladue*

* The provision is remedial, not just codifying the common law.
* Statutory interpretation: look to the atmosphere at the time this provision was enacted.
* Canada is a world leader in incarceration rates.
* This provision is an attempt to put less people in prison.
* Read it together with (d)
* Imprisonment is not successful at serving the traditional sentencing goals of separation, deterrence, denunciation and rehabilitation.
* Over-incarceration of Aboriginal peoples: “crisis” in the criminal justice system.
* The provision is responding to this crisis.
* Causes of the crisis:
* Racism: noted in the *Marshall* *Commission*
* Especially dangerous when a person is unaware of their bias.
* There is now screening of jurors to prevent this.
* Socio-economic barriers
* Residential schools
* 60s scoop
* Poverty
* Furthermore, 718 (e) and (f) focus on restorative goals:
* Repairing the harms suffered by victims;
* Promoting a sense of responsibility and acknowledgement on the part of the offender; and
* Attempting to rehabilitate the offender.
* These are all premises on understanding the harm you have caused.
* Sentencing circles: hear from victim and members of the community.
* Get insight
* Difficult process but impactful
* So this provision allows the court to take into account:
* The unique or systemic factors that played a role in bringing the particular Aboriginal offender before the court; and
* Culpability changes from case to case.
* Society bears part of this responsibility.
* The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection.
* *Gladue* report
* Why are they a good candidate for a restorative approach?
* The court gives the judge a set of questions to consider.