

Canada

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List of Abbreviations

TABLE OF INTERNATIONAL INSTRUMENTS

Alta.C.A.	Alberta Court of Appeal
B.C.C.A.	British Columbia Court of Appeal
CC	Criminal Code
C.C.C.	Canadian Criminal Cases
CanLII	Canadian Legal Information Institute
Man. Q.B.	Manitoba Queen's Bench
NPB	National Parole Board
Ont.C.A.	Ontario Court of Appeal
PPSC	Public Prosecution Service of Canada
Prov. Ct	Provincial Court
Qc. C.A.	Quebec Official Reports (Court of Appeal)
QL	Quicklaw
R.S.C.	Revised Statutes of Canada
RCMP	Royal Canadian Mounted Police
S.C.	Statutes of Canada
S.C.R.	Supreme Court Reports
SCC	Supreme Court of Canada
W.C.B.	Weekly Criminal Bulletin
W.W.R.	Western Weekly Reports
YCJA	Youth Criminal Justice Act

List of Abbreviations

General Introduction

§1. THE GENERAL BACKGROUND OF THE COUNTRY

I. Geography and Climate

1. Being the second largest country in the world, Canada has an area of 9,984,670 sq. km. Canada occupies a large territory that borders the Pacific Ocean to the west and the Atlantic Ocean to the east, the United States to the south, and the Arctic Ocean to the north. Canada's climate varies from temperate in the south to subarctic and arctic in the north.

II. Population

2. According to the 2011 census, Canada's population is approximately 34,500,000. Approximately 90% of the population is concentrated within 160 km of the US border. Its largest cities are Toronto (2,503,281) and Montreal (1,620,693). The majority of Canadians (17,882,775) speak English as their mother tongue. Most Francophones live in Quebec (6,817,655). Due to high immigration waves, the native language of 6,147,840 Canadians is neither English nor French. These are known as allophones.

3. At present, there are 6,186,950 immigrants in Canada. The government has been trying to admit annually around 250,000 immigrants for the last few years. Most immigrants settle in Toronto, Montreal, and Vancouver. Canada also has 1,172,785 aboriginal people. The majority of aboriginals live in Ontario, British Columbia, and Alberta.

4. Forty-two per cent of the Canadian population is Roman Catholic and 23% is Protestant (including United Church, Anglican, Baptist, and Lutheran).

III. Economy

5. A highly developed and industrialized country, Canada has strong manufacturing, mining, and service sectors. Its estimated 2013 GDP is USD 1.827 trillion. Canada exports energy, including oil, gas, uranium, and electric power, mainly to the United States. Exports account for roughly a third of the GDP.

6. Since the last few years, Canada has enjoyed good economic growth, moderate inflation, and a relatively low unemployment rate. It continually ranks among the top nations in the United Nations Human Development Index. Canada is also a member of the Organisation for Economic Co-operation and Development, and the G-8.

IV. Political System and Administrative Structure

7. Canada is a constitutional monarchy, a parliamentary democracy, and a federation. It is divided in ten provinces: Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island, Quebec, and Saskatchewan, and three territories: Northwest Territories, Nunavut, and Yukon. Its capital city is Ottawa, which is located in Ontario.

8. Canada's Constitution is made up of unwritten and written acts, customs, judicial decisions, and traditions. The main text is the Constitution Act of 1867, which created a federation of four provinces, and the Constitution Act of 17 April 1982, which transferred formal control over the constitution from Britain to Canada, and added a Canadian Charter of Rights and Freedoms.

9. Canada has two official languages: English and French, and has adopted the Official Languages Act. Its purpose is threefold:

- (1) To ensure respect for English and French as the official languages of Canada and to ensure equality of status and equal rights and privileges as to their use in all federal institutions, in particular with respect to their use in parliamentary proceedings, in legislative and other instruments, in the administration of justice, in communicating with or providing services to the public and in carrying out the work of federal institutions.
- (2) To support the development of English and French linguistic minority communities and generally to advance the equality of status and use of the English and French languages within Canadian society.
- (3) To set out the powers, duties, and functions of federal institutions with respect to the official languages of Canada. Canada is a multicultural country and it has adopted the Multiculturalism Act to recognize its multiculturalism. As part of this policy, the Canadian government promotes the understanding that multiculturalism is a fundamental characteristic of the Canadian heritage and identity and that it provides an invaluable resource in the shaping of Canada's future.

10. Canada has faced separatist attempts from the predominantly French speaking Quebec. Quebec held two referendums where it asked its residents whether they wanted to secede from Canada. In 1980 the result was 59.56% for No and 40.44% for Yes, and in 1995 it was 50.58% for No and 49.42% Yes. With the Quebec's Liberal Party's (federalist) triumph over the Parti Quebecois (separatists) in the last elections, the separatist movement has subsided.

11. The head of State is the Queen of the United Kingdom, referred to in Canada as the Queen of Canada, currently Queen Elizabeth II. The Queen is represented in Canada by the Governor General, who is appointed by the monarch on the advice of the Prime Minister for a five-year term. The head of the government is the Prime Minister.

12. Elections are held at intervals not exceeding five years. Following legislative elections, the leader of the majority party in the House of Commons is designated Prime Minister by the Governor General. The Cabinet is chosen by the Prime Minister, usually from among the members of his or her own party sitting in Parliament.

13. Canada has a bicameral Parliament, which consists of the Senate, whose members are appointed by the Governor General with the advice of the Prime Minister and who serve until reaching 75 years of age, and the House of Commons, whose members are elected by direct, popular vote to serve a maximum of five-year terms. The major political parties are the Liberal Party, the Conservative Party of Canada, the New Democratic Party, the Bloc Québécois, and the Green Party.

14. Canada has two main legal traditions that are officially recognized. All English provinces follow English common law. In Quebec, civil law predominates. However, criminal law is based entirely on common law. In 1774 the English Parliament passed the Quebec Act, now considered a constitutional document. This Act recognized the Roman Catholic Church in Quebec, and the establishment of French civil law to govern the relations of Canadian subjects in private law issues. British common law was imposed in all matters having to do with public law, including criminal law. Many aboriginal Canadians also recognize Aboriginal law as their legal tradition. The government has given little official recognition to Aboriginal law as a legal tradition.

V. The Judicial System

15. The Supreme Court of Canada (SCC) is the highest tribunal. It is made up of nine judges appointed by the Prime Minister through the Governor General.

16. According to the Supreme Court Act, at least three of the judges on the Court must be appointed from Quebec in order to have judges familiar with the civil law system needed to properly hear appeals from Quebec. It is convention, but not mandatory, that the remaining six positions on the Supreme Court are divided as follows: three from Ontario, two from Western Canada, and one from Atlantic Canada.

17. The SCC is Canada's final Court of Appeal. It hears appeals after a three-judge panel has determined that the case involves a question of public importance or if it raises an important issue of law (or a combination of law and fact) that warrants consideration by the Supreme Court. Criminal cases do not need leave and may be heard as of right where one judge in the Court of Appeal dissents on a point

of law. In the last ten years, the Supreme Court averaged seventy-five judgments per year, with a minimum of fifty-eight in 2007 and a maximum of eighty-nine in 2005.¹

18. The Supreme Court may also hear references from the Governor in Council, that is, the Governor General acting on the advice of the federal cabinet, where it considers important questions of law, such as the constitutionality or interpretation of federal or provincial legislation, or the division of powers between the federal and provincial levels of government. A major reference that the Supreme Court recently heard was the reference regarding the secession of Quebec, where the Court was referred the following questions: (i) Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally? (ii) Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? and (iii) In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?²

19. Authority for the judicial system in Canada is divided between the federal government and the ten provincial governments, who have jurisdiction over the administration of justice in the provinces, including the constitution, organization, and maintenance of the courts, both civil and criminal, as well as civil procedure in those courts. But, the federal government has also power to appoint the judges of the superior provincial courts (*infra*, paragraph 20).

20. With the exception of Nunavut, every province has two separate trial courts that deal with criminal matters. These include: provincial courts and superior provincial courts. Provincial courts are the lowest level trial courts. They are run and funded by their respective provinces. Moreover, the judges of these courts are appointed by their respective province. By contrast, the superior provincial courts are the highest level trial courts. They are also run and funded by their respective provinces. However, as said above, the federal government has the power to appoint the judges of the superior provincial courts.

21. Functionally speaking, each trial court has been delegated with a unique level of responsibility. For instance, provincial courts are initially responsible for processing virtually every criminal case. This takes place in the form of a preliminary inquiry. Basically, when an individual is charged with a certain criminal offence within a given province, his or her case is first subject to a preliminary

1. Supreme Court of Canada, Statistics 2004–2014, available at <http://www.scc-csc.gc.ca/case-dossier/stat/index-eng.aspx>.

2. Reference re Secession of Quebec, [1998] 2 S.C.R. 217.

inquiry at the respective provincial court. The main purpose of the preliminary inquiry is to ensure that the prosecution has sufficient evidence that will enable the successful completion of the trial. If there is sufficient evidence, the next step is to determine whether the trial will be carried out at the superior court or remain at the provincial court. This is generally contingent upon the type of crime that is at issue. For summary conviction offences (*infra*, paragraph 200), the trial will automatically remain at the provincial court level. For non-capital indictable offences (for a definition of indictable offences, see *infra*, paragraph 200), the accused is given the discretion to choose either the provincial or superior court. In the case of former capital indictable offences, however, the trial will automatically proceed to the superior court. Following trial at either court, the judgment can be appealed to two upper level appellate courts: the Provincial Courts of Appeal and the SCC (*infra*, paragraph 199).

§2. CRIMINAL LAW, CRIMINAL JUSTICE, AND CRIMINOLOGY

I. Definitions of Criminal Law

22. Criminal law in Canada is a branch of public law that deals with the definition of crime, and its sanctions under a specific procedure. The predominant function of criminal law is social control, that is, the State regulates the behaviour of Canadian citizens and social groups in Canada by imposing or threatening with the imposition of punitive sanctions.

23. Substantive criminal law deals with the definition of behaviour considered criminal, and the sanctions for those individuals and organizations that engage in these behaviours. Unlike civil law countries, in Canada, there is no general theory of the offence. Canadian courts and scholars are not concerned with the elaboration of a theory that is capable of explaining the existence or non-existence of crimes and their components in a general and comprehensive way. Nonetheless, all crimes have some basic common elements and common doctrinal structures, which permit their description and analysis from a general perspective. For this purpose, Chapter IV (*infra*, paragraphs 122–152), contains an analysis of some major criminal offences so as to give a better understanding of Canadian criminal law. This analysis will also show that in many cases, the Supreme Court departs from these elements of crime, by creating others, by neglecting to consider some elements of the crime in its analysis of criminal behaviours, and by confusing or applying these elements in an inconsistent fashion.

24. Criminal law in Canada is both codified and the result of jurisprudence developed by judges. While all the offences are now embodied in the Criminal Code, except for the contempt of court, which remains to be a common law offence, defences may continue to be common law.

25. The Canadian Criminal Code was enacted in 1892 and underwent a major reform in 1955. Apart from offences included in the Criminal Code, there are also

several federal statutes that contain definitions and sanctions for specific issues, such as offences under the Financial Administration Act, the Controlled Drugs and Substances Act, or Canada Elections Act.

26. Canadian criminal law is the almost exclusive jurisdiction of the federal government. The Canadian Criminal Code applies throughout Canada. In the Yukon, Northwest, and Nunavut Territories it applies insofar as it is not inconsistent with the Acts of these territories. Provinces have some jurisdiction over minor regulatory offences.

II. Procedural Criminal Law

27. Procedural criminal law deals with the norms and regulations governing the institution, prosecution, and adjudication of criminal offences, as well as the organization and powers of the criminal justice agents.

III. Overview of the Criminal Justice System

A. *Police*

28. Police in Canada is organized in four different levels: (i) federal, (ii) provincial, (iii) municipal, and (iv) aboriginal. As a broad overview, the police forces of Canada have been delegated with the responsibility of enforcing Criminal Code offences up to the point of making an arrest. Once an arrest is made, it is the responsibility of the prosecution to decide whether charges should be laid. That is, the police can conduct an independent investigation without the approval of the prosecution, but they cannot charge an individual with a given Criminal Code offence without the approval of the prosecution. Moreover, if the prosecution decides to lay charges, it is then the prosecution's responsibility to process the case through the court structure. The purpose of this section is to provide an explanation of how the Canadian criminal justice system functions and how Canadian police forces operate.

29. The Royal Canadian Mounted Police, known as RCMP, are the federal police which enforce most federal statutes (such as the Controlled Drugs and Substances Act). By contrast, the RCMP do not enforce Criminal Code offences on their own initiative. They only do so when they are hired to provide services by other jurisdictions and when they receive a request from a federal government department to investigate allegations of fraud connected with the use of public funds. Some provinces also hire the RCMP to provide provincial police services. Contrary to provincial police forces, the RCMP have exclusive jurisdiction to enforce Criminal Code offences anywhere in Canada. The RCMP are, therefore, not limited with respect to their authority to enforce Criminal Code offences. However, since the authority to enforce Criminal Code offences has been delegated to the provincial police forces, the RCMP will only intervene when requested to do so.

30. Provincial Police forces are responsible for policing rural areas and the areas outside municipalities and cities. They enforce Criminal Code offences and provincial laws. Provincial police forces, such as the Ontario Police Force or the Sûreté du Québec, provide services in municipalities under contract.

31. Municipal police have jurisdiction within cities. They enforce Criminal Code offences, provincial laws, and municipal bylaws. Most police work in Canada is enforced by municipal police.

32. Aboriginal communities have the right to develop autonomous police forces, which have the authority to enforce on reserve lands Criminal Code offences, provincial and federal statutes, and band bylaws.

B. Crown Prosecution

33. The Attorney General of Canada is responsible to prosecute criminal offences under federal jurisdiction and to contribute to the strengthening of the criminal justice system. The Public Prosecution Service of Canada (PPSC) is a federal government organization, created in 2006, to discharge the responsibilities of the Attorney General. The mandates of the PPSC are to provide prosecutorial advice to law enforcement agencies, and to act as prosecutor in matters prosecuted by the Attorney General of Canada on behalf of the Crown. Authority to prosecute offences under the Criminal Code is given to Provincial Attorneys General, but a Provincial Attorney General may confer authority to the Attorney General of Canada to prosecute a specific charge. Also, the Attorney General of Canada has authority under some federal statutes and in the territories.

34. As held by the SCC, the ‘purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty’.³

35. Prosecutors have flexibility to decide whether to prosecute a case or not. This decision to prosecute has to be taken into account under a twofold test: (i) is the evidence sufficient to justify the institution or continuation of proceedings? if it is, (ii) does the public interest require a prosecution to be pursued?

36. Public interest factors which may arise on the facts of a particular case include:

- (1) the seriousness or triviality of the alleged offence;
- (2) significant mitigating or aggravating circumstances;
- (3) the age, intelligence, physical or mental health or infirmity of the accused;

3. *Boucher v. The Queen*, [1955] S.C.R. 16.

- (4) the accused's background;
- (5) the degree of staleness of the alleged offence;
- (7) the accused's alleged degree of responsibility for the offence;
- (8) the prosecution's likely effect on public order and morale or on public confidence in the administration of justice;
- (9) whether prosecuting would be perceived as counter-productive, for example, by bringing the administration of justice into disrepute;
- (10) the availability and appropriateness of alternatives to prosecution;
- (11) the prevalence of the alleged offence in the community and the need for general and specific deterrence;
- (12) whether the consequences of a prosecution or conviction would be disproportionately harsh or oppressive;
- (13) whether the alleged offence is of considerable public concern;
- (14) the entitlement of any person or body to criminal compensation, reparation or forfeiture if prosecution occurs;
- (15) the attitude of the victim of the alleged offence to a prosecution;
- (16) the likely length and expense of a trial, and the resources available to conduct the proceedings;
- (17) whether the accused agrees to co-operate in the investigation or prosecution of others, or the extent to which the accused has already done so;
- (18) the likely sentence in the event of a conviction; and
- (19) whether prosecuting would require or cause the disclosure of information that would be injurious to international relations, national defence, national security or that should not be disclosed in the public interest; the application of and weight to be given to these and other relevant factors will depend on the circumstances of each case.⁴

C. Judges

Source: Canadian Superior Courts Judges Association.

37. There are four different levels of courts in Canada: (i) provincial/territorial courts, which have jurisdiction in the majority of cases; (ii) provincial/territorial superior courts, which deal with more serious crimes and with appeals from provincial/territorial court judgments; (iii) federal courts, which have appellate jurisdiction with regard to the cases tried by the provincial courts (*infra*, paragraph 39) as well as general jurisdiction regarding civil cases arising under specified federal statutes; (iv) the SCC.

38. Provincial and federal courts each have specific names, which generally correspond to the respective province that they are situated in. For example, the Ontario provincial court is known as the Ontario court of justice (OCJ), and the Ontario superior provincial court is known as the Ontario superior court of justice (OSJ).

4. Department of Justice Canada, *Public Prosecution Service of Canada Deskbook* (Department of Justice Canada, Ottawa, 2000), Part V, Ch. 15.

Moreover, the federal court in Ontario is known as the Ontario Court of Appeals (Ont.C.A). The same goes for other provinces. So, to further illustrate this point, the British Columbia provincial court is known as the British Columbia court of justice (BCJ), and the British Columbia superior court is known as the British Columbia superior court of justice (BCSJ). To that same thread, the federal court in British Columbia is known as the British Columbia Court of Appeals (BCCA). By contrast, the SCC is the only federal court of Canada that has a name that remains constant.

39. Such distinctions are important because there is a hierarchical ordering between the provincial courts and the federal provincial courts and the SCC. That is, the provincial courts are the trial courts, and the federal courts are the appellate courts. Basically, a case that is tried at one of the provincial courts will be sent to the federal appellate court level in the event of either the defence or prosecution appealing the decision at the provincial court. For example, if a decision of the OSJ was appealed, the case would generally be sent to the Ontario Court of Appeals. The decision of the Ontario Court of Appeals, if appealed, will be sent to the SCC.

40. With respect to the functioning of the courts, the superior courts have inherent jurisdiction, that is, they can hear cases in any area except those that are specifically limited to another level of court. Provincial/territorial courts of appeal and the Federal Court of Appeal deal with appeals from their respective lower courts. Furthermore, the SCC is at the highest level and is the final Court of Appeal from all other Canadian courts (*supra*, paragraph 15). The Supreme Court has jurisdiction over disputes in all areas of the law, including constitutional law, administrative law, criminal law, and civil law.

D. Corrections

41. The responsibility for corrections is shared between the federal and the provincial governments. Federal corrections are in charge of offenders that are sentenced to two or more years in prison, and provincial corrections have responsibility for those offenders that are sentenced to less than two years. At the federal level, Correctional Service of Canada is in charge of correctional facilities.

E. Parole

42. The National Parole Board of Canada has exclusive authority to grant, deny or terminate parole. Some provinces, such as Ontario and Quebec, have provincial parole boards for crimes that are served in provincial corrections facilities.

F. The Bar

43. The Bar also plays an important role in the administration of criminal justice in Canada. A lawyer is considered to be an officer of the court, who has a special duty to maintain and uphold the law. In Canada, there are fourteen provincial and territorial law societies that govern over 100,000 lawyers. Each of these law societies is grouped under the Federation of Law Societies of Canada. While most of the societies retain the traditional concepts of barrister and solicitor, in practice every member is considered a lawyer and has all the rights, duties, and prerogatives of those who may fully practice law at all levels. Canada does not recognize specializations; and any lawyer admitted to the practice of law can represent clients in criminal trials and proceedings.

§3. TRENDS WITHIN CRIMINAL JUSTICE

44. One of the main ideals in Canada, with respect to criminal matters, is that criminal legislation should be congruent with the social structure. When the majority of people continually disobey the provisions of a given piece of criminal legislation, then there is evidence that the regulatory effect of that given criminal legislation may not be congruent with the social structure. In such a case, the federal legislature needs to amend or repeal the criminal legislation in question. In this respect, the government has reformed important offences, such as sexual offences and assisted suicide, which reform reflects a change in societal attitudes toward these crimes. In the last few years, a new tendency within criminal justice has clearly emerged. As supporters of the Crime Control model (*infra*, paragraph 56), the government has adopted a law and order agenda. Under this agenda, the government has tightened sanctions, particularly for violent crimes and crimes committed with weapons. It has also increased penalties for criminal organizations. It has fostered the imposition of consecutive rather than concurrent sentences. Additionally, the government has shifted the focus of new legislation away from the rights of the accused toward the rights of victims.

§4. SOURCES OF CRIMINAL LAW

I. International Sources

45. International treaties do not have direct application in Canada as they need to be domesticated. Following the transformation approach, international treaties, particularly those that involve a change in existing law, may only have binding effect on the domestic plane after they have been adopted by the Parliament, whether federal or provincial in accordance with the constitutional distribution of competence. The Canadian legislature follows both of the methods available for the domestication of an international treaty, that is, the incorporation of the text of a treaty *in toto* and the incorporation of the substance of the treaty into a domestic

statute, usually followed for treaties whose object deals with issues already existing under Canadian domestic law.

46. Canadian law is not settled with regard to the value of international law which may conflict with domestic law, such as conflicts between treaties that have been transformed into Canadian law and domestic statutes. As to unimplemented treaties, that is, treaties which have been signed and ratified by the Canadian Federal Executive but which have not been transformed into Canadian law by an act of Parliament or a provincial legislature, recent decisions of the Supreme Court attribute these treaties a persuasive authority for the interpretation of Canadian statutes or even to shape ministerial discretion.⁵

II. National Sources

A. *The Constitution*

47. The Constitution Act, 1867 grants the federal Parliament exclusive legislative powers to enact legislation on criminal law, including the procedure in criminal matters.

48. The Constitution Act, 1867 also grants provinces the exclusive power to impose punishment by fine, penalty, or imprisonment for enforcing any provincial law within their jurisdiction. While the notions of fine and imprisonment are self-explanatory, penalty means all those sanctions that are neither fines nor imprisonment, such as confiscation and closures. For example, in *Bédard v. Dawson*,⁶ a leading case where the Supreme Court held that the provinces have the power to legislate in matters related to the prevention of crime even though the federal government had exclusive power over criminal law, the Supreme Court considered the notion of penalty to include the shutting down of a bawdy house.

B. *The Charter of Rights and Freedoms*

49. The Charter of Rights and Freedoms, adopted in 1982, is part of the Constitution and contains rights and guarantees protecting Canadians from governmental abuse. It contains several rights directly associated to the criminal justice process. These rights, known as legal rights, include the right to life, liberty, and security of the person; to be secure from unreasonable search and seizure; not to be subject to arbitrary detention or imprisonment; to be informed promptly for reasons for any arrest or detention; to retain and instruct counsel on arrest or detention; to

5. The leading case in this respect is: *Baker v. Canada* (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817.

6. *Bédard v. Dawson et al.*, [1923] S.C.R. 681.

trial within a reasonable time by an impartial tribunal; to the presumption of innocence; protection against self-incrimination; not to be subjected to cruel and unusual treatment or punishment; and the right to the assistance of an interpreter.

C. Canadian Criminal Code and Federal Legislation

50. Federal Parliament has adopted the Criminal Code which contains the offences, their punishment, and even rules dealing with criminal procedure. Unlike other common law countries, there is no separate code of criminal procedure. Parliament has adopted some laws, such as the Canada Evidence Act, that apply to criminal proceedings. But most of the norms regulating criminal trials and procedures are included in the Criminal Code. The Criminal Code also contains some general norms that are aimed at governing the application of criminal offences. It does not have a general part with fundamental principles as most civil law jurisdictions do.

51. Federal Parliament has also enacted federal statutes containing offences on specific issues regulated by these statutes, such as the Controlled Drugs and Substances Act, and Canada Elections Act. Federal Parliament has also adopted the Youth Criminal Justice Act (YCJA), which deals with offences committed by minors between the ages of twelve and eighteen.

D. Provincial and Municipal Legislation

52. Under the authority given to provinces, Canadian provinces have adopted regulatory offences (*infra*, paragraph 81), such as traffic offences and offences for conducting activities without a license.

53. Similarly, cities may enact legislation where lack of compliance with a permit or other obligations may result in a penalty.

E. Court Decisions

54. As in any common law jurisdiction, court decisions play a fundamental role in the development of criminal law in Canada. Through their decisions, judges have shaped criminal law. In the Canadian Criminal Code, there is no general theory of offence, most of the offences do not list *mens rea* or do not include a *mens rea* for all elements of the *actus reus*, and the defences are not developed. So, judges in their decisions have been filling these vacuums. For example, they have developed the battered women syndrome defence⁷ (*infra*, paragraph 99), they have read in

7. *R. v. Lavallee*, [1990] 1 S.C.R. 852.

intentional *mens rea* for the criminal harassment (stalking) offence⁸ (*infra*, paragraph 141), and they have formulated the principle of fundamental justice⁹ (*infra*, paragraph 69). Such decisions are primarily in place as a reference for other courts to follow when faced with cases addressing similar issues that do not have an explicit codified answer. Formally, they are known as legal precedents. This process follows a framework set out by a doctrine known as *stare decisis*, which states that judges are obligated to respect the precedents established by the decisions put forth in prior cases. In Canada, this is carried out in a hierarchical manner throughout the court system. Basically, judges of lower level courts are obligated to follow the decisions put forth by judges of higher level courts when faced with a similar criminal law issue. For example, if a judge from a provincial Court of Appeal were required to make a decision regarding a murder case, he or she would be obligated to follow the decision, or precedent, set by the SCC in the event that the same issue of law in a similar murder had previously been appealed and decided at the Supreme Court level.

§5. CRIMINAL JUSTICE

55. Three criminal justice models predominate in Canada. Each has influence over different aspects of criminal law and criminal justice. These models are: (i) Crime Control; (ii) Due Process; and (iii) Restorative Justice model.

56. The objective of the *Crime Control model* is to repress criminal conduct by efficiently apprehending, trying, convicting, and disposing of a high proportion of criminal offenders at an early stage of the criminal justice process. The Crime Control model operates under a presumption of guilt. This means that screening processes of the police and prosecutors are regarded as reliable indicators of probable guilt. Once a determination has been made that a person is guilty, all subsequent activity is based on the view that this person is probably guilty. The presumption of guilt is descriptive and factual in nature. The centre of gravity of the process lies on the early administrative fact-finding stages, that is, police and prosecutors, where investigative and prosecutorial officers act in an informal setting with ample faculties to elicit and reconstruct an alleged criminal event.

57. The objective of the *Due Process model* is to protect the rights of the accused by giving primacy to the individual and limiting official power. Due Process functions with a presumption of innocence. Under this presumption, a person is not to be held guilty of a crime merely on a showing that he did factually commit the crime. Instead, he or she must be held guilty if and only if these factual determinations are made in a procedurally regular fashion and by the authorities acting within competences duly allocated to them. Furthermore, he or she is not to be held guilty if various rules designed to protect him or her and to safeguard the integrity of the process (jurisdiction, venue, statute of limitations, double jeopardy, criminal

8. *R. v. Swain*, [1991] 1 S.C.R. 933.

9. *R. v. Sillipp*, (1997), 120 C.C.C. (3d) 384.

responsibility, etc.) are not given effect. The centre of gravity of criminal justice lies on formal, adjudicated, adversary fact-finding processes. The nature of the presumption of innocence is normative and legal. The centre of gravity of the process lies on the role of defence attorneys.

58. The objective of the *Restorative Justice model* is to fully address the needs of the victims, to prevent re-offending by reintegrating offenders back to community, to let offenders assume responsibility, and to create a community of support for victim, offender, and community. In the Restorative Justice model, since the perpetrator of the crime assumes responsibility for the offence, there is no emphasis on guilt and no expectation to compromise. Restorative Justice is in opposite to the adversary system, which precludes the acceptance of responsibility and limits the possibility of direct exchanges between the victim and offender. The model also seeks a commitment to both material and symbolic reparation.

59. Crime Control has influenced the organization of police and the repression of some behaviours, such child pornography and terrorism. The influence of Due Process can be clearly seen in the Charter of Rights and Freedoms, and that of Restorative Justice in diversion mechanisms in Youth Justice.

§6. CRIMINOLOGY

60. Criminology and criminologists also influence Canadian criminal law greatly. Criminology is the scientific approach to the study of criminal behaviour as a social phenomenon. It is the body of general principles regarding the process of law, crime, and control. Criminology is devoted to the analysis of the causes of crime, crime patterns, and trends. Canadian universities have been training hundreds of criminologists and many Canadian criminologists have national and international prestige. They are generally consulted by the government and criminal justice organizations to conduct empirical research and formulate policy proposals. As a result, criminologists have greatly influenced the shape and directions of criminal law in Canada.

61. There are three main criminology views: (i) individual; (ii) sociological; and (iii) conflict/critical. Criminologists enrolled in each of these views have influenced different aspects of Canadian criminal law and the criminal justice process. Individual explanations of crime focus exclusively on the offender. The major tenet of the individual view is that the causes of crimes lie with the individual. There is something that leads a person to commit crimes, whether it is their choice (Classical and Neoclassical schools), psyche (Psychological schools), or biology (Positivist school). Sociological views tend to explain criminality in terms of the social environment of the offenders. The emphasis is on external factors which may trigger off criminogenic social conditions. The immediate social environment is primarily responsible for criminality in society. Major social factors causing criminality include broken families, poor parenting, low quality educational experiences, delinquent peer relations, poverty, lack of equal economic opportunity, and inadequate

sharing in values implicit in mainstream Canadian culture, among others. The sociological view includes Social Disorganization, Differential Association, Strain, Labelling, and Control Theories.

62. Critical theories tend to attribute criminality to the capitalist system. Its major tenet is that capitalism creates criminal behaviour. It has a distinct political view of crime. For these theories, the ruling class uses the law and criminal justice system to advance its economic and social purposes, with criminal laws being viewed as the product of the upper classes. Accordingly, capitalism is the root cause of criminal behaviour because the human needs of the poor are ignored. Critical criminology also focuses on the crimes of the dominant class. These crimes have been attributed to egoistic sentiments and a need to maintain and advance one's socioeconomic position at any cost. Some critical theories also focus on male power and privilege as the root cause of criminality.

63. Individual criminology, particularly Classical School, has had the most influence on Canadian criminal law. The notion of individual criminal responsibility, codification of offences, trial by jury of peers, abolition of death penalty, and more recently anti-terrorism procedural reforms (Neoclassical School) are all due to individual criminologists. Sociological criminologists have influenced the adoption of programmes aimed at reducing criminality and the adoption of community policing strategies, while critical/conflict criminology, particularly Feminist criminologists, have been instrumental in the reform of sexual offences and pornography, among others.¹⁰

10. An Act respecting the mandatory reporting of Internet child pornography by persons who provide an Internet service (Bill C-22, Ch. 4, 2011).

Part I. Substantive Criminal Law

Chapter 1. General Principles

§1. GENERAL PRINCIPLES

64. Canadian Law does not have a general part or a body of well-defined general principles that apply to all offences. However, there are some principles which govern or help in the interpretation of crimes. Most of these principles have been developed by courts. For example, while the Charter of Rights and Freedoms and the Criminal Code do contain some provisions about retroactive laws, these have not been consecrated as principles. As a way of illustration, the Charter provides that no one is to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law. In Canada the principle of the milder statutes is not generally recognized, except for the period of time between the commission of the offence and sentencing. Furthermore, if an accused is sentenced to prison for an offence, and then that offence is abolished, the accused has to serve the remaining of the sentence.

65. The following are general norms, which may be considered principles and which have some correspondence – albeit more limited – in the civil law world.

66. *Interpretation that most favours the accused.* The SCC held that if there are real ambiguities or doubts of substance in the construction and application of a statute affecting the liberty of a subject, then that statute should be applied in such a manner as to favour the person against whom it is sought to be enforced.¹¹ This principle parallels the *in dubio pro reo* of civil law States, but the formulation in Canada is generally more restrictive than in the civil law world.

67. *Unconstitutionally vague and overbroad laws.* Laws that are excessively vague or overbroad are not considered constitutional. The Supreme Court held that:

laws must of necessity cover a variety of situations. Given the infinite variability of conduct, it is impossible to draft laws that precisely foresee each case that might arise. It is the task of judges, aided by precedent and considerations like the text and purpose of a statute to interpret laws of general application

11. *Marcotte v. Deputy Attorney General (Canada) et al.*, [1976] 1 S.C.R. 108.

*and decide whether they apply to the facts before the court in a particular case.*¹²

Again, when compared to civil law jurisdictions, this principle is narrower in Canada.

68. *Presumption of innocence.* This principle determines that when government enacts a criminal law, a person must be deemed not to be guilty of the offence until he or she is convicted according to applicable criminal law. It also means that a person who is convicted of the offence is not liable to any punishment other than the punishment prescribed by that law. This principle includes some of the notions of the legality principle contained in most civil law jurisdictions. In the leading case *R v. Oakes*, one of the first cases decided after the adoption of the Charter of Rights and Freedoms, the Supreme Court held that the:

*presumption of innocence lies at the very heart of the criminal law and is protected expressly by s. 11(d) of the Charter and inferentially by the s. 7 right to life, liberty and security of the person. This presumption has enjoyed long-standing recognition at common law and has gained widespread acceptance as evidenced from its inclusion in major international human rights documents. In light of these sources, the right to be presumed innocent until proven guilty requires, at a minimum, that: (1) an individual be proven guilty beyond a reasonable doubt; (2) the State must bear the burden of proof; and (3) criminal prosecutions must be carried out in accordance with lawful procedures and fairness.*¹³

69. *Principle of fundamental justice.* The principle of fundamental justice contemplates an accusatorial and adversarial system of criminal justice which is founded on respect for the autonomy and dignity of the person. This principle requires, among other issues, that an accused person have the right to control his or her own defence. The principle of fundamental justice is not absolute, so:

*if it is possible to reformulate a common law rule so that it will not conflict with the principles of fundamental justice, such a reformulation should be undertaken. Of course, if it were not possible to reformulate the common law rule so as to avoid an infringement of a constitutionally protected right or freedom, it would be necessary for the Court to consider whether the common law rule could be upheld as a reasonable limit under s. 1 of the Charter.*¹⁴

12. *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625.

13. *R. v. Oakes*, [1986] 1 S.C.R. 103.

14. *R. v. Swain*, [1991] 1 S.C.R. 933.

§2. CRIMINAL JURISDICTION

70. Canada has criminal jurisdiction for offences committed inside Canada. According to the SCC, all that is necessary to make an offence subject to the jurisdiction of Canadian courts is that a ‘significant portion of the activities constituting that offence took place in Canada. It is sufficient that there be a real and substantial link between an offence and Canada’.¹⁵ Canada has also jurisdiction in limited circumstances with respect to some offences committed or omitted outside Canada. These include offences committed or omitted: (a) on a ship that is registered or licensed, under Canadian Law; (b) on an aircraft registered in Canada or leased without crew and operated by a person who qualified as owner of an aircraft in Canada; (c) in some cases where the perpetrator is a Canadian citizen, such as offences relating to financing terrorism and offences in relation to cultural property; (d) in some cases where the victim is a Canadian citizen, such as crimes involving terrorist activities; or (e) the perpetrator is present in Canada. For example, offences related to aircraft include hijacking, endangering safety of aircraft or airport, and offensive weapons and explosive substances. These offences derive from the Public International Air Law Conventions adopted in the 1970s. Behaviour committed or omitted by a Canadian crewmember on a flight element of the International Space Station that constitutes an indictable offence in Canada is subject to criminal prosecution. Canadian citizens and permanent residents that engage in child sex tourism outside Canada may also be tried in Canada.

§3. CRIMINAL LAW SCHOOLS OF THOUGHT

71. Two opposing schools of thought dominate criminal law policy in Canada: utilitarianism and retributivism. While these schools are primarily concerned with theories of punishment, their main ideas affect most areas of criminal law and criminal justice policy and have shaped many substantive aspects of the theory of offence.

72. The main tenets of utilitarianism are that criminal and deviant behaviour occurs when an offender decides to risk violating the law after balancing the potential value of the criminal enterprise against the potentiality of being apprehended, as well as the severity of the punishment. For utilitarians, criminals have control over their behaviour, they choose to commit crimes, and they can be deterred by the threat of punishment. Thus, deterrence becomes the central purpose for punishment, which is conceived as a tool and not an end in itself. To help prevent crime, punishment and adjudication should be swift, severe, and certain. A severe punishment, however, is only that which is severe enough, but not more so, to outweigh the personal benefits derived from crime commission. Although widely received in modern common law legislation, utilitarian ideas have been criticized – especially in the academe – for their potential consequences when taken to the extreme. Pure utilitarianism can be used to justify punishment of the innocent in those rare

15. *Libman v. The Queen*, [1985] 2 S.C.R. 178.

instances where, on balance, greater general deterrence or other social good can be achieved.

73. The retributive criminal law school puts forward the idea that punishment is justified when it is deserved. They believe that retribution is essentially the infliction of harm on offenders on the basis that they deserve it as a result of their crimes. Civil society has a moral duty to restore the balance of justice when it is affected by a crime. The only way to restore justice is by punishing the criminal by giving him or her what he or she deserves. Unlike utilitarianism, retributivism looks backward and justifies punishment only on the voluntary commission of a crime. The primordial criticism of retributivism is that it promotes an eye for an eye philosophy and that it advocates punishment even in those situations where there is no social benefit.

74. Both schools of thought have greatly influenced criminal jurisprudence in Canada and consequently, criminal law does not adhere uniformly to one of these theories, but rather some of its rules are fundamentally retributive in nature, whereas others are utilitarian. Thus, for example, it is common to find partially utilitarian justifications emphasizing the deterrent value of legal sanctions, which are retributive in their justification of the content of the prohibition. This is so because both theories have been dominant at different times without winning the ultimate debate and both have attracted the attention of the criminal lawmakers and society. The Supreme Court has acknowledged this tension between utilitarianism and retributivism in several opportunities. In a decision about sentencing, it held that:

*retribution is an accepted, and indeed important, principle of sentencing in our criminal law. As an objective of sentencing, it represents nothing less than the hallowed principle that criminal punishment, in addition to advancing utilitarian considerations related to deterrence and rehabilitation, should also be imposed to sanction the moral culpability of the offender.*¹⁶

Similarly, the Supreme Court often looks for utilitarian and retributivist arguments in their decisions. As a way of illustration, the Supreme Court analysed that:

*the question of whether or not there should be a recognized privilege for confidential religious communications is a question of policy. The first argument is utilitarian. Religious confidentiality is vitally important not only to the maintenance of religious organizations but also to their individual members. Without it, individuals would be disinclined to confide in their religious leaders. Its value is the value to society of religion and religious organizations generally. Even from a purely utilitarian perspective, that value cannot be overstated.*¹⁷

16. *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500.

17. *R. v. Gruenke*, [1991] 3 S.C.R. 263.

Chapter 2. General Principles of Criminal Liability

75. In Canada, there is no general theory of the offence. Canadian courts and scholars are not concerned with the elaboration of a theory that is capable of explaining the existence, or non-existence, of crimes and their components in a general and comprehensive way. Nonetheless, all crimes have some basic common elements and common doctrinal structures, which permit their description and analysis from a general perspective. The basic common elements of a crime in Canada are *actus reus* and *mens rea*, together with the absence of justifications and defences.

§1. *ACTUS REUS*

76. The substantive theory of *actus reus* originated in the evidentiary requirement of the presence of *corpus delicti* for the criminal conviction. When this procedural rule turned substantive, the issue was expressed in terms of whether the concrete occurrence corresponded to an abstract crime description. *Actus reus* is defined as the physical act specified in the crime. The *actus reus* is comprised of a voluntary act that causes social harm; causation is the nexus between the act and the social harm. The act constitutes the physical element of a criminal act. It must be voluntary, which excludes reflexes and convulsions, as well as acts performed during a state of unconsciousness. Typically, the *actus reus* requirement is met when an agent acts voluntarily.

77. Social harm is the negation, endangering, or destruction of a socially valuable and legally protected interest, whether individual, societal, or State. It may adopt the form of a wrongful result, wrongful conduct, or attendant circumstances. Social harm is expressed as a wrongful result when the offence is defined in terms of a prohibited result.¹⁸ For instance, murder is a result crime because the social harm is the death of another human being. Social harm takes the form of wrongful conduct when the offence is described in terms of injurious conduct, and no harmful result is required, such as the case of possession of prohibited firearms. In this case, the social interest – to live peacefully without perils that may be triggered by the use of firearms – is endangered by the possession of illegal firearms. The definition of an offence may include other elements defined as attendant circumstances. An example of attendant circumstances can be found in the offence of bribery, which takes place when a judicial officer or a member of a legislature corruptly accepts money. The acceptance of money only by those who hold such offices constitutes the social harm in the bribery offence. Thus, judicial and legislative officers are the attendant circumstance, whose corruption constitutes social harm.

78. The causal link requirement implies that for criminal liability to arise, the act must cause the social harm both factually and legally. An act can cause harm when the ‘but for’ test is satisfied, or when the act is a substantial factor. The former

18. Joshua Dressler, *Understanding Criminal Law* 108 (6th ed., Matthew Bender & Co 2012) .

takes place when a particular result would not have occurred but for the act. The substantial factor test is satisfied when there are two or more causes, each alone sufficient to bring about the harmful result, operating together to cause it, and the defendant's conduct is a substantial contributing factor in bringing about the result. The but-for-test is considered to satisfy factual causation; and the substantial factor satisfies legal causation. In practice, legal causation is determined on the basis of a judgment call.

79. Additionally, the *actus reus* requirement means that there is no criminal liability for an omission to act, save for the exceptional situations where a legal duty to act exists. There is a duty to act when there is a special relationship: the relationship between a parent and a child; a contract which creates a duty to act, such as when a patient hires a nurse for obtaining and rendering care; a law that requires a person to act; when the defendant himself or herself caused the danger; or, when the defendant undertook to render assistance to the victim.

§2. *MENS REA*

80. The *mens rea*, or guilty mind, implies that the actor's mental state coincides with that required by the law for a particular offence. The notion of *mens rea* expresses the principle that it is not conduct alone but conduct accompanied by certain specific mental states which concerns the law. In other words, this requirement is met when, at the time the agent committed the crime, he or she had the legally requisite mental state that the law requires for the existence of criminal liability. Except for provincial regulatory offences, Canadian criminal law generally requires that there be a specified *mens rea* for every element of an offence, which includes the act itself, and the social harm. The purpose of the inclusion of the *mens rea* component is to describe the mental state in blameworthy, or culpable, conduct that leads to criminal liability, as distinguished from conduct that causes harm but is unaccompanied by the mental state necessary to impose criminal liability.

Despite the importance of *mens rea* for criminal liability, the Canadian lawmaker sometimes neglects to include the required *mens rea* in the definition of the offence or simply neglects to include a type of *mens rea* for every element of the crime. For example, the prohibited conduct in the crime of stalking (*infra*, paragraph 141) lacks any mental element. In general, where an offence does not specify the type of *mens rea* required, and the courts have not specifically mandated the inclusion of a certain type of *mens rea*, it is considered that recklessness must be read into the offence.

81. Regulatory (or *public welfare*) offences differ from criminal offences in the fact that they generally do not require any *mens rea*. Thus, the SCC held in the leading case entitled *Sault Ste. Marie* that:

regarding mens rea the distinction between the true criminal offence and the public welfare offence is of prime importance. Where the offence is criminal

mens rea must be established and mere negligence is excluded from the concept of the mental element required for conviction. In sharp contrast 'absolute liability' entails conviction on mere proof of the prohibited act without any relevant mental element. The correct approach in public welfare offences is to relieve the Crown of the burden of proving *mens rea*, having regard to *Pierce Fisheries*, [1971] S.C.R. 5, and to the virtual impossibility in most regulatory cases of proving wrongful intention, and also, in rejecting absolute liability, admitting the defence of reasonable care. This leaves it open to the defendant to prove that all due care has been taken. Thus while the prosecution must prove beyond reasonable doubt that the defendant committed the prohibited act, the defendant need only establish on the balance of probabilities his defence of reasonable care. Three categories of offences are therefore now recognised: (first) offences in which *mens rea* must be established, (second) offences of 'strict liability' in which *mens rea* need not be established but where the defence of reasonable belief in a mistaken set of facts or the defence of reasonable care is available, and (third) offences of 'absolute liability' where it is not open to the accused to exculpate himself by showing that he was free of fault. Offences which are criminal are in the first category. Public welfare offences are *prima facie* in the second category. Absolute liability offences would arise where the legislature has made it clear that guilt would follow on mere proof of the proscribed act.¹⁹

82. Both retributivists and utilitarians favour the *mens rea* requirement – albeit for different reasons. Utilitarianism embraces the *mens rea* requirement mainly on deterrence grounds. An offender cannot be deterred from the commission of a criminal act unless he or she appreciates that his or her conduct will lead to punishment. Furthermore, the higher mental states, such as purposefulness and knowledge, reflect the greater probability that the defendant will cause social harm. Thus, the severity and certainty of punishment should also increase as the need to deter the offender, and others with similar guilty mind, is greater. Retributivists also favour the *mens rea* requirement, arguing that persons who are blameworthy deserve to be punished. Those who lack a guilty mental state do not deserve any punishment. The strongest arguments condemning crimes without *mens rea* have come from retributivists, particularly culpability-based retributivists, who do not advocate punishing the blameless.

83. The *mens rea* requirements have been traditionally grouped into two categories. The first category is crimes requiring *general intent*, whereby the defendant simply desires to commit a criminal act. The second category is crimes requiring *specific intent*, where the defendant, in addition to desiring to bring about the *actus reus*, wants to do something further. An example of a specific intent crime is a breaking and entering where the intended breaking and entering of a place must be with the intention to commit an indictable offence.

19. *R. v. Sault Ste. Marie*, 1978 CanLII 11 (S.C.C.).

84. More importantly, *mens rea* is considered to comprise four distinct states of mind. These states are:

- (1) intentional or purposeful, when a defendant desires his or her conduct to cause a particular result;
- (2) knowledge, when a defendant is aware that his or her conduct is practically certain to cause a particular result;
- (3) reckless, when defendant is aware of a substantial and unjustifiable risk that his or her conduct might cause a particular result; and
- (4) negligent, when defendant should be aware of a risk that his or her conduct might cause a particular result.

85. The *purposeful or intentional* mental state implies a purpose or willingness to commit the act, or make the relevant omission. A person acts intentionally when it is the person's conscious objective or desire to engage in the conduct or cause the result. Further, willingness implies that the person knows what he or she is doing, intends to do what he or she is doing, and is a free agent. As a way of illustration, mischief requires intention to destroy or damage property. If, for instance, defendant wanted to damage someone else's goods, he or she would be acting with the required mental state, intention of mischief. Intention must be distinguished from motive. Motive is irrelevant for criminal liability purposes, i.e., for the determination of defendant's guilt or innocence. Motive plays a role only at the sentencing level.

86. Intent revolves around two aspects: the foresight that certain consequences will follow from an act; and, the wish for those consequences working as a motive which induces the act. Intent calls for a subjective test, i.e., the Crown prosecutor must prove that the accused had the intention to commit the offence in his or her state of mind. Since it is generally difficult to show beyond a reasonable doubt what a person actually thinks, except if thoughts are communicated to a third party, intentional *mens rea* may be demonstrated indirectly by means of the presumption that a person is presumed to have intended the natural and probable consequences of his or her actions. The SCC, in a recent decision, clarified the terms of the presumption:

In jury trials [...] the common sense inference instruction need not be tied to a rigid formula. While trial judges may choose to refer to the 'sane and sober' person, a simple instruction along the lines that a person usually knows what the predictable consequences of his or her actions are, and means to bring them about, would suffice.²⁰

An exceptional application of this requirement is the *doctrine of the transferred intent*, which essentially applies to murders. It often occurs in bad aim cases when a defendant intends to kill one victim, but in fact, accidentally or unintentionally,

20. *R. v. Walle*, 2012 SCC 41, [2012] 2 S.C.R. 438.

kills another one. In this case, the defendant is culpable and bears criminal liability for the murder of the unintended victim to the same extent as if he or she had killed the intended victim.

87. The concept of *knowledge* entails an awareness that defendant is committing an act that is considered an offence. It does not require any knowledge of the unlawfulness of such act or omission. A person acts knowingly when he or she is aware of the nature of his or her conduct or that the circumstances then surrounding the conduct exist; or when he or she is aware that the conduct is reasonably certain to cause the result. The main distinction between intention and knowledge is that the former entails a conscious desire to cause a particular result by one's conduct; and the latter entails an awareness that the result is practically certain to follow from such conduct. For example, a defendant wants to kill a passenger on an airplane, for which purpose he or she plants a bomb on that airplane. The defendant does not intend to kill other passengers and crew, but he or she knows that the bomb is certain to kill everyone on board. Like intentional *mens rea*, knowledge also calls for a subjective test. Canadian courts have equated *wilful blindness* with actual knowledge. The idea behind this is that an accused cannot deliberately remain ignorant and escape criminal liability as a result. So, deliberately choosing not to know something when given reason to believe further inquiry is necessary can satisfy the mental element of an offence requiring knowledge. A finding of wilful blindness involves an affirmative answer to the question: did the accused shut his or her eyes because he or she knew or strongly suspected that looking would fix him or her with knowledge? The Supreme Court has recently clarified that wilful blindness is not a separate category of *mens rea*. 'Rather, it can substitute for actual knowledge whenever knowledge is a component of the *mens rea*. Wilful blindness imputes knowledge to an accused whose suspicion is aroused to the point where he or she sees the need for further inquiries, but deliberately chooses not to make those inquiries'.²¹

88. The *reckless* mental state occurs when a person is aware of a substantial and unjustifiable risk that his or her act will cause and consciously disregards it. Intent-to-cause-serious-bodily-harm murder requires recklessness on the part of the defendant, who intends to cause his or her victim bodily harm that he or she knows is likely to cause death. A defendant is acting recklessly if he or she is aware – under a subjective test – that death may ensue and consciously disregards this possibility. In other words, reckless *mens rea* cannot be asserted on an objective consideration of what a defendant should have known, but rather on defendant's perceived and consciously disregarded risk.

89. A *negligent* state of mind implies that the defendant should be aware of a substantial and unjustified risk. The risk must be of such a nature and degree that the actor's failure to perceive it involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation. The difference between a reckless and a negligent *mens rea* is that in the latter, defendant fails to perceive a risk associated with conduct, while in the former, defendant perceives and consciously disregards the risk. The test to determine the existence of negligence is that of reasonableness. Conduct that reveals a marked and significant

²¹ *R. v. Briscoe*, 2010 SCC 13, [2010] 1 SCR 411.

departure from the standard which would be expected of a reasonably prudent person under the circumstances indicates negligence. The defendant's conduct must amount to a gross, criminal, or culpable departure from the standard of due care.

§3. JUSTIFICATIONS AND EXCUSES

90. The third component of the offence in Canadian criminal law is the absence of justification or excuse. In other words, the presence of an excuse or justification may lead to the absence, or even inexistence, of a crime. Justifications and excuses permit the exclusion, or reduction, of criminal liability in conduct that would otherwise constitute an offence. Although different in origin, justifications and excuses are generally treated together, as both have a similar effect. They generally include:

- (1) duress;
- (2) necessity;
- (3) self-defence;
- (4) defence of others;
- (5) defence of property;
- (6) parental disciplinary rights;
- (7) entrapment; and
- (8) mental defences negating responsibility, including the insanity defence and intoxication.

I. Duress

91. Duress arises when the defendant is coerced to commit a crime by the use of unlawful force against his or her person or another's person. The threat must induce a well-grounded apprehension of death or serious personal bodily injury if the crime is not carried out. While the threat must generally be present, imminent, and impending; courts have also recognized the existence of this defence when the threat is non-immediate but certain.

Duress also includes the threat of use of force. Duress encompasses two defences in Canada – one legislated in the Criminal Code and the other a judge-made defence.

92. The Criminal Code defence of duress, known as compulsion by threats and contained in section 17, may be invoked when a person commits an offence under compulsion by threats of immediate death or bodily harm from a person who is present when the offence is committed. In this case, the person acting under duress 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. The Criminal Code defence 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 abduction and detention of young persons.

93. According to the Supreme Court:

*the common law defence has freed itself from the constraints of immediacy and presence and thus appears more consonant with the values of the Charter. The common law of duress, as restated by this Court in Hibbert, recognizes that an accused in a situation of duress not only enjoys rights, but also has obligations towards others and society. As a fellow human being, the accused remains subject to a basic duty to adjust his or her conduct to the importance and nature of the threat. The law includes a requirement of proportionality between the threat and the criminal act to be executed, measured on the objective-subjective standard of the reasonable person similarly situated. The accused should be expected to demonstrate some fortitude and to put up a normal resistance to the threat. The threat must be to the personal integrity of the person. In addition, it must deprive the accused of any safe avenue of escape in the eyes of a reasonable person, similarly situated.*²²

94. In practice, criminal justice professionals consider both common law and criminal code duress defences to be only one defence, which applies in all crimes when the defendant is coerced to commit a crime by the use of, or a threat to use, unlawful force against his or her person or the person of another, and there is no safe avenue to escape.

II. Necessity

95. The defence of necessity is narrow and of limited application in Canadian criminal law. The accused must establish the existence of the three elements of the defence. First, there is the requirement of imminent peril or danger. Second, the accused must have had no reasonable legal alternative to the course of action he or she undertook. Third, there must be proportionality between the harm inflicted and the harm avoided.²³

96. Unlike other common law jurisdictions, where the necessity defence entails choosing the lesser evil, in Canada, the courts do not centre the analysis of this defence by focusing on balancing the social utility of breaking the law against obeying the law. In the words of the SCC, the essential criteria for the operation of the defence is the moral involuntariness of the wrongful action measured on the basis of society's expectation of appropriate and normal resistance to pressure.

97. The defence only applies in circumstances of imminent risk where the action was taken to avoid a direct and immediate peril. The act in question may only be

22. *R. v. Ruzic*, [2001] 1 S.C.R. 687, 2001 SCC 24.

23. *R. v. Hibbert*, [2001] 2 R.C.S. 973, 979.

characterized as involuntary where it was inevitable, unavoidable, and where no reasonable opportunity for an alternative course of action that did not involve a breach of the law was available to the accused. As well the harm inflicted by the violation of the law must be less than the harm the accused sought to avoid. Where it was contemplated or ought to have been contemplated by the accused that his or her actions would likely give rise to an emergency requiring the breach of the law it may not be open to him or her to claim his or her response was involuntary; mere negligence or involvement in criminal or immoral activity when the emergency arose, however, will not disentitle an accused from relying upon the defence. Finally, where sufficient evidence is placed before the Court to raise the issue of necessity the onus falls upon the Crown to meet the defence and prove beyond a reasonable doubt that the accused's act was voluntary; the accused bears no burden of proof.²⁴ In practice, this defence applies only when danger is caused by natural forces or by human conduct other than intentional threat of bodily harm.

III. Self-Defence

98. Canada has recently amended the requirements for self-defence. The government introduced changes to give more power to victims of violent crimes to defend themselves by killing in self-defence. Until 2012, Canada followed a narrow interpretation of self-defence whereby intentionally killing was generally outlawed. Previously, anyone who was unlawfully assaulted without having provoked the assault was justified in repelling force by force, provided the person defending himself or herself did not intend to cause death or serious bodily harm. With the reform of the Criminal Code in 2012,²⁵ intentionally causing death in order to defend oneself or others is justified, provided the three new requirements of the defence are met. According to the recent amendments, 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; (b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person against that use or threat of force; and (c) the act committed is reasonable under the given circumstances. The reasonable perception of force or threat of force (under (a)) requires a dual subjective and objective assessment: the subjective perception of the accused, which must be objectively verified. The defensive purpose associated with the accused's actions (under (b)) calls for a subjective test as to the accused's state of mind. By contrast, the reasonableness of the act in the given circumstances requires an objective assessment. In determining whether the act committed is reasonable in the circumstances (under (c)), the court must consider the relevant circumstances of the person, the other parties and the act, including the following factors:

24. *Perka v. The Queen*, 1984 CanLII 23 (S.C.C.).

25. Citizen's Arrest and Self-defence Act, S.C. 2012, c. 9.

- (1) the nature of the force or threat;
- (2) 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;
- (3) the person's role in the incident;
- (4) whether any party to the incident used or threatened to use a weapon;
- (5) the size, age, gender and physical capabilities of the parties to the incident;
- (6) 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;
- (7) any history of interaction or communication between the parties to the incident;
- (8) the nature and proportionality of the person's response to the use or threat of force; and
- (9) whether the act committed was in response to a use or threat of force that the person knew was lawful.²⁶

The excessive use of authorized force is not justified and can lead to murder if the requirements of the murder offence are met. Additionally, unlike certain other jurisdictions, there is no putative self-defence in Canada. Those who engage in excessive and unreasonable self-defence do not have a partial defence that reduces murder to manslaughter.

99. Canadian courts adopted the *battered woman syndrome* defence as a separate defence to circumvent the narrow notion of self-defence that existed prior to the 2012 reform. It remains to be seen whether the recent amendments will have an impact on the battered woman syndrome defence. According to the existing case law, when a woman kills her partner after being physically abused, or kills to prevent another attack, she may avail herself of the benefits of self-defence, even if the killing does not meet the requirements of self-defence. In these circumstances, the courts have tended to relax some of the requirements of self-defence. In order to avail herself of this defence, a woman who kills or attacks her abusive spouse or partner must prove that she has been through the battered woman cycle at least once. This cycle includes the tension-building phase, followed by the explosion or acute battering incident, culminating in a contrition phase – often referred to as the ‘honeymoon’ phase. Additionally, she must prove, usually through expert opinion, that she has experienced learned helplessness and that she suffers from a series of symptoms by which the syndrome can be diagnosed. These requirements make the defence quite narrow as they exclude those women who opt to defend themselves without experiencing the whole syndrome cycle. Even worse, the courts impose the burden of being assaulted and reconciled in order to be able to use this defence.

100. The right to defend others is now included within the existing self-defence in Canadian law. According to the 2012 amendments, a person is justified in using force to protect a third person when the latter is threatened under circumstances which would allow the third person to protect himself or herself.

26. Canadian Criminal Code, s. 34. (2).

IV. Defence of Property

101. The defence of property allows a person in a peaceable possession of property to commit a reasonable act, including the use of force, for the purpose of protecting that property from being taken, damaged, or trespassed upon. According to the amendments introduced in 2012, which sought to give more powers to victims of crimes, section 35 of the Canadian Criminal Code now allows individuals to avail themselves of the defence of property if (a) they either believe on reasonable grounds that they are in peaceable possession of property or are acting under the authority of, or lawfully assisting a person who is in peaceable possession of property; (b) they believe on reasonable grounds that another person: (i) is about to enter, is entering or has entered the property without being entitled by law to do so, (ii) is about to take the property, is doing so or has just done so, or (iii) is about to damage or destroy the property, or make it inoperative, or is doing so or has just done so; (c) the act that constitutes the offence is committed for the purpose of (i) preventing the other person from entering the property, or removing that person from the property, or (ii) preventing the other person from taking, damaging or destroying the property or from making it inoperative; *and* (d) the act committed is reasonable in the circumstances.

However, this defence does not apply if: (i) the accused does not have a claim of right to the property and the other person is entitled by law to possess the property; or (ii) the other person is doing something that he or she is authorized to do in the administration or enforcement of the law, unless the accused reasonably believes that the other person is acting unlawfully.

V. Right to Use of Force against Children

102. The limited right of parents to use force to discipline their children – whereby parents are allowed to cause physical pain by hitting, paddling, spanking, slapping, or any other physical force against their children – has generated agitated debates in the last few years. In Canadian criminal law, assault is defined as any non-consensual application of force. Such a definition would capture a broad range of conduct occurring within the normal course of parenting activities, such as placing an unwilling child in a car seat, or in his or her room for a time-out. Therefore, the criminal law includes a narrow exception, in the form of a defence, for parents in limited circumstances. Section 43 of the Criminal Code provides that a parent, teacher or person acting in the place of a parent is justified in using force to correct a child that is under his or her care provided that the force used is reasonable in all of the circumstances. This narrow defence was recently considered by the SCC and upheld as constitutional under Canada's Charter of Rights and Freedoms in the courts.²⁷ The SCC clarified that the defence is only available in situations where:

27. Canadian Foundation for Children, *Youth and the Law v. The Attorney General of Canada* ([2004] 1 S.C.R. 76, 2004 SCC 4.

minor corrective force of a transitory and trifling nature is used. It does not apply to excuse, for example, corrective force that: is used on children under 2 years or over 12 years of age; involves the use of objects or implements; or, is applied to a child's head. According to the Supreme Court, section 43 provides adequate procedural safeguards to protect the child's interest, and it sets real boundaries, delineates a risk zone for criminal sanction, and avoids discretionary law enforcement. Furthermore, the force must have been intended to be for educative or corrective purposes, relating to restraining, controlling or expressing disapproval of the actual behaviour of a child capable of benefiting from the correction. While the words 'reasonable under the circumstances' on their face are broad, implicit limitations add precision. Section 43 does not extend to an application of force that results in harm or the prospect of harm. Determining what is 'reasonable under the circumstances' in the case of child discipline is assisted by Canada's international treaty obligations, the circumstances in which the discipline occurs, social consensus, expert evidence and judicial interpretation. When these considerations are taken together, a solid core of meaning emerges for reasonable under the circumstances, sufficient to establish a zone in which discipline risks criminal sanction. Accordingly, section 43 cannot exculpate outbursts of violence against a child motivated by anger or animated by frustration. It admits into its sphere of immunity only sober, reasoned uses of force that address the actual behaviour of the child.²⁸

VI. Entrapment

103. Law enforcement agents are entitled to violate the law when it is reasonable to do so. In other words, these acts would be criminal if not performed by law enforcement agents, such as applying force, entering into property, or depriving people of liberty. Entrapment, a common law defence, generally takes place when a police officer acts undercover and induces a defendant to commit the crime. For the defence to be available, the government's conduct must create the predisposition to commit the crime. Otherwise, when the law enforcement agent merely provides someone who is already willing and ready to violate the law with the opportunity to commit a crime, the entrapment defence will not be available. Entrapment is aimed strictly at governmental misconduct; and its objective is to prevent the government from manufacturing crime. The rationale is to protect those who commit a crime at the initiative of the government, when law enforcement agents implant in their minds the predisposition to commit a crime, and actively induce its commission. Police conduct is valid in Canada if there is reasonable suspicion that the defendant was engaged in criminal activity or if there was a good faith criminal inquiry in a highly criminal area. In any case, government may not go

28. Canadian Foundation for Children, *Youth and the Law v. The Attorney General of Canada* [2004] 1 S.C.R. 76, 2004 SCC 4.

beyond providing the opportunity to commit crime, that is, it may not induce the crime.

§4. RESPONSIBILITY

I. Origins of the Mental Disorder Defence

104. The mental disorder defence, formerly known as the insanity defence,²⁹ excludes criminal responsibility. The traditional test to determine whether a defendant may be responsible for the act performed is the *M’Naghten* right-wrong test which arose in a nineteenth-century English case. This test probes whether, at the time of committing the act, the accused party was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know, that he did not know that what he was doing was wrong. The *M’Naghten* test focuses exclusively on cognitive disability and does not take into account volitional disability. The mental disorder defence has been codified in the Canadian Criminal Code, whereby 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. In Canadian criminal law, there is a presumption of sanity, so the accused must prove on a balance of probabilities that he or she is insane. This has been challenged on the grounds that it violates the presumption of innocence principle, but the Supreme Court held that:

section 16(4) of the Code constitutes a reasonable limit on the presumption of innocence. The objective of s. 16(4), which is a purely evidentiary section, is to avoid placing on the Crown the impossibly onerous burden of disproving insanity and to thereby secure the conviction of the guilty. This objective is of sufficient importance to warrant limiting a constitutionally protected right. The means chosen by the government are proportional to the objective. First, the presumption of sanity and the reverse onus embodied in s. 16(4) are rationally connected to the objective. Second, s. 16(4) impairs s. 11(d) as little as possible. To reduce the burden on the accused to a mere evidentiary burden would not achieve the objective as effectively. While s. 16 is seldom raised, given the substantial constraint on liberty which follows a successful insanity plea, if insanity were easier for an accused to establish, the defence would be successfully invoked more often. Parliament may not have chosen the absolutely least intrusive means of meeting the objective, but it has chosen from a range of means which impair s. 11(d) as little as is reasonably possible. It is not the role of this Court to second-guess the wisdom of policy choices made by Parliament. Third, there is proportionality between the effects of the measure and the objective. The burden on the accused is not the full criminal burden; rather,

29. The terminology was amended to reflect changes in the field of psychiatry and psychology.

*the accused is required to prove his insanity on a balance of probabilities. Section 16(4) represents a compromise of three important societal interests: avoiding a virtually impossible burden on the Crown; convicting the guilty; and acquitting those who truly lack the capacity for criminal intent.*³⁰

II. Intoxication

105. The intoxication phenomenon, which includes problems caused by alcohol or drugs, has a different treatment depending on whether the intoxication has been provoked voluntarily or involuntarily. If intoxication is voluntary, the general rule is that it cannot negate general intent crimes, such as sexual assault, except for those crimes not involving personal violence. It can negate specific intent crimes, such as breaking and entering (entering with intent to commit an offence). So, the defence applies only to general intent crimes that do not involve personal violence and to specific intent crimes with respect to the ulterior intention. The Supreme Court held that:

*the unavailability of the defence of intoxication for general intent offences is a limit to the rights of an accused entrenched in ss. 7 and 11(d) of the Charter. This defence is an important and valuable one for an accused in cases where, but for a rule preventing him from resorting to it, such a defence would have succeeded in raising a reasonable doubt as to voluntariness, an element essential to the commission of the actus reus. The limit on the accused's fundamental rights is the result of the judge-made rule that a defence of intoxication is unavailable or that any consideration of intoxication is made irrelevant in cases of general intent offences.*³¹

Involuntary intoxication is treated almost as the mental disorder defence. So it is a full and valid defence in Canada, which means, in practice, that involuntary intoxication negates *mens rea*, and hence there is no crime. In the leading case on involuntary intoxication,³² the SCC held that this defence ‘there is an important restriction placed on this defence. The accused must be unaware that the substance or the combination of substances might result in impairment. Further, the defence will not apply if the accused could reasonably have known that taking a certain substance or combination of substances would impair’.³³

30. *R. v. Chaulk*, [1990] 3 S.C.R. 1303.

31. *R. v. Penno*, [1990] 2 S.C.R. 865.

32. *R. v. King*, [1962] SCR 746.

33. *R. v. Goard*, 2014 ONSC 2215.

§5. CORPORATE CRIMINAL RESPONSIBILITY

106. Canada follows the *identification doctrine* for corporate criminal responsibility. Under this doctrine, corporations and other organizations have criminal responsibility when a crime is committed by senior executives or employees that are the directing mind of the corporation. According to the Supreme Court, the identification theory:

*produces the element of mens rea in the corporate entity, otherwise absent from the legal entity but present in the natural person, the directing mind. This establishes the identity between the directing mind and the corporation which results in the corporation being found guilty for the act of the natural person, the employee. In order to trigger its operation and through it corporate criminal liability for the actions of the employee (who must generally be liable himself), the actor-employee who physically committed the offence must be the ego, the centre of the corporate personality, the vital organ of the body corporate, the alter ego of the employer corporation or its directing mind.*³⁴

107. The Supreme Court elaborated three requirements for corporate criminal liability to arise. The Prosecution must prove that the action taken by the directing mind: (a) was within the field of operation assigned to him or her; (b) was not totally in fraud of the corporation; and (c) was by design or result partly for the benefit of the company. In a later decision, the Supreme Court conceptualized the notion of the directing mind by holding that ‘the key factor which distinguishes directing minds from normal employees is the capacity to exercise decision-making authority on matters of corporate policy, rather than merely to give effect to such policy on an operational basis’.³⁵

34. *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 S.C.R. 662.

35. *Rhône (The) v. Peter A.B. Widener (The)*, [1993] 1 S.C.R. 497.

Chapter 3. Inchoate Crimes

§1. ATTEMPTS

108. The offence of attempted crime takes place when a person who has the intent to commit an offence does or omits to do anything for the purpose of carrying out the intention but falls short of the execution of the crime. This offence requires three main elements: (i) the intent to commit the offence; (ii) some act or omission toward the commission of the offence; and (iii) non-completion of the offence. The *actus reus* of attempted crimes consists of an act or omission proximate to the commission of the offence, which requires that the act or omission be beyond preparation. If the accused's acts are merely preparatory for the commission of the offence, there is no attempt. In other words, the *actus reus* must be more than merely preparation to commit a crime. When the preparation to commit a crime is in fact fully complete and ended, the next step done by the accused for the purpose and with the intention of committing a specific crime constitutes an *actus reus* sufficient in law to establish a criminal attempt to commit that crime.

109. Generally speaking, the consummation of a crime usually comprises a series of acts which have their genesis in an idea to do a criminal act; the idea develops to a decision to do that act; a plan may be made for putting that decision into effect; the next step may be preparation only for carrying out the intention and plan; but when that preparation is in fact fully completed, the next step in the series of acts done by the accused for the purpose and with the intention of committing the crime constitutes the attempted crime.³⁶

110. Thus, the determination of what constitutes preparation is crucial for the determination of the existence of attempt. It involves the relationship between the nature and quality of the act in question and the nature of the complete offence. It further requires consideration of the relative proximity of the act in question to what would have been the completed offence, in terms of time, location, and acts under the control of the accused remaining to be accomplished. No satisfactory general criterion has been established by the courts to draw the line between preparation and attempt, so the distinction depends on the common sense judgment of the courts on a case-by-case basis. However, the SCC gave some general guidelines to help courts with this task. According to the highest tribunal, relative proximity may give an act, which might otherwise appear to be mere preparation, the quality of attempt. But an act which on its face is an act of commission does not lose its quality as the *actus reus* of attempt because further acts were required or because a significant period of time may have elapsed before the completion of the offence.³⁷ In Canada, the abandonment defence, i.e., when a defendant voluntarily abandons the commission of the intended crime after having taken a step beyond preparation, is very limited, and courts tend not to accept it.

36. *R. v. Ancio*, 1984 CanLII 16 (S.C.C.), [1984] 1 S.C.R. 225.

37. *Deutsch v. The Queen*, [1986] 2 S.C.R. 2.

111. The *mens rea* is dual. It consists of the intention to commit the act or omission beyond mere preparation and the specific intent to commit the full offence. The Supreme Court has concentrated on the specific intent only and has ignored the analysis of the *mens rea* of the act or omission beyond preparation. The specific intent to commit the full offence is required even in those cases, such as sexual assault, where the full offence may be committed with a lesser *mens rea* than intent. In *Ancio*, the Supreme Court held that ‘the intent to commit the desired offence is a basic element of the offence of attempt, and indeed, may be the sole criminal element in the offence given that an attempt may be complete without completion of the offence intended’.³⁸ In Canada, there is no attempt where the target offence requires a *mens rea* other than intent, such as crimes committed through recklessness or negligence, because from a logical and ontological point of view, an accused cannot attempt to be reckless or negligent.

Sanctions for attempted crimes have recently been increased, which responds to the government’s law and order agenda. Changes are not based on any empirical studies. They simply respond to a get-tough-on crime approach. If the accused attempts to commit an indictable offence which carries a sentence of life imprisonment, the maximum punishment for the attempted crime is a prison sentence of fourteen years. In the case of indictable offences which have a maximum imprisonment term of fourteen years or less, the sanction for the attempted crime is half of the longest term to which a person who is guilty of that offence is liable. In the case of an attempted murder, (a) if a restricted firearm or prohibited firearm is used, or if any firearm is used and the attempted murder is committed for the benefit of, at the direction of, or in association with, a criminal organization, the maximum sanction for the attempted murder is imprisonment for life and the minimum punishment is imprisonment for a term of: (i) five years in the case of a first offence, and (ii) seven years in the case of a second or subsequent offence. In any other case where a firearm is used in the commission of the attempted murder, the maximum punishment is imprisonment for life and the minimum punishment is imprisonment for a term of four years. In all other of attempted murder cases, the maximum sanction is also imprisonment for life, but there is no minimum sentence.

§2. CRIME PARTICIPATION

112. Crime participation deals with all those actors that take part in a crime. The principal actor or perpetrator is the one who commits the offence by himself/herself or uses an innocent instrumentality. A person who commits an offence by means of an instrument whose movements are regulated by him, actually commits the offence himself. The *doctrine of innocent agency* is predicated on the notion that a person who committed an offence by means of an innocent agent has to be deemed to be the actual perpetrator.³⁹

38. *R. v. Ancio*, [1984]1 S.C.R. 225.

39. *R. v. Berryman*, 1990 CanLII 286 (BC C.A.).

I. Aiding and Abetting

113. According to section 21 of the Criminal Code, anyone who does or omits to do anything for the purpose of aiding or abetting any person to commit a crime is a party to the offence. The terms aiding and abetting are often used together even though they refer to two different but still close meanings. To aid means to assist or help the actor and to abet refers to encouraging the crime to be committed. The *actus reus* consists of the assistance provided, such as the aiding, abetting, encouraging or advising during the commission of the crime. The assistance may either be physical or psychological conduct. Any aid, no matter how trivial, suffices to consider the person providing the help as an aider or abettor. This would include, for example, applauding, adding numerical strength, or cheering. The assistance has to be given in the presence of the perpetrator. This presence may be actual or constructed. Constructed presence takes place if the aider or abettor is situated in a position to assist the principal during the commission of the crime even if not physically present together with the principal at the scene of the crime.

114. The *mens rea* is the intention to assist the perpetrator to engage in the conduct that constitutes a crime and the knowledge that an offence is planned or is taking place. In the SCC's words:

*a person cannot properly be convicted of aiding or abetting in the commission of acts which he does not know may be or are intended. One must be able to infer that the accused had prior knowledge that an offence of the type committed was planned, i.e. that their presence was with knowledge of the intended [offence].*⁴⁰

Additionally, there is a specific *mens rea* of intention that the perpetrator actually committed the offence.

115. For murder cases, the SCC held that: 'if the intent of the aiding party is insufficient to support a murder conviction, then that party might still be convicted of manslaughter if the unlawful act which was aided or abetted is one he or she knows is likely to cause some harm short of death'.⁴¹

116. Mere presence at the commission of an offence does not constitute aiding and abetting or an offence in itself. However, it can be evidence of aiding and abetting if accompanied by other factors, such as prior knowledge of the principal offender's intention to commit the offence or attendance for the purpose of encouragement.

40. *Dunlop and Sylvester v. The Queen*, [1979] 2 SCR 881, 1979.

41. *R. v. Kirkness*, [1990] 3 S.C.R. 74.

II. Independent Offences

117. There are three independent offences related to criminal participation. These are counselling or accessory before the fact, accessory after the fact, and conspiracy.

A. Accessory before the Fact

118. Counselling or accessory before the fact takes place when a person advises, recommends, hires, procures, instigates, persuades, solicits, or incites the principal to commit an offence.

119. According to section 23 of the Criminal Code, a counsellor is a party to the offence even if the crime is committed in a way different from what was suggested, because *counselling* constitutes an offence in itself. The *actus reus* of the offence is the solicitation, procuring, or instigation to another person to commit a crime. The *mens rea* is the intention to solicit the offence with the specific intent that the other person actually commit the crime. Canadian criminal law has adopted the *doctrine of natural and probable consequences* for counsellors. So, 'everyone who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed as a result of the counselling'.⁴² This means, for example, that if the counsellor hired a person to rob a bank, and in the robbery the perpetrator takes some hostages or kills an armed guard, the counsellor will be criminally responsible for kidnapping and murder as these crimes naturally occur in most bank robberies and the counsellor ought to have known that the perpetrator would likely commit them. However, if the perpetrator also rapes a bank customer during the robbery, the counsellor will not be criminally responsible for sexual assault as this is not a natural and probable consequence of a robbery. Counselling is always an attempted conspiracy, and if and when agreed, it becomes a conspiracy.

B. Accessory after the Fact

120. An *accessory after the fact* to an offence is one who, knowing that a person has been a party to the offence, receives, comforts or assists that person for the purpose of enabling that person to escape. An accessory after the fact is not a party to the offence but is punished with the penalty for the attempt of the offence he helped with. The *actus reus* consists of receiving or assisting the person. The *mens rea* is the knowledge that the perpetrator has committed a crime, and the intention to assist the principal to escape. The notion of escape is to be interpreted in a broad manner and includes avoidance of arrest, trial, and conviction. Accessory after the offence

42. Canadian Criminal Code, s. 23.

is an independent offence regulated in section 23 of the Criminal Code. So it does not require the conviction of the perpetrator, such as when the perpetrator dies or flees the jurisdiction, but it does require that the perpetrator has committed the offence.

C. Conspiracy

121. *Conspiracy* is a crime that involves the participation of more than one perpetrator. Conspiracy involves an agreement by two or more persons to do a criminal act, a series of criminal acts, or to accomplish a legal act by unlawful means. The essence of the offence of conspiracy is the agreement to perform an illegal act or to achieve a result by illegal means. The overt acts taken to carry out that agreement are simply elements going to prove the agreement, which is the essential ingredient of the offence.⁴³ Conspiracy, regulated in section 465 of the Criminal Code, is a very controversial crime because it is predominantly mental in nature. The *actus reus* is the agreement and there is a dual *mens rea* intention to enter into the agreement and that the agreement be carried out.

43. *R. v. Douglas*, [1991] 1 S.C.R. 301.

Chapter 4. Survey of Criminal Offences

§1. CRIMES AGAINST LIFE

122. Homicide is the most salient crime against the person. In Canada, a distinction is made between culpable and non-culpable homicides. Non-culpable homicides are those that are justifiable or excusable, and thus causing a death is not unlawful. These include a soldier's killing of an enemy during wartime, provided that he respects the *jus in bello* rules, such as those contained in the Geneva Conventions. Another example is that of a law enforcement agent killing a person in the line of duty, and accidents. Culpable homicides have been characterized as the unlawful causing of the death of another. They include murder (*infra*, paragraph 123), manslaughter (*infra*, paragraph 131), and infanticide. The latter type of culpable homicide is defined as a mother's killing of her newly-born child, either wilfully or through omission, for example, when the mother is mentally disturbed as a result of the birth. Culpable homicides are governed by Part VIII of the Criminal Code that deals with Offences against the person.⁴⁴

§2. CULPABLE HOMICIDES

I. Murder

123. In traditional common law, murder is considered the unlawful killing of a human being with malice aforethought. Malice consists of an unjustified disregard for the possibility of death or great bodily harm and an extreme indifference to the sanctity of human life. Despite its name, malice does not require any special malicious *mens rea* or even premeditation. Under the Canadian Criminal Code, murder consists of four categories: (i) intent-to-kill murder, (ii) intent to cause serious bodily harm murder, (iii) transferred intent murder, and (iv) unlawful object murder. The Criminal Code also refers to a fifth category known as felony murders, but the Supreme Court struck down this category as unconstitutional.

124. Under intent-to-kill murder, there is an express intent-to-kill. All the necessary deliberation is involved in the formation of the purpose to kill before the perpetration of the fatal act. A typical example of this type of murder is when defendant purposefully shoots a victim, causing the victim's death without any justification or excuse.

125. The second type of murder requires the intent to inflict the wound which produces a homicide, and a finding that the defendant knew or should have known that his acts created a strong probability of death or great bodily harm. For example, this crime takes place when a perpetrator took a knife to the victim's apartment to scare off a man he believed was there so he could talk to the victim alone and when

44. Canadian Criminal Code, ss 222–240.

he entered the apartment, he and the victim began arguing and shoving one another; then, he stabbed her in the chest, back, arms, abdomen, and breast before he was restrained from wounding the victim further, and she died after several hours.

126. Transferred intent murder takes place when defendant intends to kill a victim, but by accident or mistake ends up killing another person, notwithstanding that he does not mean to cause death to that person. Transferred intent may also occur in the context of the intent to cause serious bodily harm murder. Transferred intent is a legal fiction whereby courts presume an intention which the perpetrator lacked with respect to the actual victim. It has been contested on the grounds that it gives the courts the right to create a *mens rea* element which does not exist in the mind of the perpetrator.

127. The unlawful object murder is not generally invoked in Canadian courts as its constitutionality is rather dubious (*infra*). An unlawful object murder takes place when the perpetrator, for an unlawful object, does anything that he knows is likely to cause death, and does in fact kill a person even though he wanted to carry out his object without killing anyone. As a way of illustration, this would take place when a store owner burns her store to get money from her insurance company and kills an employee, even though she did not intend to kill anyone. In *Vasil*, the Supreme Court held that in the prosecution of unlawful object murder, the element of unlawfulness necessary must be one that is dangerous to life. While the test is objective and the behaviour of the accused is to be measured by that of the reasonable man, such a test must nevertheless be applied having regard, not to the knowledge a reasonable man would have had of the surrounding circumstances that allegedly made the accused's conduct dangerous to life, but to the knowledge the accused had of those circumstances.⁴⁵ However, after the Supreme Court decision in *Martineau*, where the Supreme Court consecrated the principle of subjective foresight of death as constitutionally mandated for murder, the constitutionality of unlawful object murder is in doubt, which explains the lack of convictions on these grounds.⁴⁶ Convictions in these cases were reduced to manslaughter.⁴⁷

In *Martineau*, the Supreme Court held that:

The principles of fundamental justice require that a conviction for murder be based upon proof beyond a reasonable doubt of subjective foresight of death. This appeal was disposed of on the basis of the principle of subjective foresight of death, even though it could have been disposed of on the basis of objective foreseeability. The introductory paragraph of s. 213 (a) expressly removes the Crown's burden of proving beyond a reasonable doubt that the accused had subjective foresight of death. This section is an anomaly as regards the other murder provisions, especially in light of the common law presumption against convicting a person of a true crime without proof of intent or recklessness. In a free and democratic society that values the autonomy and

45. *R. v. Vasil*, [1981] 1 S.C.R. 469.

46. *R. v. Martineau*, [1990] 2 S.C.R. 633.

47. Canadian Criminal Code, s. 232.

free will of the individual, the stigma and punishment attaching to murder should be reserved for those who choose intentionally to cause death or who choose to inflict bodily harm knowing that it is likely to cause death. Requiring subjective foresight of death in the context of murder maintains a proportionality between the stigma and punishment attached to a murder conviction and the moral blameworthiness of the offender. A special mental element with respect to death is necessary before a culpable homicide can be treated as murder and gives rise to the moral blameworthiness that justifies the stigma and punishment attaching to a murder conviction. It is a principle of fundamental justice that a conviction for murder cannot rest on anything less than proof beyond a reasonable doubt of subjective foresight of death. Section 213 of the Code expressly eliminates the requirement for proof of subjective foresight and therefore infringes ss. 7 and 11 (d) of the *Charter*. The objective of deterring the infliction of bodily harm during the commission of certain offences because of the increased risk of death is sufficiently important to warrant overriding a *Charter* right. The section, however, unduly impairs *Charter* rights because it is not necessary to convict of murder persons who do not intend or foresee the death in order to achieve this objective. Since subjective foresight of death must be proven beyond a reasonable doubt before a conviction for murder can be sustained, the phrase ‘ought to know is likely to cause death’ in s. 212(c) of the Code probably infringes ss. 7 <https://zoupio.lexum.com/calegis/schedule-b-to-the-canada-act-1982-uk-1982-c-11-en-%21fragment/sec7> and 11(d) of the *Charter*. Section 212(c) would not likely be saved by s. 1.⁴⁸

128. Felony murders take place when an offender commits an offence other than a homicide and the death of a person occurs. As a way of illustration, this would happen if an airplane passenger intends to hijack the airplane, and a sky marshal shoots in order to scare the hijacker and kills a flight attendant. In felony murder cases, the perpetrator does not intend to cause death, which may be casual and unintentional. The law supplies or presumes intent-to-kill by attaching the intent to commit the other felony to the homicide. However, the Supreme Court in *Villancourt* held the unconstitutionality of felony murders in Canada on the grounds that there is no *mens rea* to kill. The Court determined that:

whatever the minimum mens rea for the act or the result may be, there are, though very few in number, certain crimes where, because of the special nature of the stigma attached to a conviction therefor or the available penalties, the principles of fundamental justice require a mens rea reflecting the particular nature of that crime. The punishment for murder is the most severe in our society and the stigma that attaches to a conviction for murder is similarly extreme. In addition, murder is distinguished from manslaughter only by the mental element with respect to the death. It is thus clear that there must be some special mental element with respect to the death before a culpable homicide can be

48. *R. v. Martineau*, [1990] 2 S.C.R. 633.

*treated as a murder. That special mental element gives rise to the moral blameworthiness which justifies the stigma and sentence attached to a murder conviction. It is a principle of fundamental justice that a conviction for murder cannot rest on anything less than proof beyond a reasonable doubt of subjective foresight.*⁴⁹

129. Murder is further divided into two degrees according to its gravity and seriousness. Murder is first degree when it is planned and deliberate. However, there are certain situations where there is first-degree murder even if the murder was not planned and deliberate. Thus, for example, there is first degree when murder is committed under a contract to kill, when the victim is a criminal justice officer, when the death is caused in the course of the commission of certain listed offences, including hijacking of an aircraft, sexual assault, kidnapping, forcible confinement, hostage taking, stalking, the intimidation of a participant in the justice system, and during a terrorist activity. In an effort to combat organized crime, the government has included all murders connected to organized crime as first degree.⁵⁰ The Supreme Court ruled that confinement during course of robbery is forcible confinement for purposes of classifying murder as first or second-degree murder. The Supreme Court has explained the rationale for considering first-degree murder those murders committed in the course of the above mentioned offences:

*Parliament's sentencing policy [is] to treat murders committed in connection with crimes of domination as particularly blameworthy and deserving of more severe punishment. [...] Second-degree murder [is] elevated to first-degree murder where the murder is causally and temporally linked to one of the predicate offences.*⁵¹

All murders that are not first degree are considered to be second-degree murders.

130. Both first- and second-degree murders carry a mandatory minimum sentence of life imprisonment, but they differ with respect to eligibility for parole (*supra*, paragraphs 42 et seq.). A person convicted of first-degree murder is eligible for parole in twenty-five years, and one convicted of second-degree murder is eligible between ten and twenty-five years. On 25 February 2011, the government introduced legislation ensuring that no early parole is permitted for those convicted of first or second-degree murder.⁵² Additional legislation now allows judges to impose consecutive parole ineligibility periods on individuals convicted of more than one first- or second-degree murder. Under the previous system, criminals convicted of multiple murders served their parole ineligibility periods concurrently. This meant that they were eligible to apply for parole after just one period ranging

49. *R. v. Vaillancourt*, [1987] 2 S.C.R. 636. This decision was later confirmed in *Martineau. R. v. Martineau*, [1990] 2 S.C.R. 633.

50. An Act to amend the Criminal Code (organized crime and protection of justice system participants), 23 Jun. 2009, BILL C-14.

51. *R. v. Pritchard*, 2008 SCC 59, [2008] 3 SCR 195.

52. An Act to amend the Criminal Code and another Act (Bill S-6, Ch. 2, 2011).

from ten to twenty-five years, depending on their sentence.⁵³ In October 2014, a trial court imposed the longest sentence ever in Canadian history. Justin Bourque was sentenced to three consecutive life sentences with a seventy-five-year period of ineligibility for parole for the murder of three RCMP officers.

II. Manslaughter

131. According to the Canadian Criminal Code, culpable homicide that is not murder or infanticide is manslaughter. Traditionally, manslaughter was conceptualized as the unlawful killing of a human being without malice aforethought, or premeditation. In Canada, manslaughter may be committed by:

- (1) an unlawful act, which must be dangerous and cause the death, where the accused must have the *mens rea* required for the unlawful act, and which is objective foreseeability of bodily harm;
- (2) criminal negligence; and
- (3) in the heat of passion caused by provocation.

132. For the heat of passion manslaughter, there must be legally sufficient provocation, that is, defendant must be provoked, for example, adultery, fear, battery, assault, mutual combat, illegal arrest, etc. The courts elaborated a two-tiered test to determine the existence of this type of manslaughter: (i) whether the wrongful act was of sufficient nature to deprive an ordinary person of self-control and (ii) whether the provoked person acted upon the sudden before his or her passion had time to cool off. This crime originated in the belief that killing on the spur of the moment, such as when a person killed another in a village brawl, or a husband who found his wife in bed with another man and killed either or both of them, was less blameworthy than killing with malice aforethought, with premeditation and deliberation. Consequently, the courts carved out the manslaughter crime for those cases in which the defendant was provoked and thus killed in the heat of passion before he cooled off. Provocation, in order to be adequate, must be such as might naturally cause a reasonable person in the passion of the moment to lose self-control and act on impulse without reflection.

According to case law, ‘the offence of criminal negligence causing death [...] does not punish accidents. Nor does it punish the merely unfortunate. It punishes those who [act] in a manner that represents a marked departure from the standard of care employed by a reasonable person, resulting in death. It is no trivial matter, and Parliament has treated it accordingly’.⁵⁴

53. An Act to amend the Criminal Code and to make consequential amendments to the National Defence Act (Bill C-48, Ch. 5, 2011).

54. *R. v. Morrisey*, [2000] 2 S.C.R. 90.

§3. SEXUAL ASSAULT IN CANADA

133. In Canada sexual offences where the victim is not exclusively a minor are considered violent crimes and as such are included within Part VIII of the Criminal Code, entitled ‘Crimes against the Person and the Reputation’. More specifically, sexual offences are considered a variety of assault. So, for example, sexual assault is aggravated according to the violence used by the perpetrator instead of the gravity of the intrusion to or violation of the victim’s sexual integrity. The three main offences are thus:

- (1) simple sexual assault;
- (2) sexual assault with a weapon, threats to a third party or causing bodily harm;
and
- (3) aggravated sexual assault.

134. Canada was a pioneer in rupturing with the traditional common law conception of rape, conceived as carnal knowledge of a woman other than the perpetrator’s wife forcibly by a man and against the woman’s will. Under the common law conception, rape was restricted to the cases of vaginal penetration with the penis against the woman’s will provided that the woman was not the perpetrator’s wife. Common law rape was derivative of abduction, where the main victim was the husband or father of the raped woman, instead of the actual raped woman. This shows that the common law concept of rape was influenced by a patriarchal conception of sexual relations and of women in particular. This male centred view is also reflected in the fact that married women were seen as property belonging to their husbands who had unlimited sexual access to their wives.

135. There is no definition of sexual assault in the Canadian Criminal Code, which only defines the offence of assault. Assault in Canadian criminal law is the application of force intentionally to another person without his or her consent. The Criminal Code is silent as to the meaning of the notion of sexual, which is central in the structure of the offence. The SCC interpreted the concept of sexual assault as ‘an assault which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated’. To aid in the determination of sexual assault, the Supreme Court constructed the following objective test: ‘viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer?’ So, in applying this test, the courts have to analyse ‘the part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats which may or may not be accompanied by force. Additionally, the accused’s intent or purpose as well as his motive, if such motive is sexual gratification, may also be factors in considering whether the conduct is sexual’.⁵⁵

55. *R. v. Chase*, [1987] 2 S.C.R. 293 at 302.

136. From these considerations, courts have interpreted that the *actus reus* of sexual assault is any non-consensual sexual touching.⁵⁶ In Canada, consent is primarily defined in an affirmative way. It means ‘a voluntary agreement of the complainant to engage in the sexual activity in question’. In other words, there is consent when both parties agree to engage in sexual activity. In a recent case, the Supreme Court clarified the scope of the *actus reus* in the sexual assault offence:

There are essentially two approaches to determining the meaning of what constitutes voluntary agreement to the sexual activity in question and the role of mistake or deception in determining whether such agreement existed. The first approach defines the ‘sexual activity in question’ as extending beyond the basic sexual activity the complainant thought she was consenting to at the time to conditions and qualities of the act or risks and consequences flowing from it, provided these conditions are ‘essential features’ of the sexual activity or go to ‘how’ the physical touching was carried out. The second approach defines ‘the sexual activity in question’ more narrowly as the basic physical act agreed to at the time, its sexual nature, and the identity of the partner. If the complainant subjectively agreed to the partner’s touching and its sexual nature, voluntary agreement is established under s. 273.1(1). That voluntary agreement, however, may not be legally effective. The primary tools of statutory construction including the plain words of the provisions, the scheme of the provisions and the legislative history support a narrow interpretation of the basic definition of consent.⁵⁷

However, ‘to be legally effective, consent must be freely given’.⁵⁸ So, the code also foresees some instances when even though there was consent it is not considered legally valid, that is, when yes means no. These situations are where: (a) the agreement is expressed by the words or conduct of a person other than the complainant; (b) the complainant is incapable of consenting to the activity; (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority; (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity. Additionally, those cases where consent is not valid for the assault offence also apply to sexual assault. Thus, no consent is obtained where the victim submits or does not resist by reason of the application or threat or fear of force to the victim or another person, by reason of fraud, or the exercise of authority. So, for example, the courts invalidated the consent given by the victims in a case where the perpetrator, who was HIV-positive, had unprotected sexual relations with two people without informing them he was HIV-positive. The courts considered that lack of disclosure of this fact amounted to fraud as both victims testified that if they had known that the accused was HIV-positive they would

56. *R. v. Ewanchuk* (1999), 131 C.C.C. (3d) 481 at para. 27 (S.C.C.).

57. *R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346.

58. *R. v. Ewanchuk* (1999), 131 C.C.C. (3d) 481.

never have engaged in unprotected intercourse with him.⁵⁹ In a recent case, the victim agreed to sexual activity with her partner, insisting that he should use a condom in order to prevent conception. Her partner had poked holes in the condom prior to engaging in sexual activity without telling the victim. The SCC held in this case that:

The question is not whether consent was vitiated by fraud. It is whether there was consent to the sexual activity in the first place. The complainant agreed to engage in sexual activity in a certain manner, that is, sexual intercourse with an intact condom. H deliberately sabotaged the condom without her knowledge or agreement. The fact that she only learned of the deliberate sabotaging after the sexual activity took place, is of no relevance. What is relevant is what sexual activity she agreed to engage in with H and whether he stuck to the bargain. In this case, he did not. Since the complainant did not agree to how she was touched at the time it occurred, consent within the meaning of s. 273.1(1) did not exist.⁶⁰

137. When dealing with consent under the *actus reus*, the sole focus is the subjective state of mind of the victim. The test is: did the victim, in her own mind, agree to the sexual touching? The accused's perception of the victim's state of mind is not relevant under the *actus reus* analysis.⁶¹ The *actus reus* of sexual assault is established by the proof of three elements: (i) touching, (ii) the sexual nature of the contact, and (iii) the absence of consent. The first two of these elements are objective. It is sufficient for the Crown to prove that the accused's actions were voluntary. The Crown need not prove that the accused had any *mens rea* with respect to the sexual nature of his behaviour. The absence of consent, however, is purely subjective and determined by reference to the complainant's subjective internal state of mind toward the touching, at the time it occurred. While the complainant's testimony is the only source of direct evidence as to her state of mind, credibility must still be assessed by the trier of fact in light of all the evidence. It is open to the accused to claim that the complainant's words and actions, before and during the incident, raise a reasonable doubt against her assertion that she, in her mind, did not want the sexual touching to take place. If, however, the trial judge believes the complainant that she did not consent, the Crown has discharged its obligation to prove the absence of consent. The accused's perception of the complainant's state of mind is not relevant and only becomes so when a defence of honest but mistaken belief in consent is raised in the *mens rea* stage of the inquiry.

The Supreme Court has recently had to determine whether a person can perform sexual acts on an unconscious person if the person consented to those acts in advance of being rendered unconscious. The Supreme Court held that:

Parliament has defined consent in a way that requires the complainant to be conscious throughout the sexual activity in question. Parliament's definition of

59. *R. v. Cuerrier* [1998] 2 S.C.R. 371.

60. *R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346.

61. *R. v. Ewanchuk* (1999), 131 C.C.C. (3d) 481 at para. 27 (S.C.C.).

consent does not extend to advance consent to sexual acts committed while the complainant is unconscious. The legislation requires ongoing, conscious consent to ensure that women and men are not the victims of sexual exploitation, and to ensure that individuals engaging in sexual activity are capable of asking their partners to stop at any point. This definition of consent is in harmony with the provisions of the Criminal Code and their underlying policies and is also consistent with the tenor of the jurisprudence of this Court. The jurisprudence has consistently interpreted consent as requiring a conscious, operating mind, capable of granting, revoking or withholding consent to each and every sexual act. The jurisprudence also establishes that there is no substitute for the complainant's actual consent to the sexual activity at the time it occurred. It is not sufficient for the accused to have believed the complainant was consenting; he must also take reasonable steps to ascertain consent, and must believe that the complainant communicated her consent to engage in the sexual activity in question. This is impossible if the complainant is unconscious. The argument that advance consent equals actual consent because the complainant cannot change her mind after being rendered unconscious runs contrary to this Court's conclusion in R. v. Ewanchuk that the only relevant period for ascertaining whether the complainant consented under the Criminal Code is while the touching is occurring. When the complainant loses consciousness, she loses the ability to either oppose or consent to the sexual activity that occurs. Finding that such a person is consenting would effectively negate the right of the complainant to change her mind at any point in the sexual encounter. In some situations, the concept of consent Parliament has adopted may seem unrealistic. However, it would be inappropriate for this Court to carve out exceptions to the concept of consent when doing so would undermine Parliament's choice. This concept of consent produces just results in the vast majority of cases and has proved to be of great value in combating stereotypes that have historically existed.⁶²

138. Sexual assault is considered a general intent offence as no ulterior *mens rea* is required. The *mens rea* of sexual assault is the intention to touch, and knowing of, or being reckless of the victim's lack of consent. In most cases, the intentional *mens rea* can be inferred from the *actus reus* itself as a person is presumed to have intended the natural and probable consequences of his actions. As in other common law jurisdictions, the controversial issues arose with respect to the *mens rea* for consent. The accused may challenge the prosecutor's evidence of *mens rea* by asserting an honest but mistaken belief in consent.⁶³ According to the Court in *Osolin*:

Section 265(4) of the Code simply sets out the basic requirements which are applicable to all defences: a defence should not be put to the jury if a reasonable jury properly instructed would have been unable to acquit on the basis of the evidence tendered in support of that defence. In other words, there must be

62. R. v. J.A., [2011] SCC 28.

63. Canadian Criminal Code, s. 273.2.

evidence sufficient to give an air of reality to the defence before it can be left with the jury. It is the trial judge who determines if there is sufficient evidence adduced to give rise to a defence. The defence of honest but mistaken belief in consent in a sexual assault trial must meet the same threshold requirement as that demanded of all defences. There must be evidence that gives an air of reality to the accused's argument that he believed the complainant was consenting before the issue goes to the jury. There is no requirement that there be evidence independent of the accused. What is required is that the defence be supported by evidence beyond the mere assertion of a mistaken belief. The defence of honest but mistaken belief in consent can realistically only arise when the accused and the complainant tell essentially the same story and then argue that they interpreted it differently. Where the evidence given is directly opposed as to whether there was consent, the defence simply cannot exist. However, even in the absence of the defence, the jury will nonetheless be bound to acquit if it has a reasonable doubt as to whether there was consent in light of the conflicting evidence on the issue.⁶⁴

139. The defence of mistake, which is only applicable to sexual offences, is in actuality a denial of *mens rea*.⁶⁵ Unlike the analysis for the *actus reus*, for the *mens rea*, consent is objective. The accused's claim that he honestly and mistakenly believed in the victim's consent must be a belief that the victim had communicated her consent to him; it must not be tainted by any of the statutory factors vitiating consent; and it cannot be raised unless the accused took reasonable steps, in the circumstances known to the accused at the time to ascertain consent. So, a mere belief by the accused that the victim, in her own mind, wanted him to touch her but did not express that desire, is not legally relevant. The accused's mere speculation as to what was going on in the victim's mind provides no challenge to the required *mens rea*.

140. Unlike other common law jurisdictions, sexual assault is not aggravated because of the existence of penetration. It is aggravated according to the resulting interference with the physical integrity of the victim. Thus, the penalty for sexual assault is increased if the perpetrator causes bodily harm – or uses a weapon or makes threats. The courts held that using a weapon includes pulling out a firearm and holding it out to intimidate the victim even if the perpetrator has not actually shot the victim.⁶⁶ A beer bottle and a dog have been considered weapons. The offence reaches its most severe form if the perpetrator wounds, maims, or disfigures the victim or endangers her life. A wound entails the breaking of the skin. Maim denotes an injury to a person to the extent that she is less able to fight, and disfigure means more than a temporary marring of the figure or appearance of a person. In these cases of aggravated sexual assault, the use of a firearm entails a higher penalty. Except for these aggravating factors, all other elements of the sexual assault offence are the same.

64. *R. v. Osolin* [1993] 4 S.C.R. 595.

65. *R. v. Ewanchuk* (1999), 131 C.C.C. (3d) 481.

66. *R. v. Rowe* (1951), 12 C. R. 148 100 C.C.C. 97 (S.C.C.).

§4. THE STALKING OFFENCE IN CANADA

141. In Canada, stalking, which is referred to as *criminal harassment*,⁶⁷ takes place when a person, acting without lawful authority and knowing that another person is harassed – or being reckless as to whether the other person is harassed – engages in prohibited conduct that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them. The prohibited conduct consists of:

- (1) repeatedly following the other person or anyone known to them;
- (2) repeatedly communicating – directly or indirectly – with the other person or anyone known to them;
- (3) besetting or watching where the other person, or anyone known to them, resides, works, carries on business or happens to be; or
- (4) threatening the victim or any member of their family.

142. The *actus reus* of this offence is harassment through prohibited conduct that causes fear, where harassment through the prohibited conduct is the voluntary act and fear for safety is the social harm expressed in terms of result. The courts held that harassment means ‘bothering someone with requests, solicitations, incitements which conveys rather well the idea that the conduct must have the effect of bothering someone because of its continuity or its repetition’.⁶⁸

143. The reasonable fear requirement has a dual objective and subjective component. The first part of the inquiry is whether the victim actually was in fear for her safety and whether that fear is reasonable. For this purpose, courts must take all evidence and the whole context. In Canada, after the landmark Supreme Court decision in *Lavallee*,⁶⁹ it is legitimate to take into account the gender of the victim and the story and circumstances surrounding the relationship which existed if any, between the accused and the victim. Courts must also consider the ‘differences which recognizably exist between the size, the strength, and the socialization of women when compared to their male counterparts’.⁷⁰

144. The prohibited conduct has given rise to several interpretations by courts and commentators. In *Ladbon*, the court had to decide whether hiring a private detective to follow the victim amounted to following as prescribed by the Criminal Code.⁷¹ The court argued that using someone else to follow the victim constituted following, so defendant was found to have committed the prohibited conduct.

145. The notion of repeat with respect to following and communication has been the object of controversy. The earlier cases held that there had to be a pattern of

67. Canadian Criminal Code, s. 264.

68. *R. v. Lamontagne* (1998), 129 C.C.C. (3d) 181 (Qc. C.A.).

69. *R. v. Lavallee*, [1990] 1 S.C.R. 852.

70. *R. v. Lafreniere*, [1994] O.J. No. 437.

71. *R. v. Ladbon*, [1995] B.C.J. No. 3056 (Prov. Ct) (QL).

repeated conduct, that is, conduct which is engaged in persistently by the accused person as the persistent conduct reasonably causes the victim to fear for his or her safety. The later cases tend to interpret this notion as simply more than once. For example, in *Ryback* the court held that three incidents of conduct are sufficient to make the conduct repeated.⁷² In *Gerein*, the stalker followed the victim in three segments over a one-hour period and the court determined that this constituted repeated following.⁷³

146. The courts interpreted that communication involves, among other things, the passing of thoughts, words, ideas or information from one person to another.⁷⁴ In another case, the courts broadened this concept to include the delivery of gifts.⁷⁵ Email and online contact are also included in the notion of communication.

147. Watching and besetting do not impose significant interpretation problems as they have been the object of judicial interpretation in other sections of the Criminal Code that had been in force long before the adoption of the criminal harassment offence. However, in one case, the court held that driving several times by the victim's house at a very slow speed when the victim was home must be interpreted as watching.⁷⁶ In another instance, the court interpreted that staring at the victim amounts to watching.⁷⁷ Threatening is also a crime outside stalking and has not been considered ambiguous. So, courts have not delved into its analysis in the context of criminal harassment. Watching and besetting, as well as threatening, do not have to be done repeatedly but one single incidence suffices to satisfy the prohibited conduct requirement.

148. In all prohibited conducts, the legislator criminalized both primary and secondary targeting. So, for example, communicating with friends or family of the victim – the harassed person – is considered a prohibited conduct. The rationale for this is that the victim might eventually hide or isolate herself from the stalker but she cannot effectively request all family members, friends, and acquaintances to do the same. However, while secondary targeting for communication, following, and watching or besetting includes 'anyone known' to the victim, for threatening secondary targeting is restricted to family members of the victim. There is no secondary targeting for the harassment, that is, only the harassing of the victim is criminalized. Thus, in a case where defendant stalked a child by following her in her car and by making contact with her in her mother's presence, the courts held that 'the fact that it caused the child's mother to fear for the child's safety was not enough to convict the accused of criminally harassing the child, whose state of mind was critical and who did not appear to have been very concerned about the encounters with the accused'.⁷⁸

72. *R. v. Ryback*, [1996] 105 C.C.C. (3d) 240 (B.C.C.A.).

73. *R. v. Gerein*, [1999] B.C.J. No. 1218 (Prov. Ct.) (QL).

74. *R. v. Johnston*, [1995] 28 W.C.B. (2d) 563 (Ont. Ct. (Prov. Div.)).

75. *R. v. Ryback*, [1996] 105 C.C.C. (3d) 240 (B.C.C.A.).

76. *R. v. Porsnuk*, [1995] M.J. No. 519 at para. 30 (Prov. Ct.) (QL).

77. *R. v. Rehak*, [1998] 6 W.W.R. 661 (Man. Q.B.).

78. *R. v. Johnston*, [1995] 28 W.C.B. (2d) 563 (Ont. Ct. (Prov. Div.)).

149. The social harm of the *actus reus* is fear for the safety of the victim or anyone known to her. The court's interpretation evolved from a narrow reading of the term as including only physical safety to a more comprehensive notion. In *Leppan*, the court held that 'fear for psychological safety is equally protected. It is not necessary that the Crown prove that the complainant suffered actual injury, either physical or mental, nor that the accused actually made a threat. But there must be a finding that there was fear for physical or psychological safety. So psychological upset certainly is protected and covered by the section'.⁷⁹

150. In Canada criminal harassment has been structured as a general intent offence. According to the Criminal Code, the *mens rea* is knowing of the harassment or being reckless about harassing the victim. While the Code does not include an intentional *mens rea*, in practice Courts usually broaden the *mens rea* requirement to include intent when defendant purposefully harasses the victim.⁸⁰ Thus, for example, in *Lafreniere*, the court held that 'even if it is found that the accused engaged in the proscribed conduct repeatedly he may not be guilty of the offence created unless it is found that in engaging in the conduct in question he intended thereby to harass the complainant or was reckless as to whether or not he was harassing the complainant'.⁸¹

151. With respect to the recklessness requirement for harassing the victim, the courts determined that a party need not be warned that his or her conduct is criminal before that conduct actually becomes criminal. Commentators and activists expressed concerns about the subjective nature of the *mens rea* required for harassment, mainly knowledge and recklessness as this requirement fails to realize that many men who engage intentionally in the type of conduct in subsection 264(2) do not believe they are harassing the object of their intentions. They often explain their actions as the expression of love or concern for the safety of the victim and her, and perhaps his, children, or concern for the protection of their property.

152. The Code is completely silent as to the *mens rea* for the prohibited conduct and the courts do not usually discuss this issue. Some commentators even – wrongly – argued that no *mens rea* is required for these conducts.⁸² However, in *Lafreniere* the defendant argued that his following the victim from place to place was purely coincidental and that he did not intend to follow her. So, the court put forward that:

If it is found that the meetings were not deliberately planned by the accused, but were only accidental or coincidental, or if a doubt is raised in that regard, the charge will not be made out. If, however, it is determined that the accused set out deliberately to do that which is complained of, i.e., followed the complainant about from place to place, then he may still be found to have harassed

79. *R. v. Leppan*, [1999] O.J. No. 3336 at para. 3 (Prov. Div.) (QL).

80. *R. v. Sillipp*, (1997), 120 C.C.C. (3d) 384.

81. *R. v. Lafreniere*, [1994] O.J. No. 437.

82. James L. Cornish, Kelly A. Murray & Peter I. Collins, *The Criminal Lawyer's Guide to the Law of Criminal Harassment and Stalking* (Aurora: Canada Law Book, 1999), 121.

*the complainant. So long as he intended to cause harassment he will fall within the section.*⁸³

153. In the same case, the court also recognized that in addition to intention the *mens rea* for the prohibited conducts may also be recklessness.⁸⁴

83. *R v. Lafreniere* [1994] O.J. No. 437.

84. *R v. Lafreniere* [1994] O.J. No. 437.

Chapter 5. The Sanctioning System: Sentencing Principles and Alternatives

§1. SENTENCING PRINCIPLES

154. Traditionally, sentencing has been reserved for the court, and courts have enjoyed discretion to impose sentences. In Canada, there is still much judicial discretion as Parliament frequently defines offences broadly to cover behaviour of varying degrees of culpability and only sets high maximum penalties to limit the judge's sentencing discretion. Maximum penalties are infrequently imposed. Sentencing is not only discretionary because judges have few statutory limits but also because they can emphasize multiple purposes or justifications for punishment, that is, sentencing depends on what a judge believes is more important in a particular case. In the SCC's words:

*in sentencing matters, the trial judge enjoys considerable discretion because of the individualized nature of the process. To arrive at an appropriate sentence, the judge must weigh the normative principles set out by Parliament in ss. 718, 718.1 and 718.2 of the Criminal Code.*⁸⁵

155. The Criminal Code codifies some sentencing principles, which judges have to take into account when imposing sentencing. The first one is the purpose of sentence.⁸⁶ 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) retribution; (b) deterrence, both specific and general; and (c) rehabilitation.⁸⁷ With respect to retribution, the Supreme Court explained that:

*Retribution represents an important unifying principle of our penal law by offering an essential conceptual link between the attribution of criminal liability and the imposition of criminal sanctions. The legitimacy of retribution as a principle of sentencing has often been questioned as a result of its unfortunate association with vengeance in common parlance, but retribution bears little relation to vengeance. Retribution should also be conceptually distinguished from its legitimate sibling, denunciation. Retribution requires that a judicial sentence properly reflect the moral blameworthiness of the particular offender. The objective of denunciation mandates that a sentence should also communicate society's condemnation of that particular offender's conduct. Neither retribution nor denunciation, however, alone provides an exhaustive justification for the imposition of criminal sanctions. Retribution must be considered in conjunction with the other legitimate objectives of sentencing.*⁸⁸

85. *R. v. L.M.*, 2008 SCC 31.

86. Canadian Criminal Code, s. 718.

87. Canadian Criminal Code, s. 718.

88. *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500.

156. Other purposes include the separation of offenders from society, where necessary, reparations for harm done to victims or to the community; and the promotion of a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

157. Another fundamental principle of sentencing is the *principle of proportionality*, which mandates that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.⁸⁹ The *principle of parity* dictates that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.⁹⁰ The *totality principle* requires that, in principle, where an accused must be sentenced for more than one offence, she must serve the sentences concurrently.⁹¹ In practice, this means that the accused will serve the longest sentence. However, when the offences involve violent crimes, the judge may impose consecutive sentences. But even in those exceptional cases where sentences have to be served consecutively, the totality principle requires that the sentence should not be unduly long or harsh. So, in Canada there may not be very long sentences of 100 years or 300 years as is common in other countries. The *principle of restraint in punishment* establishes that judges should not impose prison sentences if less restrictive sanctions may be appropriate, and they must pay particular attention to the circumstances of aboriginal offenders.⁹²

158. Aboriginal people are over-represented in the Canadian criminal justice system. So, the Criminal Code in its section 718.2(e) mandates that the court take into consideration the special circumstances of aboriginal offenders. The Supreme Court clarified the extent of this provision. It held that:

Sentencing is an individual process and in each case the consideration must continue to be what is a fit sentence for this accused for this offence in this community. The effect of s. 718.2(e), however, is to alter the method of analysis which sentencing judges must use in determining a fit sentence for aboriginal offenders. Section 718.2(e) directs judges to undertake the sentencing of such offenders individually, but also differently, because the circumstances of aboriginal people are unique. In sentencing an aboriginal offender, the judge must consider: (a) the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and (b) 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. In order to undertake these considerations the sentencing judge will require information pertaining to the accused. Judges may take judicial notice of the broad systemic and background factors affecting aboriginal people, and of the priority given in aboriginal cultures to a restorative approach to sentencing. In the usual course of events, additional

89. Canadian Criminal Code, s. 718.1.

90. Canadian Criminal Code, s. 718.2.b.

91. Canadian Criminal Code, s. 718.2.c.

92. Canadian Criminal Code, s. 718.2.d.

*case-specific information will come from counsel and from a pre-sentence report which takes into account the systemic or background factors and the appropriate sentencing procedures and sanctions, which in turn may come from representations of the relevant aboriginal community. The offender may waive the gathering of that information. The absence of alternative sentencing programs specific to an aboriginal community does not eliminate the ability of a sentencing judge to impose a sanction that takes into account principles of restorative justice and the needs of the parties involved. If there is no alternative to incarceration the length of the term must be carefully considered. The jail term for an aboriginal offender may in some circumstances be less than the term imposed on a non-aboriginal offender for the same offence. However, s. 718.2(e) is not to be taken as a means of automatically reducing the prison sentence of aboriginal offenders; nor should it be assumed that an offender is receiving a more lenient sentence simply because incarceration is not imposed. It is also unreasonable to assume that aboriginal peoples do not believe in the importance of traditional sentencing goals such as deterrence, denunciation, and separation, where warranted. In this context, generally, the more serious and violent the crime, the more likely it will be as a practical matter that the terms of imprisonment will be the same for similar offences and offenders, whether the offender is aboriginal or non-aboriginal.*⁹³

159. Despite the existence of these principles, judges have ample discretion to impose sentences. For example, while the parity principle calls for similar sentences under similar circumstances committed by similar offenders, empirical research studies show that minorities, particularly aboriginals, recent immigrants, and refugees, are sentenced to longer terms than mainstream white Canadians.

§2. AGGRAVATING AND MITIGATING FACTORS

160. A court must also take into account the existence of aggravating and mitigating factors. Thus, a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender. Aggravating factors include 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, abuse of spouse or common law partner, or abuse of a person under the age of 18 years, or abuse of a position of trust or authority in relation to the victim. Other aggravating factors include evidence that the offence was committed for the benefit of, at the direction of, or in association with a criminal organization, or that the offence was a terrorism offence. Prior convictions are also aggravating factors. Prosecutors have to prove aggravating factors on a balance of probabilities, except for the existence of prior convictions, which must be proved beyond reasonable doubt.

93. *R. v. Gladue*, [1999] 1 S.C.R. 688.

161. Mitigating factors include good character, youth, old age, ill health, remorse, provocation, and early guilty plea are mitigating factors. Courts have discretion in considering mitigating factors.

§3. SENTENCING ALTERNATIVES

162. Judges have a wide range of sentencing alternatives to choose from. Judges may even impose more than one of these alternatives at the same time, provided that they are not mutually incompatible and as long as the Criminal Code does not expressly mandate otherwise. So, for example, a judge may impose a conditional sentence and probation for a minor sexual assault offence.

163. The following sentencing alternatives are available in Canadian criminal law.

I. Absolute and Conditional Discharges

164. Absolute and conditional discharges: if the offence is subject to less than fourteen years of imprisonment and there is no minimum sentence, instead of convicting the accused, the court may order that the accused be absolutely discharged. This means that the accused will serve no prison, probation, or any other punishment. The accused will not even have a criminal record, but the offence will count as an aggravating factor if he or she commits a new offence in the future. This alternative is available only for individuals and not for organizations. Instead of an absolute discharge, the court may impose conditions that the accused must follow for a certain period of time. If the accused satisfactorily complies with these conditions, then the conditional discharge turns into an absolute discharge, with the same effects.

II. Probation

165. Probation is the most commonly used form of criminal sentencing in Canada. It is a sentence served while under supervision in the community. It is a court-ordered sanction. The goal is to allow for some degree of control over criminal offenders while using community programmes to try to rehabilitate them. Those sentenced to probation must agree to abide by court mandated conditions, which are both general, that is, for all those on probation, and specific, which are imposed on a case-by-case basis, depending on the particular circumstances of the offender. General conditions include the obligations to obey all laws, maintain employment, to remain within the jurisdiction of the court, to possess no firearms, to allow the probation officer to visit at home or at work, and so forth. Specific conditions include the obligations to pay a fine to the court, follow rehabilitation programmes, refrain from associating with others, and remain at home after dark, and the prohibition to refrain from drinking alcohol.

166. Probation, which is regulated in sections 731 and 732 of the Criminal Code, may be imposed as (i) a sentence of its own if no minimum penalty; (ii) following a prison term of two years or less; (iii) as part of a conditional discharge; (iv) a suspended sentence; (v) or an intermittent sentence. When probation is ordered by a judge at sentencing, the maximum period for probation is three years. The violation of probation constitutes an offence, which may result in a new charge, but there is no automatic imprisonment for breach of probation.

III. Fine

167. According to section 734 of the Canadian Criminal Code, a court may impose a fine to an individual (a) if the punishment for the offence does not include a minimum term of imprisonment, in addition to or in lieu of any other sanction that the court is authorized to impose; or (b) if the punishment for the offence includes a minimum term of imprisonment, in addition to any other sanction that the court is required or authorized to impose.

168. Except when the punishment for an offence includes a minimum fine, a court may fine an offender only if it is satisfied that the offender is able to pay the fine. The court may also allow an individual to work the fine off by performing community service or other type of work. If an offender does not have the means to pay a fine immediately, she should be given a reasonable time to pay. The offender may also be eligible for provincial fine option programmes in which the fine may be discharged in whole or in part by earning credits for work performed during a period not greater than two years. In the event of default, the Crown can resort to a number of civil remedies, such as suspending licenses or other instruments until the fine is paid in full or registering the fine owing with the civil courts. The option of jail for default is fenced in with important restrictions. A fine default is not punishable by committal unless the other statutory remedies, including license suspensions and civil proceedings, are not appropriate in the circumstances, or the offender has, without reasonable excuse, refused to pay the fine or discharge it under a working programme. Where the offender's reasonable excuse for failure to pay a fine is simple poverty, it is not open to a court to jail her. As the Supreme Court held, 'the purpose of imposing imprisonment in default of payment is to give serious encouragement to offenders with the means to pay a fine to make payment. Genuine inability to pay a fine is not a proper basis for imprisonment'.⁹⁴

IV. Conditional Sentence of Imprisonment

169. Another sentence alternative is the *conditional sentence of imprisonment*. According to section 742 of the Criminal Code, if a person is convicted of a relatively minor offence and the court imposes a sentence of imprisonment of less than

94. *R. v. Wu*, [2003] 3 S.C.R. 530, 2003 SCC 73.

two years, it may order the offender to serve the imprisonment sentence in the community. This is a custody sentence served in the community, which may be imposed, provided that there is no danger to the safety of the community.

However, as part of its law and order agenda, the government has recently adopted measures restricting the court's possibility of imposing conditional sentences. Thus, conditional sentences may only be imposed if:

- (1) 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 718–718.2;
- (2) the offence is not an offence punishable by a minimum term of imprisonment;
- (3) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is fourteen years or life;
- (4) 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 ten years or more;
- (5) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is ten 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
- (6) 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 USD 5,000),
 - (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).⁹⁵

170. Conditional sentences are subject to both general and specific conditions, which include prohibitions, and the obligation to maintain peace, to appear before the court when requested, or to report to a supervisor, among others. A conditional sentence of imprisonment is regarded as custody in the community. The Supreme

95. Canadian Criminal Code, s. 742.1.

Court explained the rationale and requirements of conditional sentences of imprisonment in a now widely cited case. What the impact of the new legislation will be on existing case law remains to be seen. The Supreme Court had held that:

Conditional sentences were enacted both to reduce reliance on incarceration as a sanction and to increase the use of principles of restorative justice in sentencing. A conditional sentence should be distinguished from probationary measures. Probation is primarily a rehabilitative sentencing tool. By contrast, Parliament intended conditional sentences to include both punitive and rehabilitative aspects. Therefore, conditional sentences should generally include punitive conditions that are restrictive of the offender's liberty. Conditions such as house arrest should be the norm, not the exception. No offences are excluded from the conditional sentencing regime except those with a minimum term of imprisonment, nor should there be presumptions in favour of or against a conditional sentence for specific offences. Section 742.1 of the Code lists four criteria that a court must consider before deciding to impose a conditional sentence: (1) the offender must be convicted of an offence that is not punishable by a minimum term of imprisonment; (2) the court must impose a term of imprisonment of less than two years; (3) the safety of the community would not be endangered by the offender serving the sentence in the community; and (4) a conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2. The requirement in s. 742.1(a) that the judge impose a sentence of imprisonment of less than two years does not require the judge to first impose a sentence of imprisonment of a fixed duration before considering whether that sentence can be served in the community. Although this approach is suggested by the text of s. 742.1(a), it is unrealistic and could lead to unfit sentences in some cases. Instead, a purposive interpretation of s. 742.1(a) should be adopted. In a preliminary determination, the sentencing judge should reject a penitentiary term and probationary measures as inappropriate. Having determined that the appropriate range of sentence is a term of imprisonment of less than two years, the judge should then consider whether it is appropriate for the offender to serve his or her sentence in the community. As a corollary of the purposive interpretation of s. 742.1(a), a conditional sentence need not be of equivalent duration to the sentence of incarceration that would otherwise have been imposed. The sole requirement is that the duration and conditions of a conditional sentence make for a just and appropriate sentence. The requirement in s. 742.1(b) that the judge be satisfied that the safety of the community would not be endangered by the offender serving his or her sentence in the community is a condition precedent to the imposition of a conditional sentence, and not the primary consideration in determining whether a conditional sentence is appropriate. In making this determination, the judge should consider the risk posed by the specific offender, not the broader risk of whether the imposition of a conditional sentence would endanger the safety of the community by providing insufficient general deterrence or undermining general respect for the law. Two factors should be taken into account: (1) the risk the offender re-offending; and

(2) *the gravity of the damage that could ensue in the event of re-offence. A consideration of the risk posed by the offender should include the risk of any criminal activity, and not be limited solely to the risk of physical or psychological harm to individuals.*⁹⁶

V. Imprisonment

171. *Imprisonment, whose maximum term is life*, constitutes the last resort sentencing alternative. A person sentenced to a term of less than two years generally serves his or her term in a provincial institution. All other sentences are served in a federal penitentiary.

VI. Sentence Enhancers

172. Apart from these alternatives, there are two sentence enhancers – dangerous offenders, and long-term offenders. A judge may find the offender to be a *dangerous offender* if it is satisfied (a) that the offence for which the offender has been convicted is a serious personal injury offence and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons; or (b) the offender, by his or her conduct in any sexual matter including that involved in the commission of the offence, has shown a failure to control his or her sexual impulses and a likelihood of causing injury or pain to other persons through failure in the future to control his or her sexual impulses. If the judge makes the determination of dangerous offender, the offender is sentenced to detention in a penitentiary for an indeterminate period of time. In the words of the SCC:

The dangerous offender sentencing allows the justice system to more precisely tailor the actual time served by the offender to the threat that he poses to society. The overriding aim is not the punishment of the offender but the prevention of future violence through the imposition of an indeterminate sentence. An indeterminate sentence is not an unlimited sentence. [...] The offender faces incarceration only for the period of time that he poses a serious risk to the safety of society. In the interim, it is hoped that he will receive treatment that will assist him in controlling his conduct. To release a dangerous offender while he remains unable to control his actions serves neither the interests of the offender nor those of society.⁹⁷

173. The court may find an offender to be a *long-term offender* if it is satisfied that (a) it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted; (b) there is a substantial risk that the offender will re-offend; and (c) there is a reasonable possibility

96. *R. v. Proulx*, [2000] 1 S.C.R. 61.

97. *R. v. Jones*, [1994] 2 S.C.R. 229.

of eventual control of the risk in the community. If so, the court must (a) impose a sentence for the offence for which the offender has been convicted, which sentence must be a minimum punishment of imprisonment for a term of two years; and (b) order the offender to be supervised in the community, for a period not exceeding ten years.

174. According to the SCC, the primary purpose of the dangerous offender regime is the protection of the public. The principles underlying the Code's sentencing provisions dictate that a sentence must be appropriate in the circumstances of the individual case. A judge's discretion whether to declare an offender dangerous must be guided by the relevant principles of sentencing contained in sections 718–718.2 of the *Code*. These include the principle of proportionality and the principle of restraint. A sentencing judge must consider the possibility that a less restrictive sanction would attain the same sentencing objectives as one more restrictive. Since the sentencing objective in question is public protection, if a sentencing judge is satisfied that the sentencing options available under the long-term offender provisions are sufficient to reduce the threat to the life, safety or physical or mental well-being of other persons to an acceptable level, the sentencing judge cannot properly declare an offender dangerous and thereupon impose an indeterminate sentence, even if all the statutory criteria have been satisfied. The imposition of an indeterminate sentence is justifiable only insofar as it actually serves the objective of protecting society. Prospective factors, including the possibility of eventual control of the risk in the community, must thus be considered prior to a dangerous offender designation. Lastly, section 753(5) of the Code does not preclude a sentencing judge from considering the long-term offender provisions until after he or she has already determined that the offender is not a dangerous offender. Parliament did not intend the dangerous offender provisions and the long-term offender provisions to be considered in isolation of one another.⁹⁸

98. *R. v. Johnson*, [2003] 2 S.C.R. 357, 2003 SCC 46.

Chapter 6. The Youth Criminal Justice Act

§1. THE YCJA

175. Canada has had specific criminal legislation dealing with crimes committed by minors for over a century. In 2003 a new Act, the YCJA, came into force. This Act deals with crimes committed by young people aged 12 up to 18. According to the declaration of principles, the youth criminal justice system is intended to: (i) prevent crime by addressing the circumstances underlying a young person's offending behaviour; (ii) rehabilitate young persons who commit offences and reintegrate them into society, and (iii) ensure that a young person is subject to meaningful consequences for his or her offence. In these ways, the system can contribute to the long-term protection of society. The principles of rehabilitation and meaningful consequences are conflicting, so judges and other criminal justice officers need to balance them when they take any decisions. In 2012, the YCJA was amended to include denunciation and specific deterrence as sentencing objectives for young offenders who are imposed youth sentences.⁹⁹

176. The youth criminal justice system is different from the adult system in many respects. First, it has to reflect the fact that young people lack the maturity of adults. So, the measures of accountability must be consistent with young persons' reduced level of maturity. Thus, some of the procedural protections are stronger for youth than for adults. For example, whenever a minor is arrested, the police must inform the parents and the minor has the right to a meaningful consultation with the parents.

177. Rehabilitation and reintegration also play a major role and the law recognizes the importance of timely intervention. Thus, the YCJA requires that young people have to be held accountable through interventions that are fair and in proportion to the seriousness of the offence. Within the limits of fair and proportionate accountability, interventions should reinforce respect for societal values, encourage the repair of harm done, be meaningful to the young person, respect gender, ethnic, cultural and linguistic differences and respond to the needs of Aboriginal young persons and of young persons with special requirements.

178. There are some procedural differences between the Criminal Code procedure for adults and the YCJA. For example, almost all trials are conducted by a judge alone, that is, without a jury. But when the maximum sentence is five years or longer, such as murder – ten years – jury and preliminary inquiry may be used. The same applies where there is the prospect of an adult sentence.

179. The YCJA also places great emphasis on extrajudicial measures and sanctions in the belief that these provide more effective responses than judicial measures, particularly with respect to relatively minor youth crimes.

99. YCJA 38. (2f) (i) and (ii).

180. The Act determines that *extrajudicial measures* should be designed to provide an effective and timely response to offending behaviour outside the bounds of judicial measures and to encourage young people to acknowledge and repair the harm caused to the victim and the community. Thus, police officers before starting judicial proceedings must consider whether it would be sufficient to take no further action, warn the young person, administer a caution, or, with the consent of the young person, refer him or her to a programme or agency in the community that may assist the young person not to commit future offences. Similarly, prosecutors may also caution a young person instead of using the court process or extrajudicial sanctions. Crown cautions are similar to police cautions, but prosecutors give the caution after the police refer the case to them.

181. *Extrajudicial sanctions* are a type of extrajudicial measure intended for more serious offences and offenders. Extrajudicial sanctions may be used, subject to the following conditions:

- (1) it is part of a programme of sanctions authorized by the Attorney General;
- (2) the young person consents to be subject to it;
- (3) the young person accepts responsibility for the offence; and
- (4) there is sufficient evidence to proceed with the prosecution of the offence.

182. Judges have a very broad range of sentencing alternatives, which include both non-custodial and custodial sentences. However, courts may not pursue deterrence objectives in their sentencing. As held by the Supreme Court:

General deterrence is not a principle of youth sentencing under the present regime. The YCJA also does not speak of specific deterrence. Rather, Parliament has sought to promote the long-term protection of the public by addressing the circumstances underlying the offending behaviour, by rehabilitating and reintegrating young persons into society and by holding young persons accountable through the imposition of meaningful sanctions related to the harm done. Undoubtedly, the sentence may have the effect of deterring the young person and others from committing crimes. But, by policy choice, Parliament has not included deterrence as a basis for imposing a sanction under the YCJA.¹⁰⁰

183. There is a ban on the publication of young people sentenced under the YCJA so as to protect the identity of minors. The same applies to victims and witness under the age of 18.

184. In the case of very serious offences with an adult penalty over two years, young people aged 14 and up may be sentenced as adults. According to the 2012 amendments to the YCJA, the court must impose an adult sentence if it is satisfied that: (a) the presumption of diminished moral blameworthiness or culpability of the

100. *R. v. B.W.P.; R. v. B.V.N.*, [2006] 1 S.C.R. 941, 2006 SCC 27.

young person is rebutted; and (b) a youth sentence would not be of sufficient length to hold the young person accountable for his or her offending behaviour. Otherwise, a youth sentence must be imposed.

185. The prosecution has the burden to rebut the existing presumption of diminished moral blameworthiness. Before the 2012 amendments, the burden was on the young person, who had to persuade the court that he or she should not lose the benefit of the youth sentencing provisions. The Supreme Court had however held that this presumption was unconstitutional. According to the Court:

The presumption of an adult sentence in the onus provisions is inconsistent with the principle of fundamental justice that young people are entitled to a presumption of diminished moral culpability. This does not mean that an adult sentence cannot be imposed on a young person. It may well be that the seriousness of the offence and the circumstances of the offender justify it notwithstanding his or her age. The issue, however, is who has the burden of proving that an adult sentence is justified. A young person who commits a presumptive offence should not automatically be presumed to attract an adult sentence. Because the presumptive sentence is an adult one, the young person must provide the court with the information and counter-arguments to justify a youth sentence. If the young person fails to persuade the court that a youth sentence is sufficiently lengthy based on the factors set out in s. 72(1) of the YCJA, an adult sentence must be imposed. This forces the young person to rebut the presumption of an adult sentence, rather than requiring the Crown to justify an adult sentence. This clearly deprives young people of the benefit of the presumption of diminished moral blameworthiness based on age. By depriving them of this presumption because of the crime and despite their age, and by putting the onus on them to prove that they remain entitled to the procedural and substantive protections to which their age entitles them, including a youth sentence, the onus provisions infringe a principle of fundamental justice.¹⁰¹

186. The YCJA has adopted a general publication ban for young people who were dealt with under the Act. This includes the prohibition not to publish the name and any other identifying information related to the young person.

187. When the court imposes a youth sentence on a young person who has been found guilty of a violent offence, the court shall decide whether it is appropriate to make an order lifting the ban on publication of information that would identify the young person. The court may order a lifting of the ban on publication if the court determines that the young person poses a significant risk of committing another violent offence and the lifting of the ban is necessary to protect the public against that risk.

188. When a young person has received an adult sentence, the youth justice court may order the young person to serve any portion of the imprisonment in a

101. *R. v. D.B.*, 2008 SCC 25.

youth custody facility separate and apart from any adult in a correctional facility for adults, in a provincial correctional facility for adults; or if the sentence is for two years or more, a penitentiary facility.

189. A finding of guilt under *the Youth Criminal Justice Act* does not constitute a prior conviction and thus may not act as an aggravating factor if that young person commits a new offence when he or she becomes an adult.

Part II. Criminal Procedure

Chapter 1. Principles, Institutions and Stages

190. Criminal procedure in Canada functions chronologically at three mutually exclusive levels. At each level, there are specific criminal justice officials that have been entrusted with respective responsibilities. Such criminal justice officials carry out their respective responsibilities by interacting with one another, which occurs to ensure that the function of the criminal justice process transitions smoothly throughout each level and ultimately results in the successful completion of a given criminal case. The three mutually exclusive levels are:

- (1) the police investigation;
- (2) the prosecution's analysis; and
- (3) the criminal court process. Basically, this means that a police investigation must first take place before the prosecution has the ability to analyse the issue, and the prosecution must first analyse the issue before it can be brought to the level of the criminal court process.

191. The police investigation is the first procedural step with any given criminal case. The main feature of the police investigation is that it ultimately results in the arrest of a person who violated a Criminal Code offence. An arrest basically marks the detainment of a potential suspect, which is an individual that the police have suspected to have violated a Criminal Code offence. An arrest is absolutely essential because the criminal procedure cannot begin without an arrest first being made. The making of an arrest is part of the investigative process, which largely relies on the police interacting with the public, such as interviewing potential eyewitnesses, or examining the crime scene, in a common attempt to collect evidence that will lead them to a person that is suspected of violating a given Criminal Code offence. Once the police make an arrest of a potential suspect, they then have the responsibility to consult with the prosecution as to whether or not charges should be laid.

192. The laying of charges thus rests on the prosecution's analysis. It is the second essential part of the criminal procedure process because it is ultimately the deciding factor for whether or not the case is brought to the level of the criminal court system. That is, any given criminal case will not be processed through the court system if the prosecution decides that the suspect should not be charged. This means that the suspect in police custody is essentially free to go if the prosecution decides not to charge a suspect in police custody. Conversely, any given criminal

case will be brought to the level of the court system if the prosecution decides to charge the suspect in police custody. It is at this point where the suspect becomes defined as the *accused*, and he or she will be brought to the level of the criminal court system. It is important to note that the decision of whether a suspect should be charged or not rests entirely on the prosecution. The prosecution must follow a two-tiered test to determine whether or not to prosecute: (i) the evidential test, that is, whether there is sufficient – admissible – evidence to provide a realistic prospect of conviction; and (ii) the public interest test; that is, whether it is in the public interest to prosecute. The only exception is domestic violence cases, where prosecutors have no discretion and are obligated to prosecute. For other cases, if the prosecution decides that a suspect should be charged, it is their responsibility to prepare for the criminal court process. They do so by collecting evidence from police (e.g., interviewing eyewitnesses and victims whom the police have on record), researching case precedents (decisions from prior criminal cases) relevant to the criminal case that is before them, and negotiating pleas with the accused’s defence attorney. The prosecution’s analysis is the stage in the criminal procedure process that occurs directly prior to the stage where a given criminal case reaches the level of the criminal court system. In summary, it is fundamentally a managerial process, where it is the role of the prosecution to ensure that all of the necessary formalities that will result in the successful completion of a given criminal case throughout the criminal trial process are completed.

193. Once this is achieved, there is a formal step at the beginning of the level of the criminal court system for indictable offences (*infra*, paragraph 200). This is known as the *preliminary inquiry*, which is basically a hearing that serves the purpose of determining whether or not the prosecution has a sufficient amount of evidence against the accused, that is, enough to ensure that the criminal case can be successfully carried out at the trial level.¹⁰² All preliminary inquiries occur at the provincial court level, and it is a very interactive process between the prosecution’s presentation of his or her evidence and the judge of the provincial criminal court. That is, the prosecution is given the opportunity to present his or her evidence to the judge of the respective provincial court (e.g., present eyewitness statements and/or physical evidence from the crime scene), and it is up to that judge to decide whether or not the given criminal case should proceed to the trial level.

194. The preliminary inquiry also serves as the place where the accused, generally upon consultation with his or her defence attorney, issues a plea and decides where he or she would like to have their trial held (i.e., at the provincial court where the preliminary inquiry is being held or at the respective provincial superior court). There are five different pleas: Guilty,¹⁰³ Not-Guilty,¹⁰⁴ Pardon,¹⁰⁵ *Autrefois*

102. Unlike indictable offences, there is no preliminary inquiry for summary conviction offences. They are tried only on information. Section 536 of the Criminal Code gives the accused the possibility of electing to have a preliminary inquiry for certain offences. Canadian Criminal Code, s. 536.

103. The accused is agreeing that he violated the Criminal Code offence he is being accused of.

104. The accused is denying that he violated the Criminal Code offence he is being accused of.

105. The accused has been convicted of the same Criminal Code offence in a prior criminal case, but the Crown has eliminated the conviction.

Acquit,¹⁰⁶ and *Autrefois Convict*.¹⁰⁷ The accused are only given the decision of where their trial will be held if the Criminal Code offence they are being accused of is a non-former capital indictable offence. All summary conviction offences are held at the provincial court level, and all former capital indictable offences are held at the provincial superior court level (*supra*, paragraph 21).

195. The preliminary inquiry is an extremely important step in the criminal process, because it is basically the gateway for if, and where, a criminal trial will be carried out. That is, the criminal case will not be brought to trial if the judge decides that the prosecution does not have a sufficient amount of evidence. Similarly, if the prosecution does have enough evidence; the criminal case will remain at the provincial superior court level if the accused had been charged with a summary conviction offence, but it would be brought to trial at the superior court level if they had been charged with a former capital indictable offence (on the distinction between summary conviction offences and indictable offences, see *infra*, paragraph 200). Conversely, if the prosecution had charged the accused with a non-former capital indictable offence, it is, again, the accused's decision as to whether he or she wants the trial held at the provincial court level or the provincial superior court level. Moreover, the type of plea the accused puts forth is also very important. That is, if the accused issues a guilty or not-guilty plea, the trial will proceed. However, if the accused issues a plea of *Autrefois Acquit*, *Autrefois Convict*, or that of a pardon, then they will generally not be processed to the trial level. The criminal procedure process leading up to a criminal trial is very extensive, and it relies heavily upon the interaction among the prosecution, the judge, and the accused/defence attorney. In exceptional cases, the prosecutor may proceed directly without a preliminary inquiry. The British Columbia Court of Appeals explained the nature and scope of direct indictments.

Parliament intended, by this section, to confer upon the Attorney General or his Deputy the power to override the preliminary inquiry process. It is a special power not to be exercised by Crown counsel generally but only on the personal consideration of the chief law officer of the Crown and his or her deputy. Such a power is recognition of the ultimate constitutional responsibility of Attorneys General to ensure that those who ought to be brought to trial are brought to trial. There are many reasons why an Attorney General or a Deputy Attorney General might consider a direct indictment in the interests of the proper administration of criminal justice. Witnesses may have been threatened or may be in precarious health; there may have been some delay in carrying a prosecution forward and, thus, a risk of running afoul of s. 11(b) of the Canadian Charter of Rights and Freedoms; a preliminary inquiry, in, for instance, cases essentially founded on wire-tap evidence, may be considered by the Attorney General to be expensive and time consuming for no purpose. These

106. The accused has been acquitted of the same Criminal Code offence in a prior criminal case.

107. The accused has been convicted of the same Criminal Code offence in a prior criminal case.

*are simply illustrations. It is neither wise nor possible to circumscribe the power of the Attorney General under this section.*¹⁰⁸

196. Once the case has proceeded past the preliminary inquiry, the trial will therefore begin. If a given criminal case is heard before a provincial court, the trial is always carried out before a single judge, without a jury. If a given criminal case is heard before a provincial superior court, the trial will always be carried out before a single judge, but it will not always be heard before a jury. Nevertheless, it is important to keep in mind that the trial will always be heard before a judge and jury if the accused had been charged with a former capital indictable offence. However, when an accused is charged with a non-former capital indictable offence, the trial will either be heard before a judge and jury, or before a judge without a jury, which is entirely the decision of the accused/defence attorney.

197. Regardless of whether a criminal trial is heard before the provincial superior court, or the provincial court, the entire process is *adversarial*. That is, unlike civil law criminal trials, Canada follows an adversarial system, which derives from the common law legal tradition. This basically means that in any given criminal trial in Canada the prosecution and the defence attorney engage in an argument and produce evidence that pertains to the case at hand. The judge in a criminal trial can be thought of as an umpire or referee, who basically makes sure that the trial follows an orderly structure.

198. The criminal trial level is the second step a given case will pass through in the criminal court system. It is an important step because it ultimately results in the accused being found guilty or innocent of the given Criminal Code offence that they had been charged under. If an accused is found to be innocent, he or she is essentially free to go. If an accused is found guilty, it is the responsibility of the judge to sentence him or her to the respective punishment set forth in the Criminal Code offence that he or she had been charged and convicted under.

199. It is important to keep in mind that, in the case of a conviction (i.e., guilty verdict) or an acquittal (i.e., innocent verdict), the criminal case can proceed to the appellate court level. For instance, if the accused is given an innocent verdict, the prosecution has the right to appeal the criminal case to the appellate court level. By contrast, if the accused is given a guilty verdict, the accused has the right to appeal the criminal case to the appellate court level. The appellate courts function in a hierarchical ordering, and they only hear issues of law (i.e., the facts or evidence from a trial court are not dealt with in an appellate court). The first level of appellate courts is known as the provincial appellate courts. There is a provincial appellate court within each province. For instance, the Ontario Court of Appeals is the appellate court in the province of Ontario. The second and final level of the appellate courts is known as the SCC. Basically, appeals from the trial courts are generally processed through the provincial appellate courts and decisions of the provincial appellate courts are then, if appealed by either the prosecution or the defence attorney, processed through the SCC.

108. *R v. Charlie* (1998), 126 CCC (3d) 513 at 521–522 (BCCA).

Chapter 2. Classification of Offences and Procedural Implications

200. Traditionally, at common law crimes were classified as felonies and misdemeanours, depending on the seriousness of the offence. Canada abandoned this classification in 1892. Crimes in Canada are now classified into *indictable offences* and *summary conviction offences*. Indictable offences are the most serious crimes; and they are subject to a wide range of sentences, the most severe of which is life imprisonment. Indictable offences include murder, manslaughter, robbery, and aggravated sexual assault, among many others. Summary conviction offences include minor offences which are punishable by a fine of no more than CND 2,000 and/or an imprisonment term of six months or less. Summary conviction offences include, for instance, trespassing at night, causing a disturbance, and taking a motor vehicle without the owner's consent. The most significant implications of this classification have to do with procedure. First of all, indictable offences have no statute of limitations. It is not unheard of in Canada for prosecutors to try cases that occurred decades ago, particularly those involving serious offences such as multiple instances of sexual assault or offences of a sexual nature against children.¹⁰⁹ For example, Gerald Regan, a former Nova Scotia premier, was tried in the late 1990s for eight indictable offences of a sexual nature against minors that allegedly took place between 1956 and 1969.¹¹⁰ By contrast, summary conviction offences are subject to a statute of limitations, which prescribes that no proceedings may be instituted more than six months after the time when the offence was committed. Another important procedural implication of this classification is the fact that indictable offences generally require a preliminary hearing before the case goes to trial (*supra*, paragraph 193).

201. There is a third type of offences called *hybrid offences*. Hybrid offences are dual-procedure offences which can be treated either as indictable offences or summary conviction offences. Hybrid offences constitute the majority of offences in Canada. They include assault, child pornography, sexual assault, and criminal harassment, among many others. Hybrid offences are not an exclusive Canadian phenomenon. They exist in other common law jurisdictions, such as England and Wales.¹¹¹ In Canada it is the prosecutor who has the exclusive authority to elect whether to treat a hybrid offence as either an indictable or a summary conviction offence. There is a long line of cases that confirm the power of the prosecutor to make this choice.¹¹² According to the SCC 'hybrid offences are deemed to be indictable unless and until the Crown elects to proceed summarily'.¹¹³ When the prosecutor chooses to treat a hybrid offence as indictable, the offence assumes the characteristics of indictable offences and the procedure for indictable offences is to be followed. This includes the right of a preliminary inquiry and the absence of a

109. In these cases, the accused is tried according to the criminal law as it existed when the offence was committed and not according to the law that exists at the time of the trial.

110. *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12.

111. *Magistrates' Courts Act* 1980 (UK), 1980, c. 43.

112. *R. v. Dudley*, 2009 SCC 58, [2009] 3 S.C.R. 570; *R. v. Paul-Marr*, 2005 NSCA 73, 199 C.C.C. (3d) 424; *R. v. C. (D.J.)* (1985), 21 C.C.C. (3d) 246; *R. v. Huff* (1979), 50 C.C.C. (2d) 324 (Alta. C.A.).

113. *R. v. Dudley*, 2009 SCC 58, [2009] 3 S.C.R. 570.

statute of limitations. Similarly, if the prosecutor elects to treat a hybrid offence as a summary conviction, then the offence is treated as a summary conviction offence in all respects. This means, among other issues, that the offence is subject to the statute of limitations and that there is no preliminary hearing.

Hybrid offences give the prosecution ‘the flexibility of taking the specific circumstances of a case into account to ensure that the interests of justice, including the public’s interest in the effective and efficient enforcement of the criminal law, are best served’.¹¹⁴ In order to elect to treat a hybrid offence as either an indictable offence or a summary conviction offence, the prosecution must examine the circumstances surrounding the offence and the background of the accused before making a decision. According to federal policy, procedure by indictment is reserved for the most serious cases. The factors that the prosecution has to take into account are the following: (i) whether the facts alleged make the offence a serious one; (ii) whether the accused has a lengthy criminal record; (iii) the sentence that will be recommended by the Attorney General in the event of a conviction; (iv) the effect that having to testify at both a preliminary inquiry and a trial may have on victims or witnesses; and (v) whether it would not be in the public interest to have a trial by jury.¹¹⁵ In order to fight organized crime, the government has recently adopted legislation that allows prosecutors to consider the criminal acts perpetrated by organized crime groups as serious offences even if they are not indictable offences punishable by sentences of five years or more.¹¹⁶ Courts have not yet analysed many of the procedural implications that this new legislative act may have.

In some circumstances, the Crown’s election of the treatment of a hybrid offence may be impugned as an abuse of process if it appears that it was made solely to circumvent a limitation period. There are a number of decisions in the area, with each turning on its particular facts, such as *R. v. Quinn* (1989), 54 C.C.C.(3d) 157 (Que.C.A.); *R. v. Boutilier* (1995), 104 C.C.C.(3d) 327 (N.S.C.A.); *R. v. Belair* (1988), 41 C.C.C.(3d) 329 (Ont.C.A.); *R. v. Jans* (1990), 59 C.C.C.(3d) 398 (Alta.C.A.).

114. Department of Justice Canada, *Public Prosecution Service of Canada Deskbook* (Department of Justice Canada, Ottawa, 2000), s. 2.

115. Department of Justice Canada, *Public Prosecution Service of Canada Deskbook* (Department of Justice Canada, Ottawa, 2000), s. 2.1.

116. Serious offence is now defined as ‘an indictable offence under this or any other Act of Parliament for which the maximum punishment is imprisonment for five years or more’. Canadian Criminal Code 467.1(1).

Chapter 3. Pre-trial Investigation

§1. POLICE INVESTIGATION

202. First and foremost, the criminal process begins with the commission of a criminal offence. That is, in order for a criminal trial to be required, an individual must first violate the prohibition set by a criminal statute. Another necessary requirement is that the criminal justice system must become aware of this violation. This can be difficult because criminal justice officials cannot be present during the commission of every criminal offence. Therefore, some criminal offenders go unnoticed to criminal justice system and are consequently not subject to the criminal process. Throughout the years, the Canadian criminal justice system has been gradually encouraging the active involvement of the Canadian public. In this context, the criminal justice system predominately encourages victims and other members of the Canadian public to report criminal behaviour to criminal justice officials. To facilitate this process, police throughout all levels of Canada presently interact with the public on a regular basis. Basically, the emerging ideal throughout Canada is that there should be an active relationship between the criminal justice system and the Canadian public when it comes to bringing a violation of a criminal statute to the awareness of the criminal justice system.

203. Subsequent to the criminal justice system becoming aware that a criminal offence has been committed, there are three necessary steps that must first be chronologically satisfied before the criminal trial process can be carried out. It follows that: the individual who committed the crime must first be (1) correctly arrested; (2) accurately identified; and (3) appropriately charged. From this first requirement, the police must first determine who committed the offence in question. In Canada, for situations where the police are not immediately present when the offence is committed, it is common for the police to interact with the public and/or gather physical evidence directly connected to the alleged crime event. The main point is that the police carry out the investigative process. For example, consider a situation where the police received a report that an assault had occurred, but they were not present when it was committed. Police officers in Canada generally go directly to the location where the assault occurred, and they collect evidence that will lead to the identification of the person who committed the assault. This predominately includes speaking to the victim and/or eyewitnesses who were present when the assault occurred. This process can be lengthy, but it ultimately leads police to narrow down or identify a potential suspect, which then leads to the arrest of that suspect.

204. It is important to keep in mind that, in order for the arrest to be valid, the police must respect the suspect's legal rights that are protected by the *Charter of Rights and Freedoms*. That is, if the police do not respect the rights of the suspect, they will not be legally permitted to take him/her into custody. Thus, if the police do respect the suspects *Chartered* rights, they will therefore be legally permitted to take him/her into custody. Once the suspect is held in custody, the police are then responsible to make sure that the suspect they have arrested is in fact the individual who committed the crime, that is, the assault in the case of the above example. To

do this, the police must have evidence that directly connects the suspect with the crime in question. For instance, in the assault example, the most predominate method is that police ask an eyewitness to come to the police station and identify the person they witnessed committing the assault. Generally speaking, the police do this by providing an eyewitness with a line-up of people, one of which is the suspect, where the others are individuals who are known to be innocent. If the eyewitness, or multiple eyewitnesses, identifies the suspect as the individual he, or they, witnessed committing the crime, this is generally sufficient evidence for the police to conclude that the suspect they have in custody is in fact the individual who committed the crime.

205. Once the police come to this conclusion, they are now at the point of deciding whether or not to charge the individual with the crime. That is, in the case of the above assault example, the police would then have sufficient evidence to be capable of charging the suspect with assault. The police do not, however, have complete discretion when it comes to laying charges. In Canada, it is the prosecution that has the final decision as to whether the suspect in police custody is charged with the crime he/she had been arrested for. So, in the case of the above assault example, the prosecution would decide whether the suspect should be charged with assault. This is an essential step in the criminal trial process because, in the event that the prosecution decides that charges should not be laid, the suspect is free to go and the criminal process will not continue. However, if the prosecution decides to charge the suspect with the crime, the suspect is then referred to as the accused. This is important because, in Canada, once a suspect is charged with a crime, it does not mean that he is a criminal; it just means that the Canadian criminal justice system has accused him of committing the crime. Therefore, if charged, the suspect in the assault example would become accused of committing assault, and he would consequently be referred to as the accused throughout the rest of the criminal process.

§2. PRELIMINARY INQUIRY

206. The next step in the criminal process is to determine whether or not the accused is in fact a criminal. This is precisely where the criminal trial process begins; at the level of the court system. Basically, after being arrested and charged for a given criminal offence, the accused is always first processed through the provincial court in the respective province in which the accused committed the offence. At the provincial court level, every person accused of an indictable offence is processed through what is known as a preliminary inquiry. The role of the preliminary inquiry is to determine whether the prosecution has sufficient evidence for the case against the accused to result in the successful completion of the trial.

207. As a general rule, if the accused is charged with a summary conviction offence, he or she will stand trial at the same provincial court. If the accused is charged with a non-former capital indictable offence, like in the case of the above assault example, he or she will be given the choice of whether he or she wants the trial to be held at the provincial court, following the preliminary inquiry, or before

a judge and jury at the level of the provincial superior court. Finally, if the accused is charged with a former capital indictable offence, like murder, he or she will automatically, following the preliminary inquiry, be processed to stand trial before a judge and jury at the provincial superior court.

208. Therefore, the end of the preliminary inquiry marks the end of the pre-trial criminal process. Before we move on to the criminal trial process, consider the following hypothetical example to summarize the above discussion and add some perspective. Remaining consistent with the above assault example, consider that a man assaulted another man in Ontario. The Ontario provincial police became aware of the assault and began to investigate. When the Ontario provincial police arrested the man, or suspect, whom they believed to be the man who committed the assault; they brought in multiple eyewitnesses to confirm this belief. Once the eyewitnesses positively identified the man as the person who committed assault, the Ontario provincial police notified an Ontario prosecutor of the arrest. It is important to remember that, if the prosecution does not decide to charge the person with the crime, that is, the assault in this case, the criminal process is over, and the man would be free. However, let's assume the Ontario prosecutor decided to charge the man with assault and elects to proceed as an indictable offence (*supra*, paragraph 201). In this case, the man, who would now be identified as the accused, would be processed through the OCJ, which is the formal name for the provincial court of Ontario. While at the OCJ, the preliminary inquiry will first take place. If it is shown that the crown does not have sufficient evidence to successfully proceed through an entire trial, the case is closed and the accused is free to go. However, if the prosecution does have sufficient evidence, the criminal trial will take place. Given that an assault is a non-former capital indictable offence, the accused will be given the choice to have their trial in the OCJ or have their trial before a judge and jury at the OSJ.

Chapter 4. Trial Stage

§1. GENERAL OVERVIEW

209. Canadian criminal trials follow the adversarial system (*supra*, paragraph 197) and begin with the prosecutor's opening statement. Then, the prosecutor examines witnesses and produces other evidence. The defence cross-examines the witnesses through leading questions. If a new issue arises in cross-examination or if there is some uncertainty, the prosecution may re-examine the witness. As a general rule, new facts cannot be introduced in re-examination.¹¹⁷

210. After the prosecution rests his or her case, the defence counsel may make a no evidence motion to have the charges dismissed if there is no evidence of an element of the criminal offence. The defence may or may not call evidence. If the defence does, counsel will give an opening statement and call witnesses and produce other evidence. Under special circumstances, the defence counsel may give the opening statement immediately after the prosecutor's. The prosecution will then cross-examine the witnesses; and the defence has the right to re-examine them about anything that arises from the cross-examination.

211. After resting its case, the defence will make the closing arguments followed by the prosecutor. If the defence did not call any witnesses, the prosecutor will make the closing arguments first. This has been criticized because closing last seems to give an advantage as jurors tend to remember what was said last. The fact that an accused elects to call witnesses should be independent of his or her right to close arguments after the prosecution.¹¹⁸

212. Then, if the case is tried by jurors and judge, the judge will charge the jurors. The judge will synthesize the case and instruct the jurors as to the law they have to apply. After the jury's deliberation, the jurors will render a unanimous verdict. The sentence is imposed by the judge in a separate hearing without jurors.

§2. TRIAL BY JURY

213. According to the Canadian Charter of Rights and Freedoms, any person charged with an offence has the right of trial by jury only where the maximum punishment for the offence is imprisonment for five years or a more severe punishment. All other offences are heard by judge alone. The manner in which jurors are elected depends on provincial rather than federal law. In general, jurors have to be Canadian citizens who have attained the majority of age. The sheriff calls prospective jurors to make up a panel.

117. *R. v. Moore* (1984), 15 C.C.C. (3d) 541 (Ont. C.A.).

118. *R. v. Rose*, [1998] 3 S.C.R. 262.

214. The judge may excuse any juror from jury service for reasons of (a) personal interest in the matter to be tried; (b) relationship with the judge, the prosecutor, the accused, the counsel for the accused or a prospective witness; or (c) personal hardship or any other reasonable cause.

215. Twelve jurors are then selected following a procedure where the defence and the prosecution may challenge prospective jurors. Challenges are either peremptory or for cause. The former allows the prosecution and defence to challenge a prospective juror for no reason. Each has a certain number of peremptory challenges depending on the offence. For example, in high treason or first-degree murder, there are twenty peremptory challenges for each and twelve where the accused is charged with most other offences.

216. Challenges for cause are unlimited. Section 638 of the Criminal Code spells out the grounds for challenges for cause. They include those situations when the prospective juror: (i) is not indifferent between the Queen and the accused; (ii) has been convicted of an offence for which he was sentenced to a term of imprisonment exceeding twelve months; (iii) is not a Canadian citizen; (iv) is physically unable to perform properly the duties; or (v) does not speak the official language of Canada that is the language of the trial. Challenges for cause may not be used merely to over-represent or under-represent a certain class in society or as a fishing expedition in order to obtain personal information about the jurors.

217. Verdicts must be reached by unanimity. The Supreme Court clarified that:

*this does not mean that [the jurors] are obliged to agree, but that only a unanimity of views shall constitute a verdict bringing the case to an end. The obligation is not to agree but to co-operate honestly in the study of the facts of a case for its proper determination according to law.*¹¹⁹

If there is no unanimity, a mistrial is declared; and the prosecution has the right to begin a new trial before the same court with a new jury. In the event the new trial also ends in a mistrial, the prosecutor still has the opportunity to file for a new trial until a unanimous verdict is reached. In practice, prosecutors generally refrain from retrying a case more than once. This is considered not to violate double jeopardy guarantees (*infra*, paragraph 231). Unlike those cases tried only by judges, where the judge has to provide reasons for the verdict, jurors do not have to offer reasons of their decision. Bench trials do offer reasons for decisions.

119. *Latour v. The King*, 1950 CanLII 12 (S.C.C.), [1951] S.C.R. 19.

Chapter 5. Charter of Rights and Freedoms and the Criminal Process

§1. SEARCH AND SEIZURE

218. The Charter of Rights and Freedoms contains many rights that protect from abuse of governmental authority in the criminal justice process.¹²⁰ Section 8 of the Charter grants everyone the right to be secure against unreasonable search or seizure.¹²¹ Searches and seizures are reasonable if authorized by law, if the law itself is reasonable, and if the manner in which the search is conducted is reasonable. This right protects every reasonable expectation of privacy. The scope of the reasonable expectation of privacy depends on each case. According to the Supreme Court ‘there are two distinct questions which must be answered in any section 8 challenge. The first is whether the accused had a reasonable expectation of privacy. The second is whether the search was an unreasonable intrusion on that right to privacy. Usually, the conduct of the police will only be relevant when consideration is given to this second stage’.¹²² The factors to be considered in assessing the totality of the circumstances of the reasonable expectation of privacy include the following:

- (1) presence at the time of the search;
- (2) possession or control of the property or place searched;
- (3) ownership of the property or place;
- (4) historical use of the property or item;
- (5) the ability to regulate access, including the right to admit or exclude others from the place;
- (6) the existence of a subjective expectation of privacy; and
- (7) the objective reasonableness of the expectation.

The Supreme Court held that:

*the? expectation of privacy is a normative standard. Privacy analysis is laden with value judgments which are made from the independent perspective of the reasonable and informed person who is concerned about the long-term consequences of government action for the protection of privacy. In assessing the reasonableness of a claimed privacy interest, the Court is to look at the ‘totality of the circumstances’, and this is so whether the claim involves aspects of personal privacy, territorial privacy, or informational privacy.*¹²³

219. If there is a reasonable expectation of privacy, the police must first get a *warrant*, that is, judicial authorization, to conduct a search or seizure, except under some circumstances, such as if there is imminent danger that evidence of a crime will be destroyed or that a person may be harmed, and if the search is incident to an

120. Canadian Charter of Rights and Freedoms, s. 7.

121. Canadian Charter of Rights and Freedoms, s. 8.

122. *R. v. Edwards*, [1996] 1 S.C.R. 128.

123. *R. v. Patrick*, 2009 SCC 17, [2009] 1 SCR 579.

arrest. A warrant may be given only if there are reasonable and probable grounds to believe that a crime has been committed and that the search will reveal evidence of the crime.

220. The search incident to an arrest is a common law power, which is considered an exception to the ordinary requirements for a reasonable search. In this respect, the search ‘requires neither a warrant nor independent reasonable and probable grounds. Rather, the right to search arises from the fact of the arrest. This is justifiable because the arrest itself requires either reasonable and probable grounds or an arrest warrant. However, since the legality of the search is derived from the legality of arrest, if the arrest is later found to be invalid, the search will also be considered invalid.’¹²⁴ According to the Supreme Court, ‘a warrantless search can be justified if: (1) the information predicting the crime was compelling; (2) the source was credible; and (3) the information was corroborated.’¹²⁵

The Supreme Court has recently upheld the validity of the search of cell phones, incident to an arrest. The Supreme Court held that:

The common law power to search incident to a lawful arrest permits the search of cell phones and similar devices found on the suspect. [...] The power to search incident to arrest is extraordinary in that it permits reasonable searches when the police have neither a warrant nor reasonable and probable grounds. Like other searches incident to arrest, prompt cell phone searches incident to arrest may serve important law enforcement objectives: they can assist police to identify and mitigate risks to public safety; locate firearms or stolen goods; identify accomplices; locate and preserve evidence; prevent suspects from evading or resisting law enforcement; locate the other perpetrators; warn officers of possible impending danger; and follow leads promptly. Cell phone searches also have an element of urgency, which supports the extension of the power to search incident to arrest. Safeguards must be added to the law of search of cell phones incident to arrest in order to make that power compliant with s. 8 of the Charter. Ultimately, the purpose of the exercise is to strike a balance that gives due weight to the important law enforcement objectives served by searches incidental to arrest and to the very significant privacy interests at stake in cell phone searches. Consequently, four conditions must be met in order for the search of a cell phone or similar device incidental to arrest to comply with s. 8. First, the arrest must be lawful. Second, the search must be truly incidental to the arrest. This requirement should be strictly applied to permit searches that must be done promptly upon arrest in order to effectively serve the law enforcement purposes. In this context, those purposes are protecting the police, the accused or the public; preserving evidence; and, if the investigation will be stymied or significantly hampered absent the ability to promptly conduct the search, discovering evidence. Third, the nature and the extent of the search must be tailored to its purpose. In practice, this will mean that only recently sent or drafted emails, texts, photos and the call log will,

124. *R. v. Caslake*, [1998] 1 S.C.R. 51.

125. *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393.

*generally, be available, although other searches may, in some circumstances, be justified. Finally, the police must take detailed notes of what they have examined on the device and how they examined it. The notes should generally include the applications searched, the extent of the search, the time of the search, its purpose and its duration. The record-keeping requirement is important to the effectiveness of after-the-fact judicial review. It will also help police officers to focus on whether what they are doing in relation to the phone falls squarely within the parameters of a lawful search incident to arrest.*¹²⁶

§2. ARREST OR DETENTION

221. The Charter also grants everyone the right not to be arbitrarily detained or imprisoned.¹²⁷ An arrest can be made only to: (i) prevent a crime from being committed; (ii) terminate a breach of peace; and (iii) compel a person to attend trial. Police need a warrant to arrest, except in the following circumstances: (i) they have caught a person in the act of committing an offence; (ii) there are reasonable grounds that a person has committed an indictable offence; or (iii) there are reasonable grounds that a person is about to commit an indictable offence. In all these situations, two additional conditions must be met: (a) that there are reasonable grounds, and (b) that the arrest is necessary in the public interest.

§3. LEGAL COUNSEL

222. The Charter guarantees everyone the right to retain and instruct counsel without delay and to be informed of that right.¹²⁸ Whenever a person is detained, the police must inform the detainee that he or she can consult a lawyer and that a publicly funded one is available for those who are unable to afford to hire a lawyer. This right may be waived. In several occasions, the Supreme Court clearly indicated that the right to retain and instruct counsel imposes this information duty on the police and further that they must refrain from attempting to elicit evidence from the arrested or detained person until this person has had this reasonable opportunity.¹²⁹

126. *R. v. Fearon*, 2014 SCC 77.

127. Canadian Charter of Rights and Freedoms, s. 10.

128. Canadian Charter of Rights and Freedoms, s. 10.b.

129. *R. v. Smith (Joey Leonard)*, [1989] 2 S.C.R. 368; *R. v. Manninen*, [1987] 1 S.C.R. 1233; *R. v. Ross*, [1989] 1 S.C.R. 3.

§4. CRIMINAL PROCEEDINGS

223. The Charter also requires that a detainee be informed of the specific offence without unreasonable delay and that the trial take place within a reasonable time.¹³⁰ If the trial is unreasonably delayed, the proceedings must be terminated. In general, delays beyond six to eight months to commence trial are considered unreasonable, except in very complex cases or where the accused contributed to the delay. The Supreme Court identified four factors which must be considered in determining the reasonableness of any given delay. These factors are:

- (1) the growing impairment of the interests of the accused by the passage of time, such as ‘*where there is pre-trial detention or the release of the accused pending trial is made subject to bail conditions*’;¹³¹
- (2) waiver of time periods, that is, where the accused expressly authorizes a procedure that results in a delay;
- (3) the time requirements inherent in the nature of the case; and
- (4) institutional resources.¹³²

§5. BAIL

224. The Charter also guarantees everyone the right not to be denied reasonable bail without just cause.¹³³ The Supreme Court interpreted that this right includes two distinct elements, namely the right to reasonable bail and the right not to be denied bail without just cause. Reasonable bail refers to the terms of bail. Thus, the quantum of bail and the restrictions imposed on the accused’s liberty while on bail must be reasonable. Just cause refers to the right to obtain bail. Thus, bail must not be denied unless there is just cause to do so. The just cause aspect of section 11(e) imposes constitutional standards on the grounds under which bail is granted or denied. When an accused who is charged with an offence other than murder or treason is taken before a justice, in the bail hearing, the justice must, unless a plea of guilty by the accused is accepted, order that the accused be released, unless the prosecutor shows cause why the accused should be held in custody pending trial. The only grounds for denial of bail are: (i) to ensure the accused’s attendance in court; (ii) to protect the public; and (iii) to maintain confidence in the administration of justice. This last concept is rather vague, and its constitutionality was challenged. The Supreme Court held that:

The confidence in the administration of justice component of s. 515(10)(c) does not provide a sufficiently precise standard. Whether the phrase ‘maintain confidence in the administration of justice’ has been given a workable standard by courts and/or Parliament in other contexts, in the context of s. 515(10)(c) it is

130. Canadian Charter of Rights and Freedoms, s. 11 a and b.

131. *R. v. Askov*, [1990] 2 S.C.R. 1199.

132. *R. v. Askov*, [1990] 2 S.C.R. 1199.

133. Canadian Charter of Rights and Freedoms, s. 11 e.

impermissibly vague because of the failure to establish a plausible and valid ground for denying bail that would serve the proper administration of the bail system and that is not already covered under the more specific grounds in s. 515(10)(a) and (b). Without such an independent ground, the listed factors, by themselves, point to a denial of bail on the mere two-fold basis of a serious crime and a strong prima facie case; however, it does not promote the proper functioning of the bail system to detain an accused on this basis alone, when the accused is not a flight risk and does not pose a threat to public safety. Section 515(10)(c) essentially revives the old ‘public interest’ ground and invokes similarly vague notions of the public image of the criminal justice system. It is ripe for misuse and allows irrational public fears to be elevated above an accused’s Charter rights.¹³⁴

This decision shows that the denial of bail based on the lack of confidence in the administration of justice will be rarely applied. When it is applied, the judge will have to consider only the four factors expressly determined by Parliament: (i) the apparent strength of the prosecution’s case, (ii) the gravity of the nature of the offence, (iii) the circumstances surrounding its commission, including whether a firearm was used, and (iv) the fact that the accused is liable on conviction to a potentially lengthy term of imprisonment or, in the case of an offence that involves a firearm, a minimum punishment of imprisonment for a term of three years or more.¹³⁵ A judge ‘can only deny bail if satisfied that in view of these factors and related circumstances, a reasonable member of the community would be satisfied that denial is necessary to maintain confidence in the administration of justice’.¹³⁶

225. In most cases, the onus rests with the prosecution to show cause why the accused should not be released. In some situations, the onus is switched; and it is the accused who must show cause why he or she should not be detained. The SCC upheld the constitutionality of this reverse onus of proof.¹³⁷ Release may either be on an undertaking or with a recognizance to pay an amount of money if the accused does not attend court. The Charter guarantees that the amount of money be within the accused’s reach. Conditions can be attached to an undertaking or a recognizance.

226. In some circumstances, the police can release the accused without a bail hearing (*supra*, paragraph 225) under a summons (i.e., a promise to appear before the court), a recognizance (i.e., the promise or deposit of an amount of money if the accused does not appear in court), or an undertaking with some conditions, such as the obligations to remain in the jurisdiction, to report periodically to the police, or to give the passport to the police.

134. *R. v. Hall*, [2002] 3 S.C.R. 309, 2002 SCC 64.

135. Canadian Criminal Code, s. 515 (10) c.

136. *R. v. Everette-Dorland*, 2004 MBQB 137.

137. *R. v. Pearson*, [1992] 3 S.C.R. 665.

§6. RIGHT AGAINST SELF-INCRIMINATION

227. The Charter also guarantees the right not to be compelled to be a witness in proceedings against oneself.¹³⁸ With respect to the former, the Supreme Court held that:

*Any state action that coerces an individual to furnish evidence against him- or herself in a proceeding in which the individual and the state are adversaries violates the principle against self-incrimination. Coercion means the denial of free and informed consent. However, the protection against self-incrimination afforded by s. 7 of the Charter is not absolute. In determining the ambit of this protection, it is important in a particular case to consider the context in which the claim for its application arises.*¹³⁹

228. The purpose of this right is to protect individuals from being indirectly compelled to incriminate themselves, to ensure that the Crown will not be able to do indirectly that which section 11(c) prohibits, i.e., ‘any person charged with an offence has the right ... not to be compelled to be a witness in proceedings against that person in respect of the offence’.¹⁴⁰ Section 13 inures to an individual only at the moment an attempt is made to use previous testimony to incriminate its author. At a new trial ordered by a Court of Appeal, to allow the prosecution to read into evidence the accused’s previous testimony at the first trial would, in effect, allow the Crown to do indirectly what it is estopped from doing directly by section 11(c) and would also permit indirect violation of the right of the accused to be presumed innocent and remain silent until proven guilty as guaranteed by section 11(d): *Dubois v. R.*¹⁴¹

§7. DOUBLE JEOPARDY

229. Double jeopardy is the constitutional right not to be tried again for an offence for which there was a previous conviction or acquittal. The Charter of Rights and Freedoms grants any person charged with an offence the right, ‘if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again’.¹⁴² The constitutional double jeopardy right is elaborated and codified in a series of rules.¹⁴³ These rules include (i) the pleas of *autrefois acquit* and *autrefois convict*; (ii) the rule against unreasonably splitting a case; (iii) the rule against multiple convictions; and (iv) the rule against inconsistent judgments.¹⁴⁴

138. Canadian Charter of Rights and Freedoms, s. 13.

139. *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154.

140. Canadian Charter of Rights and Freedoms, s. 11(c).

141. www.canlii.org/en/ca/charter_digest/s-13.html.

142. Canadian Charter of Rights and Freedoms, s. 11 (h).

143. *R. v. Van Rassel*, [1990] 1 SCR 225.

144. Law Reform Commission of Canada, *Double Jeopardy, Pleas and Verdicts*, Working Paper 63 (Law Reform Commission of Canada, Ottawa, 1990).

- (1) An accused may plead *autrefois acquit* or *autrefois convict* (*supra*, paragraph 195), if the accused states that he or she has been lawfully acquitted or convicted of the offence charged in the count to which the plea relates.¹⁴⁵ This applies to trials held both in Canada and abroad. However, with respect to trials that took place outside Canada, an accused is precluded from entering these pleas if at the trial outside Canada the accused was tried *in absentia* or he or she was not punished in accordance with the sentence imposed on conviction.¹⁴⁶ Despite the clarity of both the Charter and the Criminal Code, the Supreme Court denied the existence of double jeopardy for the prosecution in Canada of an accused already tried in the United States.

*Section 11(h) [double jeopardy] applies only in circumstances where the two offences with which the accused is charged are the same. Here, the offence of which the accused was acquitted in the U.S.A. and the offence with which he is charged in Canada are different because they are based on duties of a different nature. Even though the American and Canadian offences are purely criminal in nature, the alleged conduct of the accused has a double aspect: First, wrongdoing as a Canadian official with a special duty to the Canadian public under s. 111 of the Criminal Code, and second, wrongdoing as an American official or member of the American public temporarily subject to American law. The accused must now account for his conduct to the Canadian public as well as to the American public, as the offences relate to different duties. Consequently, s. 11(h) is of no assistance to the accused.*¹⁴⁷

- (2) The rule against unreasonably splitting a case bars separate trials for crimes ‘when both could conveniently be tried at the same time’, whether the second crime ‘was purposefully or negligently omitted at the first trial’.¹⁴⁸
- (3) With respect to the rule against multiple convictions, when ‘the same transaction gives rise to two or more offences with substantially the same elements and an accused is found guilty of more than one of those offences, that accused should be convicted of only the most serious of the offences’.¹⁴⁹ In other words, ‘the rule against multiple convictions is applicable when there is a relationship of sufficient proximity firstly as between the facts [factual nexus], and secondly as between the offences which form the basis of two or more charges [legal nexus]’.¹⁵⁰
- (4) The rule against inconsistent judgments, also referred to as ‘issue estoppel’, precludes the prosecution from ‘relitigating an issue that has been determined in the accused’s favour in a prior criminal proceeding, whether on the basis of a

145. Canadian Criminal Code, s. 607.

146. Canadian Criminal Code, s. 607(6).

147. *R. v. Van Rassel*, [1990] 1 SCR 225.

148. Martin Friedland, *Double Jeopardy and the Rule against Unreasonably Splitting a Case*, 17 U. Toronto L. J. (1967).

149. *R. v. Kinnear*, 2005 CanLii 21092 (ON CA), citing *Kienapple v. R.*, [1975] 1 SCR 729, 1974 CanLII 14 (SCC).

150. *R. v. Prince*, [1986] 2 SCR 480, 1986.

positive finding or reasonable doubt'.¹⁵¹ The issue estoppel may be raised when the first trial dealt with a different offence but it included the determination of an issue, such as a ruling on the admissibility of evidence. The SCC clarified that:

*Issue estoppel does not mean that every piece of evidence led in a first trial and leading to an acquittal is inadmissible in a subsequent trial on another matter. Only issues either necessarily resolved in favour of the accused as part of the acquittal or on which findings were made, even if on the basis of reasonable doubt, are estopped. The determination of whether an issue was decided at a first trial, either expressly or necessarily as a prerequisite to an acquittal must be based on a review of the relevant portions of the transcript of the first trial and, in particular, on the allegations, the nature of the Crown case, and the defence case.*¹⁵²

Double jeopardy does not apply when the accused has been tried outside the sphere of a criminal procedure, such as when the accused has been tried in a civil law case or when he or she has been disciplined in his or her profession.¹⁵³ The Supreme Court held that the double jeopardy right:

*Applies only in circumstances where the two offences with which the accused is charged are the same. The same act can give rise to different offences, each offence being based on a separate duty. Thus, the appellant in this case is not being tried and punished for the same offence. The offences are quite different. One is an internal disciplinary matter. The accused has been found guilty of a major service offence and has, therefore, accounted to his profession. The other offence is the criminal offence of assault. The accused must now account to society at large for his conduct. He cannot complain, as a member of a special group of individuals subject to private internal discipline, that he ought not to account to society for his wrongdoing. His conduct has a double aspect as a member of the R.C.M.P. and as a member of the public at large. To borrow from the words of the Chief Justice, I am of the view that the two offences were two different matters, totally separate one from the other and not alternative one to the other. While there was only one act of assault there were two distinct delicts, causes or matters which would sustain separate convictions.*¹⁵⁴

151. *R. v. Mahalingan*, [2008] 3 SCR 316.

152. *R. v. Mahalingan*, [2008] 3 SCR 316.

153. Double jeopardy precludes the prosecution and trial of an accused whose case is protected by the Charter or the statutory or common law elaborations of this constitutional right. The courts have not clarified whether these rules extend to police investigations.

154. *R. v. Van Rassel*, [1990] 1 S.C.R. 225.

Chapter 6. Disclosure and Evidence

§1. DISCLOSURE

230. A fundamental right in Canadian criminal procedure is disclosure. The prosecution is obliged to disclose to the accused all relevant evidence in its possession. The SCC held that there is a general duty on the part of the Crown to disclose all material it proposes to use at trial and especially all evidence which may assist the accused even if the Crown does not propose to adduce it.¹⁵⁵

231. This obligation is not absolute. It is subject to the prosecution's discretion with respect to the timing of disclosure and withholding information for valid purposes. This obligation must begin prior to trial; and it is usually triggered by a request from the defence. The prosecutor must provide information and documentation to the defence every time it is required and must continue to provide new evidence as it is discovered. The obligation is also subject to the limitation that the accused has no right to information that would distort the truth-seeking process. The Attorney General of Canada adopted a statement of policy dealing with disclosure, which requires that all prosecutors appearing for the Attorney General of Canada in a criminal matter disclose to the accused the evidence on which the prosecution intends to rely at trial as well as any information which may assist the accused, whether intended to be adduced or not. While there are some exceptions, the exceptions do not apply to the disclosure of any information which may show that the accused may not have committed the offence charged. The purpose of disclosure is twofold: (i) to ensure that the accused knows the case to be met, and is able to make full answer and defence; and (ii) to encourage the resolution of facts in issue including, where appropriate, the entering of guilty pleas at an early stage in the proceedings. In the event that the prosecution fails to comply with disclosure obligations, the defence may seek enforcement from the courts.

232. The information to be disclosed need not qualify as evidence, that is, pass all of the tests concerning admissibility. It is sufficient if the information is relevant, reliable, and not subject to some form of privilege.

§2. EVIDENCE: GENERAL RULES

233. The sources of evidence are primarily judge-made through common law rules, and some statutes, particularly the Canada Evidence Act, which codifies many of the earlier common law.

234. Judges are considered to have principled flexibility, that is, they have discretion to act within some general principles that govern evidence. These principles are:

155. *R. v. C.(M.H.)*, [1991] 1 S.C.R. 763.

- (1) relevance, which refers to evidence that has any tendency in reason to prove a fact at issue in a proceeding. A fact is relevant if it has probative value, that is, the fact is capable of proving or has the tendency to prove something;
- (2) finality, which mandates judges to eventually put a final stop to the case;
- (3) efficiency, which mandates judges to make a good use of time and resources; and
- (4) fairness, which requires that the prosecution and the defence have equal access to justice and that the fact finder be protected from prejudicial evidence.

I. Burden of Proof

235. In Canadian criminal trials, the prosecution has the burden of proof, that is, the prosecution has to convince the trier of fact of the culpability of the accused. The prosecution has the burden to prove every element of the crime, that is, *actus reus* – and all of its elements, that is, voluntary act, causation, social harm, and *mens rea*. Generally speaking, in Canadian Criminal procedures, the standard is beyond a reasonable doubt. The standard of proof beyond a reasonable doubt is inextricably intertwined with the presumption of innocence, the basic premise which is fundamental to all criminal trials, and the burden of proof rests on the prosecution throughout the trial and never shifts to the accused (however, see *supra*, paragraph 104). A reasonable doubt is a doubt based on reason and common sense which must logically be derived from the evidence or absence of evidence. While more is required than proof that the accused is probably guilty, a reasonable doubt standard does not involve proof to an absolute certainty. Such a standard of proof is impossibly high. Thus, this burden is generally considered to imply that the trier of fact has to be around 95% certain of the culpability of the accused. This standard differs from the one used in civil proceedings – referred to as preponderance of evidence, which simply requires the trier of fact to be more than 50% convinced. The Supreme Court ruled that the trial judge must instruct the jurors as to the criminal law meaning of the notion of reasonable doubt.¹⁵⁶

236. In some instances, the law establishes some presumptions, which result in a reverse onus of proof. For example, for the insanity defence (*supra*, paragraph 104), the law adopted the presumption of sanity, which presupposes, subject to proof to the contrary, that every person is sane. So, it is the accused who must prove by preponderance of evidence that he or she is insane. Furthermore, before any defence can be introduced before the jury, it must have an air of reality. According to the Supreme Court:

The air of reality test is a legal threshold, not a factual one. The trial judge must determine if the evidence put forward is such that, if believed, a reasonable jury properly charged could have acquitted. He is not concerned with the weight of evidence or with assessments of credibility. Essentially, for there to be an air of reality, the totality of the evidence for the accused must be reasonably and realistically capable of supporting that defence. Although there is

156. *R. v. Lifchus*, [1997] 3 S.C.R. 320.

*not, strictly speaking, a requirement that the evidence be corroborated, that evidence must amount to something more than a bare assertion. There must be some support for it in the circumstances. The judge's role is limited to ascertaining whether the accused has discharged the evidentiary burden imposed by s. 265(4) of the Criminal Code.*¹⁵⁷

237. If so, the judge may admit the defence, which will then be pondered by the trier of fact, that is, that same judge or the jury. Also, judges have to consider a possible defence even if defence counsel failed to raise it before the jury, but there must be something specific that suggests the existence of the defence.¹⁵⁸ The same applies to bench trials.

238. Apart from presumptions, judicial notices do not have to be proved. Judicial notices allow the court to take notice of some facts or events without formal proof because they are so well known that they do not need to be proved. For example, these would include the fact that Halifax is the capital city of the province of Nova Scotia, that English is a language, or that football is a sports game. Additionally, acts of Parliament, ordinances made by the Governor in Council, or the lieutenant governor in council of any province, and all acts of provincial legislatures are considered judicial notice. The Canadian Supreme Court ruled that judicial notice applies to two kinds of facts: (1) facts which are so notorious as not to be the subject of dispute among reasonable persons; and (2) facts that are capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy.¹⁵⁹

II. Means of Evidence

239. Evidence is classified according to its purpose and type. According to the purpose, evidence can be demonstrative or illustrative and direct or circumstantial. Demonstrative evidence is evidence that stands on its own, such as video surveillance cameras. Illustrative evidence is used by a witness to illustrate something, such as maps, photographs, and images generated by satellite global positioning systems, among many others. Direct evidence is evidence that supports a proposition directly at issue in case. For example, finger prints at a murder scene in a criminal trial. Circumstantial evidence is evidence that can be used to infer a conclusion. For example, a sighting of the accused in the neighbourhood at the time of the crime. Unlike other common law jurisdictions where direct evidence has priority over circumstantial evidence, in Canada both circumstantial and direct types of evidence have the same value.

157. *R. v. Park*, [1995] 2 S.C.R. 836.

158. *R. v. Robertson*, [1987] 1 S.C.R. 918.

159. *R. v. Williams*, [1998] 1 S.C.R. 1128.

240. Evidence is classified as: (i) real evidence, which consists of all tangible evidence, physical objects, such as tape recordings, computer printouts or photographs; (ii) documentary evidence, which is any printed relevant information; and (iii) testimonial evidence, which is evidence given by a witness in the form of answers to posed questions. Real and documentary evidence are subject to the rule of authentication, which requires as a condition precedent to trial admissibility that the evidence in question satisfies a finding that it is what its proponent claims. For example, any person seeking to admit an electronic document as evidence has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic document is that which it is purported to be. Documentary evidence is also subject to the best evidence rule, which requires that the proponent of a document has to produce the original document or the closest version available to an original. Following the examples of electronic documents, which have recently caused some controversy in Canada as electronic documents – unlike printed documents – may not be considered original, the best evidence rule is satisfied on proof of the integrity of the electronic documents system by or in which the electronic document was recorded or stored.

III. Witnesses

241. While the police may interrogate individuals during the investigation phase, the prosecution and the defence may call any individual to testify at trial, whether these individuals were interrogated before or not. There is no obligation to call those who were interrogated during the investigation phase as witnesses during the trial. In Canada, judges, who – as analysed above (*supra*, paragraph 197) – have a somewhat passive role during the trial, may not call witnesses.

242. Witnesses give evidence in the form of answers to questions. Two rules govern the admissibility of witnesses – compellability and competence. The former determines whether the witness can be forced to testify at trial. For example, the accused may not be forced to testify against his or her own will at the accused's trial. Competence determines whether a willing witness is permitted to testify. Traditionally, at common law in Canada, the victim was not allowed to testify as the witness was considered to have an interest in the trial. The Canada Evidence Act abolished this common law rule, and it is customary now for the victim to appear as witness.

243. In general, a spouse of the accused may only be a competent witness for the defence. But when the accused is charged with certain listed offences, such as sexual assault, and incest¹⁶⁰ among others, the spouse is a competent and compellable witness for the prosecution without the consent of the person charged.

244. A person under 14 years of age is presumed to have the capacity to testify, but minors under 14 do not take an oath or make any solemn affirmation. Solemn

160. *R. v. Hawkins* (1996), 11 C.C.C. (3d) 129, 2 C.R. (5th) 245, [1996] S.C.J. No. 117 (S.C.C.).

affirmations have the same legal value as oaths. The only difference is that a witness may opt to solemnly affirm to tell the truth instead of swearing to tell the truth. This possibility has been included to respect individuals who do not swear on religious grounds. The evidence may only be received if the minors are able to understand and respond to questions. The accused who takes the stand is not considered a witness for the purpose of this provision.

245. Witnesses are classified as either lay or expert. Expert witnesses give testimony based on their scientific, technical, or other specialized knowledge. The purpose of expert witness testimony is to assist the trier of fact to understand the evidence or to determine a fact in issue. Expert witnesses, as opposed to lay witnesses, may testify in the form of an opinion if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness can apply them to the facts of the case in a reliable form. Witnesses must qualify as experts on the basis of their knowledge, skills, experience, or education.

IV. Objections

246. The judge controls what witnesses can hear. Both the prosecution and the defence may object to questions. If sustained, the witness must refrain from answering the question. The following are the most frequent grounds for objecting questions:

- (1) irrelevant: when the question is unrelated to the issues at trial;
- (2) ambiguous, confusing or unintelligible: the question is not posed in a clear and precise manner so that the witness knows with certainty what information is being sought;
- (3) arguing the case: a question where the prosecution or defence counsel state their version of the facts and state the conclusions to be drawn from them;
- (4) argumentative: when the prosecution or counsel states a conclusion and then asks the witness to argue with it, often in an attempt to get the witness to change their mind;
- (5) a question that assumes facts not in evidence: when a question contains an unproved fact, which is taken as true in the question, such as a question to a witness about something she did when this was never substantiated;
- (6) leading: a question is leading when it is formulated as a yes/no question that suggests its own answer. Leading questions are permitted to question expert witnesses, hostile witnesses, and always during cross-examination. Thus, as a way of illustration, if the prosecution asks a non-hostile witness that it called to testify the following question ‘did you see the accused kill the victim?’, the defence may object;
- (7) compound: when the question contains more than one question, joined by an adversative or additive conjunction;
- (8) non-responsive answer: when the witness’ answer does not directly answer the question or if it exceeds the posed question;

- (9) narrative: when the question suggests that the witness narrates a series of events that may result in an irrelevant answer;
- (10) speculative: when the question asks the witness to guess or make conjectures;
- (11) opinion by unqualified witness: opinion testimony is reserved for expert witnesses only; and
- (12) hearsay: which is a statement made by someone other than the witness testifying and offered to prove its own truth. There are many exceptions to the hearsay rule. For example, the Supreme Court recognizes that ‘out-of-court statements may be admitted for the truth of their contents where their admission is reasonably necessary to the determination of a fact in issue and where the circumstances surrounding these statements tend to support their reliability’.¹⁶¹ There exist so many exceptions to the hearsay rule in Canada that many argue that the general rule should be that hearsay is permitted, save for some exceptions.

§3. EXCLUSION OF EVIDENCE

247. Canada follows a somewhat restrictive approach to the exclusion of evidence obtained against the law. The Charter in its section 24 prescribes that where 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’. Thus, the Charter implicitly authorizes courts to admit evidence illegally obtained in cases where the illegality would not be so ostensible or serious as to bring the administration of justice into disrepute. Furthermore, it is the accused that has the burden of proving that evidence was obtained in violation of his or her rights and that such violation could bring the administration of justice into disrepute.

248. The Supreme Court analysed the notion and extent of the term disrepute. It reasoned that:

Since the concept of disrepute involves some element of community views, the test should be put figuratively in terms of the reasonable person: would the admission of the evidence bring the administration of justice into disrepute in the eyes of the reasonable person, dispassionate and fully apprised of the circumstances of the case. A judge’s discretion under this test is thus not untrammelled, for he should not render a decision that would be unacceptable to the community, provided the community is not being wrought with passion or otherwise under passing stress due to current events.¹⁶²

161. *R. v. Khan*, 1990 CanLII 77 (S.C.C.), [1990] 2 S.C.R. 531, and *R. v. Smith*, 1992 CanLII 79 (S.C.C.), [1992] 2 S.C.R. 915.

162. *R. v. Collins*, [1987] 1 S.C.R. 265.

249. The Supreme Court has clarified the process for the exclusion of evidence. It held that:

viewed broadly, the term ‘administration of justice’ embraces maintaining the rule of law and upholding Charter rights in the justice system as a whole. The phrase ‘bring the administration of justice into disrepute’ must be understood in the long-term sense of maintaining the integrity of, and public confidence in, the justice system. While exclusion of evidence resulting in an acquittal may provoke immediate criticism, s. 24(2) does not focus on immediate reaction to the individual case. Rather, it looks to whether the overall repute of the justice system, viewed in the long term, will be adversely affected by admission of the evidence. The inquiry is objective. It asks whether a reasonable person, informed of all relevant circumstances and the values underlying the Charter, would conclude that the admission of the evidence would bring the administration of justice into disrepute. Section 24(2)’s focus is not only long-term, but prospective. The fact of the Charter breach means damage has already been done to the administration of justice. Section 24(2) starts from that proposition and seeks to ensure that evidence obtained through that breach does not do further damage to the repute of the justice system. Section 24(2)’s focus is also societal. Section 24(2) is not aimed at punishing the police or providing compensation to the accused, but rather at systemic concerns. When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society’s confidence in the justice system having regard to: (1) the seriousness of the Charter-infringing state conduct, (2) the impact of the breach on the Charter-protected interests of the accused, and (3) society’s interest in the adjudication of the case on its merits. At the first stage, the court considers the nature of the police conduct that infringed the Charter and led to the discovery of the evidence. The more severe or deliberate the state conduct that led to the Charter violation, the greater the need for the courts to dissociate themselves from that conduct, by excluding evidence linked to that conduct, in order to preserve public confidence in and ensure state adherence to the rule of law. The second stage of the inquiry calls for an evaluation of the extent to which the breach actually undermined the interests protected by the infringed right. The more serious the incursion on these interests, the greater the risk that admission of the evidence would bring the administration of justice into disrepute. At the third stage, a court asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence or by its exclusion. Factors such as the reliability of the evidence and its importance to the Crown’s case should be considered at this stage. The weighing process and the balancing of these concerns is a matter for the trial judge in each case. Where the trial judge has considered the proper factors, appellate courts should accord considerable deference to his or her ultimate determination.¹⁶³

163. *R. v. Grant*, 2009 SCC 32, [2009] 2 SCR 353.

250. The disrepute of justice standard has been criticized by some authors, as it does not focus on the protection of Charter rights.¹⁶⁴

251. The courts have considered a number of factors in determining the effect of the admission of evidence on the fairness of the trial. The trial is a key part of the administration of justice and its fairness is a major source of the repute of the system. A second group of factors relates to the seriousness of the Charter violation and therefore to the disrepute that will result from judicial acceptance of evidence obtained through that violation. The third group of factors relates to the effect of excluding the evidence: exclusion of evidence essential to a charge because of a trivial breach of the Charter would result in an acquittal and would bring the administration of justice into varying degrees of disrepute directly proportionate to the seriousness of the charge. The more serious the offence, however, the more damaging would be an unfair trial to the system's repute. In some cases, courts have ruled to exclude evidence but authorized the continuation with the trial.

164. Andres Hannah-Suarez 'Bringing the Administration of the Charter into Disrepute: A Critique of the Third Branch of the Collins Test for Excluding Evidence Under s. 24(2) of the Charter (2004) 18 W.R.L.S.I. 63'.

Chapter 7. Protection to Victims

§1. FEDERAL GOVERNMENTAL MEASURES

252. The Canadian government has been concerned with improving the role of victims in the criminal justice process for several years. Like in most other common law jurisdictions, the contemporary role of victims is that of a witness. Since 1988, the government has launched a process that resulted in many measures aimed at dealing with the many consequences that a crime has for victims. In 2003, the government adopted a new Canadian Statement of Basic Principles of Justice for Victims of Crime, which modernizes the statement of principles adopted in 1988. These basic principles continue to guide the development of policies, programmes, and legislation related to victims of crime. These principles require that victims of crime must be treated with courtesy, compassion, and respect, that the privacy of victims must be considered and respected to the greatest extent possible, and that the criminal justice system take all reasonable measures to minimize inconvenience to victims. It also requires that the views of victims be considered throughout the criminal justice process and in the development of programmes and services. It also mandates that victims must be informed at every stage of the criminal justice process so as to be able to participate and to receive assistance. In 2009, the federal government implemented an online Victim Services Directory, which connects victims of crime with services available in their local communities.¹⁶⁵

253. These principles have informed both federal and provincial legislation. At the federal level, the Criminal Code includes many provisions which facilitate the participation of victims of crime. These provisions include victim impact statements,¹⁶⁶ victim surcharge,¹⁶⁷ restitution,¹⁶⁸ publication bans,¹⁶⁹ exclusion orders,¹⁷⁰ facilitation of testimony,¹⁷¹ and provisions for sexual offence victims.¹⁷²

§2. VICTIM IMPACT STATEMENT

254. The victim impact statement is an opportunity for victims to tell the court about the consequences and impact that the crime implied for them. It is given at the time of sentencing; and the judge has to take the statement in consideration when imposing the sentence to the accused.

165. <http://victimservices.justice.gc.ca>.

166. Canadian Criminal Code, s. 722.

167. Canadian Criminal Code, s. 737.

168. Canadian Criminal Code, s. 741.

169. Canadian Criminal Code, s. 486.

170. Canadian Criminal Code, s. 486.2.

171. Canadian Criminal Code, s. 486.1.

172. Canadian Criminal Code, s. 486.

§3. VICTIM SURCHARGE

255. A victim surcharge is a fine imposed in addition to any other punishment for an offender. As part of its law and order agenda, the federal government has recently increased the victim surcharge amounts and abrogated the provisions that permitted the offender to petition the court to be exempted to pay the victim surcharge in the event of undue hardship to the offender or his or her dependents. The *Increasing Offenders' Accountability for Victims Act*, which became effective in October, 2013, doubled the amount of the victim surcharge and made it compulsory in all cases, even when the court does not impose a fine.¹⁷³ Where the judge imposes a fine, the surcharge is now 30% on top of the fine. Where there is no fine, the judge imposes a determined amount of money, which varies according to the classification of the offence.¹⁷⁴ The proceeds generated by the victim surcharge do not go to the victim, but to the provincial government to implement victim assistance programmes. Provinces have also adopted victim surcharge legislation.

§4. RESTITUTION

256. The victim surcharge should be distinguished from restitution, which is a compensation paid directly to the victim. Restitution may be ordered to compensate loss of or damage to property, loss of income or support incurred as a result of bodily harm suffered in the commission of the offence. In the case of a domestic violence offence, the offender may be ordered to pay compensation for reasonable expenses incurred by the victim (the offender's spouse, partner, or child), as a result of moving out of the offender's household, for temporary housing, food, child care, and transportation. Restitution may also be a condition of an offender's probation order (*supra*, paragraph 165). The Canadian government recently adopted new legislation requiring judges to consider imposing on offenders convicted of fraud crimes the duty to make restitution to their victims.¹⁷⁵

§5. PROTECTION OF VICTIMS' PRIVACY

257. While the general rule is that all criminal proceedings must be held in open court, the Criminal Code sets out exceptions in order to protect the privacy of victims. These exceptions include the exclusion of the public, the adoption of an order prohibiting publication of the identity of sexual offence victims and young witnesses in sexual offence proceedings, an order prohibiting the publication of the

173. *Increasing Offenders' Accountability for Victims Act*, Ch. 11 of the Statutes of Canada, 2013.

174. The surcharge has gone from 15% to 30% of a fine imposed on the convicted offender. When the court does not impose a fine, the victim surcharge amounts to CDN USD 200 for indictable offences and CDN USD 100 for summary conviction offences. The judge also has the discretion to impose a higher victim surcharge if the circumstances of the case require it, provided the offender has the capacity to pay. *Increasing Offenders' Accountability for Victims Act*, Ch. 11 of the Statutes of Canada, 2013.

175. An Act to amend the Criminal Code (sentencing for fraud) (Bill C-21, Ch. 6, 2011).

identity of a victim or witness of any offence, and publication restrictions regarding the admissibility of evidence dealing with a sexual assault victim's sexual history.

§6. PROVINCIAL MEASURES

258. At the provincial level, every single province and territory has adopted legislation to improve the criminal justice treatment of victims, which further implements the Canadian Statement of Basic Principles of Justice for Victims of Crime. These laws vary in terms of the amounts of compensation and restitution, but in general they all adopt similar tools as the federal government. However, when compared to the situation of victims in criminal justice proceedings in Europe, Canada is still far behind, as the role of victims is still marginal. Victims may not recuse a judge, co-prosecute an offence, request additional investigative measures, or appeal.

Part III. Execution and Extinction of Sanctions

Chapter 1. The Prison System

§1. CORRECTIONAL SERVICE OF CANADA

259. The responsibility for corrections is shared between the federal and the provincial governments. Federal corrections are in charge of offenders that are sentenced to two or more years in prison, and provincial corrections have responsibility for those offenders that are sentenced to less than two years. The control and management of the Correctional Service of Canada is the responsibility of the Commissioner of Corrections who is appointed by the Governor in Council. Municipal governments have a limited role in managing police lockups used for short-term detention.

260. The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful, and safe society by: (a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and (b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programmes in penitentiaries and in the community.

261. According to the Corrections and Conditional Release Act,¹⁷⁶ the principles that guide the Corrections Service in achieving its purposes are:

- (1) that the protection of society be the paramount consideration in the corrections process;
- (2) that the sentence be carried out having regard to all relevant available information;
- (3) that the Service enhance its effectiveness and openness through the timely exchange of relevant information with other components of the criminal justice system;
- (4) that the Service use the least restrictive measures consistent with the protection of the public, staff members, and offenders;

176. Corrections and Conditional Release Act (S.C. 1992, c. 20).

- (5) that offenders retain the rights and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of the sentence;
- (6) that the Service facilitate the involvement of members of the public in matters relating to the operations of the Service;
- (7) that correctional decisions be made in a forthright and fair manner, with access by the offender to an effective grievance procedure;
- (8) that correctional policies, programmes and practices respect gender, ethnic, cultural, and linguistic differences and be responsive to the special needs of women and aboriginal peoples, as well as to the needs of other groups of offenders with special requirements;
- (9) that offenders must obey penitentiary rules and conditions governing conditional release, and actively participate in programmes designed to promote their rehabilitation and reintegration; and
- (10) that staff members be properly selected and trained.

262. A person who is sentenced to penitentiary may be received into any penitentiary, and any designation of a particular penitentiary in the warrant of committal is of no force or effect.

263. The Correctional Service has to assign a security classification of maximum, medium, or minimum to each inmate according to the following factors:¹⁷⁷

- (1) the seriousness of the offence committed by the inmate;
- (2) any outstanding charges against the inmate;
- (3) the inmate's performance and behaviour while under sentence;
- (4) the inmate's social, criminal, and, where available, young-offender history;
- (5) any physical or mental illness or disorder suffered by the inmate;
- (6) the inmate's potential for violent behaviour; and
- (7) the inmate's continued involvement in criminal activities.

264. An inmate must be classified as maximum security¹⁷⁸ where the inmate is assessed by the Service as (i) presenting a high probability of escape and a high risk to the safety of the public in the event of escape; or (ii) requiring a high degree of supervision and control within the penitentiary. Inmates are classified as medium security¹⁷⁹ where they (i) present a low to moderate probability of escape and a moderate risk to the safety of the public in the event of escape; or (ii) require a moderate degree of supervision and control within the penitentiary. The minimum security classification is reserved for those inmates that show a low probability of escape and a low risk to the safety of the public in the event of escape, and who require a low degree of supervision and control within the penitentiary.¹⁸⁰

177. Corrections and Conditional Release Act (S.C. 1992, c. 20), s. 30.

178. Corrections and Conditional Release Regulations (SOR/92-620), s. 18 (a).

179. Corrections and Conditional Release Regulations (SOR/92-620), s. 18 (b).

180. Corrections and Conditional Release Regulations (SOR/92-620), s. 18 (c).

265. The Correctional Service may determine the administrative segregation of an inmate for a relatively short period to keep that inmate from associating with the general inmate population. The grounds for ordering administrative segregation includes acts¹⁸¹ that jeopardize the security of the penitentiary or the safety of any person, the interference with an investigation that could lead to a criminal charge, and the endanger of the inmate's own safety.¹⁸² Before ordering the administrative segregation the institutional head must be satisfied that there are no reasonable alternatives.

266. There is a very strict disciplinary system to encourage inmates to conduct themselves in a manner that promotes the good order of the penitentiary, through a process that contributes to the inmates' rehabilitation and successful reintegration into the community. Disciplinary offences include, among others:

- (1) the non-compliance with a justifiable order of a staff member;
- (2) presence in a prohibited area without authorization;
- (3) the wilful or reckless damage or destruction of property;
- (4) theft;
- (5) the possession of stolen property;
- (6) disrespect or abuse towards a staff member in a manner that could undermine a staff member's authority;
- (7) disrespect or abuse towards any person in a manner that is likely to provoke a person to be violent;
- (8) fight, assault, or threats to assault another person;
- (9) possession of or traffic in contraband;
- (10) consumption of intoxicant;
- (11) participation in a disturbance, or activity likely to jeopardize the security of the penitentiary;
- (12) escape or provision of assistance to another inmate to escape;
- (13) the offering of bribes;
- (14) gambling; and
- (15) the wilful non-compliance with a written rule governing the conduct of inmates.

267. Where a corrections officer believes that an inmate has committed a disciplinary offence, the officer must take all reasonable steps to resolve the matter informally. If this is not possible, the director of the institution may issue a charge of a disciplinary offence. The institution must give the inmate a written notice of the charge. The inmate must attend a hearing and has the right to offer a defence and present evidence. If the inmate is found guilty beyond reasonable doubt, the head of the correctional institution may impose one or more of the following sanctions:

- (1) a warning or reprimand;
- (2) a loss of privileges;

181. Corrections and Conditional Release Act (S.C. 1992, c. 20), s. 31.

182. Corrections and Conditional Release Act (S.C. 1992, c. 20), s. 31.3.

- (3) an order to make restitution;
- (4) a fine;
- (5) performance of extra duties; and
- (6) in the case of a serious disciplinary offence, segregation from other inmates for a maximum of thirty days.¹⁸³

268. The Canadian Charter of Rights and Freedoms guarantees every person the right against unreasonable searches and seizures (*supra*, paragraphs 220–222). Inmates have a lower expectation of privacy; and thus they may be subject to routine non-intrusive searches or routine frisk searches for security purposes.¹⁸⁴ However, when the institutional head is satisfied that there are reasonable grounds to believe that an inmate is carrying contraband in a body cavity and that a body cavity search is necessary in order to seize the contraband, the institutional head may authorize in writing a body cavity search to be conducted by a qualified medical practitioner, if the inmate's consent is obtained. The consent is not required when there exists a clear and substantial danger to human life or to the security of the penitentiary. Additionally, a staff member may conduct searches of cells and their contents for security purposes.

269. Visitors are also subject to routine non-intrusive searches and frisk searches for security purposes. When a staff member suspects on reasonable grounds that a visitor is carrying contraband or evidence relating to an offence a staff member of the same sex as the visitor may conduct a strip search, unless they opt to leave the penitentiary.

270. The Correctional Service provides a range of programmes designed to address the needs of offenders and to contribute to their successful reintegration into the community. In order to encourage offenders to participate in these programmes inmates may receive payments. These programmes include educational, family violence, sex offender, living skills, and substance abuse programmes. Some of these programmes are designed to help some categories of inmates, particularly women and aboriginal offenders.

183. Corrections and Conditional Release Act (S.C. 1992, c. 20), s. 40.

184. *R. v. Stillman*, 1997 CanLII 384 (S.C.C.), 1997 CanLII 384 (S.C.C.), 1997 CanLII 384 (S.C.C.), [1997] 1 S.C.R. 607.

Chapter 2. Parole and Other Conditional Releases

§1. INTRODUCTION

271. Conditional release is the supervised early release of inmates from correctional confinement. It is a carefully constructed bridge between incarceration and return to the community.

I. Types of Conditional Release

272. There are four types of conditional release: (i) temporary absence, which may be either escorted or unescorted. This type of conditional release is used for several purposes, such as to allow the offender to work on community service projects, to have contact with family, for personal development or medical reasons; (ii) day parole allows the offender to participate in community-based activities that may prepare the offender for release on full parole or for statutory release. Offenders must return to the institution or a halfway house¹⁸⁵ at night; (iii) full parole allows the offenders to serve the remainder of their sentences under supervision within the community; and (iv) statutory release is a type of conditional release that prescribes that most federal inmates – except those serving life sentences and those convicted to indeterminate sentence – have to be released under supervision once they have completed two-thirds of their sentence. Those that apply for full parole have to convince the parole board that they meet the requirements for parole. Statutory release is automatic and is granted to all those who have spent the required time in a prison, unless there are extraordinary circumstances which require their detention. In this case, the burden of proof lies on the State, not the inmate. Those that applied for full parole and were denied full parole may still benefit from statutory release when they complete two-thirds of the sentence.

II. General and Specific Conditions

273. Offenders who are released on parole, statutory release, or unescorted temporary absence continue to serve the sentence while being at large in the community until its expiration according to law. They are subject to both general and specific conditions.

274. General conditions include the obligation not to leave the jurisdiction, to report to parole officers, to allow parole officers to visit them at their homes or places of business, the obligation to find a job within thirty days, and the payment of restitution to the victim.

185. A halfway house is a residence outside the prison where inmates live under limited supervision. The objective of halfway houses is to facilitate the reintegration of the inmate back to society.

275. Offenders may also be imposed specific conditions that apply to their cases. These may include prohibition to contact the victim, the obligations to follow a programme, or to refrain from drinking alcohol. The prohibition regarding alcohol has given rise to judicial and legislative controversy. The Supreme Court in *R. v. Shoker* ruled that requesting individuals under probation conditions to give bodily samples to determine the presence of alcohol in the blood were unlawful.¹⁸⁶ Consequently, criminal justice professionals were not able to monitor compliance with court orders prohibiting drug and alcohol use. In order to deal with this problem, the government adopted specific legislation that allows a judge to impose conditions requiring individuals under probation conditions to provide bodily samples.¹⁸⁷

III. Parole Boards

276. The National Parole Board of Canada has exclusive authority under the Corrections and Conditional Release Act to grant, deny or terminate parole and other types of conditional release. Some provinces, particularly Ontario and Quebec, have provincial parole boards for crimes that are served in provincial corrections facilities. These are for convictions of two years or less. Provincial norms are similar to federal legislation, but they may differ in the period of eligibility.

277. The National Parole Board consists of forty-five full-time members and a number of part-time members appointed by the government. Full-time members hold office for periods not exceeding ten years and part-time members are appointed for three years.

§2. UNESCORTED TEMPORARY ABSENCE

278. In the case of unescorted temporary absence,¹⁸⁸ the portion of a sentence that must be served before an offender serving a sentence in a federal penitentiary may be released is: (a) in the case of an offender serving a life sentence, the period required to be served by the offender to reach the offender's full parole eligibility date (*infra*, paragraph 286) less three years; (b) in any other case, (i) one half of the period required to be served by the offender to reach the offender's full parole eligibility date, or (ii) six months, whichever is greater.

279. The Parole Board may, on application, cancel or vary the unexpired portion of a prohibition order after a period of (a) ten years in the case of a prohibition for life; or (b) five years, in the case of a prohibition for more than five years but less than life. However, those that are classified as maximum security offenders (*supra*, paragraph 266) are not eligible for an unescorted temporary absence.

186. *R. v. Shoker*, 2006 SCC 44, [2006] 2 SCR 399.

187. Response to the Supreme Court of Canada Decision in *R. v. Shoker Act*, S.C. 2011, c. 7.

188. Corrections and Conditional Release Act (S.C. 1992, c. 20), s. 115.

280. The National Parole Board or the Commissioner or the institutional head of the corrections facility may authorize unescorted temporary absence of an offender if:

- (1) the offender will not, by re-offending, present an undue risk to society during the absence;
- (2) it is desirable for the offender to be absent from penitentiary for medical, administrative, community service, family contact, personal development for rehabilitative purposes, or compassionate reasons, including parental responsibilities;
- (3) the offender's behaviour while under sentence does not preclude authorizing the absence; and
- (4) a structured plan for the absence has been prepared.

281. The authority that granted the temporary absence may cancel it, either before or after its commencement, (a) where the cancellation is considered necessary and reasonable to prevent or to sanction a breach of a condition; (b) where the grounds for granting the absence have changed or no longer exist; or (c) after a review of the offender's case based on information that could not reasonably have been provided when the absence was authorized.

§3. DAY PAROLE

282. In the case of day parole,¹⁸⁹ the portion of a sentence that must be served where the offender is serving a sentence of two years or more is the greater of (i) the portion ending six months before the date on which full parole may be granted (*infra*, paragraph 286), and (ii) six months. When the offender is serving a sentence of less than two years, the offender may apply for day parole after serving one half of the sentence before full parole eligibility. Day parole may be granted to an offender for a period not exceeding six months. This period may be renewed, subject to a positive review of the case by the Board.

283. Those offenders that are illegal immigrants and against whom there is a removal order made under the Immigration and Refugee Protection Act are ineligible for day parole or an unescorted temporary absence until they are eligible for full parole.

§4. FULL PAROLE AND STATUTORY RELEASE

284. Offenders are eligible for full parole¹⁹⁰ after serving the lesser of one third of the sentence or seven years. If the Board denies full parole, an offender has to wait for a period of six months before making a new application for full parole.

189. Corrections and Conditional Release Act (S.C. 1992, c. 20), s. 119.

190. Corrections and Conditional Release Act (S.C. 1992, c. 20), s. 119.1.

285. Offenders serving a life sentence, imposed otherwise than as a minimum punishment, are eligible for full parole after serving seven years less any time spent in custody between the day on which the offender was arrested and taken into custody, in respect of the offence for which the sentence was imposed, and the day on which the sentence was imposed.

286. Offenders serving sentences for first- and second-degree murders are eligible for full parole after serving twenty-five years and ten to twenty-five years, respectively.

287. Where an offender who is serving a sentence receives an additional sentence that is to be served concurrently, the offender is not eligible for full parole until the day that is the later of (a) the day on which the offender has served the period of ineligibility in relation to the sentence the offender was serving when the additional sentence was imposed, and (b) the day on which the offender has served (i) the period of ineligibility in relation to any portion of the sentence that includes the additional sentence, and (ii) the period of ineligibility in relation to any other portion of that sentence.

288. Where an offender who is serving a sentence receives an additional sentence, whether for facts committed before the offender was imprisoned or during imprisonment, that is to be served consecutively to the sentence the offender was serving when the additional sentence was imposed, the offender is not eligible for full parole until the day on which the offender has served, commencing on the day on which the additional sentence was imposed, (a) any remaining period of ineligibility in relation to the sentence the offender was serving when the additional sentence was imposed; and (b) the period of ineligibility in relation to the additional sentence.

289. The Parole Board may grant parole to an offender if, in its opinion: (a) the offender will not, by re-offending, present an undue risk to society before the expiration according to law of the sentence the offender is serving; and (b) the release of the offender will contribute to the protection of society by facilitating the reintegration of the offender into society as a law-abiding citizen.

290. When an offender breaches a condition of parole or statutory release, the Parole Board may: (a) suspend the parole or statutory release; (b) authorize the apprehension of the offender; and (c) authorize the recommitment of the offender to custody. The same applies when it is necessary to suspend the parole or statutory release in order to prevent a breach of any of the conditions or to protect society.

291. Dangerous offenders (*supra*, paragraph 172) are eligible for applying to full parole after serving a period of seven years. If parole is denied, they can reapply after a new period of two years. They may apply for day parole or escorted temporary absences three years before full parole eligibility.

292. The risk assessment decision-making regarding parole includes several aspects of information, which the Board has to take into account. These include the offender's criminal history risk factors and identified needs areas at the time of incarceration. These include: the nature of the offence, criminal and social history, the role of alcohol or drugs in the offender's criminal behaviour, information about anti-social behaviour, attitude of indifference to the criminal behaviour and its impact on the victim, any indication of violence or abuse of family members, employment, participation in treatment programmes, and his or her mental health status as it affects the likelihood of future criminal acts. The Board must also take into account recommendations by the judge, the victim's impact statement, and performance in school and psychological assessments, if available. After identifying the main case specificities, the Board considers any evidence of change in the offender, particularly efforts aimed at mitigating the risk factors; the offender's institutional behaviour or under conditional release as indicative of the risk the offender may present to the community.; and (the release plan, prepared by the parole office with input from the offender and his or her counsel. The Board has to analyse whether the release plan is feasible and appropriate, and whether it addresses the identified needs and risk factors of the offender. The Board has to consider also whether the plan satisfactorily addresses the community assessment, community input, and requests from victims, such as a no contact condition. The plan may include rehabilitation programmes, education, job training, and other types of support.

293. After this extensive review, the Parole Board has to make a concluding assessment of risk presented by the offender. The Board has to consider the risk assessment based on three principles: (i) protection of society, (ii) the fact that supervised release increases the likelihood of successful reintegration to society, and (iii) the restrictions limited to those necessary to protect society. The National Parole Board must grant parole if: (a) the offender is not likely to re-offend; and (b) there is a risk of re-offending, but it can be managed by specific intervention. While making a decision, the Parole Board must consider the following principles:

- (1) protection of society;
- (2) consideration of all available information in the case management process; and
- (3) the least restrictive determination to ensure protection of society.

General Conclusion

294. Canada is a federal country where provinces enjoy strong jurisdictional powers. However, substantive criminal law is the almost exclusive prerogative of the federal government. The federal Parliament has exclusive power to legislate criminal offences. In this respect, it has enacted the Criminal Code and other federal legislation. The Criminal Code also legislates on significant procedural issues. Provinces may enact regulatory offences within their areas of competence, particularly traffic violations, and have a relatively ample power to regulate some provincial procedural issues. The federal government also influences provincial criminal law by pioneering certain causes, such as measures to improve the role of victims in the criminal justice process.

295. Canadian criminal law does not have a well-defined general theory of the offence like most civil law jurisdictions. In the Canadian Criminal Code, there is not even a general part. Nonetheless, all crimes have some basic common elements and common doctrinal structures, which permit their description and analysis from a general perspective. The Criminal Code is inconsistent in its definition of the offences. So, for example, many offences do not include the required *mens rea* or do not include a *mens rea* for all elements of the *actus reus*. So, judges in their decisions have been filling these vacuums. For example, they have read in intentional *mens rea* for the criminal harassment offence and clarified the required *mens rea* for several categories of culpable homicides. But when the courts did this they did so in a piecemeal, incomplete, and sometimes even contradictory fashion. Canadian criminal law may thus only be understood by examining the leading cases, particularly those of the Supreme Court.

295–295

General Conclusion

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