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# CRIMINAL LAW

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## I. INTRODUCTION

The purpose of this study guide is to give a general overview of substantive criminal law and criminal procedure. The guide will endeavour to highlight the fundamental concepts of criminal law and how they are reflected in the various offences.

### **Substantive criminal law**

Substantive criminal law defines criminal behaviour and provides sanctions for such behaviour. Generally speaking, the substantive criminal law in Canada may be said to be made up of two parts:

- the general part, and
- the special part.

#### *The general part*

- reflects and to some extent embodies basic moral and policy considerations applicable to all offences, whether prescribed in the [Criminal Code](#) or other statutory enactments. It is in the general part that one will find the basic principles of criminal liability, the defences and modes of involvement in crime.

#### *The special part*

- contains the particular crimes or offences in all their infinite variety ranging from murder to common assault. As a basic outline of substantive criminal law, this study guide does not include those non-[Criminal Code](#) offences identified by the courts as “regulatory” or “public welfare offences”. For the principles governing this process or classification, see *R. v. Sault Ste. Marie*, [1978 CanLII 11, \[1978\] 2 S.C.R. 1299, 40 C.C.C. \(2d\) 353](#).

Generally speaking, any type of offence in Canada must derive from legislation (see s. 9 of the *Code* and the exception for criminal contempt, *United Nurses v. Alberta*, [1992] S.C.R. 901). The primary source of our substantive criminal law and criminal procedure is the [Criminal Code](#). The *Code* was first enacted in 1892, revised in 1955 and amended many times over the years. Not all criminal offences, however, are to be found in the *Criminal Code*.

A large number of other statutes such as:

- the [Customs Act](#),
- the [Income Tax Act](#),
- the [Competition Act](#),
- the *Cannabis Act*
- the *Controlled Drugs & Substances Act*, and
- the [Fisheries Act](#)

create offences that are substantially indistinguishable from *Code* offences and often involve equally high penalties.

The establishment of a true crime requires the existence of an act or omission (*actus reus*) and a mental state (*mens rea*) and both must exist together at some point during the conduct that is alleged to constitute the offence. Generally speaking, our criminal law imposes liability for acting rather than not acting. Most crimes require the commission of a positive act. Criminal liability, however, can be imposed for not acting in three different ways:

- not acting and omission may itself form part of a wider role consisting of acting, *e.g.*, failure to keep a proper lookout on the road, which is part of the offence of driving dangerously (*Code s. 249(1)*);
- not acting may be specifically prohibited as a crime, *e.g.*, not stopping at the scene of an accident (*Code s. 252(1)*); and
- where a crime consists expressly or impliedly in causing a result, *e.g.*, death, damage, danger, etc. Such result can be caused by an omission provided there is a legal duty to act – commission by omission, *i.e.*, failure to provide the necessities of life (*Code s. 215*).

The relationship between the various rights enshrined in the [Canadian Charter of Rights and Freedoms](#) and the criminal law will be considered in Part VI of this study guide. Part VI will provide a general review of sections 8 through 13 of the *Charter*.

## II. THE GENERAL PART OF CRIMINAL LAW

### 1. *The external elements of offences*

#### The *actus reus*

All offences prohibit certain voluntary conduct by acts or by omissions. The external elements of an offence are determined by examination of the description of the particular offence as contained in the offence creating provision of the [Criminal Code](#) or other enactment, along with any causally connected consequences that may also be required. The external elements of offences can be analyzed in terms of:

- voluntary conduct,
- circumstances, and
- results or consequences.

The simplest offences are those that prohibit an act, *e.g.*, assault (*Code s. 266*). Most offences will contain elements of acts and circumstances, *e.g.*, assaulting a police officer acting in the execution of his duty (*Code s. 270(1)*).

In crimes of omission, of course, the circumstances are all important since they define when a legal duty to act arises, which is accompanied by a sanction for failure to act, *e.g.*, failure to provide necessities to dependents (*Code s. 215(1)*). A resulting element or consequence may be required for offences where the voluntary conduct element is either an act or an omission. The offence of murder may be defined as doing an act that results in death, whereas criminal

negligence causing death is an offence where the death may be the result of a failure to act in the defined circumstances (*Code* [s. 220](#)).

Many common law justifications, excuses and defences continue in force under [section 8\(3\)](#) of the *Criminal Code*. The defences that are often engaged against the external elements of any offence are:

### **Failure of proof**

The Crown cannot prove beyond a reasonable doubt that the external element occurred, e.g., that the fraud occurred.

### **Denial**

A denial of the Crown's contention that the accused engaged in the prohibited conduct: "I didn't do it."

### **Alibi**

The defence of alibi is an assertion supported by evidence that at the time of the commission of the offence the accused was not present but rather was somewhere else.

### **Involuntariness, e.g., physical compulsion or compulsion by threats**

It is generally recognized that the conduct prohibited by the offence must have been voluntarily committed in order for the accused to be convicted. This element of voluntariness flows from the proposition that an involuntary event or occurrence cannot be categorized as a human act of conduct and that it would be unfair to ground punishment on an occurrence over which the accused had no control and therefore could not prevent.

For example, the person pushed by another through a plate glass window and subsequently charged with damage to property has not committed an "act" of damage in any culpable sense, since he was physically propelled or "compelled" (*Hill v. Baxter*, [1958] 1 Q.B. 227 at 286). Compulsion by threats, or duress, occurs if the requirements of [s. 17](#) of the *Criminal Code* are met. Some restrictions in s. 17 have been ruled unconstitutional, so the defence is more widely available – see *R. v. Ruzic*, [2001 SCC 24, \[2001\] 1 S.C.R. 687](#). The common law defence is available for a party to an offence such as murder or robbery (*R. v. Hibbert*, [1995 CanLII 110, \[1995\] 2 S.C.R. 973](#)).

### **Automatism/mental disorder**

More difficult than the issue of physical compulsion is the case where the source of the allegedly involuntary occurrence is linked to a mental cause, for example, the accused who receives a physical blow to the head causing a neurological dysfunction that prompts unconscious physical behaviour (*R. v. Baker*, [1970] [1 C.C.C. 203](#) (N.S. Co. Ct.) and *R. v. Bouchard* (1973), [12 C.C.C. \(2d\) 554](#) (N.S. Co. Ct.)). More difficult yet is the concept of "psychological blows" automatism. Such defence was successfully raised in *R. v. K.* (1971), [3 C.C.C. \(2d\) 84](#) (Ont. High Court of Justice) – the accused sustained a severe psychological blow on being told that his wife was leaving him. Generally, see **Don Stuart, *Canadian Criminal Law: A Treatise*, 7<sup>th</sup> ed. (Toronto: Carswell, 2014)**, and see *R. v. Stone*, [1999 CanLII 688, \[1999\] 2 S.C.R. 290](#), which outlines the distinction between insane and non-insane automatism. As the Court stated in *Stone*,

at para. 199: “it will only be in rare cases that automatism is not caused by mental disorder.” The risk of danger to the public is an important factor in this determination – see *R. v. Luedecke*, [2008 ONCA 716](#).

The distinction between insane and non-insane automatism rests with whether or not the conduct was due to a mental disorder. If the accused was suffering from a mental disorder that caused the conduct, then the mental disorder defence under s. 16 of the *Code* applies, if not then non-mental disorder automatism would remain to be proven by the accused on a balance of probabilities. If accepted by the trier of fact, then the accused would be entitled to a complete acquittal (see *Stone* and *R. v. Bouchard-Lebrun*, [2011 SCC 58](#), [\[2011\] 3 S.C.R. 575](#)).

### **Accident/causation**

The concept “defence of accident” is also used from time to time to apply to situations that can be analyzed as a failure to prove an external element of an offence because it was either involuntarily or not “caused” by the accused. In particular, where a “result” is to be proved it must also be proved that a causal connection existed between the conduct of the accused at the time in question and this result, *e.g.*, on a charge of criminal negligence causing death resulting from a motor vehicle collision, where the victim dies in hospital from a contagious disease contracted in the hospital, the accused may not be said to have “legally caused” the death of the victim. Further, the accidental, involuntary discharge of a firearm causing death is a complete defence to a charge of murder.

## **2. The fault element**

### **The mens rea**

Depending upon the external circumstances of any given offence, the fault or mental element, or the *mens rea*, will consist of intention, knowledge, recklessness or wilful blindness. All these concepts involve a “subjective awareness” of the external elements of the offence, and an aware and conscious choice by the accused to engage in the prohibited behaviour. However, some sections of the *Criminal Code* clearly impose liability on an objective standard of negligence where the accused is liable when he or she fails to meet, by markedly departing from, the standard of what a reasonable person would do in the circumstance, *e.g.*, care of explosive substances (*Code* [s. 79](#) and [s. 80](#)); careless use of firearms (*Code* [s. 86](#)); dangerous medical treatment (*Code* [s. 216](#)), guarding excavations and holes in ice (*Code* [s. 263](#)), and criminal negligence by omitting to do something that it is one's legal duty to do (*Code* [s. 219](#)).

### **Intention**

Conduct is intentional in its most basic sense if one is aware that one is engaging in the impugned conduct and voluntarily does it even though they have the ability to stop such conduct. It can be said that one acts intentionally with respect to a result when he acts either in order to bring the result about or is aware that it will occur in the ordinary course of events.

In order to obtain a conviction for some offences, the conduct in the present must be accompanied by a desire or purpose to accomplish a further goal, *e.g.*, break and enter with intent to commit an indictable offence (*Code* [s. 348](#)); possession of a controlled substance for the

purpose of trafficking (*Controlled Drugs & Substances Act s. 5*). In such cases, there is a basic intent that must be proved in relation to the immediate conduct (called general intent) and a further or ulterior intention that must be proved in relation to the reason for engaging in the immediate conduct (called specific intent). In the examples cited, it must be proven that the person intentionally broke in, or had been in possession, with the ulterior intention of committing an indictable offence, or of having the possession of the drug with the further intention of trafficking in it.

It should be noted that the requisite ulterior intention may be presumed, absent evidence to the contrary, as in [s. 348\(2\)](#) for break and enter.

### **Knowledge**

Knowledge is important as a fault element in relation to circumstances, *e.g.*, knowledge that the victim is a peace officer is an essential fault element that must be proven in a charge of assaulting a peace officer engaged in the execution of his duty (*Code s. 270(1)*). Application of force to another is the crime of assault in the absence of consent (*Code s. 265(1)*). In crimes of omission, knowledge of circumstances is particularly critical, *e.g.*, on a charge of failing to provide the necessaries of life to one's family (*Code s. 215*) it is knowledge of external circumstances, *e.g.*, that family members are destitute, that gives rise to a duty to act. The issue of knowledge or lack thereof is most often litigated as a “mistake of fact” – the argument being that the accused acted under an honest but mistaken belief, (he did not know) that the victim was not consenting (*R. v. Pappajohn*, [1980 CanLII 13](#), [\[1980\] 2 S.C.R. 120](#)), or did not know that the victim was a police officer (*R. v. McLeod* (1954), [20 C.R. 281](#) (B.C.C.A.)), or was unaware that he did not have the right to take the goods. “Possession” requires proof of “knowledge” and “control.” The accused must *know* that the item is stolen (or is a controlled substance, etc.), and must be able to exert some control over it. The requisite knowledge is often inferred from the circumstances.

### **Recklessness**

While intention and knowledge involve a full awareness of consequences or circumstances attending the prohibited conduct, recklessness is characterized by an *awareness of an unjustified risk*. Recklessness is not merely the failure to meet the standard of what a reasonable person would do in the circumstances – that is, it is not a purely “objective” standard. Recklessness can be said to involve an actual subjective awareness by the accused of the relevant risk involved in the offence. Recklessness as a general fault standard is located between intention or knowledge on the one hand and negligence on the other. (See [s. 429](#) of the [Criminal Code](#).)

### **Wilful blindness**

Wilful blindness can be a substitute for actual knowledge whenever knowledge is a component of the *mens rea*. The doctrine of 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. See *Sansregret v. The Queen*, [1985 CanLII 79 \(SCC\)](#), [\[1985\] 1 S.C.R. 570](#), and *R. v. Jorgensen*, [1995 CanLII 85 \(SCC\)](#), [\[1995\] 4 S.C.R. 55](#). As stated in *Jorgensen* (at para. 103), “[a] finding of wilful blindness involves an affirmative answer to the question: Did the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge?” See *R. v. Briscoe*, [2010 SCC 13](#), [\[2010\] 1 S.C.R. 411](#), at para 21.

***Negligence***

Negligence is commonly defined as a failure to abide by the standard of what a reasonable person would do in the circumstances. A negligence fault standard may ground criminal liability even where the accused acted without any knowledge or even recklessness concerning the relevant circumstances, or consequences, provided a reasonable person would in the eyes of the trier of fact have acted differently. Negligence is really an “objective” fault standard concerned not with the mental state of the accused but rather with the state of mind of a reasonable person in the circumstances of the accused. The other forms of *mens rea*; namely, intention, knowledge and recklessness are “subjective” fault standards.

In some quarters it is contended that negligence standards are outside a traditional concept of *mens rea* because *mens rea* is concerned with the state of mind of the accused, whereas negligence by definition is not. The Supreme Court of Canada, however, has exhibited a willingness to include negligence as a fault standard within the *mens rea* framework (*R. v. Vaillancourt*, [1987 CanLII 239](#), [1987] 2 S.C.R. 636; *R. v. Hess et al.*, [1990 CanLII 89](#), [1990] 2 S.C.R. 906; *R. v. DeSousa*, [1992 CanLII 80](#), [1992] 2 S.C.R. 944 and *R. v. Creighton*, [1993 CanLII 61](#), [1993] 3 S.C.R. 3).

With respect to *mens rea*, the objective standard of the reasonably prudent person in the circumstances must be considered by the trier of fact, but liability is to be imposed only when the failure to meet that standard can be characterized as a “marked departure” from what would normally be considered reasonable. Note that the *mens rea* requires only objective foresight of the risk of harm, in the circumstances of the accused, including the requisite mental state – i.e. the modified objective test. See *R. v. Hundal*, [1993 CanLII 120](#), [1993] 1 S.C.R. 867, and *R. v. Beatty*, [2008 SCC 5](#), [2008] 1 S.C.R. 49. The more serious the offence, the more marked the departure must be from reasonable – *R. v. Palin* (1999), 135 C.C.C. (3d) 119 (Que. C.A.).

**Defences related to the fault element*****Failure to prove subjective fault – honest mistake of fact***

It is generally agreed that an accused who genuinely believes on the basis of an honest, even if unreasonable mistake, that his conduct will not cause the prohibited offence, but nevertheless brings it about, does not intend the result. Again, even where through ignorance or honest error an accused is unaware of one of the circumstances in which certain conduct is defined as criminal, the accused cannot be said to have knowledge of the circumstance (*Beaver v. R.*, [1957 CanLII 14](#), [1957] S.C.R. 531; *Pappajohn v. R.*, *supra*). A defence of honest mistake of fact in essence is based on a failure by the prosecution to prove subjective fault.

***Voluntary intoxication***

Voluntarily induced states of intoxication may negate the specific intent that must be proved in some offences, (e.g., murder), and consequently will reduce to manslaughter what would otherwise be murder (*McAskill v. The King*, [1931 S.C.R. 330](#)). The SCC in *Leary v. The Queen*, [1977 CanLII 2](#), [1978] 1 S.C.R. 29, held that voluntary intoxication was not a defence against any crime that requires only a general intent and in that case, negated a defence of honest, mistaken belief on charges pursuant to ss. 271, 272 and 273 of the *Code* (this principle is now reflected in s. 273.2 of the *Code* for sexual assault related offences). However this pre-[Charter](#) rule was successfully

challenged as unconstitutional in *R. v Daviault*, [1994] 3 S.C.R. 63. There, the Court held that where self-induced intoxication approached automatism or insanity, ss. 7 and 11(d) required that the defence be available for all offences, including general intent offences. Parliament responded by enacting s. 33.1 of the *Criminal Code*, which limited the scope of the self-induced intoxication defence to offences that did not affect the bodily integrity of another person. Section 33.1 has been successfully challenged in some trial courts as unconstitutional, (see *R. v Fleming*, 2010 ONSC 8022, *R. v McCaw*, 2018 ONSC 3464; but the provision was upheld in *R. v Chan*, 2019 ONSC 783), and the Supreme Court of Canada declined an opportunity to consider the issue in *R. v Blanchard*, 2019 SCC 9, because of the lack of a complete record.

As a result, for those jurisdictions where there is no contrary binding authority, self-induced intoxication is only available as a defence to challenge a specific intent offence, and a general intent offence where the offence does not affect the bodily integrity of another person.

“A general intent offence” is regarded as one where the Crown need prove only that the accused at a basic and fundamental level engaged voluntarily in the impugned conduct without fully appreciating, before undertaking such conduct, the full consequences of his or her actions. Thus, assault causing bodily harm is a general intent offence and the Crown need only establish that the accused, without justification, “assaulted” the complainant. It does not have to establish that the accused actually intended to cause “bodily harm.” “Specific intent offences” are those where the Crown has to prove that the accused intended all consequences and outcomes of deliberately undertaking a criminal act. Thus, in order for the Crown to prove a charge of attempted murder, it must establish that at the time the accused acted, he or she specifically intended to cause death.

### ***Failure to prove objective fault – honest and reasonable mistake***

When faced with an offence that prohibits “unreasonable” conduct such as dangerous driving (*Code* s. 249) or failure to store firearms in a proper manner (*Code* s. 86(3)), the arguments from the accused will amount to an assertion that the conduct was reasonable and therefore lawful, or was the result of a reasonably mistaken belief as to circumstances or a reasonable ignorance of them. This is similar to the due diligence defence available for regulatory offences (see *Sault Ste. Marie*, *supra*).

### ***3. Justification***

The moral basis for the concept of justification is embedded in popular language. When we think someone was right in doing something we say that he or she was justified. Justification exists in the criminal law where, although the conduct of the accused falls squarely within the definition of an offence, the law recognizes that he acted in furtherance of an interest that takes precedence over the interest protected by the offence, *e.g.*, self-defence – in a murder case, “I shot and killed the victim intentionally but did so to save my own life.” The concern is not with the actor’s disabilities or blameworthiness, as in the case of excuses, but rather the analysis is focused on the situation in which the actor finds himself and the relative importance of his conduct in those circumstances.

The basic classifications of justification are:

- necessity;

- self-defence and the private protection of recognized interests that are being threatened; and
- exercise of lawful authority.

### *Necessity*

The defence of necessity is preserved by s. 8(3) of the *Code*. (See *Perka v. The Queen*, [1984 CanLII 23, \[1984\] 2 S.C.R. 232](#).) The defence of necessity applies where although all the essential ingredients of the offence are made out, a conviction will not follow “in urgent situations of clear and eminent peril where compliance with the law is demonstrably impossible” and “where the harm inflicted is less than the harm sought to be avoided” (*Perka v. The Queen*, *supra*). See also *R. v. Latimer*, [2001 SCC 1, \[2001\] 1 S.C.R. 3](#).

### *Self-defence and the private protections of recognized interests*

Practically all of the traditionally accepted grounds of justification linked to the private protection of recognized interests under threat are codified (*Code*, s. 34 and s. 35). In 2013, the statutory provisions regarding self-defence were amended and came into force. This was a complete rewrite and simplification of the statutory defences related to the defence of persons and property. Therefore any jurisprudence related to the law of self-defence that predates these provisions must be considered in light of the complete revision of the statutory scheme. Now the protection of oneself and people under one’s protection is governed under s. 34 of the *Code*, and protecting one’s property is governed under s. 35 of the *Code*. These defences involve a proportionality criterion, that is, was the exercise of force used to protect the accused’s interest appropriate in all the circumstances – fundamentally, was the use of force reasonable (see *Code* former and present [s. 34\(1\)](#)). The new provisions are prospective in nature and therefore any conduct that occurred prior to the amendments of the statutory defence are governed by the former provisions, and where the conduct at issue occurred after the enactment of the new provisions, then the new provisions apply, *R. v. Bengy*, [2015 ONCA 397](#).

### *The exercise of lawful authority*

The [Criminal Code](#) authorizes, and therefore justifies, the use of force in the carrying out of a number of public duties in the interest of law enforcement. Those “required or authorized by law to do anything in the administration or enforcement of the law whether as a private person, peace officer, public officer ... or ... by virtue of his office” form the broadest category (*Code* [s. 25\(1\)](#), [\(3\)](#), [\(4\)](#)). Special rules of justification are recognized for those executing process or carrying out a sentence or those making an arrest (*Code* [s. 25](#)). In addition, those preventing breaches of the peace or the commission of criminal offences are justified in the use of what would otherwise be unlawful force (*Code* [s. 27](#), [s. 30](#) and [s. 31](#)). These rules maintain the integrity of the legal system and its social order by subordinating the protection of bodily integrity, property and even perhaps privacy to the interests of law enforcement and crime prevention.

## **4. Excuses**

It has been said that: “actors are justified; acts are excused.” With excuses, the concern is not with the conduct but rather with disabilities personal to the accused which may vitiate his capacity to control his conduct or to exercise a rational choice.

Excuses are personal to the accused and are disabilities that absolve him from blame, *e.g.*, a mental disorder or automatism where the factual result of the incapacity may preclude the existence of either the *actus reus* or the *mens rea*.

### Excuses are of two kinds:

- those based on internal constraints on capacity, such as immaturity and mental disorder; and
- those based on external constraints on capacity, such as physical constraints, intoxication, automatism and superior orders.

### Internally based constraints on capacity

#### *Immaturity*

The common law at an early stage negated its original rule imposing criminal liability upon children, in favour of a rule based on the notion that children being too immature to take moral responsibility for their acts are by definition incapable of committing crimes. This basic concept is still reflected in the [Criminal Code](#), where children under the age of 12 cannot be convicted of an offence ([Code s. 13](#)) and children aged 12 to 17 are subject to the [Criminal Code](#) as modified by the different principles, procedures and penalties under the [Youth Criminal Justice Act](#).

#### *Mental disorder*

#### **Section 16 of the [Criminal Code](#) provides:**

- (1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.
- (2) Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1) until the contrary is proved on the balance of probabilities.
- (3) The burden of proof that the accused was suffering from a mental disorder so as to exempt him from criminal responsibility is on the party that raises the issue.

This section is premised on the assumption that some individuals may be so affected by a mental disorder as to negate their responsibility for voluntary conduct that they have caused in a physical sense and may even have intended in a mental sense. A person who suffers a “disease of the mind” can be excused from the full effect of criminal sanction if it is established on a balance of probabilities that he or she was, at the time of the commission of an offence, “not criminally responsible.”

The defence of automatism has been used in circumstances that warrant its classification as an excuse based on mental disorder. The sleepwalker may not have a “disease of the mind” but courts have been willing to exculpate those suffering from such a disorder who cause what otherwise would be characterized as criminal offences (*R. v. Parks*, [1992 CanLII 78, \[1992\] 2 S.C.R. 871](#)). But see *R. v. Luedecke*, [2008 ONCA 716](#), where a sexsomiatic who committed sexual assault while asleep, could be categorized as suffering from a disease of the mind.

## Excuses based on external constraints on capacity

Excuses based on external constraints that affect capacity to make rational choices or to control behaviour may be classified into two groups:

- where the constraint, disability or incapacity arises from physical or physiological causes, *e.g.*, intoxication and certain forms of automatism; and
- those excuses that recognize a morally relevant constraint on capacity, which, though very real indeed are of a non-physical nature, *e.g.*, duress, provocation, obedience to legal authority and obedience to superior orders.

## Physical or quasi-physical constraints

### *Intoxication*

The effect of intoxication is to create a disability and the conditions resulting from that disability may prevent the actual formation of a specific intent or may prevent the actor from controlling behaviour, which is in some sense knowing or intentional. Where intoxication is involuntary, the courts have recognized the fully exculpatory nature of the excuse, *e.g.*, **R. v. King**, [1962 CanLII 16, \[1962\] S.C.R. 746](#) and **R. v. Amero** (1989), 92 N.S.R. (2d) 57 (Co. Ct.). Where intoxication is voluntary it will negate the specific intent required for some offences, *e.g.*, murder – with the result that what would otherwise be murder may be reduced to manslaughter. As discussed previously, extreme self-induced intoxication creating a state akin to a mental disorder or automatism (as described in **Stone**, *supra*, at para. 162) may be a defence to a general intent offence (**R. v. Daviault**, [1994 CanLII 61, \[1994\] 3 S.C.R. 63](#)). [Section 33.1](#) of the **Criminal Code** now places limits on when the defence will be available. The defence recognized in **Daviault** will not be available for any of the offences referred to in [section 33.1\(3\)](#), *i.e.*, offences that include as an element an assault or any other interference or threat of interference with the bodily integrity of another person where the accused departs markedly from the standard of care as described in [section 33.1\(2\)](#). See also **R. v. Daley**, [2007 SCC 53, \[2007\] 3 S.C.R. 523](#), for the significance of the different levels of intoxication. [Section 33.1](#) has been successfully challenged in some trial courts as unconstitutional, (see **R. v. Fleming**, [2010 ONSC 8022](#), **R. v. McCaw**, [2018 ONSC 3464](#); but the provision was upheld in **R. v. Chan**, [2019 ONSC 783](#)), and the Supreme Court of Canada declined an opportunity to consider the issue in **R. v. Blanchard**, [2019 SCC 9](#), because of the lack of a complete record.

### *Automatism*

In **Rabey v. The Queen**, [\[1980\] 2 S.C.R. 513](#), 15 C.R. (3d) 225, Mr. Justice Ritchie adopted the following definition of automatism (page 232):

Automatism is a term used to describe unconscious involuntary behaviour the state of a person who, although capable of action, is not conscious of what he is doing. It means an unconscious, involuntary act, where the mind does not go with what is being done.

The physical blow, psychological blow or other external event will only support the defence of automatism where such blow or external event is sufficient to put a reasonable person in a

dissociative state causing automatic behaviour. As a result of *Rabey v. R.*, *supra*, a dissociative state induced by a “psychological blow” will almost invariably not give rise to a defence of automatism but at best only the defence of mental disorder under s. 16 of the *Code*. (See also: *R v. Stone*, *supra*; automatism can be either “non-mental disorder” or “mental disorder,” the former being a defence, and the latter resulting in a finding of not criminally responsible.)

### ***Duress***

The defence of duress is designed to protect an accused from criminal liability when the conduct at issue was induced by threats from a third party. Duress is governed pursuant to two legal tracts. One is [s. 17](#) of the *Code*, the other is the common law defence of duress.

Under s. 17, the defence is an excuse for a listed group of offences where the offence is committed under compulsion of threats of immediate death or bodily harm from a person present at the time the offence is committed. [Section 17](#) is limited only to the principal offenders and not to parties to the crime.

In *R. v. Ruzic* [2001 SCC 24, \[2001\] 1 S.C.R. 687](#), the SCC provided, that for those situations in which [s. 17](#) does not apply, the defence remains available to those people who are parties to the offence, for crimes that are not listed, where the threat is not immediate and by a party not present at the time of the commission of the offence. In essence, the defence of duress is available in all situations that are otherwise limited under [s. 17](#) but must still meet three prerequisites.

The three prerequisites are: first, the accused must be subject to a threat of death or serious physical injury; second, there must be no safe avenue of escape or reasonable opportunity to render the threat ineffective; third, there must be proportionality between the threat and the criminal act alleged. Once the defence is properly raised on the evidence, the Crown must negative it by proving beyond a reasonable doubt that any one of the three elements does not exist on the facts of the case. (see *R. v. Wilson*, [2011 ONSC 3385](#), 272 C.C.C. (3<sup>rd</sup>) 35 ) An attempt to utilize the defence of duress as an excuse was unsuccessful where a woman abused by her husband over a long term attempted to hire someone to kill him, *R. v. Ryan*, [2013 SCC 3](#).

### ***Provocation***

Provocation, under [s. 232](#) of the *Criminal Code*, is a partial defence exclusive to homicide that reduces the conviction from murder to manslaughter. There is both an objective and a subjective component to provocation in s. 232. Once it is established that the wrongful act or insult was sufficient to deprive an ordinary person of the power of self-control, the inquiry turns to a consideration of the subjective element of the defence, which is whether the accused acted in response to the provocation and on the sudden before there was time for his or her passion to cool. It is not a defence to any other offence. *R. v. Tran*, [2010 SCC 58, \[2010\] 3 S.C.R. 350](#).

## 5. Participation in criminal offences

### *Aiding and abetting & accessory after the fact*

Generally speaking, criminal liability can be incurred in one of five ways:

- as a perpetrator of a crime (sometimes referred to as the “principal offender”);
- as an aider to the perpetrator;
- as an abettor of the perpetrator; an accessory through a common intention with another who then commits a consequential offence;
- as an accessory after the fact; and
- as a counsellor of an offence.

The reason for liability is self-evident in the first situation. The legislative intent in relation to the imposition of secondary liability in the other cases is to deter positive, and in some cases, foreseeable effects of assisting the commission of criminal acts. [Sections 21](#) and [23](#) of the [Criminal Code](#) set forth these bases of criminal liability. Counselling is really an inchoate offence and will be considered later in this guide under that heading.

#### [Section 21\(1\)](#) provides:

- (1) Every one is a party to an offence who
  - (a) actually commits it;
  - (b) does or omits to do anything for the purpose of aiding any person to commit it; or
  - (c) abets any person in committing it.

#### *Aiders and abettors*

Courts have taken the ordinary meaning approach to the definition of the terms “aid” and “abet” in [subsection 21\(1\)](#). To “aid” means simply to assist or help in any way to promote, facilitate or bring about the accomplishment of any criminal purpose by another person. “Abet” means to instigate, promote, procure or encourage the commission of an offence. Although the terms “aid and abet” are used conjunctively by most courts, it is in fact sufficient for the Crown to prove only one or the other basis of liability (*R. v. Stevenson* (1984), [11 C.C.C. \(3d\) 443](#) (N.S.S.C.A.D.); *R. v. Meston* (1975), [28 C.C.C. \(2d\) 497](#) (Ont. C.A.)).

Parties to an offence are charged with the same substantive offence as the principal offender. The difference lies in the way in which the Crown proves criminal liability. Culpability arises upon proof of the act and intent of the party along with the fact that the perpetrator committed the crime (*Rex v. Cunningham* (1937), [68 C.C.C. 176](#) (Ont. C.A.)). [Paragraphs 21\(1\)\(b\)](#) and (c) create a legal fiction that the party has not necessarily committed the *actus reus* and *mens rea* of the crime but rather through his or her acts has nonetheless incurred liability, *i.e.*, a person who acts as a lookout, intending to prevent the intervention of a victim's friends during the course of a fight, may be charged with assault causing bodily harm even though he never touched the victim (*R. v. Stevenson, supra*).

The general rule is that an alleged aider and abettor need not know the precise crime that will be committed by the principal. Usually it will suffice that the party knew that the principal planned on committing a certain type of offence, that a crime of that type was in fact committed, and that the accused had intentionally aided or abetted its commission. That is, if a person supplies the instrument for a crime, *e.g.*, dynamite, and does so knowingly with intent to aid, the fact that he did not know the location at which the explosive would be used does not affect his criminal liability (*R. v. Yanover and Gerol* (1985), [20 C.C.C. \(3d\) 300](#) at p. 329 (Ont. C.A.)). Knowledge of the intended act can also be satisfied by proving wilful blindness (*R. v. Briscoe*, [2010 SCC 13, \[2010\] 1 S.C.R. 411](#)).

The only cases where a party's knowledge of the principal's intention has to be more specific are where the offence involved is murder or attempted murder. To be an aider or abettor of murder, the person must have aided in the acts that constitute murder knowing that death was a foreseeable consequence of the conduct. If the party only intended to aid or abet in an assault but there was only an objective foreseeability of bodily harm, he is only guilty of manslaughter (*R. v. Jackson*, [\[1993\] 4 S.C.R. 573](#)). In effect, in order for an aider or abettor to be convicted of murder, the Crown must prove beyond a reasonable doubt that the accused knew that the perpetrator who caused the death had the intent required for murder (*R. v. Chambers*, [2016 ONCA 684](#)).

### *Common intenders*

#### **Section 21(2) provides:**

(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

To prove culpability under [s. 21\(2\)](#), the Crown must show:

- that two or more persons are involved;
- that they formed an intention in common to carry out an unlawful purpose;
- that they intended to carry out an unlawful purpose and assist each other therein; and
- if any one of them, in carrying out the purpose, commits an offence, then each person who knew or ought to have known it was a probable consequence is a party to that incidental offence.

In *R. v. Sit*, [1991 CanLII 34, \[1991\] 3 S.C.R. 124](#), the Court held that since the principles of fundamental justice constitutionally require proof of *subjective* foresight of death to sustain a conviction of a principal of murder, the same degree of *mens rea* is required for conviction of a [s. 21\(2\)](#) party. Therefore, one should read out of [s. 229](#) the phrase “ought to have known”.

The obvious difference between common intenders and aiders or abettors is that the unlawful purpose mentioned in [s. 21\(2\)](#) must be different from the offence that is actually charged. That

section is intended to make a party to the offence someone who did not aid or abet in the commission of the offence, but who knew or ought to have known that the offence was a probable consequence of carrying out the unlawful purpose in common with the actual perpetrator (*R. v. Simpson*, [1988 CanLII 89, \[1988\] 1 S.C.R. 3](#)).

Organizations, which include corporations (*Code*, [s. 2](#)), can also be parties to an offence. Sections 22.1 and 22.2 of the *Code* delineate the scope of liability for organizations where the offences require proof of negligence or fault (presumably *subjective* fault). This includes conduct by a senior officer, as defined in s. 2 of the *Code*, acting within the scope of his or her authority, either involved in the offence, or directed or failed to prevent other representatives from acting or failing to act. For fault element offences, the Crown will be required to prove that the offence was committed at least in part to benefit the organization (see also the discussion of corporate liability below).

### *Accessory after the fact*

#### **Section 23 of the Criminal Code reads as follows:**

(1) 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.

In order for a person to incur criminal liability under [s. 23](#) of the Criminal Code, the following elements must be established:

- that the accused has received, comforted or assisted a party to an offence after the crime has been committed;
- that the accused knew, or was wilfully blind to the fact (see *R. v. Briscoe, supra*) that the person being assisted was a party to an offence and that his or her conduct was done for the purpose of assisting that party to escape.

Like the mental element required of aiders and abettors, accessories after the fact must be shown to have embarked upon their course of conduct with the intent to assist the principal. Proof that the acts had the effect of assisting the principal is not sufficient. Section 23 requires the actual particularization that a person was an accessory after the fact to a particular offence in the information or indictment.

Note that an accessory can be convicted even where the principle offender cannot – or has not – been convicted (*Code* [s. 23.1](#), *R. v. S.(F.J.)* (1998), [121 C.C.C. \(3d\) 223 \(SCC\)](#)).

Section 463 of the Criminal Code sets out a general scheme of punishment for attempting to commit, or being an accessory after the fact, to the commission of all offences that are not otherwise expressly dealt with by law.

## 6. Inchoate offences

### Incomplete or preliminary crimes (attempts, conspiracy, counselling, etc.)

The traditional offences of attempts, conspiracy and counseling all involve the general principle that the ambit of any offence can be extended to penalize an act short of completion of the full offence. Maximum sentences for these types of offences are in some circumstances less than the complete offences, see s. 463 of the [Criminal Code](#), but in other circumstances the maximums are the same, see 465(1)(a) and (c) of the *Criminal Code*.

#### *Attempts*

Attempted murder is particularized in s. 239, but most attempts fall under s. 24 of the *Criminal Code*.

#### Section 24 of the *Criminal Code* provides as follows:

- (1) Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out his intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.
- (2) The question whether an act or omission by a person who has an intent to commit an offence is or is not mere preparation to commit the offence, and too remote to constitute an attempt to commit the offence, is a question of law.

Generally speaking, the external circumstances of an attempt consist of an act or omission done by the accused beyond mere preparation. The mental element consists of the intention to commit the offence attempted and the intentional causing of the external circumstances necessary to carry out that intention.

The leading decision on the law of attempts in Canada is *Ancio v. The Queen*, [\[1984\] 1 S.C.R. 225](#). The court held that the intent to commit the desired offence is a basic element of the offence of attempt. The specific issue in *Ancio* was the *mens rea* required for attempted murder. The court held that such was “the specific intent to kill”.

#### *Conspiracy*

The essence of conspiracy is the agreement of two or more persons to perform an illegal act or to perform a legal act by illegal means. The overt acts done to carry out the agreement are merely elements going to prove the agreement (*R. v. Douglas*, [1991 CanLII 81, \[1991\] 1 S.C.R. 301](#)).

Section 465(1) of the *Code* contains general punishment provisions applicable to specified conspiracy offences.

## *Counselling*

### **Section 22 of the Code reads as follows:**

- (1) Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.
- (2) Every one 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 in consequence of the counselling.
- (3) For the purposes of this Act, “counsel” includes procure, solicit or incite.

This section defines when a person is a party to an offence as a result of counselling commission of that offence. In *R. v. Hamilton*, [2005 SCC 47, \[2005\] 2 S.C.R. 432](#), the SCC set out the essential elements of the offence. The *actus reus* for counselling is the deliberate encouragement or active inducement of the commission of a criminal offence. The *mens rea* consists of nothing less than an accompanying intent or conscious disregard of the substantial and unjustified risk inherent in the counselling: that is, it must be shown that the accused either intended that the offence counselled be committed, or knowingly counselled the commission of the offence while aware of the unjustified risk that the offence counselled was in fact likely to be committed as a result of the accused’s conduct.

In order to prove a person is a counselor, it is necessary to demonstrate that the person counselled is a party to the offence counselled. The crime of counselling is an incomplete offence that differs from attempts and conspiracies in that it is not one in which the counsellor himself envisages committing an offence. It is unnecessary for a counselled offence to be committed before liability is imposed on the counsellor (*Code* s. 464).

Under [s. 22\(2\)](#), the scope of the counsellor’s liability is enlarged to encompass collateral crimes committed by the person counselled. Where the accused counsels another to be a party to an offence, the accused is a party to every offence that the person counselled commits in consequence of the counselling or that the accused knew or ought to have known was likely to have been committed in consequence of the counselling. If the liability for the counselled accused for the additional offence is based on proof of a subjective mental element, it is doubtful that the phrase “ought to have known” can be relied upon as a basis of liability as it likely violates ss.7 & 11(d) of the *Charter*.

## **7. Responsibility for the acts of others**

### ***Vicarious liability***

A doctrine of vicarious responsibility makes “A” automatically responsible for the wrongdoing of “B” solely on the basis of a prior relationship and regardless of “A’s” act or fault. It is a doctrine that is particularly appropriate in the law of torts. To bring vicarious liability forward to the criminal law would require imputing to the principal or employer an *actus reus* and a *mens*

*rea* or making him liable for something he neither did nor intended to do. Understandably, the courts have been loath to extend the civil doctrine of vicarious liability to the criminal law.

In *R. v. Canadian Dredge and Dock Company*, [1985 CanLII 32, \[1985\] 1 S.C.R. 662](#), in confirming the “directing mind” theory of corporate responsibility (to be considered later in this guide), the Supreme Court of Canada expressly rejected a vicarious liability alternative found in other jurisdictions. The judgment of the Court was delivered by Estey J., who stated at para. 31:

In the criminal law, a natural person is responsible only for those crimes in which he is the primary actor either actually or by express or implied authorization. There is no vicarious liability in the pure sense in the case of the natural person. That is to say that the doctrine of *respondet superior* is unknown in the criminal law where the defendant is an individual. Lord Diplock in *Tesco [Supermarkets Ltd.] v. Nattrass*, [\[1972\] A.C. 153](#), stated at p. 199:

Save in cases of strict liability where a criminal statute, exceptionally, makes the doing of an act a crime irrespective of the state of mind in which it is done, criminal law regards a person as responsible for his own crimes only. It does not recognise the liability of a principal for the criminal acts of his agent: because it does not ascribe to him his agent's state of mind. *Qui peccat per alium peccat per se* is not a maxim of criminal law.

In *R. v. Stevanovich* ([1983](#)), [43 OR \(2d\) 266, 7 C.C.C. \(3d\) 307 \(Ont. C.A.\)](#), Mr. Justice Dubin said, at paragraph 14:

As a general rule, the doctrine of vicarious liability has no place in the criminal law. With few exceptions statutory intention is required to attach criminal liability to one person for the acts or omissions of another.

### ***Corporate liability***

Section 2 of the [Criminal Code](#) provides that “every one”, “person”, “owner”, and similar expressions include bodies corporate and companies.

Formerly, the basis of corporate criminal liability in Canada was variously known as the “directing mind”, “identification”, or “alter ego” theories, established by the Supreme Court of Canada in *R. v. Canadian Dredge and Dock Company Limited*, *supra*. The Court held that a corporation would generally be liable for an offence if a corporate director or officer commits an offence for the benefit of the corporation in the course of his or her employment.

In 2003, corporate criminal liability in Canada changed with the enactment of sections 22.1 and 22.2 of the *Code*. The change provides for a broader scope of criminal liability based on the actions of its ‘senior officers’ in both fault-based and negligence-based offences. Now a corporation can be found guilty of a crimes requiring *mens rea*, when a senior officer knows an offence is being or is about to be committed by corporate agents and fails to exercise due diligence to prevent it, and for crimes of negligence, the legislation allows for an aggregation of

fault of senior officers who by their conduct or omission, could have been party to the offence, see *R. v. Metron Construction Corporation*, [2013 ONCA 541](#).

### III. THE SPECIAL PART OF SUBSTANTIVE CRIMINAL LAW

The general part of substantive criminal law contains the basic principles of criminal liability, the defences and modes of involvement in crimes. Particular crimes as defined in the *Criminal Code* will be found in the special part of substantive criminal law. The *Criminal Code* classifies various crimes under the following heads:

- Offences against public order (*Code* s. 46 to [s. 83.33](#));
- Firearms and other weapons (*Code* s. 84 to s. 117);
- Offences against the administration of law and justice (*Code* s. 118 to [s. 149](#));
- Sexual offences, public morals and disorderly conduct (*Code* s. 150 to s. 182);
- Invasion of privacy (*Code* s. 183 to [s. 196](#));
- Disorderly houses, gaming and betting (*Code* s. 197 to s. 213);
- Offences against the person and reputation (*Code* s. 214 to [s. 320](#));
- Offences against the rights of property (*Code* [s. 321](#) to [s. 378](#));
- Fraudulent transactions relating to contracts and trade (*Code* [s. 379](#) to [s. 427](#));
- Wilful and forbidden acts in respect of certain property (*Code* [s. 428](#) to [s. 447](#));
- Offences relating to currency (*Code* [s. 448](#) to [s. 462](#));
- Instruments and literature for illegal drug use (*Code* [s. 462.1](#) to [s. 462.2](#));
- Proceeds of crime (*Code* [s. 462.3](#) to [s. 462.5](#)).

All the offences defined in the [Criminal Code](#) under the foregoing classifications must be considered against the principles set forth in the general part. The principal criminal offences are those against either the person or against property. For the purposes of this study guide only a brief description will be given of the major offences relating to persons and to property, with sections reviewing the impaired driving offences and drug offences.

#### 1. Offences relating to persons

##### *Homicide*

Homicide is not itself a criminal offence but merely the direct or indirect causing of the death of another human being (*Code* [s. 222\(3\)](#)). Culpable or blameworthy homicide is an offence and is defined in [s. 222\(5\)](#) as follows:

- 222 (5) A person commits culpable homicide when he causes the death of a human being,
- (a) by means of an unlawful act,
  - (b) by criminal negligence,
  - (c) by causing that human being, by threats or fear of violence or by deception, to do anything that causes his death, or
  - (d) by wilfully frightening that human being, in the case of a child or sick person.

Culpable homicide will be murder, manslaughter or infanticide, depending upon the external circumstances of the killing and the mental element that accompanies it.

[Section 229](#) of the [Criminal Code](#) provides the following definitions of murder:

- 229 Culpable homicide is murder
- (a) where the person who causes the death of a human being
    - (i) means to cause his death, or
    - (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;
  - (b) where a person, meaning to cause death to a human being or meaning to cause him bodily harm that he knows is likely to cause his death, and being reckless whether death ensues or not, by accident or mistake causes death to another human being, notwithstanding that he does not mean to cause death or bodily harm to that human being; or
  - (c) where a person, for an unlawful object, does anything that he knows or *ought to know* is likely to cause death, and thereby causes death to a human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being. (emphasis added)

[Section 229\(a\)](#) provides the primary definition of actual murder and requires proof of an ulterior intention to kill or closely related state of mind that combines elements of intention (to cause bodily harm), foresight or knowledge (that the bodily harm is likely to cause death) and recklessness (whether death ensues or not).

[Section 229\(b\)](#) enacts a further definition of actual murder, which also requires proof of the same mental element described in s 229(a). Under 229(b) however, liability for murder will nonetheless be established where the prosecution proves that at the time of the acts that unlawfully caused the death of “A” (the actual victim), the accused had the requisite state of mind in relation to “B” (intended victim). The prosecution must prove such a coincidence or concurrence of the external circumstances and mental element to establish the culpability of the accused.

[Section 229\(c\)](#) enacts a definition of constructive murder that in part is constitutionally deficient under [Charter s. 7](#) because it creates in part an objective standard “... he knows or *ought to know*” (*R. v. Martineau*, [1990 CanLII 80, \[1990\] 2 S.C.R. 633](#)). Subjective foresight of death must be proven beyond a reasonable doubt before a conviction for murder can be sustained.

### *Classification of murder*

[Code s. 231](#) provides as follows:

- (1) Murder is first degree murder or second degree murder.
- (2) Murder is first degree murder when it is planned and deliberate.
- (3) Without limiting the generality of subsection (2), murder is planned and deliberate when it is committed pursuant to an arrangement under

which money or anything of value passes or is intended to pass from one person to another, or is promised by one person to another, as consideration for that other's causing or assisting in causing the death of anyone or counselling another person to do any act causing or assisting in causing that death.

- (4) Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder when the victim is
- (a) a police officer, police constable, constable, sheriff, deputy sheriff, sheriff's officer or other person employed for the preservation and maintenance of the public peace, acting in the course of his duties;
  - (b) a warden, deputy warden, instructor, keeper, jailer, guard or other officer or a permanent employee of a prison, acting in the course of his duties; or
  - (c) a person working in a prison with the permission of the prison authorities and acting in the course of his work therein.
- (5) Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder in respect of a person when the death is caused by that person while committing or attempting to commit an offence under one of the following sections:
- (a) [section 76](#) (hijacking an aircraft);
  - (b) [section 271](#) (sexual assault);
  - (c) [section 272](#) (sexual assault with a weapon, threats to a third party or causing bodily harm);
  - (d) [section 273](#) (aggravated sexual assault);
  - (e) [section 279](#) (kidnapping and forcible confinement); or
  - (f) [section 279.1](#) (hostage taking)....
- (6) Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder when the death is caused by that person while committing or attempting to commit an offence under [section 264](#) [criminal harassment, commonly known as “stalking”] and the person committing that offence intended to cause the person murdered to fear for the safety of the person murdered or the safety of anyone known to the person murdered.
- (6.01) Irrespective of whether a murder is planned and deliberate on the part of a person, murder is first degree murder when the death is caused by that person while committing or attempting to commit an indictable offence under this or any other Act of Parliament if the act or omission constituting the offence also constitutes a terrorist activity.
- (6.1) Irrespective of whether a murder is planned and deliberate on the part of a person, murder is first degree murder when
- (a) the death is caused by that person for the benefit of, at the direction of or in association with a criminal organization; or

- (b) the death is caused by that person while committing or attempting to commit an indictable offence under this or any other Act of Parliament for the benefit of, at the direction of or in association with a criminal organization.

(6.2) Irrespective of whether a murder is planned and deliberate on the part of a person, murder is first degree murder when the death is caused by that person while committing or attempting to commit an offence under section 423.1.

(7) All murder that is not first degree murder is second degree murder.

[Section 231](#) classifies murder for sentencing purposes. In its primary sense first-degree murder is planned and deliberate murder under [s. 231\(2\)](#). [Section 231\(3\)](#) imputes planning and deliberation to contracted murder. Subsections 4, 5, 6, 6.01, 6.1 and 6.2 deem certain murders to be first-degree murder, notwithstanding the absence of actual or imputed planning and deliberation. Under [s. 231\(4\)](#), it is the status of the deceased that makes murder first-degree murder. [Subsections 231\(5\), \(6\), \(6.01\) \(6.1\)](#) and (6.2) classify murder as first-degree murder when the person causing death as a sole or co-principal does so while committing or attempting to commit an enumerated crime. In each and every case, murder must first be established before it can be classified as first-degree murder.

### *Infanticide*

[Section 233](#) of the [Criminal Code](#) provides:

A female person commits infanticide, when by a wilful act or omission she causes the death of her newly-born child, if at the time of the act or omission she is not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequent on the birth of the child her mind is then disturbed.

Infanticide is a specific offence, very narrowly defined in [s. 233](#). It can only be committed by a female person when, by a wilful act or omission, she causes the death of her newly born child and only if at that time she has not fully recovered from the effects of giving birth to that child and that, because of the effect of lactation consequent upon giving birth, her mind was then disturbed. Infanticide is the only form of culpable homicide that does not attract a minimum or maximum punishment of imprisonment for life. Indeed, infanticide can be used as a defence to a murder charge to reduce the potential sentence from life imprisonment to a maximum of five years, even if the Crown can prove all the essential elements to support a murder conviction: *R. v. J.B.*, [2011 ONCA 153](#).

### *Manslaughter*

[Section 234](#) of the [Criminal Code](#) provides that culpable homicide that is not murder or infanticide is manslaughter. Manslaughter, unlike the other forms of culpable homicide (murder and infanticide), is not expressly defined in the [Criminal Code](#). It is a residual category of culpable homicide, namely, that which is neither murder nor infanticide.

The crime of manslaughter is customarily divided into two groups, designated:

- voluntary manslaughter, and
- involuntary manslaughter.

In cases of voluntary manslaughter, the mental element of murder may be proven but the presence of a reasonable doubt on some defined mitigating circumstances, as for example, provocation may reduce what otherwise would be murder to manslaughter. [Section 232](#) of the [Criminal Code](#) provides the circumstances under which the excuse of provocation can result in culpable homicide, which would otherwise be murder, being reduced to manslaughter.

**[Section 232](#) of the [Criminal Code](#) provides:**

- (1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.
- (2) A wrongful act or an insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section if the accused acted on it on the sudden and before there was time for his passion to cool.
- (3) For the purposes of this section, the questions
  - (a) whether a particular wrongful act or insult amounted to provocation, and
  - (b) whether the accused was deprived of the power of self-control by the provocation that he alleged he received,
 are questions of fact, but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being.
- (4) Culpable homicide that otherwise would be murder is not necessarily manslaughter by reason only that it was committed by a person who was being arrested illegally, but the fact that the illegality of the arrest was known to the accused may be evidence of provocation for the purpose of this section. R.S., c. C-34, s.215.

Involuntary manslaughter includes all varieties of culpable homicide that lack the mental element requisite to constitute murder. Manslaughter may be committed in any of the ways set forth in s. 222(5) of the *Code*, most commonly either by criminal negligence due to a marked departure from a standard of care, such as dangerous operation of a motor vehicle, or as a result of any unlawful act in which there is no subjective intention to cause death, such as an assault.

***Assault***

**The term assault is defined by s. 265 of the *Code* as follows:**

- (1) A person commits an assault when
  - (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
  - (b) he attempts or threatens, by an act or gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
  - (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

- (2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.
- (3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of
  - (a) the application of force to the complainant or to a person other than the complainant;
  - (b) threats or fear of the application of force to the complainant or to a person other than the complainant;
  - (c) fraud; or
  - (d) the exercise of authority.

...

An assault may be actual or constructive. In its primary and actual sense, assault under [s. 265\(1\)\(a\)](#) is the intentional application of force, directly or indirectly, to the person of another without consent. Consent may be real or apprehended. Whether the victim consented is in each case a question of fact. The accused may also assert an honest belief that the victim consented to what the Crown contends constitutes the external circumstances of the offence (the Crown always has the burden of proving lack of consent – beyond a reasonable doubt). The accused must adduce some evidence to raise the issue of apprehended consent, thereafter it rests upon the prosecution to prove beyond a reasonable doubt that the accused had no such honest belief. Under s. 265(4), the trier of fact may consider the presence or absence of reasonable grounds for the belief of the accused as an item of evidence in determining the honesty with which the asserted belief was held. Constructive assaults are described in [s. 265\(1\)\(b\)](#) and (c). The definition of assault in [s. 265\(1\)](#) is by s. 265(2) made applicable to all forms of assault including the several levels of sexual assault. Assault without any other element is called common assault.

The gravity of the offence increases if other elements are present, for example:

- Anyone who while committing an assault carries, uses or threatens to use a weapon or an imitation of a weapon is guilty of the more serious offence of assault with a weapon (**Code** s.267 (a));
- If any assault causes bodily harm to the victim that amounts to assault causing bodily harm (**Code** s. 267 (b));
- Aggravated assault involving the wounding, maiming or disfiguring of the victim or endangering his life (**Code** s. 268(1)); or
- Assaulting a peace officer in the execution of his duty (**Code** s. 270).

The gravity of the assault reduces the availability of the defence of consent. If two persons consent to fight and one is wounded, or if two persons use weapons consensually during their dispute, even if neither is injured, the offences of assault causing bodily harm and assault with a weapon respectively will be proven, regardless of the existence of consent, on the basis of public policy denunciation of such behaviour. The bodily harm must be both caused and intended – see **R. v. Paice**, [2005 SCC 22, at para. 18](#). This has been created by judicial interpretation, rather than by statute, for public policy reasons. See **R. v. Jobidon**, [1991 CanLII 77, \[1991\] 2 S.C.R. 714](#).

Similarly, in Nova Scotia, in the context of “domestic violence,” it may not be open to the accused to rely on evidence that the complainant consented to the assault, even though the assault may not have resulted in any visible injury, bearing in mind that the burden to disprove consent is on the Crown. The idea that consent is not available in a domestic setting is arguable. *R. v. Shand*, [1997 CanLII 3459, 164 N.S.R. \(2d\) 252 \(S.C.\)](#) leave to appeal denied ([1998](#)) [166 N.S.R. \(2<sup>nd</sup>\) 74 \(N.S.C.A.\)](#), did seem to extend *Jobidon*, *supra*, to such cases, but it could be somewhat limited to the facts in that case (throwing rocks), since the Court did state, at para. 20: “Domestic violence is just too serious a problem to allow consent to be a defense in circumstances such as these. This was a volatile situation which could easily have escalated into something much more serious than one might expect from a barroom brawl.”

### ***Sexual assault***

Sexual assault first appeared as a crime in the *Criminal Code* in the early 1980s, replacing the offences of rape and indecent assault. Generally speaking, sexual assault is an assault committed in circumstances of a sexual nature. Like assaults *simpliciter*, there are degrees of seriousness for sexual assaults. Sexual assault with a weapon and aggravated sexual assault are more serious forms of sexual assault, just as assault causing bodily harm, assault with a weapon and aggravated assault are the more serious forms of simple assault. A sexual assault *simpliciter* attracts a maximum penalty of imprisonment of 10 years. The range of punishment increases to a maximum of 14 years if the sexual assault is coupled with any of the aggravating features of weapons, bodily harm or parties that is described in [s. 272\(1\)\(a\) to \(d\)](#). The mental element is one of general intent. There is no defence of implied consent to sexual assault (*R. v. Ewanchuk*, [1999 CanLII 711, \[1999\] 1 S.C.R. 330](#)), although the surrounding circumstances could raise a reasonable doubt about the lack of consent.

Even where consent to the sexual act has occurred, that consent may be vitiated if it is obtained by fraud, the complainant is of a particular age (compared to the age of the accused), the complainant is incapable of consenting or the accused was in a position of trust or authority (*Code*, [ss. 150.1, 265\(3\)](#) and [273.1\(2\)](#)). For a discussion of the scope of consent and when consent is vitiated by fraud, in this case by sabotaging a condom, see *R. v. Hutchinson*, [2014 SCC 19](#).

### ***Aggravated sexual assault – Section 273***

The offence of aggravated sexual assault is the most serious of the sexual assault offences and carries a maximum penalty of life imprisonment. To the external circumstances of sexual assault, [s. 273](#) adds the particulars of “wounds, maims, disfigures or endangers the life of the complainant”. None of these elements is statutorily defined, although case law has taken them to have the usual and ordinary meaning ascribed to them in common parlance. The mental element of aggravated sexual assault does not extend beyond that which is required in cases of sexual assault *simpliciter*. The distinguishing features of aggravated sexual assault lay in its external circumstances, in particular the consequences.

## ***2. Offences against property and rights of property***

Offences against property and the right of property is an extremely wide-ranging classification of property related crimes. For the purposes of this study guide, the principal property offences will only be considered. These offences are:

- theft;
- robbery;
- break and enter; and
- wilful damage to property (mischief).

### ***Theft***

The basic definition of theft is set out in [s. 322\(1\)](#)(a) to (d), and [\(2\)](#) of the [Criminal Code](#), which provides:

- (1) Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or to the use of another person, anything whether animate or inanimate, with intent,
  - (a) to deprive, temporarily or absolutely, the owner of it, or a person who has a special property or interest in it, of the thing or of his property or interest in it;
  - (b) to pledge it or deposit it as security;
  - (c) to part with it under a condition with respect to its return that the person who parts with it may be unable to perform; or
  - (d) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time it was taken or converted.
- (2) A person commits theft when, with intent to steal anything, he moves it or causes it to move or to be moved, or begins to cause it to become movable.

...

The *actus reus* of theft is set out in the opening words of [s. 322\(1\)](#). The *mens rea* is to be found in [ss. 2](#), which specifies the requisite specific intention.

### ***Robbery***

[Section 343](#) of the [Criminal Code](#) reads as follows:

- Every one commits robbery who
- (a) steals, and for the purpose of extorting whatever is stolen or to prevent or overcome resistance to the stealing, uses violence or threats of violence to a person or property;
  - (b) steals from any person and, at the time he steals or immediately before or immediately thereafter, wounds, beats, strikes or uses any personal violence to that person;
  - (c) assaults any person with intent to steal from him; or
  - (d) steals from any person while armed with an offensive weapon or imitation thereof. R.S., c. C-34, s. 302.

Robbery may be committed by any of the means described in [s. 343](#). The intent to steal is an essential ingredient of the external circumstances of robbery. The additional elements vary. Under [s. 343\(a\)](#), the Crown must prove the use or threat of violence by the accused to a person or property for a specified purpose. Subsection (b) demands proof of the infliction of personal violence upon the victim within the time specified. Under [ss. \(d\)](#), the prosecution must establish that the accused stole while armed with an offensive weapon or an imitation thereof.

The mental element that the Crown must establish under [s. 343](#)(a), (b) and (d) consists of the intention to cause the external circumstances described in each of the subparagraphs. “Steal” is defined in [s. 2](#) to mean “commit theft”, requires proof of the ulterior mental element described in [s. 322\(1\)](#) [theft] in cases of robbery falling within those paragraphs. Under [s. 343](#)(a), the Crown must also prove the use or threat of violence was for the defined purpose. The external circumstances of [s. 343\(c\)](#) are complete upon proof of an assault upon the victim. No theft is required. The prosecution must however prove that an ulterior mental element accompanied the assault; namely, the intent to steal from the victim.

### ***Breaking and entering***

[Section 348](#) of the *Criminal Code* provides:

- (1) Every one who
  - (a) breaks and enters a place with intent to commit an indictable offence therein,
  - (b) breaks and enters a place and commits an indictable offence therein, or
  - (c) breaks out of a place after
    - i) committing an indictable offence therein, or
    - ii) entering the place with intent to commit an indictable offence therein, is guilty of an indictable offence..
- (2) For the purposes of proceedings under this section, evidence that an accused
  - (a) broke and entered a place or attempted to break and enter a place is, in the absence of any evidence to the contrary, proof that he broke and entered the place or attempted to do so, as the case may be, with intent to commit an indictable offence therein; or
  - (b) broke out of a place is, in the absence of any evidence to the contrary, proof that he broke out after
    - i) committing an indictable offence therein, or
    - ii) entering with intent to commit an indictable offence therein.
- (3) For the purposes of this section and [section 351](#), “place” means
  - (a) a dwelling-house;
  - (b) a building or structure or any part thereof, other than a dwelling-house;
  - (c) a railway vehicle, a vessel, an aircraft or a trailer; or
  - (d) a pen or an enclosure in which fur-bearing animals are kept in captivity for breeding or commercial purposes. R.S., c. C-34, s.306; 1972, c.13, s.24; R.S.C. 1985, c.27 (1st Supp.), s.47; 1997, c.18, s.20.

### **Section 350**

For the purposes of sections 348 and [349](#),

- (a) a person enters as soon as any part of his body or any part of an instrument that he uses is within any thing that is being entered; and
- (b) a person shall be deemed to have broken and entered if

- (i) he obtained entrance by a threat or artifice or by collusion with a person within, or
  - (ii) he entered without lawful justification or excuse, the proof of which lies upon him, by a permanent or temporary opening.
- R.S., c. C-34, s.308.

The *actus reus* consists of the breaking and entering of a place. The offence requires proof of a mental element; namely, the intent to commit an indictable offence in the place broken into. No offence need actually be committed in the premises to establish culpability. The Crown's proof of the requisite mental element is assisted by the presumption in s. 348(2).

Under s. 348(1)(b), the external circumstances include the break and entry of a place and the actual commission of an indictable offence therein.

There are companion charges that are sometimes laid as an alternative to break and enter depending on the circumstances. *e.g.*, s.349(1) (being unlawfully in a dwelling house) or s.72 (forcible entry).

### ***Fraud***

**Section 380** of the *Criminal Code* provides:

- (1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,
- ...
- (2) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, with intent to defraud, affects the public market price of stocks, shares, merchandise or anything that is offered for sale to the public is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

**Section 380** describes the general offence of fraud and creates the specific offence of fraudulently affecting the market price of stocks, shares, merchandise or anything offered for sale to the public. The essential element of fraud is a dishonest deprivation (*R. v. Olan*, [1978 CanLII 9, \[1978\] 2 S.C.R. 1175](#)).

Actual economic loss is not an essential element of the offence, although the prosecution must prove an actual risk of prejudice to the victim's economic interest (*R. v. Campbell and Kotler*, [1986 CanLII 35, \[1986\] 2 S.C.R. 376](#)). The fraud must be committed by deceit, falsehood or other fraudulent means that need not be a "false pretence" within s. 361. "Other fraudulent means" incorporates any act that is dishonest that caused a risk of deprivation, *R. v. Riesberry*, [2015 SCC 65](#).

The mental element requires proof of a subjective knowledge of the prohibited act and that its performance could have, as a consequence, the deprivation of another, *R. v. Theroux*, [\[1993\] 2](#)

[S.C.R. 5](#). The offence created by [s. 380\(2\)](#) is to some extent similar to the general offence contained in s. 380(1). Under [s. 380\(2\)](#), the external circumstances require proof by the prosecution that the accused by deceit, falsehood or other fraudulent means affected the public market price of stocks, shares, merchandise or anything offered for sale to the public. The mental element of the offence, in addition to the intent to cause the external circumstances, involves proof of an intent to defraud and that the accused subjectively appreciated that the public market price would be affected as a consequence of the dishonest act (*R. v Potter; R. v Colpitts*, [2020 NSCA 9](#), at paras. 643 *et seq.*). The section, although designed to protect the investing public against fraudulent stock exchange transactions, is far broader and is plainly not so limited in its reach.

### ***Mischief***

The offence of mischief is created by s. 430 of the [Criminal Code](#), which provides as follows:

- (1) Every one commits mischief who wilfully
  - (a) destroys or damages property;
  - (b) renders property dangerous, useless, inoperative or ineffective;
  - (c) obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property; or
  - (d) obstructs, interrupts or interferes with any person in the lawful use, enjoyment or operation of property.
  
- (1.1) Every one commits mischief who wilfully
  - (a) destroys or alters data;
  - (b) renders data meaningless, useless or ineffective;
  - (c) obstructs, interrupts or interferes with the lawful use of data; or
  - (d) obstructs, interrupts or interferes with any person in the lawful use of data or denies access to data to any person who is entitled to access thereto.

Mischief may be committed in a number of ways. Its punishment varies with the consequences that ensue from the mischief or the value or the nature of the property in relation to which it is committed (see *Code*, ss. 430(2) to [\(5.1\)](#)).

The external circumstances or *actus reus* of the mischief offences are described in s. 430(1)(a) to (d). The mental element requires proof that the accused acted “wilfully”, but no ulterior intent need be proven.

### ***The new technologies***

So far the [Criminal Code](#) has lagged behind changes in technology with respect to offences against property and rights of property. The [Criminal Code](#) is sufficiently broad that its provisions encompass a wide variety of offences of this sort, which may be committed using computers. However, it remains to be seen whether radical amendments to the *Criminal Code* will be required to keep pace with the electronic transformation of society. The following are examples of provisions in the *Criminal Code* intended to address offences that utilize or affect computer and internet technologies:

- 161 (prohibition for child sex offence, now including computer system),
- 164.1 and 164.2 (seizure and forfeiture re child pornography),

172.1 (luring a child using computer),  
 184 (interception of communications),  
 320.1 (seizure of hate propaganda),  
 342.1 (unauthorized use of computer),  
 342.2 (possession of device to obtain computer service),  
 430(1.1) (damaging data), and  
 487(2.1) (search warrant).

In March 2015, Parliament declared in force Bill C-13 (*Protecting Canadians from Online Crime Act*) containing the new offence of publication of an intimate image without consent (s. 162.1) and updating the offence of harassing telephone calls to harassing communications (s. 372(3)). Both offences are intended to address online bullying. For an example of a prosecution under s. 162.1 see *R. v. A.C.*, [2017 ONCJ 317](#).

### 3. Impaired driving offences

In June, 2018 Parliament passed Bill C-46 making substantial amendments to the impaired driving provisions in the *Criminal Code*. These amendments coincided with the passage of the new *Cannabis Act* and reflect in part legislative provisions to address drug impaired driving. All of the new provisions were in force by December 18, 2018.

Prosecutions under the previous impaired driving provisions (s. 253) will still be conducted under those provisions for conduct that pre-dates the amendments. The previous impaired driving prohibitions (as well as operating a vessel, aircraft and railway equipment) consisted of two offences: 1. driving while impaired by alcohol or drugs, and 2. operating a motor vehicle with excess of 80 mg of alcohol in 100 ml of blood. Both offences could be committed through the ‘operation’ of the conveyance or while in ‘care and control’ of the conveyance. A related offence was the refusal to provide a breath sample upon demand by a peace officer.

The new impaired driving prohibitions contain two main parts: the first is the response to drug-impaired driving in anticipation of cannabis legalization; and, the second part repeals the transportation provisions of the *Criminal Code*, including the impaired driving provisions, and replaces them with a new Part of the *Criminal Code*.

The legislation has three main elements to address drug-impaired driving:

- authorizing the police to use approved drug screening equipment (e.g., oral fluid drug screeners) to detect the presence of a drug in a driver;
- creating new criminal offences of being at or over a prohibited blood drug concentration for certain impairing drugs within two hours of driving (the levels are set by regulation); and
- amendments addressing availability of defences, Crown disclosure obligations and other changes to the impaired driving legal framework.

The primary offences under the new provisions are:

- s. 320.14(1)(a) Operation while impaired to any degree by alcohol or a drug or a combination of alcohol and a drug
- s. 320.14(1)(b) Having a *blood alcohol concentration of 80 or more* within two hours after operation
- s. 320.14(1)(c) Having a *prohibited blood drug concentration* within two hours after operation

and offences for failing to provide a breath sample, set out in three different offences, depending on the level of any harm or injury associated with the request for the breath sample.

Since the legislation is so recent, jurisprudence interpreting the new offences is focused primarily on procedural and evidentiary issues (ex: *R v Azram*, [2019 ABPC 194](#); *R. v. Kelly*, [2019 NSPC 73](#)), however jurisprudence under the previous provisions will be a reference point for interpretation of the new offences.

The following comments are in respect of the prior offences.

### ***Driving while impaired***

The offences of impaired operation or impaired care and control of a motor vehicle are established by any degree of impairment ranging from slight to great. Impairment is an issue of fact for the trial judge (*R. v. Stellato* (1993), 78 C.C.C. (3<sup>rd</sup>) 380 (Ont. CA), affirmed (1994) 90 C.C.C. (3<sup>rd</sup>) 160 (SCC)). Care and control is also factual however there is a rebuttable presumption of care and control under s. 258(1), which applies when the accused is found occupying the seat ordinarily occupied by the driver of the motor vehicle. The *mens rea* is the intent to operate the motor vehicle and the voluntary consumption of alcohol. The rebuttable presumption in s. 258(1) also affects the *mens rea*, because it presumes an intention to exercise care and control unless the accused successfully rebuts that presumed element.

### ***Impaired by drugs***

Section 254 (3.1) of the *Code* authorizes a peace officer to demand a person to submit to an evaluation by a qualified evaluating officer to determine whether that person was operating a motor vehicle impaired by drugs or a combination of drugs and alcohol. If the evaluation results in a reasonable belief that the person is so impaired, a demand can then be made for a sample of a bodily substance (urine, oral swab or blood). The opinion of the qualified evaluating officer (called a DRE – drug recognition expert) is admissible to establish the lawful basis of the demand for the bodily substance sample (*R. v. Bingley*, [2017 SCC 12](#)).

### ***Over 80***

The external elements of the “over 80” charge are the consumption of alcohol, driving or being in care and control of the motor vehicle, and doing so while the concentration of alcohol in blood exceeds 80mg in 100ml of blood, *R. v. MacConnell* (1980), [54 C.C.C. \(2d\) 188](#) (Ont. CA). The *mens rea* element is the voluntary consumption of alcohol. There is no requirement that the Crown prove that the accused knew that the alcohol to blood concentration had exceeded the legal limit. The rebuttable presumption of care and control contained in s. 258(1) also applies to the over 80 offences.

The *Controlled Drugs and Substances Act (CDSA)* prohibits the possession and distribution of various substances including cocaine, heroin, fentanyl, etc. The *CDSA* lists the prohibited substances by schedule with Schedule I including what is colloquially termed ‘hard drugs’, such as cocaine fentanyl, heroin, etc. Schedule II once included cannabis, but now primarily consists of synthetic cannabinoids, and Schedule III includes LSD and psilocybin, among others. Other Schedules include pre-cursors to these drugs, drugs that can be possessed but not distributed without a license such as steroids, and other drugs that can be possessed only with a prescription.

Offences under the *CDSA* include prohibitions against the possession (s. 4), trafficking (s. 5(1) which includes distribution) and possession for the purpose of trafficking (s. 5(2)), importing and exporting (s. 6) and production (s. 7). The penalties may differ depending on the offence and the schedule the drug falls under. The most serious offences under the *Act* have a maximum sentence of life imprisonment.

On October 17, 2018 the *Cannabis Act* came into force. The transitional provisions removed cannabis from Schedule II of the *CDSA* and placed all federal legislative provisions relating to cannabis under the *Cannabis Act*.

The *CA* provides legal access to cannabis and controls and regulates its production, distribution and sale. Generally the *Act* authorizes, but restricts, the possession and sale of cannabis. Adults may possess up to 30 grams of cannabis (or equivalent of other cannabis products) in public and may cultivate up to 4 plants of licit cannabis at home. There is no limit on the amount of licit cannabis an adult may possess at home. A young person (under 18 years of age) may possess up to 5 grams of licit or illicit cannabis anywhere. No one may sell cannabis to a youth.

Concurrently, each provincial and territorial jurisdiction passed complimentary legislation to provide for the regulation and sale of cannabis. Nova Scotia legislation prohibits the possession of cannabis by a youth, and under its *Cannabis Control Act*, a youth is defined as someone under 19 years of age, aligning the age restriction with the liquor control laws.

Offences under the *Cannabis Act*

Possession – Section 8

The *Cannabis Act* provides for the lawful possession of *licit* cannabis but restricts *public* possession subject to quantity and age. The *Act* creates no restrictions on adult possession of *licit* cannabis in private spaces except for plant cultivation. Youth possession is restricted only by quantity, a youth can possess up to 5 grams of *licit* or *illicit* cannabis. (Note though a complete provincial prohibition)

Distribution – s. 9; Sales – s. 10

Sales and distribution are separate concepts under the *Act*. “Trafficking” is not used to describe the dissemination of cannabis under the *CA*. Rather the offence provisions relate to ‘sale’ or

‘distribution’. Sales must be conducted by authorized sellers, and restricted by quantity and age. For adults, distribution is lawful where licit cannabis is shared in quantities of 30 grams or under. In Nova Scotia the only authorized seller is the Nova Scotia Liquor Commission. Self-described cannabis ‘dispensaries’ are not authorized sellers or distributors.

Importing/Exporting – s. 11

Unless authorized under the *Act*, importing or exporting cannabis is prohibited.

Production – s. 12

Cultivation, at home, of 4 or less cannabis plants, originating from licit cannabis seeds, is allowed (s. 12(4)(b)), however production over that amount, or from illicit seeds, is prohibited, as is different forms of altering cannabis, particularly where the production process can involve dangerous processes.

Sentences

The *CA* has a complex framework of sentences, some encouraging early payment of penalties for minor offences to avoid a criminal record, to a maximum sentence of 14 years. The penalties depend on the nature of the offence, the age of the offender and whether the object of the offence involves a young person.

Note that the Nova Scotia *Cannabis Control Act* creates offences for conduct that the federal *Act* allows, such as possession by a young person. Provincial legislation in Nova Scotia also incorporates summary offence tickets as the prosecution regime for minor offences.

## IV. CANADIAN CRIMINAL PROCEDURE

### 1. Classification of offences

At common law, crimes fell into two categories:

- **indictable offences**, which included treasons, felonies and misdemeanors triable only by judge and jury; and
- **petty offences**, which were triable summarily by justices of the peace sitting without a jury.

With the enactment of the first [Criminal Code](#) in 1892, the distinction between felonies, misdemeanors and petty offences was abolished. All crimes under the [Criminal Code](#) are now classified as indictable offences, offences punishable on summary conviction, or hybrid offences. Hybrid offences enable the Crown to elect to proceed summarily or by indictment. In the event the Crown does not expressly make this election on the Court record at the time of arraignment, the Crown’s election is deemed to be by summary conviction.

In 2019 Parliament enacted Bill C-75 which was a wide ranging reform of the *Criminal Code* with one of the goals to reduce delays. The Bill came into force in stages in 2019 with all of the

provisions of the Bill in force by December 18, 2019. One change was to increase the availability of summary conviction offences by increasing both the limitation period and the default maximum penalty of imprisonment, and by creating more hybrid offences for crimes that could previously only be prosecuted by indictment. **Summary conviction offences**

All summary conviction offences under the *Criminal Code*, or any other legislation, are triable only by a summary conviction court, which is generally composed of a Provincial Court judge or a justice of the peace. Proceedings must be commenced within 12 months of the act complained of unless the prosecutor and defendant agree otherwise (*Code* s. 786, increased from 6 months). Summary conviction offences contained in other statutes may have a longer limitation period. Summary conviction offences are generally less serious than indictable offences. This difference is reflected in the penalty provisions (maximum 2 years less a day imprisonment or a fine of \$5,000 or both, increased by Bill C-75 from a maximum six months in jail or a \$5,000 fine or both – [s.787\(1\)](#)) unless otherwise provided by law.

### **Indictable offences**

All indictable offences under the *Criminal Code* carry a maximum term of imprisonment. These maximum terms are life imprisonment, 14 years, 10 years, five years and two years. A person who is convicted of an indictable offence is liable to be sentenced to the maximum punishment that may be imposed for that offence. Many offences that were previously strictly indictable are now hybrid offences *e.g.*, assault causing bodily harm, assault with a weapon, uttering death threats, and stalking. Most indictable offences provide an accused with an option to elect to be tried in the Supreme Court with or without a jury. With the coming into force of Bill C-75, only accused charged with offences that have a maximum sentence of 14 years or more may request a preliminary inquiry held in the Provincial Court (*Code*, s. 536). Offences with lower maximum penalties that used to have the option to have a preliminary inquiry, can no longer do so since the enactment of Bill C-75.

### **Hybrid offences**

If a person is charged with a hybrid offence and the Crown has chosen to proceed by indictment, then the process for straight indictable offences, as described above, is followed. There are certain hybrid offences (*e.g.*, theft or fraud where the value of what has been stolen or defrauded does not exceed \$5,000) where the Crown can elect to proceed by indictment but where the Provincial Court judge has absolute jurisdiction to hear the charges. (*Code* [s. 553](#)) If the Crown indicates that it will proceed with a hybrid offence as a summary conviction matter, then the summary proceeding provisions apply.

### **Jurisdiction**

Under the *Criminal Code*, two forums are provided for the trial of indictable offences:

- A superior court of criminal jurisdiction, which in Nova Scotia means the Supreme Court or the Court of Appeal (*Code* [s. 2](#)); and
- A court of criminal jurisdiction, which in Nova Scotia means a Provincial Court judge (*Code* s. 2).

[Section 468](#) of the *Criminal Code* provides that “every superior court of criminal jurisdiction has jurisdiction to try any indictable offence.” The general rule covering the trial of indictable offences is set out in s. 471 of the *Code*, which states:

Except where otherwise expressly provided by law, every accused who is charged with an indictable offence shall be tried by a court composed of a judge and jury.

[Section 469](#) of the *Criminal Code* gives exclusive jurisdiction to a superior court of criminal jurisdiction over certain specified offences including treason, piracy and murder.

[Section 473](#) of the *Criminal Code* is an exception to [s. 471](#) and provides that an accused charged with an offence listed in s. 469 may, with the consent of the Attorney General and the accused, be tried without a jury by a judge of a superior court of criminal jurisdiction.

[Section 553](#) of the *Criminal Code* creates another exception to the general rule in that it gives to a Provincial Court judge absolute jurisdiction to try those indictable offences listed in that section. Such offences include theft, fraud, false pretences, possession of stolen goods and attempted or counselling such offences where the value of the subject matter does not exceed five thousand dollars and is not a testamentary instrument.

### *Accused’s right of election*

For those indictable offences that do not fall within the absolute jurisdiction of a Provincial Court judge ([s. 553](#)) or of the superior court of criminal jurisdiction (s. 469) the accused has a right to choose their mode of trial and may elect to be tried either by a Provincial Court judge, or by a Supreme Court judge without a jury, or by a Supreme Court judge with a jury. There are relatively few cases, murder being the leading one, where the accused has no right to elect other than trial by a Supreme Court judge and jury (but see s. 473 of the *Code*, discussed above). As described above, the right to a preliminary inquiry for many indictable offences has been greatly reduced.

- **Provincial Court judge**

If an accused elects to be tried before a Provincial Court judge, the latter shall forthwith take a plea and either proceed with the trial or fix a date for trial (*Code* [Section 536\(3\)](#)). In either case, no formal indictment is necessary. The Provincial Court judge may proceed on the information before him. Moreover, the Provincial Court judge who receives the accused's election or takes his plea of not guilty does not become seized of the case. If he proceeds to set a date for the accused's trial, the trial may be conducted before any other Provincial Court judge who has jurisdiction over the offence.

- **Judge alone or judge and jury**

If the accused elects to be tried by a judge alone or by judge and jury, the justice (usually a Provincial Court judge) before whom the election is made must endorse the election on the back of the information. If available for the offence at issue, the Provincial Court judge may then proceed to hold the preliminary inquiry or adjourn the matter to a date when the inquiry can proceed (*Code* [Section 536\(4\)](#)). Any justice who has jurisdiction in

the province where the offence is alleged to have been committed has jurisdiction to conduct the inquiry, so long as no other justice has commenced to take evidence (*Code Section 536(5)*). After hearing all the evidence presented by the Crown and by the defence, if any, the justice (again, usually a Provincial Court judge) must then either dismiss the information or commit the accused to stand trial (*Code Section 548*).

There are provisions in the *Criminal Code* concerning “re-election” which allow accused persons to change their election after the fact. An accused has the right, within a certain timeframe, to “elect up” from Provincial Court to Supreme Court, or between modes of Supreme Court trial. Otherwise, the consent of the Crown is required. An election “down” can only be done with the Crown’s consent. (*Code s. 561*)

## ***2. Interim release***

Many people charged with offences are served with a summons to appear in court at a later date to answer to the charges. If so, then bail conditions, subject to some exceptions, cannot be imposed.

### ***Release by police***

If arrested, an accused can be released by police, with or without release conditions, or can be held for court for a bail hearing. If released with conditions, the accused can, as of right, have the conditions reviewed by the court, under [s. 499\(3\)](#) or [s. 503\(2.2\)](#) of the *Criminal Code*. The Crown enjoys the same rights under [s. 499\(4\)](#) and [503\(2.3\)](#).

### ***Release by a judge***

The starting principle for release pending trial is that an accused is entitled to be released when charged with an offence, other than one of the very serious offences listed in [s. 469](#) of the *Code*, upon his giving his unconditional undertaking to appear in court on the day of trial. This principle applies unless there is some reason to believe that detention is necessary, including ensuring attendance at court and public safety. The accused will not be released upon his unconditional undertaking if the prosecutor shows cause why the accused should be detained in custody, or shows cause why the accused should not be released on his unconditional undertaking. If the Crown shows cause why the accused should be detained in custody, the accused will be so detained. If the Crown does not show cause why the accused should be detained in custody, but satisfies the judge that the accused should not be released without conditions, a justice or a judge will release the accused upon such conditions (*Code Section 515*).

For some offences, including [s. 469](#) offences, or where the accused was already on bail for an indictable offence, the accused may have the onus to show cause why he should be released (*Code sections 515(6)* and [522](#)).

Bill C-75 also affected many reforms to the bail provisions of the *Criminal Code* to ensure that accused persons be released in a timely manner and only on reasonable and relevant conditions. The amendments also reinforce the direction of the Supreme Court of Canada in *R. v. Antic*, [2017 SCC 27](#), that “release is favoured at the earliest reasonable opportunity and on the least

onerous grounds”, with special attention to Indigenous and vulnerable populations. The amendments:

- i. increase the types of conditions police can impose on accused, so as to divert unnecessary matters from the courts and reduce the need for a bail hearing when one is not warranted;
- ii. provide guidance to police on imposing reasonable, relevant and necessary conditions that are related to the offence and consistent with the principles of bail;
- iii. legislate a “principle of restraint” for police and courts to ensure that release at the earliest opportunity is favoured over detention, that bail conditions are reasonable, relevant to the offence and necessary to ensure public safety, and that sureties are imposed only when less onerous forms of release are inadequate;
- iv. require that circumstances of Indigenous accused and of accused from vulnerable populations are considered at bail, in order to address the disproportionate impacts that the bail system has on these populations;
- v. create a new process, the “judicial referral hearing”, to streamline certain administration of justice offences out of the traditional court system where no harm has been caused to victims; and,
- vi. consolidate various forms of police and judicial pre-trial release to modernize and simplify the release process.

### ***Review of order of justice***

In Nova Scotia an accused detained in custody, or released on certain conditions, may have the order of the justice reviewed by a Supreme Court judge under the provisions of s. 520. At such a hearing, the judge will consider the record of proceedings before the justice and any additional evidence that may be presented by the accused or by the Crown. The reviewing judge will not set aside the initial order simply on the basis that he or she would not have come to the same conclusion as the justice, but may exercise her discretion. The review is in effect a hybrid of a *de novo* hearing and an appeal, whereby an error by the justice or a change in circumstances can allow for a new order. In such a hearing the accused, if he is to succeed, must show that his detention is not justified. The prosecutor can seek a similar review, under [s. 521](#).

### ***Review of detention where trial is delayed***

**Code** s. 525 provides that where an accused has been charged with an indictable offence, other than an offence listed in [s. 469](#), and has been held in custody for a period of 90 days, the person having custody of the accused shall apply to a judge to fix a date for hearing to determine whether he should be released from custody. A similar provision applies in the case of summary conviction offences, but the time for such action is 30 days rather than 90. This section does not apply where an accused has applied unsuccessfully for review of the detention, as in that case the remedy is to apply under s. 520 for a further review. See *R. v. Myers*, [2019 SCC 18](#), for a thorough interpretation and application of section 525.

## ***3. Preliminary inquiry***

As we have seen, where the indictable offence with which the accused is charged is neither one over which the superior court of criminal jurisdiction has sole jurisdiction (*Code* s. 469 – offences such as murder) or one that is in the absolute jurisdiction of the Provincial Court the accused must be put to his or her election. If the accused elects to be tried by a judge with or without a jury, and the offence charged has a maximum penalty of 14 years or greater, the Provincial Court Judge before whom the election is made is required to hold a preliminary inquiry (*Code* s. 535), if the accused or prosecutor requests one (*ss.* 535, 536).

At the preliminary inquiry, the Crown is required to present sufficient evidence to have the accused committed for trial. This does not mean that the Crown prosecutor must call every witness who can give evidence against the accused. Rather, the Crown prosecutor must present sufficient evidence to establish simply a *prima facie* case. The courts have held that it is improper for a judge to weigh the evidence at a preliminary inquiry or assess credibility. The judge is not making any findings as to the guilt or innocence of the accused.

Accordingly, the preliminary inquiry affords the accused the opportunity to test the strengths and the weaknesses of the Crown's case against him through cross-examination, without running the risk of being convicted of any offence. If a Crown witness gives contradictory evidence at trial, the witness may be faced at trial with the evidence given at the preliminary inquiry, and the judge or jury made aware of the contradiction in the testimony of the witness. The accused rarely testifies at a preliminary inquiry, for to do so would serve little purpose since the judge has only very limited authority to consider the strength of the evidence, see *R. v. Arcuri*, [2001 SCC 54](#), [\[2001\] 2 S.C.R. 828](#).

An accused must request a preliminary inquiry or can agree to hear only certain witnesses, and the judge has the power to restrict questioning. Normally, a “focus” hearing is held to determine the scope of the preliminary inquiry. Many preliminary inquiries are now conducted on the basis of only written statements made by witnesses (*Code*, *ss.* 540(7)). The preliminary inquiry judge has the authority to order the witness to attend in person for examination if the judge considers it appropriate (*Code*, *ss.* 540(9)).

The test for committing a person to stand trial following a preliminary inquiry has been set out by the Supreme Court of Canada in the *United States of America v. Sheppard*, [1976 CanLII 8](#), [\[1977\] 2 S.C.R. 1067](#), where Ritchie J. stated:

I agree that the duty imposed upon a 'justice' under s. 475(1) is the same as that which governs a trial judge sitting with a jury in deciding whether the evidence is 'sufficient' to justify him in withdrawing the case from the jury and this is to be determined according to whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty. The 'justice', in accordance with this principle, is, in my opinion, required to commit an accused person for trial in any case in which there is admissible evidence which could, if it were believed, result in a conviction.

The test restricts a preliminary inquiry judge's ability to weigh the evidence presented:

In performing the task of limited weighing, the preliminary inquiry judge does not draw inferences from facts. Nor does she assess credibility. Rather, the judge's task is to determine whether, **if the Crown's evidence is believed**, it would be reasonable for a properly instructed jury to infer guilt. Thus, this task of "limited weighing" never requires consideration of the inherent reliability of the evidence itself. It should be regarded, instead, as an assessment of the reasonableness of the inferences to be drawn from the circumstantial evidence. *R. v. Arcuri, supra*, at para 30..

If the judge has a doubt concerning the overall strength of the Crown's case, at the preliminary inquiry stage the doubt must be resolved in favour of the Crown. The judge has the authority to commit the accused to stand trial on charges which are different from or additional to that which he or she originally faced at the outset of the preliminary inquiry ([s. 548\(1\)\(a\)](#)).

Although it is not open to the defence to raise a [Charter](#) argument concerning evidentiary matters at the preliminary inquiry stage, certain [Charter](#) arguments, particularly those dealing with the constitutionality of the exercise of police authority during the investigation, can be explored at the preliminary inquiry stage.

If the accused is committed to stand trial, any appearance notice, promise to appear, undertaking or recognizance issued to, given or entered into by the accused will continue in force until the trial is completed or is varied by the court (*Code* s. 523). However, this does not mean that a justice presiding at a preliminary inquiry does not have the jurisdiction to deal with the release or detention of the accused before him. Section 523(2) of the *Code* authorizes the justice presiding at the preliminary inquiry, on cause being shown, to vacate any order previously made for the release or detention of the accused and to make any other order for his release or detention, unless the offence is one mentioned in s. 469 of the *Code*.

After the preliminary inquiry is completed and if the accused is ordered to stand trial, the justice must forward the information, the evidence, the exhibits, the statement, if any, of the accused and any promise to appear, undertaking or recognize given or entered into under Part XVI of the *Code* to the Clerk of the Court that will try the accused (*Code* [s. 551](#)).

#### ***4. Trial on indictment by judge alone or judge and jury***

##### ***Laying an Information***

Proceedings relating to both summary conviction offences and indictable offences are initially commenced by the laying of an Information. By definition, an Information is a written complaint upon oath by a person (usually a police officer) stating that he or she has reasonable grounds to believe that a named person has committed a particular offence. The Information must be sworn before a justice of the peace, who has no right to refuse to accept it provided it complies with the formalities set out in the *Criminal Code* (*Code* [s. 504](#) & s. 788).

Generally there is no time limit for the laying of an Information charging an indictable [Criminal Code](#) offence. On the other hand, as we have seen, although there are exceptions, most Informations that commence proceedings for a summary conviction offence must be sworn out

not later than 12 months after the subject matter of the proceeding arose unless the prosecutor and the defendant agree otherwise (*Code* s. 786).

### ***An Indictment***

An Indictment is also a charging document. However, in contrast to an Information, an Indictment is an unsworn document prepared by an Attorney General or his Agent, or by a person who has the consent of the Attorney General. The Indictment is the document that commences proceedings in the Supreme Court. As in the case of the Information, the Indictment, although unsworn, is a written accusation of a specific offence by a named person. The Crown has the authority to draft the Indictment reflecting the committals, or to “prefer” additional or amended charges, or to even direct an Indictment without a preliminary inquiry.

### ***Arraignment***

The first step in the trial of an accused for an indictable offence is the arraignment. This involves the calling of the accused to the bar of the court to plead to the charge made against him. An accused other than a corporation usually must appear personally and answer to the charge, but can appear by counsel in summary proceedings, and with designation of counsel (*Code* [s. 650.01](#)) for indictable matters. In addition, he or she must be present in court throughout the whole of the trial unless he or she waives the right to be present (accused must generally be present for indictable matters where evidence is presented), or is removed from the court for misconduct, or is removed by the trial judge during the trial of an issue as to fitness to stand trial (*Code* s. 650).

The procedure generally followed is that the Clerk of the Court will call the accused by name to appear before the presiding judge. The charge as set out in the Indictment will be read to the accused and the Clerk will ask him or her to plead to each count if more than one. If the accused pleads not guilty, the plea will be recorded by the Clerk of the Court on the back of the Indictment.

In a jury trial, the accused does not plead until he or she is before the jury panel.

### ***Trial by jury***

In the case of a trial by jury, once the accused has pled to the charge the next step in the trial is to empanel a jury. The procedure followed in selecting a jury is set out in the *Criminal Code* (s. 626 to [s. 644](#); Bill C-75 also amended many of the previous provisions related to jury selection. Significantly the Bill removed the availability of peremptory challenges for the Crown or defence). Once the 12-person jury has been empanelled, the presiding judge will inform them of their duties after which the Crown counsel will make his or her opening address in which the facts of the case will be outlined and summarized. Once the opening address is concluded, the Crown will call its first witness unless the accused is permitted then to make an opening address. After the prosecutor has finished the examination-in-chief of the witness, defence counsel have a right to cross-examine. After the Crown has introduced all its evidence and closed its case, defence counsel has a right to make an opening address to the jury, after which the defence will call what evidence they wish. Occasionally, the defence may be permitted to make an opening immediately following the Crown’s opening. If the defence does not call witnesses, defence

counsel will address the jury last. If, however, evidence is led on behalf of the defence, defence counsel must address the jury first. (s. 651)

Once the addresses of counsel have been completed, the trial judge will instruct the jury as to the relevant law and review the evidence pertinent to the issues raised in the trial. Once the trial judge has completed the charge to the jury, the jurors will retire to consider their verdict. The jury conducts its deliberations in private and jurors are prohibited from discussing their deliberations publicly.

When the jury has reached a unanimous verdict, the foreperson will inform the judge as to the verdict and the verdict will be read in open court. In Canada, unlike some states in the United States, jurors must be unanimous, or a mistrial will result. If jurors cannot agree on a verdict, the jury will be discharged and the Crown will have to decide whether to retry the accused before another jury.

### *Trial by judge alone*

If the trial is held before a judge alone, then the accused will have first been arraigned and entered a plea to the charge. If he or she has pled not guilty, then Crown counsel will present its evidence through such witnesses as it believes essential to prove beyond reasonable doubt that the accused committed the offence. After each witness gives their direct evidence, defence counsel will have an opportunity to cross-examine them. At the close of the Crown's case, the defence may elect to call evidence. If the defence elects to call witnesses, they will be examined-in-chief by defence counsel followed by the right of cross-examination by Crown counsel. Once the Crown has presented its witnesses and defence has presented its case, and submissions have been made, the trial judge will rule as to whether or not the Crown has proven its case beyond a reasonable doubt.

## **5. Appeals**

Appeals of summary conviction matters can be brought to the Supreme Court, referred to as the Summary Conviction Appeal Court, ([Code s. 813](#)) but where the issue is one of law alone, the Crown or defence may appeal directly to the Court of Appeal ([Code](#), s. 830).

All appeals in indictable proceedings are to the Court of Appeal.

- **From conviction** – The accused may appeal a conviction on any ground of appeal that involves a question of law alone, or on any ground that involves a question of fact or mixed law and fact with leave of the court ([Code s. 675](#))
- **From acquittal** – The Crown is limited on an appeal from an acquittal to a ground of law alone ([Code](#) s. 676(1)(a)).
- **From sentence** – The accused or the Crown may apply for leave to appeal against a sentence imposed by the trial court ([Code s. 675\(1\)\(b\)](#) & s. 676(1)(d)).

### **Procedure**

[Rule 91](#) of the *Nova Scotia Civil Procedure Rules* sets forth the formal requirements of the Notice of Appeal, the Case on Appeal and written argument or Factum of the parties. [Rule 91](#)

also prescribes time limitations, service requirements and various proceedings including chambers applications for bail pending appeal, fixing dates for the hearing of appeals and so forth. See [Rule 63](#) for Summary Conviction Appeals.

## V. SENTENCING

Sentencing is governed by Part XXIII of the *Criminal Code* – [ss. 716-751.1](#). Traditionally, the paramount purpose of sentencing was the protection of the public, and this was achieved through rehabilitation or deterrence, or a combination of the two. The sentencing provisions of the *Code* were amended in 1995 to expressly particularize (1) further objectives, e.g., denunciation, (2) principles, e.g. proportionality, and (3) aggravating and mitigating factors, e.g., breach of trust. These objectives and principles are found in [ss. 718, 718.1 and 718.2](#) of the *Code*.

Also in 1995, the conditional sentence provisions were added to the *Code*. A conditional sentence is characterized as a custodial sentence that is served in the community. Typically, a conditional sentence has strict conditions, such as house arrest, and the media and public have taken to referring to most conditional sentences as simply “house arrest.” A conditional sentence is available for any offence except those with: a defined minimum sentence, maximum penalties of 14 years or life, maximum penalties of 10 years where the offence resulted in bodily harm, or those also identified under [s. 742.1](#) of the *Code*. There are now minimum sentences for a number of sexual offences involving children ([ss. 151, 152, 153, 163.1, 170, 171 and 212](#)), firearms related offences (ex: *Code*, [ss. 92, 95 and 100](#)) and drug trafficking offences. In 2015 the Supreme Court of Canada struck down mandatory minimum sentences for possession of a loaded prohibited firearm, set out in [ss. 95\(2\)](#) of the *Code*, as cruel and unusual punishment under [s. 12](#) of the *Charter*, *R. v. Nur*, [2015 SCC 15](#). Since that decision, most of the statutory minimums, have been declared unconstitutional, , for example *R. v. Kennedy*, [2019 ONCA 77](#); *R. v. Hood*, [2018 NSCA 18](#).

### Plea negotiations

Plea negotiations, colloquially referred to as plea bargaining, is the resolution of criminal charges where the accused agrees to plead guilty in return for some consideration relating to charges or sentence. The goal of the Crown is to obtain a conviction in relation to at least some of the illegal conduct alleged and the goal of the accused is to avoid numerous or more serious convictions or a lengthier sentence. In essence, plea negotiation is risk management on the part of both the Crown and the defence. Each party is attempting to remove the risks associated with a trial or a sentencing hearing.

Plea negotiations are not statutorily authorized or prohibited. It is, in effect, a developed practice of the criminal bar that has attained the status of accepted and ethical conduct. The Nova Scotia Barristers’ Society *Code of Professional Conduct* recognizes plea negotiations and provides ethical guidelines related to its practice, specifically, Chapter 5.

Chapter 5.1.7 and 5.1.8: Agreement on Guilty Plea

5.1-7 Before a charge is laid or at any time after a charge is laid, a lawyer for an accused or potential accused may discuss with the prosecutor the possible disposition of the case, unless the client instructs otherwise.

5.1-8 A lawyer for an accused or potential accused may enter into an agreement with the prosecutor about a guilty plea if, following investigation,

- (a) the lawyer advises his or her client about the prospects for an acquittal or finding of guilt;
- (b) the lawyer advises the client of the implications and possible consequences of a guilty plea and particularly of the sentencing authority and discretion of the court, including the fact that the court is not bound by any agreement about a guilty plea;
- (c) the client voluntarily is prepared to admit the necessary factual and mental elements of the offence charged; and
- (d) the client voluntarily instructs the lawyer to enter into an agreement as to a guilty plea.

#### Commentary

[1] The public interest in the proper administration of justice should not be sacrificed in the interest of expediency.

With respect to prosecutors, Crown prosecution services' policy manuals include policy and practice directives in relation to plea negotiations (see Nova Scotia Public Prosecution Service, Crown Attorney Manual, Resolution Discussions and Agreements; Public Prosecution Service of Canada, Deskbook, Chapter 20). The preamble in the NS PPS chapter from the Crown Attorney Manual states:

Discussions between counsel aimed at resolving the issues that arise in a criminal prosecution are an essential part of the criminal justice system in Nova Scotia. When properly conducted, these "resolution discussions" benefit the accused, victims, witnesses and the general public. In an environment of comprehensive and early disclosure of evidence, counsel can often resolve issues of procedure, plea, fact and sentence to such an extent that running a case through the full criminal process would add little to what counsel achieve informally. Resolution discussions can also facilitate prompt, just disposition of cases in a manner more sensitive to the circumstances of the participants than would be possible in a formal trial e.g., the privacy of a shy witness can be protected. The proper administration of criminal justice requires effective participation by Crown Attorneys in resolution discussions. These guidelines are intended to clarify the issues which counsel may attempt to resolve, and to help ensure consistency in approach.

Plea negotiations have not been given explicit legal effect. Indeed [s. 606\(1.1\)\(b\)\(iii\)](#) of the *Criminal Code* requires a judge, upon the entry of a guilty plea, to advise the accused that the judge is not bound by an agreement made between the accused and the prosecutor. However, the Supreme Court of Canada has accepted that plea negotiations are a practical necessity and the binding effect of the agreement (as between the prosecutor and the accused, as opposed to binding the court) is a matter of upmost importance, *R. v. Nixon*, [2011 SCC 34](#), para. 47, although in that case the Court did uphold the Attorney General's authority to withdraw a plea agreement entered into by the prosecutor with carriage of the case.

## VI. THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

[Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c. 11]

The *Canadian Charter of Rights and Freedoms* came into force in 1982. It forms part of Canada's Constitution. Section 52(1) of the *Constitution Act* proclaims the Constitution as the supreme law of Canada and "any law that is inconsistent with the provisions of the Constitution (including the *Charter*) is, to the extent of the inconsistency, of no force or effect". [Section 24\(1\)](#) of the *Charter* allows those whose constitutional rights have been infringed or denied to apply to "a court of competent jurisdiction" for such remedy as is "appropriate and just in the circumstances". [Section 24](#) authorizes a court to provide a remedy where it has found that the state has violated a *Charter* protected interest. Subsection 24(1) is a general remedy section and in the criminal law context is most often utilized to stay a prosecution where no other remedy is appropriate, such as after a finding of abuse of process or unreasonable delay in bringing the prosecution to trial. Subsection 24(2) allows for the exclusion of evidence "obtained in a manner that infringed or denied any rights or freedoms" where the admission of that evidence "[could] bring the administration of justice into disrepute".

### 1. Life, Liberty and the Security of the Person (Section 7)

Section 7 of the *Charter* provides a broad range of constitutional protection against state interference with all interests related to the life, liberty and security of the person. The provision requires that laws or state actions that interfere with life, liberty and security of the person conform to the principles of fundamental justice — the basic principles that underlie our notions of justice and fair process (*Charkaoui v. Canada* (Citizenship and Immigration), [\[2007\] 1 SCR 350](#)).

Section 7 involves a two-step analysis:

Is there an infringement of one of the three (3) protected interests, that is to say a deprivation - or risk of deprivation - of life, liberty or security of the person?

Is the deprivation in accordance with the principles of fundamental justice?

This second step may be broken down into two steps, where it is necessary a) to identify the relevant principle or principles of fundamental justice and then b) to determine whether the deprivation has occurred in accordance with such principles. (*R. v. Marmo-Levine*, [\[2003\] 3 S.C.R. 571](#)).

There is no independent right to fundamental justice. Accordingly there will be no violation of section 7 if there is no deprivation of life, liberty or security of the person (*R. v. Pontes*, [\[1995\] 3 SCR 44](#), at paragraph 47).

The principles of fundamental justice are not limited to procedural matters but also include substantive principles of fundamental justice (*Re B.C. Motor Vehicle Act*, [\[1985\] 2 S.C.R. 486](#)).

The principles of fundamental justice are to be found in the basic tenets of our legal system, including the rights set out in sections 8-14 of the *Charter* (*Re B.C. Motor Vehicle Act*, *supra*, at para 29-30) and the basic principles of penal policy that have animated legislative and judicial practice in Canada and other common law jurisdictions (*R. v. Pearson*, [1992] 3 S.C.R. 665, at 683).

Interests protected under section 7 most frequently arise with respect to administration of justice issues including issues such as abuse of process, right to silence, self-incrimination, pre-charge delay, right to disclosure and full answer and defence. If there is no explicit *Charter* protection for the interest at issue, then section 7 may afford that protection or afford residual protection of an explicitly defined *Charter* protected interest.

### *Disclosure of the Crown's Case – a Section 7 Example*

An example of the application of section 7 to an interest that was not explicitly protected under the *Charter*, or forcefully enforced under the *Criminal Code* or common law, was the issue of the accused's right to full answer and defence, particularly, the right to disclosure of the Crown's case to an accused prior to trial.

In *R. v. Stinchcombe*, [1991] 3 SCR 326, the Supreme Court of Canada addressed the duties of Crown counsel to provide an accused with all evidence in its possession, whether inculpatory or exculpatory, that has some relevance to the prosecution at issue, i.e., the “fruits of the investigation”. The Court found that the duty to disclose is subsumed in the right to full answer and defence protected under section 7 of the *Charter*.

The obligation is now well defined. As the Court stated in *R. v. McNeil*, 2009 SCC 3: “While the *Stinchcombe* automatic disclosure obligation is not absolute, it admits of few exceptions. Unless the information is clearly irrelevant, privileged, or its disclosure is otherwise governed by law, the Crown must disclose to the accused all material in its possession. The Crown retains discretion as to the manner and timing of disclosure where the circumstances are such that disclosure in the usual course may result in harm to anyone or prejudice to the public interest. The Crown's exercise of discretion in fulfilling its obligation to disclose is reviewable by a court.”

Because the failure to disclose could impact an accused's right to liberty, section 7 could be invoked. Any such failure had to be executed within the principles of fundamental justice – for example to protect informant privilege or an ongoing investigation. Otherwise the failure was a breach of section 7, unless otherwise justified under section 1. If the Crown was unable to justify the failure to fully disclose, a court could order further disclosure or if still unsatisfied with the Crown's response, stay the prosecution.

### *Section 7 Infringements and Section 1 Justifications*

Section 1 of the *Charter* justifies state limitations of protected interests where that limitation is a reasonable one, proscribed by law, and justified in a free and democratic society.

The Supreme Court has repeatedly stated that infringements of section 7 “are not easily saved by section 1” and has in some cases suggested that section 1 justification may only be possible “in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like” (*Reference Re subsection 94(2) of the Motor Vehicle Act (B.C.)*).

However, in other cases, the Court has emphasized the differences between section 7 and section 1, suggesting that section 1 justification may be possible where the law serves the broader societal values underlying a free and democratic society, such as promoting respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society (*Bedford v. Canada (A.G.)*, [2013 SCC 72](#).)

## 2. Unreasonable search (Section 8)

One of the more frequent examples of an application to exclude evidence is that of an accused alleging a violation of the right to be secure against unreasonable search or seizure under s. 8 of the *Charter*. The essence of s. 8 is a protection against unjustified state intrusions on the reasonable expectations of an individual to privacy (*Hunter v. Southam*, [1984 CanLII 33, \[1984\] 2 S.C.R. 145, at 159](#)). An accused must establish a reasonable expectation of privacy, on the basis of the totality of the circumstances, in order to have standing to bring a s. 8 motion (see *R. v. Edwards*, [1996 CanLII 255, \[1996\] 1 S.C.R. 128](#)). Three broad areas of privacy have been identified by the courts (see *R. v. Dyment*, [1988 CanLII 10, \[1988\] 2 S.C.R. 417, at para 19](#)) – spatial (*e.g.*, dwelling, motor vehicle, etc.), personal (*e.g.*, frisk search, bodily samples, etc.), and informational (*i.e.*, personal and confidential, or personal core of biographical information). Where there is no expectation of privacy, one’s s. 8 right is not engaged, for example, see *R. v. Tessling*, [2004 SCC 67, \[2004\] 3 S.C.R. 342 \(heat pattern\)](#), and *R. v. Gomboc*, [2010 SCC 55 \(power usage\)](#).

For a search to be valid, it must fulfil three criteria: (1) it must be authorized by law; (2) the law must be reasonable; and (3) the search must be carried out in a reasonable manner (*R. v. Collins*, [1987 CanLII 84, \[1987\] 1 S.C.R. 265, at para 23](#)). Supreme Court jurisprudence has made clear that the “law” in “authorized by law” can include the common law, for example, consent searches, or searches incident to arrest or detention.

The clearest example of legal authorization is a valid search warrant. Parliament has, in the *Criminal Code* and other federal statutes, provided judges the authority to issue search warrants in many contexts including the authority to search and/or seize: blood samples, DNA samples, intercept and record private communications (wiretaps), install tracking devices, seize controlled drugs, etc. The most frequently used authority is under s. 487 of the *Code*. There a police officer may obtain a warrant to search a specified place where he or she has reasonable grounds to believe that there is, at that place, anything in respect of which an offence has been or is suspected of being committed.

Prior judicial authorization based on reasonable grounds offers the best protection of privacy. In fact, a warrantless search is considered *prima facie* “unreasonable” and requires the Crown to

prove the three criteria above, otherwise the burden is on the accused to prove a *Charter* violation (*Collins*, above, at para. 21-22).

Search warrants, as well, can be challenged. If the grounds for the search warrant, or Information to Obtain a Search Warrant (the supporting sworn document used as a basis for the application for the search warrant), are lacking, then a warrant can be found to be invalid and the search unreasonable, and therefore a violation of [s. 8](#) of the *Charter*. Analyzing the reasonable grounds for a search warrant (or grounds for other types of searches, e.g., incident to lawful arrest based on a tip) requires consideration of how (1) credible, (2) compelling, and (3) corroborated the grounds are (*R. v. Debot*, [1989 CanLII 13](#), [\[1989\] 2 S.C.R. 1140](#), *per* Wilson J.).

The courts have identified several exceptions to the warrant requirement where the search may be reasonable, including:

- (1) Consent (see *R. v. Wills*, [1992 CanLII 2780 \(ON C.A.\)](#); *R. v. Borden*, [1994 CanLII 63](#), [\[1994\] 3 S.C.R. 145](#)). A person may consent to a search by the state of any place or for any information in which they have an expectation of privacy. In order for the Crown to rely on consent as the authority to conduct a search, it must satisfy the court that: (i) there was a consent, express or implied; (ii) the giver of the consent had the authority to give the consent; (iii) the consent was voluntary, and was not the product of police oppression, coercion or other external conduct; (iv) the giver of the consent was aware of the nature of the police conduct to which he or she was being asked to consent; (v) the giver of the consent was aware of his or her right to refuse consent, and (vi) the giver of the consent was aware of the potential consequences of giving the consent.
- (2) Incident to lawful arrest (see *Cloutier v. Langlois*, [1990 CanLII 122](#), [\[1990\] 1 S.C.R. 158](#); *R. v. Caslake*, [1998 CanLII 838](#), [\[1998\] 1 S.C.R. 51](#), at para. 25). Where an individual is lawfully arrested, the police may search that individual and the area immediately surrounding the individual, such as the motor vehicle in which he is driving, incidental to that arrest. The criteria for exercising this authority are only that the police have lawfully arrested the individual, the search is executed in a reasonable manner and that the purpose of the search is for safety or to gather evidence related to the offence for which the individual was arrested. For example, police may not search a car for illegal drugs if the arrest is for an outstanding motor vehicle offence. A penile swab for the complainant's DNA can be obtained as incident to arrest for sexual assault if reasonable grounds exist that the search will reveal and preserve evidence and that it is obtained in a reasonable manner, *R. v. Saeed*, [2016 SCC 24](#). Strip searches and cavity searches that are conducted incidental to arrest require further supporting grounds and must be executed in a manner that does not violate the individual's [s. 8](#) rights (*R. v. Golden*, [2001 SCC 83](#), [\[2001\] 3 S.C.R. 679](#)).
- (3) Incident to lawful detention (reasonable grounds for a safety search, following reasonable suspicion for detention – see *R. v. Mann*, [2004 SCC 52](#), [\[2004\] 3 S.C.R. 59](#), at para. 37). Where the police have a reasonable suspicion that a person may be involved with or have information of an ongoing investigation, that individual may be searched incidental to that detention where a police officer has reasonable grounds to

- believe that his safety or the safety of others is at risk. If so, the officer may engage in a protective pat-down search of the detained individual.
- (4) Plain view (see *R. v. Mellenthin*, [1992 CanLII 50, \[1992\] 3 S.C.R. 615](#); *R. v. Belnavis*, [1997 CanLII 320, \[1997\] 3 S.C.R. 341](#)). The “plain view doctrine” is primarily a power to seize. In order to exercise the plain view power to justify a warrantless seizure, the Crown must establish that the officer was lawfully in a position to observe or discover the items seized; that the discovery was inadvertent and the criminal nature of the item or information was immediately obvious (*R. v. Law*, [2002 SCC 10, \[2002\] 1 S.C.R. 227](#)).
  - (5) Searches by school officials (see *R. v. M.R.M.*, [1998 CanLII 770, \[1998\] 3 S.C.R. 393](#)). Students still retain an expectation of privacy while attending school grounds although that expectation may be diminished. A teacher or principal of a primary or secondary school is not be required to obtain a warrant to search a student and thus the absence of a warrant will not create a presumption that the search was unreasonable. A search of a student will be properly instituted where the teacher or principal conducting the search has reasonable grounds to believe that a school rule has been violated and the evidence of the breach will be found on the student. These grounds may well be provided by information received from just one student that the school authority considers credible. Alternatively the reasonable grounds may be based upon information from more than one student or from observations of teachers or principals, or from a combination of these pieces of information which considered together the relevant authority believes to be credible. However police may not use school officials as their agent to carry out such a search.
  - (6) Dog sniff (*R. v. Kang-Brown*, [2008 SCC 18, \[2008\] 1 S.C.R. 456](#); *R. v. A.M.*, [2008 SCC 19, \[2008\] 1 S.C.R. 569](#)). The use of a sniffer dog by police does constitute a search for the purposes of s. 8 of the *Charter*. Additionally, the use of a sniffer dog to detect odours emanating from an individual or property (such as luggage) is a violation of s. 8 of the *Charter* unless the police officer, prior to employing the sniffer dog, has reasonable grounds to suspect that a crime is being committed. This standard is less than reasonable grounds to believe but more than a suspicion or hunch (see also *R. v. Chehil*, [2013 SCC 49](#), and *R. v MacKenzie*, [2013 SCC 50](#), for application of these principles).
  - (7) Garbage (see *R. v. Patrick*, [2009 SCC 17, \[2009\] 1 S.C.R. 579](#)). Where an individual abandons their privacy interest they cannot claim later that the state violated their [s. 8](#) rights by searching and sizing the abandoned items. Whether a person abandons their interest for the purpose of s. 8 is to be assessed objectively. Where a person sets out documents and items in the trash for municipal collection, all interest in the items is abandoned and any seizure by the police is lawful.
  - (8) Emergency responses to 911 calls (*R v. Godoy*, [\[1999\] 1 S.C.R. 311](#)) and officer safety searches can be conducted without prior judicial authorization. Officer safety searches require the officer to have reasonable grounds to believe that there is imminent threat to public safety or the police, *R. v. MacDonald*, [2014 SCC 3](#).

The most recent battlefield under s. 8 is the electronic device – laptop computer and cellphone – and internet access. Both can contain vast amounts of personal information. The SCC in *R. v. Fearon*, [2014 SCC 77](#), authorized police to search cellphones as incidental to arrest. However

the search was limited to situations where the search can truly be said to be connected to the offence in issue, restricted to a cursory search for relevant evidence and restricted in time. As well, the police must keep accurate notes of its initial cursory search. Any search beyond those parameters must be judicially authorized. In *R. v. Vu*, [2013 SCC 60](#), the Supreme Court of Canada held that the extent of the privacy interests at stake in the search of a computer requires a specific authorization to conduct that search. In *R. v. Cole*, [2012 SCC 53](#), the Court determined that even if a person is provided a ‘work’ computer but permitted incidental personal use, then there remains some degree of a privacy expectation.

In *R. v. Spencer*, [2014 SCC 43](#), the SCC held that there is a reasonable expectation of privacy in a person’s Internet Protocol address and a warrant to connect an IP address to a residential location of that computer is presumptively required. This case is also the SCC’s broadest statement of principle regarding constitutional protection of electronic and internet privacy. As well, the accused’s common law partner cannot provide consent to police access to a jointly owned laptop without the accused’s concurrent consent, *R. v. Reeves*, [2018 SCC 56](#). In *R. v. Marakah*, [2017 SCC 59](#), the SCC provided additional protection to electronic communications by accepting that a person who sends a text message to another still retains a sufficient degree of privacy in that communication to grant the sender standing to challenge the police’s constitutional authority to search for and seize that evidence. However the Court rejected the argument that police needed prior judicial authorization to pose as a young girl online and use screen capture software for email and Facebook communications in a child luring investigation, *R. v. Mills*, [2019 SCC 22](#).

### ***3. Arbitrary detention or imprisonment (Section 9)***

This section states that everyone has the right not to be arbitrarily detained or imprisoned. It is concerned with the adequacy of the standards prescribed by law for a detention or imprisonment, not with the nature or duration (see s. 12 – a prohibition against cruel and unusual treatment or punishment).

- “Detained” has the same meaning as “detention” in s. 10 (which confers the right to counsel on arrest or detention). *R. v. Hufsky*, [\[1988\] 1 S.C.R. 621](#), 633 an arrest or detention in s. 10 involves some form of compulsion or coercion. *R. v. Therens*, [\[1985\] 1 S.C.R. 613](#), 642, held that, by use of the random stop for the purposes of the spot check procedure, the police officer assumed control over the movement of the accused by a demand or direction that might have significant legal consequence and there was penal liability for refusal to comply with the demand or direction.
- “Detention” in sections 9 and 10 of the *Charter* refers to the suspension of a person’s liberty interest by a significant physical or psychological restraint, *R. v. Grant*, [\[2009\] 2 S.C.R. 353](#).
- A person is psychologically detained where a person has a legal obligation to comply with a restrictive request or demand, or, where a reasonable person would consider from the state conduct that he or she had no choice but to comply, *R. v. Grant*, [\[2009\] 2 S.C.R. 353](#).

- There is no general power to detain for investigative purposes, but police may detain where 1. There are reasonable grounds to *suspect* that in all the circumstances that a person is connected to a particular crime, and 2. the detention is reasonably necessary on an objective view of the circumstances, **R. v. Mann**, [2004] 3 S.C.R. 59. The detention cannot be more intrusive than reasonably necessary in the circumstances, **R. v. Clayton**, [2007] 2 S.C.R. 725.
- A random spot check is arbitrary if there are no criteria, express or implied however the exercise of this authority was held to be a reasonable limit under s. 1, and therefore constitutional. **R. v. Hufsky**, [1988] 1 S.C.R. 621, 633. Random roadside stops are limited to their intended purposes, however the purpose can change. A roadside stop is not a static event, **R. v. Nolet**, [2010] 1 S.C.R. 1 851.
- The provision of the *Criminal Code* requiring detention in a psychiatric facility of a person who was acquitted of a criminal charge on the ground of insanity was found to be an arbitrary detention because there were no substantive standards in place (*i.e.*, no requirement of a finding of continued danger to the public at sentencing, as compared to the “dangerous offender” provisions in the *Criminal Code*). **R. v. Swain**, [1991] 1 S.C.R. 933.
- The “dangerous offender” provisions in the *Criminal Code* were upheld because the *Criminal Code* supplied criteria for the classification of an offender as dangerous, and those criteria were tailored for the legislative purpose. **R. v. Lyons**, [1987] 2 S.C.R. 309.
- Failing a successful *Charter* challenge against the legislative provision that authorized the arrest, a lawful arrest cannot contravene s. 9 of the *Charter* for being arbitrary. **R. v. Latimer**, [1997] 1 S.C.R. 217

#### 4. Rights on arrest or detention (Section 10)

- Everyone has the right on arrest or detention
  1. to be informed promptly of the reasons therefor;
  2. to retain and instruct counsel without delay and to be informed of that right; and
  3. to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

This section only applies on arrest or detention, so it does not apply to a person who has voluntarily cooperated with the police. **R. v. Esposito** (1985), 53 O.R. (2d) 356 (C.A.).

A detention includes a restraint on liberty in the form of a physical restraint and also when a police officer or other agent of the state assumes control over the movement of a person by a demand or direction that may have significant legal consequences and that prevents or impedes access to counsel. **R. v. Therens**, [1985] 1 S.C.R. 613, 643. See the definition of detention and police limits regarding detention, in the section 9 review above.

There is a right to counsel in every situation, however brief or routine, in which there is a duty to comply with a demand by a police officer (or other official).

See:

1. *R. v. Therens*, [\[1985\] 1 S.C.R. 613](#);
2. *R. v. Thomsen*, [\[1988\] 1 S.C.R. 640](#);
3. *R. v. Hufsky*, [\[1988\] 1 S.C.R. 621](#);
4. *R. v. Simmons*, [\[1988\] 2 S.C.R. 495](#).

Note that in every case, the detained person has no choice but to obey the demand, and legal advice can only confirm that duty to obey.

### ***Right to reasons – s. 10(a) of the Charter***

The right to reasons includes the right to know the reasons for an initial detention pursuant to a brief investigative detention, *R. v. Suberu*, [2009 SCC 33](#).

- A breach of the right in this paragraph occurs when the accused, arrested for one offence, is not told he is under suspicion for a second offence. *R. v. Borden*, [\[1994\] 3 S.C.R. 145](#).
- There is an obligation to give reasons to make clear the extent of the jeopardy. *R. v. Smith*, [\[1991\] 1 S.C.R. 714](#).

### ***Right to counsel – s. 10(b) of the Charter***

[Section 10](#) (b) provides that everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right.

Section 10(b) fulfils its purpose in two ways. First, it requires that the detainee be advised of his right to counsel. This is called the informational component. Second, it requires that the detainee be given an opportunity to exercise his right to consult counsel. This is called the implementational component. Failure to comply with either of these components frustrates the purpose of [s. 10\(b\)](#) and results in a breach of the detainee's rights. Implied in the second component is a duty on the police to hold off questioning until the detainee has had a reasonable opportunity to consult counsel. The police obligations flowing from [s. 10\(b\)](#) are not absolute. Unless a detainee invokes the right and is reasonably diligent in exercising it, the correlative duties on the police to provide a reasonable opportunity and to refrain from eliciting evidence will either not arise in the first place or will be suspended. See *R. v. Sinclair*, [2010 SCC 35](#), at [paras. 24-32](#).

The informational component includes an obligation on police, upon arrest or detention, to advise the individual that they have a right to counsel free of charge, upon meeting prescribed financial eligibility under the applicable legal aid scheme, and free access to duty counsel who provide immediate, although temporary, legal advice, regardless of financial status, *R. v. Prosper*, [\[1994\] 3 S.C.R. 236](#).

The right to counsel must be provided even where the initial detention is pursuant to a brief investigative detention, *R. v. Suberu*, [2009 SCC 33](#), [\[2009\] 2 SCR 460](#); but not when detained during the execution of a roadside stop pursuant to provincial traffic laws or for roadside screening for impaired driving, *R. v. Orbanski*, [2005 SCC 37](#), [\[2005\] 2 S.C.R. 3](#)

***Right to habeas corpus - s. 10(c) of the Charter***

The paragraph confers the right, on arrest or detention, to have the validity of the detention determined by way of *habeas corpus* (a writ to “produce the body” of the person under arrest before a court of superior jurisdiction with a view to testing the legality of the detention) and to be released if the detention is not lawful.

***5. Rights on being charged with an offence (Section 11 of the Charter)***

- Section 11 guarantees the rights of any person charged with an offence.
- Section 11(b) includes a corporation. *R. v. CIP*, [\[1992\] 1 S.C.R. 843](#).
- “Charged” is satisfied when a formal written complaint has been made against the accused and a prosecution initiated. *R. v. Charbot*, [\[1980\] 2 S.C.R. 985](#), 1005. The formal written complaint is the laying of an information or the preferring of an indictment. *R. v. Kalanj*, [\[1989\] 1 S.C.R. 1594](#). Therefore, a person who is merely suspected of an offence is not charged.
- “Offence” includes any breach of law, whether federal or provincial, to which a penal sanction (namely, imprisonment or a fine, which by its magnitude, would appear to be imposed for the purpose of redressing the wrong done to society rather than to the maintenance of internal discipline within the limited sphere of activity) is attached. *R. v. Wigglesworth*, [\[1987\] 2 S.C.R. 541](#).

***Specific information – s. 11(a) of the Charter***

- This paragraph guarantees a person charged with an offence the right to be informed without unreasonable delay of the specific offence.
- The factors to be considered in respect of any delay are the same as those considered under s. 11(b) of the *Charter*, *R. v. Cisar*, [2014 ONCA 151](#).
- This right also exists under the *Criminal Code*, provincial laws and at common law, but the right cannot now be changed by statute. For example, a vague description of an offence, without reference to the statute or regulation creating the offence, is a breach of this right, even though authorized by a province's *Summary Proceedings Act*. *R. v. Lucas* (1983), [150 D.L.R. \(3d\) 118](#) (N.S.S.C. (A.D.)).
- It enshrines the rights contained in *Criminal Code* section 581 (formerly 510), which establishes the minimum requirements of a valid count in an indictment. *R. v. Lucas* (1983), [150 D.L.R. \(3d\) 118](#) (N.S.S.C. (A.D.)).

***Trial within reasonable time – s. 11(b) of the Charter***

- This paragraph guarantees a person charged with an offence the right to be tried within a reasonable time.
- Persons charged with an offence frequently invoked this provision of the *Charter* because the courts automatically grant a stay of proceedings to an accused person whose trial has been delayed beyond a reasonable time.

- This right serves three purposes:
  - to minimize the time spent by an accused person in pre-trial custody (or under restrictive bail conditions);
  - to minimize the anxiety experienced by a person awaiting the trial; and
  - to minimize the deterioration of evidence necessary to enable the accused to make full answer and defence. *R. v. CIP*, [1992] 1 S.C.R. 843, at paras 855-859.
- For an accused corporation, a delay is unreasonable only if the delay would impair the corporation's ability to make full answer and defence. *R. v. CIP*, [1992] 1 S.C.R. 843, 862-863.
- To determine the reasonableness of delay, the courts were directed to consider the test set out in *R. v. Morin*, [1992] 1 S.C.R. 771, which was a discretionary balancing exercise based on the following four factors:
  1. the length of the delay;
  2. any waivers of time periods;
  3. the reasons for the delay, including
    - (a) inherent time requirements of the case,
    - (b) actions of the accused,
    - (c) actions of the Crown,
    - (d) limits on institutional resources, and
    - (e) any other reasons for the delay; and
  4. prejudice to the accused. *R. v. Morin*, [1992] 1 S.C.R. 771 at para. 31 (S.C.C.), *R. v. Godin*, [2009] 2 S.C.R. 3.

However in 2016 the SCC released its decision in *R. v. Jordan*, 2016 SCC 27, (see also *R. v. Cody*, 2017 SCC 31) which dramatically changed the analytical framework to be used to determine whether an accused's right to a trial within a reasonable time had been violated. The majority believed the change was required because the *Morin* framework contributed to a culture of delay and complacency and was unpredictable, confusing and complex. The majority of the Court rejected the four-pronged balancing exercise for a more defined approach that included presumptive ceilings in which an accused ought to have their trial. A summary of the test is set out in the majority's decision, at para. 105, and is as follows:

- **There is a ceiling beyond which delay becomes presumptively unreasonable.** The presumptive ceiling is 18 months for cases tried in the provincial court, and 30 months for cases in the superior court (or cases tried in the provincial court after a preliminary inquiry). Defence delay does not count towards the presumptive ceiling.
- **Once the presumptive ceiling is exceeded,** the burden shifts to the Crown to rebut the presumption of unreasonableness on the basis of exceptional circumstances. Exceptional circumstances lie outside the Crown's control in that (1) they are reasonably unforeseen or

reasonably unavoidable, and (2) they cannot reasonably be remedied. If the exceptional circumstance relates to a discrete event, the delay reasonably attributable to that event is subtracted. If the exceptional circumstance arises from the case's complexity, the delay is reasonable.

- **Below the presumptive ceiling**, in clear cases, the defence may show that the delay is unreasonable. To do so, the defence must establish two things: (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings; and (2) the case took markedly longer than it reasonably should have.

**For cases currently in the system**, the framework must be applied flexibly and contextually, with due sensitivity to the parties' reliance on the previous state of the law, namely the application of the factors in *Morin*. The right to be tried within a reasonable time includes the right to be sentenced within a reasonable time. *R. v. MacDougall*, [1998] 3 S.C.R. 45.

**Delay is measured from the date of laying the Information** or directing a preferred Indictment. Delay under s. 11(b) does not include pre-charge delay, *R. v. Kalanj*, [1989] 1 S.C.R. 1594. Applications to stay prosecutions based on pre-charge delay have been based on abuse of process considerations under s. 7 of the *Charter*, and the right to a fair trial under s. 11(d) of the *Charter*, see *R. v. Lee Valley Tools*, 2009 ONCA 387.

The *Jordan* framework also applies to matters prosecuted under the *Youth Criminal Justice Act* taking into account the enhanced need for timeliness in youth matters as a case-specific factor when determining whether a case took (or is expected to take) markedly longer than it reasonably should have, *R. v. K.J.M.*, 2019 SCC 55

#### *Non-compellability – s. 11(c) of the Charter*

- This provision is declaratory of the common law that a person charged with an offence has the right not to be compelled to be a witness against himself in respect of the offence.
- Section 11(c) prohibits any comment on an accused's failure to testify, therefore the trial judge cannot warn the jury to draw any adverse inference from the accused's failure to testify. *R. v. Noble*, [1997] 1 S.C.R. 874. However in *R. v. Prokofiew*, [2012] 2 S.C.R. 639, the SCC provided that s. 4(6) of the *CEA* does not prohibit a trial judge from affirming an accused's right to silence. The Court does not suggest that such an instruction must be given in every case where an accused exercises his or her right to remain silent at trial. Rather, it will be for the trial judge, in the exercise of his or her discretion, to provide such an instruction where there is a realistic concern that the jury may place evidential value on an accused's decision not to testify.
- This paragraph does not confer a broad privilege against self-incrimination. It appears only to protect the accused from being compelled to enter a witness box. For example, the use of a breath test taken from the accused under the compulsion of the *Criminal Code* does not offend this section *R. v. Altseimer* (1982), 38 O.R. (2d) 783 (C.A.).

- Section 11(c) does not preclude the accused from being made compellable in proceedings that are not against him, or which are not in respect of the offence. For example, a person charged as an accessory to a crime can be compelled to be a witness for the prosecution at the trial of the person charged with the principal crime. *R. v. Bleich* (1983), [150 D.L.R. \(3d\) 600 \(Man. Q.B.\)](#).

### *Presumption of innocence – s. 11(d) of the Charter*

- This right guarantees a person charged with an offence to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.
- The Crown bears the burden of proving the guilt of a person charged with an offence, and the standard of proof must be the criminal standard – beyond a reasonable doubt. *R. v. Oakes*, [\[1986\] 1 S.C.R. 103](#). Therefore, reverse onus clauses which are an essential element of the offence, and are otherwise not justified under section 1, are not permitted.
- For a true crime offence, it makes no difference whether a fact proved is characterized as an essential element, a collateral factor, an excuse, or a defence. If the accused is required to prove some fact on the balance of probabilities in order to avoid conviction, then there is an infringement of the presumption of innocence. *R. v. Whyte*, [\[1988\] 2 S.C.R. 3](#).
- The presumption of innocence is not infringed by a provision that does no more than impose on an accused the burden of adducing evidence to raise a reasonable doubt as to the presence or absence of some fact that is a defence (or an element of the offence, a collateral factor, or an excuse) *R. v. Osolin*, [\[1993\] 4 S.C.R. 595](#).
- In a regulatory setting, reverse onus clauses requiring the accused to establish a due diligence defence on a balance of probabilities are permitted. *R. v. Wholesale Travel Group Inc.*, [\[1991\] 3 S.C.R. 154](#).

### *Fair trial – s. 11(d) of the Charter*

- The right to a fair trial comprises: the right to a hearing before a fair and impartial magistrate who is required to decide on the basis of the governing laws and the relevant facts; the right to know the case to be met and the right to answer the case, *Charkaoui v. Canada*, [\[2007\] 1 S.C.R. 350](#).

### *Independent and impartial tribunal – s. 11(d) of the Charter*

- The general test for judicial impartiality is to ask whether a reasonable person, fully informed of all the circumstances, would consider that a court enjoyed the necessary independent status. There must be both independence in fact and a reasonable perception of independence, *Mackin v. New Brunswick*, [\[2002\] 1 S.C.R. 405](#).

There is a presumption of judicial impartiality. The onus is on the party arguing for disqualification that the judge is either biased or that a reasonable, informed right minded person,

viewing the matter realistically would conclude that that the judge would not act impartially, *Wewaykum v. Canada*, [2003] 2 S.C.R. 259. **Reasonable bail – s. 11(e) of the Charter**

- This paragraph guarantees a person charged with an offence the right not to be denied reasonable bail without just cause.
- “Bail” refers to all forms of judicial interim release. *R. v. Pearson*, [1992] 3 S.C.R. 665, 690.
- The term “reasonable bail” means that the amount must be reasonable, and so must be the restrictions on the liberty of the accused while out on bail. *R. v. Pearson*, [1992] 3 S.C.R. 665, 689.
- The constitutional standard for “just cause” is as follows:
  - the law denies bail “only in a narrow set of circumstances”, and
  - the denial of bail is necessary to promote the proper functioning of the bail system and is not undertaken for any purpose extraneous to the bail system

See *R. v. Pearson*, [1992] 3 S.C.R. 665, 690.
- The *Criminal Code* provides for a denial of bail where either
  1. the accused's detention is necessary to ensure his attendance in court, or
  2. his detention is necessary for the protection or safety of the public, having regard to the likelihood that he would commit further crimes pending his trial.

These two grounds also constitute “just cause” under this section. *R. v. Bray* (1983), 40 O.R. (2d) 766, 769 (C.A.).
- Where there are reasonable grounds to believe that the accused has already committed an offence while out on bail, there is just cause for requiring the accused to bear the onus of persuading the court that he is not likely to do so again. *R. v. Morales*, [1992] 3 S.C.R. 711.

### ***Trial by jury – s. 11(f) of the Charter***

- This paragraph guarantees a person charged with an offence the benefit of a trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment. It does not apply in the case of an offence under military law tried before a military tribunal.
- The right is triggered by the maximum potential punishment.
- The right can be waived. *R. v. Turpin*, [1989] 1 S.C.R. 1296, 1314-1316.
- The waiver must be “clear and unequivocal” and must be made with full awareness of the consequences of the waiver. *R. v. Lee*, [1989] 2 S.C.R. 1384, 1411.

***Retroactive offences – s. 11(g) of the Charter***

- This paragraph guarantees a person charged with an offence under Canadian law a right not 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 or was criminal according to the general principles of law recognized by the community of nations.
- This section limits the power of federal and provincial governments to create retroactive offences. For example, the constitutionality of *Criminal Code* provisions (ss. 7(3.74) and (3.76)) to punish crimes against humanity and war crimes committed before the introduction of the war crimes provisions in 1987 was upheld. *R. v. Finta*, [1994] 1 S.C.R. 701.
- This is not a prohibition against the enactment of retroactive laws in general, only against the creation of retroactive criminal offences.

***Double jeopardy – s. 11(h) of the Charter***

- Once an accused has been tried for an offence and finally acquitted or convicted, he may not be placed in jeopardy a second time by being tried again for the same offence.
- An accused is not “finally” acquitted or found guilty until after all appellate procedures have been completed. *R. v. Morgentaler* (No. 2), [1988] 1 S.C.R. 30, 45, 129, 156.
- The paragraph only applies where the later charge is for an offence substantially identical to (or included in) the offence of which the accused was previously acquitted or convicted. In *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, the two offences were not similar because the elements of the offences were different.

***Variation of penalty – s. 11(i) of the Charter***

- This paragraph guarantees a person who has been charged with an offence the right, if found guilty of the offence, to be given the benefit of the lesser punishment.
- This section is designed for when the penalty for an offence has been changed after an accused person committed the offence, but before he is sentenced. If the new penalty was increased, the old penalty applies; if the penalty was reduced, the new penalty applies.
- An offender is not entitled to the benefit of a temporary reduction in punishment which occurred in the interval between the time of commission and the time of sentencing, *R. v. Poulin*, 2019 SCC 47. The section only compares the sentence in force at the time of the commission of the offence versus the sentence at the time of sentencing. An offender does not benefit from a lesser punishment that was available for that offence at any other period.
- Retrospective changes to parole eligibility that automatically lengthen the period of incarceration offend this subsection, *Whaling v. Canada*, [2014] 1 S.C.R. 392.

## 6. Right against cruel and unusual punishment (Section 12 of the Charter)

- This section prohibits any cruel and unusual *treatment or punishment*.
- The test of cruel and unusual punishment is whether the punishment prescribed is so excessive as to outrage standards of decency. *R. v. Smith*, [\[1987\] 1 S.C.R. 1045](#).
- There are two classes of treatment or punishment:
  1. those that are barbaric in themselves, and
  2. those that are grossly disproportionate to the offence. *R. v. Smith*, [\[1987\] 1 S.C.R. 1045](#).

To determine whether a minimum sentence is grossly disproportionate to the offence, the test used is that of the most innocent possible offender. *R. v. Smith*, [\[1987\] 1 S.C.R. 1045](#), 1053. That standard has since been confined to “imaginable circumstances which could commonly arise in day-to-day life”. *R. v. Goltz*, [\[1991\] 3 S.C.R. 485](#), 515-516.

The “reasonable hypothetical” test under s. 12 was reviewed in *R. v. Nur*, [2015 SCC 15](#). When a mandatory minimum sentencing provision is challenged under s. 12, two questions arise. The first is whether the provision imposes cruel and unusual punishment (*i.e.*, a grossly disproportionate sentence) on the particular individual before the court. If the answer is no, the second question is whether the provision’s reasonably foreseeable applications would impose cruel and unusual punishment on other offenders.

Where mandatory minimum sentencing laws are challenged under s. 12 on the basis of their reasonably foreseeable application to others, the question is what situations may reasonably arise, not whether such situations are likely to arise in the general day-to-day application of the law. Only situations that are remote or far-fetched are excluded.

There are now minimum sentences for a number of sexual offences involving children ([ss. 151](#), 152, [153](#), 163.1, [170](#), 171 and [212](#)), firearms related offences (ex: *Code*, ss. 92, [95](#) and 100) and drug trafficking offences. Since the SCC’s decision in *Nur* where the SCC struck down the mandatory minimum sentence for possession of a loaded prohibited firearm, set out in ss. 95(2) of the *Code*, for [violation of s. 12 of the Charter](#), the mandatory minimum sentences for other offences have not survived constitutional challenge.

The reinvigoration of the application of section 12 is also reflected in the recent decision of the SCC in *R. v. Boudreault*, [2018 SCC 58](#), striking down as unconstitutional, the mandatory minimum victim fine surcharge imposed upon conviction.

## 7. *Right against self incrimination (Section 13 of the Charter)*

- This section gives a witness the right not to have any incriminating evidence given in a proceeding used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.
- A witness may not refuse to answer a question on the ground that the answer might incriminate him.
- The purpose of s. 13 is to protect individuals from being indirectly compelled to incriminate themselves. The section embodies a *quid pro quo*: when a witness who is compelled to testify in the proceeding is exposed to the risk of self-incrimination, in exchange for the witness's testimony, the state offers protection against the later use of that evidence against that person, *R. v. Henry*, [2005] 3 S.C.R. 609.
- However, section 13 is not directed to “any evidence” the witness may have been compelled to give at the prior proceeding, but to incriminating evidence. Incriminating evidence is evidence given by the witness at the prior proceeding that the Crown could use at the subsequent proceeding, if it were permitted to do so, to prove guilt, *i.e.*, to prove or assist in proving one or more of the essential elements of the offence for which the witness is being tried. Where the evidence given by the witness at the prior proceeding could not be used by the Crown at the subsequent proceeding to prove the witness's guilt on the charge for which he or she is being tried, the prior evidence is not “incriminating evidence”. The Court allowed the Crown to use compelled civil discovery testimony to impeach the accused at his criminal trial because the evidence given at the civil discovery was not plainly incriminating of a criminal act, *R. v. Nedelcu*, [2012] 3 S.C.R. 311.
- “Other proceedings” can refer to a second trial on the same charge following a mistrial or successful appeal. *Dubois v. The Queen*, [1985] 2 S.C.R. 350.

## 8. *Exclusion of evidence under Section 24(2) of the Charter*

If an accused is able to prove a s. 8, s. 10(b), or other *Charter* violation (on a balance of probabilities), then typically the court considers exclusion of evidence as a remedy. Only the trial judge has jurisdiction to grant *Charter* relief, including exclusion of evidence.

Section 24 of the *Charter* provides as follows:

### Enforcement of guaranteed rights and freedoms

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

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that,

having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Under s. 24(2), the admission of the evidence in issue must be such that it could bring the administration of justice into disrepute. Although the *Charter* says "would", the SCC (*R. v. Collins*, [1987] 1 S.C.R. 265) says it should be read as "could".

In *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, the SCC significantly modified the test for exclusion of evidence under s. 24(2) from its previous pronouncements in *R. v. Collins*, [1987] 1 S.C.R. 265, and *R. v. Stillman*, [1997] 1 S.C.R. 607.

In *Grant*, responding to submissions that the existing framework was “difficult to apply and may lead to unsatisfactory results”, the Court unanimously recognized the need to revise and clarify the test for exclusion of evidence pursuant to s. 24(2) of the *Charter*.

The Court found that s. 24(2) required a flexible, multi-factored analytical approach to the determination of the admissibility of evidence. The majority emphasized that s. 24(2) analysis necessarily involved a consideration of “all the circumstances” and that “no overarching rule governs how the balance is to be struck”. As a result, the Court moved away from the “all-but-automatic exclusionary rule” for non-discoverable conscriptive evidence that had developed in the wake of *Stillman*. In doing so, the Court found that the “trial fairness” rationale developed pursuant to *Collins* and *Stillman* “should no longer hold”. Instead, the concept of trial fairness “is better conceived as an overarching systemic goal than as a distinct stage of s. 24(2) analysis”. Considerations such as whether the evidence was “conscripted” and the related “discoverability doctrine”, while remaining relevant, should no longer be a determinative criterion for the 24(2) inquiry.

The Court went on to replace the analytical framework established in *Collins* and *Stillman* with a “flexible test based on all the circumstances, as the wording of s. 24(2) requires”. The Court succinctly summarized this revised approach to s. 24(2) analysis at paragraph 71:

[71] A review of the authorities suggests that whether the admission of evidence obtained in breach of the *Charter* would bring the administration of justice into disrepute engages three avenues of inquiry, each rooted in the public interests engaged by s. 24(2), viewed in a long-term, forward-looking and societal perspective. 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 (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society’s interest in the adjudication of the case on its merits. The court’s role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute. These concerns, while not precisely tracking the categories of considerations set out in *Collins*, capture

the factors relevant to the s. 24(2) determination as enunciated in *Collins* and subsequent jurisprudence.

The Court then commented on the application of these three lines of inquiry with respect to different categories of evidence such as statements by the accused, bodily evidence, non-bodily physical evidence and derivative evidence.

Accuseds' statements implicate the principle of self-incrimination. "The heightened concern with proper police conduct in obtaining statements from suspects and the centrality of the protected interests affected will in most cases favour exclusion of statements taken in breach of the *Charter*, while the third factor, obtaining a decision on the merits, may be attenuated by lack of reliability." (*Grant*, para. 98) This, together with the common law's historic tendency to treat statements of the accused differently from other evidence, explains and suggests that accuseds' statements tend to be excluded under s. 24(2).

The Court considered non-bodily physical evidence at paragraphs 112-115 of *Grant*, and the factors underlying the decision whether to exclude such evidence under s. 24(2) include the following:

- (i) A minor breach weighs in favour of admission.
- (ii) A diminished expectation of privacy, e.g., automobile, weighs in favour of admission.
- (iii) A search that has little or no impact on human dignity may be considered a minor breach.
- (iv) "Reliability issues with physical evidence will not generally be related to the *Charter* breach. Therefore, this consideration tends to weigh in favour of admission." [para. 115]

As a result of *Grant*, *supra*, non-bodily physical evidence tends to be admitted, absent an egregious *Charter* breach. See *R. v. Harrison*, [2009 SCC 34](#), for an example of such a breach.

## VII. SPECIAL CONSIDERATIONS FOR ABORIGINAL CLIENTS

When representing Aboriginal clients in the criminal justice system, a lawyer must be aware of specific legislation, case law and procedures that could have a significant impact on the outcome for an Aboriginal defendant.

### Jurisdiction

If provincial or federal charges relate to alleged offences committed on Reserve Land, there may be jurisdictional considerations, particularly if it relates to a provincial statute or regulation that affects existing Aboriginal or treaty rights. Such jurisdictional issues may arise when the offences relate to business regulation, licensing, fees and taxes associated with natural resources, as well as hunting, fishing and firearm violations, especially the seizure and forfeiture of hunting and fishing equipment and vehicles. [See Section 35(1) of the *Constitution Act* (Canada) and Sections 88 and [89](#) of the *Indian Act* (Canada)]

### Jury selection

When representing an Aboriginal client who has elected to be tried by a judge and jury, counsel should always consider challenging individual jurors for cause on the *Code*. (See [Section 638](#) of the *Criminal Code*; *R. v. Williams*, [\[1998\] 1 S.C.R. 1128](#), and, *R. v. Fraser*, [2011 NSCA 70](#)).

In September 2019, the federal government introduced several amendments to the *Code* including through Bill-C75 ([SC 2019 c 25](#)). Amendments include, abolishing peremptory challenges, giving judges the the power to stand aside jurors or reasons of personal hardship or any other reasonable cause including obvious instances of juror bias, amends the challenge for cause ground based on a juror's criminal record, modifying the period of imprisonment from 12 months to 2 years.

The abolishment of the use of peremptory challenges in cases involving cases where anti-Aboriginal bias might be a factor in jury deliberations. It has been subject to constitutional challenges in the lower courts, *R v. Chouhan*, [2019 ONSC 5512](#) finding the amendment to be constitutional, while *R v King*, [2019 ONSC 6386](#) found the amendments to be unconstitutional. It is highly likely the matter will be decided by the Supreme Court of Canada in the near future.

Counsel should also confirm that the state has made reasonable efforts to use an honest and fair process preparing a jury roll that is representative of the community. [See *R. v. Kokopenace*, [2013 ONCA 389](#), Crown appeal heard by Supreme Court of Canada, appeal allowed [\[2015\] 2 S.C.R. 398](#) (the order for a new trial was set aside and the conviction reinstated)

It is not necessary to prove that racism is widespread in specific community from where jurors are drawn to invoke s.638(1)(b); judicial notice has been taken of racism being widespread throughout the country [*R v. Murphy*, [2016 YKSC 23](#)].

Exclusion of Aboriginal jurists is acceptable if they have criminal records, subject now to the modification by Bill-C75 ([SC 2019 c 25](#)) of the time period from 12 to 2 months (clauses 270-272). The disproportionate effect of exclusion of jurists with a criminal background does not make the jury unrepresentative because exclusion is being done to promote jury impartiality [*R v. Newborn*, [2016 ABQB 13](#)].

### Sentencing

Counsel representing Aboriginal offenders must be aware of the sentencing provisions in [section 718.2\(e\)](#) of the *Criminal Code*, which makes imprisonment a sanction of last resort for all offenders, and requires the court to pay particular attention to the circumstances of Aboriginal offenders. The Supreme Court of Canada has determined that the application of [section 718.2\(e\)](#) requires a sentencing judge to consider several factors when sentencing Aboriginal offenders. The provisions apply whenever the court is considering a sentence of incarceration for a Canadian Aboriginal person, and it is a remedial provision that is designed to reduce the over-representation of Aboriginal people in Canadian prisons and to encourage a restorative approach to sentencing.

Judges may take judicial notice of systemic and background factors such as residential schooling, displacement, lower education, lower income, higher unemployment, higher rate of substance

abuse and suicide, and higher levels of incarceration as factors that have played a part in bringing the individual Aboriginal offender before the courts.

A lawyer has an additional duty to present to the court case-specific information about the effect of a client's Aboriginal background, unless the client expressly waives his or her right to have it considered. [See *R. v. Gladue*, [\[1999\] 1 S.C.R. 688](#) and *R. v. Ipeelee*, [\[2012\] 1 S.C.R. 433](#)].

In Nova Scotia, case-specific information about an Aboriginal offender can be obtained through the preparation of a *Gladue Report* or through the holding of a Sentencing Circle. Both of the pre-sentence procedures are administered through the Mi'kmaw Legal Support Network.

In the absence of a *Gladue Report*, the presentence report should thoroughly canvass the *Gladue* factors unless the client expressly waives that analysis.

*Gladue* factors will not lead to an automatic reduction in sentence where the individual offender is found to come from a stable supportive background [*R v. Laboucane*, [2016 ABCA 176](#)]. Judge must assess the individual offender as someone subject to *Gladue* factors and not make general assumptions about Aboriginal offenders [*R v. Mathewise*, [2016 NUCA 5](#)].

Recent case law suggests the *Gladue* factors must be considered by a court anytime an Aboriginal person's liberty is at stake in criminal and related proceedings. [See *USA v. Leonard*, [2012 ONCA 622](#), leave to appeal to SCC refused.]

*Gladue* principles must also be applied when determining an appropriate disposition for an Aboriginal NCR offender at Review Board hearings. [See *R. v. Sim*, [\(2005\) 78 O.R. \(3d\) 183 \(C.A.\)](#)]

Parity and rehabilitation are secondary objectives to denunciation and general deterrence when evaluating an Aboriginal offender under s.718(2)(e) of the *Code*. However, rehabilitation should be given effect through sentencing [*R v. Whitehead*, [2016 SKCA 165](#)].

*R v. Omeasoo*, [2013 ABPC 328](#) applies *Ipeelee* to address Aboriginal offenders with alcohol abuse issues granted bail. Abstention from alcohol as a condition should not be imposed on Aboriginal offenders who are alcoholics. Furthermore, “*where an aboriginal offender suffering from alcoholism is to be sentenced for [breach of bail conditions] the court will look to the prosecution for assistance in determining that offender's degree of responsibility for the breach. When that information is unavailable [...], a nominal penalty such as a fine of \$1 may be imposed hereafter. This sentence, where appropriate, will signal to those considering the offender's bail in later cases that the offender's degree of responsibility for s.145(5.1) C.C. offences was significantly attenuated.*”

### **Minimum sentence**

*Gladue* principles do not preclude the application of a mandatory minimum term of imprisonment [*R. v. Johnson*, [2013 ONCA 177](#)].

*R. v. Sellars* [2017 BCSC 2236](#) applies *R. v. Wells* [2000 SCC 10](#) in its *Gladue* analysis. In the appropriate circumstances, a judge can afford the greatest weight to the concept of restorative justice notwithstanding the seriousness of the crime. *Sellars* also stands for the proposition that, where a mandatory minimum was previously in place and has been repealed, a judge is not bound to sentence along these previous lines. *Gladue* takes priority.

### **Parole/Prison**

*Gladue* principles should apply beyond the sentencing process to Aboriginal people who are in the criminal justice system. Evaluating revocation of parole involves a duty by the board to make decisions in manner responsive to unique circumstances of Aboriginal offenders and attentive to systemic disadvantages and discrimination [*Twins v. Canada*, [2016 FC 537](#)].

When an Aboriginal prisoner is being transferred from a medium-security prison to a maximum-security prison, consideration of both *Gladue* factors and an inmate's Aboriginal status indicates more procedural fairness [*Earhart v. Canada* [2015 ONSC 5218](#)].

Each Aboriginal inmate should have a *Gladue* type assessment of whether solitary confinement would be appropriate for their rehabilitation. Prisons are obligated to provide adequate information to boards reviewing solitary confinement regarding Aboriginal prisoners and their mental health. Prisons must be transparent in the programs and resources they make available to Aboriginal prisoners to help facilitate their rehabilitation [*R. v. Hamm* [2016 ABQB 440](#)].

### **Credit for remand time**

A lawyer should be aware that recent case law has held that the statutory provisions in section 719(3.1) that precludes enhanced remand credit time on a 1.5:1 basis is discriminatory and is of no force and effect against Aboriginal offenders. [*R. v. Chambers*, [2013 YKTC 77](#); *R. v. Beck*, [2014 NWTTC 9](#); *R. v. Bittern*, [2014 MBPC 51](#); and See *R. v. Summers*, [\[2014\] 1 S.C.R. 575](#).]

While parity principle applies in context of youth sentencing, *Summers* does not affect discretion of youth court judges to take pre-sentence custody into account in whatever manner judge concludes will result in sentence that will hold young person accountable [*R. v. B. (M.)*, [2016 ONCA 760](#)].

Where an Aboriginal offender is granted enhanced credit for remand time, even where the judge does not have to give enhanced credit, an offender's Aboriginal circumstances can justify increasing the credit for time served [*R. v. Mulholland* [2014 YKSC 3](#)].

### **Bail**

Recent case law has also established that the *Gladue* principles that apply to the sentencing of an Aboriginal offender apply equally when determining the question of judicial interim release at the bail hearing stage. [See *R. v. DDP*, [2012 ABQB 299](#) and *R. v. Robinson*, [2009 ONCA 205](#).]

The fact that the individual person seeking bail is Aboriginal, in and of itself, should not be characterized as a factor in favour of that person in deciding whether he or she should be released [*R. v. Rich*, [2016 NLTD\(G\) 87](#)].

**Firearm prohibition**

An order under [section 109](#) or 110 of the *Criminal Code* prohibiting an Aboriginal offender from possessing firearms and ammunition for several years may be varied pursuant to section 113 of the *Criminal Code*, if the offender can demonstrate that he or she requires a firearm for the purposes of sustaining the offender, his or her family or community, or for the purposes of employment. The existence of alternate employment and/or partial reliance on non-traditional food sources does not preclude an applicant from demonstrating that the use of a firearm is needed to sustain the applicant and his/her family. [See *R. v. Allooloo*, [2010 NWTCA 7](#) and *R. v. Cruickshank*, [2013 NSPC 120](#).]