

Wednesday 11th September 2013

1. Definitions of *criminal or penal law*

Law Commission of Canada, What is a crime? – Discussion

Read document, *Law Commission of Canada; What is a crime?

- Criminal law is a punitive response to a perceived problem
- It addresses the most serious conduct issues (ex. Murder, theft, assault)
- Equally, it addresses a much broader spectrum of problems.

How do we as a society decide to frame our criminal law?

- Generally, it rests on the notion of attributing personal responsibility for the crime itself; It individualizes the problem; it renders the individual accountable for his act;
Example
- Child abuse is the result of complex social and psychological factors yet we place the responsibility on the individual

Criminal law has more than just one objective, in fact, it has several objectives

- Objective of deterrence
Can be (1) **Specific** or (2) **General**
Criminal law seeks to deter individuals specifically

(1) **Specific:** specific deterrence is subject to the individual and the severity of the crime that he committed. If he committed a murder, then his deterrence might be federal prison for life in order for him to learn the severity of the consequences of his actions.

Example 1

Let us take a drug abuser for example, this person is reckless and he has alcoholic issues as well; he is in a reckless period in his life and he is using dangerous substance abuse. Contributing problems might be issues that he had as a child which lead him to abuse substances. One day he drinks and drives and gets a DUI. He gets fined and he may not be able to drive for a certain period of time. The second time he drinks and drives, he ends up killing someone. He goes to trial and is found guilty. During his sentencing, the judge will take into account all the principles which govern the sentencing principles. The pinnacle principal is that of “specific deterrence”. The severity of the punishment will depend on specific case by case situation where the courts need to decide which punishment is best to deter the criminal in each specific situation from committing the same offence over again or to commit another offence.

(2) **General:** The purpose of general deterrence is to deter the public from committing the offence by demonstrating the severity of the violent act through media (ex. Television, newspaper, movies). This is done to make the rest of the public understand the sanctions and punishments if you commit a crime; Media, word of mouth, are examples of general deterrence. When there are deaths caused by it, it brings the seriousness up much. The importance of general deterrence is stressed by the courts.

The impact of deterrence on the criminals and the future criminals

- Many people feel that deterrence does not always do what it is intended to
- The reason for this is because there is still crime and there are cases where criminals offend a second or even a third time
- This poses a great challenge for the justice system because for some, deterrence is not a wakeup call and for others it takes relatively longer for them to grasp the immorality or unethical and criminal aspects of the crime they committed.

Example:

Studies have shown that the use of Cannabis being illegal for the last 25 years has had no significant deterrent effect as many costs continue to rise. Therefore, criminalization of Cannabis has no effect or influence on people to stop using or distributing for the purpose of trafficking cannabis

Example:

A 19 year old is sentenced to prison for a serious offence and looking at his record, his case warrants 2+ years in jail (federal prison). The courts are preoccupied about the setting of the penitentiary being exposed to the child for a number of months and the reason for this is because the criminals in a penitentiary have a very heavy criminal background.

- However, in other areas people might believe that deterrent approaches have worked

Example:

34 years ago, drinking and driving was legal. Deterrence worked in this case because it has caused a change in the way that we think about drinking and driving and therefore it is now illegal to be drinking and driving.

- Alcohol consumption and certain forms of gambling used to be a crime and back then, they were also treated as crimes whereas today they are no longer criminal offences.
- Until 1983, a husband was allowed to sexually assault his wife in Canada
- Society has changed greatly over time

- Section 151 of the Criminal Code talks about sexual interference under the age of 16 years old
- Our notion of crime is very well based upon what we are exposed to by the media, internet, movies, etc.
- Television devotes a lot of focus on violent crime
- In Canada, there are increased demands to put pressure on the punishments for criminals
- The media promotes crime in a very exaggerated manner, it makes it seem as if the crime rate is going up by what they report, however, the crime rate is actually decreasing

Example:

If an employee steals money from the company that he works for, the employer might not want to make the matter public so they deal with it privately and therefore it is never added to be calculated within the crime rate so the crime rate can be biased.

Stigma

- Criminals may be stigmatized by the criminal law. Because of this, they may have a hard time finding a job

Re-integration into society

- If I am incarcerated in Ottawa and my family resides here, they will be able to come and visit me because it will certainly help me with my re-integration into society

Canada's Sworn Oath

- In Nunavut if you commit a crime that warrants 2+ years, you must be sent to Ottawa to serve your jail time in a penitentiary because there are none available in Nunavut. There are no roads in Nunavut, you must fly to get around. The family will have a hard time going to visit the criminal in some cases and this poses a minor issue with the criminal's re-integration into society.
 - There are different implications in terms of how successful one story is over the other
- Negative consequences on relying too much on the law

Deterrence has 3 main principles:

1. The swiftness of the punishment
2. The severity of the punishment
3. The certainty of being caught

- For some crimes, the manner in which you address the problem rather than the severity in which you deal with it is more effective to deter the criminal

- Trust issues
- There are trust issues between :
 - The criminal
 - The victim
 - The justice system
- Sometimes a victim is afraid to pursue the criminal after the complaint is done because he/she does not feel that the justice system will do its job from protecting himself/herself from the harm the criminal caused

DVTO

- Someone commits a crime, you are charged, sometimes detained, and if you are guilty you get sentenced
- There used to be a therapeutic process for criminals in jail

A) The distinction between criminal offences and regulatory offenses

Both are disapproved by society and regulated by the two levels of government.

Regulatory offenses:

1. Class of misconduct in which the standard for proving culpability has been lowered.
2. Statutory offense and is not found in Common law.
3. Mens rea is not an element required or valid to help the accused.
4. Such offenses are used to deter potential offenders from dangerous behavior rather than to impose punishment for moral wrong-doing.
5. They fall in both jurisdiction of the Federal and Provincial.
6. Usual sanctions from these are; by paying fines.
7. Can be either a Strict Liability or Absolute Liability.
8. An Absolute Liability offense does not require due diligence or mens rea.
9. A Strict Liability offense requires due diligence as proof from the accused to show he/she took the required precautions/steps to avoid the misconduct.
10. ex: R. v. Sault Sainte Marie and R. v. Wholesale Travel Group.

Criminal offenses:

1. The prosecutor has to prove actus rea, (the element of proof that the crime was enacted by the prosecuted offender) and has to prove mens rea, (the element of guilt, mens rea defines the intention to commit the act).
2. The Criminal Code contains laws regarding criminal offenses.
3. Criminal offenses are regulated by the Federal government under section 91(27) of the Constitution of Canada.

4. Usual sanctions for crimes are; Imprisonment or sentence to prison for life.
 5. Criminal Law is a punitive response to a perceived problem a necessary evil to stop the threat of violence, disorder and danger.
 6. Criminal Law rests on the notion of attributing personal responsibility for the crime.
7. R. v. Wholesale Travel Group, [1991] 3 S.C.R. 15 (optional)
 8. In this case, a travel agency was charged with false advertisement. The agency advertised vacations at “wholesale” price but the wholesale price was not accurate so how truthful were they actually being in their advertisements?
 9. Competition Act Section 361)a)
 - The distinction between a criminal offence and a regulatory offence is extensively referred to in R v St. Marie (required reading)

Criminal Offences:

- Full “mens rea” vs absolute liability offences
- Strict liability is always a regulatory offence (no mens rea no negligence proof)
- It is opened to defendant to be acquitted by proving on a balance of probabilities that all due care was taken into consideration when the offender tried to avoid the accident.

Example

- Fisherie company:
- They mine mika
- Acts that regulate the tailing ponds
- They need to be maintained and they didn’t maintain them therefore they polluted the water and they were charged
- The company had a defence by saying that they did everything reasonable to avoid the situation
- If the court is satisfied by their defence of due diligence, then the court may acquit them
- Due diligence is not for criminal offences it is only for regulatory offences
- Criminal acts are so against our values that they are universally considered prohibited
- Imagine if we had no stop signs or speed limits to regulate our conduct then we would have to bear more danger
- Food
- Imagine there were no laws regulating the packaging of food
- Like having mandatory expiry dates
- If it wasn’t required, it would be a public health concern
- Objective of regulatory legislation:
- Is to protect the broad segments of the public (employees, consumers, motorists, etc.) from adverse effects from otherwise unlawful activity
- Criminal offences are usually designed to condemn and punish wrongful acts versus regulatory offences which try to prevent from future harm
- Crimes/Regulatory offences
- Two different concepts of fault

- Regulatory: not consequence itself but consequences of the conduct lesser degree of culpability
 - Regulatory offences are regulated by the government
 - Example in the automobile act it states that every driver needs to hold a valid driver's license
 - You must follow conditions
 - Theft is theft
 - Even if you steal a pack of gum it is considered a crime
 - Regulatory
 - Both the federal and the provincial government can create laws regulating regulatory offences
 - Crimes
 - Only federal can create the statutory laws
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- Common law has long known the distinction between criminal law and regulatory offences
 - The supreme court dealt with that issue
 - There's a wide category of offences created by statutes (laws) which are created for the general regulation of laws in the interest of health and safety and general well-being of the public
 - If you commit an assault, no matter in which context, it is a crime.
 - The crown has to prove the actus reus and the mens rea for a crime to be considered a crime
 - Accidents negate mens rea
 - ALWAYS actus reus and mens rea whereas for regulatory offences, the crown does not have to prove mens rea
 - Example
 - Speeding
 - Not a criminal offence to go 110km/50km
 - All the crown has to prove is that you were going 110km
 - Section 249

B) The existence of criminal offenses and corresponding sanctions - the necessity to protect society.

- The more practical approach taken by parliament and courts to protect interest of the public
- Section 266
- Consent is a defence to assault
- Section 265
- Assault
- If two people consent to fight, then you can fight and you can be charged for the fight and you can use consent as your defence.

- However, if one person kills or seriously wounds the other during a fight they both consented to, then your consent is vitiated, unavailable, disappeared
- If you take your hockey stick and hit another player, there is no consent. However, if they were to both remove their gloves to fight, it would be considered consent

Example of Jubidon

- SCC said that if two people consent to a fight (consent to force causing serious bodily harm) and during this fight one person gets killed, the consent is vitiated.

- R. c. Cuerrier, [1998] 2 S.C.R. 371
- British Columbia
- 2 counts of aggravated assault (268 CCr)
- Explicitly been instructed by a public health nurse, he was HIV positive and was supposed to let the person know before unprotected sex with
- He had sex with two complainants
- They consented to unprotected sex
- Had they known, they wouldn't have had unprotected sex
- Neither complainant was HIV positive
- SCC heard the case
- Majority of 4 judges allowed the appeal and granted a new trial
- The court said that to prove the defence of aggravated assault the person must prove that:

1) the lives of the complainants were endangered by the act (in this case unprotected sex) and

2) If you don't know what you are consenting too, then it is not valid consent

- Not telling a person before sex you are HIV positive is a type of fraud
- Criteria: would a reasonable person would find this act to be dishonest (not to disclose your HIV status or to lie about it)
- The fraud required to vitiate consent must carry with it the risk of HIV infection but also other STDs
- The court added that the criminal law has a duty to protect people from HIV positive people
- Failure to disclose HIV can constitute fraud vitiating consent of sexual intercourse
- Operative offence is the aggravated sexual assault
- Section 273: aggravated sexual assault
- Two elements have to be present for HIV non-disclosure to not be considered fraud or aggravated sexual assault:
- 1) the viral load has to be low; and
- 2) the use of a condom
- These two can negate (to nullify or cause ineffective) the criminal charges

- How criminal law adapted to the circumstances is shown in this case and in Mobior
- R. c. Marmo-Levine, [2003] 3 S.C.R. 571

C) Definition of criminal law as it relates to the separation of powers

Section 91 and 92 of the Constitution display the distribution of competences between legislative and provincial powers when dealing with criminal or regulatory offenses.

Section 91 holds the Parliaments jurisdictions whereas 92 holds the Provincial jurisdictions.

The criteria supporting the exercise of federal powers (the courts created these criteria)

Example:

- Can't drive impaired
- There must be a sanction attached otherwise it is not a criminal act
- Intra-vires (within the authority of the provincial legislature)
- Ultra-vires (outside the authority of the provincial legislature)

- 1) Federal government has vast jurisdiction to adopt criminal laws
- 2) The law in question must provide a prohibition along with a criminal sanction
- 3) The law in question must have a legitimate public objective or aim to counter a potential harm against public health (which includes consideration of public peace, order, security, health and morality)
- 4) The law in question must not infringe upon a provincial area of jurisdiction

- Reference re Firearms Act (Can.), 2000 CSC 31, [2000] 1 S.C.R. 783
- R.J.R MacDonal v. Canada (Procureur général), [1995] 3 S.C.R. 199
- Legislation adopted by parliament
- The question was whether the statute in question was lawfully made by the federal government (in other words did the parliament have a right to create this statutory law)
- The issues being addressed is that tobacco can kill (detrimental effects to people) and therefore the question is whether it falls under criminal law or not
- The Act broadly prohibited the advertising of tobacco to solicit clients and they are not allowed to sell them without warnings on the packs that introduce possible health risks of smoking by:

- 1) advertising
- 2) promoting
- 3) labeling (hazardous notices on the packs of cigarettes)

- Court entitled in a pith and substance scenario to distinguish extrinsic evidence. It was a valid exercise from the parliament with respect to tobacco because it benefits the public's health
- The parliament even reserved their right to completely eliminate tobacco from the market because it raised a great public health issue
- For the court it logically followed that the parliament had the jurisdiction to create an act prohibiting tobacco sale without the warning signs publicized on the product itself because it raised a question of health for the public altogether
- Important criteria (general application in any situation this tobacco one is just an example)
 - Does the act or omission provide a prohibition?
 - It has to provide a sanction or consequence for the offence
 - It must have a legitimate public person aimed at countering a potential harm
 - The legislation that is being challenged cannot be disguised as a way of legislating in a field that would normally be in the jurisdiction of the province
 - Sometimes a federal statute will create an offence that parliament considers criminal but it touches upon an area that fall within the list where it confers the power on provinces to create legislation on that matter
 - If the intrusion or overlap of federal law into the provincial is not so excessive as to upset the balance of federalism then it will be deemed valid
 - Example of invalid
 - Proposed securities act (provincial) the parliament wanted to play a role in the securities act to create a set of uniform rules that would govern all the citizens of the country. The pith and substance of the securities act belonged to the jurisdiction of the provinces and not the federal government and therefore this will not be able to happen.
- You have to classify the pith and substance (the essential character) under either 91(27) or 92(14)
- Sections 91(27), 92(14) and 92(15) Constitution Act of 1867 (on exam for sure)
- Section 91(27) Constitution Act : confers the power to the parliament to have exclusive jurisdiction in creating criminal laws (exclusive power)
- Section 91(27) : is why we only have one criminal code that governs all of Canada
- Section 92 : provides a list of all the areas that the provinces can legislate
- Mark Lapin: mass murder of many women at Polytechnic. This lead to the enactment of the firearms legislation act.
- Alberta vs SCC
- Is gun control to be under the parliament (criminal law) or provincial (property and civil rights)
- The test is the pith and substance
- What is the main purpose why the gun control act was created?
- It was created to prevent criminal acts, and therefore its pit and substance resides under the criminal jurisdiction and therefore making it federal
- Two step analysis:
- The pit and substance the essential character of the law

- Two: to classify the essential character (enhancing public safety) it falls under criminal 91(27) constitution act

The criteria supporting the exercise of federal powers

1. Federal government has vast jurisdiction to adopt criminal laws:
2. The law in question must provide a prohibition along with a criminal sanction
3. The law in question must have a legitimate public objective or aim to counter a potential harm against public health (which includes consideration of public peace, order, security, health and morality)
4. The law in question must not infringe upon a provincial area of jurisdiction

- **Reference re Firearms Act (Can.) , 2000 CSC 31, [2000] 1 S.C.R. 783**

In 1995, Parliament amended the *Criminal Code* by enacting the *Firearms Act*. The amendments require the holders of all firearms to obtain licences and register their guns. Alberta referred constitutional questions to the Court of Appeal to determine whether the licensing and registration provisions of the *Firearms Act*, as they relate to ordinary firearms, are *intra vires* Parliament. The majority of the Court of Appeal concluded that the Act is a valid exercise of Parliament's criminal law power. Alberta appealed to this Court.

Held: The appeal should be dismissed. The impugned provisions of the *Firearms Act* are constitutional.

The *Firearms Act* constitutes a valid exercise of Parliament's jurisdiction over criminal law. The Act in "pith and substance" is directed to enhancing public safety by controlling access to firearms. Its purpose is to deter the misuse of firearms, control those given access to guns, and control specific types of weapons. It is aimed at a number of "mischiefs", including the illegal trade in guns, both within Canada and across the border with the United States, and the link between guns and violent crime, suicide, and accidental deaths. The purpose of the *Firearms Act* conforms to the historical public safety focus of all gun control laws. The changes introduced by the Act represent a limited expansion of the pre-existing gun control legislation. The effects of the Act also suggest that its essence is the promotion of public safety. The criteria for acquiring a licence are concerned with safety. Criminal record checks

and background investigations are designed to keep guns out of the hands of those incapable of using them safely. Safety courses ensure that gun owners are qualified.

The *Firearms Act* possesses all three criteria required for a criminal law. Gun control has traditionally been considered valid criminal law because guns are dangerous and pose a risk to public safety. The regulation of guns as dangerous products is a valid purpose within the criminal law power. That purpose is connected to prohibitions backed by penalties. The *Firearms Act* is not essentially regulatory legislation. The Act's complexity does not necessarily detract from its criminal nature. Nor does the law give either the chief firearms officer or the Registrar undue discretion. The offences are clearly defined in the Act. The chief firearms officer and the Registrar are explicitly subject to the supervision of the courts. Further, the law's prohibitions and penalties are not regulatory in nature. They are not confined to ensuring compliance with a scheme, but independently serve the purpose of public safety. Parliament's intention was not to regulate property, but to ensure that only those who prove themselves qualified to hold a licence are permitted to possess firearms of any sort. Finally, Parliament may use indirect means to further the end of public safety.

The 1995 gun control scheme is distinguishable from existing provincial property regulation schemes. The Act addresses the aspects of gun control which relate to the dangerous nature of firearms and the need to reduce misuse. While ordinary guns are often used for lawful purposes, they are also used for crime and suicide, and cause accidental death and injury. Their control accordingly falls within the criminal law power.

The registration provisions cannot be severed from the rest of the Act. The licensing provisions require everyone who possesses a gun to be licensed; the registration provisions require all guns to be registered. These portions of the *Firearms Act* are both tightly linked to Parliament's goal of promoting safety by reducing the misuse of any and all firearms. Both portions are integral and necessary to the operation of the scheme.

The *Firearms Act* does not trench on provincial powers such that upholding it as criminal law will upset the balance of federalism. The provinces have not established that the effects of the Act on provincial jurisdiction over property and civil rights are more than incidental. First, the mere fact that guns are property does not suffice to show that a gun control law is in pith and substance a provincial matter. Second, the Act does not significantly hinder the ability of the provinces to regulate the property and civil rights aspects of guns. Third, assuming (without deciding) that the provincial legislatures have the jurisdiction to enact a law in relation to the property aspects of firearms, the double aspect doctrine permits Parliament to address the safety aspects of ordinary firearms. Fourth, the *Firearms Act* does not precipitate the federal government's entry into a new field since gun control has been the subject of federal law since Confederation. There is no colourable intrusion into provincial jurisdiction.

The problems associated with the misuse of firearms are firmly grounded in morality. However, even if gun control did not involve morality, it could still fall under the federal criminal law power. Parliament can use the criminal law to prohibit activities which have little relation to public morality.

The apprehensions of northern, rural and aboriginal Canadians that this law does not address their particular needs do not go to the question of Parliament's jurisdiction to enact the law. The cost of the program and the efficacy of the law, or lack thereof, are equally irrelevant to Parliament's ability to enact it under the division of powers analysis. Within its constitutional sphere, Parliament is the judge of whether a measure is likely to achieve its intended purpose.

Wednesday 18th September 2013

McDonald decision, criteria that supports the exercise of several powers of section 91 and 92 and where the federal parliament gets its authority to legislate criminal law persistent to section 91 and 92. We went over Firearm Act and McDonald vs. Canada. I was trying to define the Criminal law and its relation to the separation of powers. First and far most question that the

Supreme Court of Canada had to address, in that particular decision whether the statute being questioned which is Tobacco products control act constituted around the exercise of criminal law and therefore intraveres to the federal government authorities. So we are going to continue briefly explain that but I thought of starting off with the why it is important the separation of powers. Let's say hypothetically we are l'Assemblée National of Ontario and we are legislating because of a particular drug problem. There is a new drug problem in our province which is not covered by the federal act and so but it is pressing for the Ontario legislator or Assemblée National and the government wants to let the provincial level legislate it and make it an issue as a criminal offence and make a law against its use, sale, possession and distribution. So we make the law and the police applies the law then let's say they arrest someone in possession of this particular drug, and they lay a charge. The charge will include the evidence, such as "On this date, the person charged was found in possession of this particular drug which is against the provincial statute. The person charged appears in court with his/her lawyer. The way this would play out is that the provincial legislator by in-acting that provision or that particular act created a criminal offence. And well that provincial legislator doesn't have the constitutional authority to create a criminal offence. They would challenge the constitutionality of this provision in court. The attorney general would come take a position and the way it would play out is that there would be arguments presented on both sides. Defence council arguing that the act or particular provision is ultra-vires to the jurisdiction of the provincial legislator to in-act such a legislation because it addresses a criminal law issue and on the government side depending on the position they take they would claim or make an argument. And that's where the argument regarding the pith and substance would be made in deciding where this act, this statute is or provision is it trying to address. Is it one under criminal law, is it truly a criminal offence being created. Or is an issue under section 92 which holds the areas of competences for the provincial legislator. At the end after determining what the pith and substance of the act is as we discussed last week, the court would then decide well in the 91 or 92 areas of jurisdiction. 91 belonging to Parliament, 92 belonging to provincial depending where the court concludes that this provision or this act. They would either declare it intra-vires (within the authority) of the particular legislator that in acted that provision or ultra-vires. So that's the example I wanted to give you. If the Court decides it is intraveres, then the provincial legislator would be able to perform this provision. If the Court decides it is ultra-vires, then the act of the provincial legislator would be unconstitutional and the charges would be dropped. The case would end there.

Coming back to the McDonald decision, to section 91 subparagraph 27 of the Constitution act of 1867. And I'm going to repeat this because it is important. Probably be in assignments or exams. It infers on parliament and the power to legislate in criminal law. Sec 91-27 confers on Parliament, the exclusive powers to legislate on criminal law. The Supreme Court of Canada has always defined on that particular section. So 91-27, must be read as a signing, a giving to the exclusive jurisdiction of the Parliament in criminal law in the widest sense of terms. So That's how the Supreme Court of Canada has approached to interpret it. In the McDonald decision, we are talking about advertisement, not arm and robbery, looking at the pift and substance of the act. The purpose he was trying to reach and had to be a valid exercise. It had to be a broad definition, had it been a narrow one the decision would have been different. In this particular decision in the McDonald case, the Court determines that the body of evidence that the detrimental effect of tobacco on health were both dramatic and serious. So the seriousness of the issue addressed, can the Parliament validly employ that Criminal law can prohibit tobacco manufacturers from inducing and producing these products. And to increase public awareness

of the effects of the usage of tobacco. That's what the ad was trying to do. The body of evidence displays the detrimental health effects of tobacco is dramatic and even death. So the question is, can the Parliament validly employ a criminal law to prohibit tobacco manufacturers from advertisement, and to make sure that all these hazards notices would be put on the packets. So the court added that the Parliament could do so and validly prohibit the manufacture and sale of tobacco products under criminal law.

The Parliament could prohibit the production, sell and manufacture of tobacco products under criminal law. Once it was accepted, the provision was legislated under the authority of the Parliament. Because it had a criminal public purpose by protecting Canadians from the harm of tobacco. What I want to underline, whether an act is a valid exercise by the Parliament criminal law power. You must look at the criteria of this offence, which must provide a sanction or a consequence, a prohibition, must have a legitimate public purpose that aims at countering a potential harm in society. One other element that the Court has also applied or considered is that the legislation that's being challenged, cannot however be culpable as disguised as a way of legislating in a field that would normally be in the jurisdiction of the provinces.

D) The definition of criminal law in relation to the protection against double jeopardy (Section 11 h) of the Canadian Charter of Rights and Freedoms) R v. Shubley [1990] 1 S.C.R 3

Protection against double jeopardy is a procedural defence that forbids a defendant from being tried again on the same or similar charges following a legitimate acquittal or conviction. In common law countries, a defendant may enter a peremptory plea meaning the defendant has been acquitted or convicted of the same offence. In Canada, the guarantee against being "twice put in jeopardy" is a constitutional right. The Canadian Charter of Right and Freedom includes provisions such as section 11 H prohibiting double jeopardy. "Any person charged with an offence has the right if finally acquitted for the offence not to be tried for it again and if found guilty and punished for the offence not to be tried or punished for it again."

Let's say someone commits murder and is acquitted. The Crown goes through the appeal process and the Court says appeal not granted. Then they go through the Supreme Court and says appeal denied. Then five years later, a piece of evidence comes to life giving full proof of the murder and slam dunks the case. However the person will not be charged for murder because he is protected by section 11 H of the Charter of Rights and Freedom. If it was a different crime, then he would be charged.

Nevertheless, if new evidence showed up proving innocence then you can go through court again to prove your innocence. But being tried again as guilty is against your constitutional rights under section 11 H of the Canadian Charter of Rights and Freedom. There is a fundamental fairness that cannot be ignored.

R. v. Shubley was an inmate in the metropolitan Toronto west protection centre. On April 19, he allegedly assaulted another inmate. The next day he was brought in by his supervisor and revised his misconduct. The assaulted inmate confirmed Shubley's action and that the assault did occur. So the warrant sanctioned Shubley in a solitary confinement for five days with a restricted diet. A year later, the assaulted inmate plaid a complaint at the result of which Shubley was charged with assault causing bodily harm contrary to the Criminal Code. Shubley appeared for his trial, and after arrangement his counsel moved to state the proceedings on the indictment on the ground that a trial would violate his rights in regards to section 11H of the CCRF to be punished twice for the same case. The court of appeal reversed the decision, ruling that the prosecution of the Criminal Code didn't violate 11 H. Shubley went to the Supreme Court of Canada. So that's how not obvious it is. So the other provision relied on was section 29 of the regulation 649 under the ministry of correctional services action. So that was a provincial statute "Where an inmate that alleged at committed a misconduct that also constitutes an indictable offence under a Criminal Code under an act of Parliament. The super intendant shall consult with a crown attorney whether the case should be dealt with by the Crown Attorney under the criminal law or by the super intendant as a matter of internal discipline. 2- where the prosecution is commanded by the Crown attorney all internal discipline against the inmate related to the misconduct shall be discontinued.

The questions raised about Shubley's case:

1. Whether there had been a violation of section 11(h) of the Canadian Charter of Rights and Freedom, by reason of the disciplinary being contemplated on the grounds that Shubley was being charged for the same assault and tried later again with a Criminal Code.
2. Whether regulation 649, precludes or prevents proceeding with a criminal code prosecution.

The reasons for the Courts decisions:

*The Supreme Court included the appeal should be dismissed. An offense called under section 11(h) of the Charter by their very nature Criminal or if the punishment invoked involved the imposition of true penal consequences.

Section 11(h) provides protection on duplication proceedings, it does not preclude to different proceedings of one Criminal and one not Criminal. The appellant consequence is of breach of discipline. So the prison disciplinary proceedings were not by its very nature not criminal, its purpose was to meet order. It lacked criminal proceeding on a public criminal offense. If he appellant was called upon twice to be put again in court for the same act, section 11(h) of Canadian Charter of Rights and Freedom applies. A true penal consequence would be imprisonment, or fine, hence the sanction provided by the law.

2. Historical aspects

J. H. Baker, An Introduction to English Legal History, 2nd edition, London, Butterworths, 1979

A) The Penal Process: from a vindictive system to a penal system based on the King's justice

- As of 1670, order of the king set the procedure to find someone guilty and to impose punishment
- 1673 lieutenant general
- Montreal, trois-rivieres and one in Quebec
- During this period, when someone was arrested or placed in jail, they would go before the lieutenant general
- The king decided what would be permitted and what would not
- Institutions were implemented in the colony
- The matters proceeded in the name of the king as though he was the victim
- In French criminal law, the accused was presumed guilty until he proved his own innocence
- The process up until guilty was not transparent at all but the punishment aspects of it were very public

B) Punishment

- The severity of the punishment was based on the person and the social class
- Types of punishments that varied
 1. Whipping
 2. Banishment
 3. Capital punishment (death sentence)
 4. Jail
- Criminal justice in new France focused on insuring suffering in chains, the goal being that this would deter others from committing similar offences
- In 1760s when the English conquered new France, the British common law applied
- Brought Habeas Corpus (custody is unwarranted, jail is unwarranted)
- The trial process was much more public
- Trials before jury became possible
- The accused was presumed innocent until the opposite was established
- The crown now had the onus of proving the guilty beyond a reasonable doubt
- Representation by a lawyer
- Officially, it was the Royal Proclamation of 1763 that implemented the British criminal law and including new France
- Over a decade later, the Quebec Act that criminal justice system would continue to apply in Quebec
- When it came to punishment, it was severe
- 50 offences warranted hanging as an option for punishment
- Later, 200 offences were warranted death sentence for punishment

C) The Arrival of Criminal Law in New France and in Quebec

- At a political level, there was a contemplation about the punishments being given
- In the 1830s an imposing prison was built (the Kingston penitentiary) it was revolutionary at the time because of its perceived focus at rehabilitation

- Prisoners would work all day in silence and hard and they could not smile and they could get whipped
- 1850s reform schools started to appear to punish young offenders with a focus on rehabilitation rather than punishment
- Children as old as 7 years would be treated the same as adults (before the reform schools)
- Different types of institutions were created (hard-core criminal jail or minor offence jails)

D) Codification and the Criminal Code of 1892

- John A Macdonald said it was important that everyone across the country follow the same criminal law system
- Provincial and municipal government could create offences as well that related to criminal laws
- BNA act constitutionalized the powers under sections 91(27) and 92(14)

Example

Someone is charged with assault they go to provincial court, the judge sentenced the person to probation, and the accused has to wait because he has to sign documents all the judges and the officials are appointed by the provincial government

- This led to a more humane approach rather than barbaric sanctions existing many years ago

E) The Historical Characteristics of Canadian Criminal Law

- 1976 death penalty was abolished by parliament and replaced by life in prison without eligibility of parole for 25 years
- 1867-1976 15 hundred people were sentenced to death in Canada and a little over half were executed by hanging
- Treatment of criminals became so harsh that it was against the rehabilitation
- 1934 archambault commission
- In 1938 commission stressed the importance of a good rehabilitation program
- Between 1950-1970 other commission that were ordered
- Fauteux report in 76 severely criticised the
- 1968 Ouimetted report of such prisons not favoring rehab causes more harm than good
- 1982 further change with the young offenders act (3 years maximum) youth can be sentenced to (12yrs-18yrs)

- Multi-dimensional system because of therapeutic court (community wellness court process)
- Yukon: wellness court in the Yukon, its multi-disciplined in addressing criminal conduct
- 1982 Constitution was repatriated from the UK and became our own constitution
- The charter is part of the constitution of Canada

3. The Legality Principle

A) The theory of sources

- Sources as it relates to:
 1. The constitution
 2. The law (statutes)
 3. The common law (jurisprudence and decisions of our court)
 4. Ratio-decendendi: the clenching element, the core reason behind the decision, and the reason for the outcome of the decision

* R. Grondin, Les source du droit pénal et leur traitement

- a) The Canadian Charter is the supreme law of the land
 - Section 1 and 52 of Canadian Constitution

- Section 52 Constitution
- Constitution is the supreme law of Canada
- Constitution defined under 52(2) Canada Act of 1982, the acts and order in the schedules, the amendments in the schedules, etc.
- First source: The constitution (principal source)
 - charter creates rights and freedoms and protects them against any violation from the state or agent of the state
 - Example where the charter does not apply
 - Someone gets arrested and gets held by the staff from the store for the theft of something
 - This person if they don't read you your lawyer rights are not breaching anything from the charter
 - They can search you and it is not a breach under unreasonable search and seizure
 - They are not an agent of the state
- Second source: Statutory law (trumps jurisprudence or common law)
 - Criminal code of Canada
 - Criminal offences always have their source in statutory law (they always have to be created by criminal law)
 - 742.1 criminal code (imposing a conditional sentence, gave way to let criminals serve their sentences in the community rather than in jail)
- Third source: Jurisprudence in common law

- Source to illustrate and provides the interpretation that the courts gave to criminal law
- Continues to apply in so long as not changed by statutes or other decisions
- If a statute amends a common law defence (jurisprudence) then the statute will trump common law
- Additional sources of criminal law
- Doctrine
- Scientific or sociological research papers introduced in evidence
- Obiter-dicta: comments or secondary reasons or considerations found in court decisions that can be relevant in the future (said in passing)

Wednesday 25th September 2013

In respect of section 52 of the Constitution states that any law or provision not conform with the Constitution is of no effect or force.

The first source of Criminal Law, The Constitution, including section 52 and the Canadian Charter. The second source which is the statutory law and the third source is common law or jurisprudence. The supplementary sources would be doctrines, research papers and obiter dicta.

*- R. v. Oakes, [1986] 1 S.C.R. 103 (R. v. Oakes)

- Example of a Theft

A theft in more legal terms is the fraudulent taking of something that belongs to somebody else. Example Joe has presumed sanity and he takes dishonestly (he knows it isn't his and doesn't have the owner's permission) Victor's motorcycle, the test applied to this qualification exercise is:

1. First premise: Section 322 of the Criminal Code
2. Second premise: you take the facts and you connect it to the law prohibiting this act
3. Third premise: is that Joe has committed theft
 - The courts apply this fluently
 - Example
 - Joe took dishonestly someone else's information without that person's consent and where he was not authorized
 - First premise: Section 322 says that theft is defined by taking ANYTHING.
 - Concept of objects: objects related to intellectual objects are NOT part of section 322 (1) and (2) and since Joe did not take an object he did not necessarily commit a theft
 - In the end the rule of law applicable in this case derives from a decision from the Supreme Court of Canada (Stewart) they had interpreted statute law [1988]
 - Charter is the basis of Criminal Law (The Constitution is the Supreme Law of the Land and nothing trumps it)
 - The Constitution is PARAMOUNT
 - Section 52(1) is what entitles the Constitution to trump all other laws
 - Section 1 gives value and gives validity to the Statutory Law

- The Canadian charter guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society
- Section 52 of the constitution gives courts the power to say that anything that goes against the charter is not valid and when applying section 52 the court has some options:
 1. Can strike out the sections of the law that violate the charter
 2. It can interpret the law narrowly so that it fits the charter rights
 3. It can declare that you are not covered by the law that violates your charter rights
- The charter ensures a number of important human rights and freedoms and under section 1, those rights are guaranteed except for reasonable limits prescribed by law in so long as it can demonstrably justifiable in a free and democratic society
- The constitution is essential for Canada because we are a free and democratic society but at the same time those rights are NOT limitless
- The crucial issues is that any limit has to be reasonably justified in a free and democratic society
- Example
- If the Parliament passes a Statute Law that gives right to the police to search your home without a warrant, and they found drugs and you are charged and have to appear in court. Your lawyer is going to plead NOT guilty and they will challenge the constitutionality of the law. Section 8 of the Charter has been violated
- Section 1 would be the argument of the Crown and Section 1 has a test that you need to pass to establish if you can go against a Constitutional right because it is a reasonable limit in a free and democratic society
- The Oakes test:
 1. The objective must have a rational connection with the restrictions imposed on the right guaranteed by the Charter
 2. The restriction must minimally impair the Charter right
 3. The benefits of the restriction and its prejudicial effects should be proportional, there must be an overall balance.

He was convicted of unlawful possession of a Narcotic

Section 8 Of the Narcotic and Drug Controlled Act

Oakes argued the constitutionality from the law in the Narcotic act which stated that there was a presumption that if you had drugs you were automatically going to be charged, unless the accused can prove otherwise, with drug possession for the purpose of trafficking

There was a reverse Onus on the accused and the accused had to disprove his guilt

In the face of a charter right which is the presumption of innocent, the Courts held that the provision the Drug act went against 11d) of the charter

The SC agreed with Oakes and they said that Section 8 goes against a charter right and that the legal burden to prove on the balance of probabilities that he did intend to traffic is upon the Crown

The general rule is that any statute or law that goes against the constitution is under section 52 invalid and inoperable

b) The role of the Parliament, in the choice of criminal or penal policy, and the role of Judges and the necessary dialogue between the courts and Parliament

*- R. v. Jobidon, [1991] 2 R.C.S. 714 (on the exam)

Jules Jobidon was charged with manslaughter for unlawful act of killing Rodney Hagger

The incident started as a fist fight between the two men

Rodney had consumed beer, after the death it was calculated as twice the limit

Jobidon was a young and fit powerful man who also drank beer before the fight

The two men had started to fight in the hotel bar

Hagger was celebrating his impending marriage

Hagger was larger than Jobidon and was stronger

The trial judge agreed that the two men consented to the fact that the fight was not over

When Hagger's party left the hotel, Jobidon's older bro and Hagger's older bro started fighting and Jobidon and Hagger started fighting

Facing each other, Jobidon punched Hagger really hard on the face

He was knocked backwards on the hood of the car and he was rendered unconscious

After throwing the first punch, Jobidon continued hitting him who was unconscious (he hit him 4-6 times on the head)

There was no interval between Hagger's fall and Jobidon's punching

The fluid vent

Hagger died of severe contusions to the head that he had received by Jobidon

The trial judge found that he did not intend to kill him nor did he intend to cause the deceased serious bodily harm

Jobidon intentionally hit Hagger as hard as he could but that he believed that he was fighting fair

Jobidon believed that Hagger had consented to a fair fight the object of which one was to hit the other as hard as possible until one gets knocked out

Although Jobidon was mistaken; he thought that when Hagger fell he was not unconscious

Trial judge held that Hager's consent negated assault

The crown appealed the judge's finding

The CA substituted him with a guilty verdict on the charge of Manslaughter

Assault and manslaughter are connected by section 222 of the Cr. Code

Assault is unlawful (the fighting)

When assault is committed and the death is the result, manslaughter should be applied

The Code at section 8 (3) Common Law Rules

265 (3)

The common law is rich and extensive

For instance, it provided as a general rule that consent only be valid only if it's given freely by a rational and sober person

Section 14 nullifies consent to the infliction of death

No person can consent to death inflicted on him by whom the consent is given

Section 14 is absolute exclusion to consent in the event of death

How and to extent is consent limited:

On policy grounds (common law codifies what the definition of consent is and how far consent can go)

Common law ground will not affect the validity of free and enlightened consent

Avoids nullification of consent which only cause minor or trivial body harm

The bodily harm contemplated by the test is 267(2)

The law is made and the judge's role is to interpret, enforce and set limitations to what is acceptable and what is not

- R. v. Morgentaler, [1988] 1 R.C.S. 30

*- Reference regarding the Motor Vehicle Act (B.B.), [1985] 2 S.C.R. 486

Subsection (1) a person who drives a vehicle on the road while prohibited to do so commits an offence and is liable on a first conviction of fine and to imprisonment for not less than 7 days and not more than 6 months

Guilt is established by proof of driving and you learn about the fact that you aren't allowed to drive only when the cop stopped you

The SC said about the provision: provided for min periods of imprisonment when prohibited and provided that this offence was absolute liability

94 (2) of no force or effect as it was inconsistent with section 7 of the Charter

The SC dismissed the appeal and agreed with the Court of Appeal

convicting a person who has done nothing wrong is unconstitutional

Principles of fundamental justice

Most important part:

Absolute liability does not per se violate section 7 of the Charter an absolute liability violates section 7 only if and to the extent it has the privilege to deprive the person from their rights to liberty

The government wants to enact this legislation so they discuss policy and want to create this section 94 that provides that upon proof that you were driving if your license happens to be suspended you are guilty no matter what but before the legislator moves forward with that they ask for the court of appeal's opinion on it

The CA gave its opinion and it was appeal to the SCC

Absolute liability (court speaking to the legislator) does not violate section of the charter, it only violates only if and to the extent that it has the potential to deprive the person from life, liberty and security

Irrespective of the nature of the offence and can only be salvaged under section 1 that such deprivation be justified in a free and democratic society.

* - Reference regarding the Motor Vehicle Act (B.B.) , [1985] 2 S.C.R. 486

Wednesday 2nd October 2013

B) The legality principle

A) Punishment can only exist where authorized by statute

- Section 6, 8(3) and 9 of the Criminal Code.

• Section 6 of the Criminal Code, "Where an enactment creates an offence and authorizes a punishment to be imposed in respect of that offence; a person shall be deemed not to be guilty of the offence until he is convicted or discharged under 730 of the offence; and a person

who is convicted or discharged under section 730 of the offence is not liable to any punishment prescribed by this Act or by the enactment that creates the offence."

- Section 8 of the Criminal Code, "Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of Parliament except in so far they are altered by or are inconsistent with this Act or any other Act of Parliament."

- Section 9 of the Criminal Code, "Notwithstanding anything in this Act or any other Act, no person shall be convicted or discharged under section 730 (a) of an offence at common law."

- It was a criminal offence to touch with anything or any part of one's body for sexual purpose the body of someone under the age of 14 (sexual interference). This provided that even though there has been consent under the age of fourteen, consent is NOT a defense. A number of years later, Parliament decided that 14 years old is not old enough for the age of consent and therefore they wanted to raise the bar to 16. So they changed the code to less than 16 years of age for the same offence.

b) The non-retroactivity of criminal law: s. 11 of the CCRF

- If a person commits an act towards a young teen that is 14 years old and 3 months. The police investigate and prepare a report. Just before they finish preparing the report the law changes before the application for offence. The date of the offence was when the law was above 14 years for consent and therefore the law is not retro-active to an offence that was committed before the law changed. However, if the OFFENCE was committed after the law changed then the bar would be raised and the police would be able to bring the matter to court. (14 years for consent raised to 16 years old for consent)

- If a legislative provision is adopted, is considered substance rather than procedural in nature than it cannot be applied retro-actively.

- Parliament cannot adopt a law creating a new offence and state that it applies to any circumstance that occurred on or before the law the date was passed this would be unconstitutional according to 11(g) of the Charter.

11(G); The Charter protects you from the retroactive application of the law.

"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;". They could not be changed even if there was a change in law.

If Parliament adopts a new law, that comes to affect tomorrow but before that the police who wants to charge an offense committed last week ago with the new provision coming tomorrow, it cannot be done because under Criminal Law that it is unconstitutional.

For example: Under section 151 of the CC, " Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 16 years; a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 10 years and to a minimum punishment of imprisonment for a term of one year; or b) is guilty of an offence punishable on summary conviction and is liable to

imprisonment for a term of not more than 18 months and to a minimum punishment of imprisonment for a term of 90 days."

The RCMP cannot lay a person on a charge based on a law that just came in at the moment of act of commission or afterwards.

c) The accused has the right to benefit of the lesser punishment – section 11i) of the Canadian Charter

Similarly, a provision which creates new punishments for an offense that already exist cannot be affected on an offender of the past.

11(i); If found guilty of the offense and if the punishment for the offense has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Similarly,

A provision which creates new punishment for an offence that already exists cannot apply to an individual charged in the past 11(i)

Example

Let us say that today sexual interference provides no minimum but is punishable to a max of ten years and someone is charged with sexual interference today in two weeks parliament comes down and changes the punishment, the elements are the same and says from now, anyone who commits sexual interference is punishable for 3 years and mandatory minimum of 3 months. The person who was charged last week it will not apply to but the person who committed the offence after the law passed it will apply too.

Example

Parliament amends the criminal code in a matter that consent is no longer a defence against a charged assault. Section 265 is changed and the change states that proof of absence of consent is no longer required. Changed the elements of an offence and therefore it applies because it is substantive

If something changes the punishment or the offence or the availability of the defence, these are considered substantive issues as opposed to procedural issues

Example

The code provides that for impaired driving as it is the criminal code provides that the crown can prove the percentage of alcohol by producing a certificate and if certain conditions were met at the time the breathalyzer demand was made by the police officer than the crown at trial does not need the police officer to prove it they could just produce the certificate and it is considered proof of the percentage of alcohol at the time of driving even though the breathalyzer demand is made an hour later. The percentage indicated on the certificate replicates the amount he had at the time he was driving. Let us say the code was changed to say that before the crown can use this that they have to give a notice to defence counsel of a ten day notice that the crowns intent to use that documentary evidence, that would apply immediately. This is considered procedural and therefore it should apply right away.

The punishment applicable is always the punishment available at the time of the act of commission, not after the commission.

R. v. Robert Duple; A Quebec supervisor in the 90's charged with laundering money related to drug offenses committed by a former client of his. His client admitted that he committed those offenses when he was his lawyer. Money was given to Robert and he allegedly laundered that money. He was charged with provision 462.31 of the Criminal Code and 19.1 Narcotics Control Act; and transfer of drug money, that he received earlier that the enactment of that provision.

Section 462.31 of the Criminal Code; Laundering proceeds of crime, Every one commits an offence who uses, transfers the possession of, sends or delivers to any person or place, transports, transmits alters, disposes of or otherwise deals with, in any manner and by any otherwise deals with, in any manner and by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds, knowing or believing that all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of (a) the commission in Canada of an designated offence;"

Money from the client, happened before 462.31 and 19.1 came in force. In 1989, when the actions were going on, possession of money generated by that crime constituted an offense according to 354 of the Criminal Code (Illegal money).

Section 354 of the Criminal Code; Every one commits an offence who has in his possession any property or thing or any proceeds of any property or thing knowing that all part of the property or thing or of the proceeds was obtained by or derived directly or indirectly from (a) the commission in Canada of an offence punishable by indictment; or (b) an act or omission anywhere that,..."

So in 89' such an offense was laundering of proceeds of crime. Defense tried to argue that the charge he was being accused of was before the law was enacted. ... Protection from retro-activity.

Ex: parliament would amend the criminal code; consent is no longer a defense in... . Change to 265, proof of consent is no longer demanded. In those circumstances, that would only apply to cases after the law is enacted

d) Ignorance of the law is no excuse (s. 19 Criminal Code)

Section 19: "Ignorance of the law by a person who commits an offense is not an excuse for committing that offense."

That's true for criminal offenses and regulatory offenses. "I didn't know that driving above a 110km/h was an offense." Too bad! "I know that my friend stole this gift he gave me, but I didn't know it was illegal to have possession of a stolen object." Too bad!

- Ignorance of the law is no excuse as to why a criminal offence was committed.
- Ignorance of the law is NOT a defense.

Example

Someone received a gift from friend that he knew he stole and he doesn't know it was an offence to be in possession of something stolen even though he did not steal it and you knew it was stolen then you are guilty. Whether you know it was an offence to the law is irrelevant.

4. The officials involved in the criminal justice system 30.00

A) Discretion, an essential element of our system of justice

- R. v. Beare; R. c. Higgins, [1988] 2 S.C.R. 387

- Served with an appearance notice for a break and entering
- Identification of Criminals act
- If a person failed to appear in court as required by the notice for the fingerprint a warrant can be charged for the person's arrest and a person who failed to comply with a summons, is also susceptible to legal sanctions
- Mr. Beare went to the office as required and he challenged that requiring suggesting it was a violation of a charter right and the outcome on appeal concerned the court that the legislation in question
- Failed to keep in mind the purpose of fingerprints
- What the Supreme Court had to say about discretion:

Constitutional law Charter of Rights Right to liberty Fingerprinting after person charged but prior to conviction Whether or not right to liberty infringed Whether or not principles of fundamental justice infringed If section 7 infringed, whether or not infringement justified under s. 1 Canadian Charter of Rights and Freedoms, ss. 1, 7, 8, 9, 10, 11(c), (d) Constitution Act, 1982, s. 52(1) Criminal Code, R.S.C. 1970, c. C 34, ss. 453.3(3), 455.5(5) Identification of Criminals Act, R.S.C. 1970, c. I 1, s. 2.

Criminal law Fingerprinting after person charged but prior to conviction Whether or not right to liberty infringed Whether or not principles of fundamental justice infringed if section 7 infringed, whether or not infringement justified under s. 1.

Respondents Beare and Higgins were charged with separate criminal offences and were served respectively with an appearance notice and a summons requiring attendance at R.C.M.P. offices to be fingerprinted under the Identification of Criminals Act. Section 2 of that Act provided for the fingerprinting of a person in lawful custody and ss. 453.3(3) and 455.5(5) of the Criminal Code required an appearance and deemed a person so appearing to be in lawful custody charged with an indictable offence. Neither respondent attended at the R.C.M.P. offices as required. The requirement that appearances be made for fingerprinting following charge but before conviction was unsuccessfully challenged on separate motions but the appeals, which were heard together, were allowed. The constitutional questions before this Court queried whether or not s. 2 of the Identification of Criminals Act and ss. 453.3(3) or s. 455.5(5) of the Criminal Code, to the extent that they provided for the fingerprinting of a person charged with but not convicted of an indictable offence, infringed s. 7 of the Charter, and if so, whether or not such infringement was justified by s. 1. Sections 8, 9, 10 and 11(c) and (d) of the Charter were also relied on.

Held: The appeal should be allowed. The first constitutional question should be answered in the negative in respect of each case; it was not necessary to consider the second.

Fingerprinting, while an invaluable tool of criminal investigation, serves a wide variety of purposes not all confined to the criminal justice system and the judicial process. Sections 453.3(3) and 455.5(5) are not simple expansions of the authority to take fingerprints and photographs but rather integral parts of a larger scheme aimed at reducing the number of persons who are arrested and taken into custody.

The impugned provisions infringe the rights guaranteed by s. 7 because they require a person to appear at a specific time and place and oblige that person to go through an identification process on pain of imprisonment for failure to comply. The infringement of these rights, however, does not violate the principles of fundamental justice for the process does not unduly invade the rights of the accused. A sense of proportion is necessary in considering the matter.

Subjecting a person charged to fingerprinting procedures does not violate the principles of fundamental justice, there being reasonable and probable grounds to believe a person has committed an offence. Any indignity attached to having one's fingerprints taken is much less than the stigma attached to many ordinary aspects of law enforcement in relation to persons in custody charged with an offence. The common law experience and legislative practice both indicate that custodial fingerprinting has not been considered fundamentally unfair. Here, the respondents, while not in custody, should be treated as being in the same position with respect

to fingerprinting as a person in custody. Prior to the Bail Reform Act, they could have been arrested on reasonable and probable grounds that they had committed the offences charged.

The impugned provisions did not violate the principles of fundamental justice through arbitrariness or any violation of respondents' privacy. The legislation was not arbitrary in its scope and did not create an arbitrary or irrational statutory scheme. Discretion, including the police discretion to fingerprint or not, is an essential, judicially recognized feature of the criminal justice system. The requirements necessary to issue and confirm an appearance notice offer a sufficient safeguard to meet the requirements of fundamental justice. A person who is charged on reasonable and probable grounds with having committed a serious crime must expect a significant loss of personal privacy incidental to his being taken into custody.

The issue of the retention of the fingerprints of an accused who was not convicted did not arise here because respondents' fingerprints were never taken.

Sections 8, 9, 10, 11(c) and (d) of the Charter were not violated. Section 8 guarantees the right to be secure against unreasonable search and seizure and s. 9 gives the right not to be arbitrarily detained or imprisoned. Neither section was breached for the reasons like those given with respect to s. 7. Section 10 (the right to counsel) and s. 11(c) (the guarantee against accused persons being witnesses against themselves) were not applicable here. Section 11(d) (the guarantee to a fair trial) could not be breached if the fingerprints used as evidence were taken in a manner consistent with fundamental justice.

It was not necessary to consider s. 1 of the Charter.

B) The police officer

a) The organization of police forces in Canada

- The R.C.M.P. Act L. R. 1985, ch. R-10 (our national police force)

- Under the RCMP act, section 3 and 4 creates the national police force and that it may exist and operate in or outside of Canada. Section 9 states that an RCMP officer is an officer in every part of Canada and has all the protections that a police officer has by law.

- As for duties, the section 18 creates the duties of the RCMP members

- La Loi sur la police, L.R.Q. P-13.1

b) The role of the police officer in the Canadian justice system

i) The investigation (methods, target/suspects, charges)

- Mostly done for the public
- Its invisible because we don't see the police doing the investigations
- They have a duty to investigate

- Starts with a complaint usually by the victim or by a citizen or a family or a friend or a store owner who has the shoplifter in custody, it could be a daycare provider who in the course of their duties blurt out something about a crime, it can follow a call to the police from a call from a person who found a body in a wooded area
- The urgency with which they investigate and the resources they have are limited so they will dedicate themselves to the more serious case (example of bike stolen over child kidnapped)
- By analogy, police duties to investigate crime flows from a complaint or a triggering event which leads to the work to discover a piece of event or puzzle that will allow you to know who committed the crime
- There could be a public inquiry where they hold public hearings where the public can intervene or ask a questions and when a citizen asked they found out it was related to an offence that could also spark an investigation
- There is wire-tapping, interception of private communications
- Lots of investigated steps had to occur prior to a wire-tap authorization
- Execution of search warrants, undercover police work
- There is a “filature” = “following a target” (serious offences where police are putting together a pattern to follow a person)
- Meeting with witnesses and taking statements
- The interview of or the interrogation of suspects
- The video-taping of interviews
- KJB case statements: originally hear-say evidence was inadmissible into court.
- There are certain circumstances where necessity (necessity of using the hearsay) is used and hearsay can now be permitted in court
- Forensic work as well
- Examining a crime scene (taking evidence in ways which avoids contamination)
- DNA evidence (samples of evidence that directly link someone by their genes to a crime scene)
- Photo-line ups
- Aerial photographs of a road
- Firearm protections in cases involving firearms
- For a firearms offence the crown has to prove that something that was seized was a firearms and if the crown simply calls the police or a witness in a case requiring proof, then there will be a problem because the police need to seize the firearm, label in property, and bring it to a locker then to an expert to do tests, to establish that it was the firearm at the scene of the crime or simply that it actually is a firearm

Example

Investigation of death by two people hunting

One is shot to death

The other person comes with an excuse and says it was an accident he tripped and he shot himself in the head

was there gun-powder on the guy's jacket? (Which would only be there if it was really close to him?)

Ballistics and autopsy concluded that a shot gun was used and not a rifle and the gunshot was way too strong for it to be what the witness said it was

Police report of the evidence is called "report to crown counsel"

Includes a narrative, list of witnesses, list of exhibits, police notes, photos, diagrams, witness statements, duds of witness statements, etc.

ii) The laying of Information (s. 504 of the Criminal Code)

- The laying of the information is a crucial part to the start of the trial (Denunciation)
- Doing it right is important; any wrong information can lead to an acquittal
- Section 504 of the Criminal Code (important)
- Provides the powers for this
- Once the charge is laid the responsibility then shifts to the prosecutor
- Police and crown are independent from one another

iii) The disclosure of evidence

- Fundamental most challenging of officer's duties
- R. v. Stinchcombe, [1991] 3 SCR 326

The accused, a lawyer, was charged with breach of trust, theft and fraud. A former secretary of his was a Crown witness at the preliminary inquiry, where she gave evidence apparently favourable to the defence. After the preliminary inquiry but prior to trial, the witness was interviewed by an RCMP officer and a tape-recorded statement was taken. Later, during the course of the trial, the witness was again interviewed by a police officer and a written statement taken. Defence counsel was informed of the existence but not of the content of the statements. His requests for disclosure were refused. During the trial defence counsel learned conclusively that the witness would not be called by the Crown and sought an order that the witness be called or that the Crown disclose the contents of the statements to the defence. The trial judge dismissed the application. The trial proceeded and the accused was convicted of

breach of trust and fraud. Conditional stays were entered with respect to the theft counts. The Court of Appeal affirmed the convictions without giving reasons.

Held: The appeal should be allowed and a new trial ordered.

The Crown has a legal duty to disclose all relevant information to the defence. The fruits of the investigation which are in its possession are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done. The obligation to disclose is subject to a discretion with respect to the withholding of information and to the timing and manner of disclosure. Crown counsel has a duty to respect the rules of privilege and to protect the identity of informers. A discretion must also be exercised with respect to the relevance of information. The Crown's discretion is reviewable by the trial judge, who should be guided by the general principle that information should not be withheld if there is a reasonable possibility that this will impair the right of the accused to make full answer and defence. The absolute withholding of information which is relevant to the defence can only be justified on the basis of the existence of a legal privilege which excludes the information from disclosure. This privilege is reviewable, however, on the ground that it is not a reasonable limit on the right to make full answer and defence in a particular case.

Counsel for the accused must bring to the trial judge's attention at the earliest opportunity any failure of the Crown to comply with its duty to disclose of which counsel becomes aware. This will enable the trial judge to remedy any prejudice to the accused if possible and thus avoid a new trial.

Initial disclosure should occur before the accused is called upon to elect the mode of trial or plead. Subject to the Crown's discretion, all relevant information must be disclosed, both that which the Crown intends to introduce into evidence and that which it does not, and whether the evidence is inculpatory or exculpatory. All statements obtained from persons who have provided relevant information to the authorities should be produced, even if they are not proposed as Crown witnesses. Where statements are not in existence, other information such as notes should be produced. If there are no notes, all information in the prosecution's possession relating to any relevant evidence the person could give should be supplied.

Crown counsel was not justified in refusing disclosure here on the ground that the witness was not worthy of credit: whether the witness is credible is for the trial judge to determine after hearing the evidence. The trial judge ought to have examined the statements. Since the information withheld might have affected the outcome of the trial, the failure to disclose impaired the right to make full answer and defence. There should be a new trial at which the statements are produced.

Crown has to provide defence with copy of what the crown has because of this case

There are exceptions: whatever the police has gathered for info that is relevant or likely relevant to the defence (relevant is very broad)

Example of "broad"

- If cops investigate a robbery and 8 witnesses or 5 witnesses describe accurately the person that they end up arresting and they point to the same person at photo lineups then this other witness comes they have reason to believe that this person is really reliable or credible and they provide a description completely out of sync with what the people pointed too during the photo-lineup, they think this person is not reliable and it's just one person, you have to be

sure that it is absolutely imperative that there is no cutting corners that information has to go to the defence council. It has to be provided because it might help him to win his case.

Typically written statements may contain references to contact information.

Limits of info required to provide:

“Disclosure of evidence”

iv) The testimony

- Testifying when called upon by the crown is often the key to the finding of guilt or the opposite in many cases.

O.J. Simpson: Many experts have their view that the demise of that case had everything to do with the testimony of the investigators. The key investigators led to (in cross exam) the jury to no-longer being able to trust them. The officials gathering the evidence are not trusted by the jury and this constitutes a major problem. A lot of evidence was established in the manner in which the blood was contained, etc. The crucial impact that his evidence regarding collateral issues relating to racism and defence being able to disprove that clearly how the jury would end up having question marks. It is key for police to always prepare well and to do your work as an investigator with the outmost integrity for your work. Review their notes and to ensure that their notes are thorough and that they are neat.

c) The independence of the police

- Their work is always governed by the principle of independence

*- *R. v. Beaudry*, [2007] 1 S.C.R. 190 ([R. v. Beaudry](#))

Facts:

- The accused, a police officer, was charged with obstructing justice under s. 139(2) of the *Criminal Code* for deliberately failing to gather the evidence needed to lay criminal charges against P, another police officer, who he had reasonable grounds to believe had been operating a motor vehicle while intoxicated. At trial, the accused contended that his decision was a proper exercise of police discretion, while the Crown argued that the decision was founded on preferential treatment. The trial judge concluded that the accused had not exercised his discretion when he had deliberately failed to take breath samples, but that he had instead granted preferential treatment to P. The judge accordingly convicted him. The majority of the Court of Appeal upheld the conviction. The appellant police officer, Alain Beaudry, is charged with obstructing justice under s. 139(2) of the *Criminal Code*, R.S.C. 1985, c. C-46. It is alleged that he deliberately failed to gather the evidence needed to lay criminal charges against a suspect who he had reasonable grounds to believe had been operating a motor vehicle while intoxicated. In answer to the charge, Mr. Beaudry contended that his decision was a proper exercise of police discretion. The Crown argued that the decision was founded

not on police discretion, but on preferential treatment of a fellow police officer. Mr. Beaudry was tried by a judge sitting alone and was convicted. The decision of Judge Beaulieu of the Court of Québec

- At the time of the events that led to this appeal, Alain Beaudry was an officer — a *sergeant chargé de la relève* (shift supervisor) — of the police service of the city of Repentigny. On September 22, 2000, at about 3:30 a.m., Sergeant Beaudry was assisting Constable Martin Boucher and Constable Hugo Bélisle in a routine operation when they heard a vehicle coming toward them making an unusual noise, as if it was running on a flat tire. Taking the lead, Sergeant Beaudry returned to his patrol car and set off in pursuit of the vehicle, followed closely by his two colleagues. At that point, Sergeant Beaudry estimated that the vehicle, a minivan, was travelling at between 60 and 70 km/h, which was over the speed limit. He also had the impression that it was a stolen vehicle. Constable Boucher testified that, during the pursuit, the driver of the minivan drove through a stop sign and almost hit the median. Sergeant Beaudry communicated with the dispatcher at the police station, who told him that the vehicle had not been reported stolen and that it belonged to a resident of Repentigny named Patrick Plourde.
- When the minivan finally stopped, Sergeant Beaudry was the first officer to approach the vehicle. The driver of the vehicle did not seem to pay much attention to Sergeant Beaudry, as he was trying to restrain a German shepherd inside the vehicle. Sergeant Beaudry ordered him, several times, to keep his hands on the steering wheel. The driver did not respond, but began to bang his head on the wheel. Sergeant Beaudry approached the vehicle and tried to speak with the driver, who was crying and talking in a confused manner. He also asked the driver whether he wanted to be taken to the hospital and to have someone look after his dog. This elicited no response either. After a few minutes, the driver got out of the vehicle and threw himself on the ground. While the police were helping him up, Mr. Plourde said, “I do the same job as you do”, and showed them his police badge. The occurrence report prepared by Constable Simard and countersigned by Sergeant Beaudry notes that the woman claimed that Mr. Plourde was “mentally disturbed”.
- While Sergeant Beaudry was en route to the station, the dispatcher asked him how to classify the occurrence. He told her: [TRANSLATION] “Enter it as ‘Assistance to the public’ for now.” He testified that when he arrived at the station, he went to see Mr. Plourde, who was still sitting in the back seat of the patrol car. He offered once again to take him to the hospital, but Mr. Plourde refused. Mr. Plourde did not want anyone to be asked to come and pick him up either. Sergeant Beaudry decided to put him in the youth detention room to let him calm down. He testified that it was at this moment, when he saw Mr. Plourde staggering, that he had reasonable and probable grounds to believe that Mr. Plourde had in fact committed the offence of driving while impaired.

Later, Constable Boucher asked Sergeant Beaudry whether he should prepare an occurrence report. Sergeant Beaudry said yes. After looking at the list of occurrence codes, he told Constable Boucher to use the code for [TRANSLATION] “unclassified activity”. Constable Boucher’s report, which Sergeant Beaudry later countersigned, mentions, among other things, that Mr. Plourde was in an advanced state of intoxication. Sergeant Beaudry attached to his report a memorandum to Assistant Director Rocheleau stating that Patrick Plourde was an officer of the Sûreté du Québec and that his immediate superior might have to be contacted. After being informed of the incident, Assistant Director Rocheleau called Sergeant Beaudry into his office. He asked him where the impaired driving report and breathalyzer results were. Sergeant Beaudry replied that he had exercised his discretion and decided neither to arrest Mr. Plourde nor to have him take a breathalyzer test. He explained that in his opinion Mr. Plourde was more in need of a helping

hand than a blow to the head. Assistant Director Rocheleau did not accept this explanation and ordered Sergeant Beaudry to prepare an impaired driving report. About a half hour later, the assistant director asked him if the report was ready. Sergeant Beaudry replied that he had not started to write it, because he had asked his union if he had to obey the order, and was waiting for the union's answer. In response to pressure from the assistant director, an occurrence report entitled "Impaired Driving" was filed. The report was signed by all the members of Sergeant Beaudry's team. As the report was only a few lines long, the senior officers of the Repentigny police were not satisfied with it, and they required that a proper report be written. A detailed report was not submitted until later that night.

Discretion is never absolute, and Beaudry was charged for not exercising his discretion transparently. The exercise of discretion is paramount to the independence of police work and therefore must be exercised transparently and honestly. Furthermore, it must be justified on reasonable grounds and likely that others would render the same decision about the circumstance.

Beaudry involves a police officer who was charged under section 269 of obstructing justice. Him being on duty one night, another police officer P was driving in a manner that got the police involved showing how unstable he was at the time and the circumstances were quite serious. There was a disagreement between the supervisor and Beaudry as he was exercising his discretion under favoritism. This was classified as unclassified.

Trial judges concludes that means he is convicted beyond a reasonable doubt. If the court thought the officer was dealing in good faith, and not in discretion of favoritism, the decision could have been different, but it was clearly on the basis of favoritism.

On that basis SCC said on the issue of police discretion, no question that police have a duty to enforce the law and investigate, both are established in common law and statute law section 48 of police act which confirms what are the missions a police officer may take. However it should not be concluded automatically, in short it doesn't mean that they have such a duty doesn't mean they can't make a consideration under certain circumstances, and apply his or her discretion.

Example: Let's say a police officer is called upon to go to a grocery store where somebody is being held by staff for shoplifting, and it turns out to be a senior citizen without a criminal record, and someone who in recent times is dealing with issues such as having to take care of his grandchildren, so he steals to provide for them. Theft is theft nevertheless, if the police has no discretion, he would not have a choice and arrest the senior citizen, however maybe the police has human considerations and public interest consideration and is not going to charge the senior citizen. In his report, he would include the facts and the circumstances that explain why he is using discretion; a senior citizen without a record, the shop owner is not pressing any further actions, the senior citizen is facing issues in his personal life leading him to the act. So the officer decides to talk with the fella, and tells him "listen don't do this again", so he takes it out of the court system and deals with it himself in good faith on discretion.

Let's say I'm the officer who shows up and the person charged with shoplifting is my nephew and I check out records and oh there's a lot there, he's a troublemaker, and because he's not my nephew and I'll scold him and tell him you stop it. Had I not known he was my nephew I'd charge him. Same theft but two conclusions differently reached by the courts

In *Beaudry*; nevertheless shouldn't be concluded that his duty is applicable to every situation, in performing everyday duties, although these are from the letter of the law. The ability to use one's judgement to individual is in fact the basis of that duty and the ability indeed the duty to use one judgment to individual circumstances and the basis of police discretion. Removing discretion would be complex and undesirable in police work.

A police officer has a reasonable ground that an offence has been committed, may decide to use his discretion, however discretion is never absolute. The officers must justify their decisions rationally for their use of discretion. The more serious the circumstance is, the more complex to justify discretion.

Two fold exercise to justify discretion:

1. When exercising this discretion not to charge it must be justified rationally, exercised honestly and transparently and on reasonable grounds.

Example; senior citizen, most would say that this is justified on reasonable grounds, much different from the nephew example. However if I am not clear and hide the real facts such as my nephew to hide my basis of favoritism, this would be dishonest and not a justified exercise of discretion. A decision based on favoritism or cultural, racial, or social stereotype cannot constitute on good discretion exercise, however the police believed he properly exercised his discretion

2. Must be justified on objective factors; would be material circumstances to consider those factors, the discretion will certainly not be exercised in a different case in the same way in theft of a young male in a store. In the case of a robbery, discretion can be exercised by not arresting or investigation, but the justification must be proportionate to the severity of the act.

While some discretion are routine and justified, others are exceptional and require the police officer to explain and justify his discretion honestly and rationally.

Section 254, 2 of the CC

the said that only provision that applies to the instant case, but does not impose on them duty "(2) If a peace officer has reasonable grounds to suspect that a person has alcohol or a drug in their body and that the person has, within the preceding three hours, operated a motor vehicle or vessel, operated or assisted in the operation of an aircraft or railway equipment or had the care or control of a motor vehicle, a vessel, an aircraft or railway equipment, whether it was in motion or not, the peace officer may, by demand, require the person to comply with paragraph (a), in the case of a drug, or with either or both of paragraphs (a) and (b), in the case of alcohol:

- (a) to perform forthwith physical coordination tests prescribed by regulation to enable the peace officer to determine whether a demand may be made under subsection (3) or (3.1) and, if necessary, to accompany the peace officer for that purpose; and
- (b) to provide forthwith a sample of breath that, in the peace officer's opinion, will enable a proper analysis to be made by means of an approved screening device and, if necessary, to accompany the peace officer for that purpose."

The SCC for the proper judgement must involve all actors involved to justify their judgment. Even though one's discretion may overlap another.

So the importance of this exercise is paramount to the independence and has to be justified according to the circumstances. Favoritism is never justified

The level of independence is very broad and it also includes interference at a political level, the RCMP commissioner is not the PM, of any, in theory there's independence and improper attempts to influence their considerations.

d) The control mechanisms

i) Internal discipline (Part IV of the R.C.M.P Act)

- Standards 37. It is incumbent on every member(a) to respect the rights of all persons; (b) to maintain the integrity of the law, law enforcement and the administration of justice;(c) to perform the member's duties promptly, impartially and diligently, in accordance with the law and without abusing the member's authority;(d) to avoid any actual, apparent or potential conflict of interests; (e) to ensure that any improper or unlawful conduct of any member is not concealed or permitted to continue; (f) to be incorruptible, never accepting or seeking special privilege in the performance of the member's duties or otherwise placing the member under any obligation that may prejudice the proper performance of the member's duties; (g) to act at all times in a courteous, respectful and honourable manner; and (h) to maintain the honour of the Force and its principles and purposes.

- Code of Conduct 38. The Governor in Council may make regulations, to be known as the Code of Conduct, governing the conduct of members.

- Contravention of Code of Conduct 39. (1) Every member alleged to have contravened the Code of Conduct may be dealt with under this Act either in or outside Canada (a) whether or not the alleged contravention took place in or outside Canada; and (b) whether or not the member has been charged with an offence constituted by, included in or otherwise related to the alleged contravention or has been tried, acquitted, discharged, convicted or sentenced by a court in respect of such an offence.

- Informal disciplinary action 41. (1) Subject to this section, the following informal disciplinary action may be taken in respect of a contravention of the Code of Conduct, namely, (a) counselling; (b) recommendation for special training; (c) recommendation for professional counselling; (d) recommendation for transfer; (e) direction to work under close supervision; (f) subject to such conditions as the Commissioner may, by rule, prescribe, forfeiture of regular time off for any period not exceeding one work day; and (g) reprimand.

- Formal disciplinary action 43. (1) Subject to subsections (7) and (8), where it appears to an appropriate officer that a member has contravened the Code of Conduct and the appropriate officer is of the opinion that, having regard to the gravity of the contravention and to the surrounding circumstances, informal disciplinary action under section 41 would not be sufficient if the contravention were established, the appropriate officer shall initiate a hearing into the alleged contravention and notify the officer designated by the Commissioner for the purposes of this section of that decision.

ii) RCMP External Review Committee

Any independent agency reporting to Parliament through the Minister of Public Safety Canada. Our mandate is one of civilian oversight of labour relations within Canada's national police, the Royal Canadian Mounted Police (RCMP). The ERC reviews certain grievances as well as appeals regarding formal disciplinary measures, and discharge and demotion cases. Upon completing its review of a case, the ERC presents recommendations to the Commissioner of the RCMP, who is the final decision-maker. The Commissioner is not bound by the recommendations of the ERC but he must provide reasons when he disagrees with the ERC in any given case. The grievance, disciplinary, and discharge and demotion processes are described under "The Organization". In carrying out its mandate, the ERC ensures that its recommendations are solidly grounded in law and that members of the RCMP are treated in a fair and equitable manner, in keeping with the public interest. The "Appropriate Officer" is responsible for initiating a hearing before an Adjudication Board when he or she believes that a member has contravened the Code of Conduct and that formal disciplinary action is warranted. The Board is composed of three officers, one of whom must be a graduate from a law school recognized by the law society of any province. Formal disciplinary action is warranted when the alleged contravention is serious in nature and informal action (such as training, counseling, transfer, closer supervision) would constitute an insufficient remedy.

- Commission for Public Complaints against the RCMP

The CPC is an independent agency created by Parliament to ensure that public complaints made about the conduct of RCMP members are examined fairly and impartially. The CPC is not part of the RCMP. CPC reports make findings and recommendations aimed at correcting and preventing recurring policing problems. The CPC's goal is to promote excellence in policing through accountability. Mandate is to receive complaints from the public about the conduct of RCMP members;

1. To conduct reviews when complainants are not satisfied with the RCMP's handling of their complaints
2. To hold hearings and carry out investigations
3. To report findings and make recommendations.

The CPC has jurisdiction over a complaint from a member of the public that concerns the conduct of an RCMP member while performing a policing duty or function. These duties and functions include criminal investigations, public complaint investigations, policing public events, security assignments and intelligence operations.

A complaint must also involve:

1. An RCMP member or other person appointed or employed under the authority of the RCMP Act
2. An RCMP member or other person who, when the complaint is made, is not deceased, retired, or resigned or been dismissed from the Force; and conduct that occurred after September 30, 1988, the date the CPC became authorized to take complaints.

- Quebec Police Ethics Commissioner - Federal and Provincial Public inquiries

iii) Civil liability (for police negligence and abuse of process or authority) - Doe v. Metropolitan Toronto (Municipality) Commissioners of Police, 1998 CanLII 14826 (C.S. Ont.)

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- Jane Doe was raped and otherwise sexually assaulted at knifepoint in her own bed in the early morning hours of August 24, 1986 by a stranger subsequently identified as Paul Douglas Callow. Ms. Doe then lived in a second-floor apartment at 88 Wellesley Street East, in the City of Toronto; her apartment had a balcony which was used by the rapist to gain access to her premises. At the time, Ms. Doe was the fifth known victim of Callow who would become known as “the balcony rapist
- Ms. Doe brings a suit against the Metropolitan Toronto Police Force (hereafter referred to as MTPF) on two bases; firstly she suggests that the MTPF conducted a negligent investigation in relation to the balcony rapist and failed to warn women whom they knew to be potential targets of Callow of the fact that they were at risk. She says, as the result of such conduct, Callow was not apprehended as early as he might otherwise have been and she was denied the opportunity, had she known the risk she faced, to take any specific measures to protect herself from attack. Secondly, she said that the MTPF being a public body having the statutory duty to protect the public from criminal activity, must exercise that duty in accordance with the Canadian Charter of Rights and Freedoms and may not act in a way that is discriminatory because of gender. She says the police must act constitutionally, they did not do so in this case and as the result, her rights under ss. 15 and 7 of the Charter have been breached. She seeks damages against the MTPF under both heads of her claim.

- Sexual violence is a form of violence; it is an act of power and control rather than a sexual act. It has to do with the perpetrator's desire to terrorize, to dominate, to control, to humiliate; it is an act of hostility and aggression. Rape has nothing to do with sex, everything to do with anger and power. It is accepted that one of the consequences of the pervasiveness of male sexual violence in our society is that most women fear sexual assault and in many ways govern their conduct because of that fear. In this way male sexual violence operates as a method of social control over women. For example, women are likely to avoid activities which they perceive may put them at risk of male sexual violence.

iv) The exclusion of evidence (s. 24(2) of the Canadian Charter) = control mechanism

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

- R v. Grant

- Three police officers were on patrol for the purposes of monitoring an area near schools with a history of student assaults, robberies, and drug offences. W and F were dressed in plainclothes and driving an unmarked car. G was in uniform and driving a marked police car. The accused, a young black man, was walking down a sidewalk when he came to the attention of W and F. As the two officers drove past, the accused stared at them, while at the same time fidgeting with his coat and pants in a way that aroused their suspicions. W and F suggested to G that he have a chat with the approaching accused to determine if there was any need for concern. G initiated an exchange with the accused, while standing on the sidewalk directly in his intended path. He asked him what was going on, and requested his name and address. At one point, the accused, behaving nervously, adjusted his jacket, which prompted the officer to ask him to keep his hands in front of him. After a brief period observing the exchange from their car, W and F approached the pair on the sidewalk, identified themselves to the accused as police officers by flashing their badges, and took up positions behind G, obstructing the way forward. G then asked the accused whether he had anything he should not have, to which he answered that he had "a small bag of weed" and a firearm.

- The accused alleged violations of his rights under ss. 8, 9 and 10(b) of the Canadian Charter of Rights and Freedoms. The trial judge found no Charter breach and admitted the firearm. The accused was convicted of five firearms offences. The Court of Appeal upheld the convictions for different reasons. It concluded that a detention had crystallized during the conversation with G, before the accused made his incriminating statements, and that the detention was arbitrary and in breach of s. 9 of the Charter. However, it held that the gun should be admitted into evidence under s. 24(2) of the Charter. The court agreed with the trial judge that the accused's act of moving the gun from one place to another fell within the definition of "transfer" in the Criminal Code, and that this justified the conviction for possession of a firearm for the purposes of weapons trafficking.

- Detention under ss. 9 and 10 of the Charter refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is

established either where the individual has a legal obligation to comply with a restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply. In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, inter alia, the following factors: (a) the circumstances giving rise to the encounter as they would reasonably be perceived by the individual; (b) the nature of the police conduct; and (c) the particular characteristics or circumstances of the individual where relevant. To answer the question whether there is a detention involves a realistic appraisal of the entire interaction as it developed, not a minute parsing of words and movements. In those situations where the police may be uncertain whether their conduct is having a coercive effect on the individual, it is open to them to inform the subject in unambiguous terms that he or she is under no obligation to answer questions and is free to go. Applying the proper legal principles to the particular facts of the case, to determine whether the line has been crossed between police conduct that respects liberty and the individual's right to choose, and conduct that does not. Deference is owed to the trial judge's findings of fact, although application of the law to the facts is a question of law.

- The evidence of the firearm was obtained in a manner that breached the accused's rights under ss. 9 and 10(b) of the Charter. An unlawful detention is necessarily arbitrary, in violation of s. 9. The officers acknowledged at trial that they did not have legal grounds or a reasonable suspicion to detain the accused prior to his incriminating statements. Therefore, the detention was arbitrary. The police also failed to advise the accused of his right to speak to a lawyer before the questioning that led to the discovery of the firearm. The right to counsel arises immediately upon detention, whether or not the detention is solely for investigative purposes.
- The criteria relevant to determining when, in "all the circumstances", admission of evidence obtained by a Charter breach "would bring the administration of justice into disrepute" must be clarified. The purpose of s. 24(2), as indicated by its wording, is to maintain the good repute of the administration of justice. Viewed broadly, the term "administration of justice" embraces maintaining the rule of law and upholding Charter rights in the justice system as a whole. The phrase "bring the administration of justice into disrepute" must be understood in the long term sense of maintaining the integrity of, and public confidence in, the justice system. While exclusion of evidence resulting in an acquittal may provoke immediate criticism, s. 24(2) does not focus on immediate reaction to the individual case. Rather, it looks to whether the overall repute of the justice system, viewed in the long term, will be adversely affected by admission of the evidence. The inquiry is objective. It asks whether a reasonable person, informed of all relevant circumstances and the values underlying the Charter, would conclude that the admission of the evidence would bring the administration of justice into disrepute. Section 24(2)'s focus is not only long term, but prospective. Section 24(2) starts from that proposition and seeks to ensure that evidence obtained through that breach does not do further damage to the repute of the justice system.
- Then faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the Charter infringing state conduct, (2) the impact of the breach on the Charter protected interests of the accused, and (3) society's interest in the adjudication of the case on its merits. At the first stage, the court considers the nature of the police conduct that infringed the Charter and led to the discovery of the evidence. The more severe or deliberate the state conduct that led to the Charter violation, the greater the need for the courts

to dissociate themselves from that conduct, by excluding evidence linked to that conduct, in order to preserve public confidence in and ensure state adherence to the rule of law. The second stage of the inquiry calls for an evaluation of the extent to which the breach actually undermined the interests protected by the infringed right. The more serious the incursion on these interests, the greater the risk that admission of the evidence would bring the administration of justice into disrepute. At the third stage, a court asks whether the truth seeking function of the criminal trial process would be better served by admission of the evidence or by its exclusion. Factors such as the reliability of the evidence and its importance to the Crown's case should be considered at this stage.

Wednesday 23rd October 2013

In the case of Grant: Three police officers were on patrol, monitoring an area in a school where there is a history of student assault, robbery and drug offences. Two of the officers were in plain clothes driving in an unmarked car, a third officer was in uniform and in a marked police car. The accused was a young black male walking on the sidewalk and he came to the attention of the two officers. The officers drove past the accused, he stared at them and at the same time fidgeting with his coat and pants in a way that aroused the officers suspicion. So those two officers suggested the third officer to have a chat with him who the accused was approaching the officer to determine if there was any need for concern. The identified officer initiated a conversation with him. He asked him what was going on, for his name and address. At one point, Grant behaving nervously adjusted his jacket, which prompted the officer to ask him to keep his arms apart. And after brief period of observing the exchange from their car, the two officers approached the pair on the sidewalk and identified themselves as police officers and they took positions behind the officer. The uniformed officer asked grant if he had anything he should not have, which Grant confessed to have a small bag of weed and a firearm. At this point, the officer arrested Grant and searched him and seized the marijuana and loaded revolver. They advised him of his right to counsel and took him to the police station. At trial, the accused alleged violation of his right section 8, 9 and 10b of the CCRF. The trial judge found that there was no charter breach and admitted the firearm, and the accused was convicted of 5 firearm offences. The court of appeal upheld the conviction for different reasons but concluded that a detention had crystallized during the conversation with the officer before the accused made his incriminating statement. And the court once they concluded there was a detention, they also concluded an arbitrary detention and in breach of s9. Section 9 protects you from arbitrary detention. However, the court held the gun should be admitted nevertheless, under s24.2 of the CCRF.

The Court agreed with the trial judge that the accused his act of moving the gun to one place to another fell within the definition of transfer in the CC, justified the conviction for the possession of firearm for the purpose of trafficking. Detention under 9.

SC had to say: Detention that turned it under s9, refers to a suspension of the individual's liberty interest, by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or command or a reasonable person would conclude by reason of state conduct he or she had no choice but to comply. In cases where there is no physical restraint or legal obligation it may not be as clear whether a person has been detained.

To determine whether a reasonable person placed in the individual circumstances would conclude that he or she has been deprived by the state of liberty or choice. The court may consider the following factors:

Firstly, to determine if there was a violation to s9 or 10; Was he detained, cause if not the exercise stops there, and if you are not detained you don't have the right to counsel which is under s10b.

1. The circumstances given rise to the encounter, as they be reasonably be perceived by the individual.
2. The nature of the police conduct.
3. Thirdly the particular charestictic or circumstances of the individual when it is relevant

To answer the question whether there was a detention, that involves a realistic appraisal of the entire interaction as it develops. Not just looking at the parts but the totality.

In those situation, where police may be uncertain whether their conduct is having a coercive effect on the individual, it's even open to them to inform the subject in clear or terms that he or she are under no obligation to answer any question and are free to go. Failure to do that, depending on the nature of the interaction, the court could conclude that detention occurred.

So the purpose of 24.2 as indicated by its wording: "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."

So the purpose of 24.2 by its wording is to:

1. Maintain the good repute of the administration of justice.
2. Viewed broadly the administration of justice embraces this notion of the importance of maintaining the of rule of law.
3. Upholding the CCRF in the justice system.
4. Maintaining the public confidence, integrity of the justice system.

= this is taken into consideration when evidence should be excluded. While exclusion of evidence resulting in an acquittal may provoke immediate, short-term criticism. 24.2 doesn't focus on the immediate reaction to the individual case, it looks at the overall repute of the justice system viewed in the long term will be adversely affected by the admission of evidence. The inquiry is objective, it ask whether a reasonable person informed of all the relevant circumstances and the values underlying the Charter will conclude that the admission of the evidence will bring the administration of justice into disrepute.

The fact of a Charter breach would mean damage has already been done to the administration of justice. 24.22 starts from that proposition and seek to ensure that evidence obtained through that breach does not do further damage to the repute of the justice system. So court said 24.2 is not aimed at punishing to the police, or compensating the accused, rather it looks to protect the justice system.

When court looks an at application to exclude evidence under 24.2, it assess, evaluate and balance the effect of admitting the evidence on society's confidence on the justice system.

Taking into account:

1. Seriousness of the Charter infringing conduct
2. The impact of the breach of the charter protected interest of the accused
3. Society interest on the adjudication of the case on its merits.

Police since 1982, when detaining someone must inform the person of his right to counsel. And give more information, in case the person says they don't know anyone or say they don't have any money.

Take into account the seriousness of the Charter breach, if not that serious then;

The first stage; the court considers the nature of the police conduct, the more severe the state conduct, leading to the charter violation, the greater the need of the court to dissociate themselves from the conduct by excluding the evidence.

Example: If police arrive at the scene of a crime, outdoors on the street and there is a firearm, victim on the sidewalk, seize the firearm, then they go to the apartment of the accused, and they conduct a search in the home without a warrant. They arrest the accused, and get statements from witnesses and end up having enough evidence for arrest. Some would consider this an arbitrary search that they conducted, and they seize something and the prosecutor believes it's useless and doesn't present it at court. At that moment, in court, defense cannot come and say "Your Honor there was a charter violation by entering that home without a warrant and we are asking you to exclude the evidence, hence the gun." But that's not how it will go, because there was no violation when obtaining the gun, it was obtained before the violation, so there's no connection between the violation or obtain of the firearm. (so no charter violation, to exclude evidence there must be a breach of Charter right which concluded the cease of evidence)

The second stage; calls for an evaluation of the extent to which the breach undermines the interest protected by the infringed right. The more serious the incursion of those interest, the greater the risk that the admission of evidence would bring the administration of justice into disrepute.

The third stage; A court asking whether the truth seeking function of the criminal process would be better served with admission of the evidence or exclusion of the evidence. The factors such as the reliability of the evidence, and its importance to the Crown's case should be considered at this stage.

Let's say: the evidence is 400 kg of cocaine, and that's found in the trunk of a big vehicle but that's found somewhere the police acted in circumstances where there was a lot of urgency, and in the end there's some asercion they really needed to get a warrant before doing anything and they missed that steps, they acted prematurely. At time Court conclude that there is a measure of the violation, but when looking at the seriousness of the violation, and some circumstances even when it is relatively serious they will look at "what does this mean for society's confidence in the justice system for nature of that breach and 400 kg of cocaine ends up being excluded. What would that do to the repute of the administration of justice.

Course reaction would be different between 400 kg of cocaine, and 1 ounce of marijuana. So there must be a balance of all these factors.

v) Abuse of process application and appropriate remedies = control mechanism

C) The Prosecutor

R. J. Frater, Prosecutorial Misconduct, Aurora, Canada Law Books, 2009

a) The Attorney General and the function of the Crown Attorney (prosecutor)

i) The Attorney General:

- Definition of Attorney General

- s. 2 of the Criminal Code

- R. c. Hauser, [1979] 1 R.C.S. 98

The attorney general is defined in section 2 of the CC. The definition quite varies; between different scenarios whether it is the AG for a province, or the AG of Canada, which is in charge of prosecution depending on the circumstances, or which law has been contravened. The general rule, is that provincial AG, are responsible for prosecuting criminal offences under the CC. For other criminal offences, under other federal statutes it is either the provincial AG or the federal AG. In the 3 territories, for example; under the Control drug and substances Act, if it is investigated by the RCMP they often take it to federal prosecutors, and when it is provincial police investigating a crime let's say in Quebec, they will take it to the provincial prosecutor.

Some offences such as fraud, capital market crime, this confers jurisdiction either federal prosecutor or provincial prosecutor. Generally there is some understanding and will use where jurisdiction meet top officials and they determine who's going to act in those circumstances. There is right to refusal.

Sometimes when it is the provincial AG will be the first to consider prosecuting certain cases. They may leave it open for the federal to intervene.

Sometimes, it's a question of resources, and so for your purpose the general rule;

1. In the provinces, criminal offences = Provincial AG's

2. In the territories it's the federal AG's

- (b) with respect to the Yukon Territory, the Northwest Territories and Nunavut, or with respect to proceedings commenced at the instance of the Government of Canada and conducted by or on behalf of that Government in respect of a contravention of, a conspiracy or attempt to contravene, or counselling the contravention of, any Act of Parliament other than this Act or any regulation made under such an Act, means the Attorney General of Canada and includes his or her lawful deputy,

-The different models of prosecution services in Canada

Most traditional model as I mentioned where in provincial AG have jurisdiction over criminal prosecution. And designate a number of crown counsel to exercise that prosecutorial discretion.

- The Director of Public Prosecutions Act - la Loi sur le Directeur des poursuites criminelles et pénales du Québec

In more recent years, few jurisdiction such as Nova Scotia and Quebec, and the federal level, made statutes creating the institution of the Director of Public Prosecution. The hallmark of that model, DDP, is considered to be the enhanced independence attributed to the direction and those designated by him or appointed by him to prosecute criminal cases.

When I talk about independence from any political influence or interference. Which for many is an important consideration since although the AG is primarily responsible for prosecutions at a theoretical level, the AG is also an elected official.

So the creation of the DPP office at a federal level up until December 2006, I use to be part of the Department of Justice. And then the Federal Counterability Act was enacted and one of the provisions enacted from this creating the DPP Act was enacted and created the office of the DPP separating the prosecution service from the Department of Justice which is Legal advisor to the minister creating that independence of the prosecution function, and an even greater independence and that's an important consideration.

The structure of the DPP provides the structure from political influence, that's in Qc, provided by the Director of Public prosecution Act. That statutes places on the shoulder of the director the responsibility of prosecution.

Sec 23 of the DPP Act, AG cannot assume a prosecution from the hands of the DPP, unless he is consulted first, and if the AG wants to give instructions to the DPP, he has to do so in writing which must then be published in the Gazette official du Quebec. So it to become public, that ensure that independence, or if that wasn't prior to that creation, that dialog has to happen in that context.

- Parliament creating the DPP Act provides in section 3 “(1) The Governor in Council shall, on the recommendation of the Attorney General, appoint a Director of Public Prosecutions (in this Act referred to as the “Director”) in accordance with section 4.
- **Marginal note: Rank and status**
- (2) The Director has the rank and status of a deputy head of a department.
- **Marginal note: Duties and functions**
- (3) The Director, under and on behalf of the Attorney General,
 - (a) initiates and conducts prosecutions on behalf of the Crown, except where the Attorney General has assumed conduct of a prosecution under section 15;
 - (b) intervenes in any matter that raises a question of public interest that may affect the conduct of prosecutions or related investigations, except in proceedings in which the Attorney General has decided to intervene under section 14;
 - (c) issues guidelines to persons acting as federal prosecutors respecting the conduct of prosecutions generally;
 - (d) advises law enforcement agencies or investigative bodies in respect of prosecutions generally or in respect of a particular investigation that may lead to a prosecution;
 - (e) communicates with the media and the public on all matters respecting the initiation and conduct of prosecutions;

- (f) exercises the authority of the Attorney General respecting private prosecutions, including to intervene and assume the conduct of — or direct the stay of — such prosecutions; and
 - (g) exercises any other power or carries out any other duty or function assigned to the Director by the Attorney General that is compatible with the office of Director.
- **Marginal note:Deputy Attorney General**
 - (4) For the purpose of exercising the powers and performing the duties and functions referred to in subsection (3), the Director is the Deputy Attorney General of Canada.
 - **Marginal note:Guidelines not statutory instruments**
 - (5) For greater certainty, guidelines referred to in paragraph (3)(c) are not statutory instruments within the meaning of the [Statutory Instruments Act](#).
 - **Marginal note:Publication**
 - (6) Any assignment under paragraph (3)(g) must be in writing and be published by the Attorney General in the [Canada Gazette](#).
 - **Marginal note:Agreements and arrangements**
 - (7) The Director may, for the purposes of exercising the powers and performing the duties and functions referred to in subsection (3), enter into an agreement or arrangement on behalf of the Attorney General with the government of a province.
 - **Marginal note:Duties — election-related matters**
 - (8) The Director initiates and conducts prosecutions on behalf of the Crown with respect to any offences under the [Canada Elections Act](#), as well as any appeal or other proceeding related to such a prosecution.
 - **Marginal note:Other powers, duties and functions**
 - (9) The Director may, under and on behalf of the Attorney General, exercise any powers or perform any duties or functions of the Attorney General under the [Extradition Act](#) or the [Mutual Legal Assistance in Criminal Matters Act](#).

- Specific attributes

-The authority to prefer a Direct Indictment (Section 577 C.C.)

577. Despite section 574, an indictment may be preferred even if the accused has not been given the opportunity to request preliminary inquiry, a preliminary inquiry has been commenced but not concluded or a preliminary inquiry has been held and the accused has been discharged, if

(a) in the case of a prosecution conducted by the AG or one in which the AG intervenes, the personal consent in writing of the AG or Deputy AG is filed in court; or

(b) in any other case, a judge of the court so orders.

= one of the exercises of the DPP

* a shoplifting charge is generally not an indictable offence, it will be a summary conviction. The accused will be charged and the crown will elected proceeds summarily because of the limited

seriousness of the crime. Available punishment for such a crime would be 6 months in jail and a fine, under summary conviction. If the crown would have went for an indictable charge, then the accused would go 2 years in jail.

On the other hand, there are some offences more serious offences that the Crown has the option of summary or indictment because the circumstances may elect to proceed by indictment.

Sexual assault, usually is charged whether summarly or indictment by the Crown. Summarly= 18 months in jail. Indictment= 10 years in jail.

Example: In sexual assault, a serious case would be rape; Indictment with preliminary hearing. However, in a less serious case, such as someone being flirty in a bar with a woman they do not know, and has no criminal record, that case would be a summary conviction without a preliminary hearing.

Some crimes are only by indictment, such as murders. There are some serious offences such as capital market frauds, some homicides, some gang related theft, the evidence is so complex. Like for example, in 1994, there is a murder in the upper Lorraine. It was a real puzzle and difficult to figure out who did it and prove it in Court. The Courthouse, normally be the Laurier Courthouse, a very small courthouse, limited space and resources. All the 87 witnesses that were called for trial were from the Montreal area. The case took 11 months at trial, so the court ruled, indictable offences. Some cases are just so complex because of the implications to the system that could be a consideration like a criteria set out in our deskbook where we should have this matter should be dealt with in a manner that it goes straight to trial. And if the AG signs a preferred indictment or a direct indictment in consens to that matter goes straight to trial. pre limb can be avoidable.

Section 577, case taken to the AG or his deputy at the time, at the Quebec (provincial) level and circumstances were explained about the implication at the pre limb, to have this kind of case, complex and luminous, the courthouse that was really paralyzed during that process for a significant period of time, where two decisions ended up being taken; 1. change of venue, so the trial could be held in Montreal. 2. preferred indictment signed by the AG of Quebec. The pre limb that allows the prosecutor there won't be a pre..., straight to trial.

= power of the DPP

ii) The prosecutor as representative of the Attorney General:

The prosecutor is an officer of justice whose function is of a quasi-judicial nature and who is required to remain independent, fair, objective and neutral.

The SCC in the case of Boushe, in 1954, remains a key in describing the vital attributes of a prosecutor.

The issue in the case goes back to the 50's, Boushe was charged with the beating to death a man named Jabour, in the course of the trial, in closing argument, the crown council made some very strong statements about the accused, comments you would never see made today, of his view of the guilt of the accused. Today this just wouldn't happen.

At issue was whether the tenure could have impacted the jury improperly, and its determination of the accused guilt. More specifically here are the comments by the Crown under scrutiny.

“Crown is not here just for the pleasure of getting innocent people convicted. So making some kind of assumption in the jury’s eye. Obv if we are here it’s cause the guy is guilty. It’s the duty of the Crown, when a case like this occurs, to do all possible research and investigation and when we do with our experts and come to our conclusion that an accused person is not guilty or that there might be a reasonable doubt, it’s our duty as crown to state that and say that the person is not guilty. In other words, making a self-serving statement that we are here on the other hand it’s obviously because he is guilty.

And the crown of the submissions that were made at that time, concluded by saying “We see everyday crimes more frequently than ever, thefts and other types of offences. At least a person charged with arm robbery doesn’t make the victim suffer like the way Boushe made Jabour suffer, it’s a revolting crime by a man against an elderly person of 77 years old and couldn’t defend himself, I have a bit of respect for those who steal when at least give a chance for their victims to defend themselves. But I have no sympathy whatsoever, and I ask you jury to give no sympathy for cowards that strike a man, friends, or neighbors that knew each other, cowardly he struck him with an axe, and if you come back with a guilty verdict, it would almost be a pleasure for me to ask for a death penalty against him.

Today, this would not happen because of the way Crowns are educated. Those submissions clearly made the assumption, he wasn’t arguing, he was making submissions that the person was guilty, he was making submission that will make the jury against Boushe and inflame the jury to come back with a guilty verdict.

That’s something you wouldn’t see today. It made it clear that it was an invitation to conclude what was made obvious. The SCC expressed a number of concerns about those comments and said the following; “There’s no doubt it is improper for counsel, crown or defence, to express his or her own opinion as to the guilt or innocence of the accused. It cannot be overemphasized that the purpose of a criminal prosecution, back in 1954, is not to obtain a conviction, it is to lay before a jury what the crown considers relevant evidence to what is alleged to be a crime. Council have a duty to see all available legal proof of the facts presented. It should be done firmly pressed to legitimate strength but it also has to be done fairly. The role of the prosecutor excludes any notion of winning or losing. This function is a matter of public duty than which in civil life there can be none charged with a greater personal liability. It’s to be efficiently performed with an engrande sense of dignity and the serious of justicness and judicial proceedings, so it’s important to see that.

Key role= integrity and fairness and justness

- **Prosecutorial independence**

SCC comments; A prosecutor’s independence and significant level of discretion does not give the crown a license to do or say whatever they want. That being said prosecutorial independence is still the most essential important consideration or aspect regarding the courts function.

Starting point of this notion of independence of Crown counsel founded in the fact that this attribute of independence rest first and foremost with the AG, with the function of the AG. It's such a underlying important aspect of the AG's role that for example, public prosecution service of Canada deskbook which contains most of the guidelines that prosecutors must respect. Highlighted part 1 of chapter 4 of the desk book.

I quote decisions of prosecutor state proceedings, or launch in appeal, must be made in accordance with legal criteria; two important principles flow from this proposition;

First : Prosecution decisions may take into account the public interest but must not include any consideration of the political implication of the decision.

Second: No investigative agency or department of government or minister of the crown may instruct pursuing or discontinuing a particular prosecution or undertaking a specific appeal. In other words, the independence, there are matters that are prosecuted, fishery act prosecution, fishery officers that will have investigated and some circumstances, crown may come to the conclusion that there is not enough evidence. We don't take our instructions from police, or fishery officers, they can provide input but at the end we are independent constitutionally to make decisions to whether we go ahead with a prosecution or not.

So these decisions rest solely with the AG, and his or her council, must be regarded as an independent officer exercising responsibility in a manner similar to that of a judge. Because the judge is protected as well by the notion of judicial independence applies, so the absolute independence of the AG whether to prosecute and in making prosecution.

It's a constitutional principle in this country that the AG must act independently when supervising prosecutorial decisions are being made in the face down the road.

Even the PM cannot influence the prosecutor's decision. That would be inappropriate.

Prosecutor independence= key element in prosecutorial proceedings

- **R. v. Beaudry, [2007] 1 S.C.R. 190, par.48**

In discharging their respective duties, both the police officer and the prosecutor have a discretion that must be exercised independently outside of any influence, they could overlap each other but that depends on the manner they are conducted.

The Public prosecution service of Canada deskbook, also elaborates in greater detail in part 3 of chapter 8 of the principles governing crown council conduct. What it says is that;

The principle of the independence of the Attorney General is firmly entrenched in our legal system, widely respected, and carefully safeguarded. The theory underlying the principle and the leading statements concerning it are dealt with in detail elsewhere. Perhaps less well understood is the operation of the independence principle in the day-to-day decision-making of individual Crown counsel. Crown counsel exercise their independence **as the representative of the Attorney General**. As such, the "independence" of Crown counsel is a **delegated** independence. Crown counsel are obliged to make decisions in accordance with the policies of the Attorney General in this deskbook, and they act under the direction of FPS Directors, Regional and Senior Regional Directors, who are in turn responsible to the Assistant Deputy Attorney General (Criminal Law). Crown counsel retain a significant degree of discretion in individual cases.

The independence principle also does not mean that Crown counsel need not consult. Quite to the contrary, responsible prosecutorial decision-making often requires consultation with colleagues, superiors or investigators.

So, what's important to remember : Independence does not equal doing whatever you want. Your independence is a delegated independence, because you are acting on behalf of somebody. Let's say there is 3000 prosecutors in the country, they are not entrenched each of them of this notion of individual independence. It's the AG's independence that's delegated to them. It's important to make proper decisions in some circumstances. It's important that they still understand the importance of consulting other prosecutors, senior and more experienced prosecutors.

In other words, prosecutorial independence is not a license to do as one wishes.

iii) Duties of the prosecutor:

• Legal advice - Section 3(3) d) of the Director of Public Prosecutions Act

(3) The Director, under and on behalf of the Attorney General,

- (a) initiates and conducts prosecutions on behalf of the Crown, except where the Attorney General has assumed conduct of a prosecution under section 15;
- (b) intervenes in any matter that raises a question of public interest that may affect the conduct of prosecutions or related investigations, except in proceedings in which the Attorney General has decided to intervene under section 14;
- (c) issues guidelines to persons acting as federal prosecutors respecting the conduct of prosecutions generally;
- (d) advises law enforcement agencies or investigative bodies in respect of prosecutions generally or in respect of a particular investigation that may lead to a prosecution;
- (e) communicates with the media and the public on all matters respecting the initiation and conduct of prosecutions;
- (f) exercises the authority of the Attorney General respecting private prosecutions, including to intervene and assume the conduct of — or direct the stay of — such prosecutions; and
- (g) Exercises any other power or carries out any other duty or function assigned to the Director by the Attorney General that is compatible with the office of Director.

When we think of prosecutors we think of lawyers, charging an accused and presenting facts in court, what we see in court. (1.41)

The surest ways of which a prosecutor to conduct him or herself no matter what task, is to always act ethically and fairly. That has to be the backdrop of all the exercised and responsibility.

Example: When dealing with members of public, family of accused, defense counsel, dealing with rude people, who may be conducting themselves disrespectfully towards a prosecutor. In short acting ethically, and in good faith should be the backdrop of all crown specific actions. And not to respond in the same rude manner.

So keeping that notion of fairness, ethics and integrity in mind specifically when the role of a prosecutor is providing legal advice. Section 3 subparagraph 3 of the Director of Public Prosecution Act provides that, duty of a prosecutor.

Frequently police come to crown council of their respective jurisdiction and request or ask for legal advice on whether they should charge on a certain case. Usually they don't, but in some cases during an investigation with the gathering of evidence raises some admissibility of evidence issues. They know that the strength of the case in court may turn on whether certain elements of evidence will be declared admissible. Rather than drawing that conclusion themselves in more complex cases police may or may not chose to come and see the crown and ask for legal advice.

- **Pre-charge approval**

There's an important duty of approval of charges like In Quebec that differs from vast majority of jurisdiction. In Quebec, it's the crown that decides if and what charges will be laid.

Rest of Canada it's the police that decides.

So one of the duties particular to Quebec are pre-charge approval of charges. When police complete their investigation, they bring the fruits of their investigation to crown counsel to review and see if there is sufficient evidence for a warrant or charge. In some circumstances in crown review and may see gaps in the evidence and ask police in act of that duty to complete the investigation, get more statements from witnesses.

Other than in Quebec, something similar but referred to post-charge screening stage. So instead of pre-charge, soon after charges are laid, once we get the material, we review as soon as possible to make a determination, the same that a crown council would do in Quebec before the charges are laid. Here we ask, is the evidence sufficient from our perspective, if it is, then is the right charge laid, if not police must get more evidence, fill in gaps, and complete their investigation at the earliest stage.

-*R. v. Beaudry, 2007 CSC 5

- **Broad discretion in the context of instigating and maintaining a prosecution**

The Crown guy has always a two tear test:

1. When we receive a case to prosecute: is there a reasonable prospect of conviction based on the case brought to us. If no, then our duty is to terminate the prosecution.

2. If yes we have to ask ourselves if it is in the public interest to continue the prosecution. If there are development, those questions will be revisited.

- **Authority to instigate and continue prosecutions and to call witnesses = part of the duty**
- R. c. Cook, [1997] 1 S.C.R.1113

- **Discretion to enter into resolution discussions or « Plea bargaining », (important duty of the Crown to help solve a case) the authority to stay the discretion and stay proceedings (section 579 C.C.) or to use alternative measures (section 716 C.C.)**

It's done in jurisdiction to organize them to be active in social problems and certain crimes. For the crown have an additional option, in some jurisdiction they have an over representation. There is an alternative to a justice system.

579. (1) The Attorney General or counsel instructed by him for that purpose may, at any time after any proceedings in relation to an accused or a defendant are commenced and before judgment, direct the clerk or other proper officer of the court to make an entry on the record that the proceedings are stayed by his direction, and such entry shall be made forthwith thereafter, whereupon the proceedings shall be stayed accordingly and any recognizance relating to the proceedings is vacated.

The way it literally plays out that duty, is in a case that happens before a court. A jury trial, the victim is trying to testify but the trauma is just so significant that he or she cannot talk. That's the essence of the case, at that point and time.

So there are different options available, one of the options in the course of that trial is that before judgement, the crown doesn't have to address to court the judge or jury. The Crown can decide not to move forward with this case. And the clerk that sits in front of the judge has the file and make notes of proceedings, provides details for court records. The Crown would direct the clerk to enter stay of proceeding. It's a responsibility provided by the law that goes beyond what the court can react. The judge can't say; hey no you can't do that. It's provide by the law.

Stay of proceedings being recommenced: (2) Proceedings stayed in accordance with subsection (1) may be recommenced, without laying a new information or preferring a new indictment, as the case may be, by the AG or counsel instructed by him for that purpose giving notice of the recommencement to the clerk of the court in which the stay of the proceedings was entered, but where no such notice is given within one year after the entry stay of proceedings, or before the expiration of the time within which the proceedings could have been commenced, whichever is the earlier, the proceedings shall be deemed never to have been commenced.

In other words, if the Crown chooses to stay, they have one year to recommence. And after that, it's over.

So there's plea-bargaining, the authority of stay proceedings have the discretion to use alternative measures that are provided by the code under "716 CC. Defined that :

Measures other than judicial proceedings under this Act used to deal with a person who is eighteen years of age or over and alleged to have committed an offence;"

"717 CC: Alternative measures may be used to deal with a person alleged to have committed an offence only if it is not inconsistent with the protection of society and the following conditions are met:

- (a) the measures are part of a program of alternative measures authorized by the Attorney General or the Attorney General's delegate or authorized by a person, or a person within a class of persons, designated by the lieutenant governor in council of a province;
- (b) the person who is considering whether to use the measures is satisfied that they would be appropriate, having regard to the needs of the person alleged to have committed the offence and the interests of society and of the victim;

- (c) the person, having been informed of the alternative measures, fully and freely consents to participate therein;
- (d) the person has, before consenting to participate in the alternative measures, been advised of the right to be represented by counsel;
- (e) the person accepts responsibility for the act or omission that forms the basis of the offence that the person is alleged to have committed;
- (f) there is, in the opinion of the Attorney General or the Attorney General's agent, sufficient evidence to proceed with the prosecution of the offence; and
- (g) the prosecution of the offence is not in any way barred at law.

Present in many communities in the North or South of Canada, is the general contemporary justice system. 717 provides the option, for community justice system. It is possible to divert cases in order to deal with them differently and deal with them at a community level. It's done in jurisdiction where a community is offered to decide to organize themselves to be active in the resolution of certain social problems. It's possible under those circumstances that respect conditions under 717, for the Crown having additional option, in some jurisdiction, for aboriginal people, an over representation before the criminal justice system. The community provides alternative measures for specific cases to determine what are the appropriate resolutions of problems. For example: when one damages the property of someone, but not cases of murder. As long as the accused is prepared to acknowledge their responsibility they can be diverted outside of the court system. And in a community justice committee would deal with that person as they know the accused better than the lawyer.

Whether by writing a letter of agreement, doing community service, repaying the damages. If so is done, then charges may be dropped.

- **Authority to decide to proceed by Indictment or by Summary Conviction**

Indictment conviction = max punishment is 10 years in jail = preliminary hearing

Summary conviction = max punishment is 18 months in jail. No preliminary hearing, no criminal record.

= One of our duties. When I go to court at first appearance for example, most jurisdiction believe the core docket of court matters is quite significant. People who are there for their first time, and the police have laid charges such as theft or impaired driving. One of the things we have to do as Crown, we are required to say in court whether we proceed by indictment or by summary conviction. That's our responsibility, if it's a shoplifting, seating in court on my first appearance, the judge calls Dave Williams (ex). First thing that would happen before the accused indicates whether he plead guilty or not, the crown will say "summary election your Honor." And if the accused is represented by a counsel, they have the option of pleading guilty or not guilty.

Knowing the election, the accused or the lawyer practically speaking for shoplifting, the crown will for sure go for summary conviction. So for shoplifting by indictment= 2 years in prison. But if by summary conviction= 6 months in jail. Generally that's not imposed, it's an indication of the seriousness by which the Crown is approaching this charge.

If in the CC. it gives you the option to go either indictable or summary conviction, then you have the authority to chose between them depending on the case presented.

However, if it only states to go indictable, then you may not chose a different option such as summary conviction.

- **Authority to seek greater punishment (section 727 C.C.) or seek a dangerous offender designation (Part XXIV C.C.)**

753 of the CC; Provides a regime

In most cases, the Crown, the most serious cases, the crown has the option with dealing with the charge, of the accused if he is found guilty making submission on sentencing based on the case law range, and be done with it. Court also provides a regime, and has a duty to consider when it is really serious, for ex: Paul Bernardo.

When dealing with very dangerous individuals particularly when they have a significant criminal records. Like if they keep committing certain offences that are considered to be serious personal injury offences, the Crown can in course of the proceedings on certain charges that are before the Court, if the person is found guilty, in addition to seeking the sentence they could otherwise seek, they can impose for a psychiatric evaluation.

There's a regime authorized by law that allow the Crown to do. Depending on the request of that evaluation they can apply to have an offender, beyond whatever sentence he receives in law, be declared a dangerous offender which leads the court to impose an undetermined sentence of jail with no specific amount of time of sentencing.

Once they go to jail, there's a review period of every 7 years, and allows that person to have their incarceration reviewed.

- **727.** (1) Subject to subsections (3) and (4), where an offender is convicted of an offence for which a greater punishment may be imposed by reason of previous convictions, no greater punishment shall be imposed on the offender by reason thereof unless the prosecutor satisfies the court that the offender, before making a plea, was notified that a greater punishment would be sought by reason thereof.

- **Authority to require a trial by judge and jury (section 568 C.C.) =another duty**

b) Control measures over the prosecutor's exercise of discretion

Same for police, police have this broad discretion independence of their function, they have a lot of power and yet you know none of that discretion, independence, power is absolute as there is a control measure.

As this is discussed for police, it is the same for Crown Council, it has a significant principle for independence. Crown discretion, all these duties indicative authority provided by law given at the hands of Crown Council, yet as a back dropped none of that power is absolute, there are control mechanism surrounding the duties of Crown council.

i) Application for abuse of process and other remedies available in the course of a trial

Decisions made by a prosecutor in the exercise of prosecutorial discretion is generally not reviewable by the courts except where there is abuse of process

So, that doesn't happen very often when there are such allegations.

- R. v. Power, [1994] 1 R.C.S 601

Respondent was charged with impaired driving following a motor vehicle collision where one of his passengers was killed and another two injured. The respondent was charged with one count of impaired driving and two counts of causing bodily harm. At trial, the breathalyzer which was the strongest evidence given by the Crown, was found to have been obtained in breach of the Charter. As such, the evidence was declared as inadmissible and therefore excluded. The Crown elected to call no further evidence. The accused was acquitted. The Court of Appeal having found no Charter breach, held that the evidence was inadmissible as a matter of law. While such an appeal would normally be allowed in a new trial order, according to section 686(4). The Court of Appeal a verdict of acquittal on the basis that there had been an abuse of process by the Crown.

No abuse of process occurred here. Furthermore, s. 686(4) of the *Criminal Code* does not confer any discretion on a court of appeal other than the discretion to dismiss or allow an appeal. As a matter of law, principle and policy, the court of appeal is not empowered to inquire into prosecutorial discretion.

In criminal cases, courts have a residual discretion to remedy an abuse of the court's process but only in the "clearest of cases" -- i.e., conduct which shocks the conscience of the community and is so detrimental to the proper administration of justice that it warrants judicial intervention. The evidence must be overwhelming that the proceedings under scrutiny are unfair to the point that they are contrary to the interest of justice.

Here, the conduct of the prosecution did not meet the high threshold required to constitute an abuse of process. There was no evidence that the Crown prosecutor's conduct was prompted by bad faith or an improper motive, nor did the prosecution intend to frustrate the administration of justice or even to circumvent the rules of criminal law regarding interlocutory appeals.

Abuse of process decisions have to only apply in the clearest cases, that it shocks the conscience of the community and is so detrimental to the proper administration of justice that it warrants judicial intervention. Misconduct of such a nature as to shock the community's sense of fairness or to warrant the application of the doctrine of abuse of process was not established by the Crown's decision not to adduce further evidence.

Wednesday 30th October 2013

should refer to oakes test for q2 of the second assignment

- Prosecutor decides if and what charges are going to be laid and other jurisdiction it's a pre-charge approval or in Quebec, a post-charge approval where the Crown reviews the evidence and the case after charges laid by the police.
- Broad discretion of the context of instigating or maintaining the prosecution and to call the witnesses.
- Discretion to enter plea-bargaining.
- The authority to stay-proceedings according to section 579.
- The discretion to use alternative-measures provided by section 716 CC.
- The authority to proceed by indictment or by summary conviction which can affect the length of the proceedings, the available punishment at the end of the proceedings and the complexity or simplicity of the proceedings.
- The authority to seek a greater punishment for really dangerous criminals. Decisions made by a prosecutor in the exercise of prosecutorial discretion is usually never revealed in court except when there's abuse of process.
- In the context of abuse of process, a control measure would be revealing the prosecutor's exercise of discretion.

***-R v Nixon (2001) SCC 34 = opportunity of the SC to look into a scenario where it was alleged the Crown so they revisited the principles of abuse of process**

Decisions made by a prosecution in the exercise of prosecutorial discretion, ...unless abuse of process

The accused drove her motor home through an intersection and struck another vehicle, killing a couple and injuring their young son. She was charged with several *Criminal Code* offences, including dangerous driving causing death, dangerous driving causing bodily harm, and parallel charges for impaired driving. Counsel initially entered into a plea agreement according to which the accused would plead guilty to a charge of careless driving under the provincial *Traffic Safety Act* with a joint sentence recommendation for an \$1,800 fine in return for which the Crown agreed to withdraw the *Criminal Code* charges. When the Acting Assistant Deputy Minister of the Criminal Justice Division of the Office of the Attorney General saw the proposed resolution, he initiated an inquiry which led him to conclude that Crown counsel's assessment of the

strength of the case was flawed. In his view, a plea to careless driving in the circumstances was contrary to the interests of justice and would bring the administration of justice into disrepute. Crown counsel was thus instructed to withdraw the plea agreement and to proceed to trial. In response, the plea bargain that the Crown withdrew from, the accused brought a s. 7 *Charter* application alleging abuse of process and seeking a court order requiring the Crown to complete the plea agreement. The application judge that heard the application held that negotiations between counsel after charges are laid are matters of tactics or conduct which are subject to review by the court, and that the repudiation of the plea agreement, in this case, was not justified. He concluded that the accused's s. 7 *Charter* right to security of the person had been breached and he directed the Crown to proceed with the agreement. The Court of Appeal allowed the Crown's appeal, finding that the repudiation of a plea agreement is a matter of prosecutorial discretion not reviewable by the courts, only if there was abuse of process. The question on this appeal is whether the trial judge erred in concluding that the Crown's repudiation of a plea agreement was an abuse of process in breach of the appellant's rights under s. 7 of the *Canadian Charter of Rights and Freedoms*. More specifically, the courts below were divided on the appropriate standard against which to measure the repudiation conduct.

The test for granting a stay of proceedings for abuse of process, regardless of whether the abuse causes prejudice to the accused's fair trial interests or to the integrity of the justice system is set out in few decisions of the SCS.

A stay of proceedings will only be appropriate when: "(1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and (2) no other remedy is reasonably capable of removing that prejudice".

The question, therefore, was the Crown's repudiation conduct so unfair or oppressive to Ms. Nixon, or so tainted by bad faith or improper motive, that to allow the Crown to now proceed on the dangerous driving *Criminal Code* charges would tarnish the integrity of the judicial system?

In this case, the Crown's repudiation conduct cannot be considered so unfair or oppressive to the accused, or so tainted by bad faith or improper motive, that to allow the Crown to now proceed on the dangerous driving *Criminal Code* charges would tarnish the integrity of the judicial system. The Supreme court was of the view that the ADM's decision to resile from the plea agreement falls within the scope of prosecutorial discretion. In the absence of any prosecutorial misconduct, improper motive or bad faith in the approach, circumstances, or ultimate decision to repudiate, the decision to proceed with the prosecution is the Crown's alone to make. Crown counsel's assessment of the strength of the evidence was erroneous and, on that basis, having regard to the seriousness of the offences, concluded that it would not be in the public interest to terminate the prosecution on the criminal charges. No bad faith, no abuse of process or misconduct so it was the Crown's full right to revoke the deal.

Reasons: No interest of the justice.

ii) Civil liability of the prosecutor = another control measure

- Proulx c. Québec (Procureur général), 2001 CSC 66

In 1986, the prosecutor determined that there were insufficient grounds to charge the appellant with the murder of his former girlfriend as there was no reliable identification evidence. The prosecution file was closed.

Some five years later, in the midst of a defamation claim launched by the appellant against a radio station and a retired police investigator who had worked on the file, the prosecutor was advised by the defamation case defendants of a potential new identification witness. So Proulx sued the police investigator from the file and the radio host. The prosecutor added the defendant police investigator who was in a civil suit, to the prosecution team, re-opened the file, and decided to prosecute the appellant on a first degree murder charge. At trial, the jury found the appellant guilty. On appeal, the Court of Appeal overturned the conviction with strong criticism of the lack of credible evidence. Following his acquittal, the appellant brought an action for damages for malicious prosecution against the Attorney General of Quebec. The Superior Court found the Attorney General liable and entered judgment against the Attorney General for over a million dollars in damages. A majority of the Court of Appeal allowed the Attorney General's appeal and dismissed the action. The question in front of this Court is whether this is one of the exceptional cases in which Crown immunity for prosecutorial misconduct should be lifted.

The appeal should be allowed.

Prosecutors are vested with extensive discretion and decision-making authority to carry out their functions and courts should be very slow to second-guess a prosecutor's judgment calls when assessing Crown liability for prosecutorial misconduct. The Department of the Attorney General and its prosecutors, however, are not above the law and this is one of the exceptional cases in which Crown immunity for prosecutorial misconduct should be lifted. (Prosecutors are not above the law)

Four requirements that must be established on a balance of probabilities in an action in damages based on prosecutorial misconduct and those requirements are satisfied here. The record reveals that: (1) the respondent initiated the prosecution; (2) the prosecution resulted in the appellant's acquittal; (3) the Crown prosecutor did not have reasonable and probable cause upon which to found the charges brought against the appellant; and (4) the prosecution was motivated by an improper purpose.

Clearly a prosecutor doesn't be convinced beyond a reasonable doubt of an accused person's guilt before bringing charges, but there must be sufficient evidence to ground a reasonable belief that a conviction could properly be obtained. In this case, it must have been clear to the prosecutor in 1991, when he authorized the charge of first degree murder, that the evidence could not properly have resulted in a conviction. In particular, the eyewitness identification of the appellant, which was the primary basis for reopening the investigation and prosecuting him, was flagrantly inadequate and the surreptitiously recorded conversation between the appellant and the victim's father was likely inadmissible evidence. The charges brought against the appellant were grounded in mere suspicion and hypotheses and were not based on reasonable and probable cause. This, by itself, is not sufficient to ground the appellant's lawsuit.

A suit for malicious prosecution requires evidence that reveals a willful and intentional effort on the Crown's part to abuse or distort its proper role within the criminal justice system. In the civil law of Quebec, this is captured by the notion of "intentional fault". The key to a malicious prosecution is malice, but the concept of malice in this context includes prosecutorial conduct that is fuelled by an "improper purpose". Here, the improper purpose arose because of the mixing of a private interest (defence of the defamation suit) and a public interest (the prosecution). The trial judge so found and there was no valid basis for the Court of Appeal to interfere with this finding.

The prosecutor's decision to recruit the retired police investigator to assist in the resurrected prosecution file, notwithstanding his status as a defendant in the appellant's well-publicized million dollar defamation suit, is further evidence of malice in the sense of the prosecutor's apparent indifference to the improper mixing of public and private business.

The prosecutor lent his office to support a defence strategy in the defamation suit and, in so doing, was compromised by the retired police investigator's apparent manipulation of

the evidence and the irregularities that took place during the re-opened investigation. That's a flagrant example that could be addressed and lead to a civil judgment against the AG.

iii) Prosecutor's conduct is reviewable by Law Society = control measure

***- Krieger v. Law Society of Alberta, 2002 SCC 65**

K was assigned to prosecute an accused charged with murder. Prior to the commencement of the preliminary inquiry, he received the results of DNA and biological tests conducted on blood found at the scene of the crime which implicated a different person than the accused. Ten days later, he advised the accused's counsel that the results of the testing would not be available in time for the preliminary inquiry. The defence counsel only learned of the testing results at the preliminary hearing, and complained to the Deputy Attorney General that there had been a lack of timely and adequate disclosure. K was reprimanded and removed from the case after a finding that the delay was unjustified. Six months later, the accused complained to the appellant Law Society about K's conduct. K sought an order that the Law Society had no jurisdiction to review the exercise of prosecutorial discretion by a Crown prosecutor and an order that the Rule of the *Code of Professional Conduct* requiring a prosecutor to make timely disclosure to the accused or defence counsel was of no force and effect. K's application was dismissed by the Court of Queen's Bench, but that decision was overturned by the Court of Appeal.

The appeal was allowed and the trial judgment restored.

The legislature of Alberta has the power to regulate the legal profession, which it has duly conferred upon the Law Society under the *Legal Profession Act*. Since the federal government has jurisdiction over criminal law and procedure and the province has jurisdiction over the administration of justice, including the regulation of lawyers and reviews of alleged breaches of ethics, there is a strong possibility of overlap between the provincial and federal spheres. Regard must be had to the pith and substance of the impugned rule to determine if it

is an unconstitutional regulation by the province of criminal law and procedure. Here, the Rule requiring timely disclosure is directed at governing the ethical conduct of lawyers, is authorized by the *Legal Profession Act*, is limited to circumstances in which the lawyer acted dishonestly or in bad faith, and is not intended to interfere with the proper exercise of prosecutorial discretion. Accordingly, the Rule applies only to matters of professional discipline and does not intrude into the area of criminal law and procedure.

A decision of the Attorney General within the authority delegated by the sovereign is not subject to interference by other arms of government. An exercise of prosecutorial discretion will, therefore, be treated with deference by the courts and by other members of the executive, as well as statutory bodies like provincial law societies. Prosecutorial discretion will not be reviewable except in cases of flagrant impropriety.

Because Crown prosecutors must be members of the Law Society, they are subject to the Law Society's code of professional conduct, and all conduct that is not protected by the doctrine of prosecutorial discretion is subject to the conduct review process. As the disclosure of relevant evidence is not a matter of prosecutorial discretion but rather a legal duty, the Law Society possesses the jurisdiction to review an allegation that a Crown prosecutor acting dishonestly or in bad faith failed to disclose relevant information, notwithstanding that the Attorney General had reviewed it from the perspective of an employer. A clear distinction exists between prosecutorial discretion and professional conduct, and only the latter can be regulated by the Law Society. The Attorney General's office has the ability to discipline a prosecutor for failing to meet the standards set by that office, but that is a different function from the ability to discipline the same prosecutor in his or her capacity as a member of the Law Society. The Act gives the Law Society jurisdiction over a very broad range of conduct including prosecutorial decisions made dishonestly or in bad faith. The Law Society's jurisdiction to

review K's failure to disclose relevant evidence to the accused is limited to examining whether it was an ethical violation.

iv) Internal control measures =removing someone from the case for example

- Prosecution policies of provincial or federal prosecution agencies (Le Guide du Service des poursuites pénales du Canada / Federal Prosecution Service Deskbook)

Internal accountability is required by a prosecution policy. All Counsel for the AG, whether for their employees or the department of justice and at-hog agents. If you make decisions like Krieger, you would be sanctioned, removed from the case as an internal control measure.

For example:

At the federal level, the deskbook, one of the goals of the federal prosecution services, the ppsp deskbook. It contains all the prosecution policies is to assist counsel in making numerous difficult decisions that rise in the course of criminal litigations. It sets objective standards in prosecutorial conduct, it provides guidance and criteria. It tells you on notice, types of situation that crown counsel can use alternative measures, in other words state proceedings, remove a case from the courts to use alternative measures such as justice committees. it would be inappropriate based on that policy to do that with a case of sexual harassment. But the prosecutor did so if somebody they know the family of the accused, whatever inappropriate considerations he had at play that would be reviewable conduct. The question will be put, why did you make that decision, and there would be no bases, and hence an important control measure is required. Prosecutors are subject also to a form of public accountability, to a membership of law society. Another form of accountability occur also in judicial review of their actions, abuse of process, these control mechanism are provided in the federal prosecutors deskbook to remind prosecutors in way of controlling their conduct.

They are also accountable to their supervisors, depending on the nature of the misconduct for all kind of process, that could be placed such as warning, reprimand, which can lead them to dismissal, those are forme of internal control mechanisms.

D) The Judge

a) The right to an independent and impartial tribunal (Section 11d of the Charter)

Judges play many role in the criminal justice system. Judges role vary on what level you are sitting on. They are the justices of the peace, in the north who require legal training, and are appointed as justice of peace. They play a role in hearing, doing bell court, and that's the basis of their functions.

In some jurisdiction, they have more powers that varies though on the nature of their appointment. Vast majority of criminal litigations, are dealt with provincial court judges. A smaller proportion are addressed to the SCC. Those typically are the murders and cases where the accused are tried by a jury and judge and to be punished for over 5 years, only indictable offences.

Murders can only be heard at trial by a jury.

A person for example, for murders it's automatically goes to the SCC.

Provincial court judges won't hear murder trials or other types of offences that are likely to be indictable offences punishable for more than 5 years.

All trials are either provincial or superior. if you are a provincial court judge, appointed by the provincial, if a federal court judge, then appointed by the federal government.

They interpret the law, they assess evidence brought to them in court. They have power to control how hearings will unfold in their court rooms. And, they are required to be impartial in their decisions makers by simply in the pursuit of justice.

Here in Canada, we have what is known to be an adversarial system of justice. We have in essence, legal cases are a contest between opposing sides, which ensures that evidence and legal arguments are fully and forcefully presented.

When the judge in their impartial capacity to the difference of the advocates in front of them, the judge is not required to take a side until the end when making a decision is needed. During trial process, they must remain above the ... providing that an independent and impartiality assessment of the facts after hearing both sides and determining how the facts will play out and how the law will be applied. Many criminal cases, almost all civil ones, all heard by sitting judges who sit alone are in those circumstances the trier of facts. They decide whether the evidence is credible, and decides which witness are telling the truth. When it is a jury trial, it's the jury who is the trier of facts, and the judge is in charge of the law and how it will be applied which is binding on the jury. But it's the jury who decides who they believe.

In terms of a judge sitting alone, they determine the facts, what evidence is credible, if witness are telling the truth and then the judge has to apply the law to the evidence and determine if a civil claim has been established and if the Crown has proven its case beyond a reasonable doubt. Anyone who faces 5 years or more in prison is convicted of crime, they have a right under the charter to require a jury trial, and for murder it is automatic.

It is the jury who are the trier of fact and the judges becomes their legal advisor for the trial proceedings while hearing the evidence and the facts provided by the witnesses.

let's say assault, in a single-judge trial, the accused will testify and explain it was a defence, he attacked me, the judge he would examine the credibility by himself, but if it were a jury trial, it's the jury who does this (examining and deciding if the evidence is convincing).

Judges takes on the legal advisor role when there is a jury, and explain what a burden of proof is. The crown is required to prove to you that the accused committed beyond a reasonable doubt. The jury is bound to apply that legal standard and they don't have discretion.

The civil standard bound to apply the law. The judge will explain the process of determining what the law in terms of the evidence is.

The judge will explain to the jury what are the standard steps and the jury has to follow the law to the evidence they have seen.from

When accused are convicted of a crime, the judge must provide a range of sentences fine to imprisonment in terms depending on the severity of the offence. Requires the court to take into account a multitude of factors provided by the Criminal Code in sentencing process. So what's

important for your purpose, is to know the right to independent and impartial tribunal and that's why is such an important role of the judges because it is provided by the charter section 11D.

"11. Any persons charged with an offence has the right (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;"

Also, subject of that that, when judges are exercising their functions, justice is not just rendered but the appearance of justice is important.

i) Justice and the appearance of justice

- R. v. R.D.S., [1997] 3 S.C.R. 484

A white police officer arrested a black 15-year-old who had allegedly interfered with the arrest of another youth. The accused was charged with unlawfully assaulting a police officer, unlawfully assaulting a police officer with the intention of preventing an arrest, and unlawfully resisting a police officer in the lawful execution of his duty. The police officer and the accused were the only witnesses and their accounts of the relevant events differed widely. The Youth Court Judge weighed the evidence and determined that the accused should be acquitted. While delivering her oral reasons, the Judge remarked in response to a rhetorical question by the Crown, that police officers had been known to mislead the court in the past, that they had been known to overreact particularly with non-white groups, and that that would indicate a questionable state of mind. She also stated that her comments were not tied to the police officer testifying before the court. The Crown challenged these comments as raising a reasonable apprehension of bias. After the reasons had been given and after an appeal to the Nova Scotia Supreme Court (Trial Division) had been filed by the Crown, the Judge issued supplementary reasons which outlined in greater detail her impressions of the credibility of both witnesses and the context in which her comments were made. The Crown's appeal was allowed and a new trial was ordered on the basis that the Judge's remarks gave rise to a reasonable apprehension of bias. This judgment was upheld by a majority of the Nova Scotia Court of Appeal. At issue here is whether the Judge's comments in her reasons gave rise to a reasonable apprehension of bias.

The courts should be held to the highest standards of impartiality. Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer. The trial will be rendered unfair if the words or actions of the presiding judge give rise to a reasonable apprehension of bias to the informed and reasonable observer. Judges must be particularly sensitive to the need not only to be fair but also to appear to all reasonable observers to be fair to all Canadians of every race, religion, nationality and ethnic origin.

Impartiality can be described as a state of mind in which the adjudicator is disinterested in the outcome and is open to persuasion by the evidence and submissions. In contrast, bias denotes a state of mind that is in some way predisposed to a particular result or that is closed with regard to particular issues. Whether a decision-maker is impartial depends on whether the impugned conduct gives rise to a reasonable apprehension of bias.

ii) Judicial independence criteria: permanence, financial security and institutional independence

Case of Moreaux-Berube 2002

The respondent, a judge of the New Brunswick Provincial Court, made derogatory comments about the residents of the Acadian Peninsula while presiding over a sentencing hearing. Three days later, while presiding in an unrelated hearing, she made an apology. The Judicial Council received several complaints alleging misconduct and an inability on the part of the respondent to continue to perform her duties as a Provincial Court judge. The majority of a three-member inquiry panel, appointed to conduct an inquiry and report findings, concluded that the respondent's comments did constitute misconduct, but that she was still able to perform her duties as a judge. They recommended that she receive a reprimand. Under s. 6.11(4) of the *Provincial Court Act*, the Council was then required to make a decision "[based on the findings contained in the [panel's] report". Despite the panel's findings the Council concluded that the respondent's remarks created a reasonable apprehension of bias and a loss of the public trust and recommended that she be removed from her office as judge. The respondent filed an application for judicial review of the Council's decision.

She said: “These are people who live on welfare and we’re the ones who support them; they are on drugs and they are drunk day in and day out. They steal from us left, right and centre and any which way, they find others as crooked as they are to buy the stolen property. It’s a pitiful sight. If a survey were taken in the Acadian Peninsula, of the honest people as against the dishonest people, I have the impression that the dishonest people would win.

The Council recommended that Judge Moreau-Bérubé be removed from her office as judge. “[i]s the conduct alleged so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office?” Based on these criteria, and on a series of factors that, in its view, a reasonable observer would consider in rendering an informed judgment about an apprehension of bias. we recommend that she be removed from office. No one is immune to their conduct.

Judicial conduct: Referring to the high standards that judges must have. Both in court and in public, important distinction between judicial conduct inside and outside the courtroom but still an important expectation and standard to determine if that person is qualified to be a judge.

- R. v. Valente, [1985] 2 S.C.R. 673

b) Internal control measures

- Canadian Judicial Council

- Le Conseil de la magistrature du Québec

Federally appointed judge = Judge appointed by the Federal Government, Judge removed by the Parliament

The Canadian Judicial Council, a federal institutions, comes into the play in circumstances where the conduct of a federally appointed judge has breached a standard behaviour which is considered not suitable to be part of the judicial system.

The recommendation will come from the Canadian Judicial Council, but only the Parliament can remove the judge from office. Under the Judges Act, Parliament has assigned a process of review to investigate complaints about judges of their inappropriate conduct not their decisions because there is an appeal review process for that.

In Quebec, they have a similar process called the “*Le Conseil de la Magistrature du Quebec*” which has its own inquiry.

c) Duty to provide reasons in judgments = another duty of judges

- Important part of their role. And is required to state why guilty or not guilty.
- Has been dealt with in a number of SCC cases.
- It's so important to motivate and provide reasons behind their decisions.
- The delivery of reason decisions is apparent to the role and part of the accountability in public. An accused should not be left in doubt about why a conviction has been entered.
- Lawyers for the parties may require reasons to assist them in considering and advising whether an appeal be launched.
- Not knowing the reason can become the basis for an appeal.
- Reasons provided by judges, at first level, provide a very important function for the appellant process.
- The appellant court, may conclude that there is a case of unreasonable verdict.
- There's a high expectation to provide reasons. So reason provided by judges require a particular importance in principle of law.
- It's a very educative process, to police officers in setting down what would be the common law. A trial judge duty is to be noted to be satisfied, duties imposed. if the reasons are generally a basis for an appellant review. As long as they address, sufficient reasons.
- So, when a trial judge is deficient, where there is a lack of how it is explained to the parties, that can be a basis for a new trial.

- R. c. Sheppard, [2002] 1 S.C.R. 869

E) The Jury: Judge of the facts = trier of facts

The jury's role is to determine whether the evidence establishes the accused's guilt beyond a reasonable doubt

- There can only be a Judge and Jury election, in the circumstances where the Charter indicates so.
- Where it's an indictable offence punishable for 5 years or more, jury is available.
- In those circumstances, the Criminal Code provides different scenarios, such as homicide, the option of a judge and jury is immediate.
- However in situations of summary conviction, a judge and jury is not required at all. Provincial Court judges sit alone for summary conviction offences.
- Most cases can't go before a jury, even certain indictable offences like theft for items less than a value of 5000\$. The court will have the choice of charging in that scenario

either a summary conviction or by indictment, if it went for indictment, the Criminal Code provides it's absolute jurisdiction of a provincial court judge and no judge and jury is required.

- So we understand that not all indictable offences have the option of a judge and jury. Only indictable offences punishable for more than 5 years, and thefts of over 5000\$ value can have the option of a judge and jury. Even for impaired driving causing bodily harm or death, jury is available.
- When that decision is made of having a judge and jury, then the judge is master of the law.
- And the jury is the master of the facts, they apply the law to the evidence, they either accept or not and make the determination of guilty or not beyond a reasonable doubt.

a) Section 626 and al. C.C.

- **626.** (1) A person who is qualified as a juror according to, and summoned as a juror in accordance with, the laws of a province is qualified to serve as a juror in criminal proceedings in that province.
- **Marginal note:No disqualification based on sex**
- (2) Notwithstanding any law of a province referred to in subsection (1), no person may be disqualified, exempted or excused from serving as a juror in criminal proceedings on the grounds of his or her sex.

Marginal note:Presiding judge

626.1 The judge before whom an accused is tried may be either the judge who presided over matters pertaining to the selection of a jury before the commencement of a trial or another judge of the same court.

- *La loi sur les Jures du Quebec*, provinces can chose an act stating the qualifications of being part of a jury.
- Section 3 of *La loi sur les Jures du Quebec*, it states to be a jury a person must be a canadian citizen and age of majority and registered in the electoral list, that's provided pursuant to section 7.1.
- A person is ineligible, or unqualified to be a jury if they don't have the qualities of section 3 or are a member of the Senate or House of Commons or member of cabinet or national assembly, cannot be a jury.
- If you are a judge of a SCC, or federal court, court of appeal, municipal court, court of Quebec, officer of justice, a lawyer or a notaire you cannot be a jury member.
- A police officer cannot be part of a jury.
- A person suffering from deficiency or a maladie metal, charged with a criminal act or declared guilty.

- Optional to be part or not: if you're a priest, an employee of a national assembly, a public servant, 65 age and over, member of the Canadian forces.
- A person who if you had already served as a jury member, you can ask to be exempted for the next 5 years. Even people who have health issues, or domestic responsibilities that make it difficult to be present as a jury, can ask to be exempted as well. All potential outs that the law provides, clear disqualifications or ineligibility.

Once a jury is selected, the law must be made cleared to them.

A jury hear a case, and sit together and apply the law as instructed by the judge on the facts of the case. They have the burden to find guilt or not, and must be convinced beyond a reasonable doubt of the accused.

Their decision has to be unanimous, either way (guilty or not). That's why some decisions take so long because 12 people as a jury, and it is never that obvious. Their decision has to be unanimous. But their path to that decision doesn't have to be unanimous, some can have different reasonings, might be placed on different issues, as long as they legally conclude in the same direction. If they decide to acquit, that decision has to be unanimous. Having to be unanimous, that's not optional, it's an instruction law by the judge. In some circumstances, there's something called a hung jury, that's when in some cases, the longer the more complex the case and the more time that the judge will give to the jury to come to a decision. The shorter the case, jury trial last two days, but the judge won't let the jury go out for 5 days for deliberation at some point there's an inquiry, a judge brings the jury in, asking if there's an issue having trouble to agree on and they will try to get a feedback on how to solve their question. In some circumstances, when jury provides a note saying they are too far apart to agree, the jury will know at some point based on the dialogs, they don't have to give a significant reason, just if they come to the conclusion, that there's a split too significant, they don't need to explain just need to mention, "hey we won't be able to reach a verdict". So that leads to hung jury, Crown looks at the case themselves, and make a decision on their own because everyone has to go home.

Definition of Hung Jury:

- *A trial jury duly selected to make a decision in a criminal case regarding a defendant's guilt or innocence, but who are unable to reach a verdict due to a complete division in opinion.*
- When a jury has been given an adequate opportunity to deliberate and is unable to reach a verdict, a retrial takes place at the discretion of the prosecution. The subsequent trial does not constitute a violation of the constitutional prohibition of Double Jeopardy.

The role of the jury is to simply render decision guilty or not guilty, then they go home and have zero say on the condescending process, except in some circumstances provided by law. For 2nd degree murder, jury are allowed to, if found guilty, to make recommendation to the judge as to what they deem should be the period of ineligibility for parole. So they render their verdict and have a further opportunity to address the issue about what's their view on ineligibility for parole. They will come back and make a recommendation to the judge. However the judge is not bound by their recommendation, but can often be taken into account.

A jury once they reach their verdict, and the sentencing process, is bound to secrecy. Unlike the US, here you don't see jury being interviewed or see what happens during deliberations, they are not bound to provide any reasons, in court they are required to take an oath to keep

everything to themselves, you won't see them be interviewed or make any comment about the case during the trial and after.

ex: in 2 years if you see that same prosecutor while you were a member of the jury, you can't go to him or anyone and be like "oh yeah, that guy in trial was crazy."

c) **The Jury nullification phenomenon**

*- **R. v. Latimer, [2001] 1 S.C.R. 3**

The accused was charged with first degree murder following the death of T, his 12-year-old daughter who had a severe form of cerebral palsy. T was quadriplegic and her physical condition rendered her immobile. She was said to have the mental capacity of a four-month-old baby, and could communicate only by means of facial expressions, laughter and crying. T was completely dependent on others for her care. She suffered five to six seizures daily, and it was thought that she experienced a great deal of pain. She had to be spoon-fed, and her lack of nutrients caused weight loss. There was evidence that T could have been fed with a feeding tube into her stomach, an option that would have improved her nutrition and health, and that might also have allowed for more effective pain medication to be administered, but the accused and his wife rejected this option. After learning that the doctors wished to perform additional surgery, which he perceived as mutilation, the accused decided to take his daughter's life. He carried T to his pickup truck, seated her in the cab, and inserted a hose from the truck's exhaust pipe into the cab. T died from the carbon monoxide. The accused at first maintained that T had simply passed away in her sleep, but later confessed to having taken her life. The accused was found guilty of second degree murder and sentenced to life imprisonment without parole eligibility for 10 years; the Court of Appeal upheld the accused's conviction and sentence, but this Court ordered a new trial.

F) **The victim**

- Victims are not part of the justice system. There's a misconception that they are a part of the justice system and have certain privileges as to drop charges. Because in criminal offences in Canada, they cannot drop charges against the accused, because it would be against the public justice.
- The victim is not an actual party of the criminal justice system, or the proceedings, the process or the charge.

For example: In a civil suit, I'm Richard and I'm suing Joe, the court document will be "*Richard v. Joe*", however in a criminal litigation, the document will be titled "*Joe v. (Canada) Attorney General*".

- Their role is being a witness to the event of criminal offence having been committed.
- That being said, the officials work with victims and prepare them for proceedings in court. In reality, at a practical level victims are given a voice like in more recent times to keep them up to date of the cases affecting them. The more serious the offence, the greater the efforts are done to take care of the victim often because the greater the victim shows interest in the case. So many criminal prosecutions, the last person the victim wants to see is us, they do not want to go to court.
- But the more serious the case, like murder, the victims become the vital point because of the level of interest, to give them information, a public confidence issue. They are keen

about what's going on for public confidence. But there are limits, the crown cannot always brief them on every issue, because admissibility might not have been determined.

- For example, if I know the accused provided a confession, I won't say it to the victim. Because their might be a jury trial at some point and I have to wait and make sure that the judge will say "Sure Crown you can use that piece of evidence in trial". If I wanting to please the victim, wish for information, I ignore that, I could be impeding the trial process. I might say something to the victim, but the victim is not consulted by the case, "he said it and he admitted it." And even a jury could be reason of a mistrial.
- As much as the victim wants to know, and for the interest of the victim as much as the interest of the accused, not every information can be laid to the victim until permissible by judge.

Wednesday 6th October 2013

a) The witness, not a party to the criminal trial process

The victim, an impression in the public that the victim is a party in a criminal justice process.

For example: In a civil suit, when you sue a person for the damages they have caused to your property, the case document will be Meredith v Joe. Therefore, in this case you are actually a party.

However, in a criminal process the victim's complaint or the complaint of a witness seeing something wrong happening to a victim, those complaints are the triggering component. They may make a statement against the accused. The victim is a criminal case, are not a party to the case, they are a witness to the proceedings.

The victim, does not have a voice in making his or her position in the sentencing of the accused and is not enabled by the system for the victim to do so. The distinction between the status of a victim in a civil suit and a criminal process, is important to set the control limit that the victim will have in criminal proceedings.

b) Victim's input into the sentencing process

When you hear of plea-bargaining, guilty pleas are registered or sentencing submissions are done in court by both sides and the judge decides what sentence should be applied on the accused, those are all usually done by defence counsel or Crown. The victim does not necessarily have a voice in that stage to make his or her position in sentencing. It's not part of their role or their capacity as a victim because it is not enabled by the criminal process. The measure of control the victim can exercise is within the boundaries of being that witness to the process. However, special, and also considered normal privileges are afforded to them because of their status as the victim in the process. They may be consulted by the Crown counsel to provide a victim impact statement about on-going fears. The Crown in the case of a friend assaulting them, may ask the victim if they'd prefer a probation order being set on the accused in order for them to feel safer. Conditions in that probation like no contact from the accused.

You hear “I drop the charges”, that doesn’t happen in Canada. The victims don’t have the power to do that because it’s the police who lays the charges and the prosecutor through his discretion chooses to prosecute the charge or not. Sometimes, the victims at one point, may voice their opinion to not continue with the proceedings about going after the accused. They can tell the Crown, or a police officer and schedule a meeting to talk it over on the phone and the Crown will look at the circumstances of the offence, the records of the accused, as being a repeating offender or not, has there been past complaints between the victim and the accused. In some circumstances, it is within the bounds of Crown’s discretion on the public interest grounds. Crown can only move forward if there is a reasonable prosecutorial conviction and if there is a public interest.

Number of factors that are taken into account and the circumstances that relate to the victim will be taken into account if we deem it would be appropriate to stay the charges.

=here stay the charges mean like drop the charges

Example: That elderly fella that stole something in the grocery store, has no criminal record, the police was involved as their was a complaint. At the mean time, through the police work and he lays the charge. In the mean time, the store owner understands the circumstances of the old man, and this victim wants to pull back the charge for many reasons that he understands the old man is poor taking care of his grandkids. The Crown, might, if learn that same information, and especially if the victim mentions it, might drop the charges. Victims are not a party in criminal proceedings, although they have a voice, yet limited.

At the same time, the Crown prosecution services, they try to be inclusive for victims to participate as much as possible. They give as much information. However they are legal barriers to giving information. The victim wants to see certain exhibits of the evidence in a homicide case.

Note: Theirs the direct victim (harmd or killed one), or the secondary victims(usually the family and friends who are traumatized by what happened).

Before the verdict, the dad of the 19 year old boy who was buried dead and discovered few months later, pictures were taken of police work and the job is being done for information to be ready for trials. The father wanted to see where his son was and see the pictures. So you got to ask yourself why not show the father, but then again is it appropriate to show the pictures to help this person move on. You make a judgment call and know this isn’t appropriate and not show the loved ones of the victim. Although, they would see the pictures during trials but you don’t show it to them until it becomes public in the public domain. As much as inclusive and participation is encouraged, that is limited.

In terms of how that impacts the relationship of Crown and victims, the Crown counsel is not the victim’s lawyer. Their role is to help the victim for the trial proceedings.

If you are suing someone, in a civil matter, you can basically tell anything to your lawyer because he is not bound to say your confidential statements. There is client confidentiality privilege, so the lawyer keeps everything to himself unless that confidentiality privilege is waived by the lawyer or victim.

But if there was a lawyer-client relationship between Crown Counsel and the victim, and in the course of process where Crown will meet with victims to prepare them for court and uncover information or facts of what happened. We often hear contradictory versions that victims give out. Sometimes, you see victims volunteering contradicting statements just like when you see in

domestic assault situations, in order not to continue proceedings they lie and cover up. They don't want the process to continue, so they end up denying the story.

But those contradicting statements become essential and impact the prospect of conviction so we cannot ignore those statements and take them into account to evaluate them with other statements and figure out what really happened. These statements may impact the prospect of conviction. For legitimate reasons we learn information, that if we treated it as a solicitor-client privilege relationship we would be duty bound, a foundation of the principle of prosecutorial independence, duty to disclose where appropriate we make decision that in circumstances we reveal the fact that we received information and that's an appropriate distinction between victim and the Crown.

The Crown is not the victim's lawyer and is not bound to confidentiality privilege.

If a victim described to what happened to her, and a few weeks later she adds when the incident occurred or when she made a statement she was under the influence and has trouble remembering the crucial facts of the case. Again, we are required by law to reveal that information because we are not bound by solicitor-client privilege. If a third party comes forward and tells the Crown or one of the staff at the Crown office, a witness coordinator something that may impact the credibility of the victim. The Crown can also not ignore that and must reveal it to Defense counsel. We have an ethical responsibility to be fair and ensure our obligations are met "because a defense counsel must advocate for their client.

- Sections 722 and al. C.C.

Refers to victim impact statement : "For the purpose of determining the sentence to be imposed on an offender or whether the offender should be discharged as presumed to section 730 in respect of any offence, the Court shall consider any statement that may have been prepared in accordance of subsection (2) of a victim of the offence describing the harm done to, or loss suffered by, the victim arising from the commission of the offence.

Subsection (4): For the purpose of this section and section 722.2 "victim" in relation to an offence, (a) means a person to whom harm was done or who suffered physical or emotional loss as a result of the commission of the offence; and (b) where the person described in paragraph (a) is dead, ill or otherwise incapable of making a statement referred to in subsection (1), includes the spouse or common-law partner or any relative of that person, anyone who has in law or fact the custody of that person or is responsible for the care or support of that person or any dependant of that person.

-Section 380.3 C.C.

That's an important element showing who can make "victim impact statement" before sentencing or after sentencing, regarding the harm done to them, if they are still feeling physical or emotional pain they can update the "victim impact statement". There's never a bar to that. The "statement" is filed with the Court and sealed by the Court until after the trial process when there is a guilty-plea and take the impact statement of the victim into account in determining the appropriate sentencing to be imposed on the accused. The victim has the option, although rarely, ask to read their statements in court and some do. You see it more in homicide cases where the victim actually wants to speak and address the Court and at that stage there is a high level of emotions and it's an important thing for the victims to do although you won't see that in other types of offences. The court is a public place, sometimes there's a lot of people and some days there's nobody. In other types of offences that people go to court for, there are difficult

things to talk about at trial stage and even less at sentencing stage. So they have a formula available that dispenses the victim from standing up and voice themselves. Although some who do prefer, have definitely the right to do so. It's the exception, not the rule for victims to do that.

Expectation in the criminal justice system that those who have suffered harm will be treated with respect, compassion and given a voice as much as possible and be given as much information. Their position as victim will make them want to know as much possible about the case and its proceedings, the stages and results. The rule in that perspective is to be as much responsive on informations for the victims.

In the Yukon, West North Territories, and Nunavut there are these positions called Crown witness coordinators, there are 16 these people who work for the Crown, and their role is to be a bit of a liaison between Crown counsel and victims. Because of the volume of prosecutor cases, prosecutors have to deal with and prosecute they sometimes become unable to find the time to spend enough time responding to victims. This position was created a number of years ago to improve in that perspective and allow these positions to be created. They are the extension of Crown counsel and they have special skills and training in social service area. They are not counsellors, therapeutic counsellors, but they provide support, they have paralegal training and learn a lot about the criminal justice system. They contact victims early on and provide them with information about the system and the cases affecting them and keep them informed what happens in Bell court.

They do what Crown counsels do in the rest of Canada that don't have these positions (Crown witness coordinator).

They meet with victimized children and it's a slow process to get them comfortable because they know we are part of the system and only wanting to know about what happened. That can be really hard for children, and takes a long time.

They may start with getting to know the child, and not talking about anything about the case and gradually starting to talk about the case. Then later, they show them the court and slowly explain to them how everything is going to happen. The judge sitting there, the clerk over there with papers and you'll have to make an oath and tell the whole truth. Tips on how to testify when nervous.

They are treated with much care during the case, and humanity and attention given to those interested victims. Some victims much prefer being far away from the case.

G) Defence counsel

Key player, in the criminal justice system. Only profession in Canada that has status in the Charter of Rights and Freedom under 10b, "*you have right to counsel*" (right to a lawyer).

The role of defence counsel is crucial:

- Their role comes into play after charges are laid.
- They make court appearances with victims or the accused

- They provide a very crucial investigation before the charge stage, for the detained.
- They are crucial in the investigation stage. For people detained, contact a lawyer. All those who exercise their 10b right.
- Police has a constitutional duty to contact for them a lawyer.
- They play an active role.
- They will give advice, sometimes advice about not making things worse for yourself.
- The defence counsel, knows if that person refuses to have breathalyzer taken he will be charged on two counts, the second would be refusal to police proceedings, although the level on the breathalyzer, might be too much, the Crown evidence. You are acquitted on the impaired driving, but also penalized for refusing the breathalyzer.

Some people with really serious offences, sometimes they are interviewed under the influence, or nervous. The person has to think about his choice, if they don't get that advice of not saying anything. Because if the defence counsel tells them after giving them advice and they still talk in the interview room, that can be used against them in a court of law.

- Provides that additional protection to refuse people to remain silent and incriminate themselves.
- They play a key role to test the credibility, reliability of the Crown's evidence.

A victim or a witness testifies that they saw the accused going through a window, charged with break and entry. And they are sure it was him. When they testify under oath and are in good faith, the defence counsel will question them; "what did you see, how long did it take for the offence to happen, how was the lighting, were you wearing glasses." asking bunch of questions to ensure the credibility of the witnesses statements.

The role is really important because at the end of the day, it ensures that there is an important reliability of the Crown, to prove beyond a reasonable doubt the guilt of any accused person. We know for a fact, the system hasn't worked in certain cases, but sometimes in cases of incriminating statements.

- At the sentencing stage; defense will say you are in an aggravating factors, the criminal record seriousness of the offence. The Crown doesn't know the background of the accused, contributing factors explaining why that person is here today. The lawyer, that's their job, bringing to the surface, all information required. The sentence will be adapted to the specific individual, the proportionality.

- Solicitor-client privilege

Evoking Charter arguments where appropriate. The key-role of testing the admissibility of Crown Counsel Where for example, Crown wants to introduce a incriminating statement, when lawyers meet with their clients if let's say " the police investigator told me that if I just admit what happened I would speak to the judge and the judge would only give you a fine. Or speak to the Crown and the Crown would not proceed with the case."

There's a rule in Criminal Law, when Crown wants to tender the statement of an accused person to a person of authority such as police, they must prove through the trial process that they can use that statement, must be declared admissible in court and in additional to Charter

requirements have before the Attorney that the statement was made freely, voluntarily, by inducement, promises.

Let's say they are proceeding to trial, the Crown will have to call what's a *voi-dire*, which is a trial within a trial: "Your Honor, the Crown is seeking to have a statement made by the accuse admissible." So they will have to prove to the judge the admissibility of the statement, with witnesses to the case and by the facts raised along investigation. As well as bringing all the authorities that came into context with the accused to prove that the statement made by the accused was made free and voluntarily.

Defence Counsel, sometimes the Crown's and police work, their version of events is quite different. Their job is addressed to you, and in Court they'd ask "Wasn't there a talk that if you made such a statement what might happen" Then you will have further questions put to them about anything that was said to induce that statement. The Defence counsel cross-examines these witnesses and once the Crown has closed its case in the *voi-dire*, Crown counsel will say "those are my witnesses for the *voi-dire*" and defence counsel would also say "For the purpose of this *voi-dire* I'm going to call my client". They don't always have to call their client, the client will testify in the trial within a trial only focused on the admissibility of the statements.

And if for example the client comes and says what he once said to his Defence counsel at a different moment, then the judge will have the opportunity to cross-examine. And at the end of the *voi-dire*, if there are no more witnesses, parties will argue (Crown and Defence counsel). "Your Honor, it's my submission that Crown counsel has not met its burden of proving beyond a reasonable doubt that my client's statement was free and voluntarily, you have evidence suggesting it was a product of inducement following the process of favor". Then the judge will have to decide to test the admissibility of the statements. If the judge has a reasonable doubt that the accused made that statement, he must declare the statement as inadmissible and then he must look at the rest of the evidence presented in the *voi-dire* and decide if it is admissible. And if it is admissible, back we go into the trial case, and have the actual statement presented as the truth of what happened in the case.

- Defence counsel has a crucial role in terms of assertion by their client that there was a Charter violation.
- Their role is to fight with the Court and pursue with saying "we'd like 24.2 to declare these statements inadmissible as the process of obtaining them was in breach of section 7 of the CCRF." same kind of procedure would play out
- Without defence counsel, most citizens who end up being accused persons would one time or another, they don't know about the system, or the *voi-dire*, Charter arguments, it's important in a fair justice system that that kind of system is available.
- Defence counsel are bound by solicitor-client privilege, and so any revelation by the client to the defence counsel cannot be disclosed unless it is waived by the client or by the Court. (No question on the exam about that)

- CBA Code of Ethics (http://www.cba.org/abc/activities_f/pdf/codeofconduct.pdf)

5. The trial process: Procedure, Punishment and Evidence

A) Overview of criminal procedure

a) Classification of offences: summary, indictable or hybrid

i) Section 34 Interpretation Act

- **34. (1)** *Where an enactment creates an offence,*
 - *(a) the offence is deemed to be an indictable offence if the enactment provides that the offender may be prosecuted for the offence by indictment;*
 - *(b) the offence is deemed to be one for which the offender is punishable on summary conviction if there is nothing in the context to indicate that the offence is an indictable offence; and*
 - *(c) if the offence is one for which the offender may be prosecuted by indictment or for which the offender is punishable on summary conviction, no person shall be considered to have been convicted of an indictable offence by reason only of having been convicted of the offence on summary conviction.*

(2) All the provisions of the Criminal Code relating to indictable offences apply to indictable offences created by an enactment, and all the provisions of that Code relating to summary conviction offences apply to all other offences created by an enactment, except to the extent that the enactment otherwise provides.

ii) Determining the court's jurisdiction (section 469, 553, 536(2) and 785 C.C.)

469, 553, and 536(2)

These provisions tell you the determination of the court's jurisdiction, they tell you what form a given case, or particular offence will be played out.

469, will tell you that murder offences and terrorism acts, that won't be dealt with summary conviction, provincial court. 553, tells you a series of offences that it's going to be absolute jurisdiction of a provincial court judge, therefore no option for a jury.

469: *"Every court of criminal jurisdiction has jurisdiction to try an indictable offence other than*

(a) an offence under any of the following sections:

(i) (ii) (iii) (iv) (v) (vi)(vii) (viii) section 235 murder

(b) The offence of being an accessory after the fact to high treason or treason or murder, is also one of the offences for which not all courts have jurisdiction on.

© an offence under section 119 bribery by the holder of a judicial office

(c.1) crimes against humanity (d) attempts of any offence mentioned in subparagraph (a)(i) to (vii) or (e) the offence of conspiring to commit any offence mentioned in paragraph (a)

553. *The jurisdiction of a provincial court judge, or in Nunavut, of a judge of the Nunavut Court of Justice, to try an accused is absolute and does not depend on the consent of the accused where the accused is charged in an information*

- *(a) with*
 - *(i) theft, other than theft of cattle,*
 - *(ii) obtaining money or property by false pretences,*

- (iii) unlawfully having in his possession any property or thing or any proceeds of any property or thing knowing that all or a part of the property or thing or of the proceeds was obtained by or derived directly or indirectly from the commission in Canada of an offence punishable by indictment or an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence punishable by indictment,
- (iv) having, by deceit, falsehood or other fraudulent means, defrauded the public or any person, whether ascertained or not, of any property, money or valuable security, or
- (v) mischief under subsection 430(4),
- where the subject-matter of the offence is not a testamentary instrument and the alleged value of the subject-matter of the offence does not exceed five thousand dollars;

In any given court week in Canada, Monday's are the docket day; that's the day where the big court list before a judge. First appearance, and the Crown will have a minimum to determine what election, (in the case of Dave, will I proceed by indictment or summary conviction, which would affect the whole proceeding. In summary conviction, there would be no preliminary inquiry, and the punishment will be less but the outcome will come quicker. If I go by indictment, depending on the case, it will have the accused entitled to a pre-limb, the penalty will change and will be more serious and the victim may testify twice in a preliminary hearing and afterwards). 553, establishes a particular category where Parliament has decided for certain cases, whether it's summary conviction or indictment, not all cases will be punishable with the option of jury. Let's say a theft of something worth less than 5000\$, is absolute jurisdiction but the Court can still select summary conviction and maximum punishment 6 months and jail, and or fine with probation. But the Crown can still select by indictment, with incarceration of 2 years. Parliament has decided that those punishments will be absolute jurisdiction of provincial court, no pre-limb or election, judge and jury not available. But the accused is entitled to the option of having a jury if the offence is punishable of 5 years or more. On a busy docket day, that list of cases the Crown has to be familiar with those provisions, what their elections might be and be prepared to how everything will be played out.

- (b) with counselling or with a conspiracy or attempt to commit or with being an accessory after the fact to the commission of
 - (i) any offence referred to in paragraph (a) in respect of the subject-matter and value thereof referred to in that paragraph, or
 - (ii) any offence referred to in paragraph (c); or
- (c) with an offence under
 - (i) section 201 (keeping gaming or betting house),
 - (ii) section 202 (betting, pool-selling, book-making, etc.),
 - (iii) section 203 (placing bets),
 - (iv) section 206 (lotteries and games of chance),
 - (v) section 209 (cheating at play),
 - (vi) section 210 (keeping common bawdy-house),

- (viii) section 393 (fraud in relation to fares),
- (viii.01) section 490.031 (failure to comply with order or obligation),
- (viii.02) section 490.0311 (providing false or misleading information),
- (viii.1) section 811 (breach of recognizance),
- (ix) subsection 733.1(1) (failure to comply with probation order)

536(2): *“If an accused is before a justice charged with an indictable offence, other than an offence listed in section 469, and the offence is not one over which a provincial court judge has absolute jurisdiction under section 553, the justice shall, after the information has been read to the accused, put the accused to an election in the following words:*

You have the option to elect to be tried by a provincial court judge without a jury and without having had a preliminary inquiry; or you may elect to be tried by a judge without a jury; or you may elect to be tried by a court composed of a judge and jury. If you do not elect now, you are deemed to have elected to be tried by a court composed of a judge and jury. If you elect to be tried by a judge without a jury or by a court composed of a judge and jury or if you are deemed to have elected to be tried by a court composed of a judge and jury, you will have a preliminary inquiry only if you or the prosecutor requests one. How do you elect to be tried?”

That’s the triggering section that relates to cases in which, if you are excluding the murder and treason of 469, or of absolute jurisdiction, for other types of offences other than summary conviction, like only the ones of indictable offences, this section would apply and even for sexual assault convicted by indictment. In those cases, you have the option for judge and jury and picked with a single judge if preferable for the accused.

iii) Limitation period (Section 786(2) C.C.)

Are important, in some circumstances. There are no limitation period for indictable offence, for offences like murder. If somebody commits a murder, that person can be charged 30 years down the road. Sometimes, it depends when the authorities knew. If the authorities knew how the case will proceed and don’t. In this case, that person if there is an unsolved crime, no limitation period. As for summary conviction, like in shoplifting, there would be a limitation period for 6 months.

Example: Extremely busy day for the Crown, the shoplifting case takes 4 months for police report to be completed and be brought to the Crown’s office. And the Crown for some reason by the addresses exceeds the 6 month period has expired. The limitation period has expired. There are options available for more serious offences that the crown can make an election for the case to survive, to continue.

When we say hybrid, the Crown has the option to go summarily or indictment. If it goes by indictment, it means that the circumstances where there is no limitation period it keeps going on.

- **786.** (1) *Except where otherwise provided by law, this Part applies to proceedings as defined in this Part.*

- (2) *No proceedings shall be instituted more than six months after the time when the subject-matter of the proceedings arose, unless the prosecutor and the defendant so agree.*

For example: A person charged with assault, and the Crown chose to proceed with indictment, and the proceedings begin. 8 months later, they are at trial, the accused is ready to plead guilty, and then doesn't want to plead guilty to an offence by indictment because of the impact it has on parole eligibility and those factors of punishment eligible for if he does plead guilty. The Crown will agree, if depending on the progress the accused has made during the time since he committed the offence, the Crown is amendable on the trial day, prepare to re-elect and proceed by summary conviction. More than 6 months, technically Crown would not be able to have another charge, or implementation by summary conviction unless the accused consent.

iv) Punishment (Section 787 C.C.)

- **787.** (1) *Unless otherwise provided by law, everyone who is convicted of an offence punishable on summary conviction is liable to a fine of not more than five thousand dollars or to a term of imprisonment not exceeding six months or to both.*
- (2) *Where the imposition of a fine or the making of an order for the payment of money is authorized by law, but the law does not provide that imprisonment may be imposed in default of payment of the fine or compliance with the order, the court may order that in default of payment of the fine or compliance with the order, as the case may be, the defendant shall be imprisoned for a term not exceeding six months.*

Unless otherwise provided by law, for summary convicted offences, an accused is punishable to a fine not more than 5000\$. Or to a term of imprisonment not exceeding 6 months or both. If otherwise provided by law, means you have to determine if you're dealing with a particular offence, there is a minimum punishment provided. Impaired driving has a minimum punishment, so even though section 787 says there is no minimum, the judge has to be aware of the law. Because it would be an error to impose a 300\$ fine for impaired driving.

787 says UNLESS OTHERWISE PROVIDED BY LAW, so if there is otherwise provided, then those apply if not, 787 applies

b) The main stages in the criminal process, from first appearance to the trial

i) The Information (Sections 504, 507(explaining the process of laying an information), 788 and 795C.C.)

- **788.** (1) *Proceedings under this Part shall be commenced by laying an information in Form 2.*
- (2) *Notwithstanding any other law that requires an information to be laid before or to be tried by two or more justices, one justice may*
 - (a) *receive the information;*
 - (b) *issue a summons or warrant with respect to the information; and*
 - (c) *do all other things preliminary to the trial.*

The type of form that can be used. (2) says what one judge can do.

Information is the stage that proceed the first appearance. The person is the charging document, on the information the officer will swear that information or a justice of peace will

contain 5 charges of assault. Count 1, on or about november 6, did assault so and so. Thereby committing an offence contrary to section 265, count 1 threats, count 2....

The accused, depending on the process, that the officer would have chose. The accused of shoplifting, will go home and not be held by custody and be given a promise to appear or a summons that says "you are charged with this, be in court on this day, time and place"

The information is the starting point, sometimes depending on the offence, it will be a document telling the person to be present in court. If it's a very serious offence, like robbery, the person will not be allowed to go home and be in custody and be charged the next morning and give an information and be in court the same day.

Depending on the seriousness of the offence, you could be held in custody or not.

ii) First appearance (Section 503, 620, 795, 800 C.C.)

503. (1) *A peace officer who arrests a person with or without warrant or to whom a person is delivered under subsection 494(3) shall cause the person to be detained in custody and, in accordance with the following provisions, to be taken before a justice to be dealt with according to law:*

- *(a) where a justice is available within a period of twenty-four hours after the person has been arrested by or delivered to the peace officer, the person shall be taken before a justice without unreasonable delay and in any event within that period, and*
- *(b) where a justice is not available within a period of twenty-four hours after the person has been arrested by or delivered to the peace officer, the person shall be taken before a justice as soon as possible,*

unless, at any time before the expiration of the time prescribed in paragraph (a) or (b) for taking the person before a justice,

- *(c) the peace officer or officer in charge releases the person under any other provision of this Part, or*
- *(d) the peace officer or officer in charge is satisfied that the person should be released from custody, whether unconditionally under subsection (4) or otherwise conditionally or unconditionally, and so releases him.*
- *(2) If a peace officer or an officer in charge is satisfied that a person described in subsection (1) should be released from custody conditionally, the officer may, unless the person is detained in custody for an offence mentioned in section 522, release that person on the person's giving a promise to appear or entering into a recognizance in accordance with paragraphs 498(1)(b) to (d) and subsection (2.1).*

(2.1) In addition to the conditions referred to in subsection (2), the peace officer or officer in charge may, in order to release the person, require the person to enter into an undertaking in Form 11.1 in which the person undertakes to do one or more of the following things:

- *(a) to remain within a territorial jurisdiction specified in the undertaking;*
- *(b) to notify the peace officer or another person mentioned in the undertaking of any change in his or her address, employment or occupation;*
- *(c) to abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the undertaking, or from going to a place specified in the undertaking, except in accordance with the conditions specified in the undertaking;*

- (d) to deposit the person's passport with the peace officer or other person mentioned in the undertaking;
- (e) to abstain from possessing a firearm and to surrender any firearm in the possession of the person and any authorization, licence or registration certificate or other document enabling that person to acquire or possess a firearm;
- (f) to report at the times specified in the undertaking to a peace officer or other person designated in the undertaking;
- (g) to abstain from
 - (i) the consumption of alcohol or other intoxicating substances, or
 - (ii) the consumption of drugs except in accordance with a medical prescription; or
- (h) to comply with any other condition specified in the undertaking that the peace officer or officer in charge considers necessary to ensure the safety and security of any victim of or witness to the offence.

Those are the options that often play out. We often hear in the media, we hear who are held in custody, in reality majority it plays out, conditions that are imposed or no conditions imposed.

795 provides certain procedural provisions. Tells what section applies depending on certain parts, types of proceedings that are applicable.

800 (1) *Where the prosecutor and defendant appear for the trial, the summary conviction court shall proceed to hold the trial.*

Did assault so and so, contrary to section 266

The information will be the starting point, the person will not be going home, and will be going to custody the next morning and appear in custody.

iii) Accused election (Sections 469, 553 and 536(2) C.C. and 11f) of the Charter)

it can even happen at first appearance.

What happens here, is the accused election depending on what kind of case it is. Like if it's a summary conviction, a person charged with summary conviction from shoplifting, the Crown selects to proceed summarily, the accused doesn't need to elect, simply required to enter a plea guilty or not guilty.

If it's an absolute jurisdiction offence provided by section 553, theft less than 5000\$ which the Crown decided that based on the accused records and seriousness of the offence, and even though we can by summary we will proceed by indictment, that accused has no election.

If it's a break and enter by indictment, it's punishable for more than 5 years, than in those kind of circumstances, sexual assault where the Crown proceeded by indictment up to 10 years in prison, the accused has a choice to make.

Either judge alone, or with jury, provincial court without pre-trial or judge and jury. When they come back, they must make an election. The election is not done for every offence.

It's a choice that the accused has to decide what kind of process they are going to pick for the proceedings, choice or election, if I am charged with aggravated assault by indictment, because it is punishable for more than 5 years, (14 years) I'm allowed to an election to chose judge alone, provincial without a preliminary hearing, or i can say with judge and preliminary hearing or judge and jury. And I'm also picking i'm deciding I want a preliminary hearing it's probably cost more.

If there is a pre-limb, there's an additional stage. It's your choice when you talk about accused election. Opposed to Crown election which is only between summary conviction or indictment. If ;let's say the Crown selects summary conviction for sexual assault, if that's possible, then the accused doesn't have to bother and make an election because summary is short. The maximum punishment would be 18 months in jail, there's no pre-limb available, or jury. But if the Crown selects by indictment, then the accused will make his election of how he wants it the process to unfold (judge and jury, or judge alone, pre-limb, which are important moment that show the reliability of the Crown's case. That's before the trial, they get to hear what that evidence is and get to hear witnesses testifying against them, judge get to cross-examine them.)

Basically, if by indictment, and not within the absolute jurisdiction found in section 553, than the accused has option to elect. However, let's say, theft of something less than 5000\$, by indictment it's punishable for 2 years, by summary 6 months. And the Crown says "By indictment Your Honor". The accused will not have the option to elect as pursuant to section 553. However, if it was a theft of more than 5000\$ and by indictment, then the accused is entitled to an election.

In offences found in 469, such as murder or treason, the accused doesn't have to elect for judge and jury. It's automatic neither elect for pre-limb, judge alone, it's provided for them. They can waive later on, but as opposed to offences that have an election option and chooses to proceed by indictment unless it is absolute jurisdiction, theft under 5000\$, even if the Crown says indictment, the accused has no election or preliminary hearing because 563(2) says so.

S11F "Any persons charged with an offence has the right (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment"

So sexual assault, for which the Crown has selected to proceed by indictment, punishable for 10 years, 11F tells you that the trial may be held with judge and jury.

If the Parliament tried to provide a provision that stated at (3) for sexual assault for which the Crown has selected to proceed by indictment, the trial will be judge will be held before a provincial court judge. Then you would be that Defence counsel could say it is unconstitutional, because provincial court judge doesn't have the option for judge and jury whereas 11F states that offences of punishment more than 5 years must be held before a judge and jury.

iv) Interim release (Sections 515 (1), (2), (4), (6) and (10) C.C. and 11 e) of the Charter)

Bail provision; for most crimes the accused will be released on bail unless the onus or burden of establishing that the accused should remain in custody, until the end of the trial proceeding, is on the Crown. The general rule, the accused can be released on bail, unless the Crown proves or shows cause of why the accused should remain in custody. The Crown's onus is to contest

that the accused should be released on bail and be kept in custody is on a balance of probabilities.

- **515.** (1) *Subject to this section, where an accused who is charged with an offence other than an offence listed in section 469 is taken before a justice, the justice shall, unless a plea of guilty by the accused is accepted, order, in respect of that offence, that the accused be released on his giving an undertaking without conditions, unless the prosecutor, having been given a reasonable opportunity to do so, shows cause, in respect of that offence, why the detention of the accused in custody is justified or why an order under any other provision of this section should be made and where the justice makes an order under any other provision of this section, the order shall refer only to the particular offence for which the accused was taken before the justice.*

The law says, unless you are charged with something such as murder like in 469, the accused must be kept in custody, and it's a reverse onus, the accused must explain why he must be released. Unless he shows cause why he should be kept in custody until trial. Otherwise it's the Crown who has to the onus to prove why the accused should not be released.

The judge doesn't just release people.

(2) Where the justice does not make an order under subsection (1), detention of the accused is justified, order that the accused be released

- *(a) on his giving an undertaking with such conditions as the justice directs;*
- *(4) The justice may direct as conditions under subsection (2) that the accused shall do any one or more of the following things as specified in the order:*
- *(f) comply with such other reasonable conditions specified in the order as the justice considers desirable.*

The basis for the justification for detention of custody, the general rule is for most offences, the judge is required to release an accused. Even with this general rule, the Crown prevails itself to show the reason why this person should not be released. The Crown will present its case, and say "This is why Your Honor". The Crown speaks first "Here's what happened Your Honor", then they will highlight the record of the accused and any relevance to the accused, the impact on the victim, the repeating offences of the accused, or if he has an untreated mental health issue that makes him act this way and therefore a danger who should not be released.

Then the defence counsel will present its case or its argument, for example, they will try to establish that their client is ready to respect and comply with any conditions the Court will impose. So at the end of the process, the justification of the detention that the Crown will try to impose based on

(10), for the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:

- *(a) where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law;*
- *(b) where the detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, or any person under the age of 18 years, having regard to all the circumstances including any substantial likelihood*

that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice (Like threaten witnesses); and

- *(c) if the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including*
 - *(i) the apparent strength of the prosecution's case,*
 - *(ii) the seriousness of the offence,*
 - *(iii) the circumstances surrounding the commission of the offence, including whether a firearm was used, and*
 - *(iv) the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject-matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more.*

So often it's the interplay between a and b. How does the Court determine if they will attend Court or not, so for example; If the person has no fixed address, or has recently entered the jurisdiction of where the act is committed, and there's no concrete information about who knows this person. Then they will look at the person's record and see that if in the last 15 years the accused has been convicted 5-6 times and failure to appear in court. "Can I rely on this person, even if his lawyer says don't worry Your Honor he will be here?" Those are the factors that are going to be considered.

Very often, however, Crown says that's not the concern and rare that person has failure to appear and will say "Your Honor, the Crown is seeking detention on the second ground."

They will emphasize the seriousness of the offence, if there's any erratic conduct or any mental issue that hasn't been treated and leads to erratic conduct. Or history, of public issue. Well from that point of view, what's the guarantee that this person will be treated or want to be treated for public safety. Look at the criminal record, and will look at how many convictions, and look at how many breaches of probation and look at the seriousness of the case, and be asked and argued that this will work or not.

11E 11. Any persons charged with an offence has the right (e) not to be denied reasonable bail without just cause;

Charter protection, that protects a person, there should be a strong basis justifying why a person should be kept in custody.

Interim release; very important and busy stage of the criminal justice process. There you have how things will unfold. The alleged offence, police are involved and will determine what charges will be laid, if charges should be laid. They make choices, if it's shoplifting, go home and here's a summons to appear in court. Or, depending on the seriousness of the offence, they will keep the person in custody till the morning, prepare the paperwork and lay their information. The Crown will be assigned to Bell Court, address an interim release and play out just like in First Appearance or can just have an appearance later on, then they proceed. The Crown challenges the release, that person should remain in custody. However, in some situations, Crown and defence counsel are able to have some discussion, and some kind of release package is suggested by Defence counsel. A viable package, like for example;

prepare relatives or friends that are ready to take in that accused and monitor their behaviour as much as giving them a fixed address.

It's all a matter of discretion for the Crown to how things will play out, to proceed showing cause, consenting to release.

What the judge can do; their use to be subsection 12 of 515:

(12) A justice who orders that an accused be detained in custody under this section may include in the order a direction that the accused abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the order, except in accordance with such conditions specified in the order as the justice considers necessary.

If a person had been charged with assault, and a justice had released that person, and their court date is in 2 months. The usual conditions of their release is not having any form of contact with the victims at all. In the mean time, they repeat the same or different offence. 529, in those sub 8, provides that in this kind of situation, your release will be revoked and put the onus, the burden on the accused to say why he should be released once again.

That's often how things unfold!

v) Preliminary hearing (Sections 536, 548 and 549 C.C.)

- A stage in the proceedings where the Crown is required to establish it has sufficient evidence to warrant the committal of the accused to trial.
- The accused is entitled to waive that.
- There was a time before Stinchcombe decision, that disclosure of evidence to defence counsel is an obligation of the Crown
- Defense counsel usually has all the evidence and are able to make decision or advise their clients in every step of the way.
- It's an important procedural aspect in the Code.
- A judge, if preliminary hearing does proceed, usually call witnesses. The starting point, if an accused doesn't ask for the pre-limb, then it is considered, presumed waived.
- So the accused must ask for it, even the Crown can ask for a preliminary hearing.
- If the Crown has concerns about the health of one of its key-witnesses, they may or the reliability of one of the witnesses, they may want to get their sworn evidence on record.
- Usually it's the accused who ask for the pre-limb to hear the complaints.
- Option at the trial stage
- It's a short version of a trial, not the same burden that the Crown has.
- Justice of Peace, is not required to judge credibility of the witnesses. Defence counsel cross-examines that statement of the witness. However, no matter what extends the credibility of the statement, and if there is evidence that a criminal offence has been committed, the Judge will commit the accused to trial and the determination of the credibility of the witnesses will be held by the trier of facts.

vi) The Indictment (Section 566 C.C.)

- Provided by section **566**. *(1) The trial of an accused for an indictable offence, other than a trial before a provincial court judge, shall be on an indictment in writing setting forth the offence with which he is charged.*
- Just like an information, is the starting point.
- The official court document that holds the criminal offences into account, that must be brought in court at trial on an indictable offence.
- In other words, if I do a preliminary hearing, the justice at that stage has an information. Let's start with break and enter, if I present my case and commit the accused to trial on break and enter. On the trial date, 2 months later the Crown is required to present an indictment.
- At the trial stage, that's what 566 says.
- Official charging document
- The judge will ask the clerk to read the charge on the indictment, and ask the accused how do you plea.
- There has to be an indictment.

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viii) The Trial and the Verdict (Sections 606, 625.1 C.C.)

- **606**. *(1) An accused who is called on to plead may plead guilty or not guilty, or the special pleas authorized by this Part and no others.*
- (1.1) A court may accept a plea of guilty only if it is satisfied that the accused*
 - *(a) is making the plea voluntarily; and*
 - *(b) understands*
 - *(i) that the plea is an admission of the essential elements of the offence,*
 - *(ii) the nature and consequences of the plea, and*
 - *(iii) that the court is not bound by any agreement made between the accused and the prosecutor.*
- *(1.2) The failure of the court to fully inquire whether the conditions set out in subsection (1.1) are met does not affect the validity of the plea.*

When accused persons are represented by Counsel, the process is much quicker. There's an assumption made by judges that the lawyer will have taken the proper time to explain to the accused what is going on. They must make inquiries to ensure the accused know how thing

will go after they plead guilty. So judges must make sure that when the statements of facts, and make sure that the accused will agree with what has been read in. And if the person is not represented by a lawyer they must push their inquiry to include to cover all of those elements read out in (1.1).

In refusal plea:

(2) Where an accused refuses to plead or does not answer directly, the court shall order the clerk of the court to enter a plea of not guilty.

That's a presumption, for the benefit of the accused to allow the process to move along.

(3) An accused is not entitled as of right to have his trial postponed but the court may, if it considers that the accused should be allowed further time to plead, move to quash or prepare for his defence or for any other reason, adjourn the trial to a later time in the session or sittings of the court, or to the next of any subsequent session or sittings of the court, on such terms as the court considers proper.

This is quite common to allow for the request of an adjournment. The request for a trial, when the accused isn't ready to proceed or defence counsel isn't ready to proceed. Usually what you see today is lawyers, when accused are represented, will have made for request for an adjournment ahead of time. There are processes on various jurisdiction where that permission can be granted in Chambers and not in open court. That's done ahead of time, sometimes several days ahead of time which allows the Crown, once notified that the matter will be adjourned, to cancel their witnesses to avoid travel cost at the time.

- **625.1** *(1) Subject to subsection (2), on application by the prosecutor or the accused or on its own motion, the court, or a judge of the court, before which, or the judge, provincial court judge or justice before whom, any proceedings are to be held may order that a conference between the prosecutor and the accused or counsel for the accused, to be presided over by the court, judge, provincial court judge or justice, be held prior to the proceedings to consider the matters that, to promote a fair and expeditious hearing, would be better decided before the start of the proceedings, and other similar matters, and to make arrangements for decisions on those matters.*

These and this kind of hearings are actually mandatory for jury trials. These are newer provisions that allow the Court to address complex issues that may come up. Particularly in the context of mega-trials, such as organized crime trials with many accused, many witnesses, many lawyers with many legal issues that need to be addressed. This allows the court and more informal flexible process to address those issues before we get to the actual trial stage in open court. So 625.1 addresses those particular issues that is mandatory at a process before jury trial.

ix) The Sentence (Part XXIII C.C.)

In the trial process, the sentence after conviction, or a verdict of guilty plea, the sentencing is the next step where the counsel is called upon to determine the appropriate punishment considering the nature of the crime committed by that particular person based on their record, offence and other various important factors.

x) The Appeal (Sections 2, 673, 675, 676, 691, 696.1 and 812 C.C.)

There's an appeal process in Canada, which differs in application, and availability on whether it is an appeal by the Crown or the accused.

- **675.** (1) *A person who is convicted by a trial court in proceedings by indictment may appeal to the court of appeal*
 - *(a) against his conviction*
 - *(i) on any ground of appeal that involves a question of law alone,*
 - *(ii) on any ground of appeal that involves a question of fact or a question of mixed law and fact, with leave of the court of appeal or a judge thereof or on the certificate of the trial judge that the case is a proper case for appeal, or*
 - *(iii) on any ground of appeal not mentioned in subparagraph (i) or (ii) that appears to the court of appeal to be a sufficient ground of appeal, with leave of the court of appeal; or*
 - *(b) against the sentence passed by the trial court, with leave of the court of appeal or a judge thereof unless that sentence is one fixed by law.*

You have several options for a basis of appeal. A fundamental difference concerns the circumstance when Crown can appeal. The Crown can only do so on a question of law. Whereas for the accused it is much broader, can be question of law or erroneous interpretation of the facts that they are alleging combined with erroneous obstruction of the law.

For the Crown it's only on a question of law.

Let's say: In a charge of indictment, the judge (judge= master of law, jury=trier of facts), instructs the jury on the law they are required to apply on the facts. And the jury then decides if they are convinced beyond a reasonable doubt that the evidence proves the guilt or innocence of the accused.

So, if the offence for example, is a charge of assault, the judge tells the jury, that the consent whether present or not, the Crown does not have to prove absence of consent. In other words, the jury is instructed that whether consent is available or not, it doesn't matter because actus rea was present, then that is all you need to state a guilty verdict. If the judge makes an error on how he or she explains the law, that would be an error of law. The Crown can only appeal on an error of law.

The Court of Appeal can only review that verdict if they come to a conclusion that when the judge instructed the jury he made an error in law. And such a mistake, that has to be significant enough, that it could have been possible for the verdict of the jury to be different. When it is the Crown appealing, the Court of Appeal cannot say that an outcome doesn't make sense based on the facts. Court of Appeals do not review the facts of the case, they only review the decision of the trial judge, if there has been a significant error in law.

When we talk about appeal to the SCC, it has to be an issue which only addresses on cases of national importance. National importance is the basis of such an appeal. Or else, SCC won't address it.

1. First you go to a Superior Provincial Court
2. Then if there is an error in law, you go to the Court of Appeal
3. And if the issue is of national importance, you go to the SCC

Difference on what the Crown can appeal on and what the accused can appeal on.

c) The trial is the exception, the general rule is the resolution of cases

In the most serious cases, which grabs the medias attention and public, usually of homicide, and have jury trials. In the vast majority of case, most people plead guilty. Most people plead guilty after lawyers meet with the Crown and plea-bargaining come to a resolution. But many people show up on first appearance in court and plead-guilty without a lawyer simply to get over with the process as early as possible. And sometimes, some plead guilty very late.

The Judge's discretion, or limits thereof, to accept joint submissions on sentencing unless the administration of justice in disrepute

Judges have a discretion to accept a guilty plea or not. That's referred to as a joint submission by two Counsels, Crown and Defence joining after negotiation and the making of comments of the sentencing. The judges, although they do have a discretion to follow or not, unless they come to a conclusion that it would bring the administration of justice into disrepute. However, usually they follow especially in matters brought to their attention by experienced Counsels.

In situations that don't follow, on appeal and those sentences have been maintained.

d) The right to disclosure of evidence =IMPORTANT

In the 80's when the Canadian Charter was new, although still developing. An impaired driving report was very thin, not detailed in the description of facts. But now with the right to disclosure, of all the facts that will be presented against you in court, the expectation of the system of officers towards Courts overtime we saw a much more detailed description. Now impaired driving reports are much more detailed, every detail of the police observance related to the driving and how the officer approaches the accused, the nervousness when presenting documents, slurred speech and any observation when the person was walking. All that evidence, statements taken of witnesses, photographs, exhibits sent to expertise. All that disclosable to the Defense Counsel so we are all on the same plain field.

1991, was a big moment for the disclosure of evidence.

R. v. Stinchcombe, [1991] 3 SCR 326

The accused, a lawyer, was charged with breach of trust, theft and fraud. A former secretary of his was a Crown witness at the preliminary inquiry, where she gave evidence apparently favourable to the defence. After the preliminary inquiry but prior to trial, the witness was

interviewed by an RCMP officer and a tape-recorded statement was taken. Later, during the course of the trial, the witness was again interviewed by a police officer and a written statement taken. Defence counsel was informed of the existence but not of the content of the statements. His requests for disclosure were refused. During the trial defence counsel learned conclusively that the witness would not be called by the Crown and sought an order that the witness be called or that the Crown disclose the contents of the statements to the defence. The trial judge dismissed the application. The trial proceeded and the accused was convicted of breach of trust and fraud. Conditional stays were entered with respect to the theft counts. The Court of Appeal affirmed the convictions without giving reasons.

Held: The appeal should be allowed and a new trial ordered.

The Crown has a legal duty to disclose all relevant information to the defence. The fruits of the investigation which are in its possession are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done. The obligation to disclose is subject to a discretion with respect to the withholding of information and to the timing and manner of disclosure. Crown counsel has a duty to respect the rules of privilege and to protect the identity of informers. A discretion must also be exercised with respect to the relevance of information. The Crown's discretion is reviewable by the trial judge, who should be guided by the general principle that information should not be withheld if there is a reasonable possibility that this will impair the right of the accused to make full answer and defence. The absolute withholding of information which is relevant to the defence can only be justified on the basis of the existence of a legal privilege which excludes the information from disclosure.

Counsel for the accused must bring to the trial judge's attention at the earliest opportunity any failure of the Crown to comply with its duty to disclose of which counsel becomes aware. This will enable the trial judge to remedy any prejudice to the accused if possible and thus avoid a new trial.

Initial disclosure should occur before the accused is called upon to elect the mode of trial or plead. Subject to the Crown's discretion, all relevant information must be disclosed, both that which the Crown intends to introduce into evidence and that which it does not, and whether the evidence is inculpatory or exculpatory. All statements obtained from persons who have provided relevant information to the authorities should be produced, even if they are not proposed as Crown witnesses. Where statements are not in existence, other information such as notes should be produced. If there are no notes, all information in the prosecution's possession relating to any relevant evidence the person could give should be supplied.

Crown counsel was not justified in refusing disclosure here on the ground that the witness was not worthy of credit: whether the witness is credible is for the trial judge to determine after hearing the evidence. The trial judge ought to have examined the statements. Since the information withheld might have affected the outcome of the trial, the failure to disclose impaired the right to make full answer and defence. There should be a new trial at which the statements are produced.

Disclosure is an ongoing obligation as we receive any form of evidence, or statement.

If they charged somebody with armed robbery and take statements from 4 witnesses. The witnesses say "Yes, that's him!" And they describe him and the events and all related evidence charging the person. But then again, 2 other statements from other witnesses stating something different from the rest, depending on their condition, perception, if it was dark at the time, or the

timing of the event or when they say the accused. "Oh yea I saw the guy running away with a weapon, he was 6'8." But the guy is 5'10. That statement can oust the charge, it must still go to Defence Counsel. It's not up to the police discretion to choose what information is relevant or not. Because he will definitely only chose information that will help him charge the person whom they detained. Even if they say, oh the person was intoxicated when giving the statement, they MUST give that information to Defence counsel.

- R. v. Dixon, [1998] 1 S.C.R. 244

Three persons were injured in a brawl where the attackers surrounded their victims in turn and kicked and beat them. Two victims (Gillis and Charman) were badly injured and a third (Watts) was permanently and very seriously injured. The accused, who was tried with four others, was convicted of aggravated assault of Watts. Significantly, he was found guilty both as a principal and also as a party (aiding or abetting) under s. 21 of the *Criminal Code*. During the course of the trial, counsel for all the accused were provided with copies of police occurrence reports which included summaries of statements given by four individuals. Two statements indicated that the persons making them had not witnessed the assaults. The third (Tynes') stated that the person was with the Crown's main identification witness in the vicinity of the assaults. It also described that witness' clothing that night. The fourth (Daye's) indicated that the person witnessed two of the assaults, identified the location of some of the accused during the assaults and identified some of the assailants. It implicated the accused in an assault for which he was neither charged nor convicted and contradicted the evidence of the main identification witness in certain respects.

None of the four statements was produced by the Crown and this gave rise to a ground of appeal based on the Crown's failure to disclose information as required by s. 7 of the *Canadian Charter of Rights and Freedoms*. The Court of Appeal dismissed the appeals. It admitted fresh evidence, however, which indicated that counsel had not only transcripts and statements that made reference to some of the persons whose statements were not disclosed but also a chart and cross-reference sheet. The accused's counsel also reviewed the police occurrence reports and decided that nothing in the four statements referred to in those reports would assist the accused in making full answer and defence. The other counsel came to the same conclusion on the basis of the summaries.

At issue were: (1) what was the appropriate test to be used in determining whether the Crown's inadvertent failure to disclose relevant material violated the accused's right to disclosure; (2) if the right to disclosure were violated, what was the appropriate test to determine whether the *Charter* right to make full answer and defence was impaired; and (3) in determining whether that right had been impaired, what was the effect to be given to defence counsel's lack of due diligence.

Held: The appeal should be dismissed.

(1) *The Crown's Duty to Disclose*

Where an accused demonstrates a reasonable possibility that the undisclosed information could have been used in meeting the case for the Crown, advancing a defence or otherwise making a decision which could have affected the conduct of the defence, he has established a violation of his *Charter* right to disclosure. The right to disclosure of all relevant material has a broad scope and includes material which may have only marginal value to the ultimate issues at trial.

You could have a scenario in the exam, with evidence and facts of a case; at first you'll think some of that evidence is useless, however you will find them very relevant if I ask you, what elements as a judge will you determine required to be disclosed!!!

The Crown accordingly may fail to disclose information which meets the *Stinchcombe* threshold or relevance, but which could not possibly affect the reliability of the result reached or the overall fairness of the trial process.

Police take statements from witnesses at a scene. Five of the witnesses say; "It happened too fast, I really can't help you. I'm not able to identify this person." Now these are all preferable details relating to the information required and to the amount of detail that the Defence would appreciate to have in order to prepare a defence. In some circumstances, what this is say if the Crown or police failed to disclose to the Crown, it might not be fatal to the result or change the verdict.

A court may well find that an accused's *Charter* right to disclosure has been breached, and yet deny the remedy of a new trial if it is found that the trial process was fundamentally fair and that there was no reasonable possibility that the result at trial might have been different had the undisclosed material been produced. The right to full disclosure is just one component of the right to make full answer and defence. The *Charter* right to make full answer and defence is not necessarily impaired solely because the right to disclosure was violated.

The Crown need not produce what is clearly irrelevant. Here, the first two statements had no relevant information at all and there was no reasonable possibility that they could have been of any use to the accused at trial. Both the third (Tynes') and fourth (Daye's) statements met the low threshold for disclosure and should have been disclosed.

Everything police put their hands on, it must be disclosed even if they believe it's irrelevant or not useful. Evidence that would be lightly relevant must be disclosed. The test to determine relevance is not by determining what would help the Crown to convict the accused. Determining relevance is not by the eye of the Crown, but by the Judge who decides what is admissible or not, as well as everything must be disclosed to Defence Counsel in order to help the accused prepare a defence and to not breach his right to disclosure. Relevance is not based on the lens of the Crown! Is this going to help me convict, that's not the test to determine relevance of information to a case. Is the evidence going to have any bearing on any particular issue relevant to the trial. Anything can be exculpatory raise questions about the act of reliability of any statements by witnesses. That's likely relevant. No information can be regarded as irrelevant.

B) Determining the appropriate sentence

Without a doubt, for judges it's the most difficult part in the criminal justice system is the determining of appropriate sentence. With people, it's very difficult, in light of the person's history, crime, reputation and role in the offence if it was an organized crime.

Example: If I plan a robbery, an armed robbery where I am the main planner and engage a couple of my friends and get them to do the heavy lifting. They are the ones who will be going in and doing the robbery. I provide them with the tools and instructions for the robbery.

Factually, the police will be able to show that I was physically the getaway driver. While they hold the guns and do the robbery and I drive them away. When we all end up being arrested, and plead guilty the physical role of each person will determine the sentencing of each of us. Well, look at the difference of roles that's an important factor in sentencing. If you take the same driver, instead of being the mastermind, who was the puppet but plays the exact same physical role as the other robbers. Then at the sentencing stage, there's no way these two drivers will be sentenced the same way as the actual robbers. The determination of sentencing will be depending on your factual role and personality. In the case of the mastermind, it is debatable of whether he should have a more serious sentence than those who physically participate, whereas the driver who played the same physical role as the mastermind. Clearly, his sentence should be different then the other two. That shows how difficult it is to determine sentencing, and that's without taking into context the personal lives of the actors which tells us what triggered them to act in this way or cause the trauma they did.

For sentencing, much more information of the offenders and full details of the offence and the event is required for the judge to determine the sentence which makes it much more difficult for the judge.

Hence, that's why in the Code, since 1996, regarding the courts. The purpose and principles of sentencing are laid out, in 718 and 718.1.

a) Traditional objectives of the sentence (Sections 718-718.1 C. C.)

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

- *(a) to denounce unlawful conduct;*
- *(b) to deter the offender and other persons from committing offences;*
- *(c) to separate offenders from society, where necessary;*
- *(d) to assist in rehabilitating offenders;*
- *(e) to provide reparations for harm done to victims or to the community; and*
- *(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.*

718.01 *When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.*

The Court also did the for offences against peace officers and justice service participants at 718.2 Those are the objects the court has to seek, guide itself by certain principles set out in 718.1 and 718.2

718.1 *A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.*

That is the guiding light for judges to balance the appropriate sentence based on the degree of the offence, and fact scenario.

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

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

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

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

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

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

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

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

(v) evidence that the offence was a terrorism offence

shall be deemed to be aggravating circumstances;

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

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

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

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

In other words, there is a problem of overrepresentation of aboriginal people. This provision when it was enacted, it wanted to take into account “are there other solutions than jail because jail cost a lot of money.” Viable solutions that may be more productive than jail, this reminds the court to consider other opportunities. This becomes a balancing exercise in terms of sentencing.

- **720. (1)** *A court shall, as soon as practicable after an offender has been found guilty, conduct proceedings to determine the appropriate sentence to be imposed.*

(2) The court may, with the consent of the Attorney General and the offender and after considering the interests of justice and of any victim of the offence, delay sentencing to enable the offender to attend a treatment program approved by the province under the supervision of the court, such as an addiction treatment program or a domestic violence counselling program.

This provision wasn't there 20 years ago, but then when these therapeutic courses were being created, the accused pleads guilty as a start, the idea was to have them go through this therapy before the sentencing process and to take excessive help into account when it comes to sentencing. Now with **720**, that said judge has to impose sentence with some pace. **(2)** allowed the judge to delay the sentencing in order for the accused to get help, that may time from one year, or 18 months, or even 2 years.

721 provides the option of seeking a pre-sentence report that helps the courts, prepared by a probation officer, before sentencing, with the help of relatives to the accused preparing a report, detailing all information as background of the accused that is sometimes very helpful for sentencing.

722, refers to the victim impact statement: (1) “For the purpose of determining the sentence to be imposed on an offender or whether the offender should be discharged pursuant to section 730 in respect of any offence, the court shall consider any statement that may have been

prepared in accordance with subsection (2) of a victim of the offence describing the harm done to, or loss suffered by, the victim arising from the commission of the offence.”

Generally, victim who chose to prepare those are done in writing filed for the Court record and sealed. However subsection 2 does allow on request of the victim, the court is required to permit the victim to read their statements.

718: Sentencing objective that you would argue about and what should be taken into account. If you are asked to explain them in the exam, you need to remember retribution. What objectives should the judge take into consideration when it comes to sentencing.

i) Retribution

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

The accused pleaded guilty to numerous counts of sexual assault, incest and assault with a weapon, in addition to other lesser offences, arising from a largely uncontested pattern of sexual, physical and emotional abuse inflicted upon his children over a number of years. None of the offences committed carried a penalty of life imprisonment. The trial judge, remarking that the offences were as serious as any he had ever had occasion to deal with, sentenced the accused to a cumulative sentence of 25 years' imprisonment, with individual sentences running both consecutively and concurrently. The Court of Appeal reduced the sentence to 18 years and 8 months. Following a line of jurisprudence it had developed in recent years, the court concluded that where life imprisonment is not available as a penalty, the totality principle requires trial judges to limit fixed-term cumulative sentences under the *Criminal Code* to a term of imprisonment of 20 years, absent special circumstances.

SCC said: Retribution is an accepted, and indeed important, principle of sentencing in our criminal law. As an objective of sentencing, it represents nothing less than the hallowed principle that criminal punishment, in addition to advancing utilitarian considerations related to deterrence and rehabilitation, should also be imposed to sanction the moral culpability of the offender. Retribution represents an important unifying principle of our penal law by offering an essential conceptual link between the attribution of criminal liability and the imposition of criminal sanctions. Retribution requires that a judicial sentence properly reflect the moral blameworthiness of the particular offender. The objective of denunciation mandates that a sentence should also communicate society's condemnation of that particular offender's conduct.

ii) Denunciation

The principle of denunciation is also very important. In the exam, you must give an objective answer to your sentencing determination.

iii) Specific and general deterrence

iv) Isolation and separation

v) Rehabilitation

vi) Reparation and to promote sense of responsibility

When a court, in addressing any accused sentencing, literally what they try to do is considering all those objectives and they consider the principles under 718.1 and 718.2 and they balance the aggravating factors and mitigating circumstances. They try to determine what factors need to be emphasized in particular for offenders. In some sentencing, the court may conclude because of the relative seriousness of the accused and nature of the offence. Let's say it's a young person with no criminal record whose taken steps to solve their addiction issues at sentencing. The Judge might focus more with the rehabilitation. But in the case of Paul Burnado, isolation and separation will become the main focus when it's a real purpose for the public when dealing with sociopath, real criminals. Even if you have a pre-sentencing report highlights sad situations of the accused. Even if you have a report saying the accused stopped drinking since the offence, if you had medical information as well indicating pain, a severe diagnosis about high risk of offending. The court may not completely ignore the other factors, but may likely put more weight on denunciation, protection of the public. Looking for deterrence rather than rehabilitation.

You could end up being in a question the Defence Counsel of an accused person. I will give you a fact scenario and ask you to submit on a sentencing report. What would you highlight as important factors the judge should consider when making the sentence based on the offence. If the fact scenario, is a very serious crime where the accused with a significant criminal record and significant role in the commission of the offence, that could be a different kind of pitch you'll be considering instead of an 18 year old with no record. Memory alone won't help you, neither tabbing the code. Only save you time!

b) Applicable principles to the determination of the appropriate sentence

i) Proportionality (Section 718.1 C. C.)

R. v. Nasagaluak [2010]

The RCMP received a tip about an intoxicated driver which led to a high speed pursuit of the accused. When the accused's car finally came to a stop, the police had to remove him forcibly. He resisted. One officer, C, punched him twice in the head while wrestling him out of the car. Once the accused was out of the car, he continued to resist. C yelled at the accused to stop resisting and gave him a third hard punch in the head. The accused was pinned face down on the pavement with C straddling his back and another officer kneeling on his thigh. He

refused to offer up his hands to be handcuffed, so a second officer, D, punched him twice in the back, breaking the accused's ribs, which ultimately led to a punctured lung.

At the police detachment following the arrest, the accused provided breath samples that placed him over the legal blood alcohol limit. The officers did not report the force they had used during the arrest and provided little to no information about the incident. The accused had no obvious signs of injury and did not expressly request medical assistance and no attempts were made to ensure that the accused received medical attention. He, however, twice told an officer that he was hurt. As well, he was observed crying, was heard to say that he could not breathe, and was observed leaning over and moaning. The accused was released the following morning and checked himself into a hospital. He was found to have suffered broken ribs and a collapsed lung that required emergency surgery.

The accused entered a guilty plea to charges of impaired driving and flight from police. At sentencing, the trial judge held that the police had used excessive force in arresting the accused and breached his rights, *inter alia*, under s. 7 of the *Canadian Charter of Rights and Freedoms*. As a remedy under s. 24(1) of the *Charter*, he reduced the accused's sentence below what he otherwise would have imposed and he ordered a 12-month conditional discharge on each count, served concurrently, with a one-year driving prohibition.

As regards the accused's sentences, the principle of proportionality is central to the sentencing process set out in the *Criminal Code* and requires that a sentence must speak out against the offence but may not exceed what is just and appropriate given the moral blameworthiness of the offender and the gravity of the offence. **(blameworthiness; just like in armed robbery, driver and armed robber, mastermind)** The determination of a fit sentence is, subject to some specific statutory rules, an individualized process that requires the judge to weigh the objectives of sentencing in a manner that best reflects the circumstances of the case. No one sentencing

objective trumps the others and the relative importance of any mitigating or aggravating factors will push a sentence up or down the scale of appropriate sentences for similar offences. The sentencing judges' discretion to craft a sentence which is tailored to the nature of the offence and the circumstances of the offender, while broad, is not without limits. His discretion is limited by case law, which sets down general ranges of sentences for particular offences which are to be used as guidelines in order to encourage consistency between sentencing decisions. It is also limited by statutes through the general sentencing principles and objectives enshrined in the *Criminal Code* and through legislated restrictions on the availability of certain sanctions for certain offences. Sentencing judges, while they can order a sentence outside the general range set by case law as long as it is in accordance with the principles and objectives of sentencing, cannot override a clear statement of law and reduce a sentence below a statutory mandated minimum, unless of course that there is a declaration that the minimum sentence is unconstitutional.

The court granted the appeal and revised the sentence imposed by the first judge.

ii) Aggravating factors or circumstances (Section 718.2 a) C. C.)

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

- *(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,*
- *(ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,*
- *(ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,*
- *(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,*
- *(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization, or*
- *(v) evidence that the offence was a terrorism offence*

- *shall be deemed to be aggravating circumstances;*

In the exam, you will have to consider what mitigating or aggravating factors will you have to consider as Crown Attorney to bring at the Court's attention at sentencing. You want to take these into accounts. That's what Crown's do!

The Crown will highlight the various aggravating factors that could warrant a particular or more serious sentence. Lead the Crown to suggest a sentence more deterrent rather than rehabilitation. Defence Counsel will try to do the opposite, and bring out the information they want; if it's a guilty plea that's a mitigating factor of those who start acknowledging responsibility of the offence. Which avoids the victim to come to court, testify and relive the experience so generally considered as an important mitigating factor.

iii) Coherence and parity in sentencing (Section 718.2b) C. C.)

- *b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;* So if the two armed robbers, do the SAME EXACT!! thing during the robbery and they both don't have a criminal record, then it is obvious they must have the same sentence, or else that would be a problem to sentencing principles.

Judges have to be preoccupied particularly in case where there are cohes.

iv) Reasonableness, proportionality and moderation (Section 718.2 c), d) and e) C. C.)= another sentencing principle

- *(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;*
- *(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and*
- ***(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.***

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

The accused, an aboriginal woman, pled guilty to manslaughter for the killing of her common law husband and was sentenced to three years' imprisonment. She was intoxicated at the time, and dealing with medical issues. As well, as emotional and reactive to those kind of circumstances.

At the sentencing hearing, the judge took into account several mitigating factors. The accused was a young mother and, apart from an impaired driving conviction, she had no criminal record. Her family was supportive and present, while on bail, she had attended

alcohol abuse counselling and upgraded her education. The accused was provoked by the victim's insulting behaviour and remarks. At the time of the offence, the accused had a hyperthyroid condition which caused her to overreact to emotional situations. She showed some signs of remorse and entered a plea of guilty. The sentencing judge also identified several aggravating circumstances. The accused stabbed the deceased twice, the second time after he had fled in an attempt to escape. From the remarks she made before and after the stabbing it was clear that the accused intended to harm the victim. Further, she was not afraid of the victim; she was clearly the aggressor. The judge considered that the principles of denunciation and general deterrence must play a role in the present circumstances even though specific deterrence was not required. He also indicated that the sentence should take into account the need to rehabilitate the accused. The judge decided that a suspended sentence or a conditional sentence of imprisonment was not appropriate in this case. He noted that there were no special circumstances arising from the aboriginal status of the accused he should take into consideration. Both were living in an urban area off-reserve and not "within the aboriginal community as such". The sentencing judge concluded that the offence was a very serious one, for which the appropriate sentence was three years' imprisonment. The majority of the Court of Appeal dismissed the accused's appeal of her sentence.

SCC said: In that Part, s. 718.2(e) mandatorily requires sentencing judges to consider all available sanctions other than imprisonment and to pay particular attention to the circumstances of aboriginal offenders. The provision is not simply a codification of existing case law. It is remedial in nature and is designed to ameliorate the serious problem of overrepresentation of aboriginal people in prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing. There is a judicial duty to give the provision's remedial purpose real force.

Section 718.2(e) directs judges to undertake the sentencing of such offenders individually, but also differently, because the circumstances of aboriginal people are unique. In sentencing an aboriginal offender, the judge must consider: (a) the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.

Ex: If you live in Yakalouyet, and you were going to be sentenced to jail, as an aboriginal person, if you are sentenced to pen time or not even pen time but not from Yakalouyet and you have to travel my plane to have to leave your community, or in the south if it is more than 2 years. During that time, contrary to most people in Ottawa, your support system, your surrounding that continue to see you and help you for reintegration phase once sentence is served. None of that will be available, judges take that into account. The aboriginal setting for Inuits, in the North, those are the kind of circumstances judges will take into account, as perhaps the justifying a lesser sentencing in appropriate sentencing. They went on to say:

If there is no alternative to incarceration the length of the term must be carefully considered. The jail term for an aboriginal offender may in some circumstances be less than the term imposed on a non-aboriginal offender for the same offence. Section 718.2(e) applies to all aboriginal persons wherever they reside, whether on- or off-reserve, in a large city or a rural area. In defining the relevant aboriginal community for the purpose of achieving an effective sentence, the term “community” must be defined broadly so as to include any network of support and interaction that might be available, including one in an urban centre.

***- R v Ipeelee (2012) SCC 13**

These two appeals involve Aboriginal offenders with long criminal records. Both Aboriginal offenders were declared long-term offenders and had long-term supervision orders (“LTSOs”) imposed. The offender I is an alcoholic with a history of committing violent offences when

intoxicated. He was sentenced to six years' imprisonment followed by an Long Term Supervision Order after being designated as such by the Court. After his release from prison, I committed an offence while intoxicated, relatively minor offence compared to the others, thereby breaching a condition of his order. He was sentenced to three years' imprisonment. The Court of Appeal dismissed the appeal, and the Supreme Court reduced that sentence to one year and came to conclude that the Court of Appeal hadn't taken into account the aboriginal status of Ipeelee.

Section 718.2(e) of the *Criminal Code* is a remedial provision designed to ameliorate the serious problem of overrepresentation of Aboriginal people in Canadian prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing. Courts must ensure that a formalistic approach to parity in sentencing does not undermine the remedial purpose of s. 718.2(e). Section 718.2(e) does more than affirm existing principles of sentencing; it calls upon judges to use a different method of analysis in determining a fit sentence for Aboriginal offenders. The enactment of s. 718.2(e) is a specific direction by Parliament to pay particular attention to the circumstances of Aboriginal offenders during the sentencing process because those circumstances are unique and different from those of non-Aboriginal offenders. Sentencing judges, as front-line workers in the criminal justice system, are in the best position to re-evaluate these criteria to ensure that they are not contributing to ongoing systemic racial discrimination. Just sanctions are those that do not operate in a discriminatory manner.

Failing to take these circumstances into account would violate the fundamental principle of sentencing — that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. The *Gladue* principles direct sentencing judges to abandon the presumption that all offenders and all communities share the same values when it comes to sentencing and to recognize that, given these fundamentally different world views, different or alternative sanctions may more effectively achieve the objectives of sentencing in a particular community.

It really highlighted the importance of roles of Counsel (either Defence or Crown). Counsel has a duty to bring individualized information before the Court in every case. Unless the offender expresses his waive to that. The importance of Gladue reports, that contains case specific information tailored to specific circumstances of the Aboriginal offender. Courts see the Gladue report as indispensable tool in sentencing when it comes to Aboriginal offenders. It is indispensable for the Judge when it comes to crafting the sentence of such an offender. **So if you are called upon to play the role of Defence Counsel, at a sentencing stage or when it comes to pleading guilty. If I put you a question, what options would you consider; one of them is you're going to want to highlight the importance of your role and get individualized information about your client. One of the things you might give before sentencing, is ask the Court to prepare a Gladue report. That's your role, a live issue in the criminal justice system. It does not happen automatically, you must make such a request and judges will generally grant them. Some jurisdiction will have what's not called a Gladue report, it's a form of pre-sentence report. They are called Gladue report, because some jurisdiction where they do prepare them, there's an emphasis on the history and background of the Aboriginal offender. It really highlights the Aboriginal background, circumstances and information that relates to the Aboriginal person before the Courts and sometimes that helps the Court. And sometimes, what helps the Court is reference to the impact of residential schools on that particular offender's life. Even reference to the parents on that offender life, which at the end of the day helps the court to understand why are we here today. So under 718.2e, a sentencing judge has a**

statutory duty to consider the unique circumstances of that Aboriginal offender. If sentencing judges failed to apply Gladue principle in any case that would run a foul under their statutory obligations. Failing to apply the Gladue principle would be unfit to the Fundamental principles of sentencing. In every case, involving an Aboriginal offender, including in breach of a court order; you have to take into account the Gladue principles. That means if you get a question, where the judge is rendering a sentence, and the judge says: "Okay we are dealing with an armed robbery, in this case there is an aboriginal person. The crime is too serious, we have to send a message, specific deterrence will be the guiding criteria for the court. And I have come to the conclusion that in these circumstances, a persons aboriginal status cannot have any bearing on what the appropriate sentencing is. You know that because of Ipeelee that would be an error in law. In other words, the judge may not impact very much a sentence. The judge has to turn their mind to the aboriginal status. It would be wrong to suggest it's irrelevant. In the balancing process, the judge is required to address, considering the objectives, the principles, different factors and at the end of the day who knows what the actual quantum of the sentence imposed. The judge must address the aboriginal status. Like in Gladue, the SCC concluded you know there was not enough emphasis of the Aboriginal status of that person because she was off reserve, at the end of the court didn't change the sentence because it was deem demonstrably unfit. But nevertheless they should turn their minds to it.

c) Punishments options

Various options in the CC

i) Imprisonment

- Legal considerations: Sections 743 to 743.6 and 742 to 742.7 C.C.

There is maximum punishment.

- The significance of maximum punishment in Canadian law

In every offence, punishable did commit an offence, it's a summary conviction, but there is a maximum punishment imposed for example in sexual assault the maximum punishment would be 18 months if it's by summary, or by indictment for 10 years. You rarely see maximum being imposed, but you do see in some circumstances, but what it tells you it's that it's an important indicator for the Courts regarding the seriousness, and objective seriousness of an offence. Because it gives the Judge an idea of how the Parliament considered this particular offence proceeded by indictment. Also, imposes that limit for a particular offence.

- Minimum punishments

There are minimum punishments given by the Code. A number of minimum punishments enacted as it relates to sexual offences. Particularly for victims under the age of sixteen. Even

drug related offences, production and trafficking, there were minimum, recently Court of Appeal of Ontario struck down minimum punishments related to firearm offences, that would be declared as unconstitutional as cruel and unfair punishment. There's a number of provisions that provide minimum punishment, there are some that provide minimum punishments that require the Crown to give notice to seek greater punishment.

- Different types of imprisonment: Conditional sentence, straight or intermittent

-Section 742.1 C.C

Commonly known as House arrest, conditional sentences. Conditional sentencing were introduced in 1996. Before 1996, pretty much for any case, the Crown had fines at their disposal as an option. They could impose probation, jail, intermittent jail sentences for 90 days just on the weekends. But the notion of conditional sentencing was not available before September 1996. Allowing sentences of imprisonment to be served in a community rather than an actual correction facility. Considered as a time of midway point between imprisonment and sanctions such as probation or fines. Part of a global review in the CC provisions. In that global review there was:

- 718, and proportionate sentencing based on the gravity of the offence,
- fundamental principles of appropriate sentencing,
- and degree of responsibility of the offender. All sentences have to be such. Including the list of aggravating factors
- In the course of that review, conditional sentencing was included
- Reduce again the reliance upon incarceration, providing an alternative mechanisms to the Courts
- and conditional sentence provides a further opportunity to incorporate restorative justice concept conduct into the sentencing process by encouraging those who have caused harm to acknowledge the fact that they caused harm and to make reparation.
- Back in 96, the year that followed 742.1 and more looks quite different today. What you saw is a gradual process of amendments.
- Parliament, elected officials, they have their views the type of circumstances they consider that these types of sentences should be imposed.
- They came to the conclusion, they don't want to see these conditional sentences imposed on certain violent offenders.
- Gradually a list of exclusions began being provided at the bottom of 742.1
- Essentially what it says to the Courts; Okay you can impose sentence except in these circumstances.
- Court discretion as it relates to the imposition of conditional sentencing has been greatly reduced and 742.1 reads as follows:

- **742.1:** *If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the conditions imposed under section 742.3, if (a) the court is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2;*
- *(b) the offence is not an offence punishable by a minimum term of imprisonment;*
- *(c) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 14 years or life;*
- *(d) the offence is not a terrorism offence, or a criminal organization offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years or more;*
- *(e) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years, that*
 - *(i) resulted in bodily harm,*
 - *(ii) involved the import, export, trafficking or production of drugs, or*
 - *(iii) involved the use of a weapon; and*
- *(f) the offence is not an offence, prosecuted by way of indictment, under any of the following provisions:*
 - *(i) section 144 (prison breach),*
 - *(ii) section 264 (criminal harassment),*
 - *(iii) section 271 (sexual assault),*
 - *(iv) section 279 (kidnapping),*
 - *(v) section 279.02 (trafficking in persons — material benefit),*
 - *(vi) section 281 (abduction of person under fourteen),*
 - *(vii) section 333.1 (motor vehicle theft),*
 - *(viii) paragraph 334(a) (theft over \$5000),*
 - *(ix) paragraph 348(1)(e) (breaking and entering a place other than a dwelling-house),*
 - *(x) section 349 (being unlawfully in a dwelling-house), and*
 - *(xi) section 435 (arson for fraudulent purpose).*

***These weren't there in 1996, so if you are called upon to consider okay what are the factors that I would consider for condition sentence in making submissions. That's what Defence and Crown counsel does see if this person is eligible or not for condition sentencing.**

Wednesday 20th November 2013

R. v. Proulx; Proulx was charged with one count of dangerous driving causing death, and one count of dangerous driving causing bodily harm. He was sentenced 18 months of jail. To be served concurrently (at the same time) on both charges. The sentencing judge concluded that a conditional sentence pursuant to s. 742.1 of the Criminal Code, which would allow the accused to serve his sentence in the community, would not be appropriate because it would be inconsistent with the objectives of denunciation and general deterrence. The Court of Appeal allowed the appeal and substituted a conditional custodial sentence for the jail term.

After a night of partying involving consumption of some alcohol, the accused decided to drive his friends home even though he knew that his vehicle was not mechanically sound. For a period of 10 to 20 minutes, the accused, who had only seven weeks of experience as a licensed driver, drove erratically, weaving in and out of traffic, tailgating and trying to pass other vehicles without signalling, despite steady oncoming traffic and slippery roads. As the accused was trying to pass another vehicle, he drove his car into an oncoming lane of traffic, side-swiped a first car and crashed into a second one. The driver of that second vehicle was seriously injured. The accident also claimed the life of a passenger in the accused's car. The accused was in a near-death coma for some time, but ultimately recovered from his injuries.

The Court of Appeal allowed the appeal and substituted a conditional custodial sentence for the jail term. In other words, what conditional sentencing means is, yes a jail sentence should be imposed but they came to the conclusion that they met the criteria set out in 742.1 allowing to serve that jail sentence in the community.

A conditional sentence should be distinguished from probationary measures. Probation is primarily a rehabilitative sentencing tool. By contrast, Parliament intended conditional sentences to include both punitive and rehabilitative aspects. Therefore, conditional sentences should generally include punitive conditions that are restrictive of the offender's liberty. Conditions such as house arrest should be the norm, not the exception. A conditional sentence can provide significant denunciation and deterrence. As a general matter, the more serious the offence, the longer and more onerous the conditional sentence should be. There may be some circumstances, however, where the need for denunciation or deterrence is so pressing that incarceration will be the only suitable way in which to express society's condemnation of the offender's conduct or to deter similar conduct in the future.

Generally, a conditional sentence will be better than incarceration at achieving the restorative objectives of rehabilitation, reparations to the victim and the community, and promotion of a sense of responsibility in the offender and acknowledgment of the harm done to the victim and the community.

Where a combination of both punitive and restorative objectives may be achieved, a conditional sentence will likely be more appropriate than incarceration. Where objectives such as denunciation and deterrence are particularly pressing, incarceration will generally be the preferable sanction. This may be so notwithstanding the fact that restorative goals might be achieved.

What a Court will look at; Back in 2000, 742.1 wasn't the same as today. 742 today excludes a list of offences from the option of conditional sentencing. In the exam if you are confronted with a scenario, where you are Defence Counsel, you have to look if you can make a pitch by reading your clients document. Talking about deterrence and denunciation, if it's an offence that is not excluded, that a judge can consider and an

accused with a great criminal record and there's a pre-sentencing report. The judge is called upon to make the sentence, and in the pre-sentencing report, the probation officer met with the accused several times and highlights the fact that the accused has no remorse, or empathy or care about what happened to the victim. Hmm, so the judge thinks about how the accused doesn't care or wtv! So the judge is going to consider whether 742 is appropriate. Generally for deterrence, specific and general deterrence, if the person doesn't get it and is clear doesn't really care about the consequences. Then the judge will say this fella is in real need of deterrence and will consider whether conditional sentencing is even appropriate under the circumstances. The judges come to the conclusion! So there's significant concerns of deterrence perspective, and rehabilitation, he will allow the accused to serve his sentence in the community. Some accused have remarkably changed from the moment of the offence to the sentencing stage which therefore makes the judge impose a conditional sentence. These factors are often highlighted by Defence Counsel in a pre-sentencing report.

In pre-sentencing report: Defence vs. Crown

- **R. v. Wells, [2000] 1 S.C.R. 207**

ii) The Fine (Sections 734 to 737 C.C.)

734. (1) *Subject to subsection (2), a court that convicts a person, other than an organization, of an offence may fine the offender by making an order under section 734.1*

When a judge is considering imposing to fine, the judge has to look at capacity to pay.

R. v. T

The accused used his brokerage business to defraud Canada Customs of \$4.7 million. He was convicted of 16 counts of fraud and attempted fraud under the *Customs Act*. The Crown sought a \$4.7 million fine in addition to imprisonment. At the sentencing hearing, the accused's counsel asserted that the accused was unable to pay a fine, but adduced little evidence to support the assertion. No explanation was given of where the \$4.7 million had gone and the Crown was unable to trace or locate the funds. The Crown urged the court to infer that the funds were still in the accused's possession. The trial judge sentenced the accused to imprisonment but declined to impose a fine because she was not satisfied as required by s. 734(2) of the *Criminal Code* that the accused was able to pay a fine. The Court of Appeal dismissed an appeal by the Crown.

Held: The appeal should be dismissed and went to the SCC.

The legislative purpose behind s. 734(2) of the *Criminal Code* is to prevent offenders from being fined amounts that they are truly unable to pay, and to correspondingly reduce the number of offenders who are incarcerated in default of payment. A court may impose a fine only if satisfied, on a balance of probabilities, that the offender has the means to pay the fine (or to discharge it under s. 736, which is not possible in this case). As a practical matter, s. 734(2) imposes a burden on the party seeking a fine to satisfy the court that the offender is able to pay. The party opposing the fine does not assume a formal burden of proof and remains free to argue that the evidence before the court should not satisfy the court that the offender is able to pay.

The Crown is not required to identify or locate the specific assets that the offender can use to pay the fine and instead may rely on indirect evidence to prove an offender's ability to pay. On the other hand, the text of s. 734(2) explicitly requires an affirmative finding that the offender is able to pay a fine, instead of requiring the party opposing the fine to prove that the offender is unable to pay the fine.

iii) Probation (Section 731 C.C. which applies t)

= A sentence whereby a convict is released from prison but is still under court supervision; a testing or a trial period. Probation can be given in lieu of a prison term or can suspend a prison sentence if the convict has consistently demonstrated good behavior.

The status of a convicted person who is given some freedom on the condition that for a specified period he or she act in a manner approved by a special officer to whom the person must report. (k2no the person is still grounded after prison, you know even if they are kinda free, they can't go to certain places, meet certain people or even talk to them. Have curfew, must have jobs in order to avoid other types of activities, stay off alcohol etc..)

It's a common measure that's imposed, allows the court to impose a series of conditions that the accused is required to follow. The judge can impose jail more than 2 years, and soon as he imposes pen-time he cannot impose probation order. But if it's a sentence up to 2 years or less, probation can be imposed but probation can't be more than 3 years. Allows to impose other

conditions; like in an assault you get six month in jail, you can be sure there will have be no contact, directly or indirectly with the victim. If the offence happened in a specific place, than a condition will be imposed such as no entry to that establishment. Court orders, that are binding.

May provide curfew, will meet with your probation officer, will follow any counselling, for anger-management suggested by the probation officer. These conditions are meant to avoid contact with victim or causing trouble and at the same time rehabilitating.

iv) Conditional or unconditional discharges (Section 730 C.C.)

A **discharge** is a type of sentence where no punishment is imposed. An **absolute discharge** is unconditional: the defendant is not punished, and the case is over. In some jurisdictions, an absolute discharge means there is no conviction despite finding that the defendant is guilty. A **conditional discharge** is a sentence passed by a court whereby the defendant is not punished, provided they comply with certain conditions. After these conditions are met, the discharge becomes absolute. If the conditions are not met, the defendant is re-sentenced.

- **730.** (1) *Where an accused, other than an organization, pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for fourteen years or for life, the court before which the accused appears may, if it considers it to be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or on the conditions prescribed in a probation order made under subsection 731(2).*

(3) *Where a court directs under subsection (1) that an offender be discharged of an offence, the offender shall be deemed not to have been convicted of the offence except that*

- *(a) the offender may appeal from the determination of guilt as if it were a conviction in respect of the offence;*
- *(b) the Attorney General and, in the case of summary conviction proceedings, the informant or the informant's agent may appeal from the decision of the court not to convict the offender of the offence as if that decision were a judgment or verdict of acquittal of the offence or a dismissal of the information against the offender; and*
- *(c) the offender may plead autrefois convict in respect of any subsequent charge relating to the offence.*

If somebody receives a conditional discharge or unconditional discharge they are not considered to have a criminal record. The criteria are set out in this section. If it's considered in the best interest of the accused, and not contrary to the public interest. Can only be done for an offence, other than an offence for which a minimum punishment prescribed by law. So it's not available for offences with minimum punishments.

- If I'm guilty for break and enter in a dwelling, I'm not eligible to conditional discharge.
- If it's theft, even by indictment, punishable up to 10 years; then I am eligible.
- So, lesser serious offences, with no criminal record = no Probation or conditional discharge

- More serious offences, = eligible for conditional discharge

Let's say a minor assault, you can impose a conditional discharge but the judge wants to be able to impose a probation order. A judge couldn't impose both at the same time, that's why it's called conditional discharge. Unconditional discharge; absolute discharge, you're not considered to have a criminal record or having been convicted.

v) Restitution (Section 738)=another sentencing option

- **738.** (1) *Where an offender is convicted or discharged under section 730 of an offence, the court imposing sentence on or discharging the offender may, on application of the Attorney General or on its own motion, in addition to any other measure imposed on the offender, order that the offender make restitution to another person as follows:*
 - *(a) in the case of damage to, or the loss or destruction of, the property of any person as a result of the commission of the offence or the arrest or attempted arrest of the offender, by paying to the person an amount not exceeding the replacement value of the property as of the date the order is imposed, less the value of any part of the property that is returned to that person as of the date it is returned, where the amount is readily ascertainable;*
 - *(b) in the case of bodily or psychological harm to any person as a result of the commission of the offence or the arrest or attempted arrest of the offender, by paying to the person an amount not exceeding all pecuniary damages incurred as a result of the harm, including loss of income or support, if the amount is readily ascertainable;*
 - *(c) in the case of bodily harm or threat of bodily harm to the offender's spouse or common-law partner or child, or any other person, as a result of the commission of the offence or the arrest or attempted arrest of the offender, where the spouse or common-law partner, child or other person was a member of the offender's household at the relevant time, by paying to the person in question, independently of any amount ordered to be paid under paragraphs (a) and (b), an amount not exceeding actual and reasonable expenses incurred by that person, as a result of moving out of the offender's household, for temporary housing, food, childcare and transportation, where the amount is readily ascertainable; and*
 - *(d) in the case of an offence under section 402.2 or 403, by paying to a person who, as a result of the offence, incurs expenses to re-establish their identity, including expenses to replace their identity documents and to correct their credit history and credit rating, an amount that is not more than the amount of those expenses, to the extent that they are reasonable, if the amount is readily ascertainable.*

Teacher with broken jaw, or has to take taxi, keeps the receipts, you break something I own, my home window = readily ascertainable

vi) Alternative measures (Sections 716-717 C.C.)

- **717. (1)** *Alternative measures may be used to deal with a person alleged to have committed an offence only if it is not inconsistent with the protection of society and the following conditions are met:*
 - *(a) the measures are part of a program of alternative measures authorized by the Attorney General or the Attorney General's delegate or authorized by a person, or a person within a class of persons, designated by the lieutenant governor in council of a province; (territorial or provincial government)*
 - *(b) the person who is considering whether to use the measures is satisfied that they would be appropriate, having regard to the needs of the person alleged to have committed the offence and the interests of society and of the victim;*
 - *(c) the person, having been informed of the alternative measures, fully and freely consents to participate therein;*
 - *(d) the person has, before consenting to participate in the alternative measures, been advised of the right to be represented by counsel;*
 - *(e) the person accepts responsibility for the act or omission that forms the basis of the offence that the person is alleged to have committed;*
 - *(f) there is, in the opinion of the Attorney General or the Attorney General's agent, sufficient evidence to proceed with the prosecution of the offence; and*
 - *(g) the prosecution of the offence is not in any way barred at law. (limitation period is not passed)*

(2) Alternative measures shall not be used to deal with a person alleged to have committed an offence if the person

- *(a) denies participation or involvement in the commission of the offence; or*
- *(b) expresses the wish to have any charge against the person dealt with by the court.*

Diversion in the North, post-charge to apply 717. Person is charged with shoplifting or less serious offence and has no criminal record. There's an alternative measure program available in the community, Justice Committee that take the accused and tell the Defence Counsel in the report if they are ready to accept him. The judge will meet with the justice committee and discuss it through. The accused won't be accepted to participate in the committee if he or she doesn't acknowledge the responsibility.

When they are being considered they are going to discuss the matter with the accused. If the accused doesn't follow through, inadmissible against them.

C) Over-riding principle: The presumption of innocence and Crown's onus to prove guilt beyond a reasonable doubt(important)

The Crown always has the onus to prove the guilt of the accused.

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

The accused, a stockbroker, was charged with fraud. The trial judge told the jury in her charge on the burden of proof that she used the words “proof beyond a reasonable doubt” . . . in their ordinary, natural everyday sense”, and that the words “doubt” and “reasonable” are “ordinary, everyday words that . . . you understand”. The accused was convicted of fraud. On appeal, he contended that the trial judge had erred in instructing the jury on the meaning of the expression “proof beyond a reasonable doubt”. The Court of Appeal allowed the appeal and ordered a new trial (agreed with Defence Counsel).

A jury must be provided with an explanation of the expression “reasonable doubt”. This expression, which is composed of words commonly used in everyday speech, has a specific meaning in the legal context. The trial judge must explain to the jury that the standard of proof beyond a reasonable doubt is inextricably intertwined with the presumption of innocence, the basic premise which is fundamental to all criminal trials, and that the burden of proof rests on the prosecution throughout the trial and never shifts to the accused. The jury should be instructed that a reasonable doubt is not an imaginary or frivolous doubt, nor is it based upon sympathy or prejudice. A reasonable doubt is a doubt based on reason and common sense which must logically be derived from the evidence or absence of evidence. While more is required than proof that the accused is probably guilty, a reasonable doubt does not involve proof to an absolute certainty. Such a standard of proof is impossibly high. Certain references to the required standard of proof should be avoided. A reasonable doubt should not be described as an ordinary expression which has no special meaning in the criminal law context.

“I think he probably did it”, but can’t go farther than that; the proper decision for the judge to render is NOT guilty!

Or after the totality of the evidence, the judge is convinced beyond a reasonable doubt based on common sense, logic and his or her conclusion on the credibility of the witnesses; the proper decision to render would of course be GUILTY!

***- R. v. Oakes, [1986] 1 S.C.R. 103 (about presumption of guilt, being unconstitutional and unreasonable in a free and democratic society)**

A provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, “trafficking” which is an important element of the offence in question, violates the presumption of innocence in s. 11(d). The fact that the standard required on rebuttal is only a balance of probabilities does not render a reverse onus clause constitutional. Section 8 of the *Narcotic Control Act* infringes the presumption of innocence in s. 11(d) of the *Charter* by requiring the accused to prove he is not guilty of trafficking once the basic fact of possession is proven.

***- R. v. W. (D.), [1991] 1 S.C.R. 742**

Appellant was convicted of sexual assault after a trial that pitted the credibility of the accused against that of the complainant. The main charge was relatively short and was correct and fair. The time period between the end of the main charge and the recharge was less than ten minutes. Counsel for the Crown had requested the recharge to review certain aspects of the law and the credibility.

The trial judge erred in his recharge. It is incorrect to instruct a jury in a criminal case that, in order to render a verdict, they must decide whether they believe the defence evidence or the Crown's evidence. Putting this either/or proposition to the jury excludes the third alternative: namely, that the jury, without believing the accused, after considering the accused's evidence in the context of the evidence as a whole, may still have a reasonable doubt as to his guilt.

A judge, is what convinces you beyond a reasonable doubt. The judge doesn't ask who does he believe.

***Where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue. The trial judge should instruct the jury that:

- (1) if they believe the evidence of the accused, they must acquit;
- (2) if they do not believe the testimony of the accused but are left in reasonable doubt by it, they must acquit;
- (3) even if not left in doubt by the evidence of the accused, they still must ask themselves whether they are convinced beyond a reasonable doubt of the guilt of the accused on the basis of the balance of the evidence which they do accept.

If you are called upon as a legal commentator, you are asked is there a problem with these submission. Who do you believe your Honor. You have to remember R. v. W. (D.)

THE ELEMENTS OF THE OFFENCE

- 1) Capacity and responsibility**
- A) Criminal liability or responsibility considerations**

- a) Minority (Section 13 C. C.)**

13. No person shall be convicted of an offence in respect of an act or omission on his part while that person was under the age of twelve years.

- b) Mental disorder (Section 16 du C. C.)**

- **16. (1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.**
- Marginal note:Presumption
- **(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. (so the onus is on the Defence Counsel; the accused party to prove that he/she is suffering from mental disorder)**

- Marginal note: Burden of proof
- (3) *The burden of proof that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party that raises the issue.*

672.8

B) The actus-reus

a) The principle of individual responsibility

Individual responsibility. Voluntary nature of the act. Always require proof of the actus reus and mens rea. As opposed to involuntary act.

b) Voluntary nature of the act

***- R. v. Ruzic, [2001] 1 S.C.R. 687**

The accused was tried before a judge and jury on charges of unlawfully importing two kilograms of heroin into Canada, contrary to s. 5(1) of the *Narcotic Control Act*, and of possession and use of a false passport contrary to s. 368 of the *Criminal Code*. The accused admitted having committed both offences but claimed that she was then acting under duress and should thus be relieved from any criminal liability. She testified that a man in Belgrade, where she lived in an apartment with her mother, had threatened to harm her mother unless she brought the heroin to Canada. She also said that she did not seek police protection because she believed the police in Belgrade were corrupt and would do nothing to assist her. The accused conceded that her claim of duress did not meet the immediacy and presence requirements of s. 17 of the *Code*, which provides a defence for a person “who commits an offence under compulsion by threats of immediate death or bodily harm from a person who is present when the offence is committed”. She successfully challenged the constitutionality of s. 17 under s. 7 of the *Canadian Charter of Rights and Freedoms*, raised the common law defence of duress and was acquitted. The Crown appealed the acquittal on the charge of importing heroin, but the Court of Appeal dismissed the appeal.

Subject to constitutional review, Parliament retains the power to restrict access to a criminal defence or to remove it altogether. The question for the courts is whether restricting the defence accords with *Charter* rights. Statutory defences are not owed special deference by reviewing courts. Determining when to absolve a person for otherwise criminal behaviour is a value-laden exercise, but statutory defences do not warrant more deference simply because they are the product of difficult moral judgments.

Although moral involuntariness does not negate the *actus reus* or *mens rea* of an offence, it is a principle which, like physical involuntariness, deserves protection under s. 7 of the *Charter*. It is a principle of fundamental justice that only voluntary conduct – behaviour that is the product of a free will and controlled body, unhindered by external constraints – should attract the penalty and stigma of criminal liability. Depriving a person of liberty and branding him or her with the stigma of criminal liability would infringe the principles of fundamental justice if the person did not have any realistic choice.

Section 17 of the *Code* breaches s. 7 of the *Charter* because it allows individuals who acted involuntarily to be declared criminally liable.

Let's say something happens between my brother and I. I'm upset with him and he's standing next to me. Hours later, I stretched while yawning. You've got part of the actus reus, but we have to determine is that voluntary, we still have to determine the mens rea. But let's say we have the same physical act, instead of hours later, couple minutes later. You have many factors to determine if the act was animated, or voluntary to apply force. Anger, aggression, time of act, relationship etc..It is more difficult. But if I apply R. v. WD, I swear I'm under oath, it wasn't a voluntary act. The judge believes me, he has to acquit me. Unless he doesn't believe me, he still acquits me, to connect the law.

c) Types of offences

i) Offences by commission

Actually have to do something

ii) Offences by omission

Or sometimes, the actus reus, is not by doing something

- Section 219 du C.C .

- 219. (1) *Every one is criminally negligent who*
 - *(a) in doing anything, or*
 - *(b) in omitting to do anything that it is his duty to do,*
- *shows wanton or reckless disregard for the lives or safety of other persons.*
- *Definition of "duty"*
- *(2) For the purposes of this section, "duty" means a duty imposed by law.*

iii) Possession related offences (Section 4(3) C.C.)

(3) For the purposes of this Act,

- *(a) a person has anything in possession when he has it in his personal possession or knowingly*
 - *(i) has it in the actual possession or custody of another person, or*
 - *(ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and*
- *(b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.*

If I'm in possession of drugs, there are circumstances where that concept of knowledge that I have it in my possession and control have to be met based on that definition. If somebody has drugs in their backpack, they have the drug in their control. But they didn't know it's there because someone put it there. Then there's an inference drawn by authorities that there was knowledge. When you are doing a trial and you apply R. v. W(D), so it's all a question of proof.

If Dave is charged with possession of drugs, but they are in his friend's house. If the police has evidence, that Dave yesterday brought the drugs in his backpack and went to Tim's house and told Tim to hold on to it till tomorrow. Then Tim tell the police that Dave told him to keep them. (that might be an example) definition of 4.3 has to be met!!

possession of a firearm: Section 88 CC

iv) Conduct related offences

- Disturbing the peace (Section 175 C.C.) = cannot go by indictment here!!

Abadan!!

- **175. (1) Every one who**
 - *(a) not being in a dwelling-house, causes a disturbance in or near a public place,*
 - *(i) by fighting, screaming, shouting, swearing, singing or using insulting or obscene language,*
 - *(ii) by being drunk, or*
 - *(iii) by impeding or molesting other persons.*
- *is guilty of an offence punishable on summary conviction.*

v) Offences requiring a certain result and the notion of causality (Section 219 to 227 C.C.)

***- R. v. Smithers, [1978] 1 S.C.R 506**

This is an appeal from a judgment of the Court of Appeal for Ontario dismissing an appeal brought by the appellant from his conviction by judge and jury on a charge of manslaughter. The indictment alleges that the appellant did unlawfully kill Barrie Ross Cobby by kicking him.

On February 18, 1973 a hockey game was played between the Applewood Midget Team and the Cooksville Midget Team at the Cawthra Park Arena in the Town of Mississauga. The leading player on the Applewood team was the deceased, Barrie Cobby, sixteen years of age; the leading player on the Cooksville team was the appellant. The game was rough, the players were aggressive and feelings ran high. The appellant, who is black, was subjected to racial insults by Cobby and other members of the Applewood team. Following a heated and abusive exchange of profanities, the appellant and Cobby were both ejected from the game. The appellant made repeated threats that he was going to "get" Cobby. Cobby was very apprehensive and left the arena at the end of the game, some forty-five minutes later, accompanied by eight or ten persons including friends, players, his coach and the team's manager. The appellant repeated his threats and challenges to fight as the group departed. Cobby did not take up the challenge. Instead, he hurried toward a waiting car. The appellant caught up with him at the bottom of the

outside steps and directed one or two punches to Cobby's head. Several of Cobby's team mates grabbed the appellant and held him. Cobby, who had taken no steps to defend himself, was observed to double up and stand back while the appellant struggled to free himself from those holding him. While Cobby was thus bent over, and approximately two to four feet from the appellant, the appellant delivered what was described as a hard, fast kick to Cobby's stomach area. Only seconds elapsed between the punching and the kick. Following the kick, Cobby groaned, staggered towards his car, fell to the ground on his back, and gasped for air. Within five minutes he appeared to stop breathing. He was dead upon arrival at the Mississauga General Hospital.

The appeal should be dismissed.

The issue as to the cause of death was properly and sufficiently delineated by the trial judge. The assault by appellant on the deceased was clearly an unlawful act and there was cogent evidence to which the jury could apply common sense in considering the issue of causality. The jury was not limited to medical evidence but had the benefit of uncontradicted evidence of lay witnesses that appellant kicked the deceased in the stomach area, that this kick caused immediate distress and that the death followed in minutes. There was therefore evidence that the kick caused the death upon which the jury was entitled to convict.

There was substantial evidence before the jury indicating that the kick was at least a contributing cause of death, outside the *de minimis* range, and that was all that the Crown was required to establish.

A person commits homicide when directly or indirectly, by any means, he causes the death of a human being and it was therefore no defence that appellant did not expect that death would ensue. Finally there could be no criticism of the judge's charge on self-defence. For some considerable time before the incident appellant alone was the aggressor.

***- R. v. Nette, [2001] 3 S.C.R. 488**

A 95-year-old widow who lived alone was robbed and left bound with electrical wire on her bed with a garment around her head and neck. Sometime during the next 48 hours, she died from asphyxiation. During an RCMP undercover operation, the accused told a police officer that he had been involved in the robbery and death. The accused was charged with first degree murder under s. 231(5) of the *Criminal Code* -- murder while committing the offence of unlawful confinement -- and tried before a judge and jury. At trial, he claimed that he had fabricated the admission. He testified that he had gone alone to the victim's house only with intent to break and enter, that the back door to the house was open as though someone already had broken into the home, and that he left after finding the victim already dead in her bedroom. **R. v. W(D) applies here but obv that didn't go so well!!** The trial judge charged the jury on manslaughter, second degree murder and first degree murder under s. 231(5) of the *Code*. In response to a request from the jury that he clarify the elements of first degree murder and the "substantial cause" test, the trial judge essentially reiterated his charge. Overall, he charged that the standard of causation for manslaughter and second degree murder was that the accused's actions must have been "more than a trivial cause" of the victim's death while, for first degree murder under s. 231(5), the accused's actions also must have been a "substantial cause" of her death. On two occasions, however, once in the main charge and once in the re-charge, he described the standard of causation for second degree murder as "the slight or trivial cause necessary to find second degree murder" instead of "more than a trivial cause". The jury found the accused guilty of second degree murder and the Court of Appeal upheld that verdict. The

only ground of appeal both before the Court of Appeal and this Court concerned the test of causation applicable to second degree murder.

Responsibility for causing a result, in this case death, must be determined both in fact and in law. Factual causation concerns how the victim came to death in a medical, mechanical, or physical sense and the accused's contribution. Legal causation concerns the accused's responsibility in law and is informed by legal considerations such as the wording of the offence and principles of interpretation. These considerations reflect fundamental principles of criminal justice.

It is not appropriate in jury charges to formulate a separate causation test for second degree murder. The causation standard expressed in *Smithers* is still valid and applicable to all forms of homicide. The standard, however, need not be expressed as "a contributing cause of death, outside the *de minimis* range". The concept of causation and the terminology used to express that concept are distinct. Latin expressions or the formulation of the test in the negative are not useful means of conveying an abstract idea. It is preferable to use positive terms such as "significant contributing cause" rather than "not a trivial cause" or "not insignificant".

The difficulty in establishing a single, conclusive medical cause of death does not lead to the legal conclusion that there were multiple operative causes of death. In a homicide trial, the question is not who or what caused the victim's death but whether the accused caused the death. The fact that other persons or factors may have contributed to the result may or may not be legally significant in the trial of the one accused charged with the offence. However, in relation to the charge of first degree murder under s. 231(5) of the *Code*, it was necessary for the trial judge to instruct the jury in accordance with *Harbottle*.

C) Coexistence of the actus reus and the mens rea(criminal intent)

Has to be present in criminal offence, you don't have enough evidence notion of intent! Has to prove mens rea. Important to distinguish between cases requiring proof of mens rea and not requiring it!

Those not requiring mens rea= Regulatory offences

Regulatory offences requiring due diligence as a defence= Strict liability offences

2. The mens rea= criminal intent , must be proven in criminal offences

A) Determination of the mens rea

a) The determination of the standard of fault applicable to a given offence

i) Roles of the legislator and of the courts in determining the standard of fault

***- R. v. Sault Ste-Marie, [1978] 2 S.C.R. 1299= strict liability**

For the disposal of garbage. The respondent City entered into an agreement with a company for the disposal of all refuse originating in the City. The company was to furnish a site and adequate labour, material and equipment. The site selected bordered Cannon Creek which runs into Root River. The method of disposal adopted was the "area" or "continuous slope" method of sanitary

landfill, whereby garbage is compacted in layers which are covered each day by natural sand or gravel. The site had previously been covered with a number of freshwater springs that flowed into the creek. Material was dumped to submerge these springs and the garbage and wastes dumped over this material, ultimately to within twenty feet of the creek. Pollution resulted and the company was convicted of a breach of s. 32(1) of *The Ontario Water Resources Commission Act*.

Regarding *mens rea* the distinction between the true criminal offence and the public welfare offence is of prime importance. Where the offence is criminal *mens rea* must be established and mere negligence is excluded from the concept of the mental element required for conviction. In sharp contrast “absolute liability” entails conviction on mere proof of the prohibited act without any relevant mental element. The correct approach in public welfare offences is to relieve the Crown of the burden of proving *mens rea*, having regard to and to the virtual impossibility in most regulatory cases of proving wrongful intention, and also, in rejecting absolute liability, admitting the defence of reasonable care. This leaves it open to the defendant to prove that all due care has been taken. Thus while the prosecution must prove beyond reasonable doubt that the defendant committed the prohibited act, the defendant need only establish on the balance of probabilities his defence of reasonable care. Three categories of offences are therefore now recognised:

(first) offences in which *mens rea* must be established,
(second) offences of “strict liability” in which *mens rea need not be established but where the defence of reasonable belief in a mistaken set of facts or the defence of reasonable care is available, and*
(third) offences of “absolute liability” where it is not open to the accused to exculpate himself by showing that he was free of fault.

Offences which are criminal are in the first category. Public welfare offences are prima facie in the second category. Absolute liability offences would arise where the legislature has made it clear that guilt would follow on mere proof of the proscribed act.

Section 32(1) being a provincial enactment does not create an offence which is criminal in the true sense;

ii) The Crown is not required to prove « motive » motive is not mens rea

So in a first degree, it helps if you can prove motive but it is not an essential element in law. If the Crown had evidence that the accused planned deliberately and premeditated, old emails, witnesses which lead to the crime.

Although, motive is helpful in finding a link of why the crime happened and who did it, but it is not an essential element, or at all even in crimes!

motive doesn't count as mens rea; you could have motive but how does that prove the intent?!

iii) The Crown is not required to prove feelings or values

c) The difference between subjective and objective fault

i) Subjective fault

It's proof of the accused mental element; which includes:

- **Proof of Knowledge**

- **Proof of Wilful blindness**

- **R. v. Sansregret, (1985)18 C.C.C. 223**

The accused Sansregret was charged with several offences including rape with the complainant's consent extorted by threats or fear of bodily harm under s. 143(b)(i) of the *Criminal Code*. The complainant, after living with the appellant for a year ended their turbulent affair. Subsequently, the appellant broke into her house twice. On both occasions, complainant feared for her safety because of his threats and violent behaviour. To calm him down and to protect herself from further violence, she held out some hope of reconciliation and consented to intercourse. Although she reported both incidents to the police and complained of being raped, no proceedings were taken after the first time because appellant's probation officer asked her not to press the matter. Appellant was arrested and charged following the second incident. At trial, the judge found not only that the complainant consented to intercourse solely because of fear engendered by appellant's threats but also that the appellant honestly believed that the consent to intercourse was freely and genuinely given. The defence of mistake of fact rests on the proposition that the mistaken belief, honestly held, deprives the accused of the requisite *mens rea* for the offence. The *mens rea* for rape under s. 143(b)(i) of the *Criminal Code* must involve a knowledge that the woman is consenting because of threats or fear of bodily harm, or recklessness as to its nature. An honest belief on the part of the accused -- even though unreasonably held -- that the woman was consenting to intercourse freely and voluntarily and not because of threats would negate the *mens rea* and entitle the accused to an acquittal. In the

present circumstances, the defence of mistake of fact was not available to the accused. The trial judge found that the complainant consented out of fear and that the appellant blinded himself to the obvious and made no inquiry as to the nature of the consent which was given. The evidence revealed that he knew of the complaint of rape caused by the first incident and therefore was aware of the likelihood of the complainant's reaction to his threats. To proceed with intercourse in such circumstances without further inquiry constitutes self-deception to the point of wilful blindness. Where the accused is deliberately ignorant as a result of blinding himself to reality the law presumes knowledge--in this case knowledge of the forced nature of the consent. There was therefore no room for the application of the defence.

ii) Objective fault or the modified objective criteria

- R. v. Hundal, (1993) 79 C.C.C. (3rd) 971 R.C.S 867

Appellant was involved in a fatal motor accident and charged with dangerous driving under s. 249) of the *Criminal Code*. The accident occurred in heavy afternoon traffic on a wet four lane street in downtown Vancouver. The deceased had waited at the intersection for a red light and was proceeding through it on a green light. He had crossed the cross-walk and the two west-bound lanes when his car was struck broadsides by the appellant's overloaded truck in the east-bound passing lane.

The appellant testified that he thought he could not stop when the light turned amber, sounded his horn and proceeded through the intersection. Several witnesses testified that appellant's truck entered the intersection after the traffic light had turned red and police testimony established that the light was timed to provide a significant delay between one direction's receiving an amber light and the other's receiving a green light. One witness, who had driven behind the truck for some distance, testified that the appellant had gone through

another intersection as the light turned red and estimated the truck's speed at the time of the collision to be between 50 to 60 km/h.

The trial judge found that the appellant's actions represented a gross departure from the standard of care to be expected from a prudent driver and found him guilty of dangerous driving causing death. That decision was upheld on appeal. At issue here is whether there is a subjective element in the requisite *mens rea* which must be established by the Crown in order to prove the offence of dangerous driving described in s. 249 of the *Criminal Code*.

The question to be asked, therefore, given that liability for dangerous driving is based on negligence, is whether, viewed objectively, the accused exercised the appropriate standard of care--not whether the accused subjectively intended the consequences of his or her action. The trier of fact must be satisfied that the conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's situation. If the accused offers an explanation, such as a sudden and unexpected onset of illness, the trier of fact, in order to convict, must be satisfied that a reasonable person in similar circumstances ought to have been aware of the risk and of the danger involved in the conduct manifested by the accused.

Wednesday 27th November 2013

3. Defences

A) Sources for available defences

a) Canadian Charter of Rights and Freedoms;

Mechanisms provided under s24 in violation of a right; 10b right to counsel, right to be protected against unnecessary search and seizure, all those rights provided under section 11

b) The Criminal Code (Eg. Section 8(3), 17 and 33.1)

17: Defence of duress **No need to worry about for exam**

8(3): States "Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offender under this Act or any other Act of Parliament except in so far as they are altered by or are inconsistent with this Act or any other Act of Parliament.
= any of the common law defences continue to apply unless they are altered, abrogated by Parliament.

c) Jurisprudence

= common law defence of duress is available.

Defense of necessity.

B) General applicable principles

a) Burden of evidence on the defence

All that the accused has to show is to raise a reasonable doubt!

-R. v. Cinous, 2002 169 C.C.C. (3d) 129

The Court said; A defence should be put to a jury if, and only if, there is an evidential foundation for it. A trial judge must thus put to the jury all defences that arise on the facts, whether or not they have been specifically raised by an accused, but he has a positive duty to keep from the jury defences lacking an evidential foundation — or air of reality.

b) The Judge must submit to the jury's appreciation any defence elicited by the evidence, whether the accused has raised them or not

Basically; I'm charged with assault, and my lawyer shows up in court and we do the trial. My lawyer, his defence, his arguing, the alleged victim consented to that brall. The Crown hasn't proved absence of consent. However the judge is of the view, considering the totality of the evidence, without it having been raised by Defence Counsel. The judge has a duty to consider that defence, even if Counsel or the accused doesn't argue it as long as there is an evidential foundation, an error of reality.

If there is an error in reality; the judge alone must consider that as defence for the accused.

They tell the Jury to consider it! Even if it wasn't raised by the accused.

Error of reality; The judge doesn't conclude on the credibility in that initial determination, doesn't make specific or permanent claiming of credibility. That belongs to the jury to assess credibility.

Example: Case law; women was accused of stabbing her sister-in-law 49 times. So she was charged with murder. The reason why she did that, had something to do with insults of lack of education.

Defence; Provocation under s232; The Court found there was no error in reality, to the contentious that that type of insult come close to supporting that defence. Specific criteria but didn't even meet it. The Judge can filter and not consider the defence any further. If it was a credibility issue, there would be a foundation. Judge can't draw findings of credibility (that's for the jury)

Might have a fact scenario, quick question requiring you to consider whether the Judge has an obligation to consider even if the defence counsel did not raise it.

1. Judge must submit, to the jury's appreciation any defence solicited by the evidence whether the accused has raised them or not.

2. The judge also has a responsibility to consider lesser and included offences.

- Intoxication; defence to an offence of murder!
- Murder requires; Culpable homicide is murder where
- (a) The one who causes the death to a human being, means to cause his death.
- (b) or means to cause him bodily harm that he knows is likely to cause him death.
- © his reckless whether death ensues or not.

If I hit somebody, but I don't mean to cause them death or injuries that I ought to have known. The person falls, hits their head and dies. That's manslaughter!

But if I hit somebody and I'm animated by that mens rea; specific intent. General intent is manslaughter. My intention, general intent, when I assaulted the person, I voluntarily or wanted to strike the person. I didn't want to kill the person; that's manslaughter.

Mens rea and Assault; is the general intent of applying force illegally on the person without their consent.

First degree murder

Definition: A culpable homicide that is planned and deliberate — both aspects must be demonstrated in order for the homicide to be considered first-degree murder.

Some homicides are automatically considered first-degree murder — even if they were not intentional or planned:

- The killing of a police officer or prison employee on duty.
- A killing committed in the course of one of the following offences: hijacking, sexual assault, sexual assault with a weapon, aggravated sexual assault, kidnapping, forcible confinement, hostage taking, terrorism, intimidation, criminal harassment, any offence committed on behalf of a criminal organization.

Sentence: First -degree murder carries an automatic life sentence with no possibility of parole for 25 years. Offenders who are paroled remain on parole for the rest of their life, even after their release from prison, meaning they must report to a parole officer and are subject to the conditions of their parole. If they break the conditions of their release, they are sent directly back to prison without a hearing.

Second-degree murder

Definition: A deliberate killing carried out without planning that does not fall under any of the categories of first degree murder.

Sentence: The minimum sentence is life in prison with no parole for 10 years, but sentences can be as long as life in prison without parole for 25 years. The date of parole eligibility is at the judge's discretion.

Manslaughter

Definition: A homicide committed without the intention to cause death, although there may have been an intention to cause harm. There are two broad categories of manslaughter: Unlawful act — when a person commits a crime that unintentionally results in the death of another person. For example, an individual punches someone in the face, and that person dies of his or her injuries, or someone fires their gun carelessly in public and unintentionally shoots a bystander.

Criminal negligence — when the homicide was the result of an act or a failure to act that showed wanton or reckless disregard for the lives of others. An act is generally considered negligent if a reasonable person would have foreseen that the action would endanger a life. A failure to act can only be considered negligence if a person had a duty imposed by law to act — it does not apply, for example, to bystanders who see a person in distress and don't help. In some instances, a murder charge may be reduced to manslaughter if alcohol or other substances are found to have impaired the mental faculties of the perpetrator or if the homicide was committed in the heat of passion resulting from provocation, which is defined as a wrongful act or insult that would deprive an ordinary person of the power of self-control.

Impaired driving causing death is a [separate offence](#) under the [Criminal Code](#) that carries a maximum punishment of 14 years in prison.

Sentence: Manslaughter carries no minimum sentence, except when it is committed with a firearm, in which case the minimum sentence is four years in prison. Sentences vary from probation to life in prison.

c) Consequences related to guilt and punishment following presentation of certain defences

i) Acquittal (automatism, necessity, intoxication, duress)

Intoxication is a defence to murder; NOT manslaughter.

The person can, if so intoxicated, did things without realizing them. (can be defence) The judge would instruct the jury if that defence is there, raised by the evidence.

The judge would instruct here are the legal elements the Crown is required to prove for manslaughter. If you are convinced beyond a reasonable doubt that the Crown has proven the elements of murder then you can convict.

Then the judge will give instructions about the defence for intoxication and how it interplays with the offence and what the conclusion would be if the defence presented and accept it and raises a reasonable doubt about the accused's guilt with regards to murder. The verdict will be manslaughter. But you would otherwise be convinced that the accused caused the death of the victim by way of illegal act. Verdict= manslaughter!

ii) Conviction for lesser and included offence (voluntary intoxication, provocation)

Included offence = manslaughter

Included offence for sexual assault = assault

C) Categories of defences

a) Defences negating the actus reus

i) Extreme intoxication (drinking to the point of unconsciousness)

- Section. 33.1 C.C.. created after following case:

- **R. v. Daviault, [1994] 93 C .C .C. (3d) 21**

That lead the defence of extreme intoxication was accepted in one circumstance in relation of general intent defence. Person was so intoxicated that he did what he did.

ii) Automatism =

- **R. v. Fontaine, [2004] 183 C.C.C. (3d) 1**

The accused worked as a garage mechanic who was payed t7at el 6awla. He received a call from R, a disgruntled former employee, who said, "We're coming to get you, pigs." The accused later heard from a co-worker that the victim had been offered a contract to kill both of them. Feeling that he was being watched and followed, the accused purchased a firearm. One evening, the accused thought he saw R lurking outside his home. The co-worker came by to check, but noticed nothing unusual. During the night, after smoking marijuana, the accused freaked out and started shooting bullets through his doors and thought he heard someone breaking into his home. He fired the gun at doors and windows and into walls and concluded that he had shot the intruders. Later that morning, Dompierre came to the garage to pay a debt. Seeing Dompierre approach, Fontaine grabbed his gun and shot Dompierre twice thinking he was the hitman. Dompierre attempted to flee. Fontaine followed him outside, fired five more shots in his direction and wounded him fatally. Seeing the victim at the garage the next day, the accused shot and killed him.

He turned himself in and claimed that he was frozen at the time of the murder and only had partial recollection. Medical experts concluded that it was possible he suffered from paranoia due to smoking marijuana. This would make him delusional. It was difficult evidentiary basis to establish. The doctor for the defence found conclusively however that Fontaine in addition had a major psychological disorder.

Sudden reaction loss of control. **There won't be question on automatism.**

iii) Alibi)

I wasn't there! The essence, is claiming you were not there and somewhere else.

b) Defences negating mens rea

i) Mistake of fact

ii) Honest but mistaken belief as to consent in sexual assault cases

-273.1 (refers to the meaning of consent), 273.2 C.C.

273.2 *It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where*

- (a) *the accused's belief arose from the accused's*
 - (i) *self-induced intoxication, or*
 - (ii) *recklessness or wilful blindness; or*
- (b) *the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.*

Those establish the conditions the Court will conclude if somebody is alleging that he thought the victim was consenting. If the circumstances that the Court assess, well the accused says he was intoxicated, reckless or wilfully blind. or even heavily intoxicated victim. The person didn't say no = situation of reckless, honest but mistaken belief

Defence that could lead to acquittal. All that must be done is raising a reasonable doubt on the accused.

- R. v. Ewanchuk, [1999] 1 S.C.R. 330, 131 C.C.C. (3d) 481

The complainant, a 17-year-old woman, was interviewed by the accused for a job in his van. She left the van door open as she was hesitant about discussing the job offer in his vehicle. The interview was conducted in a polite, business-like fashion. The accused initiated a number of incidents involving touching, each progressively more intimate than the previous, notwithstanding the fact that the complainant plainly said "no" on each occasion. He stopped his advances on each occasion when she said "no" but persisted shortly after with an even more serious advance. Any compliance by the complainant was done out of fear and the conversation that occurred between them clearly indicated that the accused knew that the complainant was afraid and certainly not a willing participant. The trial judge acquitted the accused of sexual assault relying on the defence of implied consent and the Court of Appeal upheld that acquittal. The SCC said there's no such thing as "implied consent" in Canada. No means No! They discussed the elements of actus reus and mens rea.

The *actus reus* of assault is unwanted sexual touching. The *mens rea* is the intention to touch, knowing of, or being reckless of or wilfully blind to, a lack of consent, either by words or actions, from the person being touched.

The *actus reus* of sexual assault is established by the proof of three elements: (i) touching, (ii) the sexual nature of the touching, and (iii) the absence of consent.

Court concluded, that the "implied consent" defence was aimed at negating the mens rea, in a form of honest but mistaken. The Court said that was reckless, no means no.

iii) Lawful justification

iv) Voluntary intoxication

Regarding murder, one circumstance that can be accepted as defence. It reduces murder to manslaughter It's not a complete defence.

v) Accident = negates mens rea

In the process of driving at 120km/h in bank street to get to the 417 real quick before the Senators game, (I didn't mean it to happen) I crash, and people are seriously injured. I can say I did not mean to crash, but I still did, I was still driving impaired causing injuries to people.

However example for real defence: Hunting with a friend, while walking I fall and accidentally shoot my friend dead. But, if accepted and raises a reasonable doubt; defence could be a complete defence leading to an acquittal.

c) Justifications

i) Self defence 34 C.C.

ii) Use as much force as necessary

iii) Correction of child by force

- Section 43 C.C.

43. Every school teacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.

The Constitutionality of that provision was challenged in the case of (below); The SCC upheld the constitutionality of that provision. But it did clarify the types of force, has changed the way courts approach it. They have to be very minor corrective force, that has to be transitory in nature. It does not include corporate punishment for those under 2 or older than 13. It does not include inhuman or degrading conduct like discipline with the use of belt blows, slaps to the heads, acts of anger has to be corrective!

43 decriminalizes only minimum force of transient force or impact.

- Canadian Foundation for Children v. Canada (Attorney General), [2004] 1 S.C.R. 76, 180 C.C.C. (3d) 353

iv) Defence of personal property s38 and 42

d) Excuses; like the defence of necessity;

i) Necessity

***- R. v. Latimer, (2001) 150 C.C.C. (3d) 129 CSC**

Guilty of second degree murder of his daughter who was suffering from cerebral Her suffering was extreme and decided to take her life, did not hide it. During the second trial; Counsel asked for ruling, on whether the jury can consider the defence as necessity. After

hearing the closing submissions. Necessity was not available, input into sentencing. The trial judge told the jury not to concern itself with the punishment. He added: "it may be that later on, once you have reached a verdict, you – we will have some discussions about that". Defence contended that was misleading, because if it's a second-degree murder verdict, it's an automatic imprisonment, and only measure of ineligibility for parole.

After the jury returned with a guilty verdict, the trial judge explained the mandatory minimum sentence of life imprisonment, and asked the jury whether it had any recommendation as to whether Mr. Latimer's ineligibility for parole should exceed the minimum period of 10 years. Some jury members appeared upset, according to the trial judge, and later sent a note asking him if they could recommend less than the 10-year minimum. The trial judge explained that the *Criminal Code* provided only for a recommendation over the 10-year minimum, but suggested that the jury could make any recommendation it liked.

The Court said: The defence of necessity is narrow and of limited application in criminal law. The accused must establish the existence of the three elements of the defence. First, there is the requirement of imminent peril or danger. Second, the accused must have had no reasonable legal alternative to the course of action he or she undertook. Third, there must be proportionality between the harm inflicted and the harm avoided. Here, the trial judge was correct to remove the defence from the jury since there was no air of reality to any of the three requirements for necessity.

ii) Provocation

an excuse like necessity

- **Section. 232(1) C.C.**; 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.

What is 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.

You see that defence quite often; people are charged with murder in the context of brall, physical encounter. Where the incident that triggers the reaction is very close to the time. The more distant in time, the more difficult it will be to take that as defence.

Provocation can in some circumstances become the motive in the cases of first-degree charge. But if it close in time, the classic situation; spouse catching their wife with someone else, and reacting immediately. But you can't use that defence, if you go away for 2 hours and come back to kill, that becomes motive.

iii) Duress

e) Abuse of process and police provocation

= defences, won't be on the exam

4. Rules of participation in an offence

section 21 CC, very important!!!

- **21. (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.*

If I'm the driver for you to commit an armed robbery, and I know that's what you're going to do. And I'm driving to help you commit that robbery. Then I would be charged with nothing less than armed robbery. Because there's an aid element, mens rea.

General rule: presence alone is not sufficient to engage criminal liability.

I drive you somewhere, and you commit an armed robbery. But there's no proof that I drove you to help you! The only evidence is me being there outside. Or I walk in the bank with you. And all of a sudden you decide to commit an armed robbery and take off and I do nothing, just standing. I might end up being charged. My defence that I didn't know he was going to do that. I didn't help him, but I ran away with him because I was worried I would be caught and took caught. If I'm believed then I just raised a reasonable doubt.

***- R. v. Dunlop and Sylvester, [1979] 2 S.C.R. 881, 47 C.C.C. (2d) 93**

A gang rape of the complainant occurred late at night in an isolated area. The complainant actually identified both of the accused in the sexual assault trial; as being they were there. They took part in the sexual assault. The accused denied the charge. They testified that they had attended a meeting of the club. The issue for the jury was a simple one—did the two accused have intercourse with the complainant? She said that they had, and they denied it. The judge chose, however, to instruct the jury upon parties to an offence under s. 21 of the *Code*, and it was in this respect that the convictions were challenged.

The appeals should be allowed.

It was common ground that the trial judge erred in charging the jury on s. 21(2) of the *Code*, common intention, when there was no evidence that the appellants had formed any common intention with those involved in the gang rape to commit rape upon the complainant.

SCC said: Presence at the commission of an offence can be evidence of aiding and abetting if accompanied by other factors, such as prior knowledge of the principal offender's intention to commit the offence or attendance for the purpose of encouragement. In this case there was no evidence that while the crime was being committed either of the accused rendered aid, assistance, or encouragement to the rape of the complainant.

Watch Jodi Foster, the accused

A) Party to an offence

Everyone is a party to an offence

- **Section 21(2) and 487 C.C.**

a) Actually committing the offence

- **Section 21(1)a) C.C.**

b) Aids

- **Section 21(1)b) C.C.**

- **R. v. Jackson, [1993] 4 S.C.R. 573, 86 C.C.C. (3d) 385**

J and the accused were charged with first degree murder following the killing of J's employer. J believed that the victim, with whom he had a homosexual relationship, had brought in a new employee to take his place. On the night of the murder, the accused drove J to the victim's antique shop. According to J, the accused never left the car and was unaware of what happened in the shop. J admitted to entering the shop, losing control and striking the victim with a hammer. The accused gave a different story. According to him, J talked on the way to the shop about killing the victim, although the accused took this to be a joke. J got out of the car carrying a hammer, balaclava and gloves, and ordered the accused to follow him. J entered the shop and the accused remained outside near the door where he heard loud voices and noises, suggesting that someone was getting hit. The accused became frightened and ran down the driveway toward the car. J ran after him, hit him and forced him to return to the shop. He then told the accused to retrieve the cash box. The Crown's theory was that J and the accused both entered the shop and both participated fully in the attacks as well as the robbery. The trial judge charged the jury on both murder and manslaughter. The jury found J guilty of first degree murder and the accused of second degree murder.

The SCC; A person who aids and abets another in the offence of murder can be guilty of that offence under s. 21(1)(b) and (c) of the *Code* if he possesses the requisite *mens rea* for murder. Where the aider and abettor does not have the *mens rea* required for murder, he may be guilty of the lesser offence of manslaughter if he possesses the requisite *mens rea* for that offence.

A person may thus be convicted of manslaughter who aids and abets another person in the offence of murder, where a reasonable person in all the circumstances would have appreciated that bodily harm was the foreseeable consequence of the dangerous act which was being undertaken.

c) Abetting

= to encourage, and the Crown must prove that the accused intended to do so.

- Section 21(1)c) C.C.

d) Counselling

-Section 22 and 464 C.C.

Counselling somebody to commit an offence which ends up not being committed.

C) Incompleted offences

a) Attempt (Sections 24, 239, 463, 660 C.C.)

b) Conspiracy (Sections 21(2), 465 C. C.)

c) Counselling offence that is not committed (Section 464 C. C.)