Federation of Law Societies of Canada
National Committee on Accreditation

Syllabus

Canadian Criminal Law

(Revised for June 2020)

Candidates are advised that the syllabus may be updated from time-to-time without prior notice.

Candidates are responsible for obtaining the most current syllabus available.

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Canadian Criminal Law

EXAMINATION

The function of the NCA exams is to determine whether applicants demonstrate a passable facility in the examined subject area to enable them to engage competently in the practice of law in Canada. To pass the examination candidates are expected to identify the relevant issues, select and identify the material rules of law including those in the *Criminal Code of Canada* and the relevant case law as understood in Canada, and explain how the law applies on each of the relevant issues, given the facts presented. Those who fail to identify key issues, or who demonstrate confusion on core legal concepts, or who merely list the issues and describe legal rules or who simply assert conclusions without demonstrating how those legal rules apply given the facts of the case will not succeed, as those are the skills being examined.

The knowledge, skills and abilities examined in NCA exams are basically those that a competent lawyer in practice in Canada would be expected to possess.

MATERIALS

Required:

- Steve Coughlan, *Criminal Procedure*, 4th ed. (Toronto: Irwin Law, 2020) [For the August 2020 exam, this reading list also contains reference to the appropriate page numbers in the 3rd edition.)
- Kent Roach, *Criminal Law*, 7th ed. (Toronto: Irwin Law, 2018)
- The most up-to-date *Criminal Code* (an annotated *Criminal Code* is highly recommended). The *Code* will contain the Canadian Charter of Rights and Freedoms in an Appendix.

  You must have a hard copy of the *Criminal Code* with you when you attend the exam. There are a number of published editions available. The most used are Martin's *Criminal Code* (Canada Law Book), *Practitioner's Edition* (Lexis Nexis) and Tremeears *Criminal Code* (Thomson Carswell). Select the version of your choice.

Optional:

- Don Stuart, *Canadian Criminal Law*, 7th ed. (Scarborough: Thomson Carswell, 2015)
- Don Stuart et al, *Learning Canadian Criminal Law*, 14th ed. (Scarborough: Thomson Carswell, 2018)
- Kent Roach et al., *Cases and Materials on Criminal Law and Procedure*, 11th ed. (Toronto: Emond Montgomery, 2015)

The last two books are casebooks with edited selections of cases, but students are advised to read the full cases listed in the syllabus. The optional materials are not necessary in order to write the NCA exam in Criminal Law, but candidates should be aware that they are available.

INTERNET ACCESS TO CASE LAW

Select cases identified in the Syllabus may be available via the internet at the following web sites:

- Supreme Court of Canada decisions (https://scc-csc.lexum.com/scc-csc/en/nav.do)
- Canadian Legal Information Institute (https://www.canlii.org/)

Case law may also be available electronically through commercial services such as LexisNexis / Quicklaw or eCarswell, or through a law school or County or District Court House law libraries.

READING LIST

References to the Roach text are shown as "**Roach** pp. xx-yy" and to the Coughlan text are shown as "**Coughlan** pp. xx-yy" while references to the *Criminal Code* are shown as "**CC**." All cases included in this syllabus should be read, even when identified as examples or illustrations. **You are responsible for the law each decision describes**.

GENERAL OVERVIEW AND PRELIMINARY MATTERS

1. The Sources of Criminal Law

With the exception of contempt of court, criminal offences are created in Canada by statute. Most criminal offences are created by the *Criminal Code* but it is not the only statutory source. Drug trafficking, for example, is made a criminal offence by the *Controlled Drugs and Substances Act*. The common law cannot be used to create offences in Canada because of concerns related to the principle of legality, and the notion that criminal offences should be clear, certain, and should pre-exist the act being prosecuted. As will be seen below, many rules of criminal procedure are created in the *Criminal Code*, and many other rules of procedure are common law based.

- *Frey v. Fedoruk*, [1950] S.C.R. 517
- See **CC** section 9
- **Roach** pp. 6, 95-96.

While common law offences are not allowed, common law defences are available under Canadian criminal law and can still be created by the courts. As will be seen below, the Supreme Court of Canada recognized a common law defence in *Levis (City) v. Tetrault*, [2006] 1 S.C.R. 420 (officially induced error) and *R. v. Mack*, [1988] 2 S.C.R. 903 (entrapment). Moreover, the common law can deeply influence the way that statutory criminal offences are interpreted, particularly the mental elements.

- See **CC** section 8
- See *R. v. Jobidon*, [1991] 2 S.C.R. 714, a case you will be asked to review again when considering the meaning of consent.
- **Roach** pp. 134-5 (discussing *R. v. Jobidon*)

2. The Power to Create Criminal Offences and Rules of Criminal Procedure

a) Constitutional Division of Powers Introduced - Both the Federal Government and Provincial governments have jurisdiction to create non-criminal offences (regulatory offences) and to use jail to enforce those regulatory offences, but only the Federal Government can create “criminal” offences, or “true crimes”, pursuant to its powers under s. 91(27) of the *Constitution Act, 1867*. The principles that apply to true crimes differ from those that apply to regulatory offences. These principles will be examined below when regulatory offences are discussed.

Curiously, while they cannot create criminal offences, Canadian provinces do have jurisdiction over the administration of justice within the province under s. 92(14) of the *Constitution Act, 1867*. For example, the provinces have set up the lowest level of criminal court where the vast majority of cases are actually prosecuted (the provincial courts); it is the provincial Attorneys General who prosecute most offences, including

serious offences; and the provinces have passed statutes setting out juror eligibility within the province. The procedure during criminal hearings, however, is governed by federal rules and by the common law.

- For a summary of the criminal law power, see *R. v. Malmo-Levine*, 2003 SCC 74 at paras. 73 – 79
- **Roach** pp.7-8, 26-30

b) ***The Canadian Charter of Rights and Freedoms*** - The *Canadian Charter of Rights and Freedoms* (the "Charter") imposes limits on the jurisdiction of all governments, subject to s. 1, the "reasonable limits" clause, and the seldom-used s. 33 "notwithstanding clause." Since its passage in 1982, the *Charter* has had such a profound impact on criminal law and procedure that all criminal practitioners need to develop expertise in its operation.

Section 52 of the *Constitution Act, 1982* can be used by courts to invalidate offences that Parliament has created, and courts have done so on a number of occasions, but this is not common. It has also been used to strike down rules of criminal procedure, although this too is uncommon.

- Read *Canada (Attorney General) v. Bedford*, 2013 SCC 72 as an illustration of criminal offences being struck down.
- *Read R. v. Oakes*, [1986] 1 S.C.R. 103 as an example of a rule of criminal procedure being struck down, and note the operation of section 1 as a limiting provision (though be aware that the approach has evolved since *Oakes* was decided: see the discussion in **Roach**, below). The concepts identified in *Oakes* will be revisited below in discussing the burden of proof.
- **Roach** pp. 33-91.

The *Charter* can also be used as in important interpretive tool. Even when it is not used to strike down a provision, it is the practice of courts to permit constitutional values to influence the way statutes are interpreted.

- *Read R. v. Labaye*, [2005] 3 S.C.R 728 as an illustration of how the *Charter* changed the criminal concept of indecency through a progression of cases described therein. You will see that this case provoked a strong dissenting judgment. Bear in mind that what dissenting judges say in opposition to the majority judges is not the law, but that obiter dictum explaining the law when no opposition is taken can be a valuable source for legal argument.
- **Roach** pp. 103-04 (discussing *R. v. Labaye*)

The *Charter's* largest impact on criminal procedure has been in creating constitutional procedural protections, as discussed below.

3. The Procedural Classification of Offences

In Canada, criminal offences are divided into two general categories: “indictable offences” and “summary” (or “summary conviction”) offences. Offences can be “hybrid” in the sense that the prosecutor has the right to elect whether to treat the offence as “indictable” or “summary.” The classification of offences has important implications for the penalties that are possible, and for the procedure that will be used, including the mode of trial. For example, jury trials are not available for criminal offences prosecuted by summary conviction and are also precluded for indictable offences listed in s. 553 of the *Code* as being in the absolute jurisdiction of provincial court judges.

- See **Coughlan**, pp 40 – 50 (4th), pp. 35 – 43 (3rd) and the **CC** provisions cited therein.

4. Interpreting Criminal Provisions

Interpreting the *Criminal Code* and related enactments is not unlike interpreting other statutes. There are special considerations that operate, however. For example:

a) Definitions - The *Criminal Code* has definitions for many of the terms used but they are not always easy to locate. Section 2 contains definitions that apply throughout the *Code*. The *Code* is divided into Parts, and at the beginning of each Part, there will be a definition section that applies solely to that Part. Sometimes definitions are found in or around the relevant statutory provision to be interpreted. See, for example, ss. 348(3) and 350, which apply to offences in s. 348(1) (i.e., breaking and entering). Sometime definitions come from the common law: see *R. v. Jobidon*, below.

b) Strict Construction - Historically, criminal statutes were interpreted strictly in favour of the liberty of the accused. In other words, the accused would get the benefit of any ambiguity in matters of interpretation. This principle continues to apply but has been heavily modified by the purposive interpretation.

- *R. v. Pare*, [1987] 2 S.C.R. 618
- **Roach** pp. 99-104.

c) Purposive Interpretation - Canadian law makes liberal use of purposive interpretation, in which the language that is used in the provision being construed is interpreted harmoniously with the statute as a whole, with the underlying purpose of the provision in mind so as to best accomplish its underlying purpose, always bearing in mind that the limit on purposive interpretation is that damage cannot be done to the language employed. *R. v. Pare* is an example. Be on the lookout throughout the decisions included in this list for examples of purposive interpretations.

d) French/English - Federal laws like the *Criminal Code* are passed in both of Canada's official languages. Each version is equally authoritative, and ambiguities in one language can be clarified by the other.

- See, for example, *R. v. Mac*, [2002] 1 S.C.R. 856, or for a very simple example, *R. v. Collins*, [1987] 1 S.C.R. 265 at para. 43.
- **Roach** pp. 102-03 (discussing *R. v. Mac*)

e) The *Charter* - As indicated, the *Charter* can have an important influence on the way statutory provisions are interpreted because of the presumption that statutes were intended to be constitutionally valid. You have observed this in *R. v. Labaye*, [2005] 3 S.C.R 728.

- See, for example, *Canadian Foundation for Children*, *Youth & the Law v. Canada (A.G.)*, [2004] 1 S.C.R. 76 where a Charter challenge encouraged the Court to read significant content into the concept of "reasonable corrective force." Examine this decision not only for what it shows about legal technique, and the rule of law doctrine of "void for vagueness," but also for what it says about the operation of the defence of corrective force.

  Roach pp. 98-99

THE ELEMENTS OF A CRIMINAL OR REGULATORY OFFENCE

Each criminal offence has "elements" that must be present before a conviction is possible. Indeed, all elements of the offence must be present at the same time, or there will be no crime (see *R. v. Williams* below). As is the case internationally, it is convenient to think of the elements of an offence as:

- The physical elements or *actus reus* of the offence (the act that must be performed or omission that is proscribed, the circumstances or conditions in which the act must occur, and any consequence that must be caused by the act); and
- The mental or *mens rea* elements of the offence.

The *actus reus* requirement is not simply the need to show that the accused acted voluntarily: the elements particular to each individual offence must be identified. For example, the *actus reus* of assault includes the application of force and the absence of consent, the *actus reus* of theft includes the taking of property belonging to someone else, the *actus reus* of robbery includes committing assault in order to steal, and so on.

As a general rule (but subject to exceptions) each *actus reus* element will have a corresponding *mens rea* element. For example in assault the application of force must have been intentional, and the accused must have known of the absence of consent. In Canadian law, these mental

elements normally describe the actual or "subjective" state of mind of the accused (things such as intent, knowledge, willful blindness or recklessness). It is becoming increasingly common, however, to produce offences that have an objective *mens rea*, such as negligence. Objective *mens rea* is determined not according to the state of mind of the accused (the subject), but according to what a reasonable person in the position of the accused would have known or foreseen.

As a general proposition of interpretation, a true crime will be interpreted as requiring subjective *mens rea* unless it is clear that Parliament wished to impose objective liability. Identifying what the elements of an offence are is a challenging enterprise, turning on interpretation of the offence and familiarity with relevant precedents and principles. It is not possible or desirable to attempt here to "teach" the elements of every offence. Instead, some offences will be selected for their illustrative value in demonstrating the key *actus reus* and *mens rea* concepts.

Applicants are expected to be able to demonstrate interpretive and application skills for all criminal offences, whether included in these reading materials or not. That is, candidates are expected to develop the ability to review an offence provision and analyze it in such a way as to be able to discern its essential elements (*actus reus, mens rea,* etc.). Sometimes this exercise will involve being cognizant of definitions or presumptions that are included in the offence provision or elsewhere in the *Criminal Code*. A candidate is not expected to have conducted such an analysis with respect to every offence in the *Criminal Code* prior to the exam. Nevertheless, the candidate must be able to quickly carry out an analysis of an offence that is put at issue in an exam question, even if he/she has not previously dealt with that offence in the readings.

5. The *Actus Reus*

a) Acts and Statutory Conditions - The act must be the act of the accused. The act must also be the kind of act described in the relevant provision. Further, the act must be committed under the circumstances or conditions specified in the offence. For example, an accused cannot be convicted of the offence of break and enter with intent to commit a criminal offence pursuant to s. 348 (1) (a) unless she "breaks" and "enters" something that qualifies as a "place" according to the *Criminal Code*, with the relevant *mens rea*.

See, for an example of the interpretation of acts and *actus reus* conditions:

- *R. v. J.(D.),* [2002] O.J. No. 4916 (Ont. C.A.)
- *R. v. Gunning* [2005] 1 S.C.R. 627

Acts Must be "Voluntary" or "Willed" – The act described by the offence must be "voluntary" in the sense that it must be the willed act of the accused. For example, a man in the throes of a seizure does not "will" his movements; it would be no assault on his part even if his arm was to strike another without the other's consent. It would have been possible to deal with this kind of issue using the *mens rea* concept by suggesting that he did not intend to strike the other, but Canadian law has also accepted that unless a

physical motion is willful, it is not fair to call it an act of the accused person. This is the foundation for the automatism defence, discussed below. It is easier to understand the concept of voluntariness together with automatism authorities, so this discussion will be deferred until the voluntariness-based defences are discussed below.

- **Roach** pp. 115-118.

b) The "Act" of Possession - At times part of the *actus reus* for an offence has an inherent mental element to it, as it does with the important element, common to many offences, of "possession." This concept demonstrates that the divide between the *actus reus* and *mens rea* is not always a solid one. What matters is that lawyers appreciate what the elements are, regardless of how they are characterized.

- See **CC** s. 4(3), *Controlled Drugs and Substances Act* section 2 (found in most *Criminal Codes*)
- See *R. v. York*, (2005), 193 C.C.C. (3d) 331 (B.C. C.A.) for the law of manual possession
- See *R. v. Marshall*, [1969] 3 C.C.C. 149 (Alta. C.A.) and *R. v. Terrence*, [1983] 1 S.C.R. 357 for the concept of constructive joint possession
- See *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253 for possession of electronic data
- **Roach** pp. 136-137.

c) Consent as an Element of the *Actus Reus* - Often the question of absence of consent by the victim is an important *actus reus* condition that must be present for offences to occur. Consent is a complex idea, animated by statute and the common law.

- See **CC** section 265(3)
- *R. v. Jobidon*, [1991] 2 S.C.R. 714 (reviewed above as an illustration of the common law influence on the reach of statutory provisions)
- *R. v. J.A.*, 2011 SCC 28
- *R. v. Mabior*, 2012 SCC 47
- **Roach** pp. 130-135.

d) Causation - Where the relevant offence prescribes a "consequence" that must occur before the offence is complete, the Crown prosecutor must prove that the accused caused the consequence to occur, beyond a reasonable doubt. (Equally, where no consequence is specified and the offence does not otherwise refer to causing a result, causation is not an element and need not be proven by the Crown). As *Williams* shows, if causation is not proved, the accused cannot be convicted of an offence that requires his act to produce a prohibited consequence. *Nette* discusses the need for both "factual causation" and legal causation, as well as discussing the higher causation standard for first degree murder. *Smithers* illustrates the legal causation principle of the "thin skull" and *Maybin* demonstrates the need in some contexts to consider whether intervening events have broken the relevant chain of causation. These cases illustrate how most imputable

causation principles explain why blame can be assigned in criminal cases, in spite of arguments that might, in civil cases, reduce or even eliminate civil liability.

- See **CC** ss. 224-226
- *R. v. Smithers*, [1978] 1 S.C.R. 506
- *R. v. Nette*, [2001] 3 S.C.R. 488
- *R. v. Williams*, [2003] 2 S.C.R. 134
- *R. v. Maybin*, 2012 SCC 24
- **Roach** pp. 120-127

e) Omissions - Some offences do not require a positive act by the accused. Rather, they can be committed by showing that the accused failed to act, or omitted to act. Whether an offence can occur by "omission" is a question of construction. To be guilty by omission **(1)** the offence must contemplate guilt for omissions, or **(2)** the accused must be placed under a legal duty to act either by the provision charging him or by some incorporated provision, and the omission in question must be a failure to fulfill that legal duty.

- *R. v. Peterson*, [2005] O.J. No. 4450 (Ont. C.A.), leave to appeal refused.
- *R. v. Browne*, (1997), 116 C.C.C. (3d) 183 (Ont. C.A.), leave to appeal refused
- **Roach** pp. 128-130

6. Subjective *Mens Rea*

As indicated, subjective *mens rea* focuses on the actual state of mind of the subject of the prosecution, namely, the accused. Since what someone thinks or knows is personal to her unless communicated, subjective *mens rea* ordinarily must be gleaned circumstantially, including by using the common sense inference that persons usually intend the natural consequences of their acts. Since the state of "knowledge" is not often manifested circumstantially the way apparent intent is, a court is likely to assume that the accused knew of the elements of the offence unless the so-called "defence of mistake of fact," discussed below, is made out. The close link between knowledge and mistake of fact makes it sensible to discuss the "defence" together with this *mens rea* concept.

There are many states of mind described by the various *Criminal Code* provisions. For example, one form of first degree murder requires proof of planning and deliberation (premeditation), while second degree murder requires only that the accused intends to cause death, or intends to cause bodily harm that he knows is likely to cause death.

Most offences require more than one mental state to exist. For example, to be guilty of murder, the accused must know that the living thing she is killing is a human being and intend to cause death to that human being. A sexual assailant must intend to touch the complainant, and be aware or wilfully blind that she is not consenting (although as indicated, that knowledge is likely to be assumed absent a mistake of fact defence being raised successfully). Generally, fault must be established in relation to all aspects of the prohibited act or *actus reus* though this is not an absolute rule.

It is a close exercise of construction to see what mental states are required by a particular offence. If an offence is explicit and specifies the relevant state of mind, then only that state of mind will suffice. This is why "assault" contrary to section 265 requires "intentional" touching, and not simply reckless touching. Many offences do not specify the relevant mental state. If a true crime is silent as to the mental state, it is presumed under the common law that intention or "recklessness" will suffice. Recklessness in Canadian criminal law requires subjective advertence to the prohibited risk and should not be confused with negligence. The presumption of some form of subjective fault gives way to the actual wording of the offence (see the offence in what is now s. 319(2) of the *Code* charged in *R. v. Buzzanga and Durocher* below, which was found to require the Crown to prove actual intention to bring about the consequence because of the specific statutory wording of the offence). A few crimes such as murder and attempted murder have a higher constitutionally required fault element because of their stigma and penalty.

It is important to be as specific as possible in describing the fault element for a particular offence. In particular, care should be taken to articulate the precise fault element and its relation to the *actus reus*.

- For a general discussion of various fault elements see **Roach** pp. 184-218.

In the cases included below, the most common mental states are identified and illustrated:

a) Intention, and Ulterior *Mens Rea* – Intention is a complex idea. The accused must have the very intention required by the relevant provision. For example, *Murray* intended to hold the Bernardo tapes, but not for the purpose of obstructing justice. He was therefore not guilty. In *Roks*, the Court of Appeal stresses the importance of knowing that death is probable and warns of the dangers of reasoning backwards from the fact that death occurred.

- *R. v. Murray*, [2000] O.J. No. 2182 (Ont. S.C.J.)
- *R. v. Roks*, 2011 ONCA 526
- **Roach** pp. 204-210

b) Subjective *Mens Rea* with Objective Features - Some criminal offences use standards to define criminal conduct. For example, some assaults are sexual in their nature, and others are not. Some acts are dishonest, and others are not. It is not sensible to require the accused to have a subjective appreciation that the relevant criminal standard has been met before a conviction can follow since that would permit the content of offences to vary from offender to offender. For example, the accused can commit fraud if he intends the relevant transaction, even if he does not appreciate that a transaction of that nature is "dishonest." If it were otherwise objective dishonest people would be held to lower standards than the rest of us. Or an accused can commit sexual assault if he intends to touch another, even if he does not believe that the contact is sexual in nature, so long as it is.

- *R. v. Theroux*, [1993] 2 S.C.R. 5

- *R. v. Chase*, [1987] 2 S.C.R. 293
- **Roach** pp. 475-6 discussing *Chase* and objective features of sexual assault
- **Roach** pp. 501-02 discussing *Theroux* and objective features of fraud

c) Knowledge – As indicated, bearing in mind what is said above about standards of criminality, the accused must generally know that the conditions of the *actus reus* exist. For example, an accused cannot be convicted of assaulting a police officer if she does not know the victim is a police officer. Generally, it is reasonable to assume that the accused knows the things that would be obvious to a reasonable person, and so we presume the accused knows of the relevant conditions, unless the accused presents a "mistake of fact defence." In the sexual offence context, the mistake of fact defence is heavily limited for policy reasons. A number of provisions deem knowledge where the accused has failed to take "reasonable steps" to determine actual facts. This goes beyond the doctrine of willful blindness, discussed below.

- See **CC** ss. 265(4); 273.2
- *R. v. Ewanchuk*, [1999] 1 S.C.R. 330
- *R. v. Levigne*, [2010] 2 S.C.R. 3
- *R. v. ADH*, 2013 SCC 28
- **Roach** pp. 211-213, 429-433.

d) Willful Blindness – Willful blindness is related to but distinct from recklessness. It is a subjective state of mind, requiring that the accused personally sees the risk of a fact, but then willfully avoids confirmation so as to be able to deny knowledge. This concept fits best when used as a substitute for knowledge, although courts (and Parliament in **CC**. s. 273.2) have an unfortunate habit of using "willful blindness" terminology as interchangeable with recklessness. This leads to confusion. If the two concepts were indeed interchangeable willful blindness would disappear because everyone who is willfully blind is necessarily reckless – if you suspect that a fact exists but willfully avoid confirmation so as to be able to deny knowledge (and are willfully blind) then you must necessarily be seeing and taking an unjustifiable risk that the fact may exist (and are reckless). The two concepts are not the same and should not be equated.

- *R. v. Briscoe*, 2010 SCC 13
- **Roach** pp. 213-216, 487-8.

e) Recklessness – Recklessness is a subjective state of mind that requires the accused to act in spite of actually and personally foreseeing the risk that if she does act, the prohibited consequence will be brought about. It therefore differs from negligence which can apply even if the actor does not personally see the risk, provided a reasonable person would have. Still, recklessness is a subjective *mens rea* with objective features because it exists only where it is objectively unjustifiable to take that risk the accused understood he was taking. The fact that the accused may have felt the risk to be justifiable would be no answer. Recklessness will apply where the provision creates a

consequence, but does not, as a matter of construction, require some more limited kind of *mens rea*.

- See *R. v. Theroux*, above
- *R. v. Buzzanga and Durocher*, (1979), 25 O.R. (2d) 705 (Ont. C.A.)
- **Roach** pp. 216-17.

7. Objective *Mens Rea* and True Crimes

Negligence is judged objectively, according to what a reasonable person would know or understand or how a reasonable person would act. The criminal law has long been uncomfortable with objective fault, as historically the criminal law responded to an "evil" mind, and careless people may be dangerous but they are not evil. Gradually the law has come to accept objective fault, but to adapt it to the criminal law by requiring a marked departure standard from reasonable standards and to require it to be contextualized to reflect all the circumstances, including after *R. v. Beatty* the accused's explanation and state of mind. That said, the ultimate issue is whether the accused can be said to have engaged in a marked departure from the standard of care expected of the reasonable person. In *R. v. Creighton* the Court rejected the idea that *mens rea* always has to match perfectly all aspects of the *actus reus*. In that case, the Court in a 5:4 decision held that the fault for unlawful object manslaughter was objective foresight of bodily harm (rather than death) and that the objective test should be based on a simple reasonable person standard with the personal characteristics of the accused not being relevant unless they revealed an incapacity to appreciate the prohibited risk. Negligence cannot, however, be used as the basis for murder, attempted murder or war crimes, where, as a matter of constitutional law, convictions must be based on subjective *mens rea* in the form of full scale intention. Recall as well the common law presumption that crimes require subjective fault unless something in the wording of the offence suggests objective fault. For crimes using objective fault as the *mens rea,* "penal negligence" - a more restricted form of negligence requiring a marked departure from reasonable standards of care - is generally required.

One exception is with "predicate offences," those aggravated forms of offence that apply when serious consequences result, and that include within their elements another complete but lesser offence, a "predicate" offence. For predicate offences the consequence need not be brought about by "penal negligence." It is enough if the accused commits the underlying or predicate offence (which might of course require subjective fault), and that the aggravating consequence was thereby caused. Also, for the specific offence of criminal negligence, the higher standard of a "marked and substantial" departure must be proven.

- *R. v. Martineau*, [1990] 2 S.C.R. 633
- *R. v. Creighton*, [1993] 3 S.C.R. 3
- *R. v. Beatty*, 2008 SCC 5
- *R. v. J.F*. 2008 SCC 60
- **Roach** pp. 218-227.

8. Regulatory Offences

Regulatory offences can be created by any level of government. They are created in order to regulate conduct and prevent harm rather than punish inherently wrongful conduct. They are presumed to be "strict liability" offences (offences where the Crown need only prove the *actus reus*, with the accused bearing the burden of proving an absence of negligence or a reasonable mistake of fact to avoid conviction). By requiring the accused to establish a defence of due diligence or reasonable mistake of fact on a balance of probabilities, strict liability offences violate the presumption of innocence under s. 11(d) of the *Charter*, but as in *Wholesale Travel* that has been upheld as a reasonable limit on such rights given that the accused has entered a regulated field.

Not all regulatory offences, however, will be strict liability offences. Some can be full *mens rea* offences just as true crimes are, provided there is a clear indication that *mens rea* is required. Some regulatory offences operate as absolute liability offences that will be committed whenever the relevant *actus reus* is proved, provided this is clearly what the legislators intended when establishing the offence. Absolute liability offences such as the requirement for timely retraction in *Wholesale Travel* offend principles of fundamental justice and will violate s. 7 of the *Charter* if there is a possibility that they will result in imprisonment or otherwise violate rights to life, liberty or security of the person. Given the different modes of interpretation used, it is important to be able to distinguish true crimes from regulatory offences. The Court has also recognized a defence of officially induced error that can apply both to criminal and regulatory offences, but is most relevant to regulatory offences.

- *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299
- *Reference re Section 94(2) of the Motor Vehicle Act (B.C.)*, [1985] 2 S.C.R. 486
- *R. v. Wholesale Travel Inc.*, [1991] 3 S.C.R. 154 (holding timely retraction requirements to be an unconstitutional form of absolute liability but upholding strict liability offences that require the accused to establish a due diligence defence on a balance of probabilities).
- *R. v. Raham*, 2010 ONCA 206
- *Levis (City) v. Tetreault*, 2006 SCC 12 (recognizing defence of officially induced error, and summarizing the Court's approach to classification of regulatory offences and the due diligence defence)
- **Roach** pp. 240-260.
- **Roach** pp. 113-115 (discussing officially induced error)

EXTENSIONS OF CRIMINAL LIABILITY

9. Aiding and Abetting

It is not only the person who actually performs the *actus reus* (the "principal" offender) who can be convicted of the offence. So too can those who aid (physically support) or abet (encourage) the accused to commit the offence. Indeed, persons who aid and abet one offence can, in some circumstances, be convicted of offences they did not intend to aid or abet, provided that offence is under s. 21(2) an objectively foreseeable outcome of the offence they did intend to aid or abet. In some cases such as murder or attempted murder, however, the accused must subjectively foresee the commission of a subsequent offence being committed as a result of carrying out an unlawful purpose under s. 21(2). This change to the application of s. 21(2) follows from the constitutionally required subjective *mens rea* of the crimes of attempted murder and murder. This underlines that those found guilty under s. 21(b) and (c) or s. 21(2) are guilty of the same crime as the principal offender. See *R. v. Logan*, [1990] 2 S.C.R. 731.

- See **CC** s. 21
- *R. v. Dunlop and Sylvester*, [1979] 2 S.C.R. 881
- *R. v. Logan*, [1990] 2 S.C.R. 731
- *R. v. Briscoe*, 2010 SCC 13 (reviewed above)
- *R. v. Thatcher*, [1987] 1 S.C.R. 652
- *R. v. JF*, 2013 SCC 12
- *R. v. Gauthier*, 2013 SCC 32
- **Roach** pp. 166-178.

10. Counseling

An accused can be convicted of counselling offences, whether or not the offences counselled are actually committed. If the offences counselled are committed, **CC**. s. 22 operates and the person is found guilty and punished as if he had committed the completed offence. If the offence is not committed, **CC**. s. 464 operates and the person is found guilty of a separate offence that is punished as if she had been guilty of attempting the completed crime. Note that counselling is defined in s. 22(3) of the *Criminal Code*.

- *R. v. Hamilton*, [2005] 2 S.C.R. 432
- **Roach** pp. 161-166.

11. Attempts

As the counseling offence in **CC**. s. 464 illustrates, not all crimes need to be complete before an offence arises. There is **(1)** the discrete offence under s. 464 of counselling a crime that is not committed, **(2)** the offence of conspiracy under s. 465 in which the agreement to commit a crime is a crime, and **(3)** there is liability for attempting to commit an offence under s. 24 of the

Criminal Code. *Ancio* shows the relevant *mens rea* for attempts, and *Deutsch* is instructive on when the attempt proceeds far enough to constitute a crime. The fact that it is impossible to commit the particular offence is no defence to an attempt charge, but it is not an offence to try to commit an act you believe is an offence, if it is not actually an offence. *Dery* exposes the limits of piggy-backing incomplete forms of liability.

- See **CC** ss. 463, 465, 660
- *R. v. Ancio*, [1984] 1 S.C.R. 225
- *R. v. Deutsch*, [1986] 2 S.C.R. 2
- *R. v. Déry*, 2006 SCC 53
- **Roach** pp. 143-155.

12. Corporate and Association Liability

Corporations are liable for the acts of their agents for strict and absolute liability offences. Since these kinds of offences turn on the *actus reus* alone, there is no need to use any legal devices to ascribe *mens rea* to the corporation and so the *Criminal Code* corporate liability provisions do not apply to regulatory offences. For crimes in the *Criminal Code*, however, the *Criminal Code* sets out standards for corporate and association liability. Section 22.1 applies to objective fault or negligence offences where an association is charged, and s. 22.2 applies to subjective *mens rea* offences charged against an association. See these provisions.

- **Roach** pp. 260-272.

SELECT CRIMINAL DEFENCES

Not all criminal defences are listed below. For example, s. 25 of the *Criminal Code* permits law enforcement personnel to use some force to carry out their duties, and s. 40 permits the defence of property. There are also procedural defences such as double jeopardy. Charges can be “stayed” pursuant to s. 11 (b) and 24 of the *Charter* because of unreasonable delay. You are responsible only for the select defences described below and those described in assigned cases.

13. Mental Disorder

Section 16 of the *Criminal Code* codifies and modifies the common law defence of insanity. To have access to this defence the accused must establish that he has a “mental disorder” (defined in s. 2 as a “disease of the mind” thus incorporating prior common law case law) and that it affected him in one or both of the ways described in s.16 (1). *R. v. Cooper* provides a definition of mental disorder, although it has been modified by *R. v. Parks* (discussed below). *Cooper* also stresses the significance of the concept of “appreciates” while *R. v. Kjeldson* describes how the

defence works for sociopathic or psychopathic offenders. *R. v. Oommen* edifies us about the meaning of "wrong."

- *R. v. Cooper*, [1980] 1 S.C.R. 1149
- *R. v. Kjeldson*, [1981] 2 S.C.R. 617
- *R. v. Oommen*, [1994] 2 S.C.R. 507
- **Roach** pp. 320-34.

14. Automatism and Involuntary Acts "Negativing" the *Actus Reus*

As indicated above, the accused does not satisfy the *actus reus* requirement unless her act is willed. Some courts have acquitted individuals who reflexively strike out, using the specious reasoning that their physical act was not willed, but the legitimacy of this reasoning is questionable. A more sophisticated application of the voluntariness concept was employed in *R. v. Swaby*.

It is the "voluntariness" concept that explains the defence of automatism, which operates on the theory that the accused's physical motions were not culpable where they are not voluntary or thought-directed or conscious, as in the sleep-walking case of *R. v. Parks*. Please note that automatism will not realistically operate in any case where the accused appears conscious of his conduct – it is reserved to those unusual cases where there appears to be some disconnect between the actions of the accused and his conscious will. The result of the *Parks* decision was controversial enough that the Supreme Court of Canada took procedural steps to cut the defence back in *R. v. Stone*.

Note that "automatism" is divided into two categories, "mental disorder automatism" and "non-mental disorder) automatism." Where a court finds "mental disorder automatism" the real defence it is applying is "mental disorder" under s. 16, since those who act in a state of automatism because of a disease of the mind will also qualify under the other parts of the s. 16 defence: namely being unable to appreciate the nature and quality of their acts or not having the capacity to understand that the act is wrong. If the defence that applies is "non-mental disorder automatism," (for example, a person who is unconscious due to a blow to the head, but whose body performs some action nonetheless) a complete acquittal is appropriate, on the basis that the elements of the offence have not been proven. *Stone* and now *Luedecke* have stacked the deck against this kind of defence succeeding even though it succeeded in the older case of *Parks*.

- *R. v. Swaby*, [2001] O.J. No. 2390 (Ont. C.A.)
- *R. v. Parks*, [1992] 2 S.C.R. 871
- *R. v. Stone*, [1999] 2 S.C.R. 290
- *R. v. Fontaine*, [2004] 1 S.C.R. 702
- *R. v. Luedecke*, 2008 ONCA 716
- **Roach** pp. 334-350.

15. Simple Intoxication and Specific Intent Crimes

Intoxication does not operate as a justification or excuse for criminal conduct. This so-called defence of intoxication (simple intoxication) operates only if proof of the intoxication helps leave the judge or jury in reasonable doubt over whether the accused formed the *mens rea* of an offence classified by the courts as a "specific intent" offence: that is, one that requires the accused to do an act for an ulterior purpose. Simple intoxication is not a defence for "general intent" offences, defined as offences that simply require the doing of an act without an ulterior purpose. In *R. v. George*, the Supreme Court classified robbery as a specific intent offence that allows a defence of simple intoxication but found that the included offence of assault was a general intent offence that did not allow the defence. More recently, the Court in *R. v. Tatton* elaborated on the distinction between specific and general intent offences. Please note that in Canada, the inquiry for the ordinary intoxication defence is no longer into "capacity to form the intent" as it was in common law England – the defence applies if intoxication in fact prevents the formation of the specific intent required by the relevant section.

- *The Queen v. George*, [1960] S.C.R. 871
- *R. v. Tatton*, 2015 SCC 33
- *R. v. Robinson*, [1996] 1 S.C.R. 683
- **Roach** pp. 275-285

16. Extreme Intoxication and General Intent Crimes

In *R. v. Daviault* the Supreme Court held that extreme intoxication akin to automatism could provide a defence even to general intent offences because it would undermine the voluntariness of the act and it would be unconstitutional to substitute the *actus reus* and *mens rea* of becoming intoxicated for the *actus reus* and *mens rea* of the offence. The Court indicated that the defence would be rare and would have to be established by the accused with expert evidence and established on a balance of probabilities but that it could be applied with respect to general intent offences such as assault and sexual assault. The theory behind the defence is that a person can become intoxicated enough that his mind may cease to operate sufficiently to make conscious choices relating to his actions. Scientifically, the premise that this can happen is controversial; nonetheless *Daviault* recognized that if this were to occur the *Charter* would require an acquittal since voluntariness is a principle of fundamental justice. *Daviault* was so controversial that Parliament immediately enacted s. 33.1 of the *Criminal Code* to eradicate the defence in cases involving an assault or interference with bodily integrity. This means that, subject to *Charter* challenge extreme intoxication can only be used for offences that do not involve an assault or other interference or threat of interference with the bodily integrity of another person. Be aware that nothing in s. 33.1 abolishes the defence of simple intoxication – it limits only the defence of extreme intoxication. Also be aware that Canadian courts are split on the constitutionality of s. 33.1. The deeming of self-induced intoxication in s. 33.1(2) as a sufficient level of fault for offences such as assault would seem to violate both ss. 7 and 11(d) of the *Charter* as interpreted in *R. v. Daviault* but the restrictions on the s. 33.1 defence is s. 33.1(3) might help the state justify any violation as reasonable and proportionate. The Supreme Court seemed to assume that s. 33.1 could be validly applied in *R. v. Bouchard-Lebrun* at least

in cases where an accused acted involuntarily because of a combination of self-induced induced intoxication and mental disorder.

- *R. v. Daviault*, [1994] 3 S.C.R. 63
- *R. v. Bouchard-Lebrun*, 2011 SCC 58
- **CC** s. 33.1
- **Roach** pp. 285-309

17. Defence of the Person

The self-defence provisions in the *Criminal Code* were amended in March of 2013, to replace defences which were widely seen as excessively technical and badly drafted. The new provisions are discussed in **Roach**, pp. 361-91. The primary difference in approach between the old and new provisions is that some factors which were essential requirements under the old law are now merely factors to take into account and weighed in the balance under the new law: see the discussion in *R v Cormier*. In addition, *R. v. Lavallee*, [1990] 1 SCR 852 discusses the concept of "reasonable belief" in the context of self-defence, and should still be applicable to the new provision.

- *R. v. Lavallee*, [1990] 1 S.C.R. 852
- *R. v. Cormier*, 2017 NBCA 10
- **Roach** pp. 361-391.

18. Necessity

The defence of necessity permits the conduct of the accused to be excused where its elements are met. The defence is heavily circumscribed.

- *R. v. Latimer*, [2001] 1 S.C.R. 3
- **Roach** pp. 391-401

19. Duress

The defence of duress is available under section 17 of the *Criminal Code* and at common law. Section 17 identifies a limited defence, but the common law and *Charter* have been used to extend its application so that now the main difference between the s. 17 and common law defence is that the former applies to those who have actually committed the offence (as opposed to having being parties under ss. 21(1)(b) or (c) or 21(2) or 22) and s. 17 contains a long list of crimes that are (subject to *Charter* challenge) categorically excluded from the defence. There is currently disagreement among courts of appeal as to whether duress can be pleaded as a defence to murder.

- *R. v. Ryan*, 2013 SCC 3
- *R. v. Aravena*, 2015 ONCA 250
- *R. v. Willis*, 2016 MBCA 113
- **Roach** pp. 401-420.

20. Provocation

The defence of provocation, set out in s. 232, applies solely to the offence of murder. It is a partial defence, reducing a conviction from murder to manslaughter where its elements are met. Note that the provocation defence was amended in 2015 to limit the notion of provocation to "conduct of the victim that would constitute an indictable offence under this *Act* that is punishable by five or more years of imprisonment".

This amendment restricts the provocation defence beyond the traditional requirements of being an act sufficient "to deprive an ordinary person of self-control" and have caused the accused subjectively to have been provoked. In practical terms this means that the defence of provocation will be available much less often, and when it is available an accused might also be able to (and would prefer to) argue for a full defence such as self-defence.

- *R. v. Tran*, [2010] 3 S.C.R. 350
- **Roach** pp. 443-463.

21. Entrapment

Entrapment is a common law defence that applies even where the accused has committed a crime with the required fault. It results in a stay of proceedings in cases where a state agent has provided the accused with an opportunity to commit a crime without either a reasonable suspicion that the accused was involved in crime or a *bona fide* inquiry into a particular type of crime. Alternatively even if there is a reasonable suspicion or a bona fide inquiry, entrapment will apply and result in a stay of proceedings if the state agent induces the commission of the crime.

- *R. v. Mack*, [1988] 2 S.C.R. 903
- *R. v. Barnes*, [1991] 1 S.C.R. 449
- **Roach** pp. 44-47.

22. Error of Law

An error of law generally is *not* a defence: this rule is reflected in s. 19 of the *Criminal Code*. However, this general principle is subject to exceptions in limited circumstances. In particular, when "colour of right" is specified to be relevant, a mistake about the law can be relevant.

Further, the Supreme Court of Canada has created the common law defence of "officially induced error".

- **CC** s 19
- *Lilly v. The Queen*, [1983] 1 SCR 794
- *R. v. Jones*, [1991] 3 SCR 110
- *Levis (City) v. Tetrault*, [2006] 1 SCR 420
- *R. v. MacDonald*, 2014 SCC 3
- **Roach** pp. 107-115.

THE ADVERSARIAL PROCEEDING

23. The Adversarial Process

As indicated, a trial is the opportunity for the Crown prosecutor to prove the specific allegation made in the charge (information or indictment) beyond a reasonable doubt. The key characteristic of the Canadian criminal trial is therefore the specific allegation. This is done during a trial. It is helpful to understand the trial process to situate what follows:

- **Coughlan**, pp. 505 – 544 (4th ed.), pp. 391 – 424 (3rd ed.)

a) **The Presumption of Innocence and the Ultimate Standard of Proof** – At a Canadian trial, the accused is presumed to be innocent, a right guaranteed by s. 11(d) of the *Charter*. This means that ultimately, at the end of the whole case, the Crown must prove the guilt of the accused beyond a reasonable doubt. This is the Crown's ultimate burden in both a criminal or regulatory prosecution. The meaning of proof beyond a reasonable doubt is described in *R. v. Lifchus*.

- *R. v. Lifchus*, [1997] 3 S.C.R. 320
- *R. v. Starr*, [2000] 2 S.C.R. 144
- *R. v. J.H.S.*, 2008 SCC 30
- **Roach** pp. 55-61

b) **Other Burdens** – While the Crown prosecutor must prove guilt beyond a reasonable doubt at the end of the case, there are other burdens of proof that operate during the criminal process. There are "evidential" burdens that some rules of law impose in order for a party who wishes a matter to be placed in issue to succeed in having that matter placed in issue. For example, if at the end of the Crown's case in chief the defence argues that there is no "case to meet" and requests a "directed verdict of acquittal" the judge will evaluate whether the Crown has shown a *prima facie* case. This is the same standard that applies where the accused is entitled to and requests a preliminary inquiry to determine whether there is a case to answer; the preliminary inquiry judge will

discharge the accused unless the Crown can show a *prima facie* case. The meaning of the *prima facie* case is discussed in *R. v. Arcuri* below.

Even the accused must at times satisfy an evidential burden in order to have a matter placed in issue. Indeed, if the accused wants to have a defence considered, the accused must show that the defence has an "air of reality" to it. If the accused succeeds, the judge must consider the defence, and in a jury trial must direct the jury on the law that applies to that defence: *R. v. Cinous* and *R. v. Fontaine* illustrate this.

There are numerous rules of evidence called "presumptions" that operate to assign burdens of proof to the accused. A presumption is a rule of law that directs judges and jury to assume that a fact is true (known as the "presumed fact") in any case where the Crown proves that another fact is true (known as the "basic fact"), unless the accused can rebut the presumed fact according to the assigned standard of proof. Those presumptions known as "mandatory presumptions" can be rebutted by the accused simply raising a reasonable doubt about whether the presumed fact follows from the basic fact. Typically these can be recognized because the statutory provision will contain language like "in the absence of evidence to the contrary". Where a mandatory presumption is rebutted, the "presumed fact" falls back into issue notwithstanding the presumption, and must be proved by the Crown in the ordinary way, without the assistance of the presumption.

Other presumptions operate as "reverse onus provisions," deeming the presumed fact to exist where the Crown proves the basic fact unless the accused disproves the presumed fact on the balance of probabilities. A presumption can be recognized as a "mandatory presumption" because the statutory provision raising the presumption will use language such as "the proof of which lies on him" or "unless he establishes" to describe the burden of rebuttal. A presumption will be interpreted as a "mandatory presumption" where it fails to set out the required standard of rebuttal because of s. 25 (1) of the *Interpretation Act*. Many presumptions operate in alcohol driving prosecutions and are used to determine whether the accused has more than a legal amount of alcohol in her blood while driving or having care or control of a motor vehicle: See, for example, s. 258 (1) (a), [a reverse onus provision] and ss. 258 (1) (c), (d.1) and (g), all mandatory presumptions. Presumptions are *prima facie* contrary to the *Charter* and must be saved under s. 1.

- *R. v. Oakes*, [1986] 1 S.C.R. 103
- *R. v. Cinous*, [2002] 2 S.C.R 3
- *R. v. Fontaine*, [2004] 1 S.C.R. 702
- **Roach** pp. 61-64

c) The Neutral Impartial Trier - Another critical component of the adversarial system is the presence of a neutral, impartial trier of law (to make legal decisions) and a neutral impartial trier of fact (to make factual findings at the end of the trial). In Canada, more than 95% of all criminal trials are conducted by a judge alone, so the judge performs the role both of the trier of law and the trier of fact. Where there is a jury trial, the judge acts as the trier of law, and the jury as the trier of fact. This means that the judge makes all

legal and procedural decisions during the trial, and directs the jury by instructing them on the law that applies. The jury then makes the factual decision and renders the holding. In Canada the appropriate sentence is a question of law, and therefore sentencing is done by the judge and not by the jury. Indeed, the jury should not be told of the possible sentences for fear that this will inspire a sympathetic rather than a legal verdict. Requiring the judge to remain neutral and impartial does not require the judge to remain passive. This is especially so in the case of a self-represented accused, where a trial judge has a duty to see to it that the accused's fair trial right is respected. Still, the essence of the adversarial system is that the parties initiate the proof that is brought forward, not the judge.

- **Coughlan**, pp. 545 – 559 (4th ed.), pp. 424 – 435 (3rd ed.)
- *R. v. Gunning*, [2005] 1 S.C.R 627
- *R. v. Hamilton*, [2004] O.J. No. 3252 (Ont. C.A.)

d) The Role of the Prosecutor - The prosecutor is an advocate, but also a quasi-judicial officer. This means that the prosecutor cannot act solely as an advocate, but must make decisions in the interests of justice and the larger public interest, including the interests of the accused. The prosecutor has many discretionary decisions that can be made and should act as a "minister of justice."

- See, for example, Section 5.1, The Lawyer as Advocate in Chapter 5 - Relationship to the Administration of Justice, Federation of Law Societies of Canada, Model Code of Professional Conduct (http://flsc.ca/national-initiatives/model-code-of-professional-conduct/) (Candidates should consult the Rules of Professional Conduct in force in the jurisdiction where they are writing by reviewing the Role of the Prosecutor.)
- *Krieger v. Law Society of Alberta*, [2002] 2 S.C.R. 372
- *R. v. Nixon*, 2011 SCC 34
- *R. v. Babos*, 2014 SCC 16
- *R. v. Anderson*, 2014 SCC 41

e) The Role of the Defence - The defence counsel is an officer of the court, and therefore must be respectful and honest with the court and must not attempt to mislead the court as to the state of the law. Subject to this and the rules of law and ethics, the defence counsel is obliged to act solely in the interests of the accused, advising the accused on the implications, and propriety, of pleading guilty, securing advantage of all procedural and constitutional protections available to the accused that are not properly waived; and if the accused pleads not guilty, preparing the case fully, challenging the sufficiency of prosecutorial evidence, and advancing all defences that properly arise.

- See, for example, Section 5.1, The Lawyer as Advocate in Chapter 5 - Relationship to the Administration of Justice, Section 3.3, Confidentiality and Section 3.4, Conflicts in Chapter 3, Relationship To Clients, in Federation of Law Societies of Canada, Model Code of Professional Conduct. (http://flsc.ca/national-

initiatives/model-code-of-professional-conduct/) (Candidates should consult the Rules of Professional Conduct in force in the jurisdiction where they are writing by reviewing the Role of the defence counsel, including relating to pleas of guilty.)

GETTING TO THE TRIAL: THE CRIMINAL INVESTIGATION

24. Police Powers

Police officers are independent of the Crown prosecutor in Canada. This independence is important to permit the prosecutor to act as a quasi-judicial officer, and not get too close to the mind-set of an investigator. Still, the police will often seek legal advice from Crown prosecutors, including on the wording of search warrants and the like. In the interests of securing liberty, the powers of the police are constrained by law, although they can be derived from statute, common law and by implication from statute and common law.

Police powers are also significantly limited by the *Charter*, most significantly s. 8 (unreasonable search or seizure) and s. 9 (arbitrary detention, addressing both powers of arrest and detention). Courts have undertaken a careful balancing of police powers in an attempt to ensure respect for liberty, without undermining the effectiveness of police investigations and law enforcement. The law of evidence supports limits on police powers. Although not covered in this examination, individuals have the right to remain silent in their dealings with the police, and what they say cannot be admitted if it is not "voluntary." Where there has been an unconstitutional search or arbitrary detention, evidence that has been obtained as a result may be excluded from consideration. Police officers also have significant obligations to perform in securing the right to counsel for the subject, as noted under the next heading.

- **Coughlan** pp. 7 – 28 (4th ed.), pp. 7 – 24 (3rd ed.) (sources of police power)
- **Coughlan** pp. 75 – 229 (4th ed.), pp. 66 – 171 (powers of search and seizure)
- **Coughlan** pp. 229 – 274 (4th ed.), pp. 171 – 193 (3rd ed.) (powers of detention)
- *R. v. Grant*, 2009 SCC 32
- *R. v. Suberu*, 2009 SCC 33
- *R. v. Aucoin*, 2012 SCC 66
- *R. v. Spencer*, 2014 SCC 43
- *R. v. MacDonald*, 2014 SCC 3
- *R. v. Marakah*, 2017 SCC 59

GETTING TO THE TRIAL: TAKING CONTROL OVER THE ACCUSED

25. Securing Jurisdiction over the Accused and Interim Release

The police have specified powers to arrest individuals. So too do non-police officers. The common theme in the relevant legal provisions is that arrest – taking physical control over the subject - is to be used as a last resort when other measures available for ensuring the good conduct and attendance before the criminal justice process are not practical or desirable. These less intrusive modes of securing attendance include the appearance notice, the promise to appear, and the summons. Where an individual is arrested, he or she must either be released or be given a bail hearing where it will be decided whether the individual should be released absolutely, subjected to conditions of release, or held in custody pending the trial.

- **Coughlan** pp. 64 – 66 (4th ed.), pp. 55 – 57 (3rd ed.) (gaining jurisdiction over the accused)
- **Coughlan** pp. 311 – 343 (4th ed.), pp. 223 – 252 (3rd ed.) (the arrest)
- **Coughlan** pp. 283 – 301 (4th ed.), pp. 201 – 216 (3rd ed.) (compelling appearance without arrest)
- **Coughlan** pp. 301 – 309 (4th ed.), pp. 216 – 222 (3rd ed.) (the bail hearing)
- *R. v. St-Cloud*, 2015 SCC 27
- *R. v. Antic*, 2017 SCC 27

GETTING READY FOR TRIAL

26. Disclosure and Production

A key right of the accused, and an important obligation on the Crown, is full disclosure of the fruits of the investigation (all information gathered by or made known to the police during the investigation) to the accused. All of the fruits of the investigation are to be disclosed save what is clearly irrelevant or privileged. The law of privilege is covered by the law of evidence but the most relevant privileges should be flagged here. Disclosure is to be made before the accused is called upon to elect his mode of trial for s. 536 indictable offences. The accused may also seek to secure relevant “third party records” – relevant documents that are not the fruits of the investigation and that are under the control of persons other than prosecution and police This is referred to as “production” rather than “disclosure”. Where third party records are sought, complex applications must be brought, which differ depending on whether the charge is a sexual offence prosecution or some other offence. If issues arise as to whether proper disclosure or production has been made, the assigned trial judge should ordinarily resolve them. As a practical matter, this requires early assignment of a trial judge who can address these matters.

- *R. v. Stinchcombe*, [1991] 3 S.C.R. 326
- *R. v. O’Connor*, [1995] 4 S.C.R. 411

- **CC** sections. 278.1 – 278.91
- *R. v. McNeil*, 2009 SCC 3
- **Coughlan** pp. 345 – 385 (4th ed.), pp. 254 – 288 (3rd ed.)

27. Preliminary Inquiries

As indicated, at the preliminary inquiry, the judge must determine whether the Crown has presented a *prima facie* case. If so, the accused is committed to stand trial and the prosecutor will be called upon to draft an indictment, which will replace the original information as the new charging document. If the Crown does not establish a *prima facie* case, the accused is discharged and the prosecution on the charge that has been laid ends – in effect, the accused who was "charged" is "discharged." A discharge at a preliminary inquiry is not, however, an acquittal. The prosecution can re-lay the charge and try again, but will not do so unless important new evidence is uncovered. The Attorney General also has the authority to lay a direct indictment, which gives jurisdiction to a court to try the accused. The direct indictment can be used to re-institute a prosecution after a preliminary inquiry discharge, or to bypass a preliminary inquiry altogether by indicting the accused directly to trial.

- **Coughlan** pp. 387 – 414 (4th ed.), pp. 291 – 315 (3rd. ed.)
- *R. v. Arcuri*, [2001] 2 S.C.R 828

28. The Jury Trial

If a jury trial is to be held, a trial judge is assigned, and a jury is selected.

- **Coughlan** pp. 455 – 480 (4th ed.), pp. 347 – 370 (3rd ed.) (jury selection)
- *R. v. Williams*, [1998] 1 S.C.R. 1128
- *R. v. Find*, 2001 SCC 32
- *R. v. Yumnu*, 2012 SCC 73
- *R. v. Kokopenace*, 2015 SCC 28

29. Pre-Trial Motions

In either judge alone or jury trials, there will often be preliminary legal issues to be resolved before the trial gets going. These will ordinarily be dealt with by the assigned trial judge. In a jury trial, it is often convenient to assign the judge and to dispose of these matters before a jury is selected, or if the motions can be resolved expeditiously, select the jury and require it to leave the courtroom until the motions are completed.

- **Coughlan** pp. 422 – 455 (4th ed.), pp. 322 – 346 (3rd ed.)

30. Trial Within a Reasonable Time Applications

Section 11(b) of the Charter guarantees an accused the right to a trial within a reasonable time. The only remedy for a breach of that right is a stay of proceedings, which made many judges reluctant to find a breach of the right. The result, over several decades, was that section 11(b) did very little to make the justice system move expeditiously. In 2016, in response to what it described as a "culture of complacency towards delay", the Supreme Court created a new approach to section 11(b) which provides judges with less discretion about refusing a remedy, and which is meant to encourage all justice system participants – the courts, the Crown, and the defence – to act to speed up the system.

- *R. v. Jordan*, 2016 SCC 27
- *R v Cody*, 2017 SCC 31

SENTENCING

31. General Principles of Sentencing

For the most part, the general principles of sentencing have been codified in the *Criminal Code*. Judges are instructed to use alternatives to imprisonment that are reasonable in the circumstances. If, as is often the case, the prosecutor and the defence make a joint submission on sentence, the judge can only depart from it if the joint submission is not in the public interest and should provide an opportunity for the accused to withdraw his or her plea. Mandatory sentences can be struck down as unconstitutional if they are grossly disproportionate, but judges cannot create constitutional exemptions from them. Sentences can also be reduced as a remedy for abuses of state power related to the offence.

- **CC** sections 606.1, 718, 718.01, 718.1, 718.2, 718.3, 719
- *R. v. Nasogaluak*, [2010] 1 S.C.R. 206. No. 6 (paras 39-49; 63-64)
- *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500
- *R. v. Gladue*, [1999] 1 S.C.R. 688
- *R. v. Ferguson*, 2008 SCC 6
- *R. v. Nur*, 2015 SCC 15
- *R. v. Morrisey*, 2000 SCC 39
- *R. v. Pham*, 2013 SCC 15
- *R. v. Anthony-Cook*, 2016 SCC 43
- **Roach** pp. 514-539

APPEALS AND REVIEW

32. Appeals of Final Decisions and Judicial Review of Interim Decisions

Final verdicts can be appealed. Interim decisions cannot be. Interim decisions can, however, be the subject of judicial review applications where jurisdictional errors occur. Judicial review may be necessary, for example, to challenge preliminary inquiry results, to seek or quash publication bans, or to suppress or access third party records; in these cases if we wait until the end of the trial, the damage sought to be prevented may have already occurred, hence the judicial review application. In the case of appeals, different grounds of appeal and procedural routes apply, depending on whether an offence has been prosecuted summarily or indictably.

- **Coughlan**, pp. 561 – 604 (4th ed.), pp. 437 – 473 (3rd ed.) (appeals)
- **Coughlan**, pp. 414 – 417 (4th ed.), pp. 315 – 317 (3rd ed.) (judicial review, exemplified in the context of preliminary inquiries)

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Online Resources

The majority of case law and legislative resources needed by NCA students are available on CanLII, the free legal information resource funded by the Federation of Law Societies of Canada (**www.canlii.org**). That includes all decisions of the Supreme Court of Canada, and all federal, provincial, territorial and appellate courts.

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