

**Sources of Criminal Law:**

- Common Law
- Statutory Law
  - How the judges interpret the law
- The Charter of Rights
  - Puts restrictions on the law
- Before there was a statute crimes were tried by common law
- R v. Sedley (1663) (p.1)
  - Threw bottles of urine into a crowd from the balcony where he was found guilty by a judge for disturbing the king's peace
  - In the absence of statutory law, crimes were created by the court where they court decide what people were guilty of
- Section 8 contains common law offences
- Section 9 prevents courts from creating common law offences
- One exception to the rule of common law offence
- Contempt of court
  - Not defined in criminal code but can be still prosecuted as a common law offence
- Trespass by Night S.177
  - Case of Frey v. Fredoruck
  - New offence of Trespass by Night was created to stop peeping tom behaviour
  - Summary conviction
- Voyeurism s. 162
  - Result of parliament adapting to changes
  - Motives of the accused are irrelevant
- Parliament another source of Criminal Law:
  - Federal government have exclusive jurisdiction over criminal law
  - Provinces have jurisdiction over property
  - Municipality can pass laws such as bylaws they get their jurisdiction under section 92 (it is the equivalent of a provincial law)
- Board of Commerce (1922, JCPC)
  - They could determine whether or not a company's profits were too high and that they can order a return for profits if they are too high
  - Companies did not agree with this and said that the federal government could not use their criminal law power to determine profits or to pass a law of such
  - Traditional approach to defining law set parliaments powers very narrowly
- Pata (1931, JCPC):
  - Questioned what power the federal government had in defining criminal law
  - Defined combines and made them illegal under the law
  - Court: a better government can use their power to create laws only if they create offences and a penalty (it has to be criminal in form)

- This open the doors wide for parliament in any area that they want to
- Criticized for being too broad
- Price Spreads (1937, JCPC):
  - Brought in the notion of colorful legislation
  - Parliament cannot use its criminal law power to pass a law which looks like criminal law but totally different from when its applied (called a colourable law)
  - Whenever a government passes a law and dresses it up to be something else it is called colourable legislation
- Margarine Reference (1951,JCPC):
  - The federal government had passed a dairy industry act
  - Against the law to traffic margarine (federal offence)
  - Made to protect the dairy industry
  - Does the federal government have the authority to do this?
    - They created a law with a prohibition and a penalty
    - Federal government cannot legislate something in the provincial hands even though they dressed it as a criminal law
  - Test came out of this:
    - Is the prohibition then enacted with a view to a public purpose which can support it as being in relation to criminal law?
      - Public, peace, order, security, health morality: these are the ordinary thought not exclusive ends served by that law
      - The above are considered to fall under criminal law

### **The Criminal Code:**

- In force July 1, 1893
- Was not a radical new law, it just codified how things already were
- Judges hands would be tied were the judges would not be able to create new offence
- Reforms included:
  - Murder defined and clarified
  - Larceny replaced with theft
  - Provocation defined
  - Misdemeanours and felonies abolished
  - Primitive system of appeals
- Contained 10 titles and within those parts there are 983 sections of the criminal code
- The structure has not changed
- Offences against property rights were included
- Criminal Procedure is included (Largest part of the criminal code)
- In April 1955 a new criminal code was proclaimed
  - Essentially a new criminal code but the only thing they changed were the numbers and the sections
  - Nothing new about laws or defence of insanity
  - Capital punishment was still in there
  - Section 9 Appeal of evidence
  - Made an introduction defining criminal negligence

- Crown only has to prove that your act was apart from the norm
- Boggs v. The Queen (1981, SCC)
  - The issue was a federal law that made it illegal to drive when your license is suspended under provincial law
  - You can be charged provincially and federally for driving with a suspended license
  - To catch people who were not allowed to drive because of a drunk driving charge
  - Court said that was legitimate but the federal government could not use their power to pass a law that criminalizes driving with a suspended license
- Nova Scotia Board of Censors and MacNeil (1978, SCC):
  - Porno movie made
  - Whether the province of Nova Scotia could pass laws to limit movies being shown in theaters
  - If the issue is morality or pornography should it only be the federal government that passes law?
    - Ultra vires (outside the jurisdiction of the government that passed it)
    - Intra vires (within jurisdiction)
  - Even though pornography is an issue with morality it does not mean that the provinces cannot pass laws regarding this issue where they can pass laws without entrenching federal law
  - The can set requirement
  - Morality and criminality are not necessarily the same thing
    - Even though the issue touches morality does not mean that provinces cannot pass laws on the issue
- R v. Westendorp (1983, SCC):
  - By law made prostitution illegal stating that a person prostituting or connected to prostitution can be fined
  - Westendorp approached an under cover police officer where he charged her under the bylaw not federally
  - Claimed that the by law was put in place to protect tourism in Calgary
  - Westendorp said that they were doubling up on fares for prostitution
  - Cannot make laws that duplicate provisions under the criminal code
- R v. Morgentaler (1993, SCC)
  - Performed abortions
  - Kept getting charged for doing this illegal but the juries kept on acquitting him
  - Finally charged in Toronto
  - In order for woman to get abortions you needed to get permission from a committee
  - By the time you saw the committee it was too late to get an abortion
  - No restriction on abortion in Canada
  - Morgentaler got the law struck down
  - Set up a clinic in Nova Scotia
    - They set up a Medical Service act where you cannot get an abortion at a clinic but instead at the hospital they said they created this law to ensure that everyone got the same healthcare
    - This made a list of several things that you could not get done in a clinic

- Morgentaler did 14 abortions in one day and was charged with 14 counts under the medical service act (provincial law)
  - When he got charged he argued that the province of Nova Scotia has no business making a law that is under the federal jurisdiction
    - They said that that was not what they were interested in doing (preventing abortions) but rather the ensure equality
  - SCC looked at the debates to pass this law and discovered that this law was solely passed to prevent abortions and that the province tried in fact dressing up the law to hide that fact
  - The SCC said that it was clear that this law was passed to prevent abortions
  - Abortion restrictions are to be set by federal government
- Frey v. Fedoruk (1950, SCC, p.2)
  - Caught as a peeping tom
  - Can he be arrested for doing something immoral?
  - Court ruled that they do not have a common law saying that it was illegal thus he was wrongfully arrested
  - Frey sued

#### **Charter Limits:**

- August 10, 1960: Canadian Bill of Rights
  - Federal Law that set out human rights but not in a constitutional way
- 1965: Trudeau elected to Parliament
- 1967: Trudeau became Justice Minister
- 1979: Trudeau defeated
- Constitutional document trumps all laws
- 1980: Trudeau re-elected
- 1980: Quebec Referendum
- 1981: Constitution Act

#### **Structure of the Charter:**

- 32(1): This charter applies:
  - The government
- The Canadian of Rights and Freedoms 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

#### **Hunter v. Southam (1984, SCDC, P.35)**

- First big case on the charter
- Search warrant had been executed at southam newspapers
- Shows how the court interpreted the charter
- The court said that the constitution needs to be interpreted in a broad expanded way to give life to the underlining meaning

#### **R v. Oakes (1986, SCC, p.83, 92)**

- Deals with section 1 of the charter
- Demonstrates reasonable limits

- Proportionality test
  - Rational Connection
  - Minimal impairment of rights
  - Proportionality between effects and objectives
- Before there can be a charter challenge accused has to prove that right has been infringed
- Crown has to prove that there is a law that infringes the right
- Then the Crown has to justify the law in a free and democratic society

**R v. Edwards Books & Art Lt. (1986, SCC, p.95)**

- Constitution forced him to be closed on a day for religious purposes on a day that he did not believe in for religious reasons
- Is there a reasonable alternative that would allow the province to infringe this right?

**R v. Whyte (1988, SCC, p.853):**

- Reverse onus
- In the criminal code if you are sitting in your car with keys but the engine is not on you can be charged with a DUI
- Accused had to prove that you did not have the intention to drive
- Presumption Upheld

**R v. H. (2000, OCA)**

- If you are a passenger of a stolen car you are presumed that you know the car is stolen
- You have to prove that you didn't know
- Upheld

**R. v. Sharpe (2001, SCC)**

- Court said that they went too far and that it is unconstitutional

**Downy:**

- If you live with a prostitute then you are presumed to be a pimp
- You have to prove otherwise

**Reference re s. 94(2) BCMVA (1986, SCC), p.396**

- s.7: principles of fundamental justice
- Two ways of coaching this:
  - Procedural due process
    - Section 7 only guarantees procedural process
  - Substantive due process
    - Opposite argument
    - Section 7 encompasses substantive due process
    - The court will look beyond procedural and ask if it is fair
    - Supreme court took this approach

November 7, 2012

**Rules of Interpretation:**

- Interpretation
- Traditional common law role
- Charter
- Process

**Examples of rules of Interpretation:**

- R v. Hutt (1978, SCC)
  - Under cover police officer was stopped at a light and the prostitute approached the car and she asked him if he wanted sexual services through the window
  - Is that car a public place?
    - Crown says yes and defence says no
    - Court had to decide if the conversation happened in a public place
    - SCC ruled that a car on a public road is not a public place
  - Parliament changed the law saying that a car in a public place is a public place
- R v. McEwen (1980, SCC)
  - Charged with committing an indecent act in a public place
  - Accused was parked in at an intersection and was masturbating
  - Charge with committing an indecent act in a public place
  - Question: Is the car in a public place?
    - Court says yes because a public place now includes a car
- R v. Clark (2005, SCC p.11)
  - Masturbated in his own home and was charged with committing an indecent act
  - Found guilty because you are in a public place as long as you are exposed to people
  - Despite being in his own home he could be seen by people walking by
- R v. Reed (1992, BCCA)
  - Charged with shouting in a public place
  - Spoke normally through a megaphone
  - Court had to decide what shouting is
  - Court says that it does not constitute as shouting
- R v. Michels (1995, Atla. QB)
  - Exposing himself in a public place
  - Went jogging with socks sneakers and glasses
  - He argued that he was not nude and Crown says he was
  - Court said that technically he is not nude because he was wearing something
- R v. MacDonald (1995, NB Prov. Ct.)
  - Weaving and pulled over by police
  - Told the police officer that the reason why he was weaving was because he wanted people to see him
  - He was twice over the limit
  - Police brought him down to the station for impaired driving
  - He was in a wheelchair!
  - Is this a motorized wheelchair?
    - If you take a strict or narrow look at this then yes.

- R. v. Elliot (1991)
  - Friend was drunk - had the friend drive.
  - Friend drove into a ditch
  - Elliot lifted the car up with a jack
  - Police stopped by and charged Elliot with impaired care of the vehicle
  - Court said he was guilty because anything done by a person that might set the car in motion is guilty of impaired care of control.
- R. v. Reynolds (1995)
  - Reynolds' car engine wasn't on
  - His car was being towed. Reynolds was impaired though
  - Relied on a case called Miller (where the driver was impaired and was operating a tank)
  - Tow car driver asked Reynolds to go to his car and make sure it doesn't bump into the tow truck.
- R v. Ruston (1995, Ont.CT.Gen.Div)
  - Car ran out of gas
  - Ruston is pushing the car while his mom steers
  - He is drunk and is charged
  - Jointly operating a car
- R v. Laquerre (2005,Que. Municipal Ct.)
  - Drove a zamboni drunk while cleaning the ice at a arena
  - Fans called the cops on him

#### **4 Rules of Interpretation:**

- 1. Literal Rule
  - If the statute is clear, it is not subject to interpretation.
    - Grammatical/literal Approach
      - (a) words must be given ordinary meaning
      - (b) meaning the words had on day statute was passed
      - (c) adding to terms of statute, or depriving them of effect, must be avoided.
- 2. Contextual/logical Method
  - (a) assumes legislator is rational
  - (b) law is a reflection of coherent and logical thought. You should not interpret the law in such a way that leads to a bizarre result.
    - This is often referred to as "The Golden Rule of Interpretation" -
  - "I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in the Court of Law in Westminster Hall, that in construing... Statutes... The grammatical and ordinary sense of words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the [statute], in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther."
- 3. Teleological Method
- S. 12 Interpretation Act

- Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.
- What was parliament trying to achieve (besides trying to be rational)? Were they trying to fight drunk driving? Or were they trying to fight drugs?
- Law is interpreted in such a way to understand what legislators were trying to achieve.
- 4. Historical Method
  - What events gave rise to the law? What was going on at that time to cause the parliament to pass such a law?
  - Historical method is really the teleological method taken to an extreme.
  - This is really an investigative method.
- There is not one interpretation that is liberal or one interpretation that is conservative.
- Judges also rely on certain presumptions.

### **Presumptions of Intent:**

- Reason and Justice
  - Can't lead to a result that is contrary to reason and justice.
- Individual rights and freedoms
- Common law Bill of Rights
  - (a) Charter - If there is more than one interpretation of a statute, then the one that is most consistent with the Charter should be adopted (s. 83.28; pg. 10)
  - (b) Penal statutes
    - Gouis - 1981
      - What was parliament trying to achieve with this law? If it's not clear what the legislation does, and you don't know which way to go, then you decide in favor of the accused
      - Gouis - This idea was favored in McIntosh and, later, in Mac as well.
    - McIntosh - 1995
    - Mac - 2001
  - (c) Enjoyment of property - Any law that restricts the enjoyment of our own property is inconsistent.
- Uniformity of the Law
  - If a provision makes an exception to the general law, it may be subject to restrictive interpretation.
- Stability of the Law
  - A fundamental rule is that statutes should be interpreted, as much as possible, in harmony with the general law. The legislator is presumed to have no intention to change the law beyond that which he declares expressly.
  - A rule of common law is not repealed by a statute that does not mention it

### **Cases re Interpretation:**

- **R. v. Clark (2005, SCC)**

- “Access” was a key word here
- A single word will have different meanings in different circumstances.
- **R. v. Heffer (1970)**
  - “It cannot be the intent of s. 164 (1)(a) to stigmatize as criminal every young person who travels across the country without employment and with little money in his pocket.”
  - Police charged everyone with vagrancy (drifting around the city of Winnipeg). Court said it can’t be vagrancy
  - This is the **logical approach** (surely parliament wouldn’t want a crazy result).
- **R. v. Paré (1987, SCC; pg. 18)**
  - “Single transaction” approach
  - 17 year old kid who sexually assaulted a 7 year old boy, and killed him.
  - He was charged with first degree murder (you kill somebody while committing another offense).
  - Killing with the intention of killing is first degree murder.
  - But killing while committing another offense is also first degree murder
  - So was it first degree murder? Because he first raped the kid. Then he killed the kid.
  - “I did not kill while committing the sexual assault; I killed after the sexual assault.”
  - Crown argued “single transactions.”
  - The accused did not leave and kill the 7 year old later on another day
    - This is an example of a literal approach (defense would argue this)
  - Crown would argue logical approach
  - SCC agreed with the Crown in this case. If we use the literal approach then it’s too narrow.
  - The best way to approach this is to look at it as a “single transaction.” SCC adopted the logical approach.
- **R. v. McIntosh (1995, SCC)**
  - “Where no ambiguity arises on the face of a statutory provision, then its clear words should be given effect.
  - This is another way of asserting what is sometimes referred to as the ‘golden rule’ of literal construction; a statute should be interpreted in a manner consistent with the plain meaning of its terms.”
    - Crown argued contextual approach. It takes as its starting point the intention of the legislature. However, given the confused nature of the Criminal Code provisions related to self defense, I cannot imagine how one could determine what Parliament’s intention was in enacting the provisions.
    - Since the judge’s task is to interpret the statute, not to create it, as a general rule, interpretation should not add to the terms of the law. Legislation is deemed to be well drafted, and to express completely what the legislator wanted to say
    - “The Crown is asking this court to read words into s. 34 (2) which are simply not there. In my view, to do so would be tantamount to amending s. 34 (2)…”
    - It is a principle of statutory interpretation that where two interpretation of a provision which affects the liberty of a subject are available, one of which is more

favorable to an accused, then the court should adopt the favorable interpretation.

- **R. v. Perron (2009, OCA)**
  - Is the Super Ex a “public park”?
  - Super Ex is an annual fair. Is it a public park?
  - You have to pay a provision fee - how can it be public then?
  - If you have to pay a provision fee, then it’s private.
  - OCA said that it is a public park, other than the fact that you have to pay a provision fee.
  - It doesn’t matter - the fee doesn’t matter.
  - Words don’t always have the same meaning.
  - Definitions of the word may have different meanings.
  - Accused was charged with a sexual offense against a child.
  - Court adopted literal approach.
    - Accused was not allowed to be at a public place with kids.

November 21, 2012  
Lecture 11

### **Objectives of Sentencing: s. 718**

- To codify
- A) To denounce unlawful conduct
- B) To deter the offender
- C) To separate offenders from society when necessary
- D) Rehabilitation
- E) To provide reparations for harm done to victims or to the community
- F) To promote a sense of responsibility in offenders and acknowledgement of the harm done to victims and to the community
- Depending on the situations judges may put more weight on one objective than on the other
- Primary objective for these is to protect society:
  - This is done by implementing these objectives
- What Sentencing is supposed to do:
  - Respect the law
  - Maintenance of a just, peaceful and safe society
  - Just sanctions
  - Denunciations
  - Specific and general deterrence
  - Incapacitation
  - Rehabilitation
  - Reparation
  - Sense of responsibility
  - Retribution

### **Sentencing Options**

- 1. Discharges (s.730) at the bottom of sentencing

- In order for discharge to be granted:
  - Must be in best interests of accused and public
- Not available where:
  - Where there is a minimum penalty
    - DUI - cannot get a discharge for impaired driving because it has minimal discharge
  - Cannot get a discharge if the maximum penalty is 14 years or more
    - Breaking and entering
- Absolute
  - Case is done and over, no conditions
- Conditional: see probation order, 731.1
  - Has conditions in the form of a probation order
  - Purge out of the system after 3 years
  - It automatic
- 2. Suspended Sentence (s.731) and Probation: (next step above Discharges)
  - Maximum probation is 3 years
  - Breach probation:
    - If someone breaches their conditions they will be charged with breach of probation
  - Accused has to apply for a pardon (record suspension)
    - Have to wait 6 years to apply
    - At least 8 years before they have that removed from their record
- 3. Fine (S. 734): (next step above Suspended Sentence):
  - Court must be satisfied that the accused can pay a fine
  - Corporation s. 735 no max if indictable, \$100,000 if by summary conviction
  - Victim fine surcharge 15% of fine, \$50 (summary) and 100\$ Indictable (can be asked in any sentence)
    - Amount of 50 or 100 is only if the person goes to jail
  - Restitution (s.738): same as civil judgement, s.741 (can be asked in any sentence)
    - Restitution order may still be in affect even after the probation is over
- Jail (last stop)
  - Two types
    - 1. Real Jail
    - 2. Conditional Sentences s. 742.1
      - Is a jail term but do not serve their time in jail they serve it somewhere else
        - I.e. Rehab, home, someone else's home
      - Conditions that attach depend on the nature of the offence
      - More lenient jail term
      - If the person is able to abide by conditions they will not notice the difference
      - Only available where sentence is less than 2 years
      - Judge has to be satisfied that serving a sentence in the community would not endanger the safety of the community
      - Conditions are set out in s.742.3
      - S.718 (2)(d)(e): all options besides jail should be considered
        - Jail is to be reserved for the most serious cases
        - Jail should be last resort

### **Conditional Sentences (1996):**

- You cannot get a conditional sentences if there is a minimum sentence
- Key Case:
  - R v. Proulx
    - Convicted of dangerous driving causing death
    - Had only been driving for 7 weeks
    - As he tried to pass a vehicle he went into the incoming lane and side swiped a car
    - Killed his passenger
    - Given 18 month conditional sentence
    - Crown appealed the SCC saying that the conditional sentence is not appropriate where it should not be available for someone who kills someone in dangerous driving
    - First time SCC has dealt with the provisions of conditional sentence
    - Court says that there were no offences that could not get conditional sentences unless they did not meet the requirements in the statute
    - Judge cannot grant a conditional sentence if he feels as though the accused is a risk to the community
    - How does he decide this?
      - 1. Inquires into the risk of the accused reoffending
      - 2. What type of reoffence would it be? Gravity of the damage that could ensue from possible reoffending
      - 3. The risk analysis should include the risk of any criminal activity, not just the risk of physical or psychological harm to individuals
        - The analysis does not include the risk of providing insufficient general deterrence or undermining general respect for the law by the imposition of conditional offences
    - 3 things judge has to analyze to give conditional sentence
      - 1. Eliminate (a) penitentiary and (b) probation as sentencing options
        - Appropriate sentence is a middle term of less than 2 years
      - 2. Determine whether the jail sentence of less than two years could appropriately be served in the community
      - 3. Determine whether conditional sentence is consistent with s.718-718(2) principles of sentencing
        - If the conditional sentence sends the wrong message to the community

November 28, 2012

Lecture 11

### **Sentencing cont'd:**

- Two people who do the exact same thing will not always receive the exact same sentence because it is case specific depending on the background and personality of the offender and the facts of the offence
- R v. Hamilton and Mason:
  - Two separate cases dealt with together because of similarities
  - Both were black woman who were mules for the drug trade

- Hamilton swallowed 96g of cocaine
  - Plead guilty to the offence
  - She committed the offence because of financial hardship
- Mason swallowed 103g of cocaine, also a single mother
  - No criminal record
- In both cases the trial judge found that the accused were victims of gender and racial bias
- In arriving to this decision the judge did independent research where he was able to come up with racial and gender bias
  - He relied on his experience to come to this decision
  - The defence did not raise this issue
- The narrow question on this appeal:
  - Whether or not a conditional sentence is appropriate for this crime
  - Does the judge have the authority to go beyond what the counsel is asking for and do his own research
- Court of appeal said this was inappropriate
  - Comments made by court of appeal:
    - Manner in which the sentence was delivered was inappropriate
    - Sentences did not perceive wrong doings and did not reflect the seriousness of the crime
    - Judge took on the role of advocate, witness and judge was not impartial
      - He lobbied on behalf on the category of the offenders (black woman)
      - Became an expert witness by doing his own research
- 4 problems court identified: (4 mistakes trial judge made)
  - 1. Trial judge was confronting the crown with research (was not impartial)
  - 2. Trial judge did not base sentence on accused but rather on hypothetical all drug carriers
    - Judge assumed that anyone who was a black woman and sold drugs is a good person regardless of their actions
  - 3. There was a real risk of inaccurate fact-finding
    - Court brought up the fact that there are not that many black woman in prison despite the research that the trial judge found
  - 4. The trial judge effectively converted the sentence hearing into a commission of inquiry
- Sentencing depends on:
  - 1. Gravity of the offence
    - In general
  - 2. Degree of responsibility of the offender
    - Accused behaviour, involvement and background

### **Jail Ranges:**

- Short Sharp up to 14 days
- Any term exceeding 2 years is served in federal prison
- 18 months to 2 years less a day (maximum reformatory)
- Additional orders:
  - Firearms prohibition

- Driving Prohibition
- DNA order, s 487.04
  - Buccal swab
  - Blood (most common)
  - Hair (the root)

### **Youth Sentencing:**

- YCJA
  - Separate procedural law that deals with young people of 12 years old up to the day before their 18th birthday at the time of the offence
  - Youth are charged under CC but are sentenced through the YCJA
  - S.3 Youth Criminal Justice is intended to:
    - Prevent Crime
    - Rehabilitate and reintegrate
    - Ensure that youths who commit crimes are subject to meaningful consequences
  - S. 38 Sentencing:
    - Accountability, just sanctions, meaningful consequences
    - Promotion of rehabilitation and reintegration and long-term protection of the community
      - Do this to prevent long term harm to society
    - Sentence must not be more that what an adult would get for the same offence
    - All available options other than custody must be considered “with particular attention to the circumstancing of aboriginal youth
  - Prior to the YCJA there was the Young Offender Act
    - Young offenders not eligible for parole
    - Were serving longer sentences than adults
    - Kids were being jailed for things that weren’t harmless to the community
    - Were putting kids in jail longer for their own good
    - Sentences have to be proportionate
  - S. 42: Available sentences
    - Reprimand
    - Absolute discharge
    - Conditional Discharge
    - Fine, maximum \$1000
    - Compensation for injuries
    - Restitution for property loss
      - Not more than what the owner paid
    - Compensation by way of personal services
    - Community Service
    - Weapons prohibition
    - Probation, maximum of 2 years
    - Intensive support and supervision program
    - Attend a non-residential program, max 240 hours/6 months
    - Custody and supervision (do not talk about jail)

- Order totaling no more than 2 years, or 3 years if max adult (indictable offence)
  - Excludes murder
- Deferred custody and supervision order
- Crown can apply to have a young offender tried as an adult
- 42(2)(q)
  - 1st degree murder max 10 years include 6 years custody
  - 2nd degree murder max 7 years include 4 years custody
  - Judge has to be convinced that the youth is a danger to serve the max penalty
- Can have a combination of these sentences as long as they do not conflict each other
- S 47(2)
  - Intermittent custody available if they serve 90 days or less

### **Factors Affecting Sentence:**

- S. 718.1:
  - A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender
- Factors that influence:
  - Victim is of more vulnerable group
    - Elderly or child
  - Severity of the offence
    - Injury or in assault just assault or penetration
    - Always looking at magnitude or gravity of the offence
  - The offence: (What judges will look at)
    1. Method
      - Planned = aggravated
      - Tried to cover up crime = aggravated
      - Time it took to commit
        - Was the crime committed over time? (gradually stealing 1000\$ from employer by taking 5 dollars a day)
      - Impulsivity is less harsh
    2. The magnitude and impact of the crime?
      - The extent of injury
      - Dollar value of theft
      - How many people are affected
      - Harm reasonably foreseeable?
    3. The profits available from the crime
    4. Motive: "hate crimes" s.7182(a)(i)
      - If a crime is a hate crime (aimed at a specific class of people) it is aggravated
      - Beating someone up is bad beating someone up because they're gay is worse
    5. The victim (either neutral or aggravating)
      - Spouse = aggravated
    6. Wishes of the victim
      - Taken into account through victim impact statements

- 7. Breach of Trust 7.18.2 (a)(ii),(iii)
  - Trust relationship with someone and you take advantage of them it makes it a lot worse than if there is no relationship
    - I.e. Parent committing a crime against their child
    - I.e. Employer and employee relationship
  - More likely to go to jail if you breach this relationship
- 8. Organized Crime s.718.2(a)(iv)
- 9. Terrorism offence 718.2.(a)(v)
- 10. Involving Others in the Crime
- 11. Use of Weapon s. 85 (firearms)
- The offender:
  - 1. Remorse
    - Guilty plea goes a long way towards a more lenient sentence
  - 2. Criminal History
    - Criminal Record?
  - 3. Background and attitude
    - Family background
  - 4. Behaviour after the offence
    - Counseling?
    - AA
    - The offender actively does things before being sentenced will go a long way
    - Did they go back and harassed the person that is accusing them? = aggravated
  - 5. Other penalties suffered by accused
    - Immigration consequences
    - Lost his job?
    - Lost his family?
  - 6. Guilt plea
  - 7. Time spent in custody s.719
    - Controversial
    - Prior to sentence, time spent in custody should be taken into account
    - No parole consideration for time spent in custody
  - 8. Previous good character
  - 9. Impact of the sentence
    - I.e. Ill jail cannot accommodate
- Policy and Other Considerations:
  - 1. Native offenders
  - 2. Prevalance of this type of crime
  - 3. Delay in proceeding (lose influence of deterrence)
  - 4. Marginal criminality
    - I.e. Prostitution
  - 5. Totality (s.718.2(e))
    - Being sentenced for multiple things at the same time (must be connected offences)
    - Takes into account the offenders behaviour
  - 6. Test cases

- Once person is sentenced it is no longer in the judge's hands it is in the hands of the national parole board

### **National Parole Board**

- CCRA
  - S. 4(a) Protection of the public is the paramount consideration in all decisions relating to release and supervision of offenders
- Only for Adult
- Over 80% of people serving a jail sentence are not actually in jail they are serving time in the community
- Conditional Release = allowed to be at large during term of imprisonment

### **Corrections and Conditional Release:**

- Parole Act (1959)
  - Abolish Ticket of Leave Act
  - National Parole Board became the person to decide whether or not someone should be released early
  - Objective needed to be for rehabilitation of the offender
- Warrant Expiry Date (WED)
  - Piece of paper that goes with the person to jail after they have been sentenced (comes from the judge)
  - This person is committed to jail for X number of days
  - Unconditional release at the WED
- Statutory Release Date:
  - Can be released prior to the WED
  - Release after 2/3 of their sentence
  - May not be released at statutory if the National Parole Board is convinced that you will commit a serious drug offence or violent offence
- Parole:
  - Before statutory release date
  - Provincial Jail <2 years
    - Parole is less than 1/6 of the sentence (day parole)
    - Parole is 1/3 of the sentence
  - Federal prison >2 years
    - Parole is 1/3 of the sentence

### **Penalty for Murder**

- Automatic death penalty until 1961
- Death by long drop hanging or by firing squad (military offences)
- Last execution 12:02am december 11 toronto jail
- 1961:
  - murders were re-classified for being capital or non-capital
- 1963:
  - Lester Pearson
  - All death penalties were commuted as a matter of policy
- 1968:

- 5 year moratorium on the death penalty except for killing of police officer or Correctional officer
- July 14, 1976:
  - Free vote in House of Commons
    - 130:124 in favour of abolition death penalty for Criminal Code Offences
    - Re-classified murder to first or second degree
    - Death penalty for NATIONAL Deference Act charges was removed in 1998
- 1st Degree
  - Murder is the worst crime
  - Life in jail
  - No parole for 25 years
  - Faint Hope Clause s. 746.6
    - People serving life with no parole for 15 years or more to apply for earlier parole
- 2nd degree murder:
  - Life in jail
  - No parole for 10 years can be 25 years

### **The Faint Hope Clause**

- Muderers can apply to chief justice of the province and ask for permission to make an application
- He decides if there is merit
- It gives someone hope to turn their life around
- Test:
  - Reasonable prospect that the application will succeed?
  - If not granted CJ says that the accused can wait at least 2 years to reapply
- Criteria:
  - Character of the applicant
  - Conduct while serving a sentence
  - Nature of the Offence
  - Any information provided by victim
  - Anything else that the judge considers relevant
- If judge believes there is some merit:
  - Case gets sent to jury (12 people)
  - Jury must be Unanimous
  - Question for the jury:
    - Can this person apply for parole earlier than the 25 years?
  - Relies on same criteria as the Chief Justice
- If approved by the jury:
  - The next question:
    - When he can apply for parole
      - 2/3 vote (15-24 years)
- Once they determine when he can get parole then it goes to the National Parole Board
- Chief Justice --> Jury --> National Parole Board
- If the Jury decides that he is not eligible for parole

- Jury decides when he can reapply for parole
- Came into affect in 1976
- First hearing in 1987
- As of April 2009:
  - 991 eligible for Faint Hope application
  - 174 decisions rendered
  - 144 deemed eligible to apply for parole
  - 131 granted early parole (13 did not get parole)
    - 13% of people who were eligible to get out early actually got out early
- As of April 2008
  - 125 released on early parole
    - 95 actively supervised in the community
    - 15 returned to custody
    - 11 deceased
    - 1 unlawfully at large
    - 3 deported
  - Most of them successful on parole
- Average person spend 18.4 years of their life sentence

### **Bill C-9 (Originally Bill S-6)**

- Serious Time for the Most Serious Crime Act
- Objective:
  - 1. Tighten procedures for those already in the system
  - 2. Take the Faint Hope Clause away for future murderers
- Procedural Changes (makes it harder for murderers to get parole)
  - 90-day limit after the 15-year point (have 90 days to apply)
  - If missed, you have to wait 5 years
  - Repeat applications must be within 90 days of the 5 year anniversary or date set by judge or jury
  - Therefore only 2 possible applications not 5 (like the original)
    - 15 year point or 20 year point
  - Test now for the Chief of Justice:
    - Must be satisfied that there is “a substantial likelihood of success”
  - Judge rejects application must wait another 5 years to reapply
  - Juries can also set new application date to 5 years

### **Statutory Release:**

- No statutory release for life sentences or dangerous offender sentences
- =2/3 of the sentence
- S. 129-130 states that the inmate can be detained past the 2/3 if
  - National Parole Board is convinced that the inmate will recommit a serious or violent crime

### **Provincial Sentences:**

- Statutory:
  - 2/3

- Parole Eligibility Date:
  - 1/3
- Day Parole (Halfway House)
  - 1/6

### **National Parole Board**

- Ministry of Public Safety
  - RCMP
  - Correctional Service
  - Border Agents

### **Parole Document:**

- Correctional Plan
- Community Assessment
- Up-to-date psych reports, including risk assessment

### **Escorted Temporary Absence:**

- Corrections and conditional release
- At any time of his sentence
- Life sentence National Parole Board has to decide if the person can leave

### **Final Review:**

- Short Essay and Short Answer
- Divided in two parts
  - 1. Sources of Criminal Law
    - Refers to charter, division of powers, interpretation of statutes
  - 2. Sentencing and Parole
    - Covers everything from the midterm to now Lec 6-11
    - Calculate sentences
    - Faint Hope Clause
    - Authority = sections or cases
    - Always pick SCC cases
    - Interpretation of Statutes:
      - Does not care about the position but more about how we justify it and the principles