

Definitions of criminal or penal law

The distinction between criminal offences and regulatory offences

3 CATEGORIES OF CRIMES

Regulatory Offences

Unregulated, an activity which would be dangerous to society, particularly the most vulnerable.

Eg. food packaging without regulation, no stop signs or speed limits. Protect broad segments of the public - employees, consumers, motorists from potentially adverse effects of otherwise lawful conduct.

Standards of behaviour/care in certain industries.

Conviction of regulatory offences thought to import much lesser degree of culpability than that of a true crime. The defendant failed to meet a certain standard.

**** Provincial and federal level of government can create statutes for regulatory offences.*

**** Mens rea not required.*

RELATED CASES/STATUTES:

- *R. v. Wholesale Travel Group, [1991] 3 S.C.R. 15*
- *R. v. Sault Ste. Marie, [1978] 2 S.C.R. 1299*

Strict Liability Offences:

- Defense of **due diligence** or **due care** available.
 - Defendant must prove on a balance of probabilities.

Absolute Liability:

- Crown **only has to prove actus reus** beyond a reasonable doubt.
- No defense available.

Criminal Offences

When conduct in itself, so abhorrent to basic values human society, should be completely prohibited. So repugnant, that they are universally recognized as crimes.

Eg. Robbery, fraud, murder, sexual assault.

Cannot be regulated.

**** Can only be legislated by the federal government. Unconstitutional ultra vires if provincial tries to legislate criminal law.*

(intra vires - legislating within jurisdiction).

Full Mens Rea Offences:

- Crown **must prove actus reus and mens rea** beyond a reasonable doubt.
 - Defense of due diligence does not apply.
- *mens rea* can include specific intent and general intent.

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

RELATED CASES/STATUTES:

Constitution Act of 1867

- s.91(27)
 - Federal list of jurisdiction, criminal law.
 - *** Only Parliament can enact legislation in crime in Canada.
 - *** Only one Criminal Code applies to the entirety of Canada.
- s.92 (14),(15).
 - Provincial list of jurisdiction, regulatory law.

Criteria supporting the exercise of federal powers

1. Law in question must provide a **prohibition**, as well as a **criminal sanction or consequence** for prohibited behaviour;
2. Law in question must have a **legitimate public purpose** aimed at **countering a potential harm against public health** (which includes: peace, or security, morality).
3. Law in question **cannot infringe upon the areas of provincial jurisdiction**.
 - a. Must not be coverable or disguised in a way that would be legislating in a field which is of provincial jurisdiction.
4. Even a law has regulatory aspects, **they must be secondary to primary criminal law purpose**.

TWO PART TEST

(In the case that the question of infringement upon provincial jurisdiction)

- a. Determine **pith and substance** (essential character) of the law.
 - b. **Classify** that character - under what head of power (Federal or Provincial - under s.91(27), or s.92(14)(15))
5. If there is an intrusion of the law into provincial jurisdiction, it is not so much to upset the balance federalism.

RELATED CASES/STATUTES:

- *Reference re Firearms Act (Can.)*, 2000 CSC 31, [2000] 1 S.C.R. 783
- *R.J.R MacDonald v. Canada (Procureur général)*, [1995] 3 S.C.R. 199

Definition of criminal law in relation to the protection against double jeopardy

TWO PART TEST

An offense falls under protection 11(h) *Charter* if:

- The proceedings by their very nature are ***criminal proceedings***, or if ***punishment invoked had been imposed for general deterrence of public***.
 - *Does not preclude two different proceedings, one criminal, the other not criminal, flowing from the same act.*
- The charge of the offence ***could lead to true penal consequence***.
 - Eg. Fines, imprisonment.

*** They must be identical charges.

RELATED CASES/STATUTES:

- s.11(h) *Canadian Charter of Rights and Freedoms, 1982.*
- *R. v. Shubley, [1990] 1 S.C.R. 3*
- *R v Wigglesworth (1987)2 SCR 541*

The Legality Principle

The theory of sources

SOURCES OF CRIMINAL LAW & THE HIERARCHY OF SOURCES

1. Constitution Act, 1867

- a. As provided by s.52(1) *Constitution Act, 1867*:
 “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”
 Charter rights are protected by supreme law of the land, but are not absolute/without limit. (Provided by s.1 *Charter*)
- b. When applying s.52(1) *Constitution*, the Courts may:
 - i. Strike out the part of the law that violates the *Charter*.
 - ii. Interpret a law narrowly so that it fits the *Charter* rights.
 - iii. Declare that the complainant not covered by the *Charter* rights.
- c. *The Canadian Charter of Rights and Freedoms, 1982* is included in this. It serves to protect and guarantee the rights and freedoms which are presumed fundamental, and serves two purposes:
 - i. Creates rights and freedoms.
 - ii. *****Protects them against violation by the State or agents of the State.**
- d. **s.1 Charter** is the only existing measure by which a statute can remain valid and applicable even in the face of a conclusion that one of its provisions might violate the *Charter*.
 - i. Subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
- e. *Functions of s.1 Charter*:
 - i. Guarantees the rights and freedoms set out in the provisions which follow it.
 - ii. States explicitly the exclusive justification criteria (outside of s.33 *Constitution*) against which limitations on those rights and freedoms may be measured.

Limitation on any *Charter* right must be prescribed by law.

- It must be legal, part of law, statute, or regulation within jurisdiction of the government that passed it.
- Must be clear, accessible to citizens - to protect against arbitrary actions by government.

See Below for OAKES TEST

2. **Statutory Law**

Sources of Criminal Law, including statute of criminal law; Criminal Code of Canada, as well as other statutes that have penal or criminal content.

Eg: Youth Criminal Justice Act, Controlled Drugs and Substance Act, Correctional Services.

- a. Statutes trump common law. They have priority in consideration in decisions, and decisions can be reversed by statute.

3. **Common Law (Jurisprudence)**

The totality of judgements rendered by Canadian Courts and the some of the British Courts.

- a. Interpretation done by courts of criminal statutes in application to actual cases.
- b. Courts are required to take them into account, not binding on all courts.
 - i. Practical usefulness to finding solutions.
 1. Can include doctrines (written by Lords), scientific or sociological reports that are relevant to a court issue.
- c. Notion of **stare decisis** - the decisions of higher Courts are binding on lower Courts.
 - i. Ratio decidendi: main reasoning behind a decision. In higher courts, by way of *stare decisis*, these reasonings and conclusions are binding on all other courts of Canada. *The decision is law* when made by Supreme Court of Canada (SCC).
 - ii. Obiter dicta: comments or secondary observations/reasons that are found in Court's decisions, but they are only secondary - this can include commentary. They are not the core reason behind the decision. Not binding on other courts.

Eg. When statutory text is interpreted by SCC, that ruling becomes binding on all courts - it becomes law. The interpretation can only be changed by a legislative amendment.

THE OAKES TEST:

Defendant claims violation of s.11(d) *Charter* (presumed innocent until proven guilty), and inferentially, a violation of s. 7 *Charter* (right to life, liberty, and security of the person) which provides:

Right to be presumed innocent until proven guilty requires at minimum:

1. An individual be proven guilty beyond a reasonable doubt;
2. The State must bear the burden of proof;
3. Criminal prosecutions must be carried out in accordance with lawful procedures and fairness.

The offence with which Oakes was charged required him (the defendant) to disprove on a balance of probabilities the existence of the presumed fact - violating the presumption of innocence by way of a reversal of the onus (burden).

The lowered standard of proof required (balance of probabilities vs. beyond a reasonable doubt) does not render the reverse onus constitutional.

The main contribution of the Oakes case is the *Justification of Limits test - the Oakes Test*. Crown must satisfy two criteria to establish that limit is reasonable and demonstrably justified in a free and democratic society.

TWO PART LEGAL TEST

1. **There must be a *pressing and substantial objective for the law or government action in a free and democratic society*.** (Purpose of the law must be important to society)

R v Big M Drug Mart [1985]

2. **The means chosen to achieve the objective must be *proportional to the burden on the rights of the claimant*.** (Government must find reasonable ways to achieve/implement legislation). ***Must be reasonable + demonstrably justified.***
 - a. **The objective must be *fair (not arbitrary) & rationally connected to the limit on the Charter right*.** (Any limitation to *Charter* right CANNOT be arbitrary, unconnected to the purpose of the law.) - This is where s. 8 failed in the *Oakes* test for that same case.
 - b. **The limit must *minimally impair the Charter right*.** (For action that infringes *Charter* rights to be ok, it must be impaired as little as possible. If Government can achieve legislative objective in way that involves less impairment to a right, it *must*. Most arguments tend to fail at this point in the test. Courts might take on deferential approach to the law when law in question infringes a right/freedom in order to protect another right/freedom.)
 - c. **There should be an overall balance or *proportionality between the benefits of the limit and its deleterious effect*.** (Overall benefits of the law in question. *Is the limit on the right proportional to the importance of that law's purpose? Are the benefits of the law greater than the negative effects of the limitation of a right? Does society benefit more from the law in place than the limitations on the right?*)

RELATED CASES/STATUTES:

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

s.51(1) Constitution Act, 1867.

s.1, s.11(d), s.7 Canadian Charter of Rights and Freedoms, 1982.

The legality principle

1. Punishment can only exist where authorized by statute.
 - a. s.6,8(3),9. Cr. C.
2. The non-retroactivity of criminal law
 - a. s.11(g) *Charter*
 - b. *R v Dineley [2012] 3 SCR 272* (See below)
3. The accused has the right to the benefit of the lesser punishment.
 - a. s.11(i) *Charter*
4. Ignorance of the law is no excuse.
 - a. s.19 *Cr. C.*

DINELEY

- DUI - Carter defence, legislation to eliminate the Carter defence after commission.
 - Not about the provisions being procedural or substantive in nature, but about ***discerning whether they affect substantive rights.*** (Elimination of defense?)
 - ***Important to observe the ***day that the law comes into force in relation to the alleged offence date.***

Officials Involved in the Criminal Justice System

The police officer

Role of the police officer in the Canadian justice system

The police officer's duty is all encompassing. They include:

1. Investigation of crimes

- a. Duty to investigate, wide variety of tasks and responsibilities.
 - i. Trigger of investigation:
 1. Complaint - from victim, member of the public.
 2. Spectrum of severity is large
 - a. Complexity & urgency of situation affects urgency of intervention and amount of resources dedicated to the crime (determination of speed of response and level of resources engaged).
 - ii. Discovery of sufficient number of pieces of puzzle (evidence) to put together the situation.
 1. The goal is not to necessarily get the *whole picture*, but to attain perpetrator of *actus reus*.
 2. *Acquire enough evidence/information to charge suspect.*
 - iii. Strategies and techniques
 1. Allocated under certain circumstances
 - a. Search warrant - obtaining sufficient info to obtain warrant.
 2. KGB statements
 - a. Written statements by witness (anticipation of recanting witness).

2. Laying of an Information (s.504 Cr. C.)

- a. RTTC (groundwork for s.504 Cr. C.)
 - i. Synopsis, list of witnesses, list of exhibits, copy of exhibits, diagrams, etc.
 1. Cansay/willsay (Statements by witnesses, accused, victims).
 - ii. Provide copies of police officer notes.
 - iii. Expert reports
 - iv. Copy of court process documents
 1. Information to obtain warrant.
 - v. Probation order if applicable.
- b. s.504 Cr. C.**
 - i. provides authority for **anyone** to lay an information (with reasonable grounds to believe that an indictable offence).

- ii. Once charges laid, **responsibility shifts to prosecutor.**

3. **Disclosure of Evidence**

- a. Disclosure package to defense counsel. RE: Stinchcombe
- b. Includes:
 - i. Whatever the police have gathered as information or evidence that is relevant to defence.
 - 1. Exceptions:
 - a. Information that might disclose information of witnesses or victims which might endanger them (contact info)
 - b. Identity of police informant.

4. **Testifying**

- a. Notes have to be good - might be called to testify a year later, must be able to talk about details of offence. (Eg. DUI).

RELATED CASES/STATUTES:

- s.504 *Criminal Code*
- *R. v. Stinchcombe, [1991] 3 S.C.R. 326*

The independence of the police

BEAUDRY

Police discretion: *Police officer who has reasonable grounds to believe that an offence has been committed, or that a more thorough investigation might produce evidence that could form the basis of a criminal charge, may exercise his or her discretion to decide not to engage the judicial process.*

***Police discretion is not absolute.

TWO-FOLD TEST

- Far from having *carte blanche*, exercise of discretion must be justified **subjectively** - rationally, must be exercised **honestly and transparently**, on basis of **valid and reasonable considerations**.
 - Evaluation via judgment of socio-economic, racial, cultural, or favoritism basis is not a proper exercise of discretion.
 - Officer's sincere belief of the correct decision is insufficient.
- Must also be **justified on basis of objective factors**.
 - **Portionate to severity of the conduct** - must be clear that this was **executed for public interest**.

RELATED CASES/STATUTES:

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

The control mechanisms

1. Internal Discipline (eg. Part IV RCMP act)
 - a. Conduct of members regulated by *RCMP Act*.
 - i. Informal disciplinary action
 - ii. Formal disciplinary action
2. RCMP External Review Committee
 - a. Independent agency - reports to Parliament through department of Public Safety.
 - b. Commission for Public Complaints (CPC) against RCMP
3. Civil Liability
 - a. Police negligence, failure to duty, abuse of process of authority.
 - i. *Jane Doe v. Metropolitan Toronto Police [1986]*
4. Exclusion of evidence (**s. 24(2) Charter**). (See below for Grant)

When a person's rights are violated to obtain evidence, the evidence shall be removed. This can go so far as to obtain an acquittal.

 - a. Powerful control mechanism to review behaviour of police **during investigation**.
 - b. Closes the loop - without s.24(2) *Charter*, no mechanism for consequence of violated *Charter* rights.

GRANT

Claim violation to s.8,9,10(b) *Charter*.

Viewed broadly, s.24(2) is the "administration of justice" - used to maintain rule of law, to uphold *Charter* rights.

- **Longer-term**, it is used to **maintain the integrity** of, and to maintain the public's trust in the justice system.
- Does not focus on immediate reaction on individual case.
 - Inquiry is objective:
 - Would a reasonable person, informed of all the relevant circumstance and *Charter* values, find that admitting evidence would putting administration of justice into disrepute?

THREE PART TEST

When faced with advocacy for exclusion, the Court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to:

1. **Seriousness of Charter infringing state conduct.**
 - a. *The more severe* or deliberate the *state conduct* that led to the *Charter* violation, the greater the need for the courts to *dissociate themselves*

from that conduct, by excluding evidence linked to that conduct, in order to **preserve public confidence** in and **ensure state adherence to the rule of law**.

2. ***Impact of the breach on the Charter protected interest of the accused.***
 - a. Evaluation of the **extent to which** the breach actually **undermined** the interests protected by the **infringed right**
 - b. The *more serious the incursion on these interests*, the **greater the risk** that admission of the evidence would **bring the administration of justice into disrepute**.
3. ***Society's interest in the adjudication of the case on its merits***
 - a. Whether the **truth-seeking function of the criminal trial process** would be *better served* by admission of the evidence or by its **exclusion**.
 - b. Factors such as the **reliability of the evidence** and its **importance to the Crown's case** should be considered at this stage.

RELATED CASES/STATUTES:

- *R. v. Grant [2009] 2 S.C.R. 353*
- s.24(2) *Canadian Charter of Rights and Freedoms, 1982*

Abuse of process application and appropriate remedies

- Eg. Violation of s.10(b) *Charter* - failure to provide a reasonable opportunity to contact counsel?
 - It is not so simple as informing the accused of their *Charter* right, duty to provide options should they not know an attorney - Legal Aid, Public Defense, ect.
 - ***Degree of seriousness is very important. (What are the steps that the officer has taken to abide by the rules?)
 - Exclusion of evidence would = acquittal serial murder means the *Charter* violation would have to be very severe.

The Prosecutor

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

Advocacy Role/Conduct

- Must remain fair, not mislead the Court, objective (not providing personal opinion);
- Must remain open-minded to possibility of innocence in advocacy;
- State the law accurately;

- Be fair in approach, be respectful towards defence counsel/accused/defence's witnesses.
- Avoid conflicts of interest (appearance thereof or direct).
 - Should not participate in prosecution where accused, victim, or witness is related to Prosecutor. **Perception/Appearance of conflict of interest is important to consider.**

BOUCHER

- Purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime.
- Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly.
- The role of prosecutor excludes any notion 'of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility.
 - It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

Prosecutorial independence

BEAUDRY

- Both the police officer and the prosecutor have a discretion that must be **exercised independently of any outside influence**. *Krieger v. Law Society of Alberta, [2002] 3 S.C.R. 372, 2002 SCC 65.*
- The **limits of each official's discretion** are inherent in that person's **role and duties**.
- Responsibilities of Crown prosecutors do not serve to limit the scope of police discretion.

RELATED CASES/STATUTES:

- *Krieger v. Law Society of Alberta, [2002] 3 S.C.R. 372, 2002 SCC 65*
- *R. v. Beaudry, [2007] 1 S.C.R. 190*
- *R. v. Boucher, [2005] 3 S.C.R. 499, 2005 SCC 72*

Duties of the prosecutor

Surest way for prosecutor to conduct themselves no matter what the case - to act ethically (in good faith, devoid of partisan interaction) and fairly.

1. **Legal advice**

- a. typically to police
 - i. Decision on charges

1. Determining if they are on reasonable grounds (admissibility of evidence)
- ii. Question of prosecutability of case (see point 3)

2. Pre-charge approval

- a. In most part of the country, with the exclusion of QC, NB, and , **police lay the charges.**
 - i. The case is sent to Crown's office.
 - ii. Review by crown is done after police start laying of charges.
 - b. Where there is the pre-charge approval system in place, police do not lay charges until Crown has approved the charges.
 - i. Application of two tier test (point 3) determines *which charges should be laid.*
 1. Benefits to this system:
 - a. It is fairer to the accused;
 - b. ensures only cases with reasonable prospect of conviction will proceed;
 - c. more efficient because fewer mistakes will occur in laying of charges;
 - d. decision whether to prosecute is more objective.
- 3. ***Broad discretion in instigating and maintaining prosecution**
- a. During the life of a prosecution (particularly when new evidence is introduced), prosecution is guided by a two tier test.

TWO TIER TEST

1. ***Is there a reasonable prospect of conviction?***
 2. ***Is it in the public interest to instigate the prosecution?***
- 4. Discretion for resolution discussions** (known as plea-bargaining)
- a. Crown can consult police on whether there is concern on adequacy of resolution.
- 5. Authority to stay proceedings (s.579 Cr. C.)**
- a. Asks a clerk of the Court to "enter a stay in proceedings" on the record.
 - b. s.579(1) Cr. C.: power to stay proceedings with concern to prosecutability.
 - i. one year is allocated - if nothing changes this;
 - c. s.579(2) Cr. C.: proceedings deemed to have never commenced.
- 6. ***Use of alternative measures (s.716, s.717Cr. C.)**
- a. s.716 provides **definitions** for sentencing.

- b. s.717 **conditions** to being accepted for alternative measures of administration of justice.
 - i. Must admit to the facts of the case (not equivalent to pleading) - if accused does not admit to the facts of the case, they are not eligible.
 - ii. Committee must accept the case (depends on severity, history)
 - iii. Crown must accept the application of measures to the case.
 - iv. Accused must consent to the use of alternative measures.
 - v. There must be no bar to proceedings.

7. *Authority to proceed by indictment or summary conviction.**

- a. Requires the Crown to know the **sentencing range** of the law.
- b. Must *look at the seriousness of the facts*.
- c. Must consider the **implications on the victim**.
 - i. For indictable offences with a punishment of 5 years or more, the accused is entitled to a trial by judge and jury.
 1. Putting victim on the stand only in front of a judge, vs. in front of the judge and the jury.
 - ii. Summary offences (less than 6 months, fine under \$5000) are go through a faster process to trial - they do not allow for an election for preliminary hearing.

RELATED CASES/STATUTES:

- s.579, s.716, s.717 *Criminal Code of Canada, 1892*

Control measures over the prosecutor's exercise of discretion

Application for abuse of process

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

NIXON

- Repudiation of a plea agreement is a matter of prosecutorial discretion, not reviewable by courts.
 - An act of prosecutorial discretion is subject only to judicial review under the abuse of process doctrine.
- Test for granting a stay of proceedings by the Court in doctrine of abuse of process (in the case of prosecutorial *misconduct, improper motive, or bad faith*).

TWO TIER TEST

- The prejudice caused by the abuse in question will be manifested, perpetuated, or aggravated through the conduct of the trial or by its outcome; and

- No other remedy is reasonably capable of removing that prejudice.

Prosecutor's conduct is reviewable by Law Society

In Canada, prosecutor's job is never about 'winning'. Crown has an absolute duty to disclose to defence counsel. (re: Boucher)

KRIEGER

- Disclosure to defence counsel is a legal duty, not part of prosecutorial discretion.
- **Timely disclosure** is directed at **ethical conduct of lawyers** (Legal Profession Act)
 - Used in circumstances of dishonesty or bad faith, not intended to interfere with proper exercise of prosecutorial discretion. Matter of professional discipline.

RELATED CASES/STATUTES:

- *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372, 2002 SCC 65
- *R v Nixon* (2001) SCC 34

Internal control measures

Prosecution policies are important because they **provide a measure of accountability - framework by which decisions are expected to be made.**

The Judge & Jury

The Judge is the provides instructions law to the jury, the jury is the judge of the facts. They are bound to apply the legal instructive given to them by the Court.

The Victim

- **Not a party to the proceedings**
- **Victim is a witness to the alleged offence.**
 - They are not the ones to decide to law the charge, nor to stop the proceedings.
- **Victim's input into sentencing process is provided by s.722 Cr. C. by way of a Victim Impact Statement.**
 - If the accused is found guilty, VIS is considered in the ruling.

RELATED CASES/STATUTES:

- s.722 *Criminal Code of Canada*, 1892.

Defense Counsel

Right to counsel is entrenched in the *Charter* - constitutionally recognised importance.

- s.10(b) *Charter* allows anyone to contact counsel and seek advice *before* being charged.
 - Protects the right of the accused:
 - To silence/not incriminate themselves

- Be secure against unreasonable search and seizure.
- A means to **protect from wrongful conviction**.

Duties of defense counsel

- **Ensure full disclosure** is provided by ensuring Crown lives up to its burden.
- Present and **explore various avenues** that without counsel, accused would not know of.
- Ensuring all legal issues bearing on accused's case are properly formed/adjudicated.
- **Test the credibility of statements**
 - Cross-examining Crown's witnesses.
- As most people plead guilty, defense counsel plays a crucial role at sentencing.
 - Crown brings up the impact on the victim (s.722 Cr. C.)
 - Defense provides the rest of the picture regarding the accused
 - Presenting additional information/**mitigating factors** that would otherwise not be known to the judge.
 - **Individualise the sentence** imposed.

Solicitor-Client Privilege

- Privilege is the client's - only they can waive it.
- Obligation of counsel - what is said by a lawyer to their clients is protected.

RELATED CASES/STATUTES:

- s.10(b) *Canadian Charter of Rights and Freedoms, 1982*

The Trial Process: Procedure, Punishment & Evidence

Criminal procedure

Determining the court's jurisdiction

- **s.469 Cr. C.** Court of criminal jurisdiction
 - Lists which offences/attempts of offences which are exceptions - *Provincial Court cannot hear them*.
- **Absolute Jurisdiction Offence (s.553 Cr. C.)**
 - Jurisdiction of a Provincial Court Judge, or in Nunavut, a judge of the Nunavut Court of Justice. s.553 Cr. C.
 - For the purpose of this class, any of the following offenses with value of **less than \$ 5000**, falls under an *Absolute jurisdiction offence*:
 - Theft
 - Fraud
 - Mischief

- Consequently, **anyone charged with an absolute jurisdiction offence** in accordance with s.553 Cr. C. **is not entitled to a preliminary hearing, pursuant to s.536(2) Cr. C.**

RELATED CASES/STATUTES:

- s.469, 553, 536(2) *Criminal Code of Canada, 1892.*

Limitation Period

As provided by **s.786(2) Criminal Code**, for any summary offence, no proceedings shall be instituted 6 months after the subject-matter of the proceedings arose, unless prosecutor and defendant so agree.

Main stages in the criminal process, from first appearance to the trial

1. The Information

- a. **s.504 Cr. C. - anyone can lay an information.**
- b. Starting point of process.

2. First Appearance

- a. **s.503 Cr. C. - Once charged, appellant to *appear in court*.**
 - i. Typically on summary offence, police will use discretion and release people.
 - ii. Provides **release conditions police can impose.**
 - iii. Options for Crown and Defense to alter release conditions.

3. Accused election

- a. Summary conviction - accused pleads guilty or not guilty.
- b. **Hybrid or Indictable offense (*imprisonment 5 years or more*)**, accused elects:
 - i. Trial with:
 - 1. Judge and jury, or
 - 2. Only judge.
 - ii. Accused has an option to the preliminary hearing (inquiry). **Guaranteed by s.11(f) Charter.**
- c. If charged with absolute jurisdiction offense, accused is not privy to a preliminary inquiry, nor a trial by judge and jury (s.553, s.536(2) Cr. C).

4. Interim Release (Bail)

- a. **s.515(1) Cr. C. GENERAL RULE:**

For most crimes, accused will be released on bail unless Crown shows cause as to why the accused should remain in custody - onus is on the Crown to show cause for accused to remain in custody, it is determined on a balance of probabilities.

 - i. **Onus on accused if offense falls under s.469.**
- b. **s.515(2)a) Cr. C. Conditions of bail by judge**

- c. **s.515(4) Cr. C. Judge can provide orders the accused must comply to**
- d. **s.515(6) Cr. C. Reverse onus for release (onus shifted to the accused)**
 - i. s.515(6)a) committed crime while on bail for an indictable offence.
 - ii. s.515(6)b) accused committed an indictable offense, and is not ordinarily a resident of Canada.
- e. **s.515(10) Cr. C. Justification to detain accused**
 - i. s.515(10)a) Flight risk, record of failure to appear in court.
 - ii. s.515(10)b) For safety of public and/or witnesses
 - iii. s.515(10)c) Detention necessary to maintain confidence in administration of justice.
- f. **s.515(12) Cr. C. Order for no communication**

5. Preliminary Hearing

- a. Gate-keeper function
 - i. Used to determine if there is sufficient evidence for accused to stand trial.
- b. Crown only need to prove on a balance of probabilities.
 - i. Justice has limited latitude for the Court to challenge evidence.
 - 1. Justice doesn't evaluate credibility in prelim.
- c. Invaluable tool for Defense - ability to use record from prelim to cross-examine at trial.

LEGAL TEST TO PROCEED TO TRIAL

Could a jury who is properly instructed and acting reasonably return a verdict of guilt on evidence presented?

6. Trial and the Verdict

- a. **s.606(1) Cr. C. Available pleas (guilty & not guilty).**
- b. **s.606(1.1) Cr. C. Conditions to accepting guilty plead.**
 - i. **Voluntary decision** to make plead by accused.
 - ii. **Understands** the plead is equivalent to an admission of the essential elements of the offence, nature, and **consequences**.
 - iii. **Court is not bound by any agreements made between Crown and Defense.**
- c. **s.606(1.2) Cr. C. Court does not have responsibility to inquire on fulfillment of conditions in (1.1) - does not affect validity of plea.**
- d. **s.606(2) Cr. C.** If accused fails to elect a plead, Court puts down plead of not-guilty.

7. The Sentence

- a. See: **"Determining Appropriate Sentence"**

RELATED CASES/STATUTES:

- s.469, 504, 503, 536(2), 553, 515(1)(2)a)(4)(6)a)b)(10)a)b)c)(12), 606(1)(1.1)i)ii)iii)(1.2)(2) *Criminal Code of Canada, 1892.*
- s.11(f) *Canadian Charter of Rights and Freedoms, 1982.*

***Right to disclosure of evidence

See: Prosecutory is reviewable by Law Society.

STINCHCOMBE

- Crown has a **legal duty to disclose all relevant information to Defense.**
- Information obtained by investigation is not for Crown to secure conviction, but **property of the public to ensure that justice is done.**
- Crown's duty to respect rules of privilege, protect identity of informers.
- Crown has **discretion to relevance of information** - reviewable by trial judge.

GUIDE FOR DISCLOSURE

Information should **not be withheld if there is a reasonable possibility that this will impair the right of the accused to make full answer and defence.**

- **Diligence obligation:** Defense counsel must bring to trial judge's attention **as early as possible** Crown's failure to disclose.
 - Allows for judge to remedy any prejudice - avoid new trial.
 - Usually, remedy is not a stay in proceedings, but **offer for adjournment** so that Defense has time to go over the evidence, analyse **prospect of using evidence.**
- **Initial disclosure** should occur **before accused called to elect mode of trial/plead.**
 - Informs defence counsel on how to plead/elect.
 - **All relevant information must be disclosed, whether Crown intends to introduce into evidence or not, whether nature of evidence is inculpatory or exculpatory.**
 - If there are no statements made, provide notes - if no notes, provide all information in prosecution's possession relating to relevant evidence.
- **Purpose of disclosure is two-fold:**
 - Ensure accused knows case to be met, **able to make full answer and defence**; and
 - Encourage resolution of facts in issue (including, where appropriate) **entering of guilty pleas at early stage in the proceedings.**

RELATED CASES/STATUTES:

- *R. v. Stinchcombe, [1991] 3 S.C.R. 326.*

Determining the appropriate sentence

***Objectives of the sentence

Serve as a guide for the Courts on sentencing.

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

- *****s.718 Cr. C. Purpose of sentencing**
 - a) Denunciation
 - b) Deterrence (specific and general)
 - c) Isolation and separation
 - d) Rehabilitation
 - e) Reparation
 - f) Responsibility
- **s.718.01, s.718.02 Cr. C.** Specific provisions re:crimes against children and peace officers.

***Applicable principles to the determination of the appropriate sentence

- *****s.718.1 Cr. C. Proportionality of sentence**
 - Sentence must be proportionate to the severity of the offence committed and the responsibility of the offender.
 - *See Nasogaluak below.*
- *****s.718.2 Cr. C. Consideration upon sentencing**
 - **s.718.2(a) Cr. C. Aggravating factors or circumstances.**
 - **s.718.2(b) Cr. C. Parity, coherence in sentencing.**
 - **Reliability, stability, fairness.**
 - Sentencing should be similar for similar situations.
 - **s.718.2(c)(d)***(e) Cr. C. Reasonableness, proportionality, moderation.**
 - **s.718.2(e) Cr. C. - Particularly for aboriginal offenders.**
 - *See Gladue & Ipeelee below.*
- Individualising the punishment/taking into consideration of particular circumstances.

NASOGALUAK

- Principle of proportionality is central to the sentencing process set out in the *Cr. C.* - requires sentence to speak out against offence, but not exceed what is just and appropriate in regard to the moral blameworthiness of the offender and gravity of the offence.
- **Sentencing is an individualised process** - requires judge to **weigh the objectives of sentencing** in manner **that best reflects circumstances of the case.**
 - **Judge's discretion limited by case law** (which should be used as guidelines, encourage consistency), and **statutes** (*Cr. C.*)

- Judges **cannot reduce sentence below a mandated minimum, unless** the minimum sentence is **unconstitutional**.
- Specific sentencing objectives (for children, peace officers) *trumps* other objectives.

GLADUE

- s.718.2(e) *Cr. C.* is a response to overrepresentation of aboriginal peoples in jails/in front of courts.
 - Crown looks for aggravating factors
 - Defense looks for mitigating factors
- Specifically, s.718.2(e) *Cr. C.* encourages recourse to **restorative approach** to sentencing.
 - **Judicial duty to give provision's remedial purpose real force.**
 - **Applies to all aboriginal offenders, wherever they reside: on- or off-reserve.**
- Part XXVIII (Sentencing) *Cr. C.* places **emphasis on decreasing use of incarceration. CONSIDER ALTERNATIVE SENTENCING (s.717 Cr. C.)**

CONSIDERATIONS FOR ABORIGINAL OFFENDERS

- a. Unique **systemic/background factors**; and
 - b. **Types of sentencing procedures and sanctions that may be appropriate** in circumstances due to particular aboriginal heritage/connection.
- *****Additional case-specific information will come from counsel.**
(GLADUE REPORT)
 - Pre-sentence report taking into account systemic/background factors and appropriate sentencing procedures and sanctions - might come from representations of relevant aboriginal community.
 - Eg. Sentencing circles.

IPEELEE

- Onus is on counsel to bring forward mitigating factors via individual circumstances/history.
- Failure to apply Gladue principles would result in sentence that is not fit in sense outlined in s.718.1 *Cr. C.*
 - Error would need Appellate intervention.

RELATED CASES/STATUTES:

- *R. v. Nasogaluak* [2010] 1 SCR 206
- *R. v. Gladue*, [1999] 1 S.C.R. 688
- *R. v. Ipeelee* [2012] SCC 13
- s.717, 718(a)(b)(c)(d)(e), 718.01, 718.02, 718.1, 718.2(a)(b)(c)(d)(e).

Punishment (sentencing) options

1. Imprisonment (s.743 Cr. C.)

a. s.742.1 Cr. C. Conditional Sentences

- i. House arrest, may serve so long as conditions are fulfilled.
- ii. Not a danger to society, ***punishment of less than two years.***

b. Straight sentence

- i. Sentence served in penitentiary or detention center.

c. Intermittent sentence (s.732(1) Cr. C.)

- i. ***Sentence of 90 days imprisonment or less.***

2. The Fine (s.734-737 Cr. C.)

a. s.734(2) Cr. C. Onus on the Court to determine capacity to pay

3. Probation (s.731 Cr. C.)

a. Allows Court to impose numerous conditions, provide structure.

b. Accompanies other sentencing options - mandatory and discretionary.

- i. ***s.731(a) Cr. C. Cannot be imposed if there is a minimum punishment prescribed.***
- ii. ***s.731(b) Cr. C. Cannot be imposed for anyone sentenced for two years or more.***

c. s.731.1 Cr. C. - Range of conditions available to Court.

- i. Regarding s.109-110 Cr. C.

4. Conditional or unconditional discharges (s.730(1)(3)Cr. C.)

- a. Depends on severity.
- b. Must look at the penalty to see if it is an applicable option.
 - i. Summary conviction offences, or to a student - no criminal history.

5. Restitution (s.738(1)a)b)c)Cr. C.)

- a. Follows s.730 Cr. C., Court can demand offender pay damages.

6. Alternative Measures (s.716, 717 Cr. C.)

a. s.717(1) Cr. C. Conditions to application of alternative measures

- i. ***s.717(1)a) Cr. C. - Accused is approved for the program***
- ii. ***s.717(1)b) Cr. C. - Crown find they are appropriate for offender, society, and victim.***
- iii. ***s.717(1)c) Cr. C. - Offender ready to participate, with informed consent.***
- iv. ***s.717(1)d) Cr. C. - Offender has been advised of right to counsel.***

- v. **s.717(1)e) Cr. C.** - Offender accepts they have committed the acts which form the basis of the offence. (Not equivalent to pleading guilty).
 - vi. **s.717(1)f) Cr. C.** - There is sufficient evidence to proceed with prosecution.
 - vii. **s.717(1)g) Cr. C.** - Prosecution is not barred by law.
- b. Note that s.717 Cr. C. *cannot be used if accused denies participation or involvement in the offence, or prefers case be dealt with by Courts.*

RELATED CASES/STATUTES:

- s.743, 732(1), 742, 734(2), 731(a)(b), 730(1)(3), 738(1)a)b)c), 717(1)a)b)c)d)e)f)g) *Criminal Code of Canada, 1892.*

Over-riding principle

*** Presumption of innocence and Crown onus to prove guilt beyond a reasonable doubt.

LIFCHUS

- Jury must be provided with explanation of expression “reasonable doubt”, in its ***specific meaning*** in the ***legal context***.
- Judge must explain:
 - The ***standard of proof*** “beyond a reasonable doubt” ***is inextricably intertwined*** with the presumption of innocence (as detailed in Oakes). ***Fundamental to all criminal trials.***
 - ***The onus is always on the Crown, it never shifts to the accused.***
 - ***Reasonable doubt is NOT imaginary, or frivolous doubt*** - not based on sympathy or prejudice.
 - ***Doubt based on reason and common sense must be logically derived from the evidence or absence of evidence.***
 - Does not involve proof to absolute certainty.

W.(D.)

- ***Either/or proposition to jury excludes third alternative:***
 - ***Jury, without believing the accused,*** after considering accused’s evidence in context of evidence as a whole, ***may still have reasonable doubt as to his guilt.***

- Where credibility is important:
 - Must be clear that ***prosecution has not proved its case beyond a reasonable doubt if, after consideration of both sides of evidence, there is doubt.***
- Judge should instruct jury:
 - If they ***believe the evidence of the accused, they must acquit;***
 - If they ***do not believe the testimony of the accused*** but are ***left in reasonable doubt by it, they must acquit;***
 - ***Even if not left in doubt*** by evidence of the accused, they ***still must ask themselves*** whether they are ***convinced beyond a reasonable doubt of the guilt of the accused on the basis of the balance of evidence which they do accept.***

RELATED CASES/STATUTES:

- *R. v. Lifchus, [1997] 3 S.C.R. 320*
- *R. v. W. (D.), [1991] 1 S.C.R. 742*
- *R. v. Oakes, [1986] 1 S.C.R. 103*
- s.11(d) *Canadian Charter of Rights and Freedoms, 1982.*

Elements of the Offence

Capacity and responsibility

Criminal liability or responsibility considerations

- ***Minority (s.13 Cr. C.)***
 - Offenders under 12 years of age cannot be convicted of a criminal act.

RELATED CASES/STATUTES:

- s.13 *Criminal Code of Canada, 1892.*

Coexistence of the actus reus and the mens rea

Determination of the *mens rea*

The determination of the ***standard of fault applicable to a given offence.***

1. Roles of the legislator and of the courts in ***determining the standard of fault.*** (See Sault Ste. Marie below)
2. The Crown is not required to prove motive
 - a. ***Crown must prove actus reus and mens rea, but no motive.***
 - i. Motive helps or lack thereof helps on an evidentiary basis.

SAULT STE. MARIE

- The ***distinction between a true criminal offence and public welfare offence (regulatory offences) is the necessity of mens rea.***
 - Criminal Offences: where mens rea must be established - mere ***negligence is excluded from concept of the mental element required for conviction.***
 - Absolute liability: conviction on mere proof of prohibited act without any relevant mental element.
 - Strict liability: mens reas need not be established, defense of reasonable belief in a mistaken set of facts/defence of reasonable care.
- ***Regulatory offences do not require the Crown to prove mens rea, as it is a virtual impossibility in most regulatory cases to prove wrongful intention.***

RELATED CASES/STATUTES:

- *R. v. Sault Ste-Marie, [1978] 2 S.C.R. 1299*

Defences

Sources for available defences

1. ***Canadian Charter of Rights and Freedoms, 1982.***
 - a. Not technically a defence - offers protection.
 - b. See *Vu, Cole* below.

VU

- Court found there is an expectation of privacy in personal computers and cell phones.
 - Police require a warrant which explicitly provides the search of personal computers.

COLE

- High degree of privacy expected in work computer, when this is delegated to an employee by an employer. Depends on the policy and practices in the workplace.
 - May diminish expectancy of privacy, but not eliminate.
 - Employers cannot consent to unwarranted search of their employees work computers.

RELATED CASES/STATUTES:

- *R. v. Vu [2013] 3 SCR 657*
- *R. v. Cole [2012] 3 SCR 34*
- *Canadian Charter of Rights and Freedoms, 1982.*

2. General applicable principles (*Burden of evidence on a defence*)

- a. For defense to be put to a jury - if, only if there is evidential foundation.
- b. Judges must charge the jury with available defenses which arise from the facts, whether this is specifically raised by the accused or not.

TEST FOR ERROR OF REALITY

- Determines whether judge will consider defence.
- Burden on the accused to provide evidence of the existence of an available defence for it to be applicable. Does not need to be persuasive.
- **Judge must consider the totality of the evidence, assumes evidence relied upon by the accused to be true.**
 - Not determining actual substantive merits of the evidence (up to jury to decide).

3. Categories of defences

a. Defences negating *mens rea*.

i. *Mistake of fact*

1. Accused made mistakes as to particular facts.

ii. *Honest but mistaken belief as to consent* in sexual assault cases.

1. See *Ewanchuk* below.

iii. *Voluntary intoxication*

1. ***Not a complete defence***
2. ***Not a defence in a charge of general intent*** (eg. assault)
3. Defence for ***specific intent offence***.
 - a. “did with the intent to”, “means to...” = specific intent.
4. If jury allows defence, acquittal for the charged offence, reduction - eg. Murder to manslaughter.

iv. *Accident*

EWANCHUK

- Conviction for sexual assault requires **two elements**:
 1. ***Unwanted sexual touching***
 2. ***Intention to touch knowing of, or being reckless of, knowingly blind to the lack of consent of person being touched.***
- The ***actus reus*** requires **three elements**:
 1. *Touching (Objective)*
 2. *Sexual nature of the contact (Objective)*
 3. *Absence of consent (Subjective)*

- a. Complainant's fear need not be reasonable, nor communicated to the accused in order for consent to be vitiated.

RELATED CASES/STATUTES:

- *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, 131 C.C.C. (3d) 481
- s.273.1, 273.2 *Criminal Code of Canada*, 1892.

b. Justifications

i. Correction of child by force (s.43 Cr. C.)

1. Only minor corrective force of a transitory and trifling nature.

a. Cannot be degrading, inhuman, blows or slaps to the head, or in an act of anger.

- i. Does not include children under 2, over 12.**

c. Excuses

i. Necessity

1. See Perka below.

ii. *Provocation**

1. **s.232(1) Cr. C.**

- a. Used to reduce murder to manslaughter.
- b. Can lead to reduced conviction.

PERKA

- Defence of **necessity** only applies when:
 - Situation of imminent risk - **actions are taken to avoid direct, and immediate peril.**
 - **When it is unavoidable, inevitable, with no reasonable opportunity for an alternative course of action** that did not involve a breach of the law was available to the accused.
 - **Violation of the law must be less than the harm the accused sought to avoid.**
 - **When sufficient evidence** to raise issue of necessity, **onus is on the Crown to prove** beyond a reasonable doubt **the act was voluntary.**

RELATED CASES/STATUTES:

- *R. v. Perka*, [1984] 2 S.C.R. R.C.S. 232, 14 C.C.C (3d) 385
- s.273(1)(2) *Criminal Code of Canada*, 1892.

Rules of participation in an offence

Presence alone is not sufficient to engage criminal liability. (See Dunlop below)

Party to an offence

- **s.21(1) Cr. C. Parties to an offence**
 - See Dunlop below.
- **s.21(2) Cr. C. Common intention**
- **s.21(1)b) Aiding**
 - ***Proof of knowledge of the offence.***
 - Pay attention to evidence.
- **s.21(1)c) Abetting (encouraging)**
 - *Intended to, or acted in a way that would encourage or incite the offense.*
- **s.22, s.464 Cr. C. Counselling**
 - *Whether an attempt or committed offence.*
 - *Main offence needs to not work out.*
 - If offence works, charged with the offence, not s.464.

DUNLOP

- ***Presence at commission of an offence can be evidence*** of aiding and abetting if accompanied by other factors:
 - ***Prior knowledge of offender's intention.***
 - ***Presence with knowledge of intention*** of crimes to be committed.
 - ***Attendance for the purpose of encouragement.***
 - ***Presence to aid/assist in offence.***

RELATED CASES/STATUTES:

- *R. v. Dunlop, [1979] 2 S.C.R. 881, 47 C.C.C. (2d) 93*
- *s.21(1)b)c)(2), 22, 464 Criminal Code of Canada, 1892.*