PART ONE

INTRODUCTION TO CRIMINAL LAW AND PROCEDURE

CHAPTER ONE

FOUNDATIONS FOR THE STUDY OF THE CRIMINAL PROCESS

This book treats the study of the criminal law as the study of a complex social, legal, and institutional process. It is a process that is shaped by background assumptions about government power and responses to social breakdown. The criminal law authorizes a set of specific police powers, is channelled through a particular trial procedure, ascribes responsibility for crime using an intricate body of principles of liability, and imposes suffering on individuals as a consequence of wrongdoing. This book calls on students to gain a detailed appreciation for the law that structures each element of this process. Yet it also insists that each element must be understood in relation to the others, and it is always conscious of various critiques and calls for reform. An organizing premise of this book is that the study of the criminal law must be fundamentally informed by a keen appreciation for broader historical and social context, always attentive to the reality that each element of the criminal process has material effects—for better and for worse—on those it touches.

This chapter provides the foundation necessary for this approach to the study of the criminal law. The first section provides an overview of the criminal process. It explains how the book is arranged to map and explore that process, from police powers and trial processes through

to sentencing and punishment. Section II examines the constitutional context of the criminal law, including the constitutional division of powers between the federal and provincial governments, the role of the *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 (referred to throughout this book as "the Charter"), and the status of Aboriginal and treaty rights, and Indigenous law, as an underacknowledged component of Canada's constitutional framework that has much to say about criminal justice. Section III turns to the *Criminal Code*, RSC 1985, c C-46, the central piece of legislation that shapes the criminal law. This section discusses the nature and history of codification of the criminal law and various issues surrounding the interpretation of the *Criminal Code*. Many of these issues will be revisited in subsequent chapters, which examine various provisions of the *Criminal Code* as they relate to police powers, trial processes, offences, defences, and sentencing and punishment.

I. OVERVIEW OF THE CRIMINAL PROCESS

A. LEGISLATION AND THE LIMITS OF THE CRIMINAL LAW

The criminal law is the result of a complex process that starts with the decision of a society, through the legislature, to define certain behaviour as not only prohibited, but prohibited on pain of criminal punishment. As you will read below, criminal law in Canada is enacted by the federal Parliament, which under s 91(27) of the *Constitution Act, 1867*, 30 & 31 Vict, c 3 has exclusive jurisdiction over criminal law and procedure.

The *Criminal Code* of Canada contains many offences, ranging from traditional crimes such as murder, assault, robbery, and theft to newer crimes such as operating a conveyance with a blood alcohol level "over 80," and participating in the activities of a criminal organization or a terrorist group. Some offences, such as assault or sexual assault, protect bodily integrity, while others, such as theft, protect property. Crimes relating to firearms and impaired driving offences obviously attempt to prevent conduct that presents a significant risk of harm to others. Crimes against the possession and sale of illegal drugs or obscene material are also understood as preventing harm, but they also show the criminal law's function in expressing standards of socially acceptable behaviour.

Chapter 2 introduces a tradition of philosophical debate about the appropriate limits of the criminal law, while also showing how these debates have found expression in Canadian constitutional law and in decisions made by Parliament on issues like the decriminalization of possession of cannabis. The Charter places limits on the criminal law; for example, criminal offences that prohibit various forms of expression must be shown by the state to be demonstrably justified and reasonable limits under s 1 of the Charter. Chapter 2 provides two case studies—the criminal regulation of sex work and of hate speech—as examples of how pitched debates about the role and limits of the criminal law have played out within our constitutional jurisprudence.

Though this book is generally focused on true crimes enacted by Parliament, it is important to bear in mind that the range of ways that legislatures can prohibit activity through punishment—the scope of what is called "penal law"—is much broader than what is found in the *Criminal Code* or other federal criminal legislation. The *Criminal Code* contains many offences, but they constitute only a small number of all the offences in Canada. Most offences are regulatory. Regulatory offences can be enacted by the federal Parliament, provinces, or municipalities. They include traffic offences (such as speeding), polluting, engaging in a regulated activity without a licence or without keeping proper records, and offences relating to harmful commercial practices, such as using misleading advertising or not complying with health and safety regulations. The punishment for regulatory offences is usually a fine but may include imprisonment. In any event, the accused is frequently a corporation that cannot be

imprisoned but that can be fined or placed on probation. The primary purpose of regulatory offences is to deter risky behaviour and prevent harm rather than punish intrinsically wrongful and harmful behaviour. Generally, fewer restrictions are placed on the state in the investigation and prosecution of regulatory crimes. In Chapter 7 you will learn more about regulatory offences, their history and role, and some of the legal rules that apply to them. Chapter 11 discusses principles of corporate liability.

B. POLICE POWERS AND THE TRIAL PROCESS

The criminal law assumes concrete shape and has material impacts on people's lives through its enforcement and administration in the criminal justice system. The criminal law is *experienced* through policing, detention, and trial processes; those are the means by which legal rules and principles touch the lives of those they govern. For that reason, focusing on the principles of criminal liability alone fails to paint a realistic and socially accurate picture of the nature of the criminal law. Indeed, the majority of criminal justice spending (57.2 percent) is on the police; 32.2 percent on corrections, including federal and provincial prisons; 4.5 percent on courts; 3.5 percent on prosecutions; and 2.5 percent on legal aid to fund the defence of those accused of crimes: see Ting Zhang, *Costs of Crime in Canada, 2008* (Ottawa: Department of Justice, 2008).

Accordingly, after examining the limits on the criminal law, this book turns to the investigation of crime, addressing police powers (Chapter 3), moving then to the prosecution of crime and the trial process, including pre-trial issues such as the decision to grant bail and the selection of the jury (Chapter 4). Given the rights provided under the Charter to privacy and liberty, the presumption of innocence, and procedural fairness, these phases of the criminal process are rich with constitutional issues that invite debate about the meaning and effect of—and justifiable limits on—Charter rights. Indeed, most Charter litigation is conducted as part of the criminal process.

C. PRINCIPLES OF CRIMINAL LIABILITY

At the criminal trial, the touchstone principle is that the morally innocent must not be found guilty and punished. But what constitutes "guilt" for the purposes of criminal law? This is the fundamental question answered by the principles of criminal liability, explored in Part Two of this book. As required by the presumption of innocence, the Crown must generally prove beyond a reasonable doubt to the judge or jury that the accused committed the prohibited act, or *actus reus* (Chapter 5), with the required fault element, or *mens rea* (Chapter 6).

The *actus reus* is usually defined as an overt act, such as the taking of another person's property. The legislature can, however, define the prohibited conduct as an omission or a failure to take action. For example, a parent can be guilty of the criminal offence of failing to provide the necessities of life to his or her child. The *actus reus* also includes a requirement that conduct be voluntary and sometimes involves particular circumstances (such as being *impaired* while operating a conveyance) or prohibited consequences (such as *causing* bodily harm).

A great variety of fault elements are used in criminal and regulatory offences. Sometimes the fault element is specified in the wording of an offence by phrases such as "intentionally," "knowingly," "recklessly," or "negligently." Frequently, however, the courts will have to infer what type of fault element is required. Often a distinction between "subjective" and "objective" fault elements is drawn. A subjective fault or mental element depends on what was in the particular accused's mind at the time that the criminal act was committed. In determining this, the judge or jury must consider all the evidence presented, even if it reveals factors that are peculiar to the accused, such as the accused's diminished intelligence. On the other hand, an objective fault element does not depend on the accused's own state of mind but rather on what a

reasonable person in the circumstances would have known or done. Ignorance of the law is generally not an excuse (an issue discussed in Chapter 8), but the accused's ignorance of, or mistakes about, certain facts may prevent the prosecutor from establishing the necessary fault.

As noted above, there are a vast array of non-criminal offences called regulatory offences. There are special rules for determining liability for these offences (Chapter 7). Most regulatory offences, known in Canada as "strict liability offences," require the accused to establish a defence of due diligence or lack of negligence after the state has proven the prohibited act beyond a reasonable doubt. Other regulatory offences, known as "absolute liability offences," only require proof of the prohibited act and do not allow any defence of due diligence or require proof of any fault. When such offences are combined with imprisonment, they are constitutionally problematic because they can punish individuals and corporations even though they could not have reasonably been expected to prevent the prohibited act.

Although the simplest form of criminal liability is an individual committing the prohibited act or omission with the necessary fault, or *mens rea*, there are a number of important extensions of criminal liability. These are examined in Part Three of this book.

A crime may be committed by more than one person. A person who assists or otherwise participates in the commission of an offence can be convicted of the same offence as the person who actually commits the offence (Chapter 9). The parties provisions in s 21 of the *Criminal Code* mean that people who have different levels of involvement in a crime may be found guilty of the same offence. The extent of an offender's participation in a crime will be considered by the judge when determining the appropriate sentence.

A person might also be guilty of an offence that is not "complete." These ways of being held responsible for an offence are described as forms of "inchoate liability," and they are addressed in Chapter 10. For example, s 24 of the *Criminal Code* states that anyone having an intent to commit an offence, who does or omits to do anything beyond mere preparation to commit the criminal offence, is guilty of attempting to commit the offence, regardless of whether it was possible to commit an offence. A person punished for an attempted crime is punished more for his or her intent to commit the crime than the harm caused. Incitement, or counselling, and conspiracy are other forms of inchoate liability that will be examined in Chapter 10.

As corporations have come to play an increasingly influential role in our society, the question of whether and when corporations can be held criminally responsible has become more urgent and interesting. Chapter 11 explores the separate regime in the *Criminal Code* for determining the liability of corporations and other organizations.

Many of the most important principles of criminal liability, including several of a constitutional nature, have been developed in the context of two particular crimes: sexual assault and homicide. These two crimes, the principles that they have yielded, and the broader social world they respond to and are shaped by are explored in Part Four. The law of sexual assault, examined in Chapter 12, has been particularly dynamic over the last four decades and has risen to the forefront of public debate about the criminal justice system. The law of homicide—involving the important distinction between murder and manslaughter, as well as the classification of murder as first-degree or second-degree murder—is examined in Chapter 13.

Criminal liability is not complete, however, with proof of the *actus reus* and *mens rea*. Even if he or she has committed the prohibited act with the required fault, the accused may still be acquitted, or have a different or lesser penalty imposed, if a defence applies. These defences, or "principles of exculpation," are explored in Part Five. One such principle—provocation—applies only to the crime of murder and, if successful, results in a conviction for the lesser offence of manslaughter. This "partial" defence of provocation, which has been significantly narrowed in recent years, is addressed in Chapter 14. Chapter 15 examines the related defences of mental disorder and automatism as they relate to the accused's capacity to be at fault and to be held responsible for criminal acts. The mental disorder defence leads to a special disposition whereby the accused, although not convicted, may be subject to further detention or treatment. Chapter 16 examines the complex defences of intoxication as they apply to various

crimes. Intoxication most often acts as a defence that raises a reasonable doubt about whether the accused had the required fault or intent for more serious or complex crimes, but there is a form of the defence—extreme intoxication—that can negate liability for simpler offences. Intoxication defences are highly controversial and have resulted in interesting and important legislative interventions, particularly in respect of sexual assault.

Chapter 17 examines self-defence, a defence that has long been codified in the *Criminal Code* but was recently amended in an attempt to make it simpler. As will be seen, this defence is also controversial. It both reflects and is shaped by the context in which an accused may claim self-defence, having resorted to violent self-help. Chapters 18 and 19 examine the related defences of necessity and duress, which excuse crimes committed by people in agonizing circumstances where they have no reasonable choice but to commit the crime.

In this part, we will see that the field of criminal defences has also become constitutionalized in recent years, based on the idea that limits on defences are unconstitutional (violating s 7 of the Charter) when they would allow people to be deprived of their liberty in a manner that is not in accordance with the principles of fundamental justice.

D. SENTENCING AND PUNISHMENT

When an accused is found criminally liable, the criminal process is not at an end. The consequence of a conviction is the imposition of some form of punishment. It is critical that this be kept in mind throughout one's study of the criminal process: the sometimes abstract principles of criminal liability result in outcomes that are profoundly concrete—for the offender, for communities, and for society at large. The sentencing judge generally has wide discretion to tailor punishment to the gravity of the offence and the offender's degree of responsibility. The *Criminal Code* sets out a series of principles that the judge must consider and lists a range of objectives of sentencing, including denunciation, deterrence, separation, rehabilitation, reparations, and promotion of responsibility. These principles and objectives point back to fundamental questions about the overall purpose and goals of the criminal law: what, precisely, is the criminal process designed to achieve and is it capable of achieving it?

In Canada, no response to this question and no understanding of sentencing and punishment are possible without attention to the overincarceration of Indigenous peoples. This "crisis," as it has been described by the Supreme Court of Canada since 1999, and the legal principles that Parliament and the courts have adopted to respond to it, are at the heart of this book's discussion of sentencing and punishment in Part Six, Chapter 20. This part of the book also examines the politics and constitutionality of mandatory minimum sentences—an important contemporary story in the law of sentencing in Canada. The chapter ends by pointing to the need to think more carefully about the prison and, more generally, the adequacy of carceral responses to crime.

II. THE CONSTITUTIONAL CONTEXT OF CRIMINAL LAW

The supreme source of criminal law in Canada is the Constitution, as represented by both the division of powers between federal and provincial governments in ss 91 and 92 of the *Constitution Act, 1867* and the rights and freedoms in the 1982 *Canadian Charter of Rights and Freedoms*. These documents are key elements of the constitutional context of criminal law in Canada. In your study of the criminal law, you will see references to the division of powers and frequent discussion of the impact of the Charter. Less commonly discussed, but equally significant, aspects of the constitutional history and context of Canadian criminal law are the treaty relationships between Indigenous peoples and the Crown, Aboriginal rights and title as protected by the Constitution, and Indigenous legal traditions. This section introduces you to the division of powers and the Charter before exposing you to ways in which Indigenous law,

Aboriginal rights, and treaties with Indigenous peoples may bear on how you think about the criminal law.

A. THE CRIMINAL LAW AND THE DIVISION OF POWERS

Since 1867, the Constitution has provided for a division of legislative authority and responsibility between the federal government, on the one hand, and the provinces, on the other. Either the federal or provincial legislature has the authority to act on any given issue. Prior to the introduction of the Charter, the key task in constitutional review of legislation was to determine which level of government had authority over a given issue and whether a legislature acted outside the matters on which it had authority. Legislation on matters outside the areas of authority given to a level of government is unconstitutional because it is *ultra vires* (outside the powers) of the legislature in question. How is legislative authority over the complex field of criminal law, and the many institutions involved in its administration, divided in Canada?

Section 91(27) of the *Constitution Act, 1867* vests in the federal Parliament exclusive jurisdiction to legislate in relation to "the Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters." This means that the substance of criminal law and rules of criminal procedure in Canada are federal matters. The federal Parliament also has jurisdiction under s 91(28) to establish, maintain, and manage penitentiaries, which have been considered to be the place of detention for persons serving terms of imprisonment lasting two years or more.

The provinces have jurisdiction under s 92(15) to impose punishment by way of fine, penalty, or imprisonment in order to enforce valid provincial laws. The provinces also have jurisdiction over the administration of justice under s 92(14), the establishment of "Reformatory Prisons" (s 92(6)) (the place of detention for persons serving terms of imprisonment lasting less than two years), and "Asylums" (s 92(7)), and property and civil rights (s 92(13)).

The federal government appoints the judges of the higher superior trial courts under s 96 of the *Constitution Act, 1867*. The provinces appoint judges to provincial courts, where most criminal trials are held. The federal government also appoints appeal court judges, including those on the Supreme Court of Canada.

The following excerpt outlines the historical and contemporary importance of federal jurisdiction over criminal law and procedure.

Martin L Friedland, "Criminal Justice and the Division of Power in Canada"

in Martin L Friedland, ed, *A Century of Criminal Justice*
(Toronto: Carswell, 1984) ch 2 (footnotes omitted)

Confederation

The discussion and legislative debates leading to Confederation show that there was no controversy over whether legislative power over criminal law and procedure should be given to the federal government. Centralizing the criminal law power was in deliberate contrast to the American Constitution which left control over the criminal law power to the individual states.

Why was the criminal law power given to the federal government? Sir John A. Macdonald, then the Attorney-General, expressed what must have been the consensus at the time when, in the parliamentary debates in 1865, he stated:

> The criminal law too—the determination of what is a crime and what is not and how crime shall be punished—is left to the General Government. This is a matter

> almost of necessity. It is of great importance that we should have the same criminal law throughout these provinces—that what is a crime in one part of British America, should be a crime in every part—that there should be the same protection of life and property in one as in another.

He then commented on the American division of authority:

> It is one of the defects in the United States system, that each separate state has or may have a criminal code of its own,—that what may be a capital offence in one state, may be a venial offence, punishable slightly, in another. But under our Constitution we shall have one body of criminal law, based on the criminal law of England, and operating equally throughout British America, so that a British American, belonging to what province he may, or going to any other part of the Confederation, knows what his rights are in that respect, and what his punishment will be if an offender against the criminal laws of the land. I think this is one of the most marked instances in which we take advantage of the experience derived from our observations of the defects in the Constitution of the neighboring Republic.

There is no doubt that the Civil War in the United States was a major factor in the desire of many to place some of the more important powers and symbols of nationhood within the legislative authority of the federal government. The criminal law plays an important role in society in stating fundamental values. This can be seen today in the discussions taking place on such criminal law issues as the law of abortion, the law relating to homosexual conduct, the question of the reintroduction of capital punishment, and the activities of the police and the security service. ...

Scope of the Criminal Law Power

A hundred years ago, the courts gave the criminal law power a very wide meaning. In 1882, in *Russell v. The Queen*, the Privy Council seemed to uphold the validity of the Canada Temperance Act of 1878 under the criminal law power. The Court stated:

> Laws ... designed for the promotion of public order, safety, or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights. They are of a nature which fall within the general authority of Parliament to make laws for the order and good government of Canada, and have direct relation to criminal law, which is one of the enumerated classes of subjects assigned exclusively to the Parliament of Canada.

But doubt was thrown on *Russell* by Lord Watson in 1896 in the *Local Prohibition* case. He explained *Russell* as based on the "peace, order and good government" clause, and went so far as to say, in one example, that "an Act restricting the right to carry weapons of offence, or their sale to young persons, within the province would be within the authority of the provincial legislature" and not of the federal parliament. Lord Watson's enhancement of provincial power over "property and civil rights" at the expense of federal powers such as the criminal law power was also found in Lord Haldane's judgments in the 20th century.

In 1922, in the *Board of Commerce* case, Lord Haldane severely restricted the criminal law power to cases "where the subject matter is one which by its very nature belongs to the domain of criminal jurisprudence." But later decisions have broadened that definition. Lord Atkin in the *P.A.T.A.* case in 1931 gave the following definition: "The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited

with penal consequences?" But just as Haldane's definition was too narrow, Lord Atkin's has proven to be too wide. The federal government cannot take jurisdiction simply by imposing a criminal penalty. The *Margarine Reference* case in 1951 demonstrated this limitation on the criminal law power. The Supreme Court held that to forbid manufacture and sale of margarine for economic purposes is "to deal directly with the civil rights of individuals in relation to particular trade within the Provinces." A similar approach was taken by the Supreme Court in 1979 with respect to the marketing of apples under the Canada Agricultural Products Standards Act in *Dominion Stores Ltd. v. The Queen* and with respect to the marketing of "light beer" under the federal Food and Drugs Acts in the *Labatt Breweries* case. In both cases the majority of the Supreme Court held that the criminal law power could not justify the legislation and so declared parts of the federal legislation *ultra vires*.

... The recently enacted gun control provisions have been challenged—unsuccessfully—in a number of cases. The Supreme Court of Canada has not yet dealt with the issue. When it does, no doubt it will disregard Lord Watson's statement, quoted earlier, and uphold the federal legislation. Controlling firearms is directly related to the criminal law. One of the reasons why the United States has a gun problem is because of the absence of strong federal legislation which would effectively prevent guns being sent from lax gun control states to other states. ...

[The Supreme Court did indeed hold that gun control laws, including those providing that it was a criminal offence to have an unlicensed or unregistered gun, were within the federal jurisdiction. It concluded that "the regulation of guns as dangerous products is a valid purpose within the criminal law power." See *Reference re Firearms Act (Can)*, 2000 SCC 31 at para 33. See also *Quebec (AG) v Canada (AG)*, 2015 SCC 14, confirming that the federal government could not only repeal the long gun registry but destroy records so that Quebec could not use them to create its own registry. The recent trend seems to be moving back toward an expansive approach to Parliament's criminal law power to include matters such as offences that restrict the advertising of tobacco or the introduction of substances that are toxic to the environment. See *RJR-MacDonald Inc v Canada (AG)*, [1995] 3 SCR 199; *R v Hydro-Québec*, [1997] 3 SCR 213. See generally The Constitutional Law Group, *Canadian Constitutional Law*, 5th ed (Toronto: Emond, 2016) ch 11.]

Provincial Legislation

Provincial laws can be struck down either for lack of constitutional power under section 92 or for conflict with federal legislation. Under both heads the Supreme Court of Canada has tended to uphold provincial law. A trio of cases in 1960 showed the reluctance of the Supreme Court of Canada to declare provincial legislation inoperative because of existing federal legislation. Of course it will do so if it conflicts with federal legislation. But what is meant by conflicts? In *O'Grady v. Sparling* the Supreme Court upheld provincial careless driving legislation, although the federal Criminal Code makes it an offence to operate a motor vehicle in a criminally negligent manner. In *Stephens v. The Queen* the Supreme Court upheld provincial competence to require a driver involved in an accident to stop, provide particulars, and offer assistance, in spite of a provision in the Criminal Code making the same conduct an offence, though with the added element of "intent to escape civil or criminal liability." Finally, in *Smith v. The Queen* the Supreme Court upheld a section of the Ontario Securities Act making it an offence to furnish false information in any document required to be filed or furnished under the Act, although the Criminal Code makes it an offence for a person to publish a prospectus which he knows is

false in a material particular with intent to induce persons to become shareholders in a company. In none of these cases was there held to be a conflict. ...

... The tendency to uphold provincial legislation can also be seen in a number of recent Supreme Court of Canada cases in which provincial legislation was challenged as not falling within section 92. In 1978 in *Dupond* [*v City of Montreal*, [1978] 2 SCR 770] the majority of the Supreme Court of Canada upheld a Montreal by-law designed to prevent assemblies and passed to cope with occurrences such as the F.L.Q. rallies. The same year the Supreme Court in the *McNeil* case [*Nova Scotia Board of Censors v McNeil*, [1978] 2 SCR 662] upheld Nova Scotia legislation which permitted the banning of the movie, "Last Tango in Paris," even though there was also federal obscenity legislation in the Criminal Code. In 1982, in the *Schneider* case [*Schneider v The Queen*, [1982] 2 SCR 112], the Supreme Court upheld provincial legislation providing for the compulsory treatment of heroin addicts. In the most recent Supreme Court case, *Westendorp v. The Queen*, however, the Court struck down a Calgary by-law which had attempted to deal with prostitution by prohibiting a person from remaining on the street for the purpose of prostitution or approaching another person on the street for the purpose of prostitution. Laskin C.J., for a unanimous Supreme Court, held that the by-law was "a colourable attempt to deal, not with a public nuisance but with the evil of prostitution. ... If a province or municipality may translate a direct attack on prostitution into street control through reliance on public nuisance, it may do the same with respect to trafficking in drugs, and, may it not, on the same view, seek to punish assaults that take place on city streets as an aspect of street control!" Thus, just as there are limits on federal legislation, there are limits on the creation of provincial offences.

[As you will read below, a provincial attempt to prohibit the performance of an abortion other than in a hospital has been held to be an invalid provincial attempt to enact criminal laws. See *R v Morgentaler*, [1993] 3 SCR 463. Important cases concerning the scope of the federal criminal law power, and conflicts and interactions with legislation passed under provincial heads of authority, continue to arise. Provincial legislation governing the civil forfeiture of proceeds of crime was upheld in *Chatterjee v Ontario*, 2009 SCC 19, even though it overlapped with certain *Criminal Code* provisions. In a sharply divided decision in *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, the Supreme Court held that certain of the provisions of the federal Act were valid exercises of the criminal law power, whereas others were *ultra vires* Parliament, as they were "best classified as being in relation to three areas of exclusive provincial legislative competence: the establishment, maintenance and management of hospitals; property and civil rights in the province; and matters of a merely local or private nature in the province" (at para 287).]

Administering the Criminal Law

Section 92(14) of the B.N.A. Act gives the provinces authority over "the administration of justice in the province, including the constitution, maintenance, and organization of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts." Does this give the provinces or the federal government the primary power to prosecute federal offences enacted under the criminal law power? In 1979 in the *Hauser* case [*R v Hauser*, [1979] 1 SCR 984] the Supreme Court was called on to decide whether the federal government could control prosecutions under the Narcotic Control Act [SC 1996, c 19]. The Court held that the federal government had this power, although, to the surprise of many, not on the basis that the Narcotic Control Act was criminal law, but rather because it was

enacted under the "peace, order and good government" clause. The Court, therefore, left open the question of what would happen when the issue related directly to enforcing the criminal law.

Two important cases decided by the Supreme Court in 1983 dealt with that question. In *A.G. Canada v. Canadian National Transportation Ltd. et al.* the issue was whether the federal government has the power to control prosecutions under the Combines Investigation Act. Section 2 of the Criminal Code gives the power to prosecute federal offences not under the Criminal Code to the Attorney-General of Canada. Chief Justice Laskin gave the judgment for the majority of the seven-member court, holding that the Combines Act is valid under section 91(27), the criminal law power, and that the federal government has exclusive authority to control prosecutions. The majority judgment did not deal with the validity of the legislation under any other head of federal power. Dickson J. upheld federal prosecutorial authority for violations of the Combines Investigation Act under the federal "trade and commerce" power. With respect to the criminal law power, Dickson J. maintained the position he had taken in his dissent in *Hauser* that only the provincial Attorney General can validly prosecute criminal enactments. ...

In *The Queen v. Wetmore and Kripp*, released the same day as the *Canadian National Transportation* case, the issue was the power to prosecute under the federal Food and Drugs Act. Again, Laskin C.J. held that because the Act fell under the criminal law power the federal government could control who had the power to prosecute. Dickson J., dissenting and characterizing the view of the majority as "blind centralism," held that the legislation was only valid under the criminal law power and thus it was the provincial, not the federal Attorney General who had the power to prosecute. ...

The result of the cases, then, appears to be that the federal government has exclusive power to prosecute federal offences. This power can, however, be delegated to the provincial Attorney General as is done directly in section 2 of the Criminal Code for Criminal Code offences. ...

Thus far the courts have not dealt directly with the question of whether the federal government could, if it wished, control prosecutions under the Criminal Code itself. The issue is not likely to arise because section 2 of the Code now gives this power to the provincial Attorneys General. ...

[Section 2 still generally defines the attorney general in charge of prosecuting *Criminal Code* offences as the provincial attorney general but also now grants the federal attorney general concurrent jurisdiction to prosecute terrorism offences or offences that were committed outside of Canada but can be prosecuted in Canada.]

Do you agree with those, such as Laskin CJ, who support a strong and exclusive federal jurisdiction in matters concerning criminal justice? What would be the advantages and disadvantages of giving the provinces more power in these matters?

Justice Dickson, as he then was, stated in his dissent in *R v Hauser*, [1979] SCR 984 at 1032 that part of the Confederation bargain was that while the criminal law was to be enacted by the federal Parliament, its administration was to be left in the hands of local and provincial authorities "where it could be more flexibly administered":

> The position of decentralized control, which had obtained in England from time immemorial, and in Canada prior to Confederation, with local administration of justice, local police forces, local juries, and local prosecutors, was perpetuated and carried forward into the Constitution through s. 92(14). The administration of criminal justice was to be kept in local hands and out of the control of central government.

Before the enactment of the Charter, exclusive federal jurisdiction over criminal law and procedure was one of the few means to strike down provincial legislation that threatened civil liberties.

Switzman v Elbling and AG of Quebec

[1957] SCR 285

KERWIN CJ: Section 1 provides

> 1. This Act may be cited as *Act Respecting Communistic Propaganda*.

Sections 3 and 12 read:

> 3. It shall be illegal for any person, who possesses or occupies a house within the Province, to use it or allow any person to make use of it to propagate communism or bolshevism by any means whatsoever.
>
> 12. It shall be unlawful to print, to publish in any manner whatsoever or to distribute in the Province any newspaper, periodical, pamphlet, circular, document or writing whatsoever propagating or tending to propagate communism or bolshevism.

Sections 4 to 11 provide that the Attorney-General, upon satisfactory proof that an infringement of s. 3 has been committed, may order the closing of the house; authorize any peace officer to execute such order, and provide a procedure by which the owner may apply by petition to a judge of the Superior Court to have the order revised. Section 13 provides for imprisonment of anyone infringing or participating in the infringement of s. 12. ...

The validity of the statute was attacked upon a number of grounds, but, in cases where constitutional issues are involved, it is important that nothing be said that is unnecessary. In my view it is sufficient to declare that the Act is legislation in relation to the criminal law over which, by virtue of head 27 of s. 91 of the *British North America Act*, the Parliament of Canada has exclusive legislative authority. The decision of this Court in *Bédard v. Dawson et al.* (1923), 40 C.C.C. 404 is clearly distinguishable. As Mr. Justice Barclay points out, the real object of the Act here under consideration is to prevent propagation of communism within the Province and to punish anyone who does so—with provisions authorizing steps for the closing of premises used for such object. The *Bédard* case was concerned with the control and enjoyment of property. ... It is not necessary to refer to other authorities, because, once the conclusion is reached that the pith and substance of the impugned Act is in relation to criminal law, the conclusion is inevitable that the Act is unconstitutional.

[Seven other judges concurred with Kerwin CJ in the result. Justice Taschereau dissented and relied on *Bédard v Dawson* (1923), 40 CCC 404 (SCC), which had upheld a Quebec law aimed at closing "disorderly houses" after there had been *Criminal Code* convictions for gambling or prostitution offences. Justice Taschereau stated that the provinces had the power to legislate to prevent crime such as treason and sedition.]

Even after the enactment of the Charter, the inability of the provinces to enact laws classified as criminal laws was still applied by the courts.

R v Morgentaler

[1993] 3 SCR 463

SOPINKA J: The question in this appeal is whether the *Nova Scotia Medical Services Act*, RSNS 1989, c. 281, and the regulation made under the Act, N.S. Reg. 152/89, are *ultra vires* the province of Nova Scotia on the ground that they are in pith and substance criminal law. The Act and regulation make it an offence to perform an abortion outside a hospital. ...

In January 1988, this Court ruled that the *Criminal Code* provisions relating to abortion were unconstitutional because they violated women's Charter guarantee of security of the person: *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (*Morgentaler* (1988)). At the same time the Court reaffirmed its earlier decision that the provisions were a valid exercise of the federal criminal law power: *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616 (*Morgentaler* (1975)). The 1988 decision meant that abortion was no longer regulated by the criminal law. It was no longer an offence to obtain or perform an abortion in a clinic such as those run by the respondent. ... This legislation deals, by its terms, with a subject historically considered to be part of the criminal law—the prohibition of the performance of abortions with penal consequences. It is thus suspect on its face. Its legal effect partially reproduces that of the now defunct s. 251 of the *Criminal Code*, in so far as both precluded the establishment and operation of free-standing abortion clinics. ... The primary objective of this legislation was to prohibit abortions outside hospitals as socially undesirable conduct and any concern with the safety and security of pregnant women or with health care policy, hospitals or the regulation of the medical profession was merely ancillary. This legislation involves the regulation of the place where an abortion may be obtained, not from the viewpoint of health care policy, but from the viewpoint of public wrongs or crimes. ...

[Chief Justice Lamer and La Forest, L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, and Major JJ concurred with Sopinka J in declaring the impugned law to be an unconstitutional provincial invasion of the federal criminal law power.]

Reference re Firearms Act (Can)

2000 SCC 31

THE COURT: In 1995, Parliament amended the *Criminal Code*, R.S.C., 1985, c C-46, by enacting the *Firearms Act*, S.C. 1995, c. 39, commonly referred to as the gun control law, to require the holders of all firearms to obtain licences and register their guns. In 1996, the Province of Alberta challenged Parliament's power to pass the gun control law by a reference to the Alberta Court of Appeal. The Court of Appeal by a 3:2 majority upheld Parliament's power to pass the law. The Province of Alberta now appeals that decision to this Court. ...

The answer to this question lies in the Canadian Constitution. The Constitution assigns some matters to Parliament and others to the provincial legislatures: *Constitution Act, 1867*. The federal government asserts that the gun control law falls under its criminal law power, s. 91(27), and under its general power to legislate for the "Peace, Order and good Government" of Canada. Alberta, on the other hand, says the law falls under its power over property and civil rights, s. 92(13). All agree that to resolve this dispute, the Court must first determine what the gun control

law is really about—its "pith and substance"—and then ask which head or heads of power it most naturally falls within.

We conclude that the gun control law comes within Parliament's jurisdiction over criminal law. The law in "pith and substance" is directed to enhancing public safety by controlling access to firearms through prohibitions and penalties. This brings it under the federal criminal law power. While the law has regulatory aspects, they are secondary to its primary criminal law purpose. The intrusion of the law into the provincial jurisdiction over property and civil rights is not so excessive as to upset the balance of federalism. ...

Yet another argument is that the ownership of guns is not criminal law because it is not immoral to own an ordinary firearm. There are two difficulties with this argument. The first is that while the ownership of ordinary firearms is not in itself regarded by most Canadians as immoral, the problems associated with the misuse of firearms are firmly grounded in morality. Firearms may be misused to take human life and to assist in other immoral acts, like theft and terrorism. Preventing such misuse can be seen as an attempt to curb immoral acts. Viewed thus, gun control is directed at a moral evil.

The second difficulty with the argument is that the criminal law is not confined to prohibiting immoral acts: see *Proprietary Articles Trade Association v. Attorney-General for Canada*, [1931] A.C. 310 (P.C.). While most criminal conduct is also regarded as immoral, Parliament can use the criminal law to prohibit activities which have little relation to public morality. For instance, the criminal law has been used to prohibit certain restrictions on market competition. ... Therefore, even if gun control did not involve morality, it could still fall under the federal criminal law power.

We recognize the concerns of northern, rural and aboriginal Canadians who fear that this law does not address their particular needs. They argue that it discriminates against them and violates treaty rights, and express concerns about their ability to access the scheme, which may be administered from a great distance. These apprehensions are genuine, but they do not go to the question before us—Parliament's jurisdiction to enact this law. Whether a law could have been designed better or whether the federal government should have engaged in more consultation before enacting the law has no bearing on the division of powers analysis applied by this Court. If the law violates a treaty or a provision of the Charter, those affected can bring their claims to Parliament or the courts in a separate case. The reference questions, and hence this judgment, are restricted to the issue of the division of powers.

We also appreciate the concern of those who oppose this Act on the basis that it may not be effective or it may be too expensive. Criminals will not register their guns, Alberta argued. The only real effect of the law, it is suggested, is to burden law-abiding farmers and hunters with red tape. These concerns were properly directed to and considered by Parliament; they cannot affect the Court's decision. The efficacy of a law, or lack thereof, is not relevant to Parliament's ability to enact it under the division of powers analysis. ... The cost of the program, another criticism of the law, is equally irrelevant to our constitutional analysis.

On federalism and the criminal law, see Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) ch 18; Patrick Monahan, Byron Shaw & Padraic Ryan, *Constitutional Law*, 5th ed (Toronto: Irwin Law, 2017) ch 11; and Mark Carter, "Criminal Law in the Federal Context," in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) 475.

B. THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

With the introduction of the Charter in 1982, the constitutional context for criminal law in Canada changed in a fundamental way. In the constitutional review of legislation a new question was added: even if the law complies with the division of legislative authority set out by the division of powers, does this legislative act comply with the rights and freedoms set out in the Charter?

The Charter pervades the whole of criminal law from the initial decision to criminalize conduct, through the investigation of crime by police, the prosecution of offences, the determination of criminal liability, and even the sentencing of offenders. Almost every chapter in this book will examine some aspect of the Charter. We recognize, however, that the Charter may be unfamiliar to some students, and for this reason what follows is a brief introduction to the Charter.

The Charter, as part of the supreme law of Canada, applies to the activities of Canadian legislatures and governmental officials such as the police. It differs from the *Canadian Bill of Rights* enacted in 1960, both because it is part of the Constitution and because it applies to all governments and not just the federal government.

The Charter guarantees a number of rights, including freedom of expression and equality rights. The legal rights set out in ss 7 to 14 of the Charter are designed to protect those subject to criminal investigation, those charged and tried for criminal offences, and those punished for crimes. The broadest legal right is contained in s 7, and it can potentially apply at any of the above stages of the criminal process. It provides as follows:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Sections 8 to 10 of the Charter protect those subject to investigation by the state. Section 8 provides the right to be secure against unreasonable searches or seizures, while s 9 provides the right not to be arbitrarily detained or imprisoned. Upon arrest or detention, individuals have a number of rights under s 10, including the right to retain and instruct counsel without delay and to be informed of that right.

Sections 11 to 14 of the Charter protect those who are charged and tried for offences. For example, before trial, a person who is charged has a right not to be denied reasonable bail without just cause (s 11(e)) and to be tried within a reasonable time (s 11(b)). At trial, the accused has, among other rights, the right to be presumed innocent until proven guilty in a court of law in a fair and public hearing by an independent and impartial tribunal (s 11(d)) and the right to a jury trial in certain circumstances (s 11(f)). When finally acquitted or found guilty and punished for the offence, the accused has the right not to be tried or punished for it again (s 11(h)).

Everyone has the right not to be subjected to any cruel and unusual treatment or punishment (s 12), and this is the right that is most relevant to sentencing issues.

Another right that has increased relevance to criminal justice is s 15(1) of the Charter, which provides:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Laws and practices can be found to infringe s 15(1) of the Charter. At the same time, a concern about equality is part of the rationale for certain criminal laws, such as those prohibiting hate speech or obscenity.

If a law is found to infringe a Charter right, it is open for the state to prove under s 1 of the Charter that it is a reasonable limit prescribed by law and demonstrably justified in a free and democratic society. If the law is not so justified, then under s 52 of the *Constitution Act, 1982*

any law that is inconsistent with the Charter is to the extent of the inconsistency of no force or effect.

In addition to the remedy of striking laws down, the courts have broad powers to order remedies for Charter violations, including unconstitutional police practices. Section 24(1) of the Charter provides that those whose Charter rights have been infringed may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just. Section 24(2) governs the remedy of exclusion of evidence obtained in a manner that violates Charter rights by providing that evidence shall be excluded from a criminal trial if it is established that, having regard to all the circumstances, its admission would bring the administration of justice into disrepute.

Finally, it should be noted that in the context of the legal rights discussed above, not only can the state try to justify laws that violate rights as reasonable limits under s 1, but it can also provide that an Act or a provision thereof shall operate notwithstanding s 2 or ss 7 to 15 of the Charter (s 33). This power has rarely been used by governments and never used with respect to the criminal law.

You will study a number of these Charter rights and remedies in the chapters that follow. For further readings on the Charter, see Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007); Don Stuart, *Charter Justice in Canadian Criminal Law*, 7th ed (Toronto: Carswell, 2018); and Robert J Sharpe & Kent Roach, *The Charter of Rights and Freedoms*, 6th ed (Toronto: Irwin Law, 2017).

C. TREATIES, ABORIGINAL RIGHTS, AND INDIGENOUS LAW

The criminal law was one tool used by colonial authorities and the Canadian state to extend and consolidate power over a territory with which Indigenous peoples had a relationship far deeper than Western concepts of ownership, and on which Indigenous nations had administered systems of law and justice long before the arrival of European law. This history of the use of Canadian criminal law is filled with violence, tragedy, and injustice. See e.g. Shelley AM Gavigan, *Hunger, Horses, and Government Men: Criminal Law on the Aboriginal Plains, 1870-1905* (Vancouver: UBC Press, 2012). The conflict between the pre-existing sovereignty and laws of Indigenous peoples and the asserted sovereignty and legal authority of the Canadian state is thus a crucial, though underexamined, component of the constitutional context of criminal law in Canada.

In some parts of Canada, the sovereignty of Indigenous peoples was acknowledged by the British Crown through historical nation-to-nation treaties, which established foundational relationships between Indigenous nations and the British Crown. These treaties included certain rights and entitlements for the Indigenous nations that signed the treaty, in exchange for allowing the colonial government to share, use, and settle the land. Many aspects of these treaties have not been honoured by the Canadian state. In *Canadian Justice, Indigenous Injustice: The Gerald Stanley and Colten Boushie Case* (Montreal & Kingston: McGill-Queen's University Press, 2019), Kent Roach discusses the history and contemporary relevance of Treaty 6, which was signed in 1876 and covers parts of present-day Alberta and Saskatchewan. He explains as follows (at 17):

> The text of Treaty 6 agreed to provide the Indigenous tribes with farming equipment, medicine chests, schools, and relief during famine. As Cree Elder Gordon Oakes has explained, the Queen promised, "education health, housing, school, blankets, farm implements: what the Indian can use to make a living. These are the things that were promised." Many of these promises were broken. This Treaty, however, can still provide benefits for both Indigenous and non-Indigenous people. It is a foundational constitutional document that provides a basis for governing with consent, respect and harmony, as opposed to coercion, force and polarization.

Roach notes that, like many of the so-called "Numbered Treaties," Treaty 6 contained a "peace, order, and mutual aid and assistance" clause that committed the signatories to "maintain peace and good order." Relying on the work of James (Sa'ke'j) Henderson, Roach explains that "the First Nations chiefs who signed the Treaty believed [this clause] contemplated the preservation of Indigenous justice systems through nation-to-nation interactions with the settlers over justice issues that affected them both" (at 24; see also James (Sa'ke'j) Henderson, *Treaty Rights in the Constitution of Canada* (Toronto: Thomson, 2007) at 551-56; Matthias Leonardy, *First Nations Criminal Jurisdiction in Canada* (Saskatoon: Native Law Centre, 1998) at 199-209).

As foundational constitutional documents, treaties continue to have independent force. Indeed, s 35(1) of the *Constitution Act, 1982*, the same constitutional document that introduced the Charter, specifically provides that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." What relevance does this constitutional context have for contemporary criminal law?

In *Canadian Justice, Indigenous Injustice*, Roach argues that the failure to include Indigenous peoples on Canadian juries violates such peace, order, and mutual aid and assistance treaty clauses. You will learn more about the selection of jurors in Chapter 4, and the *Stanley* case in Chapter 17. But treaty rights have also been invoked by Indigenous peoples to resist the authority of Canadian criminal law.

R v Pamajewon, [1996] 2 SCR 821, concerned two members of the Shawanaga First Nation and two members of the Eagle Lake First Nation who had been charged with *Criminal Code* offences for gambling-related activities on their reserves. They had been convicted at trial and the convictions were upheld on appeal. Before the Supreme Court of Canada, the appellants argued that these gambling activities, which were conducted in accordance with laws passed by the First Nations, were protected by their Aboriginal and treaty right to self-government, recognized and affirmed by s 35(1) of the *Constitution Act, 1982*. Accordingly, they argued, they could not be convicted of these offences. The Supreme Court rejected this argument. The Court concluded that the accused's claim of the right to manage their lands was cast at too broad a level of generality and the right to regulate gambling on their reserves was not part of a practice, custom, or tradition integral to the distinctive culture of the Indigenous group claiming the right. The Court's restrictive approach to defining Aboriginal rights in this and related cases has been heavily criticized. See e.g. Brad Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*" (1996) 42:4 McGill LJ 1011; John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22:1 American Indian L Rev 37; John Borrows, "With or Without You: First Nations Law (in Canada)" (1996) 41:3 McGill LJ 629.

R v Pamajewon can be contrasted with a more generous approach taken by the United States Supreme Court in *California v Cabazon Band of Mission Indians*, 480 US 202 (1987), which held that tribes should be able to regulate gambling as a regulatory matter. This decision spawned a boom in on-reserve gambling, which has become an industry earning $21 billion annually. Indigenous gambling in Canada has also developed since *Pamajewon*, with casinos now earning $375 million annually for more than 300 of Canada's 630 First Nations. At the same time, First Nations self-determination has continued to be frustrated by requirements for provincial approval of gaming under the *Criminal Code*. See Yale Belanger, "First Nations Gaming in Canada" (2018) 30 J L & Soc Pol'y 175.

In 1993, Donald Marshall Jr, the Mi'kmaq man whose wrongful conviction for murder will be examined in detail in Chapter 4, was charged with fishing for eels without a licence. When told by a fisheries officer that he needed a licence, he replied: "I don't need a license. I have the 1752 Treaty." Jane MacMillan, *Truth and Conviction: Donald Marshall Jr. and the Mi'kmaq Quest for Justice* (Vancouver: University of British Columbia Press, 2018) at 113. After a lengthy, expensive and divisive trial and appeals that featured much historical evidence and that took a toll on his health, Donald Marshall Jr's claim of a treaty right to fish commercially was eventually upheld by the Supreme Court of Canada in *R v Marshall*, [1999] 3 SCR 533.

What are the risks of misunderstanding and distortion when Indigenous people must translate and explain their laws and assert their rights in the context of penal proceedings? What resources for different approaches to justice might thereby be lost to us all? In *Truth and Conviction*, Jane MacMillan writes (at 116) that

> at no time during the legal proceedings was Donald given an opportunity to express how it was that he became a harvester, how he understood his ability to fish as part of his inherent right and as part of his Mi'kmaq identity. He did not get a chance to describe how he practiced Mi'kmaq legal principles of responsible harvesting and sharing.

She also details a subsequent case in which a similar charge was resolved under Mi'kmaq law with a focus on conservation and lobsters, as opposed to the state as the victim, and with a penalty of a week of the accused's catch being given to the community (ch 8).

As you have learned, both the Charter and Aboriginal and treaty rights are fundamental aspects of the constitutional context for criminal law in Canada. How should these two dimensions of our constitutional lives interact? Note that s 25 of the Charter provides as follows:

> 25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
>
> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
>
> (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Consider the following case:

R v Ippak
2018 NUCA 3

[The case arose in the small Nunavut community of Sanikiluaq. Overwhelmingly Inuit, Sanikiluaq was a "dry community" in which the decision was made, by plebiscite, to prohibit the purchase, sale, transport, and possession of alcohol. The accused, Ippak, was the sole passenger on a flight from Montreal to Sanikiluaq. The local RCMP had received an anonymous tip that Ippak was carrying alcohol. Two officers met Ippak at the airport and advised him that he was under investigation for transporting liquor. They asked to search his bags, and he agreed (and signed a "Consent To Search Form" [at para 8]), saying that he was not carrying alcohol. One officer opened his bag, detected "a strong aroma of marihuana" (at para 9), and arrested Ippak for possession of marijuana. The officers ultimately found 3.7 pounds of marijuana and charged Ippak with possession for the purpose of trafficking. All agreed that the police lacked reasonable grounds to detain Ippak and that the officers' actions therefore breached his ss 8, 9, and 10 Charter rights. Indeed, the evidence was that, in an effort to enforce the alcohol prohibition, the RCMP in Sanikiluaq frequently detained individuals at the airport and searched their bags without reasonable grounds and without informing them of their right to counsel, as required by the Charter. As you will learn, when evidence is obtained in a manner that infringes Charter rights, s 24(2) requires a judge to determine whether that evidence should be excluded; it must be excluded if "the admission of it in the proceedings would bring the administration of justice into disrepute." The Supreme Court's guiding authority on the application of s 24(2) is *R v Grant*, 2009 SCC 32. The trial judge found that the breaches were not serious and admitted the evidence, leading to

Ippak's conviction. At the Court of Appeal for Nunavut, all three judges on the panel found that the breaches were wilful, systemic, and serious, and therefore excluded the evidence and entered an acquittal. But whereas the majority of the Court (Wakeling and Schutz JJA) based its decision on case law and the *Grant* test, making no reference to Indigenous law, Berger JA, writing a separate concurring decision, took a different approach:]

Berger JA (concurring):

[56] This appeal engages a consideration of s. 25 of the Charter … .

• • •

[70] The issues on appeal have their genesis in breaches of ss 7, 8, 9 and 10(b) of the *Charter of Rights and Freedoms* (The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Charter*]). A tension arises, however, between Inuit law and traditions and the protection of individual liberty through *Charter* remedies. In order to reconcile the two, I have concluded that Inuit law's restorative justice approach, providing as it does an alternative form of justice, furnishes a just solution in the case at bar that is not inconsistent with Canadian legal principles … .

• • •

[73] In his seminal work entitled "*Aboriginal Justice and the Charter—Realizing a Culturally Sensitive Interpretation of Legal Rights*", UBC Press 2012, David Milward acknowledges that the culturally sensitive interpretation of legal rights "actually involves addressing two different kinds of tension." He explains at pg. 72:

> "One source of tension is the conflict between protecting individual liberty through Charter rights and maintaining legal space for aboriginal traditions that, by comparison place greater emphasis on the collective good."

[74] He proposes that principles of constitutional balancing provide a workable method to address this tension.

[75] Citing s. 35(1) of the *Constitution Act, 1982*, Milward asserts that "an essential consideration involved with realizing the culturally sensitive interpretation of legal rights is the exploration of how the concept may fit within the broader Canadian legal system." In his review of the competing views on how legal rights impact upon aboriginal rights, he relies on the proposition that s. 25 of the *Charter* (referenced at the start of this judgment) should be interpreted in a way that balances the rights of aboriginal individuals with the collective rights of aboriginal people.

• • •

[83] The decision to keep Sanikiluaq "dry", while it has its origins in colonization, appears to conform to the positivistic approach in Aboriginal law that engages community members to create binding laws and regulate behaviour (John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 46 [*Indigenous Constitution*]). These types of laws rely on the authority of a "sufficient number of people within a community" and create a guide for behaviour (*Indigenous Constitution* at 47). Positivistic laws, when used in an Aboriginal context, still carry a connection to sacred rules in their particular culture. A bandleader or other important figure would often declare positivistic laws, however, these laws can also develop from the community's group perspective on an issue (*Indigenous Constitution* at 50). While the plebiscite conforms to a statutory framework based on Canadian law, its implementation via plebiscite makes it enforceable from an Inuit law perspective as well.

[84] It seems to me that aboriginal legal principles and perspectives on criminal law and on the application of the *Charter* must be taken into account in pursuit of

the objective of mutually enriching and harmonizing Canadian and Indigenous legal orders.

[85] A cautionary note is in order. As Chief Justice Finch of the Court of Appeal for British Columbia pointed out in his paper *The Duty to Learn: Taking Account of the Indigenous Legal Orders in Practice*, published in November 2012 for The Continuing Legal Education Society of British Columbia, there is a danger that "in retaining and imposing our ideas of what constitutes 'law', according to our training and established habits of mind, we may inadvertently give weight only to those elements of an Aboriginal legal system which are recognized in Canadian law, rendering the Canadian legal framework determinative. At the same time, we may fail to perceive essential elements of these legal orders. At the very least, we must question our assumptions; at most, we must unlearn them. Not, of course, in every context. But for purposes of approaching Aboriginal legal orders, we must do our utmost to recognize and to relinquish our preconceptions of what objectively constitutes a 'law' or a 'system of laws.'"

[86] Nunavut and Sanikiluaq are not *Charter* free zones. The protections that are afforded to all Canadian citizens apply with full force and effect throughout the country. How then to apply the *Grant* analysis in the case at bar without derogating from *Charter* imperatives while, at the same time, retaining a critical awareness of Indigenous legal principles.

[87] Within the Inuit legal paradigm, whether a person breaches Canadian law or Inuit maligait, the ultimate consequence is that the person will shorten his or her life (*Inuit Elders: Perspectives on Traditional Law* (Iqaluit: Nunavut Arctic College, 1999) at 13 [*Traditional Law*]). The primary intent of Inuit law, as I understand it, is to preserve the community and avoid negative consequences for the individual and the group as a whole.

[88] In Inuit culture, individuals are encouraged to confess any wrongdoings, as harbouring a secret transgression can cause illness in the person or community (*Traditional Law* at 144). The Inuit believe that it is dangerous to fail to disclose wrongdoings, and are socialized within their culture to confess to them ((Mariano Aupilaajurk et al, Inuit Perspectives on the 20th Century, Volume 4: *Inuit Quajimajatuqangit: Shamanism and Reintegrating Wrongdoers into the Community* (Iqaluit: Nunavut Arctic College, 2002) at 180 [*Reintegrating Wrongdoers*]). Upon confession, the community engages with the offender to reconcile and reintegrate them into the community as each individual is a "potentially valuable" member of society (*Reintegrating Wrongdoers* at 718).

[89] Under Inuit law, especially for less serious offences, the primary goal is to preserve the community by reintegrating the offender. Imprisonment, any type of isolation of an individual, or removing him or her from the community has a negative impact on both the individual and the community itself (*Reintegrating Wrongdoers* at 18). Social problems are viewed as something that affects the whole community, not just an individual (*Traditional Law* at 17). An individual can be reintegrated in different ways depending on the nature of the incident.

[90] Alcohol and other intoxicating substances present a unique challenge to Inuit law, as individuals struggling with substance abuse have a "totally different way of life" than Inuit elders (*Reintegrating Wrongdoers* at 186).

[91] It follows that the question then becomes whether the issues on appeal can properly be resolved through the concurrent application of Inuit and Canadian law.

• • •

[93] As discussed above, the general focus of aboriginal justice is on restoration and healing, as opposed to the adversarial system's focus on deterrence and

punishment. When there is a conflict between aboriginal law and Canadian law, scholars have called for the incorporation of Aboriginal values and "accommodations" in the adversarial system (Dale Dewhurst, "Parallel Justice Systems", Catherine Bell & David Kahane eds., *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) at 215 [*Parallel Justice*]).

[94] Accordingly, it is important to consider how Inuit legal values can be integrated into each stage of the s. 24(2) analysis to which I now turn.

[After analyzing the facts in light of both the *Grant* test and certain principles of Inuit law, Berger JA concluded as follows:]

[103] The appellant was in breach of his community's admonition to ban alcohol and mood-altering drugs from Sanikiluaq. Both Canadian law and Inuit law recognize his transgression; they differ, however, in addressing it. Canadian society's preoccupation with adjudication (read: conviction and sentencing) does not accord with Inuit culture's principal focus on reintegration of the individual and preservation of the community.

[104] Yet when Canadian law is married to and reconciled with Inuit law and culture in the application of the *Grant* factors, both favour exclusion of the evidence.

CONCLUSION

[105] In the result, the competing interests and resulting tensions set out at the outset of this judgment are, in my opinion, reconcilable upon invocation and application of a more inclusive analysis that recognizes and embraces Inuit law and culture in assessing the *Grant* factors.

[106] It follows that for the reasons set out, I would exclude the evidence, quash the conviction and substitute an acquittal.

What are your reflections on Berger JA's approach in *Ippak*? The majority of the Nunavut Court of Appeal and Berger JA came to the same result in the case. Did their difference in approach matter? Why or why not?

One Indigenous scholar, Aki-Kwe/Mary Ellen Turpel-Lafond in "Aboriginal People and the Canadian Charter of Rights and Freedoms" (1989) 10:2-3 Can Woman Stud 149 at 152-53, argued early in the Charter's history that the Charter "represents an act of ethno-centrism and domination" and that its enforcement provisions were focused on individual rights, thus making it "highly questionable" whether judges would accept "a collectivist idea of rights (or responsibilities)." Other Indigenous scholars, such as David Milward in *Aboriginal Justice and the Charter,* cited by Berger JA, take a different view. Milward argues that the Charter could play a role in combatting corruption and domination within Aboriginal communities, noting that "with Aboriginal communities, it is not just a simple dichotomy between the collective and the individual" (at 52).

Can you think of other places within the criminal justice system in which Indigenous law and legal principles should or could be used to inform the approach to crime and punishment?

There is a vast and growing literature on Indigenous law, including Indigenous criminal law. See generally John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010); John Borrows, *Law's Indigenous Ethics* (Toronto: University of Toronto Press, 2019); Jeffrey Hewitt, "Indigenous Restorative Justice: Approaches, Possibility and Meaning" (2016) 67 UNBLJ 313; Angelique Eaglewoman, "Envisioning Indigenous Community Courts to Realize Justice in Canada for First Nations" (2018) 56:3 Alta Law Rev 669; Hannah Askew, "Learning from the Bear-Walker: Indigenous Legal Orders and Intercultural Legal Education in Canadian Law Schools" (2016) 33:1 Windsor YB Access Just 29; Hadley Friedland,

"Different Stories: Aboriginal People, Order, and the Failure of the Criminal Justice System" (2009) 72:1 Sask L Rev 105; Emily Snyder, Val Napoleon & John Borrows, "Gender and Violence: Drawing on Indigenous Legal Resources" (2015) 48:2 UBC Law Rev 593; David Milward, *Aboriginal Justice and the Charter: Realizing a Culturally Sensitive Interpretation of Legal Rights* (Vancouver: UBC Press, 2012); David Milward, "Sweating It Out: Facilitating Corrections and Parole Through Aboriginal Spiritual Healing" (2011) 29:1 Windsor YB Access Just 27-54.

III. THE CRIMINAL CODE

A. THE IDEA OF A CRIMINAL CODE

For most of common law history, the criminal law was found in various pieces of specific legislation and in the decisions of courts—the common law. Over the 19th century, influenced by thinkers like Jeremy Bentham, the desire to modernize and rationalize the law gave rise to much energy and activity around the project of codification of the criminal law: bringing the criminal law into a single, coherent, and exhaustive document. Multiple model and draft codes were generated in England and adopted in various places in the Commonwealth, including India and Jamaica. And yet despite 40 years of study and effort, and the creation of an English Draft Code in 1878, England never codified its criminal law.

Codification is thought to advance some of the most fundamental values of the criminal law. Many of these values are captured in the maxim *nullum crimen sine lege, nulla poena sine lege*: "there must be no crime or punishment except in accordance with fixed, predetermined law." Track the various expressions of this idea as you learn about the history and approaches to the interpretation of Canada's *Criminal Code*.

On the history of codification, see e.g. Lindsay Farmer, "Reconstructing the English Codification Debate: The Criminal Law Commissioners, 1833-45" (2000) 18:2 Law & Hist Rev 397; Wing-Cheong Chan, Barry Wright & Stanley Yeo, eds, *Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform* (London and New York: Routledge, 2011).

B. HISTORY OF THE CANADIAN CRIMINAL CODE

Unlike England, Canada adopted a criminal code in 1892. The history of the Canadian *Criminal Code* is briefly stated in the following extract.

Alan W Mewett, "The Criminal Law, 1867-1967"

(1967) 45:4 Can Bar Rev 726 at 726-30 (footnotes omitted)

For a large part of the nineteenth century, the idea of codification of the criminal law had been mooted in England and elsewhere in the English-speaking world. In 1838 in England the first Criminal Law Commissioners were appointed to report on and draft such a code and in 1878, largely as a result of the work of Sir James Stephen, the English Draft Code, dealing with indictable offences, was formulated. Although this formed the basis of two Bills presented to the English Parliament, both attempts to introduce a comprehensive criminal code were abortive.

In Canada, the Bill Respecting Criminal Law of 1892 was expressed by Sir John Thompson to be founded on the Draft Code prepared by the Royal Commission in Great Britain in 1880, on Stephen's *Digest of the Criminal Law*, the edition of 1887, Burbidge's *Digest of the Canadian Criminal Law* of 1889 and the Canadian statutory law. He quoted from the *Commission Report* to define the codification as follows:

> It is a reduction of the existing law to an orderly written system, freed from needless technicalities, obscurities and other defects which the experience of its administration has disclosed. It aims at the reduction to a system of that kind of substantive law relating to crimes and the law of procedure, both as to indictable offences and as to summary convictions.

A series of amendments resulted in the consolidations of 1906 and 1927, but neither of these could be called revisions. In 1947, a Royal Commission to Revise the Criminal Code was appointed, reported in 1952 and in 1953 the Revised Code was enacted. This revision did not greatly alter the structure or substance of the original Code, no attempt being made to consider or redefine fundamental criminal law concepts. The system of punishments was rationalized, certain procedural reforms were introduced and a relatively small number of specific offences were either redefined or introduced.

One significant change was that enacted by section 8 [now s 9] stating:

> Notwithstanding anything in this Act or any other Act, no person shall be convicted or discharged under section 736
>
> (a) of an offence at common law,
>
> (b) of an offence under an Act of the Parliament of England, or of Great Britain, or of the United Kingdom of Great Britain and Ireland, or
>
> (c) of an offence under an Act or ordinance in force in any province, territory or place before that province, territory or place became a province of Canada,
>
> but nothing in this section affects the power, jurisdiction or authority that a court, judge, justice or provincial court judge had, immediately before April 1, 1955, to impose punishment for contempt of court.

Prior to the enactment of section 8 of the 1953 revision, prosecutions were successful for such common law offences as abuse of office in taking fees wrongfully, public mischief, champerty and maintenance and perhaps barratry.

It was thus not until 1953 that all common law offences were abolished throughout Canada. It is interesting to note that, in contrast, the first English Draft Code proposed the abolition of all common law offences not specifically enacted in the Code. It could not, however, be maintained that prosecution for common law offences was a very frequent occurrence in Canada after 1892, and the Revision Commissioners decided that there was no point in preserving them after 1953. Instead, all those thought applicable to Canada were specifically enacted. ...

On the other hand, faced with the difficulty, if not impossibility of attempting to codify the common law defences, the Commissioners merely recommended, and Parliament enacted, section 7(2) [now s 8(3)] providing:

> Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of the Parliament of Canada, except insofar as they are altered by or are inconsistent with this Act or any other Act of the Parliament of Canada.

For the history of codification and the *Criminal Code* in Canada, see Graham Parker, "The Origins of the Canadian Criminal Code" in David H Flaherty, *Essays in the History of Canadian Law* (Toronto: Osgoode Society, 1981) ch 7; Desmond Brown, *The Genesis of the Canadian Criminal Code of 1892* (Toronto: University of Toronto Press, 1989); Nicholas Kasirer, "Canada's Criminal Law Codification Viewed and Reviewed" (1990) 35:4 McGill LJ 841; and Alan W Mewett, "The Canadian Criminal Code, 1892-1992" (1993) 72:1 Can Bar Rev 1. For an alternative code

that was not adopted in Canada, see Martin L Friedland, "R.S. Wright's Model Criminal Code: A Forgotten Chapter in the History of the Criminal Law" in ML Friedland, ed, *A Century of Criminal Justice* (Toronto: Carswell, 1984) ch 1.

C. EXHAUSTIVITY AND THE CRIMINAL CODE

As you have read, the central idea of a criminal code is to consolidate the criminal law into a single, coherent, and therefore readily knowable source. This goal—the goal of "exhaustivity," we might call it—is pursued, in part, to honour the values of certainty and fairness reflected in the maxim *nullum crimen sine lege, nulla poena sine lege*. One implication of this maxim is that no one should be punishable for an offence found only in the common law. If the defining idea of a criminal code is this kind of exhaustivity, when might we be said to truly have adopted a criminal code in Canada? Have we yet achieved the standard reflected in that important maxim? The approach to exhaustivity in the *Criminal Code* in respect of common law offences and defences differs, and each will be reviewed in turn below.

1. Common Law Offences

As you read in the extract above written by Alan Mewett, it was not until 1953 that the *Criminal Code* prohibited offences at common law. The current version of the relevant provision, s 9 of the *Criminal Code*, provides as follows:

> 9 Notwithstanding anything in this Act or any other Act, no person shall be convicted or discharged under section 730
>
> (a) of an offence at common law,
>
> (b) of an offence under an Act of the Parliament of England, or of Great Britain, or of the United Kingdom of Great Britain and Ireland, or
>
> (c) of an offence under an Act or ordinance in force in any province, territory or place before that province, territory or place became a province of Canada,
>
> but nothing in this section affects the power, jurisdiction or authority that a court, judge, justice or provincial court judge had, immediately before April 1, 1955, to impose punishment for contempt of court.

Yet even before the abolition of common law offences by the 1953 *Criminal Code*, the Supreme Court of Canada in *Frey v Fedoruk* (a civil action for false imprisonment and malicious prosecution) had decided not to increase the number of common law offences and thus refused to declare it to be an offence to be a "peeping tom."

Frey v Fedoruk
[1950] SCR 517

[Frey was caught and detained by Fedoruk after Frey was observed at 11 p.m. looking into a window of a woman's room in Fedoruk's house. Frey was charged that he "unlawfully did act in a manner likely to cause a breach of the peace by peeping." He was convicted at trial, but the conviction was overturned on the basis that there was no such offence. Frey then brought a civil suit as a plaintiff against Fedoruk and others for false imprisonment. Fedoruk argued as a defendant that he was justified in restraining Frey because Frey was committing a criminal offence.]

CARTWRIGHT J (speaking for 6 out of 7 members of the Supreme Court sitting on the case stated in part): ... This appeal raises questions as to whether the conduct of the Plaintiff, which is popularly described as that of a "peeping tom," constitutes a

criminal offence and if so, whether the Defendants Fedoruk and Stone were justified in arresting the Plaintiff without a warrant.

• • •

The majority of the Court of Appeal were of [the] opinion that the Plaintiff was guilty of a criminal offence at Common Law, and that the Defendants were justified in the circumstances in arresting him without a warrant.

• • •

The only charge laid against the Plaintiff was that he:

> unlawfully did act in a manner likely to cause a breach of the peace by peeping at night through the window of the house of s. Fedoruk, there situated, against the peace of our Lord the King, his Crown and dignity; Contrary to the form of Statute in such case made and provided.

On this charge the Plaintiff was convicted by a police magistrate sitting for the summary trial of an indictable offence. The formal conviction concludes with the words:

> and I adjudge the said Bernard Frey for his said offence to keep the Peace and be of good behaviour for the term of one year.

• • •

If it should be admitted as a principle that conduct may be treated as criminal because, although not otherwise criminal, it has a natural tendency to provoke violence by way of retribution, it seems to me that great uncertainty would result. I do not think it safe by the application of such a supposed principle to declare an act or acts criminal which have not, up to the present, been held to be criminal in any reported case.

• • •

O'Halloran, J.A. does not refer to any reported case in which the conduct of a "peeping tom" has been held to be a criminal offence. As mentioned above, we were referred to no such case by counsel, and I have not been able to find one.

I do not understand O'Halloran, J.A. to suggest in his elaborate reasons that there is precedent for the view that the Plaintiff's conduct in this case was criminal. Rather he appears to support the finding of the trial Judge to that effect on the grounds stated in the following paragraph:

> Criminal responsibility at Common law is primarily not a matter of precedent, but of application of generic principle to the differing facts of each case. It is for the jury to apply to the facts of the case as they find them, the generic principle the Judge gives them. Thus by their general verdict the jury in practical effect decide both the law and the facts in the particular case, and have consistently done so over the centuries, and cf. Coke on Littleton (1832 Ed.) vol. 1, note 5, para. 155(b). The fact finding Judge in this case, as the record shows, had not the slightest doubt on the evidence before him that what the appellant had been accused of was a criminal offence at Common Law.

• • •

I am of the opinion that the proposition implicit in the paragraph quoted above ought not to be accepted. I think that if adopted, it would introduce great uncertainty into the administration of the Criminal Law, leaving it to the judicial officer trying any particular charge to decide that the acts proved constituted a crime or otherwise, not by reference to any defined standard to be found in the code or in reported decisions, but according to his individual view as to whether such acts were a disturbance of the tranquility of people tending to provoke physical reprisal.

John Willis saw the Supreme Court's decision in *Frey v Fedoruk* not to expand the range of common law crimes to cover "peeping toms" as a decision to place "the protection of the individual from the risk of oppression" above "the protection of the state from the risk of disorder." He stated (at 1025-26) that the decision

> enunciates in ringing tones the grand old slogan that Canadians are not at the mercy of the whims of officials, even those officials who are independent of the government in power and called judges. So long as the principle is vindicated, it matters not that the police cannot any longer afford to the householder the protection he has been led to expect.

Willis observed that in England the common law crime of public mischief has been useful in addressing problems such as group libel and "hoaxing the police": "Case Comment" (1950) 28 Can Bar Rev 1023 at 1026.

When in 1953 Parliament enacted the present s 9 of the *Criminal Code* abolishing all common law offences except contempt of court, it also introduced an offence of trespassing at night in s 162 (now s 177). The offence provides:

> Every one who, without lawful excuse, the proof of which lies on him, loiters or prowls at night on the property of another person near a dwelling-house situated on that property is guilty of an offence punishable on summary conviction.

You will note that s 9 makes one exception to the prohibition on common law offences: courts may still impose punishment for contempt of court, which is a common law crime. *United Nurses of Alberta v AG Alberta*, [1992] 1 SCR 901, involved a Charter challenge to the use of the common law contempt offence. The accused union was fined $400,000 for contempt of court for disobeying court directives not to go on strike. The union argued that the common law contempt crime was contrary to s 7 of the Charter on the basis that codification of crimes was a principle of fundamental justice. In rejecting this argument, McLachlin J (as she then was) stated the following, for the majority of the Supreme Court of Canada:

> It is argued that the offence of criminal contempt violates s. 7 of the *Canadian Charter of Rights and Freedoms* because it is not codified and is vague and arbitrary. ...
>
> The union's first position is that all uncodified common law crimes are unconstitutional. It is a fundamental principle of justice, it submits, that all crimes must be codified. Criminal contempt, although mentioned in s. 9 of the *Code*, is not codified, both its *actus reus* and *mens rea* being defined at common law.
>
> We were referred to no authority in support of the proposition that fundamental justice requires codification of all crimes. The union cites the principle that there must be no crime or punishment except in accordance with fixed, predetermined law. But the absence of codification does not mean that a law violates this principle. For many centuries, most of our crimes were uncodified and were not viewed as violating this fundamental rule. Nor, conversely, is codification a guarantee that all is made manifest in the *Code*. Definition of elements of codified crimes not infrequently requires recourse to common law concepts: see *R. v. Jobidon* (1991), 66 C.C.C. (3d) 454, where the majority of this court, per Gonthier J., noted the important role the common law continues to play in the criminal law. The union also relies on the fact that this court has said it is for Parliament, not the courts, to create new offences: *Frey v. Fedoruk* (1950), 97 C.C.C. 1, [1950] 3 D.L.R. 513, [1950] S.C.R. 517; s. 9 of the *Criminal Code*. But this does not mean that the courts should refuse to recognize the common law crime of contempt of court which pre-dated codification and which is expressly preserved by s. 9 of the *Criminal Code*. I conclude that lack of codification in itself does not render the common law crime of criminal contempt of court unconstitutional.
>
> The next argument is that the crime of criminal contempt is so vague and difficult to apply that it violates the fundamental principle of justice that the law should be fixed, predetermined and accessible and understandable by the public. ...

In this case there was ample evidence to support the conclusion that the union chose to defy court orders openly and continuously, with full knowledge that its defiance would be widely publicized and, even putting the union's case at its best, it did not care whether this would bring the court into disrepute.

Criminal contempt, thus defined, does not violate the Charter. It is neither vague nor arbitrary. A person can predict in advance whether his or her conduct will constitute a crime. The trial judges below had no trouble applying the right test, suggesting that the concept is capable of application without difficulty. Thus the case that the crime of contempt violates the principles of fundamental justice has not been made out.

The union's appeal was dismissed and the conviction affirmed.

Thus, with the exception of the common law offence of contempt, courts cannot create new common law crimes. The next case, however, demonstrates how courts can interpret an existing provision in a manner that effectively extends the offence and applies the extended provision retroactively to the case at hand.

R v Jobidon

[1991] 2 SCR 714

[The accused was charged with manslaughter by the unlawful act of assault. He fought the victim first in a bar in Sudbury and later in the parking lot of the bar. The victim, who was drunk but larger than the accused and had boxing experience, had got the better of the fight in the bar. In the parking lot, however, Jobidon rendered the victim unconscious with the first blow to the face and then followed that up with several more blows causing the victim to go into a coma and eventually die. The accused was acquitted of manslaughter at trial on the basis that the victim had consented to the fight. Section 265(1)(a) defines assault as the intentional application of force to another person "without the consent of [the other] person." The Crown successfully appealed to the Court of Appeal, which concluded that for reasons of public policy there could be no consent to such an assault and entered a conviction of manslaughter. The accused appealed to the Supreme Court.]

GONTHIER J (L'Heureux-Dubé, La Forest, Cory, and Iacobucci JJ concurring):

There is one principal issue raised in this appeal ... whether absence of consent is a material element which must be proved by the Crown in all cases of assault or whether there are common law limitations which restrict or negate the legal effectiveness of consent in certain types of cases ... .

Resolving the main issue calls for close scrutiny of the relevant statutory provisions and of the pertinent case law. ...

• • •

Section 265(1)(a) states that an assault occurs when, "without the consent of another person, he applies force intentionally to that other person, directly or indirectly." Section 265(2) provides that "This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault." In the appellant's opinion, the trial judge's finding of consent meant that all the elements of the offence of assault had not been proved. The appellant should therefore have been acquitted on that basis, since the legislature intended that consent should serve as a bar to conviction.

According to the appellant, the legislature could have specified that in certain situations, or in respect of certain forms of conduct, absence of consent would not be an operative element of the offence. It has done so with other offences. Parliament

has provided that no person is entitled to consent to have death inflicted on him (s. 14). It restricted the concept in ss. 150.1 and 159 of the *Code* by denying defences to sexual offences based on a child's consent. It also did this in s. 286 by negating the validity of a young person's consent to abduction. But with the assault provisions in s. 265, it chose not to insert policy-based limitations on the role of consent. Moreover, in s. 265(3), Parliament expressly specified the circumstances in which consent would be vitiated on grounds of involuntariness, but the circumstances described in that subsection do not include the policy limitation applied to fist fights by the English Court of Appeal in the *Attorney General's Reference*, ... *infra*.

The appellant further observed that, in England, the crime of assault is not defined in a criminal code but in the common law, to which common law limitations and exceptions more naturally apply. In Canada, we have a code of general principles by which, it is presumed, ambiguity is to be construed in favour of the liberty of the subject.

• • •

In step with the Court of Appeal, the Crown argued that the overwhelming weight of common law authorities supports the position that one cannot validly consent to intentionally caused bodily harm in all circumstances, and that the law prohibits consent to street brawls or fist fights. It is not in the public interest that people should engage in these sorts of activities, so, on public policy grounds, the word "consent" in s. 265 of the *Code* should be read in light of the common law, which limits its applicability as a defence to assault. The Crown also noted that fist fighting is without social value and has been outlawed in other common law jurisdictions.

• • •

The controversy in this appeal stems from the apparent contradiction between the holding of the Ontario Court of Appeal in the instant appeal and the wording of s. 265(1)(a). By that wording, once the trial judge found that the deceased had consented to a fight with Jobidon, it appears as if he could not have committed the unlawful act of assault since s. 265(2) states a general rule that s. 265 applies to all forms of assault, including assault causing bodily harm. Consequently, given the reference to absence of consent in s. 265(1), proof of consent to a fist fight in which force is intentionally applied and which results in bodily harm would seem to serve as a defence for Jobidon. ...

• • •

Parliament could have specified whether the term "consent" is aimed simply at the kind of *activity* being purportedly consented to (here a fist fight), or whether it refers to consent to a *trivial injury* which does not amount to bodily harm (such as might be sustained in sporting activities), or whether for the defence to apply the consent must be as to the *precise extent of harm actually caused* by the application of force. At any point in the history of the provision Parliament could have taken the opportunity to specify whether the common law, which already had had much to say about assault and the requirement of consent, was being emptied of relevance. But it did not do these things. Nor did it have to.

Just as the common law has built up a rich jurisprudence around the concepts of agreement in contract law, and *volenti non fit injuria* in the law of negligence, it has also generated a body of law to illuminate the meaning of consent and to place certain limitations on its legal effectiveness in the criminal law. It has done this in respect of assault. In the same way that the common law established principles of public policy negating the legal effectiveness of certain types of contracts—contracts in restraint of trade for example—it has also set limits on the types of harmful actions to which one can validly consent, and shelter an assailant from the sanctions of our criminal law.

• • •

All criminal offences in Canada are now defined in the *Code* (s. 9). But that does not mean the common law no longer illuminates these definitions nor gives content to the various principles of criminal responsibility those definitions draw from. As the Law Reform Commission of Canada has noted in its 31st report on recodification, the basic premises of our criminal law—the necessary conditions for criminal liability—are at present left to the common law. (*Recodifying Criminal Law*, at pp. 17, 28 and 34.). ... The *Code* itself, in s. 8, explicitly acknowledges the ongoing common law influence: ...

> 8. ...
>
> (2) The criminal law of England that was in force in a province immediately before April 1, 1955 continues in force in the province except as altered, varied, modified or affected by this Act or any other Act of the Parliament of Canada.
>
> (3) Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of Parliament except in so far as they are altered by or are inconsistent with this Act or any other Act of Parliament.

Section 8 expressly indicates that the common law rules and principles continue to apply, but only to the extent that they are not inconsistent with the *Code* or other Act of Parliament and have not been altered by them.

• • •

In light of this communicated understanding of the antecedents and purpose of s. 8(3), it can hardly be said that the common law's developed approach to the role and scope of consent as a defence to assault has no place in our criminal law. If s. 8(3) and its interaction with the common law can be used to develop entirely new defences not inconsistent with the *Code*, it surely authorizes the courts to look to pre-existing common law rules and principles to give meaning to, and explain the outlines and boundaries of an existing defence or justification, indicating where they will not be recognized as legally effective—provided of course that there is no clear language in the *Code* which indicates that the *Code* has displaced the common law. That sort of language cannot be found in the *Code*. As such, the common law legitimately serves in this appeal as an archive in which one may locate situations or forms of conduct to which the law will not allow a person to consent.

• • •

We have observed from the general analysis of the *Code* and common law that, in the history of our criminal law, codification did not replace common law principles of criminal responsibility, but in fact reflected them. That history also reveals that policy-based limitations of the sort at issue here boast a lineage in the common law equally as long as the factors which vitiate involuntary consent. Since these policy-based limitations also existed before the codification of Canada's criminal law there is no reason to think they have been ousted by statutory revisions and amendments made to the *Code* along the way.

• • •

... It would have been quite impractical, if not impossible, for Parliament to establish an adequate list of exceptions to apply to all situations, old and new. Policy-based limits are almost always the product of a balancing of individual autonomy (the freedom to choose to have force intentionally applied to oneself) and some larger societal interest. That balancing may be better performed in the light of actual situations, rather than in the abstract, as Parliament would be compelled to do.

With the offence of assault, that kind of balancing is a function the courts are well-suited to perform. ... The common law is the register of the balancing function of the courts—a register Parliament has authorized the courts to administer in respect of policy-based limits on the role and scope of consent in s. 265 of the *Code*.

• • •

Foremost among the policy considerations supporting the Crown is the social uselessness of fist fights. As the English Court of Appeal noted in the *Attorney General's Reference*, it is not in the public interest that adults should willingly cause harm to one another without a good reason. There is precious little utility in fist fights or street brawls. These events are motivated by unchecked passion. They so often result in serious injury to the participants. Here it resulted in a tragic death to a young man on his wedding day.

There was a time when pugilism was sheltered by the notion of "chivalry." Duelling was an activity not only condoned, but required by honour. Those days are fortunately long past. Our social norms no longer correlate strength of character with prowess at fisticuffs. Indeed when we pride ourselves for making positive ethical and social strides, it tends to be on the basis of our developing reason. This is particularly true of the law, where reason is cast in a privileged light. Erasing longstanding limits on consent to assault would be a regressive step, one which would retard the advance of civilised norms of conduct.

Quite apart from the valueless nature of fist fights from the combatants' perspective, it should also be recognized that consensual fights may sometimes lead to larger brawls and to serious breaches of the public peace. In the instant case, this tendency was openly observable. At the prospect of a fight between Jobidon and the deceased, in a truly macabre fashion many patrons of the hotel deliberately moved to the parking lot to witness the gruesome event. That scene easily could have erupted in more widespread aggression between allies of the respective combatants. Indeed it happened that the brothers of Jobidon and Haggart also took to each other with their fists.

Given the spontaneous, often drunken nature of many fist fights, I would not wish to push a deterrence rationale too far. Nonetheless, it seems reasonable to think that, in some cases, common law limitations on consent might serve some degree of deterrence to these sorts of activities.

Related to a deterrence rationale is the possibility that, by permitting a person to consent to force inflicted by the hand of another, in rare cases the latter may find he derives some form of pleasure from the activity, especially if he is doing so on a regular basis. It is perhaps not inconceivable that this kind of perversion could arise in a domestic or marital setting where one or more of the family members are of frail or unstable mental health. As one criminal law theorist has written:

> ... the self-destructive individual who induces another person to kill or to mutilate him implicates the latter in the violation of a significant social taboo. The person carrying out the killing or the mutilation crosses the threshold into a realm of conduct that, the second time, might be more easily carried out. And the second time, it might not be particularly significant whether the victim consents or not. Similarly, if someone is encouraged to inflict a sado-masochistic beating on a consenting victim, the experience of inflicting the beating might loosen the actor's inhibitions against sadism in general.

(G. Fletcher, *Rethinking Criminal Law* (1978), at pp. 770-71.)

Of course this appeal does not concern sadism or intentional killing. But it comes close to mutilation. In any event, the weight of the argument could hold

true for fights. If aggressive individuals are legally permitted to get into consensual fist fights, and they take advantage of that license from time to time, it may come to pass that they eventually lose all understanding that that activity *is* the subject of a powerful social taboo. They may too readily find their fists raised against a person whose consent they forgot to ascertain with full certitude. It is preferable that these sorts of omissions be strongly discouraged.

Wholly apart from deterrence, it is most unseemly from a moral point of view that the law would countenance, much less provide a backhanded sanction to the sort of interaction displayed by the facts of this appeal. The sanctity of the human body should militate against the validity of consent to bodily harm inflicted in a fight.

• • •

The policy preference that people not be able to consent to intentionally inflicted harms is heard not only in the register of our common law. The *Criminal Code* also contains many examples of this propensity. As noted above, s. 14 of the *Code* vitiates the legal effectiveness of a person's consent to have death inflicted on him under any circumstances. The same policy appears to underlie ss. 150.1, 159 and 286 in respect of younger people, in the contexts of sexual offences, anal intercourse, and abduction, respectively. All this is to say that the notion of policy-based limits on the effectiveness of consent to some level of inflicted harms is not foreign. Parliament as well as the courts have been mindful of the need for such limits. Autonomy is not the only value which our law seeks to protect.

Some may see limiting the freedom of an adult to consent to applications of force in a fist fight as unduly paternalistic; a violation of individual self-rule. Yet while that view may commend itself to some, those persons cannot reasonably claim that the law does not know such limitations. All criminal law is "paternalistic" to some degree—top-down guidance is inherent in any prohibitive rule. That the common law has developed a strong resistance to recognizing the validity of consent to intentional applications of force in fist fights and brawls is merely one instance of the criminal law's concern that Canadian citizens treat each other humanely and with respect.

• • •

Conclusion

How, and to what extent is consent limited?

The law's willingness to vitiate consent on policy grounds is significantly limited. Common law cases restrict the extent to which consent may be nullified; as do the relevant policy considerations. The unique situation under examination in this case, a weaponless fist fight between two adults, provides another important boundary.

The limitation demanded by s. 265 as it applies to the circumstances of this appeal is one which *vitiates consent between adults intentionally to apply force causing serious hurt or non-trivial bodily harm to each other in the course of a fist fight or brawl*. (This test entails that a minor's apparent consent to an adult's intentional application of force in a fight would also be negated.) This is the extent of the limit which the common law requires in the factual circumstances of this appeal. It may be that further limitations will be found to apply in other circumstances. But such limits, if any, are better developed on a case by case basis, so that the unique features of the situation may exert a rational influence on the extent of the limit and on the justification for it.

Stated in this way, the policy of the common law will not affect the validity or effectiveness of freely given consent to participate in rough sporting activities, so

long as the intentional applications of force to which one consents are within the customary norms and rules of the game. Unlike fist fights, sporting activities and games usually have a significant social value; they are worthwhile. ...

• • •

Finally, the preceding formulation avoids nullification of consent to intentional applications of force which cause only minor hurt or trivial bodily harm. The bodily harm contemplated by the test is essentially equivalent to that contemplated by the definition found in s. 267(2) of the *Code*, dealing with the offence of assault causing bodily harm. The section defines bodily harm as "any hurt or injury to the complainant that interferes with the health or comfort of the complainant and that is more than merely transient or trifling in nature."

On this definition, combined with the fact that the test is restricted to cases involving adults, the phenomenon of the "ordinary" schoolyard scuffle, where boys or girls immaturely seek to resolve differences with their hands, will not come within the scope of the limitation. That has never been the policy of the law and I do not intend to disrupt the status quo.

• • •

I would uphold the decision of the Court of Appeal. The appeal is dismissed.

[Justice Sopinka, with Stevenson J concurring, also agreed on the facts that there was an assault and that this provided a basis for the manslaughter conviction but did not agree with Gonthier J's approach to consent as a component of the crime of assault:]

SOPINKA J: I have had the advantage of reading the reasons of Gonthier J. and while I agree with his disposition of the matter I am unable to agree with his reasons. This appeal involves the role that consent plays in the offence of criminal assault. Unlike my colleague I am of the view that consent cannot be read out of the offence. I come to this conclusion for two reasons: (1) consent is a fundamental element of many criminal offences, including assault, and (2) the statutory provision creating the offence of assault explicitly provides for the element of consent.

• • •

... I see no evidence in the clear and simple language of s. 265 that it intended to outlaw consensual fighting in the interests of avoiding breaches of the peace or to allow it if a judge thought that it occurred in circumstances that were socially useful. Rather, the policy reflected in s. 265 is to make the absence of consent a requirement in the definition of the offence but to restrict consent to those intentional applications of force in respect of which there is a clear and effective consent by a victim who is free of coercion or misrepresentation. Instead of reading the words "without the consent of another person" out of s. 265 I am of the opinion that the intention of Parliament is respected by close scrutiny of the scope of consent to an assault. Instead of attempting to evaluate the utility of the activity the trial judge will scrutinize the consent to determine whether it applied to the very activity which is the subject of the charge. The more serious the assault the more difficult it should be to establish consent.

• • •

Section 265 states that "[a] person commits an assault when *without the consent of another person*, he applies force intentionally to that other person ..." (emphasis added). My colleague Gonthier J. concludes that on the basis of cases which applied the common law, that section should be interpreted as excluding the absence of consent as an element of the *actus reus* in respect of an assault with intent to commit intentional bodily harm. In coming to his conclusion my colleague relies on a

number of English authorities. The issue was not finally resolved in England until the decision of the English Court of Appeal on a reference to it by the Attorney General in 1980. See *Attorney General's Reference (No. 6 of 1980)*, [1981] 2 All E.R. 1057. Unconstrained by the expression of legislative policy, the court moulded the common law to accord with the court's view of what was in the public interest. On this basis the court discarded the absence of consent as an element in assaults in which actual bodily harm was either caused or intended. Exceptions were created for assaults that have some positive social value such as sporting events. In Canada, the criminal law has been codified and the judiciary is constrained by the wording of sections defining criminal offences. The courts' application of public policy is governed by the expression of public policy in the *Criminal Code*. If Parliament intended to adopt the public policy which the English Court of Appeal developed it used singularly inappropriate language. It made the absence of consent a specific requirement and provided that this applied to *all* assaults without exception. ...

In my opinion the above observations as to the appropriate use of public policy are sufficient to conclude that the absence of consent cannot be swept away by a robust application of judge-made policy. This proposition is strengthened and confirmed by the specific dictates of the *Code* with reference to the essential elements of a criminal offence. Section 9(a) of the *Code* provides that "[n]otwithstanding anything in this Act or any other Act, no person shall be convicted ... (a) of an offence at common law." The effect of my colleague's approach is to create an offence where one does not exist under the terms of the *Code* by application of the common law. The offence created is the intentional application of force with the consent of the victim. I appreciate that my colleague's approach is to interpret the section in light of the common law but, in my view, use of the common law to eliminate an element of the offence that is required by statute is more than interpretation and is contrary to not only the spirit but also the letter of s. 9(a). One of the basic reasons for s. 9(a) is the importance of certainty in determining what conduct constitutes a criminal offence. That is the reason we have codified the offences in the *Criminal Code*. An accused should not have to search the books to discover the common law in order to determine if the offence charged is indeed an offence at law. ...

Application to This Appeal

Given the danger inherent in the violent activity in this case, the scope of the consent required careful scrutiny. The trial judge found that the consent given by Haggart did not extend to a continuation of the fight once he had lost consciousness. By striking Haggart once he was unconscious, the accused acted beyond the scope of the consent of Haggart and thus committed the *actus reus* of assault.

• • •

Having found that the accused committed an assault, and given that Mr. Haggart died as a result of that unlawful act, the accused is therefore guilty of manslaughter via *Criminal Code* ss. 222(5)(a) and 234. I would therefore dispose of the appeal as proposed by Gonthier J.

Should common law policy constraints on assault such as are contemplated by the majority in *Jobidon* be applied to sado-masochistic sexual activities between consenting adults? The House of Lords in a 3:2 decision in *R v Brown* (1993), 97 Cr App R 44 said yes, as did the Ontario Court of Appeal in *R v Welch* (1995), 101 CCC (3d) 216 (Ont CA).

The Supreme Court revisited *Jobidon* in *R v Paice*, 2005 SCC 22 at para 18 and concluded, "*Jobidon* requires serious harm both intended and caused for consent to be vitiated." Justice Charron explained (at para 12):

> Indeed, if the test were otherwise and a conviction possible if bodily harm were *either* intended or caused, the result would be to criminalize numerous activities that were never intended by Parliament to come within the ambit of the assault provisions and would go beyond the policy considerations identified in *Jobidon*. For example, if causation alone sufficed, a person who agreed to engage in a playful wrestling match with another could end up being criminally responsible if, even by accident, he caused serious bodily harm to the other during the course of play. This Court in *Jobidon* was very mindful not to overextend the application of the principle to like situations. [Emphasis added.]

In the sexual assault causing bodily harm context, courts have now indicated that consent will only be vitiated if, in an assault of a sexual nature, the accused both caused bodily harm and subjectively intended to inflict it. *R v Quashie* (2005), 198 CCC (3d) 337 at para 58 (Ont CA); *R v Zhao*, 2013 ONCA 293 at para 107. Do these refinements help justify the policy of vitiating consent on common law public policy grounds?

2. Common Law Defences

The 1953 amendments that introduced the provision that became s 9 of the *Criminal Code* also included the following section, applicable to common law defences:

> 8(3) Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of Parliament except in so far as they are altered by or are inconsistent with this Act or any other Act of Parliament

Why should offences at common law be prohibited under s 9(a) of the *Criminal Code* but not defences, excuses, or justifications?

Amato v The Queen
[1982] 2 SCR 418

[In this case, Estey J interpreted s 7(3) (now s 8(3)) of the *Criminal Code* to allow the judicial development of a defence of entrapment. The subsequent development of entrapment will be examined in Chapter 3.]

ESTEY J: If there be a defence of entrapment available to the accused in the circumstances of this appeal it cannot be of statutory origin for it is not to be found in the *Criminal Code*. If a defence arises in the common law it can only find its way into the courts through s. 7(3) of the Code:

> 7(3) Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of the Parliament of Canada, except in so far as they are altered by or are inconsistent with this Act or any other Act of the Parliament of Canada.

This provision in turn only supports the application of such a defence if s-s. (3) has a continuing prospective character when properly construed. The Chief Justice

assumes this to be the case in *R. v. Kirzner* (1977), 38 C.C.C. (2d) 131 at p. 138, 81 D.L.R. (3d) 229 at p. 236, [1978] 2 S.C.R. 487 at p. 496:

> I do not think that s. 7(3) should be regarded as having frozen the power of the Courts to enlarge the content of the common law by way of recognizing new defences, as they may think proper according to circumstances that they consider may call for further control of prosecutorial behaviour or of judicial proceedings.

... [T]he common law would be allowed to develop defences not inconsistent with the provisions of the *Code* if the construction adopted was prospective. For this conclusion I find support in the Report of the Imperial Commissioners on the Draft Code of 1879, s. 19 of which is the forerunner of our present s. 7(3). The commissioners explained the inclusion of s. 19 (now s. 7(3)) as follows, at volume I, p. 10, of their report:

> But whilst we exclude from the category of indictable offences any culpable act or omission not provided for by this or some other Act of Parliament, there is another branch of the unwritten law which introduces different considerations; namely, the principles which declare what circumstances amount to a justification or excuse for doing that which would be otherwise a crime, or at least would alter the quality of the crime. ...
>
> ... At present we desire to state that in our opinion it is, if not absolutely impossible, at least not practicable, to foresee all the various combinations of circumstances which may happen, but which are of so unfrequent occurrence that they have not hitherto been the subject of judicial consideration, although they might constitute a justification or excuse, and to use language at once so precise and clear and comprehensive as to include all cases that ought to be included, and not to include any case that ought to be excluded.
>
> We have already expressed our opinion that it is on the whole expedient that no crimes not specified in the Draft Code should be punished, though in consequence some guilty persons may thus escape punishment. But we do not think it desirable that, if a particular combination of circumstances arises of so unusual a character that the law has never been decided with reference to it, there should be any risk of a Code being so framed as to deprive an accused person of a defence to which the common law entitles him, and that it might become the duty of the judge to direct the jury that they must find him guilty, although the facts proved did show that he had a defence on the merits, and would have an undoubted claim to be pardoned by the Crown. While, therefore, digesting and declaring the law as applicable to the ordinary cases, we think that the common law so far as it affords a defence should be preserved in all cases not expressly provided for. This we have endeavoured to do by Section 19 of the Draft Code.

It might also be noted that in recent years this court has adverted to common law defences of duress (*R. v. Paquette* (1976), 30 C.C.C. (2d) 417, 70 D.L.R. (3d) 129, [1977] 2 S.C.R. 189), necessity (*Morgentaler v. The Queen* (1975), 20 C.C.C. (2d) 449, 53 D.L.R. (3d) 161, [1976] 1 S.C.R. 616), and due diligence (*R. v. City of Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353, 85 D.L.R. (3d) 161, [1978] 2 S.C.R. 1299), without exclusive concern for the state of the law prior to the 1892 introduction of the *Criminal Code*.

Applying the ordinary rule of construction where statutes and common law meet I conclude that s. 7(3) is the authority for the courts of criminal jurisdiction to adopt, if appropriate in the view of the court, defences including the defence of entrapment. The components of such a defence and the criteria for its application raise other issues.

Justice Estey dissented in this case, but the full Court eventually endorsed a defence of entrapment in *R v Mack*, [1988] 2 SCR 903 as discussed in Chapter 3.

In 1987, the Law Reform Commission of Canada proposed that all defences be set out in a new *Criminal Code* "in the interest of comprehensiveness." The commission noted that it would still be "open to the courts to develop other defences insofar as is required by the reference to 'principles of fundamental justice' in section 7 of the *Charter*": *Recodifying Criminal Law, Report 31* (Ottawa: Law Reform Commission of Canada, 1987) at 28. Is this a wise departure from s 8(3) of the present *Criminal Code* as interpreted in *Amato*, above? Note that the subcommittee of the Standing Committee on Justice and the Solicitor-General examining the General Part of the *Criminal Code* recommended in its report of February 1993 that the *Criminal Code* should codify existing defences but continue to allow for the recognition of new defences.

As you will read later in this book, a number of the principal defences in Canadian criminal law—including intoxication, automatism, necessity, and duress—are entirely common law defences or are only partially addressed in the *Criminal Code*.

D. INTERPRETATION OF THE CRIMINAL CODE

Even in respect of offences, which can no longer exist at common law, certainty is not assured by the mere fact of codification. Language is never perfectly precise, making its meaning always open to debate. Moreover, the very nature of legislation is that it is written at a given moment to apply in the future to a complex world that will yield situations and facts that cannot be wholly foreseeable at the time of drafting. These truths, combined with the adversarial context in which ambiguities in language will be hotly debated and contested, mean that judicial interpretation of legislation, also called "statutory construction," plays an important role in shaping the criminal law.

Having considered the *Jobidon* decision, you have already seen the fundamental way in which statutory interpretation can shape the scope and application of the criminal law. Many of the cases that you will study turn on a question of statutory construction, requiring judges to interpret the meaning of the criminal law. How does one interpret a criminal statute? What principles guide judges and lawyers in this task? Are there limits on how much interpretation a court can engage in to give meaning to a statute? One must turn to both the common law and the Constitution for a full response to these questions.

1. Common Law Principles of Statutory Interpretation

In *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42, the Court set out the basic rule governing the interpretation of statutes:

> 26 In Elmer Driedger's definitive formulation, found at p. 87 of his *Construction of Statutes* (2nd ed. 1983):
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings ... . I note as well that, in the federal legislative context, this Court's preferred approach is buttressed by s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that 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."

It must also be remembered that, as national law, both the English and French versions of the *Criminal Code* are authoritative. That being so, how does one resolve apparent differences in the meaning of the French and English versions of a provision? The Court addressed this in *Schreiber v Canada (AG)*, 2002 SCC 62. Justice LeBel explained the rule as follows:

> [56] A principle of bilingual statutory interpretation holds that where one version is ambiguous and the other is clear and unequivocal, the common meaning of the two versions would *a priori* be preferred; see: Côté, *supra*, at p. 327; and *Tupper v. The Queen*, 1967 CanLII 14 (SCC), [1967] S.C.R. 589. Furthermore, where one of the two versions is broader than the other, the common meaning would favour the more restricted or limited meaning … .

In *R v Daoust*, 2004 SCC 6, Bastarache J explained the importance of this rule in the criminal law setting:

> [35] [W]hen one of the two versions of a provision of a bilingual statute has a broader meaning than the other, the common meaning of the two versions is normally the one that is derived from the version with a more restricted meaning. This rule is especially relevant in a criminal context, as the accused may, depending on which version he or she reads, form a different conception of the elements of the offence in question.

The following case demonstrates the importance of statutory interpretation to the application of the criminal law and shows these foundational principles of statutory interpretation at work.

R v Clark

2005 SCC 2

The judgment of the Court was delivered by FISH J —

I

[1] The appellant stands convicted for having masturbated near the uncovered window of his illuminated living room.

[2] He was first noticed by Mrs. S., a neighbour who was watching television with her two young daughters in their partially lit family room. Mrs. S. moved to another room for a better view and then alerted her husband. Together, they observed the appellant for 10 to 15 minutes from the privacy of their darkened bedroom, across contiguous backyards, from a distance of 90 to 150 feet.

[3] The police were summoned and the appellant was charged under both s. 173(1)(a) and s. 173(1)(b) of the *Criminal Code*, R.S.C. 1985, c. C-46.

[4] Section 173(1)(a) makes it an offence to wilfully perform an indecent act "*in a public place* in the presence of one or more persons"; s. 173(1)(b), on the other hand, makes it an offence to wilfully commit an indecent act "*in any place*, with intent thereby to insult or offend any person".

[5] According to the trial judge, it did not appear that the appellant knew he was being watched. Nor did the appellant intend "to insult or offend any person". Indeed, the trial judge found that there was "an escalation of [the appellant's] activity" when Mrs. s. left her partially illuminated family room, from which she could presumably be seen by the appellant. "[A]nd", the trial judge added, "there is nothing to suggest … , in fact, to the contrary, that [the appellant] was aware that [Mrs. S.] was watching from the darkened bedroom window".

[6] The trial judge was satisfied, however, that the appellant had "converted" his living room into a public place and had, in that "public place", wilfully committed an indecent act in the presence of one or more persons.

[7] On these findings, the trial judge acquitted the appellant under s. 173(1)(b) but found him guilty under s. 173(1)(a). His appeals to the Supreme Court and Court of Appeal of British Columbia were dismissed.

• • •

[10] It has not been suggested that the trial judge in this case committed a palpable and overriding error in his appreciation of the evidence. This appeal therefore falls to be decided by applying the law as set out by Parliament to the facts as found by the trial judge.

[11] Section 173(1)(a) of the *Code* makes it an offence to wilfully perform an indecent act "*in a public place in the presence of one or more persons*". In virtue of s. 150, "'public place' includes any place to which the public have access as of right or by invitation, express or implied". Parliament has distinguished legislatively in Part V of the *Criminal Code*—the context that concerns us here—between conduct that is prohibited "in a public place" and conduct that is prohibited if it is "exposed to public view". We should not by judicial interpretation frustrate Parliament's manifest intention by merging these two different foundations of criminal liability.

• • •

[13] I agree with the appellant's submission that his living room was not a public place within the meaning of s. 173(1)(a). The living room of his private home was not a place "to which the public [had] access as of right or by invitation, express or implied". From both the text and the context, it seems obvious to me that "access", as used here, means "the right or opportunity to reach or use or visit": *The Canadian Oxford Dictionary* (2001), at p. 7. I do not believe it contemplates the ability of those who are neither entitled nor invited to enter a place to see or hear from the outside, through uncovered windows or open doors, what is transpiring within.

[14] In my respectful view, the trial judge thus erred in concluding that the appellant's living room had been "converted" by him into a public place simply because he could be seen through his living room window and, though he did not know this, was being watched by Mr. and Mrs. S. from the privacy of their own bedroom 90 to 150 feet away.

[15 I shall explain more fully below why I would allow the appeal on this ground alone. ...

• • •

IV

[33] The appellant does not contest the trial judge's finding that he committed an "indecent act" within the meaning of s. 173(1)(a) of the *Criminal Code*. He concedes, at least implicitly, that masturbating in an illuminated room near an uncovered window visible to neighbours can be "indecent" within the meaning of that section.

[34] The appellant contends, however, that he did not wilfully commit this indecent act "in a public place in the presence of one or more persons", as required by s. 173(1)(a). He raises three grounds: first, that his living room was not a "public place" within the meaning of s. 173(1)(a); second, that the complainants were "surreptitiously watching him from beneath the blinds of a window in their own private bedroom some distance away"—and, therefore, not "in his presence", as likewise required by s. 173(1)(a); third, that he cannot be said to have *wilfully* committed an

indecent act in the presence of anyone, since the trial judge found there was no evidence that he knew he was being observed.

• • •

V

[37] It is common ground that the appeal must succeed if the appellant did not commit an indecent act *in a public place* within the meaning of ss. 150 and 173(1)(a) of the *Criminal Code*.

[38] These provisions read:

> 150. In this Part,
>
> • • •
>
> "public place" includes any place to which the public have access as of right or by invitation, express or implied;
>
> 150. Les définitions qui suivent s'appliquent à la présente partie.
>
> « endroit public » Tout lieu auquel le public a accès de droit ou sur invitation, expresse ou implicite.
>
> 173.(1) Every one who wilfully does an indecent act
>
> (a) in a public place in the presence of one or more persons, or
>
> (b) in any place, with intent thereby to insult or offend any person,
>
> is guilty of an offence punishable on summary conviction.
>
> 173.(1) Est coupable d'une infraction punissable sur déclaration de culpabilité par procédure sommaire quiconque volontairement commet une action indécente:
>
> a) soit dans un endroit public en présence d'une ou de plusieurs personnes;
>
> b) soit dans un endroit quelconque avec l'intention d'ainsi insulter ou offenser quelqu'un.

[39] It will be immediately noticed that the French version of s. 150 contains no equivalent of "includes" in the English text. The appellant submits that the French definition is thus exhaustive in its terms, narrower than the English and common to both versions. The French definition, in the appellant's view, must therefore prevail: *R. v. Daoust*, [2004] 1 S.C.R. 217, 2004 SCC 6 (CanLII), at paras. 26-37.

[40] The respondent considers that there is "no discordance between the French and English text on the *characteristics* that make a place 'public'" (emphasis in original). In the respondent's words, the issue is whether "private property, when exposed to public view, is a 'place' to which the 'public have access as of right or by invitation, express or implied'".

[41] There is thus no need to choose in this case between the English and French versions of s. 150. The parties agree that both versions require *public access* by right or invitation: their disagreement is limited to the meaning of "access" in this context.

[42] On that issue, which is decisive in this case, the appellant submits that ss. 150 and 173(1)(a) contemplate *physical access* to the place in which the impugned act was committed; the respondent, that *visual access* is sufficient. In my view, the appellant's position is supported by the prevailing rules of statutory construction. The respondent's position is not.

[43] It is now well established that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42 (CanLII), at para. 26, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at para. 21.

[44] As a matter of semantics, the "ordinary" meaning of a disputed term will, of course, often vary with the context in which it is being used. Thus, for example, "access" has one "ordinary meaning" in relation to the rights of non-custodial parents, another as regards on-line computing, and yet another with respect to a place.

[45] Section 150 of the *Criminal Code* uses the word "access" in reference to a "place"—in this case, a private home. And our concern is with access to that place "as of right or by invitation". In common usage, "access" to a place to which one is invited or where one has a right to be refers to entering, visiting or using that place—and not, as I said earlier, to looking or listening in from the outside. When we are told that someone has access, as of right or by invitation, to an apartment, a workshop, an office, or a garage, this does not signify to us a mere opportunity or ability to look through a window or doorway and to see what is happening inside.

[46] This "grammatical and ordinary sense" of "access" in relation to a place must, of course, be read harmoniously with the legislative context that concerns us here and the intention of Parliament as it appears from the *Criminal Code*: *Bell ExpressVu* and *Rizzo & Rizzo Shoes* [[1998] 1 SCR 27].

[47] I begin with the immediate legislative context.

[48] First, interpreting "public place" in a manner consistent with *physical* as opposed to *visual* access, renders the whole of s. 173(1) more coherent. The offences under ss. 173(1)(a) and 173(1)(b) are circumscribed in distinct ways. Section 173(1)(a) prohibits indecent acts in public places, while s. 173(1)(b) prohibits indecent acts in any place—public or private—when they are committed with intent to insult or offend.

[49] Moreover, as I mentioned earlier, Parliament has distinguished in the *Code* between conduct that is criminal because it occurs *in a public place* and conduct that is criminal because it is *exposed to public view*. Section 173(1)(a), as we have seen, grounds liability in the fact that the prohibited act is committed in a public place. The offence of nudity is set out in the very next section of the *Code*:

> 174.(1) Every one who, without lawful excuse,
>
> (a) is nude in a public place, *or*
>
> (b) is nude and *exposed to public view while on private property*, whether or not the property is his own,
>
> is guilty of an offence punishable on summary conviction.

[50] Section 174(1) makes it perfectly clear that the definition of "public place" in s. 150 of the *Criminal Code* was not meant to cover private places exposed to public view. Were it otherwise, s. 174(1)(b) would be entirely superfluous.

[51] Section 150 applies equally to s. 174(1) and s. 173(1)(a). If "public place" does not, for the purposes of s. 174(1), include private places exposed to public view, this must surely be the case as well for s. 173(1)(a). And I hasten to emphasize that ss. 173(1) and 174 of the *Criminal Code* were enacted in their present form *simultaneously*, as ss. 158 and 159, when the present *Code* was revised and enacted as S.C. 1953-54, c. 51. Parliament could not have intended that identical words should have different meanings in two consecutive and related provisions of the very same enactment.

[52] Section 213(1) of the *Code* provides further support, if any were needed, for the proposition that the grammatical and ordinary meaning I have ascribed to "access" is consistent with its legislative context and with Parliament's intention in enacting s. 150. Section 213(1) makes it an offence for anyone "in a public place *or in any place open to public view*" to commit certain specified acts for the purposes of prostitution.

[53] The underlined, alternative route to liability in s. 213 was added by R.S.C. 1985, c. 51 (1st Supp.), s. 1. Parliament shortly thereafter directed its attention to s. 173, adding subs. (2): see R.S.C. 1985, c. 19 (3rd Supp.), s. 7. The respondent notes,

correctly, that s. 213, unlike s. 173, is not in Part V of the *Criminal Code* and suggests that it was amended in response to comments by this Court in *Hutt v. The Queen*, 1978 CanLII 190 (SCC), [1978] 2 S.C.R. 476. This may well be so, but Parliament is deemed to act deliberately. It is therefore not unreasonable to suppose that Parliament, when it expanded s. 213 to include places open to public view, did not add similar language to s. 173(1)(a) because it did not intend acts committed in such places to be caught under the latter section.

[54] I think it inappropriate for this Court to do now what Parliament declined to do then and remains free in its wisdom to do still.

VI

[55] For all of these reasons, as indicated at the outset, I would allow the appeal, vacate the appellant's conviction and enter an acquittal.

Clark concerned the application of the normal common law rules of statutory interpretation to determine the meaning of an aspect of the prohibited act, or *actus reus*—whether the activity in question occurred in a "public place." As you will learn in Chapter 6, significant interpretive problems also arise in respect of defining the fault element, or *mens rea*, of criminal offences. (For an example that also raises issues of how statutory interpretation should respond to technological change, see *R v Hamilton*, 2005 SCC 47.) In fact, critical questions of statutory interpretation—which are always in part about the relative roles of Parliament and the courts—arise across the criminal law, including on issues of criminal defences, police powers, and trial procedure.

In addition to the normal rules or "canons" of statutory interpretation, there is a special principle that applies specifically to legislation that might affect an individual's liberty: the rule of strict construction of penal statutes. This rule holds that when interpreting a penal statute, including the *Criminal Code*, any real textual ambiguities should be resolved in a way that benefits the accused. In other words, the accused should be given the benefit of a doubt when the meaning of a criminal law is not clear. In effect, this principle requires courts to err on the side of a narrower scope for the criminal law when Parliament has not been sufficiently precise. But when should courts apply the rule of strict construction? The following case explores the rule of strict construction and answers this important question.

R v Paré

[1987] 2 SCR 618

WILSON J (for the Court): Section 214(5)(b) [see now s 231(5)] of the *Criminal Code*, RSC 1970, c. C-34, as amended by 1974-75-76, c. 105, s. 4, which was in force at the time of the commission of the offence provided that murder is first degree murder when the death is caused by a person while the person is committing indecent assault. The respondent, Marc-André Paré, indecently assaulted and murdered a seven-year-old boy, Steeve Duranleau. The central issue in this appeal is whether the respondent murdered the child "while committing" the indecent assault. ...

1. The Facts

On July 13, 1982, at about 1:30 in the afternoon the respondent Marc-André Paré, then 17 years old, met Steeve Duranleau, a seven-year-old boy. At Paré's suggestion the two went swimming. After about 15 minutes in the pool Paré offered to

take Duranleau to look at some used cars. The offer was only a pretense. Paré's real motive was to get Duranleau alone in order to have sexual relations with him.

After changing, Paré and Duranleau went to a parking-lot where they looked at some used cars. Near the parking-lot was a bridge that crossed the St. Charles River. Paré lured Duranleau under the bridge. Duranleau wanted to leave but Paré told him not to and held him by the arm. Paré sat there for the next 10 minutes holding Duranleau by the arm. Then Paré told Duranleau to lie on his back and keep quiet. Paré pulled Duranleau's shorts down and lowered his own pants and underwear. He then lay on top of Duranleau and indecently assaulted him. After ejaculating beside Duranleau's penis, Paré sat up and got dressed.

At this point Duranleau told Paré that he intended to tell his mother about the incident. Paré told him that he did not want him to tell his mother and that, if he did, he would kill him. After this exchange of words Paré was certain that the boy would tell his mother as soon as he could. Paré made Duranleau lie on his back. He waited for two minutes with his hand on Duranleau's chest. He then killed Duranleau by strangling him with his hands, hitting him on the head several times with an oil filter, and strangling him with a shoe-lace.

... At trial the accused admitted all the facts outlined above. On December 7, 1982, the accused was found guilty of first degree murder. The accused's appeal to the Quebec Court of Appeal was dismissed on April 2, 1985 (per L'Heureux-Dubé, Beauregard and LeBel JJ.A.), the court substituting a verdict of second degree murder for the jury's verdict of first degree murder.

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3. The Issue

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(b) Section 214(5): "While Committing"

(i) The Literal Meaning

Did the respondent murder Duranleau while committing an indecent assault? Counsel for the respondent submit that he did not. The argument here is simple. The murder occurred, it is submitted, after the indecent assault was complete. Thus, by a literal reading of s. 214(5) Paré did not murder Duranleau "while committing" an indecent assault.

This argument is a forceful one but by no means decisive. The literal meaning of words could equally be termed their acontextual meaning. As Professor Dworkin points out, the literal or acontextual meaning of words is "the meaning we would assign them if we had no special information about the context of their use or the intentions of their author": see R. Dworkin, Law's Empire (1986), p. 17, Cambridge, Harvard University Press. Thus, the words "while committing" could have one meaning when disembodied from the *Criminal Code* and another entirely when read in the context of the scheme and purpose of the legislation. It is the latter meaning that we must ascertain. ...

[Justice Wilson then reviewed the appellate case law, finding support for both narrow and broad interpretations of the words "while committing." She continued as follows:]

(iii) Strict Construction

Counsel for the respondent argue that the doctrine of strict construction of criminal statutes requires that this court adopt the interpretation most favourable to the

accused. According to this argument the words "while committing" must be narrowly construed so as to elevate murder to first degree only when the death and the underlying offence occur simultaneously. In order to assess the validity of this position we must examine the doctrine of strict construction.

The doctrine is one of ancient lineage. It reached its pinnacle of importance in a former age when the death penalty attached to a vast array of offences. As Stephen Kloepfer points out in his article "The Status of Strict Construction in Canadian Criminal Law" (1983), 15 Ottawa L. Rev. 553 at pp. 556-60, the doctrine was one of many tools employed by the judiciary to soften the impact of the Draconian penal provisions of the time. Over the past two centuries criminal law penalties have become far less severe. Criminal law remains, however, the most dramatic and important incursion that the state makes into individual liberty. Thus, while the original justification for the doctrine has been substantially eroded, the seriousness of imposing criminal penalties of any sort demands that reasonable doubts be resolved in favour of the accused.

This point was underlined by Dickson J. in *Marcotte v. Deputy Attorney-General of Canada* (1974), 19 C.C.C. (2d) 257 at p. 262, 51 D.L.R. (3d) 259 at p. 264, [1976] 1 S.C.R. 108 at p. 115:

> It is unnecessary to emphasize the importance of clarity and certainty when freedom is at stake. No authority is needed for the proposition that if real ambiguities are found, or doubts of substance arise, in the construction and application of a statute affecting the liberty of a subject, then that statute should be applied in such a manner as to favour the person against whom it is sought to be enforced. If one is to be incarcerated, one should at least know that some Act of Parliament requires it in express terms, and not, at most, by implication. ...

(iv) Applying the Doctrine

As we have noted above, it is clearly grammatically possible to construe the words "while committing" in s. 214(5) as requiring murder to be classified as first degree only if it is exactly coincidental with the underlying offence. This, however, does not end the question. We still have to determine whether the narrow interpretation of "while committing" is a reasonable one, given the scheme and purpose of the legislation.

In my view, the construction that counsel for the respondent would have us place on these words is not one that could reasonably be attributed to Parliament. The first problem with the exactly simultaneous approach flows from the difficulty in defining the beginning and end of an indecent assault. In this case, for example, after ejaculation the respondent sat up and put his pants back on. But for the next two minutes he kept his hands on his victim's chest. Was this continued contact part of the assault? It does not seem to me that important issues of criminal law should be allowed to hinge upon this kind of distinction. An approach that depends on this kind of distinction should be avoided if possible.

A second difficulty with the exactly simultaneous approach is that it leads to distinctions that are arbitrary and irrational. In the present case, had the respondent strangled his victim two minutes earlier than he did, his guilt of first degree murder would be beyond dispute. The exactly simultaneous approach would have us conclude that the two minutes he spent contemplating his next move had the effect of reducing his offence to one of second degree murder. This would be a strange result. The crime is no less serious in the latter case than in the former; indeed, if anything, the latter crime is more serious since it involves some element of deliberation. An interpretation of s. 214(5) that runs contrary to common sense is not to be adopted if a reasonable alternative is available.

In my view, such an interpretation has been provided by Martin J.A. in *Stevens* [(1984), 11 CCC (3d) 518 (Ont CA)]. As noted above, Martin J.A. suggested that "where the act causing death and the acts constituting the rape, attempted rape, indecent assault or an attempt to commit indecent assault, as the case may be, all form part of one continuous sequence of events forming a single transaction" the death was caused "while committing" an offence for the purposes of s. 214(5). This interpretation eliminates the need to draw artificial lines to separate the commission and the aftermath of an indecent assault. Further, it eliminates the arbitrariness inherent in the exactly simultaneous approach. I would, therefore, respectfully adopt Martin J.A.'s single transaction analysis as the proper construction of s. 214(5).

This approach, it seems to me, best expresses the policy considerations that underlie the provision. Section 214, as we have seen, classifies murder as either first or second degree. All murders are serious crimes. Some murders, however, are so threatening to the public that Parliament has chosen to impose exceptional penalties on the perpetrators. One such class of murders is that found in s. 214(5), murders done while committing a hijacking, a kidnapping and forcible confinement, a rape, or an indecent assault. An understanding of why this class of murder is elevated to murder in the first degree is a helpful guide to the interpretation of the language.

The Law Reform Commission of Canada addressed this issue in its paper on *Homicide* (Working Paper 33, 1984). At p. 79 the paper states:

> ... there is a lack of rationale in the law. Subsection 214(5) provides that, whether planned and deliberate or not, murder is first degree murder when committed in the course of certain listed offences. It is curious that the list there given is considerably shorter than that given in section 213 which makes killing murder if done in the commission of certain specified offences. Inspection and comparison of the two lists, however, reveal no organizing principle in either of them and no rationale for the difference between them.

With respect, I disagree. The offences listed in s. 214(5) are all offences involving the unlawful domination of people by other people. Thus an organizing principle for s. 214(5) can be found. This principle is that where a murder is committed by someone already abusing his power by illegally dominating another, the murder should be treated as an exceptionally serious crime. Parliament has chosen to treat these as murders in the first degree.

Refining then on the concept of the "single transaction" referred to by Martin J.A. in *Stevens*, *supra*, it is the continuing illegal domination of the victim which gives continuity to the sequence of events culminating in the murder. The murder represents an exploitation of the position of power created by the underlying crime and makes the entire course of conduct a "single transaction." This approach, in my view, best gives effect to the philosophy underlying s. 214(5).

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4. Conclusion

The respondent murdered Steeve Duranleau two minutes after indecently assaulting him. The killing was motivated by fear that the boy would tell his mother about the indecent assault. The jury found the respondent guilty of first degree murder. They were entitled to do so. The murder was temporally and causally connected to the underlying offence. It formed part of one continuous sequence of events. It was part of the same transaction.

I would allow the appeal and restore the conviction of first degree murder.

In a number of subsequent cases, the Supreme Court has affirmed that courts should only resort to the principle of the strict construction of the criminal law, and other "special" rules of statutory construction, if there remains an ambiguity after the law has been subject to a contextual and purposive interpretation. As the Court explained in *Bell ExpressVu*, one must first apply this normal, "modern approach" to statutory interpretation to determine whether an ambiguity truly exists. "Other principles of interpretation—such as the strict construction of penal statutes and the '*Charter values*' presumption—only receive application where there is ambiguity as to the meaning of a provision" (at para 28). The Court went on to explain as follows:

> [29] What, then, in law is an ambiguity? To answer, an ambiguity must be "real" (*Marcotte*, *supra*, at p. 115). The words of the provision must be "reasonably capable of more than one meaning" (*Westminster Bank Ltd. v. Zang*, [1966] A.C. 182 (H.L.), at p. 222, *per* Lord Reid). By necessity, however, one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major J.'s statement in *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, 1999 CanLII 680 (SCC), [1999] 1 S.C.R. 743, at para. 14, is apposite: "It is only when genuine ambiguity arises between two or more plausible readings, *each equally in accordance with the intentions of the statute*, that the courts need to resort to external interpretive aids" (emphasis added), to which I would add, "including other principles of interpretation."
>
> [30] For this reason, ambiguity cannot reside in the mere fact that several courts—or, for that matter, several doctrinal writers—have come to differing conclusions on the interpretation of a given provision. Just as it would be improper for one to engage in a preliminary tallying of the number of decisions supporting competing interpretations and then apply that which receives the "higher score," it is not appropriate to take as one's starting point the premise that differing interpretations reveal an ambiguity. It is necessary, in every case, for the court charged with interpreting a provision to undertake the contextual and purposive approach set out by Driedger, and *thereafter* to determine if "the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning" (Willis, *supra*, at pp. 4-5).

On the common law rules governing the interpretation of the criminal law, see Kent Roach, *Criminal Law*, 7th ed (Toronto: Irwin Law, 2018) at 99-104; Don Stuart, *Canadian Criminal Law*, 7th ed (Toronto: Carswell, 2014) at 38-42.

Will a court, equipped with these common law principles of statutory interpretation, resolve any and all ambiguities in a criminal law, no matter how unclear the legislation? Otherwise put, can a criminal statute ever be "fatally" unclear or imprecise such that it would be inappropriate to rescue it through judicial interpretation? For an answer to this question, one must turn to consider constitutional limits on statutory interpretation.

2. Constitutional Rules Governing Statutory Interpretation: Vagueness, Overbreadth, and the Criminal Law

Recall the Latin maxim that is at the heart of the project of codification: *nullum crimen sine lege, nulla poena sine lege*: "there must be no crime or punishment except in accordance with fixed, predetermined law." You have seen that the pursuit of the values of rationality, certainty, and fairness that give rise to this maxim has shaped the history and structure of the *Criminal Code*, as well as the common law principles applicable to the interpretation of the criminal law. One might rightly understand this maxim as an expression of a commitment to the rule of law, which the Supreme Court has described as one of the "fundamental and organizing principles of the Constitution" (*Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 32). It should therefore not be surprising that the Constitution, and specifically the Charter, includes rights and principles designed to protect these ideals of fairness, notice, and certainty in the criminal law.

Sections 11(g) and (i) of the Charter are examples of such rights. They provide that any person charged with an offence has the right:

> (g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations; ...
>
> (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

The legislative enactment and retroactive imposition of a crime would, in most cases, violate not only s 11(g) of the Charter but also the principles of fundamental justice in s 7 of the Charter.

The constitutional commitment to certainty, rationality, and notice in the criminal law is also found in two constitutional principles governing statutory construction, principles that place limits on how unclear or imprecise Parliament can be in its legislation: the interrelated concepts of vagueness and overbreadth. Recall that s 7 of the Charter provides that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The Supreme Court of Canada has found that it is a principle of fundamental justice that laws cannot be vague or overbroad. Given that criminal laws interfere with a person's liberty, a vague or overbroad law offends s 7.

In *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606, the Court affirmed the existence of a "void for vagueness" doctrine under the Charter, described its rationales, and explained when a law is unconstitutionally vague. Justice Gonthier wrote as follows (at 632-40):

> The "doctrine of vagueness", the content of which will be developed shortly, is a principle of fundamental justice under s. 7 and it is also part of s. 1 *in limine* ("prescribed by law").
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> • • •
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> The two rationales of fair notice to the citizen and limitation of enforcement discretion have been adopted as the theoretical foundations of the doctrine of vagueness, here (*Prostitution Reference* [[1990] 1 SCR 1123] and *Committee for the Commonwealth of Canada* [[1991] 1 SCR 139]) as well as in the United States (see *Grayned v. City of Rockford*, 408 U.S. 104 (1972), at pp. 108-9) and in Europe, as will be seen later. These two rationales have been broadly linked with the corpus of principles of government known as the "rule of law," which lies at the core of our political and constitutional tradition.
>
> *(a) Fair notice to the citizen*
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> Fair notice to the citizen, as a guide to conduct and a contributing element to a full answer and defence, comprises two aspects.
>
> First of all, there is the more formal aspect of notice, that is acquaintance with the actual text of a statute. In the criminal context, this concern has more or less been set aside by the common law maxim, "Ignorance of the law is no excuse," embodied in s. 19 of the *Criminal Code*. ... Some authors have expressed the opinion that this maxim contradicts the rule of law, and should be revised in the light of the growing quantity and complexity of penal legislation: see E. Colvin, "Criminal Law and The Rule of Law," in p. Fitzgerald, ed., *Crime, Justice & Codification: Essays in commemoration of Jacques Fortin* (Toronto: Carswell, 1986), p. 125, at p. 151, and J.C. Jeffries, Jr., "Legality, Vagueness, and the Construction of Penal Statutes" (1985), 71 *Va. L. Rev.* 189 at p. 209. Since this argument was not raised in this case, I will refrain from ruling on this issue. In any event, given that, as this court has already recognized, case law applying and interpreting a particular section is relevant in determining whether the section is vague, formal notice is not a central concern in a vagueness analysis.
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Fair notice may not have been given when enactments are in somewhat general terms, in a way that does not readily permit citizens to be aware of their substance, when they do not relate to any element of the substratum of values held by society. It is no coincidence that these enactments are often found vague. For instance, the vagrancy ordinance invalidated by the United States Supreme Court in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), or the compulsory identification statute struck down in *Kolender v. Lawson*, 461 U.S. 352 (1983), fall in this group.

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(b) Limitation of law enforcement discretion

Lamer J. in the *Prostitution Reference* (1990), 56 C.C.C. (3d) 65, used the phrase "standardless sweep," first coined by the United States Supreme Court in *Smith v. Goguen*, 415 U.S. 566 (1974) at p. 575, to describe the limitation of enforcement discretion rationale for the doctrine of vagueness. It has become the prime concern in American constitutional law: *Kolender*, at pp. 357-8. Indeed, today it has become paramount, given the considerable expansion in the discretionary powers of enforcement agencies that has followed the creation of the modern welfare state.

A law must not be so devoid of precision in its content that a conviction will automatically flow from the decision to prosecute. Such is the crux of the concern for limitation of enforcement discretion. When the power to decide whether a charge will lead to conviction or acquittal, normally the preserve of the judiciary, becomes fused with the power to prosecute because of the wording of the law, then a law will be unconstitutionally vague.

For instance, the wording of the vagrancy ordinance invalidated by the United States Supreme Court in *Papachristou*, and quoted at length in the *Prostitution Reference* at p. 86, was so general and so lacked precision in its content that a conviction would ensue every time the law enforcer decided to charge someone with the offence of vagrancy. The words of the ordinance had no substance to them, and they indicated no particular legislative purpose. They left the accused completely in the dark, with no possible way of defending himself before the court.

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Legal rules only provide a framework, a guide as to how one may behave, but certainty is only reached in instant cases, where law is actualized by a competent authority. In the meanwhile, conduct is guided by approximation. The process of approximation sometimes results in quite a narrow set of options, sometimes in a broader one. Legal dispositions therefore delineate a risk zone, and cannot hope to do more, unless they are directed at individual instances.

By setting out the boundaries of permissible and non-permissible conduct, these norms give rise to legal debate. They bear substance, and they allow for a discussion as to their actualization. They therefore limit enforcement discretion by introducing boundaries, and they also sufficiently delineate an area of risk to allow for substantive notice to citizens.

Indeed no higher requirement as to certainty can be imposed on law in our modern State. Semantic arguments, based on a perception of language as an unequivocal medium, are unrealistic. Language is not the exact tool some may think it is. It cannot be argued that an enactment can and must provide enough guidance to predict the legal consequences of any given course of conduct in advance. All it can do is enunciate some boundaries, which create an area of risk. But it is inherent to our legal system that some conduct will fall along the boundaries of the area of risk; no definite prediction can then be made. Guidance, not direction, of conduct is a more realistic objective. ...

A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. Such a provision is not intelligible, to use the

terminology of previous decisions of this Court, and therefore it fails to give sufficient indications that could fuel a legal debate. It offers no grasp to the judiciary. This is an exacting standard, going beyond semantics. The term "legal debate" is used here not to express a new standard or one departing from that previously outlined by this Court. It is rather intended to reflect and encompass the same standard and criteria of fair notice and limitation of enforcement discretion viewed in the fuller context of an analysis of the quality and limits of human knowledge and understanding in the operation of the law.

In *Nova Scotia Pharmaceutical*, above, the Supreme Court of Canada unanimously held that s 32(1)(c) of the then *Combines Investigation Act*, RSC 1970, c C-23, which made it an offence to "lessen, unduly, competition," was not impermissibly vague.

The related doctrine of overbreadth is also a constitutional expression of the rule of law and its demand for precise, rational, and non-arbitrary criminal law. The next case, one of the first striking down a criminal offence on the basis of overbreadth under s 7, explains the doctrine and its relationship to vagueness.

R v Heywood

[1994] 3 SCR 761

[This case involved s 179(1)(b) of the *Criminal Code*, which provided that it was an offence for a person with a past sexual violence conviction to be "found loitering in or near a school ground, playground, public park or bathing area." The British Columbia Court of Appeal quashed the conviction of a man with two prior convictions of sexual assault of young girls after he was "found loitering in or near ... a playground." He had been found photographing young children at play after a store had alerted the Victoria police that he had brought photos of the crotch area of young girls to be developed. The Crown appealed to the Supreme Court.]

CORY J (Lamer CJ, Sopinka, Iacobucci, and Major JJ concurring): ... Overbreadth and vagueness are different concepts, but are sometimes related in particular cases. As the Ontario Court of Appeal observed in *R. v. Zundel* (1987), 58 O.R. (2d) 129, at pp. 157-58, cited with approval by Gonthier J. in *R. v. Nova Scotia Pharmaceutical Society*, [[1992] 2 SCR 606], the meaning of a law may be unambiguous and thus the law will not be vague; however, it may still be overly broad. Where a law is vague, it may also be overly broad, to the extent that the ambit of its application is difficult to define. Overbreadth and vagueness are related in that both are the result of a lack of sufficient precision by a legislature in the means used to accomplish an objective. In the case of vagueness, the means are not clearly defined. In the case of overbreadth the means are too sweeping in relation to the objective.

Overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective? If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.

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In summary, s. 179(1)(b) is overly broad to an extent that it violates the right to liberty proclaimed by s. 7 of the Charter for a number of reasons. First, it is overly broad in its geographical scope embracing as it does all public parks and beaches no matter how remote and devoid of children they may be. Secondly, it is overly

broad in its temporal aspect with the prohibition applying for life without any process for review. Thirdly, it is too broad in the number of persons it encompasses. Fourthly, the prohibitions are put in place and may be enforced without any notice to the accused.

I am strengthened in this conclusion by a consideration of the new s. 161 of the *Criminal Code*, S.C. 1993, c. 45, s. 1, which was enacted shortly after the decision of the British Columbia Court of Appeal in this case. ...

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It can be seen that this section is limited to clearly defined geographical areas where children are or can reasonably be expected to be present. Further, the prohibition may be for life or a shorter period and a system of review is provided. Additionally, the order of prohibition is made part of the sentencing procedure so that the accused is aware of and notified of the prohibitions. It is thus apparent that overly broad provisions are not essential or necessary in order to achieve the aim of s. 179(1)(b).

GONTHIER J (La Forest, L'Heureux-Dubé, and McLachlin JJ concurring (in dissent)): The interpretation I advocate eliminates Cory J.'s concern that the prohibition is overbroad. A lifetime prohibition of activities with a malevolent or ulterior purpose related to reoffending is in no way objectionable or overbroad. Such a prohibition would impose a restriction on the liberty of the affected individuals to which ordinary citizens are not subject, but that restriction is directly related to preventing reoffending. The affected persons' history of offending, the uncertainties prevalent in treating offenders and a desire to disrupt the cycle of reoffending justify what is, in effect, a minor intrusion which does not breach the principles of fundamental justice.

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In addition to overbreadth, the absence of any notice of the prohibition contained in s. 179(1)(b) was relied upon by Cory J. in concluding that s. 7 of the Charter was violated. The basis for this conclusion was that notice is provided for in the case of certain other prohibitions contained in the Code and that the lack of notice in the case of s. 179(1)(b) "is unfair and unnecessarily so." In so concluding, Cory J. would make notice, albeit in limited circumstances, a principle of fundamental justice. With all due respect, I cannot agree. It is a basic tenet of our legal system that ignorance of the law is not an excuse for breaking the law. This fundamental principle has been given legislative expression in s. 19 of the *Criminal Code*: "Ignorance of the law by a person who commits an offence is not an excuse for committing that offence." Though formal notice of the content of s. 179(1)(b) might be preferable, I can see no basis for transforming the legislator's decision to provide notice in respect of certain Code prohibitions into a principle of fundamental justice.

Section 161(1) provides that in the case of a person convicted of a sexual offence with respect to a person under 16 years of age, the court may, in addition to other punishments, prohibit the offender from:

(a) attending a public park or public swimming area where persons under the age of 16 years are present or can reasonably be expected to be present, or a daycare centre, schoolground, playground or community centre;

(a.1) being within two kilometres, or any other distance specified in the order, of any dwelling-house where the victim identified in the order ordinarily resides or of any other place specified in the order;

(b) seeking, obtaining or continuing any employment, whether or not the employment is remunerated, or becoming or being a volunteer in a capacity, that involves being in a position of trust or authority towards persons under the age of 16 years;

(c) having any contact—including communicating by any means—with a person who is under the age of 16 years, unless the offender does so under the supervision of a person whom the court considers appropriate; or

(d) using the Internet or other digital network, unless the offender does so in accordance with conditions set by the court.

In *R v Budreo* (2000), 32 CR (5th) 127 (Ont CA), the Ontario Court of Appeal held that the reference to a "community centre" in a similar peace bond provision in s 810.1 of the *Criminal Code* was overbroad to the objective of protecting children from sexual violence because children might not be present in such centres. The Court declared the reference to "community centres" to be unconstitutional.

In most cases, challenges under s 7 of the Charter to offences on the basis of vagueness or overbreadth have failed, with the courts often stressing that courts can still place a limiting interpretation on expansively worded statutes. See Kent Roach, *Criminal Law*, 7th ed (Toronto: Irwin Law, 2018) at 71-77; Don Stuart, *Charter Justice in Canadian Criminal Law*, 7th ed (Toronto: Carswell, 2018) at 128-44. With that in mind, consider the next case, in which the Supreme Court showed its willingness to save potentially vague or overbroad unconstitutional legislation by interpreting the legislation to comply with constitutional limits (sometimes called "reading the legislation down"), just as Gonthier J attempted to do in his dissent in *Heywood*.

Canadian Foundation for Children, Youth and the Law v Canada (AG)

2004 SCC 4

[In this case, the Supreme Court considered whether s 43 of the *Criminal Code*, authorizing the use of force "by way of correction toward a pupil or child ... if the force does not exceed what is reasonable under the circumstances," was void because of vagueness or overbreadth. The majority of the Court also rejected arguments that it violated ss 2 and 15 of the Charter.]

McLACHLIN CJ (Gonthier, Iacobucci, Major, Bastarache, Binnie, and LeBel JJ concurring): ...

[15] A law is unconstitutionally vague if it "does not provide an adequate basis for legal debate" and "analysis"; "does not sufficiently delineate any area of risk"; or "is not intelligible." The law must offer a "grasp to the judiciary": *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at pp. 639-40.

Certainty is not required. As Gonthier J. pointed out in *Nova Scotia Pharmaceutical*, *supra*, at pp. 638-39,

> ... conduct is guided by approximation. The process of approximation sometimes results in quite a narrow set of options, sometimes in a broader one. *Legal dispositions therefore delineate a risk zone*, and cannot hope to do more, unless they are directed at individual instances. [Emphasis added.]

[16] A law must set an intelligible standard both for the citizens it governs and the officials who must enforce it. The two are interconnected. A vague law prevents the citizen from realizing when he or she is entering an area of risk for criminal sanction. It similarly makes it difficult for law enforcement officers and judges to determine whether a crime has been committed. This invokes the further concern

of putting too much discretion in the hands of law enforcement officials, and violates the precept that individuals should be governed by the rule of law, not the rule of persons. The doctrine of vagueness is directed generally at the evil of leaving "basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application": *Grayned v. City of Rockford*, 408 U.S. 104 (1972), at p. 109.

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[19] The purpose of s. 43 is to delineate a sphere of non-criminal conduct within the larger realm of common assault. It must, as we have seen, do this in a way that permits people to know when they are entering a zone of risk of criminal sanction and that avoids ad hoc discretionary decision-making by law enforcement officials. People must be able to assess when conduct approaches the boundaries of the sphere that s. 43 provides.

[20] To ascertain whether s. 43 meets these requirements, we must consider its words and court decisions interpreting those words. The words of the statute must be considered in context, in their grammatical and ordinary sense, and with a view to the legislative scheme's purpose and the intention of Parliament: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26. Since s. 43 withdraws the protection of the criminal law in certain circumstances, it should be strictly construed: see *Ogg-Moss v. The Queen*, [1984] 2 S.C.R. 173, at p. 183.

[21] Section 43 delineates who may access its sphere with considerable precision. The terms "schoolteacher" and "parent" are clear. The phrase "person standing in the place of a parent" has been held by the courts to indicate an individual who has assumed "all the obligations of parenthood": *Ogg-Moss*, *supra*, at p. 190. These terms present no difficulty.

[22] Section 43 identifies less precisely what conduct falls within its sphere. It defines this conduct in two ways. The first is by the requirement that the force be "by way of correction." The second is by the requirement that the force be "reasonable under the circumstances." The question is whether, taken together and construed in accordance with governing principles, these phrases provide sufficient precision to delineate the zone of risk and avoid discretionary law enforcement.

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[27] [T]he law has long used reasonableness to delineate areas of risk, without incurring the dangers of vagueness. The law of negligence, which has blossomed in recent decades to govern private actions in nearly all spheres of human activity, is founded upon the presumption that individuals are capable of governing their conduct in accordance with the standard of what is "reasonable." But reasonableness as a guide to conduct is not confined to the law of negligence. The criminal law also relies on it. The *Criminal Code* expects that police officers will know what constitutes "reasonable grounds" for believing that an offence has been committed, such that an arrest can be made (s. 495); that an individual will know what constitutes "reasonable steps" to obtain consent to sexual contact (s. 273.2(b)); and that surgeons, in order to be exempted from criminal liability, will judge whether performing an operation is "reasonable" in "all the circumstances of the case" (s. 45). These are merely a few examples; the criminal law is thick with the notion of "reasonableness."

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[30] The first limitation arises from the behaviour for which s. 43 provides an exemption, simple non-consensual application of force. Section 43 does not exempt from criminal sanction conduct that causes harm or raises a reasonable prospect of

harm. It can be invoked only in cases of non-consensual application of force that results neither in harm nor in the prospect of bodily harm. This limits its operation to the mildest forms of assault. People must know that if their conduct raises an apprehension of bodily harm they cannot rely on s. 43. Similarly, police officers and judges must know that the defence cannot be raised in such circumstances.

[31] Within this limited area of application, further precision on what is reasonable under the circumstances may be derived from international treaty obligations. Statutes should be construed to comply with Canada's international obligations: *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, at para. 137. Canada's international commitments confirm that physical correction that either harms or degrades a child is unreasonable.

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[36] Determining what is "reasonable under the circumstances" in the case of child discipline is also assisted by social consensus and expert evidence on what constitutes reasonable corrective discipline. The criminal law often uses the concept of reasonableness to accommodate evolving mores and avoid successive "fine-tuning" amendments. It is implicit in this technique that current social consensus on what is reasonable may be considered. It is wrong for caregivers or judges to apply their own subjective notions of what is reasonable; s. 43 demands an objective appraisal based on current learning and consensus. Substantial consensus, particularly when supported by expert evidence, can provide guidance and reduce the danger of arbitrary, subjective decision making.

[37] Based on the evidence currently before the Court, there are significant areas of agreement among the experts on both sides of the issue (trial decision, para. 17). Corporal punishment of children under two years is harmful to them, and has no corrective value given the cognitive limitations of children under two years of age. Corporal punishment of teenagers is harmful, because it can induce aggressive or antisocial behaviour. Corporal punishment using objects, such as rulers or belts, is physically and emotionally harmful. Corporal punishment which involves slaps or blows to the head is harmful. These types of punishment, we may conclude, will not be reasonable.

[38] Contemporary social consensus is that, while teachers may sometimes use corrective force to remove children from classrooms or secure compliance with instructions, the use of corporal punishment by teachers is not acceptable. Many school boards forbid the use of corporal punishment, and some provinces and territories have legislatively prohibited its use by teachers: see, e.g., *Schools Act, 1997*, S.N.L. 1997, c S-12.2, s. 42; *School Act*, R.S.B.C. 1996, c. 412, s. 76(3); *Education Act*, S.N.B. 1997, c. E-1.12, s. 23; *School Act*, R.S.P.E.I. 1988, c. S-2.1, s. 73; *Education Act*, S.N.W.T. 1995, c. 28, s. 34(3); *Education Act*, S.Y. 1989-90, c. 25, s. 36. ... Section 43 will protect a teacher who uses reasonable, corrective force to restrain or remove a child in appropriate circumstances. Substantial societal consensus, supported by expert evidence and Canada's treaty obligations, indicates that corporal punishment by teachers is unreasonable.

[39] Finally, judicial interpretation may assist in defining "reasonable under the circumstances" under s. 43. It must be conceded at the outset that judicial decisions on s. 43 in the past have sometimes been unclear and inconsistent, sending a muddled message as to what is and is not permitted. In many cases discussed by Arbour J., judges failed to acknowledge the evolutive nature of the standard of reasonableness, and gave undue authority to outdated conceptions of reasonable correction. On occasion, judges erroneously applied their own subjective views on what constitutes reasonable discipline—views as varied as different judges' backgrounds. In addition, charges of assaultive discipline were seldom viewed as

sufficiently serious to merit in-depth research and expert evidence or the appeals which might have permitted a unified national standard to emerge. However, "[t]he fact that a particular legislative term is open to varying interpretations by the courts is not fatal": *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, at p. 1157. This case, and those that build on it, may permit a more uniform approach to "reasonable under the circumstances" than has prevailed in the past. Again, the issue is not whether s. 43 has provided enough guidance in the past, but whether it expresses a standard that can be given a core meaning in tune with contemporary consensus.

[40] When these considerations are taken together, a solid core of meaning emerges for "reasonable under the circumstances," sufficient to establish a zone in which discipline risks criminal sanction. Generally, s. 43 exempts from criminal sanction only minor corrective force of a transitory and trifling nature. On the basis of current expert consensus, it does not apply to corporal punishment of children under two or teenagers. Degrading, inhuman or harmful conduct is not protected. Discipline by the use of objects or blows or slaps to the head is unreasonable. Teachers may reasonably apply force to remove a child from a classroom or secure compliance with instructions, but not merely as corporal punishment. Coupled with the requirement that the conduct be corrective, which rules out conduct stemming from the caregiver's frustration, loss of temper or abusive personality, a consistent picture emerges of the area covered by s. 43. It is wrong for law enforcement officers or judges to apply their own subjective views of what is "reasonable under the circumstances"; the test is objective. The question must be considered in context and in light of all the circumstances of the case. The gravity of the precipitating event is not relevant.

[41] The fact that borderline cases may be anticipated is not fatal. As Gonthier J. stated in *Nova Scotia Pharmaceutical*, at p. 639, "... it is inherent to our legal system that some conduct will fall along the boundaries of the area of risk; no definite prediction can then be made. Guidance, not direction, of conduct is a more realistic objective."

[42] Section 43 achieves this objective. It sets real boundaries and delineates a risk zone for criminal sanction. The prudent parent or teacher will refrain from conduct that approaches those boundaries, while law enforcement officers and judges will proceed with them in mind. It does not violate the principle of fundamental justice that laws must not be vague or arbitrary.

[43] My colleague, Arbour J., by contrast, takes the view that s. 43 is unconstitutionally vague, a point of view also expressed by Deschamps J. Arbour J. argues first that the foregoing analysis amounts to an impermissible reading down of s. 43. This contention is answered by the evidence in this case, which established a solid core of meaning for s. 43; to construe terms like "reasonable under the circumstances" by reference to evidence and argument is a common and accepted function of courts interpreting the criminal law. To interpret "reasonable" in light of the evidence is not judicial amendment, but judicial interpretation. It is a common practice, given the number of criminal offences conditioned by the term "reasonable." If "it is the function of the appellate courts to rein in overly elastic interpretations" (Binnie J., at para. 122), it is equally their function to define the scope of criminal defences.

[44] Arbour J. also argues that unconstitutional vagueness is established by the fact that courts in the past have applied s. 43 inconsistently. Again, the inference does not follow. Vagueness is not argued on the basis of whether a provision has been interpreted consistently in the past, but whether it is capable of providing guidance for the future. Inconsistent and erroneous applications are not uncommon in criminal law, where many provisions admit of difficulty; we do not say that

this makes them unconstitutional. Rather, we rely on appellate courts to clarify the meaning so that future application may be more consistent. I agree with Arbour J. that Canadians would find the decisions in many of the past cases on s. 43 to be seriously objectionable. However, the discomfort of Canadians in the face of such unwarranted acts of violence toward children merely demonstrates that it is possible to define what corrective force is reasonable in the circumstances. Finally, Arbour J. argues that parents who face criminal charges as a result of corrective force will be able to rely on the defences of necessity and "de minimis." The defence of necessity, I agree, is available, but only in situations where corrective force is not in issue, like saving a child from imminent danger. As for the defence of de minimis, it is equally or more vague and difficult in application than the reasonableness defence offered by s. 43.

Overbreadth

[45] Section 43 of the *Criminal Code* refers to corrective force against children generally. The Foundation argues that this is overbroad because children under the age of two are not capable of correction and children over the age of 12 will only be harmed by corrective force. These classes of children, it is argued, should have been excluded.

[46] This concern is addressed by Parliament's decision to confine the exemption to reasonable correction, discussed above. Experts consistently indicate that force applied to a child too young to be capable of learning from physical correction is not corrective force. Similarly, current expert consensus indicates that corporal punishment of teenagers creates a serious risk of psychological harm: employing it would thus be unreasonable. There may however be instances in which a parent or school teacher reasonably uses corrective force to restrain or remove an adolescent from a particular situation, falling short of corporal punishment. Section 43 does not permit force that cannot correct or is unreasonable. It follows that it is not overbroad. ...

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ARBOUR J (Deschamps J concurring (in dissent)):

[131] This appeal raises the constitutional validity of s. 43 of the *Criminal Code*, R.S.C. 1985, c. C-46, which justifies the reasonable use of force by way of correction by parents and teachers against children in their care. Although I come to a conclusion which may not be very different from that reached by the Chief Justice, I do so for very different reasons. The Chief Justice significantly curtails the scope of the defence of s. 43 of the *Code*, partly on the basis that s. 43 should be strictly construed since it withdraws the protection of the criminal law in certain circumstances. According to her analysis, s. 43 can only be raised as a defence to a charge of simple (common) assault; it applies only to corrective force, used against children older than two but not against teenagers; it cannot involve the use of objects, and should not consist of blows to the head; and it should not relate to the "gravity" of the conduct attracting correction.

[132] With respect, in my opinion, such a restrictive interpretation of a statutory defence is inconsistent with the role of courts *vis-à-vis* criminal defences, both statutory and common law defences. Furthermore, this restrictive interpretation can only be arrived at if dictated by constitutional imperatives. Canadian courts have not thus far understood the concept of reasonable force to mean the "minor corrective force" advocated by the Chief Justice. In my view, the defence contained in s. 43 of the *Code*, interpreted and applied inconsistently by the courts in Canada, violates the constitutional rights of children to safety and security and must be

struck down. Absent action by Parliament, other existing common law defences, such as the defence of necessity and the "de minimis" defence, will suffice to ensure that parents and teachers are not branded as criminals for their trivial use of force to restrain children when appropriate.

[133] Section 43 of the *Code* justifies the use of force by parents and teachers by way of correction. The force that is justified is force that is "reasonable under the circumstances." The section does not say that forcible correction is a defence only to common assault. Nor has it been understood to be so restrictive: see *R. v. Pickard*, [1995] B.C.J. No. 2861 (QL) (Prov. Ct.); *R. v. G.C.C.* (2001), 206 Nfld. & P.E.I.R. 231 (Nfld. S.C.T.D.); *R. v. Fritz* (1987), 55 Sask. R. 302 (Q.B.); *R. v. Bell*, [2001] O.J. No. 1820 (QL) (S.C.J.); and *R. v. N.S.*, [1999] O.J. No. 320 (QL) (Ct. J. (Gen. Div.)), where s. 43 was successfully raised as a defence against charges of assault with a weapon and/or assault causing bodily harm.

[134] In the *Code*, the justifiable use of force may be advanced as a defence against a wide range of offences that have at their origin the application of force. These offences range from common assault, to assault causing bodily harm and eventually to manslaughter. ...

[135] In the case at bar, the critical inquiry turns on the meaning of the phrases "force by way of correction" and "reasonable under the circumstances" (s. 43 of the *Code*). To say, as the Chief Justice does, that this defence cannot be used to justify any criminal charge beyond simple assault, that the section cannot justify the use of corrective force against a child under 2 or against a teenager, and that force is never reasonable if an object is used, is a laudable effort to take the law where it ought to be. However, s. 43 can only be so interpreted if the law, as it stands, offends the Constitution and must therefore be curtailed. Absent such constitutional constraints, it is neither the historic nor the proper role of courts to enlarge criminal responsibility by limiting defences enacted by Parliament. In fact, the role of the courts is precisely the opposite.

[136] Setting aside any constitutional considerations for the moment, courts are expressly prohibited by s. 9 of the *Code* from creating new common law offences. All criminal offences must be enacted by statute. On the other hand, the courts have been and continue to be the guardians of common law defences. This reflects the role of courts as enforcers of fundamental principles of criminal responsibility including, in particular, the fundamental concept of fault which can only be reduced or displaced by statute.

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[138] In this case, we have been asked to either curtail or abolish altogether a defence created by Parliament. If we are to do this, as I believe we must, it should be for higher constitutional imperatives. Absent a finding of a constitutional violation by Parliament, the reading down of a statutory defence as is done by the Chief Justice amounts to, in my respectful opinion, an abandonment by the courts of their proper role in the criminal process.

[139] Courts, including this Court, have until now properly focussed on what constitutes force that is "reasonable under the circumstances." No pre-emptive barriers have been erected. Nothing in the words of the statute, properly construed, suggests that Parliament intended that some conduct be excluded at the outset from the scope of s. 43's protection. This is the law as we must take it in order to assess its constitutionality. To essentially rewrite it before validating its constitutionality is to hide the constitutional imperative.

[140] The role of the courts when applying defences must be contrasted with the role of courts when they are called upon to examine the constitutional validity of

criminal offences. In such cases, it is entirely appropriate for the courts to interpret the provisions that proscribe conduct in a manner that least restricts "the liberty of the subject," consistent with the wording of the statute and the intent of Parliament. This is what was done in *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, for example. But such a technique cannot be employed to restrict the scope of statutory defences without the courts compromising the core of their interplay with Parliament in the orderly development and application of the criminal law.

[141] In the end, I will conclude, not unlike the Chief Justice, that the use of corrective force by parents and teachers against children under their care is only permitted when the force is minimal and insignificant. I so conclude not because this is what the *Code* currently provides but because it is what the Constitution requires. ...

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[183] "Reasonableness" with respect to s. 43 is linked to public policy issues and one's own sense of parental authority. "Reasonableness" will always entail an element of subjectivity. As McCombs J. recognized in the case at bar, "[b]ecause the notion of reasonableness varies with the beholder, it is perhaps not surprising that some of the judicial decisions applying s. 43 to excuse otherwise criminal assault appear to some to be inconsistent and unreasonable" ((2000), 49 O.R. (3d) 662, at para. 4). It is clear, however, that the concept of reasonableness, so widely used in the law generally, and in the criminal law in particular, is not in and of itself unconstitutionally vague. "Reasonableness" functions as an intelligible standard in many other criminal law contexts.

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[189] I doubt that it can be said, on the basis of the existing record, that the justification of corporal punishment of children when the force used is "reasonable under the circumstances" gives adequate notice to parents and teachers as to what is and is not permissible in a criminal context. Furthermore, it neither adequately guides the decision-making power of law enforcers nor delineates, in an acceptable fashion, the boundaries of legal debate. The Chief Justice rearticulates the s. 43 defence as the delineation of a "risk zone for criminal sanction" (para. 18). I do not disagree with such a formulation of the vagueness doctrine in this context. Still, on this record, the "risk zone" for victims and offenders alike has been a moving target.

[190] In the Chief Justice's reasons, it is useful to note how much work must go into making the provision constitutionally sound and sufficiently precise: (1) the word "child" must be construed as including children only over age 2 and younger than teenage years; (2) parts of the body must be excluded; (3) implements must be prohibited; (4) the nature of the offence calling for correction is deemed not a relevant contextual consideration; (5) teachers are prohibited from utilizing corporal punishment; and (6) the use of force that causes injury that is neither transient nor trifling (assault causing bodily harm) is prohibited (it seems even if the force is used by way of restraint). At some point, in an effort to give sufficient precision to provide notice and constrain discretion in enforcement, mere interpretation ends and an entirely new provision is drafted. As this Court concluded in *R. v. Heywood*, [1994] 3 S.C.R. 761, at p. 803:

> The changes which would be required to make s. 179(1)(b) [here, s. 43] constitutional would not constitute reading down or reading in; *rather, they would amount to judicial rewriting of the legislation*. [Emphasis added.]

The restrictions put forth by the Chief Justice with respect to the scope of the defence have not emerged from the existing case law. These restrictions are far

from self-evident and would not have been anticipated by many parents, teachers or enforcement officials.

[191] In my view, we cannot cure vagueness from the top down by declaring that a proper legal debate has taken place and that anything outside its boundaries is simply wrong and must be discarded. Too many people have been engaged in attempting to define the boundaries of that very debate for years in Canadian courtrooms to simply dismiss their conclusions because they do not conform with a norm that was never apparent to anyone until now. As demonstrated earlier, s. 43 has been subject to considerable disparity in application, some courts justifying conduct that other courts have found wholly unreasonable, despite valiant efforts by the lower courts to give intelligible content to the provision. Attempts at judicial interpretation which would structure the discretion in s. 43 have, in my opinion, failed to provide coherent or cogent guidelines that would meet the standard of notice and specificity generally required in the criminal law. Thus, despite the efforts of judges, some of whom have openly expressed their frustration with what has been described as "no clear test" and a "legal lottery" in the criminal law (McGillivray, "'He'll learn it on his body': Disciplining childhood in Canadian law" [(1997) 5 Intl J Child Rts 193], at p. 228; *James*, ... per Weagant Prov. J., at paras. 11-12), the ambit of the justification remains about as unclear as when it was first codified in 1892. As Lamer C.J. stated in *R. v. Morales*, [1992] 3 S.C.R. 711, at p. 729:

> A standardless sweep does not become acceptable simply because it results from the whims of judges and justices of the peace rather than the whims of law enforcement officials. Cloaking whims in judicial robes is not sufficient to satisfy the principles of fundamental justice.

This would not only raise the already high bar set in *Nova Scotia Pharmaceutical*, *supra*; it would essentially make it unreachable.

[192] As a result, I find that the phrase "reasonable under the circumstances" in s. 43 of the *Code* violates children's security of the person interest and that the deprivation is not in accordance with the relevant principle of fundamental justice, in that it is unconstitutionally vague.

Do you agree with McLachlin CJ and the majority of the Court, or with Arbour J's dissent? What arguments do you find compelling on each side?

The principles of fundamental justice have continued to evolve so that laws can potentially be struck down not only if they are excessively vague or overbroad but also if they are arbitrary or grossly disproportionate to their legislative aims. You will learn more about these developments in Chapter 2, when you read an excerpt from *Canada (AG) v Bedford*, 2013 SCC 72. The Court in *Bedford* observed (at para 123) that arbitrariness, overbreadth, and gross disproportionality

> compare the rights infringement caused by the law with the objective of the law, not with the law's effectiveness. That is, they do not look to how well the law achieves its object, or to how much of the population the law benefits. Nor do they consider ancillary benefits to the general population. Furthermore, none of the principles measure the percentage of the population that is negatively impacted. The analysis is qualitative, not quantitative. The question under s 7 is whether *anyone's* life, liberty or security of the person has been denied by a law that is inherently bad; a grossly disproportionate, overbroad, or arbitrary effect on one person is sufficient to establish a breach of s. 7.

Other principles of fundamental justice that impact criminal and regulatory offences and defences will be examined in other parts of the book, most notably in Chapters 6, 7, 13, 16, and

18. For a discussion of the impact of s 7 and the principles of fundamental justice on Canadian criminal law, see e.g. Kent Roach, *Criminal Law*, 7th ed (Toronto: Irwin Law, 2018) ch 2; Don Stuart, *Charter Justice in Canadian Criminal Law*, 7th ed (Toronto: Carswell, 2018) ch 2; and Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms*, 2nd ed (Toronto: Irwin Law, 2019).

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