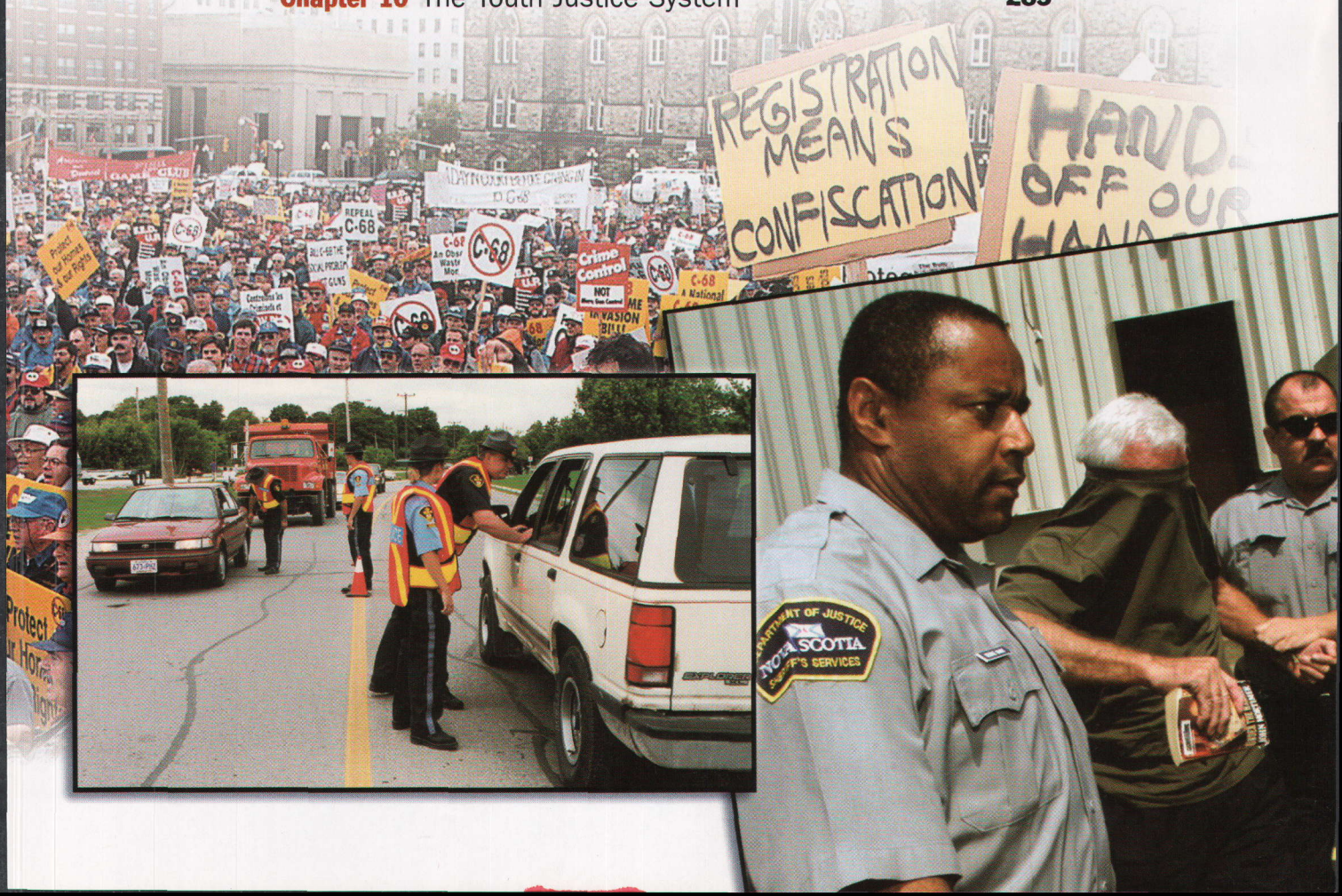
Ignorantia legis neminem excusat
Ignorance of the law, which everyone is bound to know, excuses no one.
Legal Maxim

Unit 2

Criminal Law



Chapter 4

Criminal Law and Criminal Offences

Focus Questions

- What is a crime?
- What is the difference between summary and indictable offences?
- What elements or conditions must exist for an action to be considered a crime?
- What criminal courts exist to interpret and apply the law?
- How are crimes handled in the courts?

Chapter at a Glance

Figure 4-1

This Vancouver house was the scene of a home invasion. A home invasion involves several people who determine that the residents are home and devise a plan to confront, attack, and subdue them. Robbery is the goal. What kind of evidence might officers be looking for at this crime scene to determine if a home invasion occurred?

4.1 Introduction

The law exists to protect society and individuals and to keep order. **Criminal law** deals with offences committed against society. **Civil law** deals with offences committed against individuals.

The distinction between criminal law and civil law is obvious in the following example. Suppose Ron decides to break into Kathy's house to steal her electronic equipment. He breaks the door lock with a crowbar and enters the house when no one is home. He leaves with a laptop computer, a stereo-CD player, a DVD player, and a digital camera. The *Criminal Code* describes Ron's offence as **"break and enter"** and sets a penalty for committing the offence (see The Law, below).

For breaking and entering, Ron would be charged under criminal law because he has done something that society considers unacceptable. People have the right to live safely in their own homes and to keep their own possessions. If Ron is found guilty, he may have to pay a fine, do community work, and/or be imprisoned. All these penalties will result in a cost to him—either paying money and/or being deprived of his time and freedom. However, none of these penalties compensates Kathy for her personal property losses. For this, she must sue Ron for damages under civil law. This case would be heard at a different time and in civil court. (For information on the civil courts, see Chapter 11.)

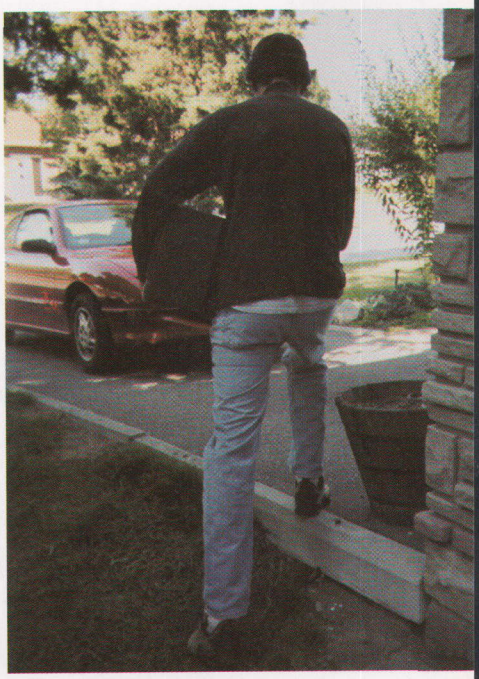


Figure 4-2

Ron escapes with Kathy's stereo-CD player. Breaking and entering is a criminal offence, a crime against society.

The Need for Criminal Law

Criminal law helps to keep order in society. Penalties for crimes help to deter (prevent) people from committing crimes. Criminal law emphasizes prevention and penalties. It does not place much emphasis on compensating victims for the losses suffered because of a crime. It is difficult, if not impossible, to compensate victims for certain crimes. The victim of a murder can never be brought back. The victim of a penniless thief will not be repaid.

The Law — The Criminal Code

Excerpts from the *Criminal Code*

348.

(1) Every one who

(a) breaks and enters a place with intent to commit an indictable offence therein ...

is guilty

(d) if the offence is committed in relation to a dwelling-house, of an indictable offence and liable to imprisonment for life, and

(e) if the offence is committed in relation to a place other than a dwelling-house, of an indictable offence and liable to imprisonment for a term not exceeding ten years or of an offence punishable on summary conviction.

For Discussion

1. **Why do you think that the punishment for breaking into a dwelling-house (private residence) is more severe than for breaking into a business or store?**

Most people believe that criminal law should protect people and property. Some want harsh penalties to discourage potential offenders or to punish people for wrongdoing. Others want the criminal justice system to rehabilitate, or help, those who have already harmed society. Some think that criminal law should have all these functions.

4.2 The Nature of Criminal Law

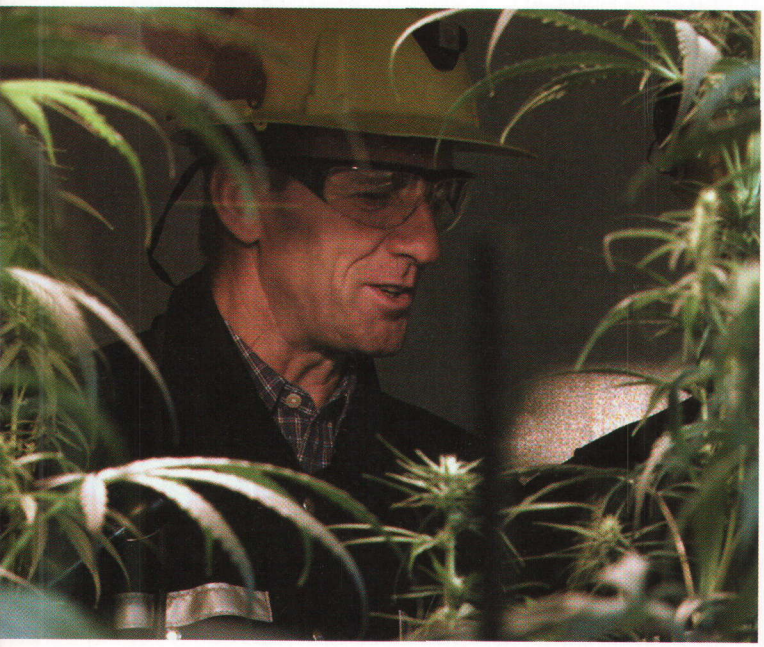


Figure 4-3

Former federal Health Minister Allan Rock is shown with the government's legal marijuana crop. Canada's new medicinal marijuana policy came into effect in August 2001. It allows people who require marijuana for medical reasons to be exempt from narcotics laws. They can grow marijuana, or have someone grow it for them, and use it without fear of prosecution.

Parliament decides what is a crime and regularly passes laws to change the *Criminal Code*. At any given time, the *Criminal Code* reflects the values of society by declaring certain actions to be criminal. Reform of the *Criminal Code* usually reflects a shift in these values and may occur because of public pressure. For example, in Canada, there has been some public pressure to decriminalize the use of marijuana, which means that smoking marijuana would no longer be a crime. However, not everyone agrees with this proposed change, and the issue is the subject of heated debate.

Criminal Actions

Because different people have different values and beliefs, they may disagree on which actions are criminal. Law makers, lobbyists, and members of the general public often debate such topics as euthanasia (mercy killing), gun control, abortion, and pornography. In a healthy, democratic society, such debates can help to determine what changes are needed in the law. In general, Parliament will reexamine laws if the public is overwhelmingly in favour of reform, if an issue does not "go away," or if an interest group that opposes an existing law has gained enough support to force a parliamentary debate.

The Law Commission of Canada has suggested that certain conditions must exist for an act to be subject to criminal penalties. These are as follows:

- The action must harm other people.
- The action must violate the basic values of society.
- Using the law to deal with the action must not violate the basic values of society.
- Criminal law can make a significant contribution to resolving the problem.

Any reforms to the *Criminal Code* must take these conditions into consideration.

Agents of Change — Svend Robinson

Svend Robinson is the NDP representative of British Columbia's Burnaby–Douglas constituency. First elected to the House of Commons in 1979 at 26, Robinson began his political career as the youngest member of the NDP caucus. He has been reelected six times.

Robinson is no stranger to controversy. He has engaged in civil disobedience and has taken legal risks to advance the causes he believes in. He supported Sue Rodriguez, a British Columbia woman suffering from Lou Gehrig's disease, in her attempt to convince the Supreme Court of Canada to legalize doctor-assisted suicide. Though Rodriguez's efforts to change the *Criminal Code* failed, she did die in 1994 with the help of an unidentified physician. Robinson was at her bedside and witnessed her death.

Following her death, a special Senate Committee on Euthanasia and Assisted Suicide was appointed on February 23, 1994. It undertook "to examine and report on the legal, social and ethical issues relating to euthanasia and assisted suicide." In 1995, the Senate committee voted 4 to 3 against legalization. It was split on whether the current laws should be rewritten.

In November 1997, Robinson tried to change the law with a private bill. His move, like most bills not sponsored by government, failed. Recent polls indicate there is growing support among Canadians for people being able to take control of their own dying process, but there is no clear consensus about what kind of rules are needed. Despite differences of opinion within its membership, the Canadian Medical Association continues to state that members should not participate in euthanasia and assisted suicide.

See Issue on page 134 for more on euthanasia.

For Discussion

1. **Identify information from this profile that suggests Canadian attitudes about euthanasia and assisted suicide are changing.**
2. **What is the position of the Canadian Medical Association?**
3. **Should courts decide on issues of euthanasia or assisted suicide or should legislators decide? Explain.**

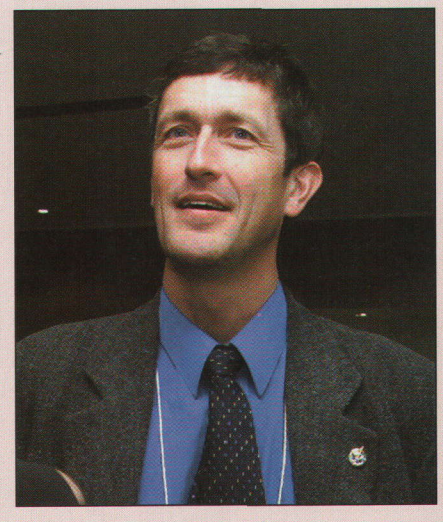


Figure 4-4
Svend Robinson

Review Your Understanding (Pages 103 to 105)

1. **Explain the main purpose of criminal law.**
2. **Describe three functions of criminal law and provide brief examples to support your understanding.**
3. **When does Parliament decide to make certain actions criminal?**
4. **Why is it important to have a free and open debate about possible changes in the law?**
5. **According to the Law Commission of Canada, what conditions must exist for an action to be considered a crime? Express your opinion on whether you think each condition set out by the Law Commission is valid. Provide examples to support your opinion.**

activity

Visit **www.law.nelson.com** and follow the links to learn about law reform and the work of the Law Commission of Canada.

4.3 The Power to Make Criminal Law

In 1867, when Canada became a country, the provinces gave jurisdiction (authority) over criminal law to the federal Parliament. This meant that Parliament had the authority to decide which actions were crimes and to set punishments for crimes (section 91 of the *British North America Act*). Today, this means that if you were to commit a criminal offence in any of the provinces and territories, you would receive the same treatment whether you committed the offence in British Columbia or in Nova Scotia.

Quasi-Criminal Law

Following Confederation, the provinces still had the right to pass some laws. Technically, laws passed by the provinces, territories, or municipalities are not considered part of criminal law. They are referred to as quasi-criminal law because they resemble criminal law but do not deal with actual crimes. Traffic offences that fall under the *Highway Traffic Act* of each province and bylaws passed by municipalities are examples of quasi-criminal law. Breaking these laws usually results in a fine.

Did You Know?

The *Criminal Code* does not allow accused persons to defend themselves on the grounds that they did not know they were committing an offence. Section 19 of the Code states that "ignorance of the law by a person who commits an offence is not an excuse for committing that offence."

The Criminal Code

The *Criminal Code* is the main source of criminal law in Canada. It describes offences that are considered crimes, as well as punishments for crimes. Other criminal offences are listed in statutes passed by Parliament, such as the *Controlled Drugs and Substances Act* (formerly the *Narcotic Control Act*). You will read about these statutes in later chapters.

Parliament is always reforming the *Criminal Code* to meet the needs of Canadian society and to reflect its values. The judiciary (the judges and courts) interpret the criminal laws and apply them to individual cases. Judges have the power to determine if a law trespasses upon a citizen's rights as outlined in the *Canadian Charter of Rights and Freedoms*. If this occurs, the law is ruled to be unconstitutional and no longer in effect. When judges make decisions on important cases, these decisions may become precedents and may be followed by other judges making decisions in similar cases. In this manner, the judiciary helps to influence criminal law in Canada. These precedents are often referred to in the *Criminal Code*.

Did You Know?

In 1993, the *Criminal Code* was changed to make harassment a crime in the wake of some well-publicized cases of stalking and harassment. Criminal harassment includes repeatedly following someone, repeatedly watching someone's house or place of work, and making threats of violence.

Review Your Understanding (Page 106)

1. **Why was the federal government given jurisdiction over criminal law?**
2. **Compare quasi-criminal law to criminal law and provide an example of each.**
3. **Identify the purpose of the *Criminal Code* of Canada.**
4. **When might a law be ruled unconstitutional?**
5. **How does the judiciary influence our criminal law?**

4.4 Types of Criminal Offences

If you attend a session at a Canadian court, you will hear people being charged with **summary conviction offences** or **indictable offences.** Some offences can be either summary or indictable, depending on the circumstances of the cases. These are called **hybrid offences** because they could belong to either category of offence.

Summary Conviction Offences

Summary conviction offences are minor criminal offences. People accused of these offences can be arrested and summoned to court without delay. The maximum penalty for most summary convictions under the *Criminal Code* is $2000 and/or six months in jail. In other statutes, more severe penalties for summary offences are given. For example, the *Controlled Drugs and Substances Act* specifies a maximum penalty of a fine of $2000 and/or imprisonment for one year for possession of a narcotic.

Indictable Offences

Indictable offences are serious crimes that carry more severe penalties than summary conviction offences. The *Criminal Code* sets a maximum penalty for each offence—up to life imprisonment for some offences, such as homicide. It is up to the trial judge to decide the actual penalty. Some indictable offences have a minimum penalty that judges are forced to impose. For example, impaired driving carries a minimum penalty that can range from a $600 fine to five years imprisonment, depending upon the number of times the accused has committed the offence.

Figure 4-5

This car crashed into a Kingston, Ontario, home. The driver was charged with impaired driving. A passenger and someone in the house were killed. Would this be a summary or an indictable offence?

Hybrid Offences

Hybrid offences are those for which the Crown attorney has the right to proceed summarily, and impose a less severe punishment, or to proceed by indictment. Theft is an example of a hybrid offence, as section 334 of the *Criminal Code* makes clear (see The Law, page 108).

Review Your Understanding (Pages 107 to 108)

1. **Distinguish between a summary and indictable offence.**
2. **Compare the maximum penalty for summary and indictable offences.**
3. **What choices does a Crown attorney have in dealing with a hybrid offence?**

The Law — The Criminal Code

Excerpts from the *Criminal Code*

334.

... everyone who commits theft

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years, where ... the value of what is stolen exceeds five thousand dollars; or

(b) is guilty

(i) of an indictable offence and is liable to imprisonment for a term not exceeding two years, or

(ii) of an offence punishable on summary conviction,

where the value of what is stolen does not exceed five thousand dollars.

For Discussion

1. **Under what circumstances would a person be charged by summary conviction?**
2. **Under what circumstances would a person be charged by indictment?**

4.5 The Elements of a Crime

Two conditions must exist for an act to be a criminal offence: ***actus reus*** and ***mens rea***. In Latin, *actus reus* means "a wrongful deed." In other words, it must be shown that the person committed an act prohibited by law. *Mens rea* means "a guilty mind." Therefore, it must also be shown that the accused intended to commit the offence. These two conditions must exist at the same time.

The *Canadian Charter of Rights and Freedoms* states in section 11(d) that a person is "to be presumed innocent until proven guilty according to law." This means that the Crown attorney has the responsibility to prove that *actus reus* and *mens rea* existed at the time the crime was committed. In addition, these conditions must be proven beyond a reasonable doubt. If there is a reasonable doubt in the mind of the judge or jury that the accused committed the crime, the accused will be acquitted and set free.

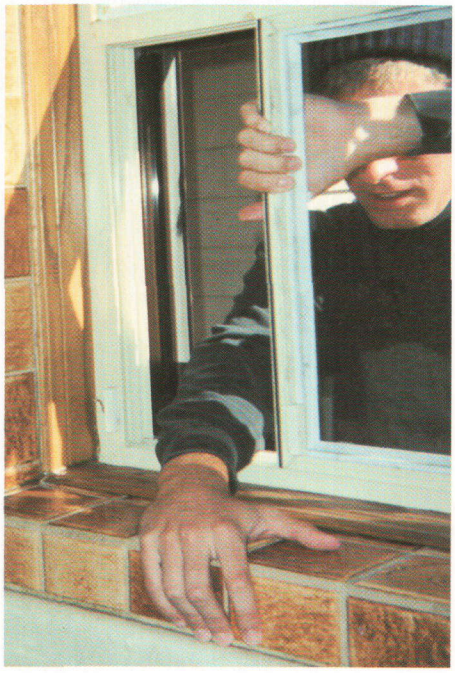


Figure 4-6

Ron has "entered" Kathy's house by putting his arm through the kitchen window.

Actus Reus

The *Criminal Code* usually explains what must occur for an act to be considered a crime. For example, section 348 clearly states that two actions must occur during a break and enter for a wrongful deed (*actus reus*) to have occurred. The first is the break-in itself; the second is the entry.

As you read earlier, Ron committed break and enter. You will recall that he broke the door lock with a crowbar and entered Kathy's house. What if he had only broken a kitchen window? In this case, the break-in would have occurred, but not the entry. However, if Ron reaches an arm through the window to climb in but someone scares him off, he has still entered because a part of his body was in the house.

Actus reus can also describe a failure to do something. For example, it is a crime for parents to withhold the necessities of life from their children.

Mens Rea

Mens rea is the second condition that must exist for an act to be considered a crime. *Mens rea* exists if the offence is committed with (1) intent or knowledge, or (2) recklessness.

Intent or Knowledge

Intent is really the true purpose of an act. It is based on the facts and on what a reasonable person would be thinking under the circumstances. Ron wants to break into Kathy's house to steal her electronic equipment. He has the intent to rob Kathy. That is the true purpose of his act, even if he denies it.

Intent can be either general or specific. A **general intent** to perform an action means that the intent is limited to the act itself and the person has no other criminal purpose in mind. In the case of assault, for example, the Crown need only prove the intent to apply force. Intent can be inferred from the fact that the accused *did* apply force. Similarly, for a charge of trespassing at night, once the Crown has proven that the accused *was* on someone else's property at night, the intent to be there is inferred. There is no need to prove any other *mens rea* to prove that a crime was committed.

Specific intent exists when the person committing the offence has a further criminal purpose in mind. For example, you can infer specific intent from Ron's offence of break and enter because it involves (1) an intentional illegal action (breaking and entering a place) that is committed with the intent to commit (2) a further illegal action (robbery, an indictable offence).

You Be the JUDGE

In the case of *R. v. Daviault* (1994), the Supreme Court of Canada ruled that "extreme drunkenness" was an appropriate defence for certain crimes, for example, sexual assault. It argued that the intoxication of the defendant was so extreme that the situation was unlikely to happen again.

- What element of a crime is missing in a situation of extreme drunkenness? Should self-induced intoxication be a defence to drunkenness? Explain.

Case

R. v. Molodowic

[2000] 1 S.C.R. 420
Supreme Court of Canada

The accused suffered from a severe mental disorder known as paranoid schizophrenia. After shooting and killing his grandfather, he drove to a friend's house and reported what had happened. He asked the friend to call the police. After the police informed the accused of his rights, he gave them a statement.

The accused was charged with second-degree murder and was tried by a judge and jury. In his defence, two psychiatrists testified that the accused had a mental disorder and honestly believed that he had to kill his grandfather to end his mental torment. They said that the accused did not have the ability to appreciate that his action was morally wrong at the time of the killing. The accused was convicted of second-degree murder; he appealed the verdict and the appeal was dismissed. The issue in the appeal was whether the verdict was unreasonable given the impact of the mental illness on criminal responsibility.

The Supreme Court ruled that the appeal should be allowed. A verdict of not criminally responsible by reason of mental disorder was entered.

For Discussion

1. **Were *actus reus* and *mens rea* present at the time this crime was committed? Explain.**
2. **Why do you think the Supreme Court allowed the appeal?**
3. **Should mental illness be used as a reason to nullify criminal responsibility? Explain your opinion.**

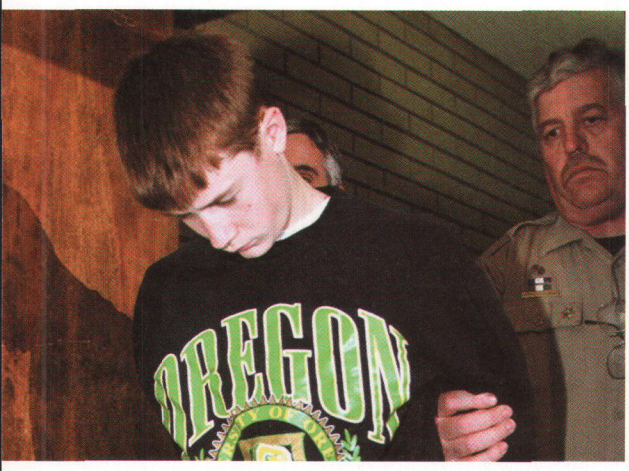


Figure 4-7

Some U.S. states allow minors to be tried as adults for some murder cases and for sex crimes if the defendant is at least 14 years old. Kip Kinkel, shown here, murdered his parents before attacking his classmates, killing two and injuring 25. He was sentenced to life imprisonment.

The law considers some people to be incapable of forming the intent necessary to commit a crime. Examples include people suffering from some forms of mental illness, minors (children), or people who are so drunk or "high" that they do not understand what they are doing (see Case, page 109). These persons will be considered in Chapters 8 and 10.

Knowledge

The **knowledge** of certain facts can also provide the necessary *mens rea.* For example, section 342(1)(d) of the *Criminal Code* says: "Every person who uses a credit card knowing that it has been revoked or cancelled is guilty" of an indictable offence. Here, it is only necessary to prove that the person used the credit card, knowing that it had been cancelled. It is not necessary to prove that there was an intent to defraud.

Motive

The reason for committing an offence is called the **motive.** Motive is not the same as intent, and it does not establish the guilt of the accused. The fact that Ron wanted to steal Kathy's electronic equipment in order to pawn it for cash is not relevant to his guilt. In addition, a person can have a motive and not commit an offence. Suppose that a suspicious fire kills a man whose wife is having a serious affair with another man. The wife may have had a motive to kill, but unless it can be shown that she acted to cause the fire, or failed to act, she has not committed an offence. Motive may be used as circumstantial evidence—indirect evidence that would lead you to conclude that someone is guilty. However, the elements of the offence must be proven to obtain a conviction. The judge may also refer to the motive for an offence during sentencing.

Recklessness

Recklessness is the careless disregard for the possible results of an action. When people commit acts with recklessness, they may not intend to hurt anyone. However, they understand the risks of their actions and proceed to act anyway. Driving over the speed limit and cutting people off in traffic could result in criminal charges if injury occurs as a result of these actions. *Mens rea* would exist if such recklessness were proven.

Offences without a Mens Rea

Some offences are less serious than those found in the *Criminal Code.* To prove that these offences occurred, it is not necessary to prove *mens rea.* These offences are usually violations of federal or provincial regulations passed to protect the public. Speeding, "short-weighting" a package of food, and polluting the environment are all examples of regulatory offences. Regulatory offences also carry lesser penalties. As a result, they do not carry the stigma associated with a criminal conviction.

Case

R. v. Wilson

[2001] B.C.W.L.D. 561
British Columbia Court of Appeal

Marven Wilson was convicted of dangerous driving causing death and received a sentence of four years. The same judge also acquitted him of impaired driving causing death. Wilson decided to appeal his sentence.

In 1996, Wilson had tried to overtake a pickup truck driven by his friend Todd McComber. Both had been drinking alcohol. Wilson hit McComber's truck, which caused it to roll over several times. Rocky Cameron, a passenger, was thrown from the truck and died of his injuries. Neither man was wearing a seat belt. Police arrested Wilson for being intoxicated in a public place, but did not take breath samples. Wilson had several previous convictions for drinking and driving, not wearing a seat belt, and speeding.

In his appeal, Wilson argued that the sentence was too harsh. He said that the trial judge had made a mistake—the judge had convicted him of dangerous driving causing death while under the influence of alcohol but had acquitted him of the impaired driving charge. This was a contradiction. The three Court of Appeal judges agreed with Wilson and reduced his sentence to three years' imprisonment.

For Discussion

1. **Is there intent or recklessness in this case? Explain.**
2. **What contradiction is the Court of Appeal referring to in the trial decision?**
3. **What mistake did the arresting police make and how did it influence the decision of the case at trial?**
4. **Which verdict do you support? Justify your opinion by using the facts from the case to support your view.**

Case

R. v. Memarzadeh

(2001) 142. O.A.C. 281
Ontario Court of Appeal

On June 29, 1997, Said Memarzadeh was released from a police station with a written promise to appear in court on a certain date. Later that day, a citizen complained that a number of items had been stolen from a home near the police station. Although there was no evidence that a break-in had occurred, Memarzadeh's written notice to appear in court was found in the home.

Memarzadeh was arrested and convicted of break and enter. He received a 30-day sentence. At his trial, he said he could not remember being at the police station on the day of the break and enter. It also emerged that he had spent eight years in an Iranian jail as a political prisoner and had undergone three brain operations following some severe beatings.

Memarzadeh successfully appealed his conviction for break and enter. The appeal court decision said there was no evidence that the home had been broken into, or that the accused had been on the premises. The fact that Memarzadeh's document—the promise to appear in court—was found in the home did not prove he had been there.

For Discussion

1. **Identify the *actus reus* in this case.**
2. **Did *mens rea* exist here? Explain.**
3. **With which decision do you agree, the trial court decision or the appeal court decision? Explain your answer.**

There are two types of regulatory offences: **strict liability offences** and **absolute liability offences.** To prove a strict liability offence, it is only necessary to prove that the offence was committed. The accused can put forward the defence of **due diligence,** which means that the accused took reasonable care not to commit the offence or honestly believed in a mistaken set of facts.

Absolute liability offences are similar to strict liability offences in that the Crown does not have to prove *mens rea.* However, absolute liability offences have no possible defence—due diligence is not accepted as a defence for committing such offences. If the person committed the *actus reus,* he or she is guilty, no matter what precautions were taken to avoid committing the offence.

Canadian law does not specify which regulatory offences are strict liability or absolute liability. It is left to the courts to decide what the government intended. Because absolute liability offences provide little opportunity for a successful defence, the Supreme Court of Canada ruled in *Re B.C. Motor Vehicle Act* (1985) that a prison term for an absolute liability offence was unconstitutional.

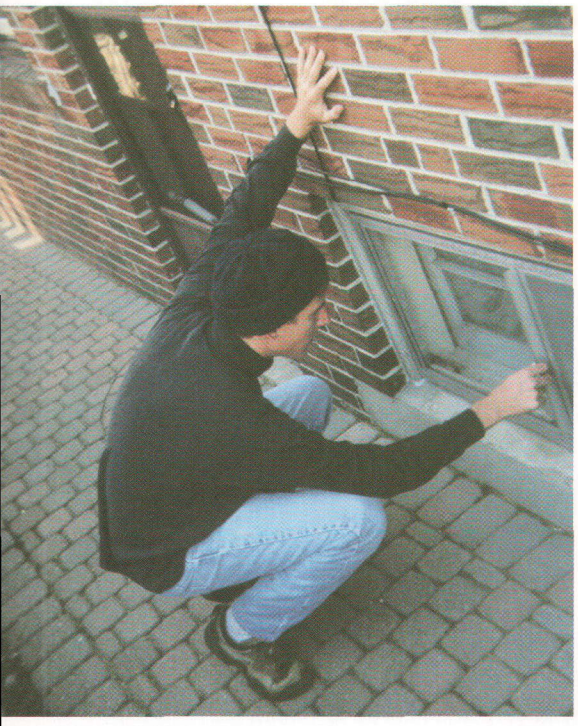


Figure 4-8

Ron is checking Kathy's windows to see how secure they are. He has gone beyond the preparation stage and is making an attempt to break and enter Kathy's house.

Attempt

A person who intends to commit a crime but fails to complete the act may still be guilty of a criminal offence. In Ron's case, a police officer could have observed him walking around the house at night with a flashlight, trying the doors to see if they were locked. Ron would be found guilty of an **attempt** to break and enter under section 24(1) of the *Criminal Code.*

As with any crime, proving attempt means proving that there was intent to commit the offence. The *actus reus* for an attempt begins when the person takes the first step toward committing the crime. It is the judge who decides—even in trial by jury—when the preparation stage has ended and the attempt stage has begun. For example, Ron prepared for his crime by buying housebreaking tools and noting when Kathy entered and left the house. However, it was only when he took his first step toward the actual break-in that he attempted the crime.

During a trial, if the Crown is unable to prove that the offence was committed but only that an attempt was made, the accused may be convicted of the attempt. If the accused was originally charged with the attempt, but the evidence indicates that the offence was actually committed, the judge may order the accused to be tried for the offence itself.

Conspiracy

A **conspiracy** is an agreement between two or more people to commit a crime or to achieve something legal by doing something illegal. For example, if Ron and Hank discuss their plans to break into Kathy's house to steal her

Case

R. v. Bernier

2001 BCCA 394
British Columbia Court of Appeal

A trial judge convicted Bernier of robbery while using a firearm; assault while using a weapon; breaking and entering a residence and committing theft; and possession of stolen property of a value less than $5000. Bernier appealed the first two conviction charges but not the other convictions.

Bernier was a member of a home-invasion gang in 1997. The gang broke down the door of Dean Eve's basement apartment while one member yelled: "Police, on your hands and knees!" They handcuffed Eve, who testified that one of the gang members had a gun. The gang members told him they were looking for money and drugs. They took $300 and then hit Eve on the head with the butt of the gun, causing injury. When the homeowner returned, he found that his upstairs apartment had been ransacked and several items were missing. When the gang members were arrested, some of the stolen items were found in their possession.

Bernier's trial judge ruled that he had intent to aid others to commit an offence. Bernier claimed that he did not know that a gun would be used during the home invasion. He felt that he should be found not guilty of the weapons offences. On appeal, the three judges could find no evidence that Bernier knew of a weapon or ought to have known that it would be used at the scene of the crime. They substituted the more serious weapons charges with the less serious charges of robbery and assault.

For Discussion

1. **What is a "home invasion"? What crimes are associated with it?**
2. **Why do you think "robbery while using a firearm" and "assault while using a weapon" are more serious than "robbery" and "assault"?**
3. **Why do you think the appeal court substituted the less serious charges of robbery and assault?**

credit cards, they have conspired to commit a crime. Even if they do not carry out the plan, they have agreed to a conspiracy to commit the crime.

In a conspiracy, all the people involved must be serious in their intention to commit the crime. Jokes or threats are not considered conspiracy.

Review Your Understanding (Pages 108 to 113)

1. **Identify the two elements that must exist for a crime to be committed.**
2. ***Actus reus* does not always require an action to be committed. Give an example of such a circumstance.**
3. **Distinguish among the different categories of *mens rea* and provide an example for each.**
4. **Distinguish between general and specific intent.**
5. **How is motive used in a criminal trial?**
6. **For which offence is the defence of due diligence available? Explain how it would be used.**
7. **Identify the element of a crime that must be proven in an absolute liability offence. Why do such regulatory offences exist?**
8. **When does an attempt begin? Provide an example of a situation where a criminal charge of attempt could be made.**
9. **When could individuals be charged with conspiracy?**

4.6 Parties to an Offence

A person who commits an offence, aids a person to commit an offence, or abets a person in committing an offence is defined as a party to a crime under section 21 of the *Criminal Code.*

Aiding or Abetting

Aiding means to help someone commit a crime. **Abetting** means to encourage someone to commit a crime. Two things must be proven before an accused can be convicted of aiding or abetting. First, the accused had knowledge that the other person intended to commit the offence. Second, the accused actually helped or encouraged the person to commit the offence. Mere presence at the scene of the crime does not provide conclusive evidence of aiding or abetting. Under section 21(2) of the *Criminal Code,* a person who plans an offence is just as guilty as a person who actually commits it.

To counsel (suggest) or incite (urge) someone to commit a crime is also an offence. If Ron urges a friend to take an unlocked car with the keys in it for a joy ride, he is inciting another to commit an offence. Even if the offence is not carried out, the person who incites the offence—Ron—can receive the same penalty as the person who attempts it.

Did You Know?

Husbands and wives are exempt from being charged as accessories to each other because of traditional attitudes. Many of our current laws were inherited from the common law, where the wife was considered to be one with her husband. It has been suggested that these laws do not reflect current values in our society.

Accessory after the Fact

An **accessory after the fact** is someone who helps a criminal escape detention or capture. Helping someone escape capture includes providing food, clothing, or shelter to the offender. One exception to this law is the favoured relationship between a legally married couple. A man or a woman cannot be held responsible for assisting in the escape of a spouse and someone escaping with the spouse.

Case

R. v. Goodine

(1993) 141 N.B.R. (2d) 99
New Brunswick Court of Appeal

One summer afternoon in 1992, Todd Johnston went for a ride with his girlfriend and two friends, Jason Boyd and Cory Goodine. After driving on some country roads near Arthurette, New Brunswick, Johnston stopped the truck. Without warning, he shot Boyd in the head with a revolver. He then removed Boyd's body from the truck and dragged it a short distance.

Still holding the revolver, Johnston ordered Goodine to "get off the truck and help me because you're in on this, too." Goodine obeyed Johnston's orders to drag the body into the woods. When the victim moaned, Johnston shot Boyd again in the back of the head. Medical evidence at trial indicated that either shot would have caused Boyd's death.

A few days later, Goodine told two of his friends about the murder and led them to Boyd's body. The next day, the friends reported the incident to the police, who arrested Goodine and charged him with being an accessory after the fact to murder. The accused was acquitted following a trial by jury. The Crown appealed to the Court of Appeal, but the appeal was dismissed.

continued

For Discussion

1. **Why did the Crown appeal the accused's acquittal?**
2. **What is the *actus reus* of accessory after the fact?**
3. **Why was Goodine not charged with aiding and abetting?**
4. **What defence would be open to Goodine to explain his actions?**
5. **On what basis do you think the jury acquitted Goodine? Explain.**

Review Your Understanding (Pages 114 to 115)

1. **According to section 21 of the *Criminal Code*, who may be a party to an offence?**
2. **Distinguish between "aid" and "abet."**
3. **What is the significance of section 21(2) of the *Criminal Code*?**
4. **Identify who may be considered an accessory after the fact.**

4.7 Our Criminal Court System

Thousands of cases go to trial each year. The cost of operating the criminal justice system, which is paid for by the taxpayer, is very high. As a result, the structure and procedures of Canadian courts are constantly changing to provide greater efficiency.

Jurisdiction over the court system is divided between the federal and provincial governments. The *Constitution Act, 1867*, gave the provincial governments jurisdiction over the administration of justice in their provinces. The provinces organize and maintain their provincial courts by, for example, providing courthouses and court staff. The federal government controls criminal law and establishes procedures to be followed in criminal matters.

The *Constitution Act, 1867*, also gave the federal government the authority to set up two other courts. One of these is the Court of Appeal for Canada, known as the Supreme Court of Canada. The other court is the Federal Court, which reviews decisions of federal boards and commissions, among other activities. It does not, however, deal with criminal law.

The Criminal Court System in Canada

Supreme Court of Canada

- is the highest appeal court in Canada
- has unlimited jurisdiction in criminal matters
- hears appeals from provincial appeal courts
- hears cases of national importance; for example, interprets the *Charter* or clarifies a criminal law matter
- generally grants leave (permission) before the appeal will be heard
- sets national precedent; decisions must be followed by all judges in all courts of Canada

continued

Did You Know?

The *Anti-Terrorism Act* states that someone who knowingly takes in a terrorist, takes part in terrorism, or is an accomplice commits an indictable offence and could receive up to 10 years' imprisonment. Facilitating a terrorist act could get up to 14 years. Convicted leaders of terrorist acts can receive up to life imprisonment.

e activity

Visit **www.law.nelson.com** and follow the links to learn about the Federal Court of Canada.

The Criminal Court System in Canada (continued)

Provincial Supreme Court of Appeal (names vary)

- hears appeals from the Trial Division of Provincial Supreme Courts
- sets province's precedent; decisions must be followed by all judges in that province

Provincial Supreme Court–Trial Division (names vary)

- tries the more severe crimes such as manslaughter and sexual assault, and most severe indictable offences such as murder and treason
- hears criminal appeals in summary conviction cases
- sets province's precedent; decisions must be followed by Provincial Court judges in that province

Provincial Courts–Criminal Division

- arraigns (reads the charge and enters the plea) all criminal cases
- holds preliminary hearings in most severe indictable offences, but the accused can elect to have the case tried in higher court
- hears and tries criminal summary conviction cases and the least serious indictable offences such as theft under $5000

Figure 4-9

Distinguish between the "highest" and "lowest" courts in Canada. Identify the jurisdiction for each level of court.

Case

Reference Re Milgaard

[1992] 1 S.C.R. 866
Supreme Court of Canada

David Milgaard was found guilty of the rape and murder of Gail Miller in a trial by judge and jury in 1970. He was sentenced to life in prison at the age of 17. The Saskatchewan Court of Appeal affirmed his conviction, and his request to appeal to the Supreme Court of Canada was dismissed. Milgaard went to prison.

In 1992, the Supreme Court of Canada reviewed the case because of fresh evidence. One of the key witnesses at the original trial admitted he had lied about Milgaard's involvement in the crime. The Supreme Court ruled that the continued conviction of Milgaard was a miscarriage of justice. However, it was not satisfied beyond a reasonable doubt that Milgaard was innocent. It recommended that the conviction be quashed and a new trial ordered.

Figure 4-10

David Milgaard and his mother, Joyce, walk through the Winnipeg Airport the day after DNA evidence cleared him of the 1969 rape and murder of Gail Miller.

continued

It also noted that the attorney general for the province of Saskatchewan did not have to pursue a new trial. Milgaard was released after serving 22 years in jail.

In 1997, a new forensic tool—DNA testing—proved that Milgaard was innocent of the crime, and his name was cleared forever. In 1999, Larry Fisher, a serial rapist who had seven rape convictions, was convicted of the original crime. The Canadian and Saskatchewan governments awarded David Milgaard and his family $10 million in damages and apologized for the injustice that had been done to him. It was the largest settlement in Canadian history.

When asked about his wrongful conviction, Milgaard replied, "The question shouldn't be, how do I feel about this? The question should be, how did this happen?"

For Discussion

1. **Should a 17-year-old be imprisoned with hardened criminals? Explain.**
2. **Summarize the ruling of the Supreme Court of Canada in this case.**
3. **Did Milgaard and his family receive adequate compensation for his 22 years spent in jail. Explain.**

Criminal Offences and Procedures

As noted earlier, summary offences and more serious indictable offences have different trial procedures. These will be examined in more detail in the following chapters.

activity

Visit **www.law.nelson.com** and follow the links to learn more about the David Milgaard case.

Examples of Categories of Indictable Offences

Least Serious Trial procedure similar to summary offences	More Serious Accused selects one of three trial procedures	Most Serious Trial usually before judge and jury
theft (under $5000)	manslaughter	murder
mischief (under $5000)	assault	treason
fraud (under $5000)	sexual assault	piracy
driving while disqualified	weapon offences	bribing a judicial official

Figure 4-11

Why do you think there are different trial procedures for different types of offences?

Summary and Minor Indictable Offences Procedures

There is a six-month limitation period for the laying of a charge for a summary offence. This means that a person must be charged within six months of committing an offence. The provincial court judge hears the evidence and gives the verdict for summary and minor indictable offences.

For some quasi-criminal offences under provincial jurisdiction, such as traffic offences, a court appearance is not usually necessary. However, entering a plea of "not guilty" in such a situation requires a court appearance. Merely signing the "guilty" plea on the ticket citation or order is sufficient. Of course, the fine must also be paid.

Case

R. v. Wust

[2000] 1 S.C.R. 455
Supreme Court of Canada

The accused pleaded guilty to a charge of robbery with a firearm. When he was sentenced, he had been in custody for seven and a half months. The judge sentenced him to four and a half years' imprisonment less one year for time already served.

The Crown appealed the sentence, arguing that it was far too light. It wanted a sentence of seven to eight years with no time off for time served. It argued that the three-and-a-half-year sentence was less than the four-year mandatory sentence required for using a gun while committing a crime. In its opinion, the judge had made an error when deciding the sentence.

The Supreme Court of Canada disagreed. It ruled that the goal of sentencing is to provide a fair sentence and the best person to do this is the judge who passes sentence. Judges give credit for time already served when deciding the sentence and this is what happened here. The Supreme Court ruled that the original sentence must stand.

For Discussion

1. **How would you classify the offence of robbery?**
2. **What is the mandatory sentence required for using a gun while committing a crime?**
3. **Do you think the Supreme Court is setting a precedent in this case? Explain.**

Did You Know?

In 1998, 76 percent of violent crimes in Canada were assaults. Of these, 90 percent did not involve a weapon or result in serious injury. The next largest category of violent crimes was robbery. Less than 1 percent of violent crimes involved homicide or attempted homicide. Violent crimes accounted for 12 percent of all crimes committed.

Indictable Offences Procedures

If an offence is indictable, there is no time limit for the laying of a charge after the offence has been committed. Minor indictable offences are treated very much like summary offences. For more serious indictable offences, the accused is allowed to choose the trial procedure: by a provincial court judge, a higher court judge, or a judge and jury. Most indictable offences are classified as serious. They include such offences as sexual assault and weapons offences. The most serious indictable offences are tried by a judge and jury. These include murder and treason.

Review Your Understanding (Pages 115 to 118)

1. **What types of cases does the Supreme Court of Canada handle?**
2. **What is the legal effect when a decision is made by the Supreme Court of Canada?**
3. **What types of cases are handled by the Federal Court of Canada?**
4. **What functions do the provincial Supreme Courts perform?**
5. **How are summary, minor indictable, and quasi-criminal offences handled?**

CAREERS

In Criminal Law

Careers in police work or correctional services are well suited to people who are self-confident and assertive and who can remain calm in hazardous situations. Being a keen observer of people and having an ability to work independently, as well as part of a team, are other desirable qualities for this line of work.

Visit www.law.nelson.com and follow the links to research the different programs in criminology offered by Canadian colleges and universities.

Figure 4-12
Police officers

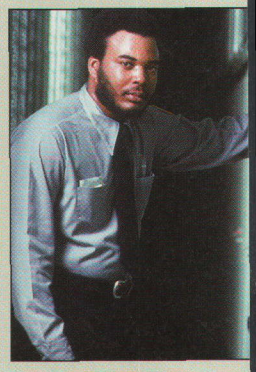


Figure 4-13
Correctional services officer

In Focus

Police Officer

Police officers are responsible for maintaining public safety and order and enforcing laws and regulations. Police assigned to criminal investigations gather evidence from crime scenes, interview witnesses, make arrests, and testify in court. Officers assigned to traffic patrol enforce traffic laws, provide emergency assistance, and investigate traffic accidents. Police officers visit classrooms or community centres to talk about crime prevention and safety.

Probation Officer

Probation officers interview offenders to determine if they can safely rejoin the community. They help to plan rehabilitation programs and set limits on the conduct of offenders. Clients must meet with their probation officers on a regular basis to evaluate progress and to determine if probation orders are being followed.

Correctional Services Officer

Correctional services officers watch over prisoners and maintain order in correctional facilities. They supervise prisoners during work periods, mealtimes, and recreational breaks. They also guard prisoners moving between correctional facilities and monitor any potential prison disturbances and escape attempts. Officers work outdoors in all kinds of weather conditions. Indoors, conditions for these officers can be noisy and overcrowded.

Career Exploration Activity

As a class, explore the career opportunities in police work and correctional services. The information you compile can be used to profile various law-related careers for a guidance bulletin-board display, or you may choose to run a law-related career fair.

1. **Use the Internet, your local employment information centre, or contact the local authorities to conduct research into these careers.**
2. **Briefly summarize the education and training requirements, wage rates, working conditions, and future job prospects for police, probation, and correctional officers. Record the information on index cards.**

ISSUE

Will Stricter Gun Control Make Canada a Safer Place?

Figure 4-14

This pro-gun rally was held in Ottawa in September 1998 to protest the *Firearms Act*. What do some of the signs say about protesters' views?

In 1995, Parliament passed the *Firearms Act*. This law required any Canadian who had a gun to obtain a licence for it by January 1, 2001. A licence allows a person to own or buy guns and ammunition. Gun owners who fail to obtain a licence can be imprisoned for up to five years or have their guns seized. Canadians who applied for a gun licence in time paid $10 for a licence. Those who did not make the deadline have to pay $60 and attend a firearms course costing up to $60.

About 1.8 million gun owners applied for licences and met the deadline, but there are still an estimated 400 000 owners who have not. According to the Fire Arms Centre, 2238 licences have been refused. Anyone who does not have a licence will have his or her firearms seized by the police and can receive up to five years in prison.

By January 1, 2003, gun owners must also register each gun that they own with the government. Anyone "knowingly neglecting to register a firearm" can be imprisoned for up to 10 years.

The licensing and registration of firearms gives authorities a computerized record of all gun owners and the weapons in their possession.

The *Firearms Act* also sets a compulsory minimum four-year prison term for anyone convicted of using a gun in a serious crime such as murder, robbery, or sexual assault.

On One Side

Opponents of the *Firearms Act* view it as a threat to gun ownership in Canada. Hunters, target shooters, and gun collectors say they should be allowed to pursue their hobbies without being regulated. The National Firearms Association, with 100 000 members, argues that the new law will make it more difficult for Canadians to defend themselves and their property. It claims that the new law puts unfair restrictions on law-abiding citizens.

Others view gun ownership as a democratic right that government has no right to limit. This group points out that since firearms are used in only 6 percent of adult crimes, restricting the rights of all Canadians is unfair. They say gun registration is the first step toward banning guns altogether.

On the Other Side

Supporters of the *Firearms Act* include police, victims' groups, women's groups, experts in suicide prevention, and emergency room physicians. This side believes that stricter gun controls are making Canada a safer place. Firearms are responsible for 1400 deaths in Canada each year. Of these, 75 percent are suicides and 15 percent are homicides. Firearms are also a leading cause of death among teens. Tougher gun laws could make it more difficult to own guns and could reduce impulsive suicides in this age group.

Some supporters of gun controls want the government to go further. They want to make it illegal to own or use any kind of gun. They say that if this step were taken, there would be a dramatic drop in gun-related crimes. They point to the high rate of crime and violence in the United States, where citizens own an estimated 212 million firearms.

The Bottom Line

In 1997, the Alberta government challenged the legality of the *Firearms Act* in court. It argued that guns were property and that property falls under the jurisdiction of the provincial governments.

In 2000, the Supreme Court of Canada ruled that the *Firearms Act* was legal. The federal government has control over criminal law and guns are linked to crime, not property. By requiring gun owners to get licences and register their weapons, the government is keeping guns out of the hands of criminals. Investigating the backgrounds of those who apply for licences ensures that only those who are law-abiding citizens will receive one.

What Do You Think?

1. **Briefly outline the requirements for gun ownership under the *Firearms Act*.**
2. **Distinguish between a licence and a registration.**
3. **Under what circumstances do you think a licence application would be refused?**
4. **Identify the arguments that are presented for and against the *Firearms Act*.**
5. **Why did the Alberta government challenge the *Firearms Act*? How did the Supreme Court rule on this issue?**

e activity

Visit **www.law.nelson.com** and follow the links to learn more about gun control in Canada.

Agents of Change — Suzanne Laplante-Edward

On December 6, 1989, a gunman entered Montreal's École Polytechnique. He killed 14 female engineering students and injured 13 others before killing himself. This event, known as the Montreal Massacre, was the worst mass murder in Canada's history.

The Montreal Massacre was a major impetus for gun control legislation in Canada. Parents of the slain victims became some of the most effective lobbyists for Bill C-68 (the *Firearms Act*). Suzanne Laplante-Edward is the mother of Anne-Marie Edward, one of the victims. She describes Canada's gun control legislation "as our daughter's legacy."

In recent years, Laplante-Edward has openly criticized opponents of the *Firearms Act*. "Now that the law is passed and being implemented, we resent having to continually defend it against the gun lobby's relentless attempts to undermine it," she said recently. "Opponents argue that the law 'punishes' law-abiding gun owners. I ask you: how does registration and licensing compare to the loss of a child? What sane person could make such an argument?"

Chief Brian Ford, of the Ottawa–Carleton Regional Police and Secretary–Treasurer for the Canadian Association of Chiefs of Police (CACP), said that the parents of the Montreal Massacre victims had a huge impact on the system: "In many ways, December 6, 1989 ... highlighted the flaws in Canada's old gun laws." Ford pointed out that without information about gun ownership, police "cannot control the illegal gun trade or enforce safe storage requirements. Police chiefs across Canada remain committed to the new gun control legislation."

For Discussion

1. **How did the Montreal Massacre affect gun control legislation in Canada?**
2. **Some people argue that the Montreal Massacre was not a typical crime and that the push for gun control legislation in its wake was based on emotion rather than true need. Argue for or against this statement.**

Figure 4-15
Suzanne Laplante-Edward

Chapter Review

Chapter Highlights

- Criminal law deals with offences against society.
- Civil law deals with offences against individuals.
- Through penalties, criminal law deters people from committing offences.
- Civil law emphasizes compensation for damages.
- Criminal law is the responsibility of the federal government.
- Quasi-criminal law deals with offences such as traffic violations.
- Summary offences are minor criminal offences.
- Indictable offences are more serious criminal offences.
- The Crown must prove its case beyond a reasonable doubt.
- *Actus reus* and *mens rea* must exist to prove someone guilty.
- Ignorance of the law is no excuse.
- Aiding and abetting a criminal is a crime.
- Supreme Court of Canada decisions must be followed by lower courts.
- Each province has a Trial Division and an Appeal Division for important criminal cases.
- All criminal cases start in provincial court, Criminal Division.
- Provincial court judges try summary and minor indictable offences.
- An accused has a choice of trial procedures for more serious indictable offences.
- The most serious indictable offences are tried by judge and jury.

Review Key Terms

Name the key terms that are described below.

a) a person who helps an offender escape detention

b) cause or reason to commit a criminal act

c) failing to pay attention to the possible injuries that might result from an action

d) planning and acting together for an unlawful purpose

e) law that deals with offences against society

f) taking reasonable care not to commit an offence

g) Latin phrase meaning "a wrongful action"

h) Latin phrase meaning "a guilty mind"

i) knowing certain facts, which provides the necessary *mens rea* for an offence

j) the first step toward committing the crime

k) minor criminal offences that are tried immediately

l) serious crimes that carry more severe penalties than summary conviction offences

m) offences that are punishable as indictable or summary offences

n) criminal liability based on the commission of an offence

o) criminal liability in which intent is assumed to be present but need not be proven

p) encouraging another person to commit a crime

Check Your Knowledge

1. What is a crime and how is it dealt with in Canadian society?
2. Explain the types of criminal offences and provide an example of each.
3. Distinguish between the *actus reus* and *mens rea* in a criminal offence and provide an example for each.
4. Summarize the structure of the criminal court system and identify the types of cases heard in each court.

Apply Your Learning

5. In groups, examine the Law Commission's four conditions that must exist in order for something to be considered a crime. Apply them to child pornography. What are your conclusions regarding each of the four conditions as they relate to this offence?
6. *R. v. Oommen*, [1994] 2 S.C.R. 507 (Supreme Court of Canada)

   In the early morning hours, Oommen killed Beaton as she lay sleeping on a mattress in his apartment. He fired nine to 13 shots at

her from a semi-automatic repeating rifle. The evidence disclosed no rational motive for the killing.

At the time of the killing, Oommen believed that the members of a local union were conspiring to destroy him. He became fixated with the idea that his "assailants and enemies" had commissioned Beaton to kill him.

At the trial, Oommen relied on the defence of mental disorder. Psychiatrists testified that he possessed the general capacity to distinguish right from wrong and knew it was wrong to kill a person. But they also said that on the night of the murder, his delusion deprived him of that capacity. The trial judge rejected the defence of mental disorder. Oommen knew right from wrong and he was not relieved from criminal responsibility. He was convicted of second-degree murder and sentenced to life imprisonment without eligibility of parole for 10 years.

a) What is the *mens rea* requirement of second-degree murder? Did Oommen possess this *mens rea*?

b) Did either his motive or his delusion have any effect on the decision? Explain.

7. *R. v. Kirkness*, [1990] 3 S.C.R. 74 (Supreme Court of Canada)

Kirkness had been drinking with his friend Snowbird when they agreed to break into a house at Snowbird's suggestion. Kirkness used the handle of a garden tool to open a window of the house of an 83-year old woman. Snowbird proceeded to sexually assault the woman. While this was happening, Kirkness stole various things in the house. Snowbird dragged the unconscious woman into the hallway and began to choke her. Kirkness asked him "not to do that because he was going to kill her." Snowbird then suffocated the victim.

Is Kirkness a party to the murder? Why or why not?

8. *R. v. Wilkins* (1964), 44 C.R. 375 (Ontario Court of Appeal)

A police officer parked his motorcycle, but left it running while he went to write a ticket. Wilkins drove the motorcycle a short distance to play a joke on the officer. He was charged with the theft of the motorcycle. Theft requires the intent to convert an object to one's own use.

What was Wilkins' motive? Can he be found guilty of theft? Explain.

9. *R. v. Jackson* (1977), 35 C.C.C. (2d) 331 (Ontario Court of Appeal)

Deralis was a trafficker in narcotics. Jackson, a friend, agreed to store 3 kg of marijuana in his apartment. Jackson did it because he knew that Deralis had a record, whereas he did not, and because it would help Deralis escape detection. The police found the marijuana. Jackson was found guilty of possession. The Crown appealed to obtain the more serious conviction of trafficking. It argued that Jackson had aided and abetted Deralis in his trafficking.

Should Jackson be found guilty of trafficking for aiding and abetting Deralis? Explain.

Communicate Your Understanding

10. The maximum penalty for break and enter is life imprisonment. First offenders sometimes get a suspended sentence. In 1997, 25 percent of those who were convicted did not receive a prison sentence and for those who did, the average sentence was four months. No one received more than three years. Develop arguments to either support or criticize the sentencing here.

11. "The law exists to protect society and individuals and keep order." Based on the following statistics from Statistics Canada (1999), develop arguments that would support the above statement.

- 91 percent of Canadians stated they were satisfied with their personal safety, compared to 86 percent in 1993.
- 25 percent reported they had been a victim of a crime, compared to 23 percent in 1993
- 37 percent of these crime victims did not report the incidents to police, compared to 42 percent in 1993.
- 54 percent believed that crime levels in their neighbourhoods had remained the same in the past 5 years, compared to 43 percent in 1993.
- 29 percent believed that crime rates had increased, compared to 46 percent in 1993.

12. From a newspaper or the Internet, collect five criminal law articles on cases that have not yet gone to trial. Write a brief summary of the facts of each case. Consult the *Criminal Code* and comment on the following:

a) For each case, indicate the offence committed, the *actus reus,* the *mens rea,* and the maximum penalty for the offence.

b) Summarize the evidence that you think the Crown and defence might present.

c) Indicate whether you think the accused will be found guilty or not guilty at trial. Give reasons for your decision.

Develop Your Thinking

13. Consider the following facts as reported by GPC Research in 2000:

- 17 percent of Canadian households have at least one firearm.
- 10 years ago 24 percent of households had guns.
- 13 percent of urban homes and 30 percent of rural homes have guns.
- 87 percent of firearms owners are male.
- 98 percent of firearms owners were aware that they had to purchase a licence by January 1, 2001.

a) What has been the trend in gun ownership in Canada?

b) Why do you think there is a difference in the percentages of gun owners in urban and rural Canada?

c) Despite being aware of the law, 400 000 Canadians still have not applied for their licences. Why do you think this is the case?

14. In groups, brainstorm and list some of the causes of crime. Develop a second list of suggestions about how these causes could be eliminated. How realistic are these suggestions? What limitations exist? Share your conclusions.

Chapter 5

The Criminal Code

Focus Questions

- What are crimes of violence?
- What changes have been made to the *Criminal Code* that reflect the changing views of society?
- What actions are considered to have a high social impact and are debated by society and in Parliament?
- What acts are considered property crimes?
- What laws in the *Criminal Code* protect children?

Chapter at a Glance

Figure 5-1

Two power company employees work to disconnect power to a telephone booth in Edmonton on July 2, 2001. The booth was one of several damaged during a post-Canada Day celebration. What penalties would you impose on people who commit the offence of mischief?

5.1 Introduction

The Canadian *Criminal Code* is a federal statute that reflects the social values of Canadians. In Chapter 4 you learned that the Code is often amended to reflect these changing values. While some actions are removed from the Code, others are added if society considers them criminal. For example, using the Internet to distribute child pornography has recently been declared a criminal activity. Currently, bills are before Parliament to establish sex offender registries, to make it illegal for anyone to use the Internet to prey on children, and to increase the penalties for people who maltreat animals. These bills reflect some social concerns of the early 2000s.

The *Criminal Code* is the main body of criminal law and identifies hundreds of acts that are considered criminal. About 80 percent of all criminal offences committed in a given year are *Criminal Code* offences. Because criminal law is federal law, the offences are treated identically across Canada. Many of these offences, along with their penalties, are listed on pages 155 to 157.

As you become more familiar with the *Criminal Code*, you will notice that the offences listed are described precisely. Careful wording is necessary to ensure that citizens are not arrested on a criminal charge if they are involved in a non-criminal matter, or that they are not set free on a technicality. The elements required for the Crown to obtain a conviction must be specified clearly. Despite the precise wording, many cases are appealed on a point of law because lawyers and judges may interpret the law in different ways.

Although it is impossible to cover all the offences in the *Criminal Code* in this text, you will examine the most common crimes and those that involve significant social issues.

Criminal Code Incidents, 2000

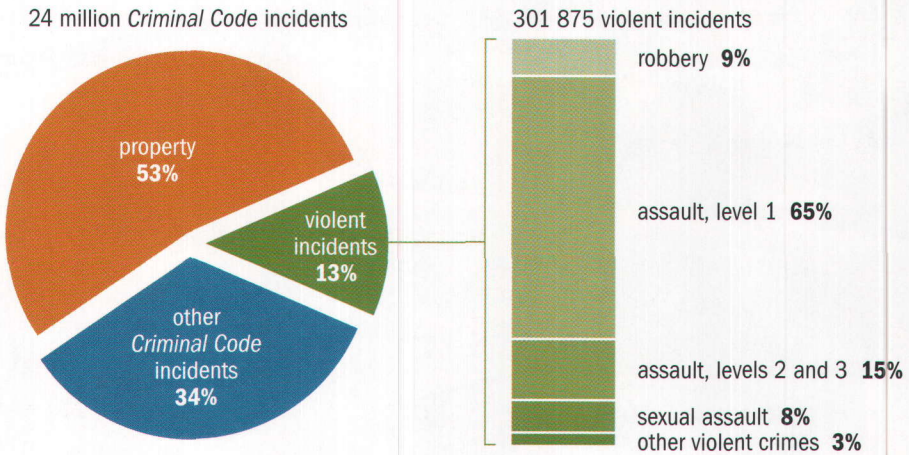


Figure 5-2

In 2000, 13 percent of *Criminal Code* incidents included crimes of violence. Why do you think that assault, level 1 (see Assault, page 133) makes up the largest percentage of violent incidents?

5.2 Violent Crimes

Violent crimes are offences that harm the human body in some way. The severe penalties cited in the Code of Hammurabi (see page 10) show that protection of one's person has always been considered important. Approximately 13 percent of all *Criminal Code* offences committed are of a violent nature (see Figure 5-2). In this section, you will examine the following violent crimes: homicide, assault, sexual offences, abduction, and robbery.

activity

Visit **www.law.nelson.com** and follow the links to find more recent statistics on homicide in Canada.

Homicide

Killing another human being, directly or indirectly, is **homicide.** Homicide is a criminal offence if it is "culpable"—in other words, deserving of blame. **Murder, manslaughter,** and **infanticide** are **culpable homicide. Non-culpable homicide** is not criminal and occurs when death is caused by complete accident or in self-defence.

Did You Know?

In 2000 there were 542 homicides in Canada. The number of homicides has gradually decreased, from a high of 635 in 1996.

Homicide Rates for the Provinces and Territories, 2000

Province/ Territory	Rate per 100 000 people
Alberta	1.9
British Columbia	2.1
Manitoba	2.6
New Brunswick	1.3
Newfoundland & Labrador	1.1
Northwest Territories	2.4
Nova Scotia	1.6

Province/ Territory	Rate per 100 000 people
Nunavut	10.8
Ontario	1.3
Prince Edward Island	2.2
Quebec	2.0
Saskatchewan	2.5
Yukon Territory	6.5

Figure 5-3

Prepare a bar graph to illustrate these statistics.

Types of Homicide

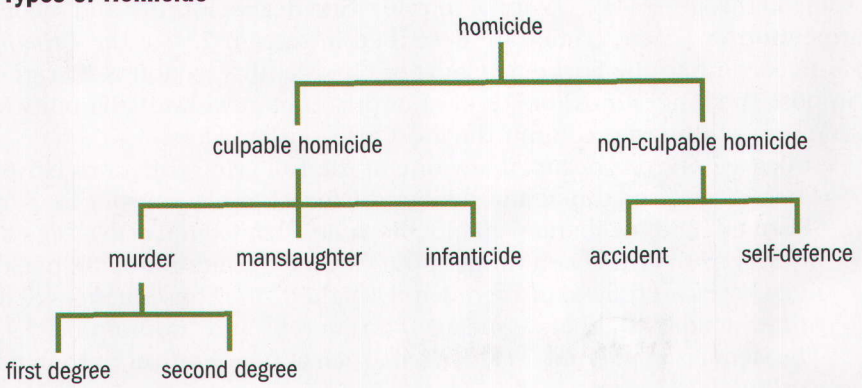


Figure 5-4

What do you already know about these types of homicide?

Murder

The most serious violent crime that one person can commit against another is murder—intentional killing. In this situation, the accused may be found guilty even if he or she did not have the intent to kill. Section 229 of the *Criminal Code* specifies the circumstances under which a person may be found guilty of murder, even if there was no intent to commit murder.

The Law — The Criminal Code

Excerpts from the *Criminal Code*

229.

Culpable homicide is murder

(a) where the person who causes the death of a human being

  (i) means to cause his death, or

  (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;

(b) where a person, meaning to cause death to a human being or meaning to cause him bodily harm that he knows is likely to cause his death, and being reckless whether death ensues or not, by accident or mistake causes death to another human being, notwithstanding that he does not mean to cause death or bodily harm to that human being; or

(c) where a person, for an unlawful object, does anything that he knows or ought to know is likely to cause death, and thereby causes death to a human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being.

For Discussion

1. **In your own words, describe when culpable homicide is murder.**
2. **For each subsection of section 229, give an example of a scenario that would fall within the description.**

Suppose Anya fires at Harry with intent to kill, but her shot kills Martin instead. Anya is still guilty of murder although she did not intend to kill Martin. Similarly, if Dom seeks revenge against Elliot by committing arson, and the resulting fire causes the death of Freeman, who is in the building, Dom will be charged with murder, even though there was no intent to harm Freeman.

Canada recognizes two classes of murder: **first-degree murder** and **second-degree murder.** These crimes are described in section 231 of the *Criminal Code.* According to the Supreme Court of Canada, this section is "designed to impose the longest possible term of imprisonment without eligibility for parole upon those who commit the most grievous murders."

First-degree murder occurs if any one of the following situations exists:

- The murder is planned and deliberate, for example, murder for hire. "Planned" and "deliberate" are not the same. Planned refers to a "scheme or design" that has been thought out carefully. In addition, the person must have carefully "considered and weighed" the consequences of his or her actions. Deliberate means "considered" and "not impulsive."
- The victim is a law enforcement agent, such as police officer or someone working in a prison.
- The death occurs while another offensive crime is being committed. These crimes include hijacking an aircraft, sexual assault, aggravated sexual

assault, sexual assault with a weapon, threats or causing bodily harm to a third party, kidnapping and forcible confinement, and hostage taking.
- The murder was caused while committing or attempting to commit an offence related to criminal harassment.
- The murder is committed while using explosives to commit an offence in association with a criminal organization.
- The murder was committed while committing, or attempting to commit, an indictable offence that could also be considered a terrorist activity.

Murder that does not fit into any of the above categories, but is still caused intentionally, is classified as second-degree. The minimum sentence for both first- and second-degree murder is life imprisonment.

The cause of death is known as **causation** and is usually an issue in murder trials. For example, if Tina is struck by Glen and falls into a river and drowns, the trial will consider whether Glen's striking or the drowning caused her death. In many cases, evidence given by an expert can help to pinpoint causation. It is necessary to prove causation in order to convict a person of first-degree murder. The Crown must prove that the accused "participated in the murder in such a manner that he was a substantial cause of the death of the victim."

Case

R. v. Martineau

[1990] 2 S.C.R. 633
Supreme Court of Canada

Tremblay and Martineau set out with a pellet pistol and rifle to commit a crime. Although armed, Martineau thought that it would only be a break and enter. They entered the McLeans' house and robbed the couple. Then Tremblay shot and killed them. After Martineau heard the shot that killed the first victim, he allegedly said, "Lady, say your prayers."

Martineau asked Tremblay why he killed the couple, and Tremblay replied that the couple had seen their faces. Martineau responded that they couldn't have seen his because he was wearing a mask.

The Supreme Court of Canada held that section 213(a) [now section 230] of the *Criminal Code* was inconsistent with sections 7 and 11(d) of the *Charter*. Furthermore, the sections could not be justified by section 1 of the *Charter*.

The *Criminal Code* states: "Culpable homicide is murder where a person causes the death of a human being while committing or attempting to commit ... breaking and entering ... whether or not he knows that death is likely to be caused to any human being, if (a) he means to cause bodily harm for the purpose of ... (ii) facilitating his flight after committing or attempting to commit the offence, and the death ensues from the bodily harm."

For Discussion

1. **The Supreme Court of Canada stated: "in a free and democratic society that values the autonomy and free will of the individual, the stigma and punishment attached to murder should be reserved for those who choose intentionally to cause death or who choose to inflict bodily harm knowing that it is likely to cause death." What is the *mens rea* of murder? How could it be argued that Martineau did not have the required *mens rea* for murder?**
2. **The Court ruled that for a conviction of murder to be sustained, subjective foresight of death must be proven beyond a reasonable doubt. Interpret what you think is meant by the term "subjective foresight."**

Case

R. v. Charemski

[1998] 1 S.C.R. 679
Supreme Court of Canada

Charemski was charged with the murder of his estranged wife. She was found in the bathtub in her apartment on Christmas Day, her head at the tap end, with hot water burns on the skin. Charemski had travelled from Vancouver, British Columbia, to London, Ontario, to see his wife. The evidence implicating him in the murder was as follows:

- Charemski was present at his wife's apartment building on the night that she died, and he phoned her from the foyer.
- In early conversations with the police, Charemski said his wife complained about forgetting things and about falling asleep in the bathtub, sometimes for an hour or two, and that she had almost drowned on a couple of occasions.
- He could not account for the time between his arrival at his wife's apartment building on Christmas Eve and the time he was picked up by a taxi and left for Toronto, during which time the victim died.
- He told police that his wife had taken lovers in the past and was always "making problems" for him.
- He received social assistance and held a life insurance policy on the deceased in the amount of $50 000.
- The deceased's key to her apartment could not be found.
- The deceased told her doctor that when she had lived with Charemski she had been afraid of him and had wanted to move away from him.

The Crown presented no evidence that Charemski was in his wife's apartment on the given night. There was no evidence of fingerprints or of foul play in the apartment. The Crown could not prove that he actually knew how his wife died until police told him. Forensic evidence was inconclusive on the manner of death, whether from natural causes, accident, suicide, or homicide.

The trial judge directed a verdict of acquittal because he believed that no reasonable jury could return a verdict of guilty because of the lack of evidence as to the cause of death. The Ontario Court of Appeal set the verdict aside and ordered a new trial. Charemski appealed to the Supreme Court of Canada, which upheld the Court of Appeal decision.

For Discussion

1. **Discuss the importance of causation as it relates to a criminal trial.**
2. **What must the Crown prove in order for the charge of murder to be made out?**
3. **The evidence against Charemski was mostly circumstantial (indirect) evidence. How do you think this evidence would have been used in the Charemski case?**
4. **What factors do you think the Supreme Court of Canada took into consideration in ordering a new trial?**

Manslaughter

Manslaughter is causing the death of a human, directly or indirectly, by means of an unlawful act. Manslaughter is not murder and requires only general intent. For example, if Marina loses control of her car while speeding and kills a pedestrian, she could be charged with manslaughter, not murder. The *mens rea* for manslaughter is that a reasonable person would recognize that the unlawful act could physically harm or kill the victim.

Sometimes, people charged with murder are convicted of manslaughter. This can happen if the accused successfully uses one of two defences: provocation or intoxication. For a provocation defence, it must be shown that the accused caused another's death "in the heat of passion caused by sudden

provocation." Further, the provocation must be a wrongful act or insult, and must be something that would cause an ordinary person to lose self-control (excepting drugs or alcohol). Finally, the killing must take place during the loss of self-control. If, after being provoked, the accused has time to plan the killing of the other person, the charge will be murder, not manslaughter.

The issue of intoxication is often significant in murder cases because being drunk or "high" can affect a person's ability to predict the consequences of his or her actions. The Crown must prove both the killing and the necessary intent if the accused uses the intoxication defence. If there is doubt as to the ability to form the necessary intent because the accused ingested alcohol or drugs, the accused must be found guilty of manslaughter, not murder.

Case

R. v. Parent

[2001] 1 S.C.R. 761
Supreme Court of Canada

Parent was charged with first-degree murder. He shot his estranged wife of 24 years in a fit of rage after she threatened to "wipe him out completely" during a divorce dispute. Parent and his wife Bédard had equal shares in a convenience store. A dispute over division of their assets followed their 1992 separation. The dispute led to a significant reduction of their wealth.

In 1996, the day Bédard was to buy her husband's share of the business after it had been seized by the bank, Parent showed up at the sheriff's office where the sale was to take place. An argument followed, and Bédard issued her threat. Parent, a former police officer, pulled out his revolver and fired six bullets at her. He then quietly walked away, but turned himself in later that night.

Parent testified that he never intended to kill his wife, but that he overreacted to her insults. At his murder trial, the judge instructed the jury that Parent could be found guilty of the lesser offence of manslaughter because he killed during a "fit of rage." The jury found him guilty of manslaughter, and he was sentenced to 16 years in prison. The Crown appealed to the Quebec Superior Court, which upheld the original jury decision. The Crown then appealed to the Supreme Court of Canada, which ordered a new trial on second-degree murder charges. (Intense anger alone is insufficient grounds to reduce murder to manslaughter.)

R. v. Thibert

[1996] 1 S.C.R. 37
Supreme Court of Canada

Thibert was charged with the first-degree murder of his wife's lover, Sherren. Two months before the murder, his wife told him that she was having an affair. The next morning, he met his wife in an attempt to persuade her to return home. She was accompanied by Sherren. Thibert was unsuccessful and later called her at work to arrange a meeting to again discuss her return. He had been successful in convincing her to stay once before.

Thibert placed a rifle in his car before leaving to meet her, thinking that he might have to kill Sherren. He testified that while driving, he abandoned that thought and decided to use the gun as a bluff to get his wife to go with him. Thibert met his wife and followed her into the parking lot of her workplace. Sherren came out of the building and began to lead her back into the office. Thibert removed the rifle from his car, whereupon his wife told Sherren that the rifle was not loaded. Sherren walked toward Thibert, taunting him by saying, "Come on big fellow, shoot me? You want to shoot me? Go ahead and shoot me." He kept moving toward Thibert, ignoring instructions to stay back. Thibert testified that his eyes were closed as he tried to retreat and the gun discharged.

The trial judge allowed the jury to consider the defence of provocation. However, the judge did not instruct the jury that the Crown had to disprove

continued

provocation beyond a reasonable doubt. Thibert was found guilty of second-degree murder. In a majority decision, the Alberta Court of Appeal dismissed Thibert's appeal. His appeal to the Supreme Court of Canada was allowed, and a new trial on the charge of second-degree murder was ordered.

For Discussion

1. **Identify the elements that must be present for provocation to be a valid defence.**
2. **Prepare an organizer to match the evidence in each case with the elements that must be present for provocation to be a valid defence.**
3. **Compare the verdicts at trial level for each case. Why do you think they were different?**
4. **Did Parent demonstrate the elements necessary for his defence of provocation? Explain your position with evidence from the case.**
5. **Did Thibert demonstrate the elements necessary for his defence of provocation? Explain your position with evidence from the case.**
6. **In Thibert's case, the majority decision of the Supreme Court of Canada indicated that the second "element requires that the accused act upon that insult on the sudden and before there was time for his passion to cool. To be sudden provocation, the wrongful act or insult must strike upon a mind unprepared for it, and it must make an unexpected impact that takes the understanding by surprise and sets the passions aflame." Compare the Parent and Thibert cases. Did that second element exist in these cases? Justify your opinion by providing supporting evidence from each of the cases.**

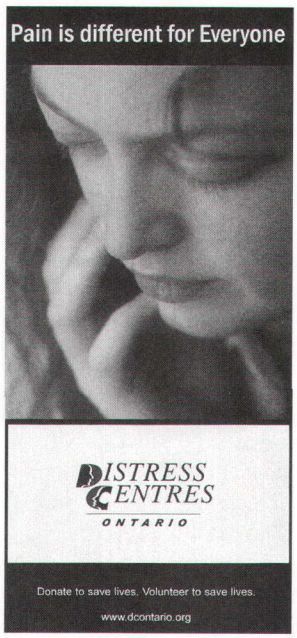


Figure 5-5

Until 1972, it was a criminal offence to attempt suicide. Today, it is recognized that people who attempt suicide benefit from counselling and other forms of treatment, not punishment.

Infanticide

Infanticide is the killing of a newborn by his or her mother. An infanticide charge means that the accused has not yet recovered from the effects of childbirth and is suffering from depression or mental disturbance. The maximum punishment is imprisonment for five years. Infanticide is a charge seldom seen before the courts.

Suicide and Euthanasia

It is an offence to counsel anyone to commit suicide, or to help anyone accomplish the deed. Until 1972, it was also an offence to attempt to commit suicide.

Assisted suicide is a controversial issue. Some chronically ill Canadians have argued that they have the right to assistance when they wish to commit suicide. Disability rights groups often oppose legalizing assisted suicide because they believe that people who have disabilities may be pressured to end their lives.

A related issue is **euthanasia,** sometimes called mercy killing. This means that one person acts to end another person's life. There are different levels of consent to euthanasia. For example, if Judith, a patient with terminal cancer, has expressed a wish to die, ending her life under these circumstances would be called "voluntary euthanasia." On the other hand, Dieter, another patient with terminal cancer, has not expressed a wish to die. Perhaps he cannot express such a wish (e.g., because he is in a coma), or perhaps he does not wish to die. Ending his life under these circumstances would be called involuntary euthanasia (see Issue, page 134).

Assisting a suicide, voluntary euthanasia, and involuntary euthanasia are treated as homicide under the *Criminal Code.* However, cases involving elderly, disabled spouses are often dealt with compassionately by the courts.

Under Canadian law, patients who are considered to be of sound mind have the right to refuse treatment for an illness, even if lack of treatment results in death, more severe illness, or greater pain. A more difficult situation arises in the case of a person whose judgment is considered questionable. Some provinces deal with this situation by encouraging residents to sign personal care directives while they are of sound mind. A personal care directive answers questions regarding life support. This helps a future legal guardian to assess what the person would really want, if it becomes impossible to communicate. In the absence of a directive, legal guardians or physicians make decisions that seem appropriate to them, within the guidelines of medical ethics and human rights legislation.

activity

Visit **www.law.nelson.com** and follow the links to learn more about euthanasia.

Assault

Three levels of **assault** are listed in the *Criminal Code*. They are classified according to their severity, with increasing penalties. Intent is a key element in all three. If the action is the result of carelessness or reflex, rather than intent, there is no assault. A threat can be an assault if there is an ability to carry it out at the time it is made.

The first level of assault consists of any of the following actions:

- applying intentional force to another person, either directly or indirectly, without that person's consent
- attempting or threatening, by an act or a gesture, to apply force
- approaching or blocking the way of another person, or begging, while openly wearing or carrying a weapon or an imitation of a weapon

Harmful words do not equal an assault—the words must be accompanied by gestures. For example, if Rodney tells Adnan, "I am going to belt you," it is not an assault unless Rodney also waves a fist. On the other hand, an assault can occur even if the victim is unaware of it. If someone shoots a gun at someone and misses, there may be an assault. In addition, consent is not necessarily given just because the victim participates in an activity that poses some risk. For example, in Olympic boxing, both fighters consent to being struck with gloved fists on the head and on the body above the belt, but they do not consent to being bitten, or kicked, or struck in any way below the belt.

You Be the JUDGE

An Angus Reid Group survey recently noted that 16 percent of Canadians thought it should be a criminal offence for a parent to spank a child. Men and women equally opposed making spanking a criminal offence.

- Should it be a criminal offence for a parent to spank a child? Explain your position.

Levels of Assault According to Severity

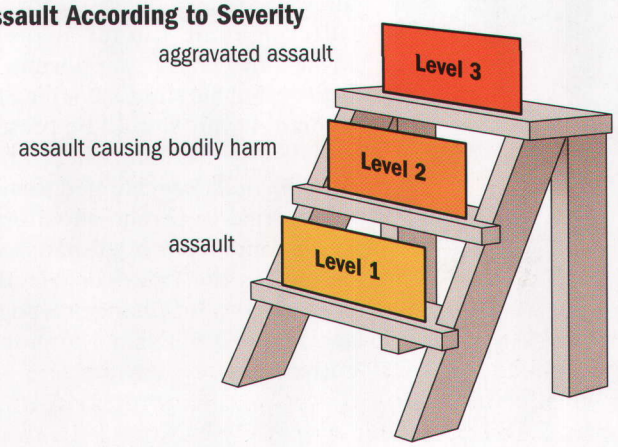


Figure 5-6

Level 3 is the most severe form of assault and so carries the heaviest penalties.

ISSUE

Should Euthanasia Be Legalized?

In 2001, the Netherlands (Holland) became the first Western country to legalize euthanasia (mercy killing). The Dutch law created a new debate in Canada over whether or not Canada should follow the Dutch example. Euthanasia has been hotly debated in Canada for many years.

The sensitive nature of euthanasia emerged in 1993 when Robert Latimer killed his 12-year-old daughter, Tracy, with carbon monoxide in the cab of his truck. Tracy suffered from severe cerebral palsy and could not talk, walk, or take care of herself. At his trial, her father maintained that he had ended his daughter's life out of compassion. In other words, he made the decision to end Tracy's life for what he considered to be good reasons. Despite Latimer's defence that he killed out of "compassion," the Saskatchewan Court of Queen's Bench in *R. v. Latimer* (1997) found him guilty of second-degree murder and made him ineligible for parole for 10 years. In 2001, the Supreme Court of Canada unanimously upheld this decision in *R. v. Latimer* (2001).

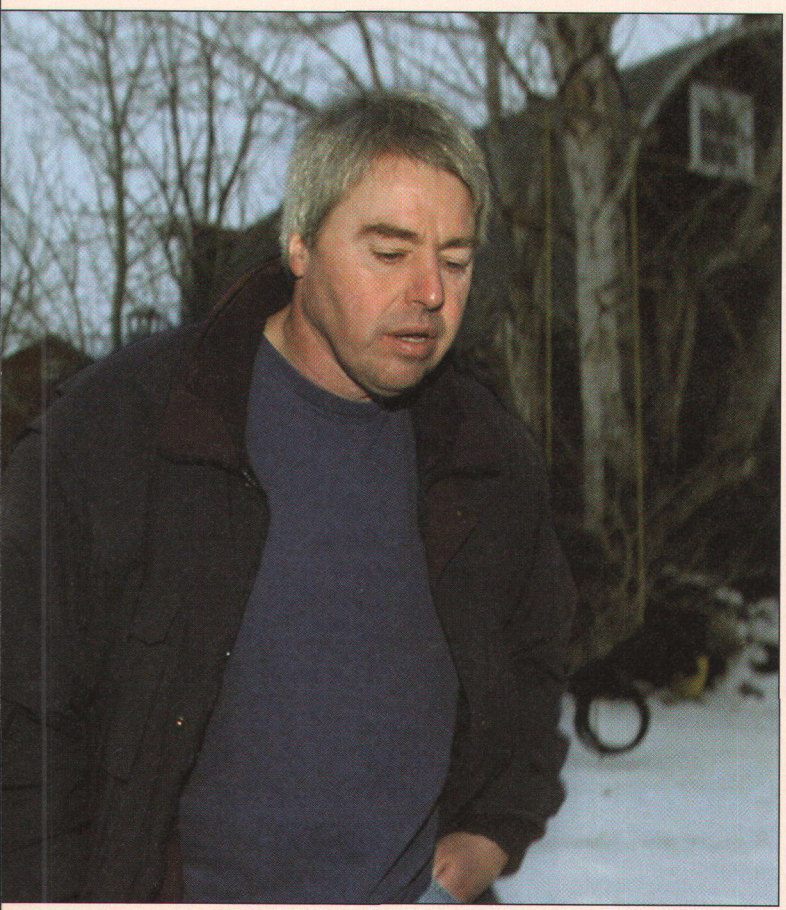


Figure 5-7

Robert Latimer at his Saskatchewan farm following the 2001 Supreme Court decision that upheld his second-degree murder conviction

The Latimer decision divided Canadians. Some thought that Latimer had received a just punishment because Tracy Latimer had not consented to euthanasia. Others thought the punishment was too severe. In an Ipsos-Reid opinion poll, 26 percent of Canadians believed that the sentence was deserved, while 71 percent thought it should be reduced and 2 percent had no opinion.

On One Side

In an age of medical technology, machine-supported life can be carried on for months, even years. Some believe that those who are terminally ill or suffering from severe mental and/or physical damage should be allowed to die instead of being kept alive by machines. Some also believe that people should be allowed to make decisions for others who are suffering and cannot express their own wishes. In general, supporters of euthanasia believe that life should be free of pain and that human dignity should be preserved.

The organization Dying with Dignity wants the *Criminal Code* changed to make hastening death legal in certain situations. This group wants some form of euthanasia to be clearly defined in the *Criminal Code* and legalized.

See Agents of Change on page 105 to learn about one politician's attempts to legalize euthanasia.

On the Other Side

Opponents of euthanasia argue that legalizing it could cause harm. They question why euthanasia is necessary, saying that doctors are not obligated to treat an illness unless they expect to achieve a benefit for the patient. If better pain management is required, then it should be available, even if it does nothing to prolong life.

Some people, including certain people with disabilities, fear that legal euthanasia compromises their rights. They believe that human beings should not be allowed to decide who should live or die Moreover, the law should protect people who cannot consent to euthanasia.

The Bottom Line

Euthanasia raises some important legal, medical, and moral questions:

- Should a person be forced to face an agonizing death without dignity?
- Should doctors and family members be legally permitted to decide the fate of a patient who has no hope of recovery?
- Should the courts decide whether a human being will live or die?
- Should the law regarding euthanasia be changed?

What Do You Think?

1. **Dutch law requires the following when euthanizing people:**
   - **The patient must be suffering unbearable pain.**
   - **All other medical options have been exhausted.**
   - **Voluntary and informed consent must be obtained.**
   - **A second opinion must be obtained from another doctor.**
   - **The act of euthanasia must be carefully carried out.**

   Express your opinion on this law by commenting on each of the specific requirements identified above.
2. **How does the issue of euthanasia relate to the Robert Latimer case?**
3. **Express your opinion on the euthanasia debate. Use the questions raised in The Bottom Line to guide your response. Provide examples to support your opinion. Share your opinion with a classmate.**

Figure 5-8

Traci Walters leans on her scooter at the Supreme Court building in June 2000. She and other members of groups advocating the rights of disabled people were attending the Latimer trial.

The second level of assault is **assault causing bodily harm.** It is committed by anyone who, while committing assault, carries, uses, or threatens to use a weapon or an imitation of a weapon, or causes bodily harm. "Bodily harm" is defined as anything that interferes with the victim's health or comfort in more than a fleeting, trifling way.

The third level of assault is **aggravated assault.** This is the most severe form of assault. It is committed if a person wounds, maims, disfigures, or endangers the life of the victim. The *mens rea* required is only to commit bodily harm, and not necessarily to wound, maim, disfigure, or endanger the life. The defence of consent may not be accepted in some circumstances for this level of assault.

Case

R. v. Godin

(1994) 89 C.C.C. (3d) 574
Supreme Court of Canada

Godin was taking care of his girlfriend's baby. The baby was cranky and vomited his milk. Godin called an ambulance. At the hospital, the baby was diagnosed as having suffered a major head trauma. X-rays revealed a fracture of the skull. Internal bleeding had caused the baby to be critically ill. There was also bruising on the top of the baby's mouth. The doctor expressed an opinion that it would take a "violent impact" to cause such an injury.

Godin told the ambulance attendants that the baby had choked on his medication. When confronted with the skull fracture, he explained that he had slipped down the stairs while carrying the child, and the child had struck the door frame.

Godin was charged with assault causing bodily harm. At trial, he testified that while administering medication to the baby, the baby choked. Godin said he panicked and slapped the baby on the back, and the baby struck his head on the table. The trial judge noted that Godin never sincerely endeavoured to provide a totally candid account of what took place that night. The judge noted that "in the face of such strong inculpatory facts, the accused, in my view, had to offer some explanation which might reasonably be true or otherwise ... he runs the risk of being convicted."

Godin was convicted, but the New Brunswick Court of Appeal upheld his appeal and ordered a new trial. The Crown appealed to the Supreme Court of Canada, which reinstated the trial decision.

For Discussion

1. **On what basis would Godin have appealed to the New Brunswick Court of Appeal?**
2. **What factors do you think the trial court took into consideration in deciding that Godin had the necessary *mens rea* for assault causing bodily harm?**
3. **Why did the Supreme Court reinstate the trial decision?**

Sexual Assault

The offences of rape and indecent assault were rewritten in the 1980s to emphasize the violent, rather than sexual, nature of these crimes. How can it be determined if the conduct of the accused was sexual in nature? A number of factors are relevant: the part of the body touched; the nature of the contact; the situation in which it occurred; the words and gestures accompanying the act; and all other circumstances surrounding the conduct, including threats, which may or may not have been accompanied by force.

There are three levels of **sexual assault,** which parallel the three levels of assault described on page 133. The definition of the first level of sexual assault is the same as assault, except that it occurs in relation to sexual conduct.

The second level is defined in section 272(1) as follows: "Every person ... who, in committing a sexual assault, (a) carries, uses or threatens to use a weapon or an imitation of a weapon; (b) threatens to cause bodily harm to a person other than the complainant; (c) causes bodily harm to the complainant; or (d) is a party to the offence with any other person, is guilty of an indictable offence and liable ... to imprisonment for a term not exceeding fourteen years." Note that the wording does not include the words "knowingly" or "with intent," so this is a general intent offence.

Aggravated sexual assault, the most severe form of sexual assault, is defined in section 273: "(1) Every one commits an aggravated sexual assault who, in committing a sexual assault, wounds, maims, disfigures or endangers the life of the complainant. (2) Every person who commits an aggravated sexual assault is guilty of an indictable offence and liable ... to imprisonment for life."

The *actus reus* of sexual assault is the sexual touching to which the victim does not consent. The *mens rea* of sexual assault can rest on knowledge that the victim gave no consent; recklessness; or willful blindness (the perpetrator avoids asking the victim if consent is being given). Consent is frequently an

You Be the JUDGE

In Texas, some sex offenders have been ordered to post signs declaring their whereabouts, such as "Danger: Registered Sex Offender Lives Here." Texas law also requires the publication of sex offenders' pictures and addresses. In Canada, police sometimes warn the public that a sexual offender has moved into an area.

- Does announcing the presence of a sexual offender violate his or her rights under the *Canadian Charter of Rights and Freedoms*? Explain.

Where Sexual Assaults by Strangers Occur

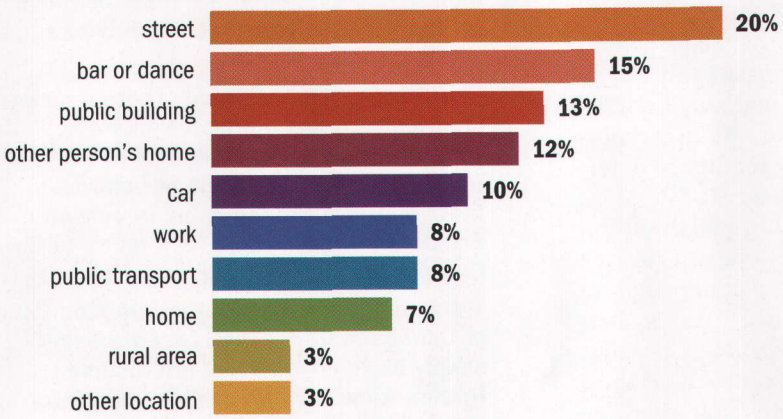


Figure 5-9
The majority of sexual assaults by strangers occur outside the home.

The Law — The Criminal Code

Excerpts from the *Criminal Code*

273.1

(2) No consent is obtained, for the purposes of sections 271, 272 and 273, where

(a) the agreement is expressed by the words or conduct of a person other than the complainant;

(b) the complainant is incapable of consenting to the activity;

(c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;

(d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or

(e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

For Discussion

1. Interpret, in your own words, the meaning of "no consent."

issue in sexual assault trials, especially since there are usually few witnesses to sexual assault. The situations in which consent is not deemed to have been given in sexual assault cases is outlined in section 273.1(2) of the *Criminal Code* (see The Law, page 137).

Case

R. v. Cuerrier

[1998] 2 S.C.R. 371
Supreme Court of Canada

In 1992, Cuerrier tested positive for HIV. A public health nurse instructed him to wear a condom every time he had intercourse. He was also supposed to tell any future sexual partner that he was HIV-positive. Cuerrier angrily rejected this advice, complaining that he would never have a sex life if he told anyone about his HIV status. He soon began an 18-month relationship with the complainant, K.M. They had sex more than 100 times, most of it unprotected. Cuerrier assured her that he had tested negative for HIV eight or nine months earlier. K.M. developed hepatitis. She was informed that her HIV test was negative, but that Cuerrier had tested positive. She was advised to be tested further to determine if she had developed the virus.

On hearing that the relationship had ended, a public health nurse delivered letters to Cuerrier ordering him to inform his future partners that he was HIV-positive and to use condoms. Cuerrier then began a sexual relationship with B.H. They had mostly unprotected sex about 10 times. B.H. then learned that Cuerrier had HIV. He apologized for lying, but B.H. complained to authorities and Cuerrier was charged with two counts of aggravated assault. At the time of the trial, neither complainant had tested positive for the HIV virus.

The Crown's position was that Cuerrier had committed fraud when he lied and that the women had therefore not consented to sexual intercourse, but were instead assaulted. The trial judge entered a **directed verdict** acquitting the respondent. The British Columbia Court of Appeal refused to set aside the acquittals. The Crown appealed to the Supreme Court of Canada. The appeal was allowed and a new trial ordered.

For Discussion

1. **Identify the elements that must be proven for the accused to be found guilty of aggravated assault.**
2. **The *Criminal Code* provides that no consent is obtained where the complainant submits or does not resist by reason of fraud. This fraud or dishonest actions or behaviour must relate to the obtaining of consent. Explain how fraud could be a factor in the Cuerrier case.**
3. **The majority decision of the Supreme Court of Canada stated: "The consent cannot simply be to have sexual intercourse. Rather, it must be consent to have intercourse with a partner who is HIV-positive." How did the Supreme Court further clarify the issue of consent?**
4. **How did the actions of Cuerrier endanger the life of the complainant?**

Consent is not a defence where the victim is under 14 years of age, unless the accused is less than three years older than the victim. In *R. v. M. (M.L.)* (1994), a 16-year-old girl had been sexually assaulted by her step-father. The Supreme Court of Canada ruled that it is not necessary for the victim to physically or verbally resist an attacker to establish lack of consent. The girl had said that she was too frightened to resist.

Self-induced intoxication is not a defence if the accused "departed markedly from the standard of reasonable care." In other words, if the accused drank

so much that loss of self-control was bound to occur, intoxication cannot be used as a defence. The law was clarified following a sensational case, *R. v. Daviault* (1994), where the court held that self-induced intoxication can be a defence in a sexual assault case if there is reasonable doubt that the accused could form an intent. The accused had been drunk during an attack on a 65-year-old partially paralyzed woman. Many Canadians were outraged by this judgment, and the *Criminal Code* was later amended to clarify the issue of criminal fault by reason of intoxication.

The *Criminal Code* permits one spouse to charge the other spouse for any level of sexual assault, whether or not they are living together.

Is the past conduct or lifestyle of the complainant relevant in a sexual assault trial? These factors may influence a jury to decide whether or not consent was given or whether the accused could honestly have believed that it was. The *Criminal Code* now prohibits evidence of sexual reputation from being raised in court in order to challenge or support the credibility of the complainant. However, evidence about the sexual activity of the complainant can be introduced after a judge has determined its value to the fairness of the trial. In section 276, the Code explains what the judge must consider in determining whether to admit the evidence, and in what situations the information should be made public.

In 1997, the *Criminal Code* was amended to allow personal records of the victim to be entered as evidence at trial (see The Law, below). Among the records that are included are medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption, and social services records, as well as personal journals and diaries. The *Criminal Code* also specifies when personal records should be admitted as evidence, how this decision should be made, and whether the evidence should be published.

You Be the JUDGE

"On appeal, the idea also surfaced that if a woman is not modestly dressed, she is deemed to consent. Such stereotypical assumptions find their roots in many cultures, including our own. They no longer, however, find a place in Canadian law."

—Chief Justice Beverley McLachlin, Supreme Court of Canada

- Discuss the meaning of Chief Justice McLachlin's comment with respect to the issue of consent.

The Law — The Criminal Code

Excerpts from the *Criminal Code*

276.

(3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account

(a) the interests of justice, including the right of the accused to make a full answer and defence;

(b) society's interest in encouraging the reporting of sexual assault offences;

(c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;

(d) the need to remove from the fact-finding process any discriminatory belief or bias;

(e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;

(f) the potential prejudice to the complainant's personal dignity and right of privacy;

(g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and

(h) any other factor that the judge, provincial court judge or justice considers relevant.

For Discussion

1. Summarize the factors that must be weighed by a judge in determining the admissibility of evidence of a complainant's sexual activity.

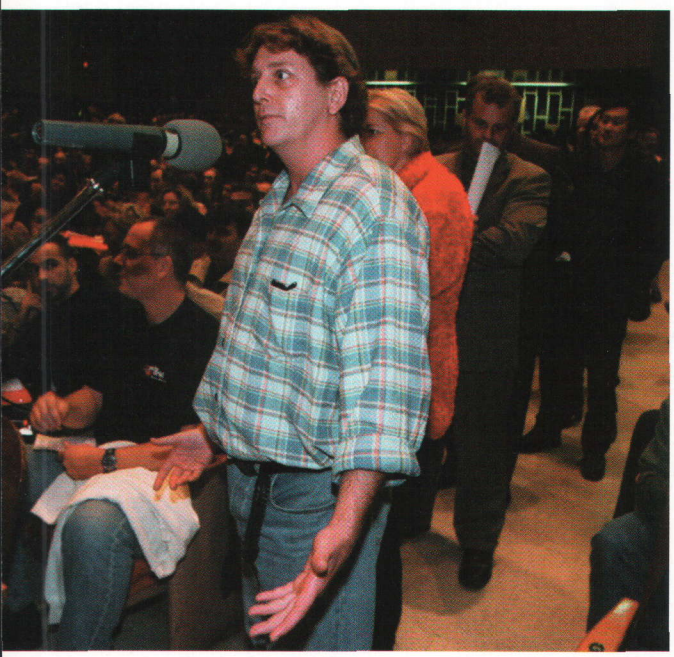


Figure 5-10

These Toronto residents were unhappy that a convicted child molester was being released into their neighbourhood. Was it appropriate for police to notify them that the offender had a history of reoffending?

Other Sexual Offences

The law protects young people from being pressured into sexual relationships with older people. The *Criminal Code* states that it is an offence for a person to touch, for sexual purposes, a part of the body of a person under the age of 14, or to invite, counsel, or incite that person to touch, for sexual purposes, a part of the body of any person. Whether or not the victim consented is irrelevant unless the accused is less than three years older than the victim.

A similar offence exists if the person is in a position of trust or authority toward a person 14 years of age or more but under the age of 18, or the victim is in a relationship of dependency with the accused. The accused cannot offer a defence by saying that he or she did not know the age of the victim; that is, the accused must have taken all reasonable steps to determine the age of the complainant in order to mount this defence. It is irrelevant to the defence if the victim consented. Generally, a person who is aged 12 or 13 cannot be tried for these offences.

Other sexual offences are as follows. It is an offence to

- commit bestiality, or compel (force) another to commit bestiality, or to commit bestiality in the presence of a person under the age of 14, or to incite a person under 14 to commit bestiality
- **procure** a person under the age of 18 for the purpose of engaging in any sexual activity prohibited by the *Criminal Code*
- as owner, occupier, or manager of premises, knowingly permit a person under the age of 18 to resort to, or to be in or on the premises for the purpose of, engaging in any sexual activity prohibited by the *Criminal Code*
- in the home of a person under 18, participate in adultery or sexual immorality or indulge in habitual drunkenness or any other form of vice, and thereby endanger the morals of the child or render the home an unfit place for the child to be in
- commit an indecent act in a public place, or be nude in a public place, or be nude on private property and exposed to public view
- commit **incest** (have sexual intercourse with a blood relative)
- exploit sexually a person with a mental or physical disability

A related addition to the Code allows a judge to prohibit sex offenders from frequenting places where children gather and from being employed in positions of trust over children.

e activity

Visit **www.law.nelson.com** and follow the links to learn more about organizations that are concerned with missing children.

Abduction

Because the number of separated and divorced families in Canada is rising, so is the number of abductions. **Abduction** is the forcible removal of an unmarried person under the age of 16 from the care of a parent, guardian, or any other person who has lawful care of the child. Foster parents are considered

guardians, as is a child welfare agency that has custody of the child.

A separate offence is the unlawful taking, enticing, concealing, detaining, receiving, or harbouring of a person under the age of 14 by anyone other than the parent or guardian.

Disputes over custody may result in one parent enticing a child away from the custodial parent. The offence of enticing was created to cover such situations. **Enticing** occurs when a custodial parent refuses to give access to a child according to the terms of an agreement, or a non-custodial parent detains or runs away with the child during a time of access.

One defence against enticing is that the other parent consented to the action. Another is that it was necessary to protect the child from imminent harm. Accommodating a child who prefers to live with the non-custodial parent is not a defence.

Figure 5-11

These Canadian children were reunited with their father, Craig Merkley, in January 2001. They had been abducted by their mother, Merkley's former wife. Few child abduction cases involve strangers.

Robbery

Robbery is theft involving violence, the threat of violence, assault, or the use of offensive weapons. When the Crown is basing its case on the threat of violence, it must prove that the victim felt threatened and that there were reasonable and probable grounds for the fear. For example, phrases such as "Empty your till!" or "This is a holdup!" have been accepted as threats of violence. These phrases imply that violence will result if the command is not obeyed. Similarly, using a finger or fist to simulate a weapon has been accepted in court as a threat of violence. Holding an imitation weapon is classified as using an offensive weapon. The severe punishment for robbery—life imprisonment—reflects society's revulsion for criminals who steal using violence.

It is also an offence to mask or colour one's face with the intent to commit an indictable offence.

Review Your Understanding (Pages 127 to 141)

1. **What constitutes a violent crime?**
2. **Distinguish between culpable and non-culpable homicide.**
3. **Identify the *mens rea* and *actus reus* of murder.**
4. **Distinguish between first- and second-degree murder, and describe the penalties for each.**
5. **Identify the *mens rea* and *actus reus* of manslaughter.**
6. **Under what circumstances could a charge of murder be reduced to manslaughter?**
7. **Identify the factors that must be present for a culpable homicide to be considered infanticide.**

Did You Know?

In 1999, of the 410 children abducted in Canada, only 52 were kidnapped by strangers. The remaining 358 were abducted by a parent.

8. **Distinguish among the three levels of assault.**
9. **Distinguish among the three levels of sexual assault.**
10. **In what situations is consent not a defence to sexual assault?**
11. **Distinguish between abduction and enticing.**
12. **Describe four separate offences that pertain to sexual intercourse involving persons under the age of 18.**
13. **Describe the elements of robbery.**

5.3 Actions with High Social Impact

Certain actions have a high social impact and are often debated by the public and the media, as well as in Parliament. This section examines some of these actions and the issues raised by them.

Abortion

Abortion was removed from the *Criminal Code* in 1989. However, Nova Scotia tried to continue regulating abortion by passing the *Medical Services Act*. It tried to stop abortions from being performed in private clinics and charged Dr. Henry Morgentaler with 14 counts of performing unauthorized abortions in a private clinic. The trial judge dismissed the charges, as did the Nova Scotia Court of Appeal on a Crown appeal. Both courts ruled that the Nova Scotia legislature did not have the power to pass the *Medical Services Act* because it was a criminal law and outside the jurisdiction of the province.

Did You Know?

In a recent survey of Torontonians, only about one in three people knew that Canada has no laws limiting the availability of abortion.

The abortion debate often turns on whether a fetus should be considered a human being. (The legal definition of a fetus is "an unborn product of conception after the embryo stage.") The *Criminal Code* defines the matter in section 223. The Supreme Court of Canada has not ruled on when a fetus becomes a human being. In one case it gave no ruling on the issue, stating that it was up to Parliament to legislate on such an important matter. A similar decision was made in *R. v. Sullivan*.

The Law

The Criminal Code

Excerpts from the *Criminal Code*

223.

(1) A child becomes a human being within the meaning of this Act when it has completely proceeded, in a living state, from the body of its mother whether or not

(a) it has breathed,

(b) it has an independent circulation, or

(c) the navel string is severed.

(2) A person commits homicide when he causes injury to a child before or during its birth as a result of which the child dies after becoming a human being.

For Discussion

1. **Summarize the *Criminal Code* definition of when a child becomes a human being.**

Case

R. v. Sullivan

(1991) 63 C.C.C. (3d) 97
Supreme Court of Canada

Jewel Voth hired two midwives, Mary Sullivan and Gloria Lemay, to deliver her baby. The two women had no formal medical training, but had some experience with home births and had done some background reading. Voth began a difficult labour on May 7, 1985. After several hours, the baby's head emerged. Despite repeated attempts, the midwives could not extract the baby from the birth canal. The midwives called an ambulance, and Voth was taken to a hospital emergency department where the baby was delivered within two minutes of arrival, using standard obstetrical techniques. By that time, the baby had suffocated from lack of oxygen. Attempts to revive the child failed.

Sullivan and Lemay were charged with one count of criminal negligence causing death to the child and a second count of criminal negligence causing bodily harm to the mother (see page 153 for more on criminal negligence). At trial in Vancouver's County Court in October 1986, they were convicted on the first charge but acquitted on the second charge. The two women were given suspended sentences and placed on three years' probation.

The women appealed their conviction to the British Columbia Court of Appeal. In July 1988, that court dismissed the charge of criminal negligence causing death and substituted a conviction on the second count of criminal negligence causing bodily harm. The court did so even though the Crown had not appealed the acquittal by the trial judge on that charge. The court's decision was based on the fact that an injury to the unborn child equalled an injury to the mother. In its judgment, the court stated: "As a matter of law, a child remains part of the mother when it is in the birth canal."

Sullivan and Lemay appealed their substituted conviction to the Supreme Court of Canada. In the meantime, the Crown appealed the overturning of the trial conviction on the first count. The appeals were heard in late October 1990. In a unanimous decision released on March 21, 1991, the Supreme Court upheld the acquittal of the two Vancouver midwives.

For Discussion

1. **Read the section on criminal negligence on page 153. Express your opinion as to whether you think Sullivan and Lemay were guilty of criminal negligence. Use facts from the case to support your opinion.**
2. **Prepare an organizer to summarize the main arguments that would be presented by the Crown and by the defence.**
3. **Why would the British Columbia Court of Appeal dismiss the conviction of the charge of criminal negligence causing death and substitute a conviction for criminal negligence causing bodily harm?**
4. **What is the significance of the Supreme Court of Canada decision?**

Looking Back — Canada's Abortion Law

The Canadian Parliament banned abortion completely in 1869, shortly after Confederation. The penalty for performing an abortion was life imprisonment. Pressure to liberalize Canada's abortion law began in the 1960s and came primarily from medical and legal associations, but also from various women's and social justice groups.

In 1967, Justice Minister Pierre Trudeau presented a bill to liberalize Canada's abortion law. The bill became law in 1969, exactly 100 years after abortion was first made illegal in Canada.

Abortion remained in the *Criminal Code,* but would be permitted under certain circumstances. A woman could get a legal abortion if she had the permission of a therapeutic abortion committee: three doctors at an accredited hospital. The committee would approve the abortion if it was determined that continuation of the pregnancy would endanger or would likely endanger the woman's life or health.

This law specified that it was an offence for any person, including the woman herself, to procure a miscarriage without the permission of the abortion

continued ▶

committee. Even if an attempt to abort met with failure, all concerned with the abortion were liable to prosecution.

In 1988, the Supreme Court of Canada ruled that the 1969 amendments to the *Criminal Code* on abortion were unconstitutional.

Figure 5-12

Nurses rallying against abortion. Abortion is a highly sensitive issue. In the late 1960s, Pierre Trudeau liberalized Canada's abortion law.

In 1989, after the Supreme Court decision, a bill on abortion legislation was introduced into Parliament. It would have permitted abortions only when a doctor considered a woman's physical, mental, or psychological health to be threatened. The House of Commons passed the legislation, but it was subsequently defeated in the Senate. Justice Minister Kim Campbell announced that the government would not introduce new legislation. Thus, Canada does not have a law that prohibits abortion.

Despite the fact that there are no restrictions on the availability of abortion in Canada, the majority of abortions are performed during the first 12 weeks of pregnancy. Most physicians will not perform an abortion past 20 or 21 weeks unless there are health or genetic reasons.

For Discussion

1. **Outline Canada's abortion law from 1969 to 1988. Indicate under what circumstances abortion would have been considered a crime during this period.**
2. **Explain Canada's current legal status on abortion.**

Did You Know?

Firearms account for about one in three homicides. The use of firearms in violent crimes decreased from 5.6 percent in 1995 to 4.1 percent in 1999.

Weapons

The *Criminal Code* defines a weapon as anything used or intended for use

- in causing death or injury to a person
- in threatening or intimidating any person

The object in question need not have been designed as a weapon.

Prohibited weapons include gun silencers, switchblade knives, automatic firearms, rifles and shotguns that are sawed off or otherwise modified, and any other weapon that has been declared prohibited. **Restricted weapons** include firearms that can be fired with one hand; semi-automatic weapons having a barrel length from the muzzle end of the barrel, up to and including the chamber, of less than 470 mm; firearms that can be folded or telescoped; firearms that can fire bullets in rapid succession; and any other weapon that has been declared restricted.

The federal government now requires that all owners and users of firearms—an estimated 3 million Canadians—obtain a Possession and Acquisition Licence (PAL) and register their firearms, whether restricted or not. Any restricted or prohibited firearm registered under the previous system must be re-registered by December 31, 2003 (see Issue, page 120).

The PAL is valid for five years. To apply, a person must be 18 years of age and complete an application form. Young people aged 12 to 17 can obtain a PAL with parental permission, but their parents must agree to supervise the use of the firearm. A PAL is not issued until a safety check is run on the

applicant. Applicants must pass the Canadian Firearms Safety Course to qualify for a PAL.

Canadians with a PAL may own and use firearms, borrow firearms in the same class as their own, and obtain ammunition. The PAL specifies what class(es) of firearms the person can own: non-restricted, restricted, or prohibited.

To discourage people from keeping weapons illegally, the government sometimes offers "amnesty periods" during which weapons can be registered or turned into police with no questions asked. Police donate the weapons to institutions, use them for safety education training, or destroy them.

Figure 5-13
Owners and users of firearms must have a licence.

Canadian society is alarmed by the use of weapons during the commission of serious crimes. The *Criminal Code* provides a one-year minimum sentence for using a firearm while committing an indictable offence. In serious cases, that sentence can be increased up to 14 years. For some offences, such as attempted murder, manslaughter, robbery, sexual assault with a weapon, and kidnapping, the minimum penalty is increased to four years. The sentence must follow any other punishment for the indictable offence. Thus, a person sentenced to 10 years for the indictable offence and one year for the use of the firearm while committing the offence would have a sentence of 11 years. If the person has a previous firearms conviction, the minimum sentence is increased to three years, and if there is more than one weapons offence, each sentence must be served consecutively (i.e., follow the other).

Other firearm offences listed in the *Criminal Code* include

- pointing a firearm at another person without lawful excuse, whether the firearm is loaded or unloaded
- carrying or possessing a weapon, an imitation of a weapon, a prohibited device, or any ammunition or prohibited ammunition for a purpose dangerous to the public peace, or for the purpose of committing an offence
- carrying a concealed weapon, prohibited device, or any prohibited ammunition
- not reporting to a peace officer the finding of a prohibited weapon or firearm
- not reporting misplacing or losing, or having had stolen from one's possession, a restricted weapon for which a registration certificate has been issued
- altering, defacing, or removing the serial number on a firearm
- possessing a firearm that has an altered, defaced, or removed serial number
- using, carrying, shipping, or storing a firearm, prohibited weapon, restricted weapon, prohibited device, or any ammunition or prohibited ammunition in a careless manner or without reasonable precautions for the safety of other persons

You Be the JUDGE

Young people aged 12 to 17 can also obtain a Minor's Possession Licence (MPL) that lets them use a non-restricted firearm for target practice, hunting, instruction in the use of firearms, and taking part in organized shooting competitions, and that lets them buy ammunition. The MPL does not allow people to buy a firearm.

- *Should* persons between the ages of 12 and 17 be allowed to use firearms? Justify your opinion.

Opinions About Prostitution in Toronto

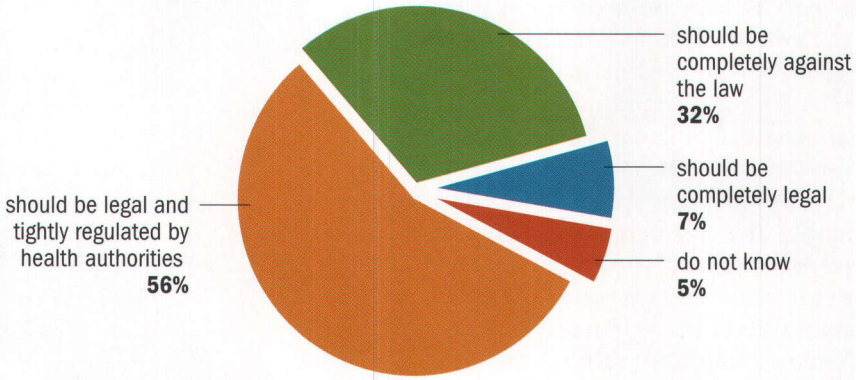


Figure 5-14

What can you infer from these statistics? Identify some reasons for keeping prostitution illegal.

Offences Relating to Prostitution

Prostitution is legal in Canada. However, some activities related to prostitution, such as **soliciting** and keeping a common bawdyhouse (a place of prostitution), are illegal. Soliciting is communicating for the purpose of prostitution. According to the Supreme Court of Canada, such communication must be "pressing or persistent" to be an offence.

Procuring involves directing customers to the services of a prostitute or living off the earnings of a prostitute, even on a part-time basis. The penalty for procuring is much more substantial than the penalties for soliciting or keeping a common bawdyhouse.

Soliciting can be considered a "crime without a victim," but many would argue that prostitutes are victims of procuring. Nonetheless, some Canadians believe that the government should not interfere with the morals of its citizens by legislating such matters. However, legislators are concerned about the issues that surround prostitution: its frequent occurrence in crime areas, its connections with the drug trade, exploitation of prostitutes by pimps, and the impact of prostitution on neighbourhoods.

Some provinces have moved to protect underage prostitutes. Alberta's *Protection of Children Involved in Prostitution Act* allows authorities to pick up suspected prostitutes under 18 years of age. They are taken to a safe house and can be held for up to 72 hours without being charged. The safe house provides an opportunity for the youths to be free of their pimps and to receive counselling.

Obscenity

Obscenity, described in section 163 of the *Criminal Code*, continues to be controversial. The Supreme Court of Canada generally follows the "community standards test." It notes that "the courts must determine as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure." Sex acts must be "degrading or dehumanizing" to be deemed obscene. The courts are frequently put in the position of determining whether something is obscene or a work of art.

Case

R. v. Butler

(1992) 70 C.C.C. (3d) 129
Supreme Court of Canada

Butler opened the Avenue Video Boutique in Winnipeg in 1987. His shop sold and rented "hard-core" videotapes and magazines as well as sexual paraphernalia. During the first month of operation, police entered the store with a search warrant and seized the inventory. Butler was charged with selling obscene material, possessing obscene material for the purpose of distribution, possessing obscene material for the purpose of sale, and exposing obscene material to public view.

Butler reopened the store and again was charged. At trial, he was convicted of eight counts relating to eight videotapes and fined $1000 per offence. Acquittals were entered on the remaining 242 charges. The Crown appealed the 242 acquittals and Butler cross-appealed the eight convictions. The majority of the Manitoba Court of Appeal allowed the appeal of the Crown and entered convictions for Butler with respect to all the counts. Butler appealed to the Supreme Court of Canada.

In its decision, the Supreme Court of Canada divided pornography into three categories:

- *Explicit sex with violence,* which would almost always constitute undue **sexual exploitation.**
- *Explicit sex without violence that subjects people to degrading or dehumanizing treatment,* which may be undue (excessive) if the risk of harm is substantial. Whether the exploitation is undue would depend on
  - a determination of what the community would tolerate others being exposed to on the basis of the harm that may flow from such exposure. Harm can be presumed if the material predisposes a person to act in an antisocial manner.
  - whether the materials place women (and sometimes men) in positions of subordination and therefore infringe the principle of equality.
- *Explicit sex without violence that is neither degrading nor dehumanizing,* which would be tolerated. The onus is on the government to prove that the exploitation is undue. Any doubt will be resolved in favour of freedom of expression.

The Court ruled that section 163 of the *Criminal Code* violates the guarantee to freedom of expression in section 2(b) of the *Charter,* but that it is a reasonable limit prescribed by law and is therefore constitutional. Butler's case was sent back to trial to be decided on the basis of the new rules.

For Discussion

1. **Explain the differences between the categories of pornography established by the Supreme Court of Canada.**
2. **Which category would always be classified as obscene?**
3. **What two factors would be used to determine if the exploitation of sex was undue (excessive)?**
4. **How did the Supreme Court rationalize keeping section 163 in the *Criminal Code* if it violated section 2(b) of the *Charter*?**
5. **What criteria should be used to determine whether material is degrading? For example, should the criteria be based on what you think other people should not view or what you think you should not view?**

Section 163(8) states: "For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene." The expressions "dominant characteristic" and "undue exploitation" are the bases on which many defences are founded.

A variety of offences relate to obscenity: making, printing, circulating, mailing, or distributing obscene material; and presenting or taking part in an immoral theatrical performance. Police can obtain a warrant to seize any

materials that they consider to be obscene and lay charges. Customs officers also have the right to seize materials considered obscene and forbid their entry into Canada.

Concern about the exploitation of children in pornography has resulted in amendments to the *Criminal Code*. Child pornography is defined as "a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means, (i) that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity." Any person in possession of, producing, or distributing and selling any child pornography is guilty of an offence.

Corruption and Abandonment of Children

Parents or guardians of children may not procure them for prostitution or for any sexual activity prohibited by the *Criminal Code*. As well, it is an offence to own, occupy, or manage a place that children are using for sexual activity prohibited by the Code. It is also an offence to abandon or expose a child under the age of 10 if endangering the child's life or permanently harming his or her health is likely.

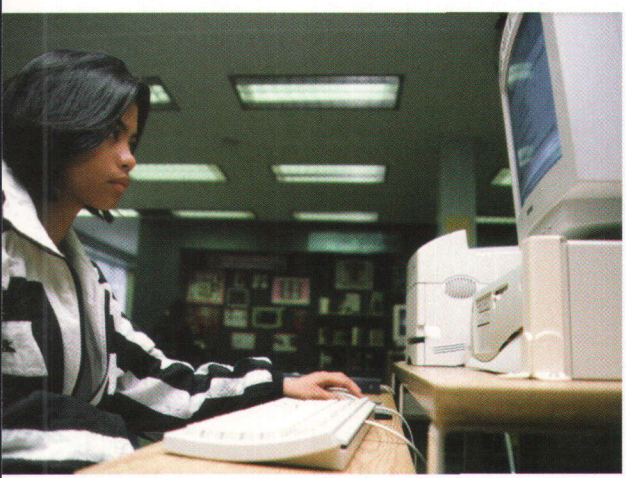


Figure 5-15

What can young people do to avoid being "stalked" on the Internet?

To protect the public from high-risk sexual offenders, Parliament is considering a national sex offender registry system. Similar registries now exist in Ontario. Information would be kept at the Canadian Police Information Centre, which is maintained by the RCMP. The information would then be available to police forces across Canada. Convicted offenders would be required to register their current addresses with the police.

Parliament may also establish the offence of cyberstalking (luring through the Internet). The aim is to protect children from predators who strike up acquaintances with lonely or naive boys and girls. In recent years, there have been cases of children leaving home to meet or live with a cyber acquaintance in another city or country. The offence would make it illegal to communicate for sexual purposes with someone believed to be a child.

Review Your Understanding (Pages 142 to 148)

1. **Identify the significance of the 1988 Supreme Court of Canada decision regarding abortion.**
2. **Distinguish between prohibited and restricted weapons.**
3. **What must a citizen in Canada do in order to legally possess or use a gun?**
4. **Describe five offences pertaining to weapons, other than those that deal with prohibited and restricted weapons.**
5. a) **Distinguish between procuring and soliciting.**
   b) **What elements must exist for a conviction on soliciting?**
6. **Discuss four issues related to prostitution that are of concern to legislators.**
7. **How does the *Criminal Code* define obscenity?**

5.4 Property Crimes

At one time, protection of property was one of the most important functions of criminal law. Until the 18th century, death was a common penalty for theft. Property such as livestock and horses was so important to owners that society demanded this extreme punishment. The *Criminal Code* continues to provide major penalties for offences against property. In fact, property offences make up approximately two-thirds of all offences listed in the *Criminal Code.* The major property crimes are arson, theft over $5000, theft under $5000, motor-vehicle theft, break and enter, possession of stolen goods, and fraud.

Arson

Owing to an increase in intentional fires and explosions, the *Criminal Code* was amended in 1990 to include more acts under the definition of **arson.**

The Code defines arson as the intentional or reckless causing of damage by fire or explosion to property, whether or not the arsonist owns the property. If the arsonist is aware that someone occupies the property, or is reckless in that regard, or if the fire or explosion causes bodily harm to another person, the maximum penalty is life imprisonment. Where there is no danger to life, the maximum penalty for arson is 14 years in prison.

Committing arson with intent to defraud—for example, to collect on an insurance policy—carries a maximum penalty of 10 years. Possessing any explosive material or device, such as a bomb, for the purpose of committing arson is illegal. Finally, to set off a false fire alarm is a hybrid offence: the maximum penalty is two years if the Crown proceeds by indictment.

Theft

Theft has a number of elements. Each element must be proven for a successful conviction.

- The act must be fraudulent, which means that the person who is stealing must have intended to do something wrong.
- The person taking the item must not have any **colour of right** to it. "Colour of right" means that the person has a legal right to the item.
- The accused must have an intent to deprive the owner of the item or convert it to his or her own use.

If the value of the goods is below $5000, the offence is generally known as theft under $5000. If the value is over $5000, the offence is known as theft over $5000. The penalties are substantially different. Theft under $5000 is a hybrid offence with a maximum penalty of two years. Theft over $5000 has a maximum penalty of 10 years.

A person can also be charged with theft based on the principle of recent possession. When arrested, a person who has possession of items that were recently stolen must be able to explain at trial how he or she came to possess them. If the accused provides an explanation, the onus is on the Crown to disprove it. If the Crown fails to do so, the accused must be acquitted.

Did You Know?

Arson is the cause of more than 12 percent of all fires in Canada. Fires started by arson kill more than 50 and injure over 500 people annually. Property damage each year because of arson exceeds $150 million. The maximum penalty for arson is 14 years. In your opinion, should the maximum penalty for arson be the same as the maximum penalty for aggravated assault? Explain.

Did You Know?

More than 50 percent of arson incidents are committed by people between 12 and 17 years of age.

Did You Know?

It is an offence to steal any computer service; to intercept any function of a computer system; or to use a computer system to commit a crime.

Did You Know?

In 2000, there were 293 416 break-ins—a 9 percent decrease from the previous year and the lowest rate since 1978. Sixty percent of the break-ins occurred in homes. At the same time, a survey of 26 000 people showed that fewer people are reporting break-ins to police. Why would people decide not to report them?

Break and Enter

The law considers break and enter, commonly called burglary, a serious offence. The terms "break" and "enter" are defined in sections 321 and 350 of the *Criminal Code*. Section 321 states: "In this Part, 'break' means (a) to break any part, internal or external, or (b) to open any thing that is used or intended to be used to close or to cover an internal or external opening." Section 350(a) states: "A person enters as soon as any part of his body or any part of an instrument that he uses is within any thing that is being entered." Due to an increase in home invasions in larger cities, amendments to the *Criminal Code* proposed in 2001 would permit tougher penalties for break-and-enter crimes involving a home.

The offence of break and enter is described in section 348 of the *Criminal Code* (see The Law, page 103).

When someone illegally enters a residence by some other means (not by break and enter) to commit an indictable offence, there is a separate offence—being unlawfully in a dwelling-house (residence). The penalty for this offence is less severe than it is for break and enter. It is also an offence to possess housebreaking, vault-breaking, or safe-breaking tools if circumstances indicate that the owner possessed such tools for the purpose of breaking in. No break-in need actually occur.

Case

R. v. Holmes

(1988) 64 C.R. (3d) 97
Supreme Court of Canada

Holmes was charged with possession of housebreaking tools, under section 309(1) [now 351(1)] of the *Criminal Code*. The tools were a pair of pliers and a pair of locking pliers. If such tools give rise to a reasonable inference that they could be used for housebreaking, the section requires an owner to prove that the tools have no illegal purpose.

Holmes argued that this requirement violated the presumption of innocence guaranteed by section 11(d) of the *Canadian Charter of Rights and Freedoms*. It reversed the burden of proof by making him prove that he was innocent. Before entering his plea, Holmes moved to have the indictment quashed (suppressed). The trial judge granted the motion. The Crown appealed, and the Ontario Court of Appeal set aside the order. Holmes appealed to the Supreme Court of Canada.

The Supreme Court of Canada ruled that the words "reasonable inference" do not permit a finding of guilt unless something is proved beyond a reasonable doubt. Therefore, the Crown had to prove that there was possession, and that the tools were obtained for the purpose of committing a crime. The words "without lawful excuse, the proof of which lies upon him" were included in the Code to make available the defence of innocent purpose. Hence, the section did not require the accused to prove that the tools were not for an illegal purpose and therefore did not violate section 11(d).

For Discussion

1. **Identify the three elements that must be proved for the Crown to obtain a conviction on possession of housebreaking tools.**
2. **Interpret the meaning of section 11(d) of the *Charter* and explain how it relates to the burden of proof on the prosecution.**
3. **Reverse onus means the accused has to prove he or she is innocent. How does a reverse onus limit the right protected under section 11(d)?**
4. **On what basis did the Supreme Court of Canada rule that the offence was not one of reverse onus?**
5. **Explain the defence of innocent purpose.**

Possession of Stolen Goods

It is an offence for someone to possess anything that he or she knows was obtained during the commission of an indictable offence. In addition, owning a car with a licence plate whose serial numbers are removed or destroyed will lead to the presumption that the car was obtained during the commission of an indictable offence.

Fraud

Making false statements to obtain credit or a loan is a crime. For example, if Connie applies for a loan on the Internet and lies about her salary and her assets, she could be charged with obtaining credit by **false pretences** under section 361(1) of the *Criminal Code*: "A false pretence is a representation of a matter of fact either present or past, made by words or otherwise, that is known by the person who makes it to be false and that is made with a fraudulent intent to induce the person to whom it is made to act on it."

Credit is a form of money. In fact, the amount of "money" that can be spent using stolen credit cards can sometimes exceed the amount that one thief can carry away from the bank. Section 342 of the *Criminal Code* describes the offence of credit card fraud.

The *Criminal Code* also states that anyone who writes a cheque for which insufficient funds are available when the cheque is cashed is guilty of an offence. It is a defence if the person can prove that, when the cheque was issued, there was every reason to believe that the funds were available.

The Law — The Criminal Code

Excerpts from the *Criminal Code*

342.

(1) Every person who

- **(a)** steals a credit card,
- **(b)** forges or falsifies a credit card,
- **(c)** possesses, uses or traffics in a credit card or a forged or falsified credit card, knowing that it was obtained, made or altered
  - **(i)** by the commission in Canada of an offence, or
  - **(ii)** by an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence, or
- **(d)** uses a credit card knowing that it has been revoked or cancelled,

is guilty of

- **(e)** an indictable offence and is liable to imprisonment for a term not exceeding ten years, or
- **(f)** an offence punishable on summary conviction.

For Discussion

1. **Why do you think the number of offences related to credit card fraud is increasing?**
2. **In your opinion, would use of more personal identification, such as fingerprints on a scanner, be better identification for credit? What shortcomings are there to using such techniques?**

Review Your Understanding (Pages 149 to 151)

1. **Explain the elements necessary for a theft conviction.**
2. **Interpret the legal meaning of the terms "break" and "enter."**
3. **Explain the concept of reverse onus as it applies to the possession of housebreaking instruments and the possession of stolen goods.**
4. **Discuss three examples of fraud.**

5.5 Other Crimes

The following offences are significant because they occur frequently, are recent additions to the Code, or are of general interest.

e activity

Visit **www.law.nelson.com** and follow the links to learn more about UN conventions and protocols related to terrorism.

Terrorism and Terrorist Acts

The terrorist events of September 11, 2001, resulted in several changes and additions to the Canadian *Criminal Code* (see Agents of Change, page 30). Canada also signed 14 United Nations conventions related to terrorism, including the *Suppression of Terrorist Financing Convention* and the *Suppression of Terrorist Bombings Convention.*

You Be the JUDGE

Does the definition of "terrorist activity" cover events such as those in the United States on September 11, 2001? Explain.

The Canadian government defines "terrorist activity" as "an action that takes place either within or outside of Canada that is an offence under one of the UN anti-terrorism conventions and protocols; or is an action taken for political, religious or ideological purposes and intimidates the public concerning its security, or compels a government to do something, by intentionally killing, seriously harming or endangering a person, causing substantial property damage that is likely to seriously harm people or by seriously interfering with or disrupting an essential service, facility or system." The activity does not have to take place in Canada—it can be against a Canadian citizen or government facility located outside Canada.

The *Criminal Code* now allows the government to publish the names of groups, referred to as "entities," that are acting as, or on behalf of, a terrorist group.

Canada, along with many other countries, took action to cut off the sources of funds that terrorists use to carry out their activities. It is now an offence to knowingly collect or provide funds, either directly or indirectly, to carry out terrorist crimes. The government also has the right to freeze any property that is being used in any way to assist a terrorist group. To further control use of property by terrorists, financial institutions must report to the government any assets in their possession that belong to a listed entity. Legislation was also enacted to make it a criminal offence to commit any indictable offence under *any* Act of Parliament for the benefit of, under orders of, or in association with a terrorist group.

The cause of most terrorist activities is hatred of a particular group. The *Criminal Code* amendments give a judge the right to order the deletion of hate propaganda contained on Internet sites. The damaging of a religious property motivated by bias, prejudice, or hate was also added as an offence.

Criminal Harassment

The offence of criminal harassment (stalking) was added to the *Criminal Code* in 1993. It prohibits anyone from repeatedly communicating with or following another person, any member of the other person's family, or anyone known to that person, where in all the circumstances, they reasonably fear for their safety.

activity

Visit **www.law.nelson.com** and follow the links to learn more about criminal harassment.

Criminal Harassment: Relationship of Accused to Victim, 1999

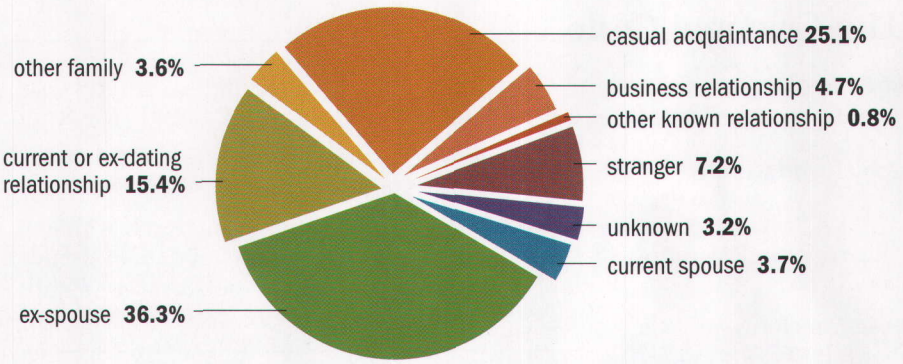


Figure 5-16

Women were victims in 75 percent of the incidents. Why do you think it is most likely for an ex-spouse to be engaged in criminal harassment? Draw another conclusion from the data.

Criminal Negligence

The definition of **criminal negligence** is found under section 219 of the *Criminal Code.*

Criminal negligence comprises three categories: criminal negligence in the operation of a motor vehicle (examined in Chapter 6); criminal negligence causing bodily harm (see *R. v. Sullivan,* page 143); and criminal negligence causing death. Intent is not necessary. Indifference as to what the reasonable person would do under the circumstances may result in a conviction. Thus, a person who drives in a manner very different from that of the reasonable person and who is inconsiderate of the safety of others is criminally negligent. See Chapter 12 for more on negligence.

The Law — The Criminal Code

Excerpts from the *Criminal Code*

219.

(1) Every one is criminally negligent who

(a) in doing anything, or

(b) in omitting to do anything that it is his duty to do,

shows wanton or reckless disregard for the lives or safety of other persons.

(2) For the purposes of this section, "duty" means a duty imposed by law.

For Discussion

1. Give examples of wanton or reckless disregard for the lives or safety of other persons that could result from the operation of a motor vehicle.

Mischief

The offence of **mischief** can relate to a variety of circumstances involving the deliberate destruction or damaging of property. Today, some of the most valuable property is electronic information (data). Because of the possibility that data may be deliberately destroyed, for example, by a computer virus, the definition of mischief includes harm to data. These offences are defined in sections 430(1) and 430(2) of the *Criminal Code.*

The Law — The Criminal Code

Excerpts from the *Criminal Code*

430.

(1) Every one commits mischief who wilfully

(a) destroys or damages property;

(b) renders property dangerous, useless, inoperative or ineffective;

(c) obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property; or

(d) obstructs, interrupts or interferes with any person in the lawful use, enjoyment or operation of property.

(1.1) Every one commits mischief who wilfully

(a) destroys or alters data;

(b) renders data meaningless, useless or ineffective;

(c) obstructs, interrupts or interferes with the lawful use of data; or

(d) obstructs, interrupts or interferes with any person in the lawful use of data or denies access to data to any person who is entitled to access thereto.

For Discussion

1. **Why is section 430(1.1) significant in our society today?**
2. **Assume you were having a loud party at your house. Under what circumstances could you be charged with the offence of mischief?**

Review Your Understanding (Pages 152 to 154)

1. **Name some offences considered to be terrorist activities according to the *Criminal Code.***
2. **What elements must be proven to obtain a conviction on a charge of criminal negligence?**
3. **How does the *Criminal Code* define mischief relating to data?**

5.6 Offences and Penalties

The following is a list of the offences and penalties found in the *Criminal Code.*

Indictable Offence—Life Imprisonment

Accessory after fact to murder
Aircraft, endangering safety
Arson, disregard for life
Break and enter, dwelling-house
Criminal negligence causing death
Explosives, intent to cause harm, death
Explosives, used against a public building, with intent to cause death

Extortion
Hijacking
Hostage taking
Kidnapping
Killing unborn child in act of birth
Mail, stopping with intent to rob
Manslaughter
Mischief (if dangerous to life)
Murder
Murder, attempted
Murder, conspiracy to commit
Riot Act, hindering reading of
Robbery
Sexual assault, aggravated
Terrorism, any indictable offence at the direction of or in association with a terrorist group

Indictable Offence—14 years

Administering noxious thing endangering life
Aircraft, taking explosives or weapons on
Aggravated assault
Arson, damage to other's property
Bribery of judicial officers, peace officers
Causing bodily harm by criminal negligence
Causing bodily harm with intent
Contradictory evidence by witness
Counterfeit money, making, possessing, or uttering
Criminal organization, participating in
Fabricating evidence
Facilitating a terrorist activity
Firearm, use of during offence
Impeding attempt to save life
Incest
Passport, forging or using forged [passport]
Perjury
Piracy
Sexual assault, using weapon, or causing bodily harm
Suicide, counselling, aiding

Indictable Offence—10 years

Abduction of person under 14
Assault causing bodily harm
Cattle theft
Credit, obtained by false pretense
Criminal negligence causing bodily harm
Disguise with intent to commit indictable offence
Face masked or coloured
False pretence, property obtained by (over $5000)
Housebreaking instruments—possession
Mail theft
Prison breach
Procuring
Sexual intercourse, administering drug, liquor for illicit
Terrorism, participating in a terrorist group, concealing a terrorist
Terrorist activities, financing, providing property
Theft, or possession of property obtained by crime, if over $5000

Indictable Offence—5 years

Abduction of person under 16
Bigamy
Childbirth, failing to obtain assistance in
Explosive, illegal possession
Fire, setting by negligence
Fraud upon the government
Genocide, advocating
Indignity to dead body
Infanticide
Marriage, procuring feigned
Municipal corruption
Polygamy
Sexual activity, parent procuring (under 14)
Traps likely to cause bodily harm
Unlawful drilling

Indictable Offence—2 years

Abandoning child
Administering noxious things to annoy
Automobile master key, selling
Cheating at play
Coin device, possession of instrument for breaking
Common bawdyhouse, keeping
Common nuisance
Corrupting children
Disobeying order of court
Disposing of body of child to conceal birth
Duelling
Eavesdropping equipment, illegal possession of
Escape, permitting or assisting
False message
Gaming-house, keeping
Gaming- or betting-house, found-in
Intercepted information, illegal disclosure of
Lotteries, illegal
Mail, using to defraud
Misconduct of officers executing process
Procuring own miscarriage
Riot, taking part
Sexual activity, parent procuring (under 18)
Spreading false news

Hybrid Offence

The number in parentheses indicates the maximum penalty in years if the offence is tried by indictment. If two numbers are shown, the first is the maximum penalty in months for the summary offence if other than the usual six months.

Abduction in contravention of custody order (10)
Abduction where no custody order (10)
Assault, assaulting a peace officer (5)
Assault, causing bodily harm (10)
Bodily harm, unlawfully causing (10)
Break and enter, non-dwelling-house (10)
Buggery, bestiality (10)
Computer, unauthorized use (10)
Credit card, theft; forgery (10)
Dwelling-house, unlawfully in (10)
Escape, unlawfully at large (2)
Failing to appear at court (2)
False alarm of fire (2)
Firearm, pointing (5)
Forcible entry (2)
Forgery (10)
Harassment, criminal (5)
Hatred, incite or promote (2)
Mailing obscene matter (2)
Mischief motivated by bias, prejudice, or hate (18, 10)
Mischief, over $5000 (10), under $5000 (2)
Morals, corrupting (2)
Necessaries, failing to provide (2)
Obstructing, resisting an officer (2)
Pornography, making child (10)
Pornography, possession of child (5)
Probation order, failure to obey (2)
Public mischief (5)
Recognizance, breach of (2)
Sexual assault (10)
Sexual exploitation, 14 to 18 (5)
Sexual exploitation of person with disability (18 m) (2)
Sexual interference, under 14 (10)
Sexual purposes, removal of child from Canada for (5)
Sexual touching, invitation to, under 14 (10)
Theft, or possession of property obtained by crime, if under $5000 (2)
Threat, to harm or cause death (18 m) (2)
Threat, uttering (18 m) (5)
Weapon, unauthorized possession of prohibited, restricted (5)
Weapon, concealed or in motor vehicle (5)

Summary Offence—6 months

Advertising reward and immunity
Animals, injuring or endangering
Assembly, participating in unlawful
Causing a disturbance
Coin, defacing
Gaming- or betting-house, found-in
Impersonating a peace officer
Impersonating at an examination
Indecent act, telephone call
Loitering
Motor vehicle theft
Nudity
Slug, having or making
Soliciting
Trespassing at night
Water-skiing, failure to watch, or at night
Weapon, at a public meeting

Minimum Penalties

Betting, illegal (1st offence: 2 years; 2nd: 14 days to 2 years; 3rd: 3 months to 2 years)
Criminal negligence causing death, using a firearm (4 years to life)
Firearm, imitation, using to commit an offence (1st offence: 1 to 14 years; 2nd: 3 to 14 years)
Firearm, using to commit an offence (1st offence: 1 year; 2nd: 3 years)
Hostage taking, using firearm (4 years to life)
Kidnapping, using firearm (4 years to life)
Manslaughter, using firearm (4 years to life)
Murder, attempted, using firearm (4 years to life)
Robbery, using firearm (4 years to life)
Sexual assault, aggravated, using firearm (4 years to life)
Sexual assault, using firearm (4 to 14 years)

Chapter Review

Chapter Highlights

- The charge for a homicide depends upon the person killed and the intent.
- Assault charges can be one of three charges, depending upon the severity of the assault.
- Sexual assault charges can be one of three charges, depending upon the severity of the assault.
- Consent is frequently an issue in a sexual assault trial.
- There is legislation designed to protect children.
- Weapons are classified as prohibited and restricted weapons.
- Soliciting, keeping a common bawdyhouse, and procuring are illegal.
- The community standards test is followed by courts in determining obscenity.
- Property crimes make up approximately two-thirds of *Criminal Code* offences.
- Arson is the intentional or reckless causing of damage by fire or explosion.
- The penalties for theft under $5000 and over $5000 are significantly different.
- It is an offence to be in the possession of property while knowing that it was obtained by the commission of an indictable offence.
- The offence of "obtaining by false pretences" requires that the person knows that the facts presented are false.
- The offence of mischief refers to the deliberate damaging of property.

Review Key Terms

Name the key terms that are described below.

a) the cause of death, usually an issue in murder trials

b) forcible removal of a child

c) anything that serves to indicate a person has true ownership of something

d) any weapon that has been declared prohibited

e) painlessly putting to death as an act of mercy a person suffering from an incurable and disabling disease

f) communicating for the purposes of prostitution

g) theft involving violence, threat of violence, assault, or the use of offensive weapons

h) killing of an infant shortly after birth, by its mother who has become mentally disturbed from the effects of giving birth

i) the deliberate destruction or damage of property

j) planned and deliberate killing

k) to live off the earnings of a prostitute

l) intent to wound, maim, or disfigure

m) intentional damage by fire

n) blamable killing

o) the act of fraudulently taking something

p) a representation known to be false

Check Your Knowledge

1. Indicate, by providing examples, what would be considered crimes of violence.
2. Outline actions that are considered to have a high social impact and are debated by society and in Parliament.
3. Identify the actions that are considered property crimes. Provide examples.
4. Provide examples of laws in the *Criminal Code* that are specifically designed to protect children.

Apply Your Learning

5. For each of the following incidents, indicate the offence that will be charged, the elements that must be proven for a successful conviction, and the maximum penalty.
   a) The accused killed her child shortly after childbirth.
   b) The accused wrote obscenities on the side of a building.
   c) The accused entered a home and stole a television.
   d) The accused quickly spent money that he found deposited mistakenly in his bank account.
   e) The accused set fire to his friend's car.
   f) The accused pushed his friend down the stairs. The friend died.

6. *R. v. Creighton*, [1993] 3 S.C.R. 3 (Supreme Court of Canada)

Creighton, Caddedu, and Martin shared a large quantity of alcohol and cocaine at Martin's apartment over an 18-hour period. All the parties involved were experienced cocaine users. Creighton injected cocaine into Martin's forearm with her consent. She immediately began to convulse violently and appeared to cease breathing. The other two could not resuscitate her. Caddedu wanted to call 911 but was dissuaded by Creighton, who placed Martin on the bed, cleaned the apartment of any possible fingerprints, and left with Caddedu. Seven hours later, Caddedu returned and called for emergency assistance. Martin was pronounced dead. As a result of the injection, she had experienced a cardiac arrest and later asphyxiated on the contents of her stomach. The defence conceded that trafficking had taken place. The Crown argued that Creighton was guilty of manslaughter as the death was the direct consequence of an unlawful act.

What factors could the Crown consider in their argument for manslaughter?

7. *R. v. Thornton* (1993), 82 C.C.C. (3d) 530 (Supreme Court of Canada)

Thornton was well-informed about HIV and its means of transmission. He knew that he was a member of a group that was highly at risk of contracting AIDS. Moreover, he knew that he had twice tested positive for HIV antibodies and that he was therefore infectious. Thornton nevertheless donated blood to the Red Cross in 1987.

Thornton was charged with committing a common nuisance, which is defined as doing an unlawful act or failing to discharge a legal duty and thereby endangering the life, safety, health, property, or comfort of the public. The *Criminal Code* provides in section 216 that "every one who undertakes to administer surgical or medical treatment to another person or to do any other lawful act that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill and care in so doing."

How could it be argued that Thornton was guilty of the crime of common nuisance?

8. Examine the following statistics related to homicides in Canada in 1999, as reported by Statistics Canada in October 2000.
   - Canada's homicide rate was its lowest since 1967.
   - Canada's homicide rate was one-third less than the American rate, but higher than most European rates.
   - Almost 90 percent of accused persons were male, as were two-thirds of homicide victims.
   - About 8 percent of homicide incidents were murder–suicides.
   - Thirty-one percent of homicides involved firearms.
   - Handguns were used in 55 percent of all firearm homicides.
   - The majority of firearms-related deaths were a result of suicide.
   - Four out of five victims of spousal homicide were female.
   - Fifty-one percent of female homicide victims were killed by someone with whom they had an intimate relationship, compared with 6 percent of male victims.
   - Of the children under 12 who were killed, 80 percent were killed by a parent.
   - Sixty-four percent of people accused of homicide had a previous criminal record.

   What conclusions can be drawn about homicide offences and weapons-related offences in Canada?

Communicate Your Understanding

9. Assume that the next session of Parliament is considering opening debate on the *Criminal Code* in relation to the following topics:

- censorship
- euthanasia
- weapons

Select one topic and write a letter to your local member of Parliament, outlining your position on how to balance individual and societal interests. Extend your research by providing examples from the news.

10. Investigate current issues in criminal law by selecting three news articles from print or online sources that deal with criminal law matters. For each article, complete the following:

a) Briefly summarize the article.
b) Outline at least two main criminal issues discussed.
c) Where possible, identify the opinion of the author.
d) Express your opinion on this criminal matter, and justify your view by providing examples to support it.

Develop Your Thinking

11. How have changes in attitudes and societal values brought about changes in criminal law? Support your answer by providing examples of recent changes to criminal law in Canada by researching from the text, current print media, or the Internet.

12. The *Criminal Code* specifies a number of offences that are often referred to as "crimes without victims." They include communicating for the purpose of prostitution, obscenity, and keeping a bawdyhouse (brothel). Should the police control such activities, or should people be allowed to decide for themselves whether or not to engage in them? Explain. How could it be argued that there are victims in these crimes?

Chapter 6

Drug Use, Drinking, and Driving

Focus Questions

- What basic drug offences are found in the *Controlled Drugs and Substances Act*?
- What rights do police have for the search and seizure of controlled drugs?
- Which offences are connected with impaired driving?
- What changes in the law have been made to reduce the occurrence of drinking and driving?
- What are the costs to Canadian society of illegal use of drugs and impaired driving?

Chapter at a Glance

Figure 6-1

A customs agent holds a brick of hashish concealed in food packages. This drug bust in Montreal yielded 10 000 kg of hashish. It takes millions of dollars to fight the illegal drug trade. Do you think this money is well spent?

6.1 Introduction

Did You Know?

Some authorities recently told the United Nations: "We believe that the global war on drugs is now causing more harm than drug abuse itself." How might this be possible?

Driving under the influence of alcohol and using illegal drugs are serious crimes that trouble Canadians. These crimes are costly to Canadian society, resulting in more tax spending on health care and legal aid, and soaring insurance rates. Federal and provincial governments have tried to solve these problems by introducing stiffer penalties and other **deterrents,** and by giving the police greater powers. Still, there is a widespread belief that neither drug traffickers nor impaired drivers are penalized severely enough. In this chapter, you will examine these crimes in more detail as well as the legislation designed to protect Canadian society.

The Cost of Illegal Drugs

Worldwide, governments spend millions monitoring drug traffic and arresting people involved in the drug trade. It is also expensive to prosecute crime related to illegal drugs; for example, murder, property damage, assaults, theft, and robbery. The illegal drug trade feeds large fortunes to criminal organizations. Do such costs justify the "war on drugs," or should governments just legalize the possession and use of certain drugs? Revenue generated by the world's illicit drug industry is estimated to be $600 billion. Annual production of marijuana in British Columbia is valued at $6 billion, which would make it the largest industry in the province.

6.2 The Controlled Drugs and Substances Act

A **drug** has been defined as "any substance that by its chemical nature alters structure or function in a living organism." Of course, not all chemicals with these effects are classified as illegal drugs. Otherwise, tea, beer, cola, and aspirin would be classed with heroin and cocaine. Drugs are classified as criminal because using or possessing them is restricted by law. Thus, the fact that marijuana is not a narcotic has been ruled by the courts to be irrelevant; marijuana is still on the list of substances defined as a controlled drug by Parliament. The rel-

Figure 6-2

Controlled substances are used legitimately by some Canadians to manage pain. How can prescription medication be kept away from addicts?

evant statute relating to the use of drugs—the *Controlled Drugs and Substances Act*—was enacted in 1997. It is a combination of the old *Narcotic Control Act* and sections of the *Food and Drugs Act*.

The *Controlled Drugs and Substances Act* criminalizes possession of, and trafficking in, a variety of illegal and controlled drugs. The Act has four basic schedules, or lists:

- Schedule I lists the most dangerous drugs, including narcotics such as heroin and cocaine.
- Schedule II lists cannabis (marijuana) and its derivatives.
- Schedule III lists many of the more dangerous drugs previously found in the *Food and Drugs Act*, such as lysergic acid diethylamide (LSD).
- Schedule IV lists drugs that must be controlled but that have therapeutic use, such as barbiturates.

Two other schedules that will be referred to below are Schedules VII and VIII. Schedule VII refers to cannabis resin and cannabis in amounts up to 3 kg; Schedule VIII refers to cannabis resins in amounts up to 1 g and to cannabis in amounts up to 30 g. The Act defines a **controlled substance** as being any substance included in Schedules I to IV.

activity

Visit **www.law.nelson.com** and follow the links to learn about drug awareness programs.

Possession

It is an offence to possess any drug listed in Schedules I to III. Canadians are allowed to possess drugs found in Schedule IV, which are for therapeutic use. Figure 6-3 summarizes the penalties for possessing drugs found in Schedules I, II, VIII, and III.

Penalties for Possession

Schedule and Substance	Offence	Penalty (maximums)
Schedule I Dangerous drugs	If a first offence and tried as a summary offence	$1000 and/or 6 months
	If a subsequent offence	$2000 fine and/or 1 year
	If tried as an indictable offence	7 years
Schedule II Cannabis (marijuana) and its derivatives	If a first offence and tried as a summary offence	$1000 and/or 6 months
	If a subsequent offence	$2000 and/or 1 year
	If tried as an indictable offence	5 years less a day
Schedule VIII Cannabis resin up to 1 g and cannabis up to 30 g	If charged under Schedule VIII, the offence is always tried as a summary offence.	$1000 and/or 6 months
Schedule III Dangerous drugs formerly listed in the *Food and Drugs Act*	If a first offence and tried as a summary offence	$1000 and/or 6 months
	If a subsequent offence	$2000 and/or 1 year
	If tried as an indictable offence	3 years

Figure 6-3

A person found with one marijuana cigarette will not be treated the same as someone who has a large amount of cannabis. In many locations, possession of a Schedule VIII amount of marijuana is ignored. The Crown can also discriminate between first offenders and those with numerous possession convictions.

The Law — The Criminal Code

Excerpts from the *Criminal Code*

4.

(3) For the purposes of this Act,

(a) a person has anything in possession when he has it in his personal possession or knowingly

(i) has it in the actual possession or custody of another person, or

(ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and

(b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

For Discussion

1. **Describe what "possession" means, referring to section 4(3)(a)(i) of the *Criminal Code*. Give examples of how this situation could occur.**
2. **Why would the law allow a charge of possession even if the person does not actually have the drugs?**
3. **Kim knows that Cheryl's locker at school is about to be searched for illegal drugs, so she agrees to put the drugs in her own locker. What part of the definition of possession applies to Cheryl?**

Even if you possess a small quantity of a drug, you can still be charged with possession. As long as the drug is identifiable, a charge can be laid. In addition, the *Controlled Drugs and Substances Act* adopts the definition of possession given in section 4(3) of the *Criminal Code*. A person is defined as "having possession" even when he or she does not technically own the drug. Having control over a drug can therefore lead to a charge. For example, Deirdre, who gives a controlled substance to Max for safekeeping, is guilty of possession. Taia, who is part of a group using a controlled substance, can also be found in possession. If five people are sharing a marijuana "joint," they could all be convicted of the offence of possession. The owner of the house in which the five are smoking the drug is particularly vulnerable, even if he or she does not use the marijuana, because allowing its use in his or her home implies consent.

When prosecuting a drug case, the Crown must prove possession and show that the drug in question is a controlled substance. In addition, the Crown must show that there was intent to possess; that is, the accused must know that the substance is a drug. The Supreme Court of Canada ruled in *R. v. Beaver* (1957) that *mens rea* is a necessary element of the offence. Beaver had a package he thought contained sugar of milk, a white powder. In fact, it contained a narcotic. Beaver was acquitted.

In 2001, regulations under the *Controlled Drugs and Substances Act* were changed to allow patients with terminal illnesses, chronic conditions, or chronic pain to either grow their own marijuana or designate someone to grow it for them. The federal health department is paying a Saskatchewan company to grow the marijuana for eligible patients. The legal users of marijuana under this legislation must carry an identification card.

Did You Know?

A 2000 *National Post*/COMPAS poll showed that 53 percent of Canadians opposed buying or using marijuana for personal use. Sixty-nine percent thought that marijuana possession could be punishable by a fine instead of imprisonment.

Case

R. v. Hamon

(1993) 85 C.C.C. (3d) 490
Quebec Court of Appeal

Hamon was found guilty of growing and possessing marijuana. He challenged the constitutionality of the relevant sections of the *Narcotic Control Act*, now known as the *Controlled Drugs and Substances Act*. He argued that the provisions violated section 7 of the *Canadian Charter of Rights and Freedoms*. Hamon based his challenge on the following points:

- "Liberty" as used in section 7 includes the right to make fundamental personal decisions without state interference.
- There are benefits to the non-abusive use of marijuana.
- If the objective is to protect people with whom he associates, a complete ban on cultivation and possession is unnecessary.
- The prohibition is not entirely rational since the government has not prohibited alcohol or tobacco use.
- Marijuana is not a narcotic and is not similar to narcotics.
- The prohibition could be achieved by regulating the use of marijuana.
- It is unnecessary to prohibit marijuana given its actual effects.

The Quebec Court of Appeal dismissed Hamon's appeal of his conviction.

R. v. Parker

(2000) 188 D.L.R. (4th) 385
Ontario Court of Appeal

The accused, Terrance Parker, had suffered from epileptic seizures for almost 40 years. He tried to control the seizures through surgery, which failed, and conventional medicine, which was moderately successful. Smoking marijuana reduced the number of seizures substantially. He had no legal source of marijuana, so he grew his own. His home was searched twice, and he was charged. He brought forward the defence that the legislation infringes his rights as guaranteed by section 7 of the *Charter*. The trial judge stayed the cultivation and possession charges against Parker. To protect Parker and others like him who need to use marijuana as medicine, the trial judge read into the legislation an exemption for persons possessing or cultivating marijuana for their "personal medically approved use." The Crown appealed that decision.

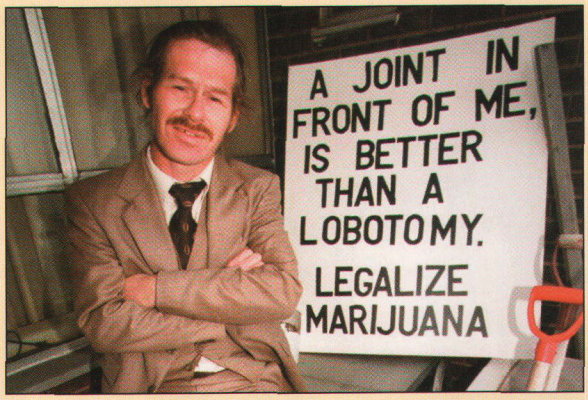


Figure 6-4
What does Parker's message say to you?

The Ontario Court of Appeal agreed with the trial judge that Parker should have the right to grow marijuana for his medicinal use. However, the appeal court did not agree with the trial judge's unilateral decision to amend the legislation. The court declared the prohibition on the possession of marijuana in the Act to be of "no force and effect" for a period of one year, to allow Parliament to amend the legislation.

For Discussion

1. **What does section 7 of the *Charter* guarantee? Discuss the guarantee as it applies to Hamon's and Parker's defences.**
2. **Present a counterargument for each of Hamon's arguments.**
3. **What does it mean to "stay" the charges against Parker?**
4. **The trial judge "read into the legislation" an exemption. What does that mean? Why did the appeal court overrule this decision of the trial judge?**
5. **The court declared the prohibition on the possession of marijuana for medical purposes to be of "no force and effect." What does that mean?**

Prescription Shopping or Double Doctoring

Some people need controlled drugs for medical reasons, for example, for a severe chronic condition or for relief from cancer pain. Other people are addicted to certain controlled substances. Such people may engage in **prescription shopping** or **double doctoring;** that is, they try to obtain the same prescription from a number of doctors. It is an offence to seek or obtain a narcotic or prescription from a doctor without disclosing all other controlled drugs or prescriptions for controlled drugs received within the previous 30 days. If tried as a summary offence, a first offence carries a penalty of $1000 and/or six months in prison. If the person has committed the offence before, he or she may be fined $2000 and/or sent to prison for one year. If tried as an indictable offence, the penalties range from 18 months to 7 years, depending on the substance.

Offences Related to Trafficking

According to the *Controlled Drugs and Substances Act,* to **traffic** is to "to sell, administer, give, transfer, transport, send or deliver the substance." Section 5 of the Act states that no person shall traffic in, or possess for the purpose of trafficking, any substance included in Schedules I, II, III, or IV or any substance believed to be that substance. The penalties for trafficking vary and are listed in Figure 6-5.

Because trafficking has such a broad definition—merely to give drugs to another person constitutes trafficking—no profit motive is necessary. How much assistance must someone give a drug buyer before the law views it as trafficking? This issue was addressed in *R. v. Greyeyes.*

Penalties for Trafficking

Schedule and Substance	Offence	Penalty (maximums)
Schedule I Dangerous drugs	If tried as an indictable offence	Life
Schedule II Cannabis (marijuana) and its derivatives	If tried as an indictable offence	Life
	If amount trafficked not more than amount specified in Schedule VII (3 kg)	5 years less a day
Schedule III Dangerous drugs formerly listed in the *Food and Drugs Act*	If tried as a summary offence	18 months
	If tried as an indictable offence	10 years
Schedule IV Controlled drugs with therapeutic use	If tried as a summary offence	1 year
	If tried as an indictable offence	3 years

Figure 6-5

The maximum penalties for trafficking vary with the type of controlled substance. Trafficking in what substances could result in a penalty of life imprisonment?

Case

R. v. Greyeyes

[1997] 2 S.C.R. 825
Supreme Court of Canada

Ernest Greyeyes sold five joints of marijuana to Constable Morgan, an undercover RCMP officer. The next day, Morgan asked Greyeyes if he knew where he could get some cocaine. Greyeyes said that if Morgan would drive him, he would take him to an apartment building to get some. The sellers were not at home, so Morgan and Greyeyes returned in the evening and entered the building together. Greyeyes talked to the occupants through the closed door and negotiated a deal. The purchase price was to be $40 for the cocaine, and the items were exchanged under the door. Morgan drove Greyeyes home and gave him $10 for helping to obtain the cocaine.

At trial, Greyeyes was acquitted of trafficking in cocaine but the Saskatchewan Court of Appeal overturned the acquittal and entered a conviction. Greyeyes's appeal to the Supreme Court of Canada was dismissed.

For Discussion

1. **Examine the wording of what constitutes the offence of trafficking. Is possession an included element of the offence?**
2. **Review the elements necessary to be found guilty of aiding and abetting an offence, as discussed in Chapter 4, page 114. What are those elements?**
3. **Compare the sentences for possession and trafficking of a Schedule I drug to a Schedule III drug. In a case with facts similar to *R. v. Greyeyes*, would it be fair that a buyer could possibly receive a possession penalty whereas a person who assists in finding drugs could possibly receive a trafficking penalty? Support your opinion.**
4. **In your opinion, should Greyeyes be found guilty of possession, possession for the purpose of trafficking, aiding or abetting for the purpose of possession, trafficking, or aiding and abetting in trafficking? Support your opinion.**
5. **Having police officers pose as drug dealers to entrap offenders of illegal-drug laws has been criticized as being unethical. Do you agree or disagree? Why?**

The amount of controlled drug seized may determine whether a charge of trafficking is laid. Before 1986, if the accused was found guilty of possession, the onus was on that person to prove that he or she did *not* have the controlled drug for the purpose of trafficking. In *R. v. Oakes* (1986), the Supreme Court of Canada ruled that this "reverse onus" violated the presumption of innocence contained in section 11(d) of the *Canadian Charter of Rights and Freedoms*. Since then, the onus has been on the Crown to prove that the person possessed the controlled drug for the purpose of trafficking. The Crown may be aided in proving trafficking if drug paraphernalia (equipment) is found, such as scales or pipes. Large amounts of cash may also be used as evidence that trafficking has occurred.

Police often act as undercover agents in stopping the drug trade, and the procedures they use to obtain evidence may open the door to an offender's appeal. Some of these practices, such as having police officers pose as drug dealers to **entrap** drug offenders, seem to undermine the integrity of the justice system by allowing the police too many powers. Several court rulings have sent a message to police that they may not entrap individuals or use

You Be the JUDGE

"[T]he offence of trafficking is taken extremely seriously by both the courts and the public.... It goes without saying that someone branded as a 'trafficker' is held in extremely low regard by the public."
—Supreme Court Justice Claire L'Heureux-Dubé

- Do you agree with this statement? Support your opinion.

physical violence to obtain evidence. Nor may police undertake **random virtue testing,** which is the practice of investigating an individual for drug offences without having reasonable and probable grounds for so doing.

Importing and Exporting

Section 6 of the *Controlled Drugs and Substances Act* makes it an offence to import or export any substance listed in Schedules I to IV. The accused need not bring the goods into the country; simply arranging for their importation can result in a conviction. The penalties for importing and exporting a controlled substance are listed in Figure 6-6.

Penalties for Importing and Exporting Controlled Substances

Schedule and Substance	Offence	Penalty (maximums)
Schedule I Dangerous drugs	If tried as an indictable offence	Life
Schedule II Cannabis (marijuana) and its derivatives	If tried as an indictable offence	Life
Schedule III Dangerous drugs formerly listed in the *Food and Drugs Act*	If tried as a summary offence	18 months
	If tried as an indictable offence	10 years
Schedule IV Controlled drugs with therapeutic use	If tried as a summary offence	1 year
	If tried as an indictable offence	3 years

Figure 6-6

The maximum penalties for importing and exporting controlled substances vary from one year to life imprisonment depending on the type of substance.

Producing a Controlled Substance

The amount of marijuana being grown in Canada has increased greatly. Growing marijuana is illegal, unless permitted by the federal health department. It is also illegal to produce any other drug specified in Schedules I to IV. The penalties for producing a controlled substance are listed in Figure 6-8.

Figure 6-7

These imported fake duck eggs were filled with heroin and were seized by customs agents in Toronto and Vancouver.

Penalties for Producing a Controlled Substance

Schedule and Substance	Offence	Penalty (maximums)
Schedule I Dangerous drugs	If tried as an indictable offence	Life
Schedule II Cannabis (marijuana) and its derivatives	If tried as an indictable offence	7 years
Schedule III Dangerous drugs formerly listed in the *Food and Drugs Act*	If tried as a summary offence	18 months
	If tried as an indictable offence	10 years
Schedule IV Controlled drugs with therapeutic use	If tried as a summary offence	1 year
	If tried as an indictable offence	3 years

Figure 6-8
It is illegal to produce a controlled substance unless authorized to do so. The production of dangerous drugs and narcotics may result in a penalty of life imprisonment.

Possession of Property Obtained by Certain Offences

It is also an offence to possess any property you know was obtained through the commission of a crime. Similarly, it is an offence to possess the cash obtained from selling the property. This section of the *Criminal Code* is used to charge those who do not take part directly in offences such as trafficking, but who share in the proceeds of illegal drug sales. Therefore, if Sam accepts gifts from Clara knowing the gifts were obtained from trafficking, Sam can be charged. If the value of the property exceeds $1000, the penalty for an indictable offence is up to 10 years in prison. If the value of the property is less than $1000, the penalty ranges from a $2000 fine plus six months in prison for a summary conviction, and if indictable up to two years in prison.

Enterprise Crime and Laundering

Money or property associated with a crime such as trafficking is often "laundered" by criminals to remove the taint of the crime. To **launder** means to use, transfer the possession of, send, transport, transmit, alter, dispose of, or otherwise deal with any property obtained through crime. By making laundering an offence, police are able to reduce the easy movement of property, especially cash, obtained through the drug trade. Because many of the illegal drugs sold in Canada come from foreign sources, it is quite common for the profit from the sale of the drugs to be transferred outside Canada. Since it is believed that profits from the sale of illegal drugs fund terrorism, the federal government has stepped up its surveillance of large amounts of money leaving the country.

Since 2000, certain groups must report cross-border transactions exceeding $10 000, large cash transactions, and "suspicious" transactions. This law applies to lawyers, accountants, real-estate agencies, and financial institutions, including banks. The government has set up an office to investigate each reported transfer. The law calls into question lawyer–client confidentiality, and may one day be challenged in the courts. The penalties are substantial: $2 million dollars and/or five years in jail.

Figure 6-9
In 1996, owners of this company in Vancouver were charged with an international money-laundering scheme and drug operation.

Police Rights of Search and Seizure under the Act

The *Controlled Drugs and Substances Act* grants police the right to search for controlled substances and drugs. Other rights that are incidental to the search, such as arrest, are granted by the *Criminal Code*. Search and arrest are discussed in more detail in Chapter 7.

Section 11 of the *Controlled Drugs and Substances Act* states that a warrant can be issued by a judge for a search if police believe an offence is in progress. An officer may act without a warrant if the situation is urgent and it is impractical to obtain one. For example, an officer would be compelled to force a search if the suspect is obviously flushing evidence down the toilet. The Act provides that the officer can use as much force as is necessary in these circumstances to enter the premises.

Upon entry, the officer can search anyone if there are reasonable grounds to believe that the person possesses a controlled substance. The officer may seize any controlled drugs or substances, or any items reasonably believed to contain or conceal one. Objects that may have been used in the commission of the offence may also be seized.

Case

R. v. Adams

(2001-08-13) ONCA C34243
Ontario Court of Appeal

The police had reasonable and probable grounds to arrest Fritz Adams for trafficking in narcotics. They entered his rooming house by tricking the superintendent into believing they were investigating a noise complaint. They found Adams in the laundry room, and he was arrested after police found narcotics in his pocket. At trial, the Crown argued that the police did not need to obtain a warrant because Adams had no expectation of privacy while in the laundry room. Furthermore, the Crown argued that the superintendent gave informed consent to the officers' entry. Adams was found guilty of drug trafficking by a judge alone.

Adams appealed the decision to the Ontario Court of Appeal, stating that his right to be secure against unreasonable search and seizure under section 8 of the *Charter* was violated. He acknowledged that the police had reasonable and probable grounds to arrest him, but argued that the superintendent only let them enter because he was given false information. Adams also argued that the arrest was illegal because the police failed to obtain a warrant to enter a dwelling-house as required by the *Criminal Code*. Adams was acquitted by the court.

In *R. v. Feeney* (1997), the Supreme Court of Canada outlined the following with respect to police entering a dwelling-house:

- The privacy interest outweighs the interest of the police, and arrests without a warrant in dwelling-houses are prohibited.
- There are exceptions with respect to the unreasonableness of searches without a warrant.
- Privacy issues must give way to the interest of society in ensuring adequate police protection when there is hot pursuit.
- Even if a warrant is obtained, proper announcement must be made before forcibly entering a dwelling-house to make an arrest.

For Discussion

1. **Why would Adams prefer to have been tried by a judge alone instead of a judge and jury?**
2. **If the police had been refused entry by the superintendent, what means could they have used to obtain the legal right to enter?**
3. **What is "hot pursuit"? Did it exist in this case? Explain.**
4. **Applying the Feeney decision to the Adams case, do you think that Adams's right to privacy outweighed the desire of the police to make an arrest? Explain.**

The *Controlled Drugs and Substances Act* does not give police the power to stop and search a person for drugs in a public place. The *Criminal Code* authorizes this type of search. However, there must be reasonable grounds for believing that the person is in possession of a drug.

Sentencing

In 1999, the *Controlled Drugs and Substances Act* was amended to reflect the occasionally violent nature of illegal drug transactions and the vulnerability of youth. The Act outlines the principles of sentencing in this area, noting that sentencing must contribute to respect for the law and the maintenance of a just, peaceful, and safe society. Sentences must encourage offenders to rehabilitate (reform) themselves, seek treatment in appropriate circumstances, and acknowledge the harm done to victims and to the community.

The amendments also specified circumstances where the offence would be considered especially serious:

- if a weapon was used, carried, or threatened to be used
- if violence was used or threatened
- if the offender trafficked or tried to traffic substances found in Schedules I to IV in or near a school or any public place usually frequented by persons under 18 years of age
- if the offender trafficked or tried to traffic substances found in Schedules I to IV to a person under 18 years of age
- if the offender was previously convicted of a substance offence
- if the offender used the services of a person under the age of 18 years to commit, or be involved in, the commission of a substance offence

Parliament's concern with these factors is so great that if one of these factors exists and the judge does not sentence the offender to prison, he or she must give reasons for that decision.

Agents of Change — The Drug Treatment Court in Toronto

The Toronto Drug Treatment Court—the first of its kind in Canada—was established in 1998 for a six-year trial period. Its purpose is to keep offenders in the criminal justice system receiving both community support and treatment under judicial supervision for 12 to 18 months.

This unique court is based on the principles that treatment for offenders' drug problems will reduce their dependency on drugs, prevent them from reoffending, and provide an alternative to incarceration, thereby saving the system money. The program is directed at nonviolent offenders who are addicted to cocaine or opiates, with a focus on youth, women and men from diverse communities, and street prostitutes.

The Drug Treatment Court is a combined effort of the Centre for Addiction and Mental Health, the criminal justice system in Toronto, the Toronto Police Service, the City of Toronto Public Health and Healthy City Office, and various community-based service agencies.

For Discussion

1. **Identify the objective of the Toronto Drug Treatment Court program.**
2. **How does this program save the criminal justice system money?**
3. **Why do you think this program is directed at the groups identified?**

ISSUE

Should People Who Use Illegal Drugs Be Punished?

Marijuana, cocaine, and heroin are just three of the illegal drugs listed in the *Controlled Drugs and Substances Act*. Twenty-three percent of Canadians admit to using cannabis (marijuana and a related substance, hashish) at least once in their lifetimes. Four percent have admitted to using cocaine at least once.

Drug Use in Canada (percentage of population)

Substance	1989	1998
Cannabis	6.5	7.5
Cocaine, including crack	1.4	0.7
Heroin	0.4	1.0

Figure 6-10

Why do you think that the use of cannabis has increased rather than cocaine or heroin?

Cannabis generally induces a state of relaxation, heightened sensory awareness, a sensation that time is slowing down, and a rapid heartbeat. Some studies have shown that it may be more damaging to health than ordinary cigarettes. It can cause physical addiction, paranoia, and damage to body organs.

Cocaine is a stimulant extracted from the South American coca bush. Its use can lead to severe physical, psychological, and dependency problems. Regular use can damage nasal passages, cause impotence, and create paranoia or depression. Large doses can cause violent behaviour, convulsions, and even death.

Heroin is a substance derived from the opium poppy. It can produce a "rush" and a feeling of excitement immediately after it is taken. As the body develops a tolerance for the drug, increasing amounts are needed to achieve the same effect. It is highly addictive, and nausea, diarrhea, and pain are symptoms experienced after the drug's effect wears off.

On One Side

Many people think drug abuse is a serious offence. They believe that higher fines and longer jail sentences for drug users and traffickers would reduce drug use. They applaud the fact that in 1999, there were 39 percent more arrests for possession of marijuana than in the previous year; 21 126 people were convicted of a marijuana offence; and 13 percent of this group served time in jail. These Canadians want the police to have greater powers to search for illegal drugs so that the

Drug Incidents, Canada, 2000

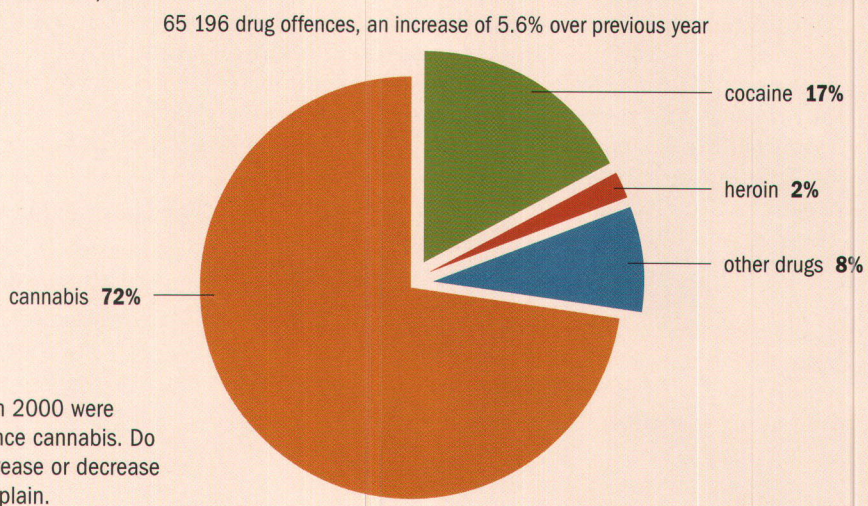


Figure 6-11

Most drug incidents in 2000 were related to the substance cannabis. Do you think this will increase or decrease in the near future? Explain.

laws can be more easily enforced. The $100 million a year it costs Canadian taxpayers to enforce Canada's drug laws is money well spent. If tough drug laws are not enforced, society will be weakened and destroyed.

On the Other Side

Other Canadians feel that stiffer penalties will not rehabilitate drug users. Those who use illegal drugs should be treated rather than punished. They applaud a 2000 Ontario Court of Appeal ruling, which stated that the sections on marijuana in the *Controlled Drugs and Substances Act* are unconstitutional because they fail to recognize the drug has medicinal uses (see Case, page 165).

Support for Legalization of Marijuana in Canada

Year	Percentage of Population
2000	47
1995	31
1990	24
1985	30
1980	29
1975	26

Figure 6-12
Why do you think support for the legalization of marijuana has grown steadily since 1975?

Some people think the millions of dollars spent to arrest and punish drug offenders would be better spent treating drug addicts to cure and rehabilitate them. They note that many important organizations think the government should decriminalize the use and possession of marijuana. The Canadian Medical Association, Canadian Bar Association, Canadian Council of Churches, Association of Police Chiefs, and RCMP all favour decriminalization.

The Bottom Line

As long as particular drugs are identified as illegal, the *Controlled Drugs and Substances Act* must restrict them. But should drug users be considered victims who require treatment rather than offenders? Canada's law makers have been reluctant to deal with the issue. Recently, the British Columbia Court of Appeal in *R. v. Malmo-Levine* (2000) refused to overturn the conviction of possession of marijuana. It argued that it is up to Parliament to change the law, not the courts.

activity

Visit **www.law.nelson.com** and follow the links to learn more about the issue of decriminalizing marijuana.

What Do You Think?

1. **Why do people use illegal drugs? What are some problems associated with these drugs?**
2. **In a group, identify arguments that support stiffer penalties for illegal drugs. Outline arguments that support rehabilitation of users. Present your arguments to the class.**
3. **Why do recent court decisions on drug use appear contradictory?**
4. **Why is public opinion so important in determining drug-use laws in Canada? Does there appear to be a trend? Explain.**
5. **As a class, discuss the idea that all drugs should be decriminalized with no penalties for their use. Identify the advantages and disadvantages for society.**
6. **Explain the meaning of the following quote from Raymond Kendall, Secretary General of Interpol, and give your opinion: "The prosecution of thousands of otherwise law-abiding citizens every year is both hypocritical and an affront to individual civil and human rights."**

Review Your Understanding (Pages 162 to 173)

1. a) What is the definition of a drug?
   b) On what is the criminal classification of drugs based?
2. Describe two situations in which someone may be charged with possession, while not having physical possession.
3. Is intent necessary for possession? Explain.
4. What changes were made to the *Controlled Drugs and Substances Act* in 2001 due to the ruling in *R. v. Parker*?
5. How does the *Controlled Drugs and Substances Act* define trafficking?
6. What two points must the Crown prove to obtain a conviction for trafficking?
7. Who can be charged with the offence of importing and exporting narcotics?
8. What is prescription shopping?
9. Describe a situation in which a warrantless search would be legal. Explain why.
10. Identify the circumstances that are to be considered serious when a judge is sentencing an offender.

Did You Know?

Impaired driving is the main criminal cause of death in Canada. On average, there are four deaths and 125 injuries daily as a result of impaired driving. How does society pay for drinking-and-driving accidents?

6.3 Drinking and Driving

Canadian citizens and legislators continue to worry about drinking and driving. Those who engage in such reckless behaviour are penalized by law and criticized by society. The federal government has increased *Criminal Code* penalties for the offences related to impaired driving. Despite the increase, more than 83 000 impaired driving charges were laid in the year 2000. The provinces and territories, which regulate highways, the licensing of drivers, and alcohol consumption, have introduced measures to deter impaired driving by reducing offenders' access to motor vehicles.

Definition of a Motor Vehicle

As you read, keep in mind that a **motor vehicle** is defined in the *Criminal Code* as "a vehicle that is drawn, propelled, or driven by any means other than by muscular power, but does not include railway equipment." In other words, issues related to driving apply to boats and aircraft in addition to automobiles, trucks, motorcycles, snowmobiles, and other motorized land vehicles.

Figure 6-13

Under the law, snowmobiles are considered motor vehicles.

Dangerous Operation of a Motor Vehicle

It is an offence to operate a motor vehicle in a manner dangerous to the public on a street, road, highway, or other public place. The definition of a "public place" has been examined in case law and has been found to include parking lots at shopping plazas and schools, as well as private roads regularly used by the public.

To obtain a conviction on "dangerous operation of a motor vehicle," the Crown must establish fault. In determining fault, the court must consider the standard of care that a prudent and responsible driver would have exercised. All factors, including the nature, condition, and use of the public place where the offence occurred, and the amount of traffic at the time and in that place, are considered. There does not have to be any "public" present at the time of the offence—only an expectation that someone could have been present. Chapter 12 discusses standard of care in more detail.

Case

R. v. MacGillivray

[1995] 1 S.C.R. 890
Supreme Court of Canada

On a warm, clear summer day, the beach at "the rocks" at Cribbons Point in Nova Scotia was active with swimmers, divers, and sunbathers. Several family members were on board MacGillivray's boat as it bounced in the water and headed toward seven boys. The boys waved their arms and shouted, as did those on the shore, to alert MacGillivray of the dangerous situation. The boat was up at such an angle that MacGillivray did not see the boys, and the propeller struck and killed one of them.

Some witnesses testified that the boat was travelling over the speed limit. The trial judge found that no one was leaning over the side to look out for dangers. MacGillivray was found guilty of dangerous operation of a motor vehicle. His appeals to the Nova Scotia Court of Appeal and the Supreme Court of Canada were dismissed.

R. v. Hundal

[1993] 1 S.C.R. 867
Supreme Court of Canada

The Supreme Court of Canada stated in *R. v. Hundal* that when a judge assesses a situation of dangerous driving, he or she "should be satisfied that the conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's situation." In this case, a trucker was driving in heavy afternoon traffic on a wet, four-lane street in downtown Vancouver. He thought that he could not stop when a light turned amber. He testified that he sounded his horn and proceeded through the intersection. He struck a car going across the intersection, killing the driver. The trial judge found that Hundal's actions represented a gross departure from the standard of care to be expected from a prudent driver.

For Discussion

1. **What standard of care should MacGillivray have shown while driving his boat?**
2. **What facts indicate that Hundal's actions were a gross departure from the standard of care expected from a prudent driver?**
3. **What penalty would you impose on MacGillivray? What penalty would you impose on Hundal?**

Failure to Stop at the Scene of an Accident

If you are involved in an accident, you must stop at the scene. The law requires you to give your name and address to the other party. If the other party has been injured or appears to require assistance, you must offer assistance.

The penalty for failure to stop was increased in 1999 (see Figure 6-17, page 180). Legislators were concerned that impaired drivers were leaving accident scenes to avoid being charged with impaired driving causing death. Occasionally, there is a justifiable excuse for leaving the scene of an accident; for example, leaving to get help. However, there is no justification if the accused knows an accident has occurred, panics, and leaves. Drivers who try to escape the scene while being chased by police are committing the offence of flight.

Did You Know?

In 1981, 162 000 people were arrested for impaired driving. In 2000, 69 192 people were charged. The Canada Safety Council estimates that there are 16 million incidents of drunk driving yearly in Canada.

Impaired Driving

Impaired driving has become the main criminal cause of death in Canada. Yet, offenders have often received sentences that seem trivial compared with the consequences of their actions. Canadians have urged legislators to increase penalties for this offence, as a deterrent. The penalties have increased twice since 1985. Section 253 of the *Criminal Code* describes the offence of impaired driving.

The Law

The Criminal Code

Excerpts from the *Criminal Code*

253.

Every one commits an offence who operates a motor vehicle or vessel or operates or assists in the operation of an aircraft or of railway equipment or has the care or control of a motor vehicle, vessel, aircraft or railway equipment, whether it is in motion or not,

(a) while the person's ability to operate the vehicle, vessel, aircraft or railway equipment is impaired by alcohol or a drug; or

(b) having consumed alcohol in such a quantity that the concentration in the person's blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood.

For Discussion

1. **Identify three ways the offence of impaired driving can be committed, as specified in the first paragraph of section 253.**
2. **Give two examples of how a person can be in care and control of a motor vehicle when it is not in motion.**
3. **Martin takes a sedative drug, knowing that it might impair his ability to drive. He hopes that he will arrive at his destination before it takes effect. He is involved in an automobile accident due to his sedation. Is Martin guilty of impaired driving? Explain.**

Section 253 actually sets out four offences:

- driving while ability is impaired by alcohol or drugs
- having care or control of a motor vehicle when impaired by alcohol or drugs
- driving while the **blood–alcohol level** is over 80 mg in 100 mL of blood
- having care or control of a motor vehicle when the blood–alcohol level is over 80

A person can be charged with the first two offences when the blood–alcohol level is below 80.

For a person to be charged with either of the "care or control" offences, it is not necessary for the vehicle to be in motion, or even running. *Mens rea* exists when there is intent to assume the care or control of the vehicle after consuming alcohol and while impaired. In addition, *mens rea* exists when the blood–alcohol level is over 80. *Actus reus* is the action of assuming care or control. Sitting in the driver's seat implies care or control, unless the driver can establish that he or she did not intend to set the car in motion. In other cases, such as when the driver is lying down in the car, the Crown must prove beyond a reasonable doubt that the accused was in care or control of the vehicle.

The issue of whether a vehicle was in the "care or control" of the accused has been central to many cases. A person who was standing beside his vehicle after having called a tow-truck has been ruled to be in care or control, as has a person who sat in her car for 15 minutes after stopping.

The term "impaired" in section 253(a) is not defined in the *Criminal Code*. The court need not factor in a blood–alcohol level that would establish the person as impaired. Rather, it is up to the court to determine, on the evidence presented, whether the ability to drive was impaired. It also does not matter how the accused was driving. What is important is establishing that the driver's ability to operate a vehicle is impaired. Finally, the word "drug" is interpreted much more broadly than one might think. In one case it was found to include a chemical in plastic model cement.

Criminal Code Traffic Incidents, 2000

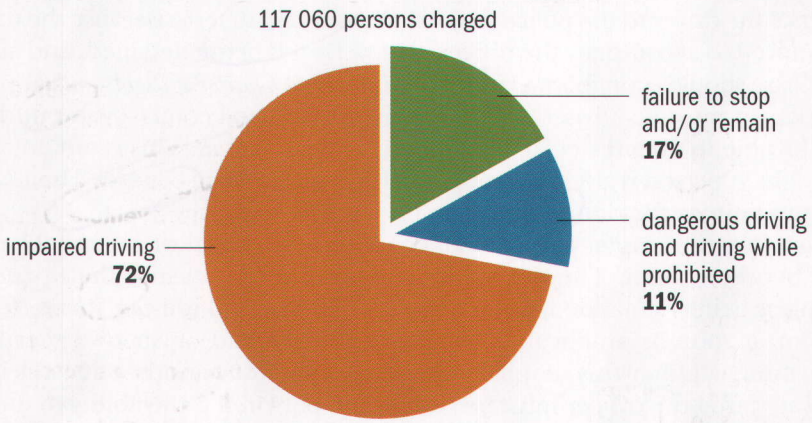


Figure 6-14

In 2000, most *Criminal Code* traffic incidents were related to the offence of impaired driving. Do you think the laws against impaired driving need to be strengthened?

Tests for Impaired Driving

Justice Finlayson noted in *R. v. Seo* (1986) that the most effective deterrent to impaired driving is the possibility of detection. The *Criminal Code* outlines many procedures to aid in detection of impaired driving; for example, taking breath samples and doing blood tests. Drivers may also be asked to pass balance and coordination tests any time after being stopped.

Breath Tests

The use of roadside stops has been found constitutional by the Supreme Court of Canada, whether they are part of an organized program or done randomly. Drivers have questioned the right of the police to stop them when they have

Figure 6-15
A roadside screening test

no reasonable grounds to suspect an offence has been committed. However, the courts have recognized Parliament's intention to reduce the problem of drinking drivers and have ruled that spot checks are a reasonable limit prescribed by law.

When stopped in a roadside spot check, a driver may be asked by the police to undergo a **roadside screening test.** The officer will demand that the driver breathe into an approved testing device. The demand may be made only if the officer has reasonable grounds to suspect that the driver has consumed alcohol. It is an offence to refuse the demand. Approved roadside screening devices are described in the *Criminal Code.* Failing the screening test does not mean one is automatically charged with an offence—the results can only be used to show that the officer had grounds to demand a breath sample.

Several legal principles related to roadside testing have been established. For example, the officer who demands the test must decide upon the adequacy of the results—that decision cannot be made by another officer at the scene. Moreover, the courts have ruled that it is not necessary for the testing officer to show the results of a roadside test to the person tested.

If the roadside test indicates that a breath sample is required, the officer will take the driver to the police station for more breath tests. Because the driver is required to accompany the officer, that person is being **detained,** and arrest or release should soon follow. Under the *Canadian Charter of Rights and Freedoms,* the person must be advised of his or her right to legal counsel without delay and be able to obtain free advice from a legal-aid lawyer. This is not an absolute right. A person is given only a reasonable time to obtain counsel. The *Charter* also guarantees the right to discuss with counsel in private.

Two breath samples must be taken, with an interval of at least 15 minutes between them. The officer must communicate clearly that a breath sample is being demanded, not requested. The demand must be made "forthwith or as soon as practicable." Each case is weighed on its own merits to determine whether this requirement has been met. A number of cases have indicated that the officer must be certain the person has the ability to understand his or her rights. A person would probably be acquitted if he or she refused to take a test and was later found to have a concussion, or to be so drunk as to be incapable of understanding the demand.

You Be the JUDGE

During holidays, some police forces randomly stop vehicles at checkpoints to establish if drivers have been drinking. The Supreme Court of Canada has ruled that such programs are legal because they are a temporary activity and can proceed without a warrant.

- Some officers want these programs to operate year-round. Would you support this idea? What might stand in the way?

Did You Know?

A national Canada Safety Council survey found that 70 percent of Canadians said they never drive after drinking any amount of alcohol. Do you think that impaired-driving laws keep your peers from drinking and driving? Why?

Blood Samples

If the person cannot physically give a breath sample, the officer may demand a blood sample. Blood samples are drawn only under the direction of a qualified medical practitioner. The practitioner can refuse if taking a sample would endanger the life or health of the accused. The sample must be taken within four hours of the alleged offence. Two blood samples are actually taken, one of which is made available to the accused for testing. If the accused is not able to give permission for a blood sample, a warrant must be obtained. In *R. v. Colarusso,* however, the Supreme Court of Canada admitted blood

samples that were obtained under questionable circumstances. In collisions where there is injury or death, a warrant to take a blood sample from an unconscious driver can be obtained if the officer believes that the driver is impaired.

At the roadside or at the police station, an officer may also require a driver to perform a sobriety test, such as walking a straight line. In such cases, the driver is being detained. Courts have ruled that the demand to perform such tests is valid, as long as the evidence of failing the test is used only to decide whether the person should be asked to submit a breath sample. The Supreme Courts in Alberta, Nova Scotia, and Prince Edward Island have ruled that there is no legislation giving officers the right to demand the test.

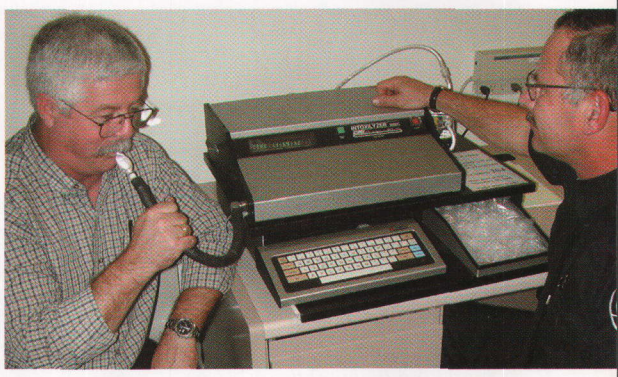


Figure 6-16
Providing a breath sample at the police station

Case

R .v. Colarusso

(1994) 87 C.C.C. (3d) 193
Supreme Court of Canada

Colarusso was driving without his lights on. He rear-ended a pickup truck, sending it into a ditch, where it flipped over. The occupants of the truck were seriously injured. An off-duty police officer saw Colarusso stop briefly before he continued southbound in the northbound lane. Colarusso then collided head-on with another car. An occupant of that car was killed. Colarusso was injured.

Colarusso was arrested at the scene by officers who observed signs of impairment. He was charged with a number of offences, including criminal negligence causing death, and advised of his *Charter* rights. Officers demanded a breath sample. Before that could occur, Colarusso was driven by the police to a hospital for treatment of injuries. No breath test was given, nor did the police make a demand for a blood sample.

In hospital, Colarusso agreed to give blood and urine samples for medical purposes. He gave the urine sample in the presence of a police officer. The samples were sent to the hospital lab to be used in tests. The coroner investigated the scene of the second accident, and then went to the hospital to investigate the car occupant's death. He needed samples of Colarusso's blood and urine. The coroner gave the samples to the police, requesting that they be taken to the Centre of Forensic Sciences and stored properly.

The Crown called the forensic toxicologist who had analyzed Colarusso's samples at the request of the coroner. The toxicologist testified that at the time of the accidents, Colarusso's blood–alcohol level was between 144 and 165. Colarusso argued that the evidence of the toxicologist should be excluded because the blood and urine had been seized in violation of his rights under section 8 of the *Charter*. He was convicted at trial, and his appeals to the Ontario Court of Appeal and Supreme Court of Canada were dismissed.

For Discussion

1. **What is a forensic toxicologist?**
2. **What is a coroner?**
3. **Consider the evidence samples:**
   a) **Who obtained the blood and urine samples and for what purpose?**
   b) **How did the police get access to the samples?**
   c) **Did the way the police gained access to the samples bring the administration of justice into disrepute? Explain.**
4. **Should the Crown be able to use the samples obtained by the coroner as part of its case? Why or why not?**
5. **Why do you think the Supreme Court of Canada found that the evidence could be admitted?**

e activity

Visit **www.law.nelson.com** and follow the links to find out about recent impaired driving cases.

Did You Know?

The following provinces and territories can discharge a person from an impaired-driving conviction and impose treatment for alcohol or drug addiction.

- Alberta
- Manitoba
- New Brunswick
- Northwest Territories
- Nova Scotia
- Prince Edward Island
- Saskatchewan
- Yukon Territory

Penalties

The penalties for impaired-driving offences are outlined in Figure 6-17. Note that a second offence does not necessarily mean a second charge on the same offence, but simply two motor vehicle offences related to drinking. In *R. v. Kumar* (1993), the Supreme Court of British Columbia ruled that the penalty for a second offence can be varied if it is found to be cruel and unusual punishment and therefore contravenes section 12 of the *Canadian Charter of Rights and Freedoms*.

In some jurisdictions, a judge may **discharge** an offender who would benefit from treatment for alcohol or drug addiction. This may be done in cases of impaired operation of a motor vehicle and operating a motor vehicle with a blood–alcohol level over 80. Releasing the offender must not be contrary to the public interest, and the offender must go for treatment.

As you read through Figure 6-17, you will see that impaired driving, driving with a blood–alcohol level over 80, and refusing to provide a breath sample result in a driving prohibition. These are prohibitions under the *Criminal Code*. It is an offence to operate a motor vehicle if you have been disqualified from doing so.

Penalties for Driving Offences under the Criminal Code

Offence	Details of Offence	Penalty (maximums unless otherwise noted)
Dangerous driving	Hybrid	5 years
Dangerous driving causing bodily harm	Indictable	10 years
Dangerous driving causing death	Indictable	14 years
Failure to stop	Hybrid	5 years
Failure to stop, bodily harm	Indictable	10 years
Failure to stop, death	Indictable	Life
Flight from a peace officer	Hybrid	5 years
Flight resulting in bodily harm	Indictable	14 years
Flight resulting in death	Indictable	Life
Driving while impaired; driving with over 80 mg of alcohol per 100 mL of blood; refusal to provide a breath or blood sample	First offence	Fine of not less than $600 and 1 to 3 years' driving prohibition*
	Second offence	Minimum 14 days and 2 to 5 years' driving prohibition
	Subsequent offences	Minimum 90 days and minimum 3 years' driving prohibition
	Summary	6 months
	Indictable	5 years
Impaired driving causing bodily harm		10 years
Impaired driving causing death		Life

* If the offender participates in an alcohol ignition antilock program (see page 182) for 1 year, the 1-year minimum can be reduced to 3 months.

Figure 6-17

Fines, driving prohibitions, or jail terms may be the maximum penalty given for specific driving offences under the *Criminal Code*. If the offence involves death, a penalty of life imprisonment may result.

There are additional penalties that can be imposed, depending on the liability of the offender. If the person caused death or bodily harm by criminal negligence, or was charged with manslaughter, dangerous operation of a motor vehicle, fleeing a peace officer in a motor vehicle, failure to stop at the scene, or impaired driving causing bodily harm or death, he or she may be ordered not to drive after release from prison. These orders may remain in effect for several years.

Case

R. v. Thompson

(2001) 141 O.A.C.1
Ontario Court of Appeal

Officer Shields observed Thompson's vehicle hugging the white dotted line between lanes on Arrow Road in Toronto. She directed Thompson to pull over. Because Thompson said he had consumed "one or two beers" and because his eyes were red and bloodshot, she demanded he take a roadside test. On the first try, Shields could not hear the tone that the device was supposed to make, nor could she hear any air passing through the mouthpiece. On the second and third attempts, air did enter the machine but without sufficient pressure to activate the device. She then arrested Thompson for failure to provide a sample.

At trial, Shields could not specifically say that she had checked for obstructions in the mouthpiece before Thompson blew in it. There was nothing in her notes to indicate that she had. She gave evidence that checking was part of her standard practice. Thompson was found guilty. He appealed to the Ontario Court of Appeal, which upheld his conviction.

Thompson appealed for two reasons. First, Shields had not checked the mouthpiece. Second, Thompson said the section in the *Criminal Code* stating that a person has committed an offence if a sample is not provided when demanded violated his rights under sections 7 and 10(b) of the *Canadian Charter of Rights and Freedoms*. He believed that the demand resulted in an illegal **detention,** and denied his right to retain and instruct counsel without delay and to be informed of that right.

For Discussion

1. **In your opinion, should the fact that Shields did not specifically know whether she had checked the mouthpiece, nor have any note concerning that procedure, have resulted in an acquittal? Explain.**
2. **What do sections 7 and 10(b) of the *Canadian Charter of Rights and Freedoms* provide?**
3. **The results of a roadside test are not used to determine level of impairment, but only to determine if further tests should be given. A person is then given the standard warning concerning the right to remain silent and right to counsel. In this era of cellular phones, should a person be able to obtain counsel before doing a roadside test? Explain.**
4. **The appeal court referred to the following passage in *R. v. Milne* (1996) regarding the use of roadside tests. "[The] objective ... is to provide the police with the tools needed to remove impaired drivers from the highway immediately and thereby avoid the calamitous results likely to occur if they are allowed to proceed. The objective is not to convict impaired drivers at any cost." In your opinion, is the requirement to do a roadside test an acceptable denial of the right to "life, liberty and security of the person"? Explain your views.**

Provincial and Territorial Offences Related to Impaired Driving

Under their authority to regulate motor vehicles, the provinces and territories have been trying to reduce access to vehicles by drunk drivers. Some of these initiatives are discussed below. (See also Agents of Change, page 267.)

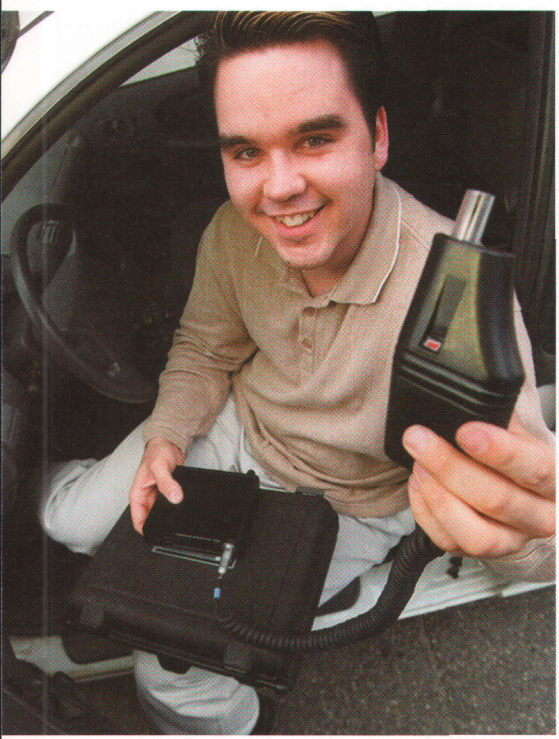


Figure 6-18

Dave Wilson, president of MADD (Mothers Against Drunk Driving) Winnipeg, displays an antilock device to deal with repeat drunk drivers. The unit is part of the ignition and prevents the car from starting if alcohol is detected.

Certain laws allow vehicles to be stopped at random. When a police officer stops someone under the authority of a provincial or territorial statute, the smell of alcohol or drugs, or evidence discovered during a safety check, may lead to further investigation under the *Controlled Drugs and Substances Act* or the *Criminal Code*. The officer must have grounds for searching the automobile for the offence in question: he or she cannot undertake a search simply in the hopes of finding illegal items.

The provinces and territories may also suspend the licences of persons convicted under the *Criminal Code* for additional periods. A convicted offender may therefore be subject not only to a fine or imprisonment, but also to a suspension.

The provinces and territories have legislation permitting the short-term (i.e., 12- to 24-hour) suspension of a driver's licence if the driver has consumed alcohol. In Ontario, a driver's licence can be taken away for 12 hours if an approved screening device shows a blood–alcohol level of over 50. Removal of a driver's licence in British Columbia can occur if the reading is over 30. Anyone who drives during this period can, of course, be charged with the additional offence of driving without a licence.

Under provincial or territorial law, the offender may have to install an "antilock" device on the vehicle. The driver must blow into a mouthpiece located on the dashboard. If the reading is over the limit set for the driver, the car will not start. The device also records how many times the driver tried to drive while drunk. Such information can later be used as evidence of driving while intoxicated. Studies have shown that the rearrest rate for offenders with an antilock device is 75 percent lower than those without the device.

Provincial and territorial legislation can also define repeat-offender status and increase penalties for this category. Manitoba, for example, has a mandatory jail term for repeat offenders if convicted twice within five years. Now, the provinces and territories are trying to broaden the definition of "repeat offender." Some believe that offences committed within the last 10 years, and not just the last five years, should be taken into consideration.

Quebec has introduced compulsory assessment and treatment of offenders who have a blood–alcohol level greater than 80. The tests establish when a motorist is a problem drinker. While offenders are receiving treatment, their licences are suspended. After successfully completing the treatment, the offender gets the licence back, but must agree to use an antilock device on the car for a specified time. The new rules impose a blood–alcohol level limit of 0 on all drivers of public vehicles, which includes taxis, buses, and transport trucks.

e activity

Visit **www.law.nelson.com** and follow the links to learn about the antilock device for vehicles.

Figure 6-19

Under a graduated licensing program, a driver's licence is awarded in stages. Training may take several years to complete. What are the advantages and disadvantages of such a system?

Finally, graduated licensing programs require new drivers to gain extensive road experience before becoming full-fledged drivers. Where this program is in effect nothing over a 0 blood–alcohol level is tolerated for probationary drivers.

Other Consequences for the Drinking Driver

Impaired driving has other important consequences. A conviction will result in **demerit points,** which could lead to licence suspension. It may also lead to an increase in the offender's automobile insurance rate. An insurer can even refuse to pay any claim on behalf of a person who is at fault in an accident that occurred because of impaired driving or while the person's licence was suspended.

You Be the JUDGE

In *R. v. Seo* (1986) (page 177), the court noted: "Increased penalties have not been an effective deterrent."

- What are some of the advantages and disadvantages of having increased penalties for drinking and driving offences?

Review Your Understanding (Pages 174 to 183)

1. **What circumstances are considered in establishing fault for the dangerous operation of a motor vehicle?**
2. **What is a public place, in relation to the operation of a vehicle?**
3. **Identify the offences that supplemented the law on negligence in the operation of a motor vehicle. Why were they added?**
4. **What must a driver do at the scene of an accident in which he or she is involved?**
5. **What does "care or control" mean with respect to a motor vehicle?**
6. **Discuss in detail the two offences that relate to impaired driving.**
7. **What procedures must the police follow when administering a roadside test?**
8. **When can blood samples be taken as evidence of impaired driving?**
9. **Summarize the provincial and territorial laws that are aimed at reducing drinking and driving.**
10. **What consequences other than a fine or imprisonment does a conviction for impaired driving carry?**

Chapter Review

Chapter Highlights

- The cost to society of impaired driving and drug use is significant.
- The laws concerning use of drugs are found in the *Controlled Drugs and Substances Act*.
- Controlled substances are those listed in Schedules I to IV of the *Controlled Drugs and Substances Act*.
- "Possession" of an illegal drug does not necessarily mean that it has to be on your body.
- In particular circumstances, individuals can legally use marijuana for medicinal purposes.
- Double doctoring, which is obtaining two prescriptions for a controlled drug, is illegal.
- Police should not engage in entrapment or random virtue testing of citizens.
- Police need a search warrant to enter a premises, unless in "hot pursuit."
- Judges must consider special sentencing provisions for drug offences.
- Impaired driving is the main criminal cause of death in Canada.
- It is an offence to operate a motor vehicle dangerously in a public place.
- The penalty for failure to stop was increased to deter impaired drivers from fleeing.
- It is up to the court to determine, based on the evidence, whether a driver was impaired.
- Police have the right to conduct roadside screening tests.
- A person can be required to perform a sobriety test, such as walking a straight line.
- To keep impaired drivers from using their vehicles, the provinces and territories have instituted penalties that are imposed in addition to the *Criminal Code* penalty.

Review Key Terms

Name the key terms that are described below.

a) to manufacture, sell, or give illegal drugs to another person

b) to transfer money obtained from drug-related or other criminal activities

c) trying to obtain the same narcotic prescription from different doctors

d) without grounds, to try to find out if someone is a drug dealer by encouraging him or her to sell drugs

e) a breath test carried out to determine if further breath samples should be given

f) points that accumulate, resulting in a driver's licence being suspended

g) police investigation of an individual for drug offences without having reasonable and probable grounds for so doing

h) any substance that by its chemical nature alters structure or function in a living organism

i) any substance contained in Schedules I to IV of the *Controlled Drugs and Substances Act*

Check Your Knowledge

1. Distinguish among the various drug-related offences and provide examples for each.
2. Outline the rights police have for the search and seizure of controlled drugs.
3. Summarize the main *Criminal Code* offences associated with a motor vehicle.
4. Identify the types of evidence that can be used in an impaired-driving case and the conditions under which it can be obtained.

Apply Your Learning

5. *R. v. Kuitenen and Ostiguy*, 2001 BCSC 677 (British Columbia Supreme Court)

   Kuitenen and Ostiguy were charged with producing a controlled drug and with possession for the purpose of trafficking in a controlled drug. The RCMP received information from an informant, believed to be reliable, that there was a significant amount of marijuana growing on a property on the Davis Lake Road in British Columbia. The informant explained that the owner of the property was purchasing inordinately large amounts of diesel fuel, which could possibly be evidence of a growing operation. The informant gave the police the licence number of a vehicle, which turned out to belong to Kuitenen.

The police did not believe they had sufficient grounds to obtain a search warrant. The police decided to fly over the property, which included Kuitenen's house, using a helicopter equipped with a "FLIR." The device is capable of measuring heat loss from buildings, which in turn may indicate the presence of marijuana production. They viewed videotape of the flyover, and concluded that there appeared to be an underground structure on the property. The police made more flyovers, without a warrant, and said: "If we were up high enough we would not be invading anyone's privacy." However, on one of the videos, they could see a person urinating. Believing that a marijuana-cultivation operation was on the property, the officer obtained a search warrant. There is no doubt that the evidence obtained as a result of the helicopter surveillance was crucial in securing the general warrant. The police entered the property and found a large marijuana-cultivation operation.

a) Did Kuitenen have a reasonable expectation of privacy?
b) Did the flyovers together with the use of intrusive technology constitute an unlawful search and seizure? Explain.
c) Would the admission of the evidence bring the administration of justice into disrepute? Explain.

6. *R. v. Lauda* (1999), 121 O.A.C. 365 (Ontario Court of Appeal)

Crime Stoppers received a tip that marijuana was being grown in a cornfield in Bentinck Township in Ontario. A police constable went to the property without a warrant, located the cornfield, and found approximately 100 marijuana plants among the corn. The police returned another day to find Lauda cutting the marijuana. He was arrested and charged with producing marijuana and possession of marijuana.

The police then obtained a search warrant for the cornfield and the adjacent residence and outbuildings. In the basement, behind a false wall, they located $24 950 in cash, various firearms, and over 1100 g of marijuana; in other parts of the house they found cannabis resin, hashish oil, marijuana buds and seeds, and a marijuana plant. In a nearby shed, they located a 22-L can containing isopropyl alcohol, a substance used for making hashish oil.

The property was surrounded by fencing, as was the cornfield where the marijuana was being grown. Entry to the property was barred by a locked gate and "no trespassing" signs were clearly posted. Embedded screws in the lane were to prevent vehicular access to the cornfield. The trial judge indicated that it is unrealistic to assume that these items could be expected to provide privacy in a country setting. Hunters, hikers, and snowmobilers are notorious for disregarding such signs.

In the United States, in *Oliver v. United States* (1984), the "open fields doctrine" was established. It states that the protection against unreasonable searches and seizures does not extend to unoccupied lands, except those immediately surrounding the home where the right to privacy may reasonably be expected.

In Canada, if the fields are considered part of the dwelling, and there is a reasonable expectation of privacy, a search warrant would be needed.

a) In your opinion, was a search warrant required for the police to legally enter the cornfield? Explain.
b) Should the open fields policy be used in Canada to deter the growing of marijuana? Explain.

7. *R. v. St. Pierre,* [1995] 1 S.C.R. 791 (Supreme Court of Canada)

St. Pierre was charged with having the care or control of a motor vehicle while her blood–alcohol level was over 80. She was stopped because a police officer saw her driving erratically. She failed a roadside screening test and was taken to the police station for more breath tests. She had to wait about an hour for her testing session. She went to the washroom three times during that period.

Both of her breath samples produced a reading of 180. St. Pierre showed the officer two empty 50 mL vodka bottles and told him she was an alcoholic and had consumed the contents of the bottles while in the washroom, to calm herself. The officer testified that the bottles contained no residue and did not smell of vodka. The *Criminal Code* provides that the results of the tests are evidence of driving with a blood–alcohol level over 80, unless there is evidence to the contrary.

St. Pierre was acquitted by the trial judge. The summary conviction appeal court upheld the acquittal, but the Ontario Court of Appeal allowed the Crown's appeal. St. Pierre appealed to the Supreme Court of Canada.

a) Was there a way to determine what St. Pierre's blood–alcohol level was at the time of driving? Explain.
b) Along with driving with a blood–alcohol level of over 80, what other charge could have been laid?
c) Based on the facts, what do you think was the ruling of the Supreme Court of Canada?

8. *R. v. Polashek* (1999), 172 D.L.R. (4th) 350 (Ontario Court of Appeal)

Polashek was legally stopped by police. The police officer had a 20- to 30-second conversation with Polashek and detected a strong odour of marijuana coming from the vehicle. The officer did not see any smoke, nor could he tell if the odour was of burned or unburned marijuana. He told Polashek that he smelled marijuana, to which Polashek replied "No, you don't." Based on the smell, Polashek's response, the area of Mississauga where Polashek was stopped, and the time of night, the officer believed that he had grounds for making an arrest for possession of narcotics.

A search of Polashek found a dark tarlike substance, which the officer believed to be marijuana, and $4000. A search of the trunk revealed wrapped bags of marijuana, a scale and rolling tobacco, and a small amount of LSD. Polashek was then arrested for possession of a narcotic for the purpose of trafficking. He was informed of his right to counsel at that time.

Polashek was found guilty at trial. He appealed, based on what is referred to in the United States as the "plain-smell doctrine." He argued that the police officer had no right to search his vehicle based on the smell of marijuana coming from it. He thus argued that his right to be free from unreasonable search and seizure under section 8 of the *Canadian Charter of Rights and Freedoms* was violated.

In referring to the plain-smell doctrine, the court noted that it was decided in a similar United States case that the smell of marijuana lingers. The marijuana could have been smoked five minutes ago or several hours ago by someone else. The accused was acquitted.

a) In your opinion, did the officer have grounds to conduct a search?
b) Should the plain-smell doctrine be followed in Canada? Support your opinion.

Communicate Your Understanding

9. For each of the following incidents, prepare a sentence for the offender. Write each answer as if you were a judge who was going to deliver it in court, giving reasons for the sentence.

a) LeBeau was charged with four counts of criminal negligence causing death, one count of criminal negligence causing bodily harm, four counts of impaired driving causing death, and one count of impaired driving causing bodily harm. The charges arose as a result of a high-speed car crash. Four young occupants were killed, and the other two occupants, including LeBeau, were seriously injured.
b) Taylor was found guilty of impaired driving causing death, impaired driving causing bodily harm, and failure to stop at the scene of an accident. Taylor had driven through

a stop sign and hit another vehicle. One person was killed, others were injured, and Taylor fled the scene. He was later apprehended after having consumed more alcohol. Two weeks earlier he had committed the offence of driving while impaired.

c) McIvor, 20, drunk and stoned on marijuana, left a party and drove his girlfriend's car down a gravel road at speeds of up to 150 km/h. He lost control of the vehicle and ploughed into Hansen. She was out on her morning walk. McIvor thought about hiding her body and then setting the car on fire to avoid being caught. Instead he took off, leaving Hansen to die in the ditch.

d) Bozzard sold some marijuana to a young person aged 14. The marijuana also found its way into the hands of others at the buyer's school.

10. Hard-core drinkers and those who engage in heavy drinking sessions are the focus of current drinking-and-driving legislation. These offenders have no regard for the public awareness campaigns on the issue, the denunciation that accompanies the offence, or the threat of harsh punishment. The Canada Safety Council estimates that 80 percent of offenders drive while suspended. Chronic offenders are estimated to be responsible for 30 percent of impaired driving fatalities. In a Statistics Canada survey, binge drinking was defined as "the consumption of five or more alcoholic beverages" per occasion. It was found that 24 percent of youths aged 15 to 19 binge-drank monthly, as did 29 percent of men and 19 percent of women.

Write a short paper indicating

a) what legislation is available to deter hard-core drinkers from reoffending

b) your views on whether such legislation is effective

c) what legislation you think could be enacted to deter binge-drinkers further

11. Obtain current information on either drug use and drug laws or drinking-and-driving laws in Canada and another country. Prepare a one-page report comparing your findings about the two countries, including the laws, penalties, and statistics on occurrences of offences. Create a poster or use graphics software to illustrate your information.

12. From a newspaper, collect five examples of legal cases involving drug offences or drinking-and-driving offences. Prepare a summary of each case, showing the offence committed; the facts in favour of the Crown and the defence, respectively; the maximum penalty for the offence; and the sentence, if possible. Attach the newspaper articles to your summary.

13. Using one of the newspaper articles that you collected in Question 12 as a springboard, prepare a five-minute speech outlining your views on the topic of drug use and drug laws or drinking-and-driving laws.

Develop Your Thinking

14. One of the arguments given in support of legalizing the possession of marijuana in amounts sufficient for one's own use is that less damage is caused by use of marijuana than from use of alcohol. In your opinion, is that argument valid in supporting the legalization of marijuana? Support your opinion.

15. a) What is random virtue testing? Why do the police use it in drug-related cases?

b) In what way does random virtue testing violate rights protected in the *Charter?*

c) In your view, does the use of random virtue testing tend to bring the administration of justice into disrepute? Explain.

16. *John v. Flynn* (2001), 201 D.L.R. (4th) 500 (Ontario Court of Appeal)

Shawn Flynn showed up at his overnight shift after drinking heavily. During the shift, he drank in his truck in the parking lot on his break, and again when his shift ended at 6:30 A.M. He then drove home, had a snack, and headed out to play cards and drink beer at a friend's house. Shortly

thereafter, while driving on the wrong side of a snow-covered highway, he struck Claude John's car, severely injuring him. Evidence at the trial indicated that no one saw Flynn drinking at work that night, nor any signs of impairment. However, evidence did indicate that Flynn's employer, Eaton Yale Ltd., was aware that workers consumed alcohol in the parking lots during their breaks. John sued and was awarded $620 052.88. The employer was found to be 30 percent liable. The decision was appealed. In a previous case, *Jacobsen v. Nike Canada Ltd.* (1996), the employer actually supplied the alcohol to its employees. (See also *Hunt v. Sutton Group Incentive Realty Inc.* (2001), page 352.)

a) In your opinion, what responsibility does the employer have for employees in situations such as this?
b) What is the main difference between the John case and the Jacobsen case?
c) In your opinion, should the employer be found liable in the John case? Why?

17. It has been stated that, regarding drinking and driving, "What people fear most is not the fine but the loss of their vehicle." Express your opinion on this statement. Support your view by researching current laws that may result in the loss of a vehicle for drinking and driving.

18. Invariably, after the sentencing of an impaired driver who has caused death, people react to the sentence by saying it is too low. A Canada Safety Council survey showed that 65 percent of Canadians think that impaired driving laws are not strict enough. (However, only 20 percent actually knew the penalties for impaired drivers.)

In your opinion, should there be a minimum sentence for impaired driving offences? If so, should the minimum be higher? Support your opinion.

19. A proposal by the Vancouver Police Department would have required convicted drunk drivers each to display the letter "D" on their car window. In Ohio, judges are permitted to issue a special licence plate to convicted drunk drivers who need their cars for work. Police then know that the car is only to be used for that purpose.

In your opinion, should sentencing of impaired drivers include identifying them to the general public?

Chapter 7

Bringing the Accused to Trial

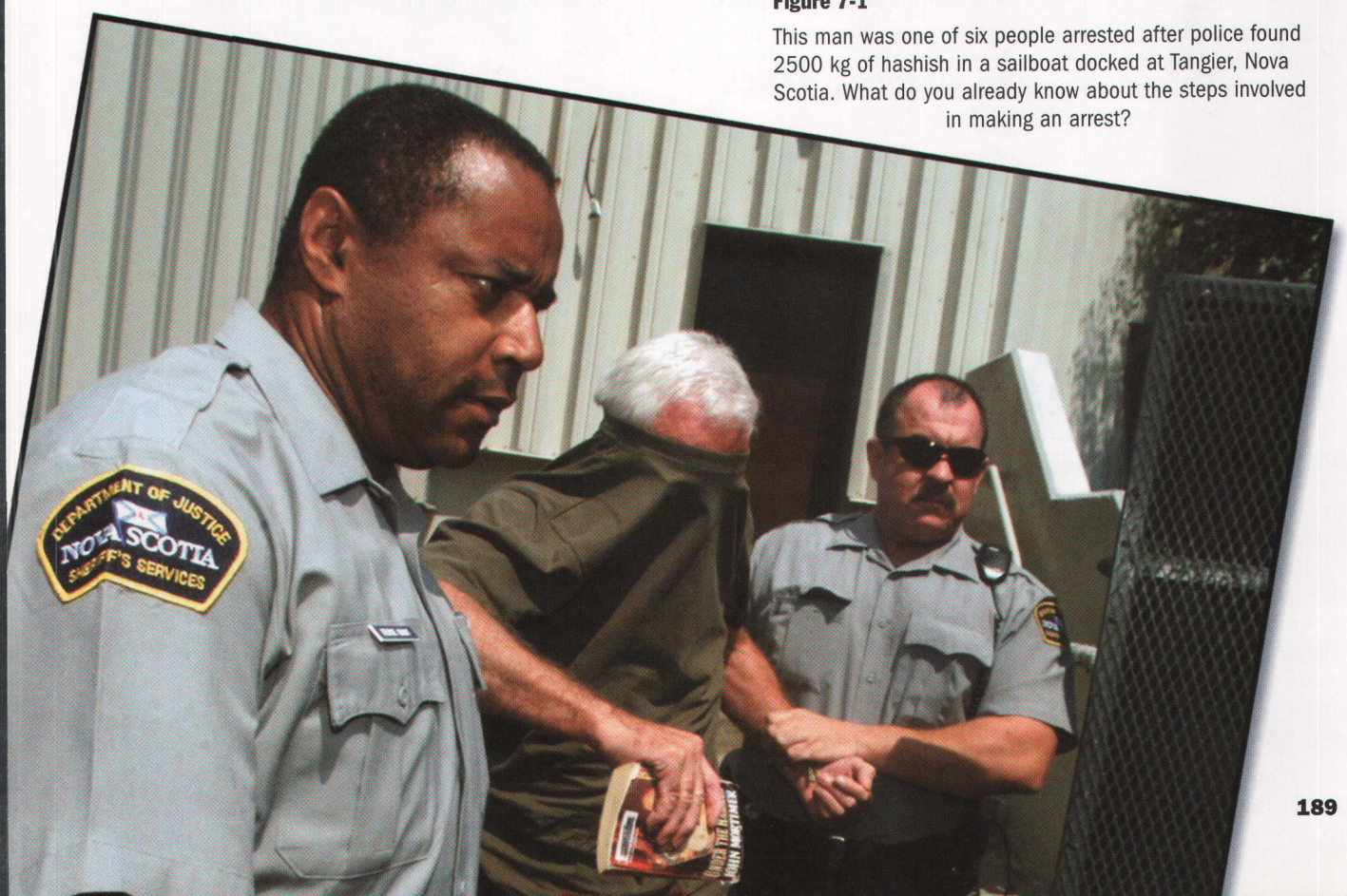
Focus Questions

- What is a legal arrest?
- What are the legal rights of the police and the accused?
- What steps can police take when someone is a suspect?
- What legal procedures can take place before a trial?

Chapter at a Glance

Figure 7-1

This man was one of six people arrested after police found 2500 kg of hashish in a sailboat docked at Tangier, Nova Scotia. What do you already know about the steps involved in making an arrest?



7.1 Introduction

Friction between the public and the police can occur when someone is arrested. This is especially true when the accused is innocent or confused. Although the police may have evidence that an offence has been committed and are authorized to make an arrest, the accused has certain legal rights that he or she may exercise during and after the arrest.

Many Canadians often confuse their rights with those of American citizens. There are important differences. Canada's law tries to protect Canadian society by trying to balance the investigation and arrest rights of the police with individual rights guaranteed in the *Canadian Charter of Rights and Freedoms.* As you read this chapter, be aware of this balance. It will help you understand how laws are designed to protect you in Canadian society.

7.2 Arrest

Merely suspecting that someone did something is insufficient grounds to **arrest** a person. First, police officers must determine that an offence has been committed. Second, they must have reasonable grounds to believe that the suspect committed the offence. When police are ready to apprehend and charge a suspect, they have three choices available to them. They can issue an **appearance notice,** arrest the suspect, or obtain a warrant for arrest.

Appearance Notice

The police may issue an appearance notice for summary conviction offences, hybrid offences, and less serious indictable offences. This document names the offence with which the accused has been charged. It also gives the time and place of the court appearance. The officer must believe that the accused will appear in court on the given date. The accused must also sign the document and receive a copy of the notice. The officer will then swear an **information** before a judge or justice of the peace. This document states that the officer believes on reasonable grounds that the person named in the appearance notice committed the offence.

Did You Know?

The *Anti-Terrorism Act* takes away the right to remain silent for suspected terrorists. Investigative hearings require suspects to go before a judge—even if they are not under arrest—and they must answer all police questions. Their testimony at such hearings cannot be used against them at any future trial.

Arresting the Suspect

For more serious indictable offences, the police will arrest the suspect and take the suspect into **custody.** Arresting officers must

- identify themselves
- advise the accused that he or she is under arrest
- inform the accused of the right to a lawyer (section 10(b) of the *Canadian Charter of Rights and Freedoms*)
- inform the accused of the charges. Section 10(a) of the *Canadian Charter of Rights and Freedoms* states that "everyone has the right on arrest or detention to be informed promptly of the reasons therefor."

The purpose of the arrest is to lay charges, preserve evidence, and prevent the accused from committing further offences. Any officer can arrest without a warrant if there are reasonable grounds to believe that someone has committed an indictable offence, is committing an indictable or a summary offence, or is about to commit an indictable offence. After the arrest, the officer must swear an information before a judge or justice of the peace.

The Law

When arresting a suspect, the police must read the following:

1. Notice on arrest: I am arresting _____ for _____ (briefly describe reasons for arrest).
2. Right to counsel (lawyer): It is my duty to inform you that you have the right to retain and instruct counsel without delay. Do you understand?
3. Caution to charged person: You (are charged, will be charged) with _____. Do you wish to say anything in answer to the charge? You are not obligated to say anything unless you wish to do so, but whatever you say may be given in evidence....

For Discussion

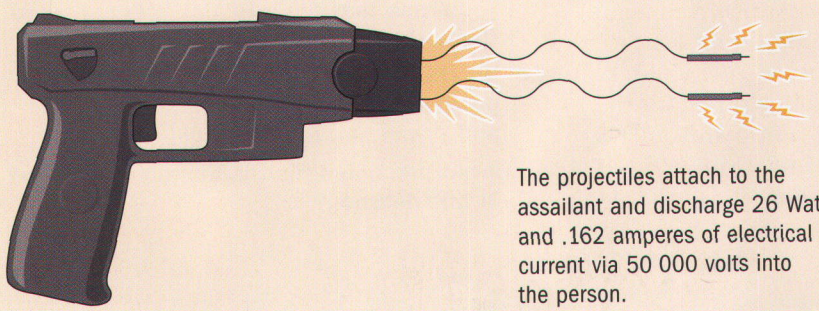
1. Why is it important to read this notice to accused persons upon their arrest?

If the accused resists arrest, the police can use as much force as is necessary to prevent an escape. The police are criminally liable for the use of unnecessary force. In certain circumstances, they can apply force that could cause death or serious injury if it protects others from death or bodily harm. In 1994, Parliament passed a law that gave police and anyone assisting them the power to use deadly force. They can do so in the following situations:

- The behaviour of a suspect might cause serious harm or death to others.
- The suspect flees to escape arrest.
- There is no alternative means to prevent escape.

How an ADVANCED TASER Works

A compressed nitrogen gas capsule disperses two electrified projectiles that are connected to the weapon by insulated wire, up to a range of 4.5 m. The power surge instantly disrupts the central nervous system and results in muscle spasms that cause the person to fall to the ground.



The projectiles attach to the assailant and discharge 26 Watts and .162 amperes of electrical current via 50 000 volts into the person.

Figure 7-2

In several Canadian cities and towns, police are experimenting with TASERs or remote stun guns. These guns discharge 50 000 volts into suspects and stun them. They cost $700 each and are an alternative to the standard handguns issued to police officers.

Warrant for Arrest

If the accused flees the scene of a crime, police can swear an information before a judge or justice of the peace. A document called a **summons** orders the accused to appear in court at a certain time and place. It is delivered to the accused by a **sheriff** or a deputy.

If the police can show the judge that the accused will not appear in court voluntarily, the judge will issue a **warrant for arrest.** It names or describes the accused, lists the offence(s), and orders the arrest of the accused. There must be reasonable grounds to believe that the accused has committed the offence. Otherwise, judges will refuse to issue either a summons or a warrant.

Figure 7-3

A security camera shows a store detective (left) apprehending and arresting a suspect.

Case

R. v. Macooh

[1993] 2 S.C.R. 802
Supreme Court of Canada

An officer saw Macooh drive through a stop sign at 3:45 A.M. in Spirit River, Alberta. (Driving through a stop sign is a summary offence.) The officer turned on his cruiser's emergency signals and followed the suspect. Macooh accelerated and drove through two more stop signs before stopping at an apartment building and running toward the back door. The officer yelled at him to stop, but he entered the building. The officer followed him to an apartment and called out at the door. He identified himself as an RCMP officer. Receiving no answer, he entered the apartment and found Macooh in bed.

The officer advised Macooh that he was under arrest for failing to stop for a police officer. The accused appeared to be impaired and resisted the officer. He was arrested and charged with impaired driving, failing to stop for a peace officer, failing to provide a breath sample, and assaulting a peace officer with intent to resist arrest.

At trial, the provincial court judge ruled that the officer's entry into the dwelling-house while in hot pursuit of Macooh for a provincial offence was unlawful. Therefore, his arrest was also illegal. In addition, since the entry was illegal, all the evidence obtained resulting from the entry was not admitted. Macooh relied on sections 7 and 9 of the *Charter* as part of his defence. He was acquitted on all charges.

The Alberta Court of Appeal and the Supreme Court of Canada both ruled that the right of arrest on private property during immediate or hot pursuit was not limited to indictable offences. Macooh's arrest was therefore lawful. He was convicted on all charges.

For Discussion

1. **What indications are there that the officer was in "hot pursuit"?**
2. **What rights do police who are in hot pursuit have to enter a dwelling?**
3. **What rights does Macooh have under sections 7 and 9 of the *Charter*? How could you argue that the arresting officer limited these *Charter* rights?**
4. **What arguments would support the officer's position that the limitation of sections 7 and 9 was reasonable in this situation?**
5. **What precedent did the Supreme Court set in this decision?**

Arrest by Citizens

Citizens can make an arrest under certain circumstances. This law gives store detectives, private detectives, and other citizens the authority to make arrests.

The Law — The Criminal Code

Excerpts from the *Criminal Code*

494.

(1) Any one may arrest without warrant

(a) a person whom he finds committing an indictable offence; or

(b) a person who, on reasonable grounds, he believes

(i) has committed a criminal offence, and

(ii) is escaping from and freshly pursued by persons who have lawful authority to arrest that person.

(2) Any one who is

(a) the owner ... of property, or

(b) a person authorized by the owner ... of property, may arrest without warrant a person whom he finds committing a criminal offence on or in relation to that property.

For Discussion

1. **Summarize the circumstances under which a citizen can make an arrest.**
2. **What are the potential problem(s) of making a citizen's arrest? Would you make one? Explain.**

Review Your Understanding (Pages 190 to 193)

1. **Why is there sometimes conflict between the police and the public when arrests are made?**
2. **Why is it important to know your legal rights?**
3. **When does an arrest take place? What is its purpose?**
4. **Describe in detail the three choices available to police when they believe an offence has been committed.**
5. **Why must police swear an information before a judge or justice of the peace?**
6. **a) How much force may police use when making an arrest?**
   b) What can happen if police use too much force?
   c) Should police be forbidden to use any kind of force when making an arrest? Explain.
7. **Distinguish between a summons for arrest and a warrant for arrest.**

Did You Know?

The *Anti-Terrorism Act* permits police to use preventive detention for those suspected of planning an act or acts of terrorism. These suspects can be imprisoned without a warrant for their arrest. They must be brought before a judge within 24 hours and can then be released after 72 hours, but only if they accept a judge's conditions for a supervised life in the community for the next 12 months. If they refuse to accept these conditions, they can be imprisoned for a year.

7.3 Duties of Police Officers

In Canada, there are three levels of policing: federal, provincial, and municipal. The Royal Canadian Mounted Police (RCMP) is the federal (national) police force. The provincial police forces in Ontario and Quebec are the Ontario Provincial Police (OPP) and the Sûreté du Québec (SQ). In all other provinces, the RCMP also serves as the provincial police force. Municipal police,

e activity

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such as the Moose Jaw Police Department, enforce municipal laws. The RCMP, the OPP in Ontario, and the SQ in Quebec carry out the duties of the municipal police in areas that do not have their own municipal police forces.

Police Conduct

Police officers are responsible for their conduct and behaviour when carrying out their duties. If they break the rules of police conduct, they can be charged under criminal law or sued under civil law. Each province has a board that reviews complaints from citizens concerning police conduct. Police officers often have to make quick decisions to save their own lives and those of others. At all times, officers must follow section 25 of the *Criminal Code*, which requires an officer to act "on reasonable grounds ... and in using as much force as is necessary for that purpose."

The Police Log

Police officers are usually the first persons at a crime scene. They must bring law and order to the situations they encounter. They must also secure the crime scene so that crucial evidence does not get contaminated. Police officers keep an accurate log (written record) of what they see and hear at the scene of the crime. These logs may be an important factor in determining the value of evidence presented in court.

Review Your Understanding (Pages 193 to 194)

1. **Describe the three levels of policing in Canada.**
2. **What can happen to police who abuse their power?**
3. **Why are police logs important?**

7.4 Citizens' Rights

The legal rights of citizens who are detained and/or arrested are outlined in sections 7 to 11 of the *Canadian Charter of Rights and Freedoms* (see Appendix A, page 600). However, the meaning of many of these clauses remains open to court interpretation.

An informed and responsible citizen may want to cooperate with the police. Innocent persons often show their innocence by immediately giving information to the police. This can save time and money. Despite the presumption of innocence, the police tend to form conclusions based on an individual's behaviour when being questioned.

Rights on Being Detained

When an officer stops someone for questioning, that person is being detained. People who are detained do not actually have to answer questions unless they are in a specific situation, such as a police spot check on a busy highway, or

being placed under arrest. Detention should lead quickly to arrest—otherwise, the person should be free to go. If a police officer insists on questioning or searching a reluctant individual, that person should immediately demand to see a lawyer and write down the badge number of the officer and the names of any witnesses.

A citizen who is detained illegally may sue the police for false arrest or detention or complain to the police commission. A citizen is allowed to use as much force as necessary to resist an illegal arrest or search. However, the force used must be reasonable.

Rights on Being Arrested

Someone who is charged with committing a crime has the right to be informed promptly of the reason for the arrest and the right to obtain a lawyer without delay (section 10 of the *Charter*). The Supreme Court of Canada has ruled that this includes being advised of the availability of a **duty counsel**—a lawyer on duty at the court. The police must also inform the accused that legal aid is available if that person cannot afford a lawyer.

A request by the accused to contact a lawyer must be honoured immediately. Anyone who has decided to hire a lawyer can refuse to answer any further questions, except those necessary to complete the charge, such as name, address, occupation, and date of birth. One study found that almost 60 percent of defendants gave verbal statements and 70 percent gave written statements to police before contacting a lawyer. Perhaps these people thought it would be better to answer police questions because refusing to talk could create a bad impression. However, any statements volunteered to the police can be used as evidence.

When people are read their rights, they must truly understand them. If the accused are intoxicated, the police must wait until they are sober. If the accused cannot understand English or French, they must be read their rights through an interpreter. Once they decide to contact a lawyer, they must have access to a telephone. They must be allowed to talk privately with their attorneys. They also have the right to give up counsel and answer police questions.

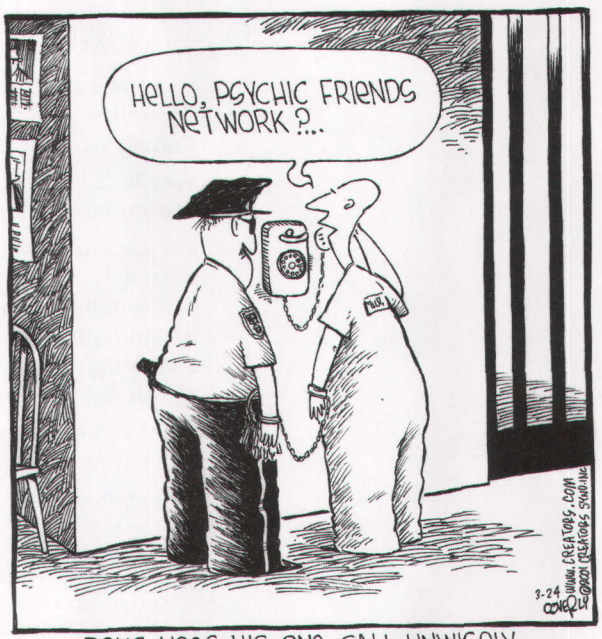

Figure 7-4

How would you use your one phone call?

Police Rights

The police have the right to **search** the accused upon arrest to look for evidence related to the charge or for any item that might help the accused to escape or cause harm. The police may take away the possessions of the accused. The police also have the right to take the accused to the police station. Here, a more thorough search is likely to take place. This might involve a strip-search and skin-frisk, or a body cavity search if drugs are involved. Extensive

body searches must be conducted by officers of the same sex as the accused, and they cannot be done without sufficient reason. The police may wish to fingerprint and photograph the accused at this time, or later.

The accused does not have to take part in a **line-up,** where several individuals, including the suspect, line up for possible identification by the victims or witnesses. Nor must the suspect take a **polygraph test** (lie detector test), or give blood, urine, or breath samples (except in cases of impaired driving offences). Accused persons should consult with their lawyers about these procedures. Section 487.04 of the *Criminal Code* does allow police to obtain DNA samples from a suspect, but they must have a warrant to do so. It actually might be to the suspect's advantage to permit evidence to be collected. For instance, when murder has been committed under the influence of drugs or alcohol, the extent of the influence might affect the outcome of the trial or even the sentence.

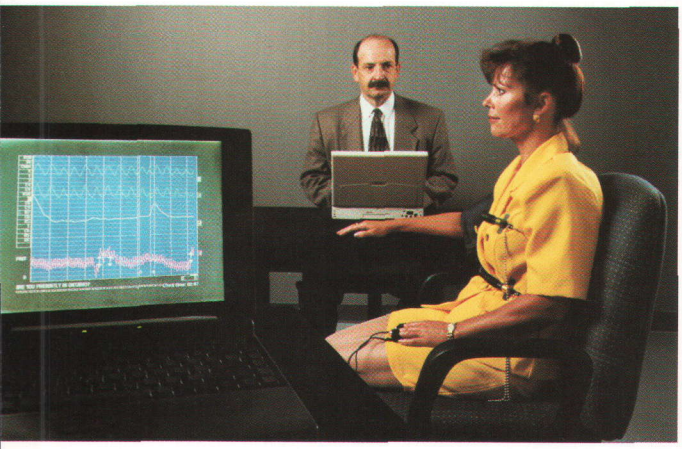

Figure 7-5
A polygraph test in progress

Review Your Understanding (Pages 194 to 196)

1. **Refer to sections 7 through 11 of the *Canadian Charter of Rights and Freedoms* (see Appendix A, page 600) and summarize the legal rights of Canadians.**
2. **Why is it important to cooperate with the police? Under what circumstance might this not be advisable?**
3. **For each of the rights of the police, state the corresponding right of a citizen:**
   a) the right to question before arrest
   b) the right to search a person before arrest
   c) the right to question after arrest
   d) the right to search a person after arrest.
4. **What rights do the police have concerning the following: fingerprinting, requesting a line-up, a polygraph test, or a blood sample?**
5. **Why is it sometimes to a suspect's advantage to let the police collect evidence?**

7.5 Search Laws

The police may wish to search the residence of the accused to look for evidence related to the charge. To do so, they must have a **search warrant,** a legal document issued by the court to increase police authority.

Obtaining the Search Warrant

To apply for a search warrant, an officer must swear before a justice of the peace or a judge that an offence has been committed and that there are reasonable grounds to believe that evidence of a crime exists on the property.

If the officer's testimony is accepted, a search warrant is issued. If the information about the evidence being on the property was received from an informer, the officer must outline to the court why the informer is reliable before a warrant will be issued. Section 8 of the *Charter* guarantees citizens the right to be secure against unreasonable search or seizure.

Telewarrants can be obtained by telephone or other telecommunication means, such as by fax or e-mail. This process allows for the warrant to be obtained quickly in the likelihood that evidence may be destroyed.

Using the Search Warrant

A warrant can be used to search a residence only on the date indicated, between 6:00 A.M. and 9:00 P.M. The search can involve only those areas and items outlined in the warrant. Only the items mentioned in the warrant can be seized, unless other illegal items are found during the search. The officers must have reasonable and probable grounds that such items were used when committing a crime or were obtained illegally. The officers cannot go beyond the terms of the warrant in hope of finding something illegal that would justify the laying of a charge. The items seized can be kept for up to three months, or for a longer period if they are needed as evidence at trial.

Search Laws and Rules

Police can demand to enter a property when they are carrying a search warrant. If permission is refused, or if no one is home, the police have the right to break into the premises. However, the police are liable for any excessive force used. Anyone who answers the door can ask the police to show him or her a copy of the search warrant before allowing them entry. If the document is not correct in every detail, entry can be refused. Once inside, the police can only search a person after arrest, unless they believe that the person possesses illegal drugs, liquor, or weapons.

Police do not need a search warrant if individuals agree to be searched. These persons voluntarily give up their constitutional rights. Police may have to prove in court that this consent was voluntary.

Police need a warrant when using electronic surveillance equipment, such as video surveillance, tracking devices, or telephone recorders that intercept private conversations. Judges must be assured that such devices will not interfere with the bodily integrity or property of the people being monitored. The vast majority of warrants issued to police for this purpose involve the illegal-drug trade.

The *Anti-Terrorism Act* permits police to use electronic surveillance on suspected terrorists for up to one year. Usually, such permission is granted by a superior court judge for only 60 days, although this can be renewed.

Figure 7-6

This tiny microphone is concealed in a tie and can be used to collect vital evidence about drug trafficking or other crimes.

Case

R. v. Araujo

[2000] 2 S.C.R. 992
Supreme Court of Canada

Several accused persons faced charges of trafficking in cocaine. Much of the evidence against the accused came from wiretapping evidence by the RCMP.

During the trial, the defence argued that the 130-page application for permission to wiretap was flawed. The application had mixed up some of the names of informants, as well as the information they had given to the RCMP. Therefore, the judge who had given permission to do the wiretapping had received false information, and the wiretap was illegal. The trial judge agreed and the wiretap evidence was not introduced into court. The accused were acquitted and released.

The Crown appealed the verdict and the British Columbia Court of Appeal reversed the trial judge's decision and ordered a new trial. The defence appealed to the Supreme Court of Canada. The Supreme Court ruled against the defence, and the appeal was denied. The Court said that when the RCMP applied for permission to wiretap, it convinced the judge that there was no other way of obtaining evidence to convict the accused. Previously, the RCMP had used surveillance and search warrants, but these methods had produced no evidence. The RCMP had also considered using undercover agents, but concluded that this was too risky. The judge had concluded that the only way to apprehend the higher-ups in this cocaine drug ring was to give permission for the wiretap.

The Supreme Court acknowledged that there were errors in the wiretap application, but noted that the application did not seek to mislead the judge. They were honest mistakes. The police had reasonable and probable grounds to suspect that the accused were members of the drug ring and the wiretap evidence supported this suspicion. It was necessary to use wiretapping to get enough evidence to convict the accused.

For Discussion

1. **Why do the police have to get permission from a judge to wiretap?**
2. **On what basis were the accused acquitted and released at trial?**
3. **Compare the trial decision to that of the Supreme Court of Canada. Why did the Court allow the wiretap evidence?**

Exceptions to Search Laws

There are some important exceptions to the search laws you have just learned about. Under the *Controlled Drugs and Substances Act*, the police may search any place that is not a private residence without a warrant if there is a reasonable belief that it contains illegal drugs. Anyone found inside these premises can also be searched without a warrant. These types of searches usually take place when there is no time to obtain a warrant or because of the need for a surprise entry.

Under provincial liquor laws, police may search a vehicle for illegal alcohol without a warrant. In addition, if police stop a motor vehicle and become suspicious that the driver is hiding something, they can search the vehicle without a warrant if they have reasonable and probable grounds that an offence is being committed or has been committed. The police may also search for illegal weapons without a warrant in any place that is not a private residence (e.g., a car).

Case

R. v. Richardson

(2001) 153 C.C.C. (3d) 449
British Columbia Court of Appeal

Two officers set up a traffic roadblock looking for drivers who might be driving under the influence of alcohol or driving without valid licences or insurance. At 1:30 A.M., the police noticed a car approaching the roadblock. It slowed down and then approached them. The officers detected a strong smell of marijuana and asked Richardson and two other occupants to get out of the vehicle. When confronted about the strong smell, Richardson produced a small metal box that contained small amounts of marijuana and hashish oil. The officers then asked Richardson to open the trunk of the car. In it they found 11 bags of marijuana and $6000 in cash.

Richardson protested against the search, claiming that it was illegal. The officers had no warrant to search the car. The police handcuffed Richardson because he was obstructing a legal search. The officers believed they had a legal right to search the car. They charged Richardson with possession of a narcotic for the purpose of trafficking and possession of cannabis resin.

In court, Richardson argued that the officers had searched the car illegally and that the evidence should not be admitted in court. It was a violation of sections 8 and 10 of the *Charter*. The trial judge ruled that the evidence was admissible under section 24(2) of the *Charter*. The judge convicted Richardson of possession of marijuana for the purpose of trafficking and gave him a six-month suspended sentence. Richardson appealed. The question was whether it was appropriate to exclude the evidence found in the trunk of the car because of the abuse of police powers. The appeal court dismissed Richardson's appeal. It ruled that the circumstances justified the search and the handcuffing. The charge was a serious one, and to exclude the evidence would weaken the public's confidence in the legal system.

For Discussion

1. **The defence and the Crown referred to sections 8, 10, and 24(2) of the *Canadian Charter of Rights and Freedoms*. Look up these sections and summarize them in your own words.**
2. **On what basis could the defence argue that the police abused their powers?**
3. **How did the appeal court justify including the evidence?**

Review Your Understanding (Pages 196 to 199)

1. **Describe how a search warrant is obtained and used.**
2. **What should a person know when police officers arrive with a search warrant?**
3. **What is a telewarrant and what is its purpose?**
4. **What restrictions are there on the use of electronic surveillance equipment used under the authority of a warrant?**
5. **Outline the important exceptions to search laws for illegal-drug and alcohol offences.**
6. **Under what circumstances can police search motor vehicles? What are they usually looking for?**

e activity

Visit **www.law.nelson.com** and follow the links to learn how wiretapping is used to fight telemarketing fraud.

7.6 Release Procedures

Most people accused of crimes are not locked up after being arrested. They may be taken down to the police station where the police record the criminal charges. The officer in charge of the lockup or station may release people charged with summary convictions, hybrid offences, or indictable offences that carry a penalty of five years or less. If there are grounds to believe that further offences will be committed or that the accused will not appear in court, the accused may be confined until a bail hearing takes place.

For indictable offences carrying a penalty of more than five years' imprisonment, accused persons must be brought before a judge within 24 hours, or as soon as possible, for a bail hearing. "Bail" is money or other security paid to the court to ensure the appearance of the accused at a later date. Once bail is paid, the accused is released. The judge decides whether or not bail will be granted. If bail is granted and the accused fails to appear on the court date, the person who posted the bail loses the money.

In 1985, the *Criminal Code* was changed to put less emphasis on the payment of money as a condition of being released. The old bail laws were thought to discriminate against the poor. Now, if a person pleads not guilty, the judge must release the accused on his or her promise to appear. Only if the Crown attorney can show that the accused would likely miss his or her court date or be a threat to the protection and safety of the public can bail be denied.

If the charge is serious, such as a murder charge, the accused must show why he or she should not be kept in custody and should be released until the court date appearance. This is known as **reverse onus.** The responsibility is on the accused to prove that no threat exists to society and that he or she will appear when so ordered. For other criminal offences, it is up to the Crown attorney to prove that the accused should not be released.

Case

R. v. Mapara

(2001) 149 B.C.A.C. 316
British Columbia Court of Appeal

In 2001, Sameer Mapara was convicted of first-degree murder, a crime that carries a minimum penalty of 25 years' imprisonment. His trial lasted five months. He appealed the decision and asked to be released on bail until his appeal was decided. He argued that he had no previous criminal record and posed no threat to anyone. He also promised to turn himself into custody if his appeal was rejected.

The Crown opposed his release on the following grounds:

- There was no guarantee Mapara would surrender himself back into custody.
- He was a flight risk.
- He had originally emigrated from Kenya and could easily go back there, where he had family and friends.

The Crown argued that public confidence in the justice system would be shaken if persons appealing first-degree murder convictions were allowed out on bail.

Mapara is married and has four young children. He has serious financial difficulties. His father-in-law is suing him for $780 574, and the Bank of Montreal has reported that he issued cheques for $107 242.45 without sufficient funds.

The British Columbia Court of Appeal observed that Parliament has not excluded persons who have been convicted of first-degree murder from seeking

continued

release on bail. It wondered what the bail conditions would be for such a serious offence. It concluded that it would consider the matter and make a judgment at a later date.

For Discussion

1. **What is reverse onus? How can it be applied to this case?**
2. **What argument has the Crown used to oppose granting bail?**
3. **How do Mapara's personal circumstances support his request to be released on bail?**
4. **Why did the appeal court not immediately reject his request?**
5. **What judgment would you render on Mapara's request to be released on bail? Explain your answer.**

Judicial Release Procedures

If released, the accused is required to sign an **undertaking** and to live up to the conditions set by the court. These conditions might include a curfew, orders not to associate with former friends or go to certain places, and an order to report to a police station once a week. These regulations are designed to help the accused avoid further trouble with the law before the court hearing. The accused might also be required to sign a **recognizance.** This document states that the accused recognizes that he or she is charged with an offence, and that he or she promises to appear in court on a certain date. Depending on the case, the accused may pay money in order to be released.

Release Denied

If the accused is not released by the judge, he or she is entitled to appeal the decision to a higher court. If, for any reason, the accused is kept in prison without being arrested, or is denied a bail hearing, an application for a writ of *habeas corpus* can be made. This writ requires the accused to appear in court, to swear that he or she has been denied these rights, and to ask for release. A judge rules on the application. If the writ is granted, the accused is released.

Fingerprints and Photographs

People who are charged with indictable offences and are released may be fingerprinted and photographed before the release. Of course, this step would be unnecessary if these procedures were done at the time of the arrest.

When people are acquitted of a crime, they do not automatically have the right to insist that fingerprint and photo records be

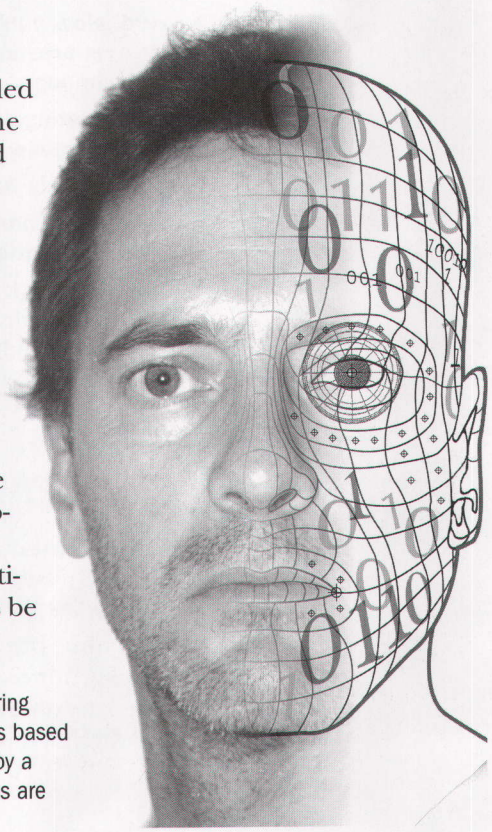

Figure 7-7

Biometrics is a new science that establishes the identity of individuals by measuring their physical features; for example, their nose, eyes, lips, ears, and hairlines. It is based on the idea that the distances between someone's features can be represented by a mathematical pattern. Why do you think gambling casinos and some police forces are using biometrics technology?

removed from police files. There is no law that says this must happen. Each police force decides whether or not to comply with this request. Similarly, if someone is mistakenly arrested and fingerprinted, it is difficult to have the file destroyed.

Protection of Society

Maintaining the balance of rights between citizen and society is a matter of concern to Canadians. Too much emphasis on individual rights can lead to less emphasis on the protection of society, possibly leading to an increase in crime. On the other hand, too much emphasis on the protection of society can result in a police state and the elimination of individual rights. It is up to the public and police to reduce the possibility of conflict. The public can contribute by not exploiting their rights to take advantage of others and the Canadian legal system. The police can contribute by not abusing their powers and by remaining aware of their duty to society.

Review Your Understanding (Pages 200 to 202)

1. **After being arrested, which categories of accused persons might be released until their court appearances?**
2. **Under what circumstances will suspects not be released until their court date appearances?**
3. **Why were the bail laws revised?**
4. **How could it be argued that reverse onus breaks the rule that someone is presumed innocent until proven guilty? How could its use be justified in our society?**
5. **Distinguish between an undertaking and a recognizance, and identify the purpose of each.**
6. **Why is *habeas corpus* an important legal right in a democracy?**
7. **What happens to the fingerprints and photographs of people who are acquitted? Do you agree with this procedure?**
8. **Why is it important to maintain the balance of individual rights and the protection of society as a whole? In your opinion, is this balance being achieved?**

7.7 Awaiting Trial

The accused should consult a lawyer and reveal everything that is connected to the case. The lawyer can then prepare the best defence possible. The lawyer will study legal texts and laws related to the offence, interview witnesses, and examine previous court decisions and precedents to gather the necessary background for the case. The accused has the right to make suggestions to the lawyer. If there is a serious disagreement, the accused can change lawyers, or the lawyer can withdraw from the case.

Legal Aid

Section 10(b) of the *Canadian Charter of Rights and Freedoms* states that all Canadians have the "right to retain and instruct counsel without delay" for criminal cases. If the accused cannot afford a lawyer, he or she can apply for "legal aid": a court-appointed lawyer paid for by the government. Legal aid is provided only to those who receive social assistance or those whose family incomes are below social assistance levels. Besides criminal cases, legal aid is also available in civil and family court cases. People who are awarded legal aid can choose which lawyer will represent them.

activity

Visit **www.law.nelson.com** and follow the links to learn more about legal aid.

Did You Know?

There are approximately 1.1 million applications in Canada for legal aid each year, and almost 750 000 of them are approved.

Disclosure

The Law Commission of Canada says that **disclosure** is one of the most important features of the criminal justice system. Prior to a trial by jury, the Crown attorney and the defence are required to meet and reveal all the evidence that both sides have for the upcoming trial. The Crown must show its evidence so that the accused can fully understand the Crown's case and can prepare a defence. The defence may put forward evidence or arguments that prove to the Crown that it does not have a case. If the defence proves its case, charges will be dropped and no trial will occur.

Disclosure has become more important in recent years and has reduced the number of jury trials. It also reduces the time and cost of trials. It helps to ensure that the accused gets a fair trial because once people know all the evidence that will be used against them, they can prepare a proper defence. In non-jury trials, the accused or the Crown may ask for such a meeting for the same purpose.

Collecting Evidence

Before a criminal trial, both the Crown and the defence may examine exhibits that have been offered to the court as evidence in the trial. Such items might include weapons, clothing, traces of blood or other fluids, or fingerprints. In so doing, they are making use of **forensic science.** Forensic science uses medicine and other sciences to try to solve legal problems. The term is perhaps used most often in connection to an autopsy, an examination to determine the cause of death. Forensic scientists can find clues in samples of blood and other bodily fluids, teeth, bones, hair, fingerprints, handwriting, clothing fibres, and other items. These clues can help to determine the guilt or innocence of the accused.

Recent technology has led to many advances in forensic science. For instance, fingerprinting now involves computers rather than ink and paper. A computer can be used to compare fingerprints to a vast number of other fingerprints on file, reducing to a few hours a task that used to take months. This automated system was established in 1976.

Another new procedure is DNA matching. This technique is based on the fact that every cell of a particular human being contains a unique form of the complex chemical DNA (deoxyribonucleic acid). The unique profile of each person's DNA makes possible the technique of DNA matching.

activity

Technology has increased our ability to rely on evidence gathered at the crime scene. Visit **www.law.nelson.com** and follow the links to learn more about DNA.

Did You Know?

Forensic scientists can tell a person's sex from a hair root and determine the probable make, model, and year of a hit-and-run vehicle from a speck of paint. The RCMP's forensic crime laboratories handle thousands of cases a year.

This is a powerful tool. It allows the Crown to enter into evidence a DNA match; for example, a hair sample matching that of the accused found on the victim's body at the scene of the crime. The defence can also show that there is no match between the accused and the evidence collected at the scene of the crime.

Because of the importance of DNA matching as evidence, the *Criminal Code* was amended in 1995 to permit police to obtain DNA samples from suspects. A warrant is required. In 2000, the RCMP opened a DNA data bank that stores the genetic profiles of people convicted of serious crimes. The purpose of the data bank is to track criminals and solve crimes. It cost $10.6 million to set up and its operation costs are $5 million a year. (See Issue, page 210.)

Case

R. v. Feeney

(2001) 152 C.C.C. (3d) 390
British Columbia Court of Appeal

Feeney was accused of murdering an 85-year-old man by striking him repeatedly on the head with a crowbar. He was also accused of stealing the man's cash, cigarettes, beer, and truck. The deceased's truck was found later in a ditch with a bloody crowbar beside it. A cigarette butt was found at the victim's mobile home, as were fingerprints.

The police entered Feeney's home and seized a bloody shirt; they did not have a search warrant. At his trial, Feeney's sister testified that she saw him arrive home on the day of the murder and saw bloodstains on his shirt. But she said that she did not know if she was dreaming or could actually remember what she had seen. Feeney was convicted of second-degree murder. On appeal, the Supreme Court of Canada set aside the conviction and ordered a new trial. The police had not obtained a search warrant and the search of Feeney's home was illegal. The bloody shirt could not be used as evidence, even though the blood stains matched the victim's blood type.

During the second trial, the RCMP obtained other evidence to prove Feeney's guilt. The cigarette butt was analyzed to provide DNA material. A warrant was issued under section 487.05 of the *Criminal Code* to obtain a blood sample from Feeney. There was a match: the DNA on the cigarette butt was the same as Feeney's. The RCMP also obtained a set of fingerprints from the Calgary Police Department, which had fingerprinted Feeney the previous year for a break and enter. There was another match: the fingerprints were the same as those found at the scene of the crime. Feeney's sister also changed her testimony and said that she had actually seen Feeney with the bloodstains and that it was not a dream.

Feeney's lawyer argued that the fingerprint evidence should not be considered because it had been obtained after an illegal arrest. Section 487.05 of the *Criminal Code* should not apply because Feeney's rights had been violated under sections 7 and 8 of the *Charter*. He noted that evidence given by Feeney's sister was unreliable and should not be considered. Despite these arguments, the second trial jury found Feeney guilty of second-degree murder. On appeal, the British Columbia Court of Appeal rejected his defence arguments and upheld his conviction.

For Discussion

1. **Why do you think the RCMP did not obtain a search warrant before searching Feeney's home?**
2. **Why did the Supreme Court order a new trial?**
3. **Why did the RCMP have to obtain new evidence for Feeney's second trial?**
4. **What new evidence did the RCMP obtain for use in the second trial?**
5. **Do you agree with the appeal court's decision? Explain.**

Agents of Change — Alec Jeffreys

In the early 1980s, a young British geneticist was experimenting with extracting DNA from human muscle tissue and made an astounding discovery. Alec Jeffreys realized that random segments of human DNA—the protein molecules in cells that determine the genetic characteristics of all living things—are "genetic markers." They are as unique to each individual (with the exception of identical twins) as a fingerprint.

Jeffreys found a way to process these markers, using electricity and radioactive labelling, so that they formed a distinct bar-code-like pattern on X-ray film. Police could then match with great probability the bar codes from DNA evidence at a crime scene with DNA samples taken from suspects. Jeffreys called his technique "DNA fingerprinting."

Jeffreys' technique first came to public attention when it helped to solve the murders of two British women in the mid-1980s. The police arrested a 17-year-old male and sent semen and blood samples to Jeffreys for testing. The results proved that the young man was not the murderer. Jeffreys would later recall that this was "the first man ever proved innocent by molecular genetics, and without the evidence he would have gone to jail for the rest of his life." The police then required that all males in the area between the ages of 13 and 30 give blood samples for DNA testing. There was still no match.

Later, 27-year-old Colin Pitchfork was overheard in a bar boasting to friends that he had persuaded a friend to give a blood sample for him. Police arrested him, and DNA tests showed that he had likely committed both crimes. He was given two life sentences. This was the first time that DNA testing had pointed to a criminal.

For his contribution to forensic science, Jeffreys was knighted by the Queen in 1994.

For Discussion

1. **What discovery did Alec Jeffreys make with respect to DNA?**
2. **Briefly summarize the technique of DNA fingerprinting.**
3. **Explain the significance of the Colin Pitchfork case.**

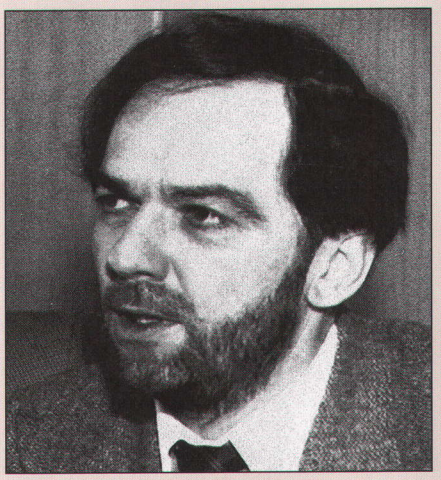

Figure 7-8
Alec Jeffreys

Court Appearances

When the accused appears in court, the provincial court judge will set a trial date or ask for an **adjournment,** which puts the matter over to a later date. This gives the accused time to obtain legal advice. The judge will also indicate in which court the case will be tried. The three possibilities are determined by the type of offence:

- Offences over which a provincial court has absolute authority include all summary and minor indictable offences, and they are listed in section 553 of the *Criminal Code.* They include theft, fraud, mischief (all under $5000), and keeping a bawdyhouse.
- For more serious indictable offences, the accused can elect to be tried by a provincial court judge without a jury; or tried in a higher court by a judge alone or a judge and jury. These crimes include assault, sexual assault, and weapons offences.

- Offences that can be tried usually by a judge and jury in a supreme court of the province are the most serious indictable offences. These are listed in section 469 of the *Criminal Code* and include treason, murder, and piracy. Only 5 percent of crimes are heard at the superior court level. When the accused appears in provincial court, the judge will set a date for a preliminary hearing.

The Plea

Someone charged with committing a criminal offence enters a plea in provincial court. The person states whether he or she is guilty or not guilty of the charge read in court. About 90 percent of accused Canadians plead guilty at this stage of the process.

If the accused pleads guilty to a summary conviction or minor indictable offence, he or she is sentenced immediately or remanded (sent back) into custody. The **remand** can last up to eight days, or until the judge can review the circumstances of the case and the criminal records of the accused and pass sentence. If the accused pleads not guilty, the provincial court judge will set a trial date. If the accused pleads guilty to a serious indictable offence and wants to be tried by a provincial court judge, the same procedures will apply as for summary convictions and minor indictable offences.

Preliminary Hearing

The **preliminary hearing** lets the provincial court judge decide whether there is sufficient evidence to proceed with a trial in a higher court. It only takes place when the accused pleads not guilty to an indictable offence and chooses to be tried by a higher court judge or a judge and jury. During the preliminary hearing, the judge hears evidence and the testimony of witnesses to determine if a reasonable case can be made against the accused. If the evidence is insufficient, the charges are dropped and the accused is free to go. If there is sufficient evidence, the trial date is set by the judge.

The defence does not need to call evidence at the preliminary hearing, but can cross-examine the Crown witnesses. If evidence is presented, it is recorded and may be brought up at trial to attack the credibility of witnesses who change their story. Such evidence may also be useful if the witnesses later refuse to testify, flee, or die.

Sometimes the defendants will skip the preliminary hearing and go directly to trial. This is done if (1) the accused has decided to plead guilty; (2) the accused wants to have the trial date set as early as possible; or (3) the accused wants to avoid negative publicity that may result from the preliminary inquiry.

Case

R. v. Olubowale

(2001) 142 O.A.C. 279
Ontario Court of Appeal

The accused was arrested and charged with murder. At his preliminary hearing, the Crown presented this evidence: The accused was a bouncer at a tavern. A group of men were asked to leave the tavern and the bouncer followed them outside. The victim made racial comments to Olubowale and a fight ensued.

Olubowale weighed twice as much as the victim and was 30 cm taller. He was also a trained boxer. Witnesses said the accused hit the victim three times with blows described as "precise," "powerful," "full force," and "very strong." Olubowale delivered the last blow after chasing the victim around a car. The victim fell and hit his head on the concrete and died of his injuries. At his preliminary hearing, the accused asked the judge to reduce the charge to manslaughter.

Section 229 of the *Criminal Code* defines murder as follows:

(a) where the person who causes the death of a human being
  (i) means to cause his death, or
  (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not.

The provincial court judge would not reduce the charge to manslaughter and committed the accused to stand trial for murder. Olubowale appealed this ruling. The Ontario Court of Appeal decided that the accused could not be tried under section 229(a)(i). But it also ruled that Olubowale's actions were reckless because he knew his actions were likely to cause death (section 229(a)(ii)). The appeal was dismissed and the accused was ordered to stand trial for murder.

For Discussion

1. **When is a preliminary hearing held?**
2. **Why were Olubowale's actions considered reckless?**
3. **What would have happened if the appeal court had upheld the appeal?**

Resolution Discussions

Before trial, defence attorneys may encourage the accused to participate in a resolution discussion. The result can be a **plea negotiation,** commonly known as plea bargaining. Plea and sentencing decisions are discussed in these pre-trial resolution meetings. If there is strong evidence against the accused, the defence may encourage the person to plead guilty to a lesser charge in hope of receiving a lighter sentence. A guilty plea to a lesser charge benefits the court. It saves time and money and eliminates jury selection.

Plea negotiations may free up the court system, but they are not formally recognized in the *Criminal Code.* During discussions, the accused may give up the right to a fair public hearing in court, where he or she might receive a "not guilty" verdict. If the plea cannot be negotiated, any evidence that was revealed during the negotiations can be used at trial. This may weaken the position of the accused.

How the System Works: Ontario Provincial Court

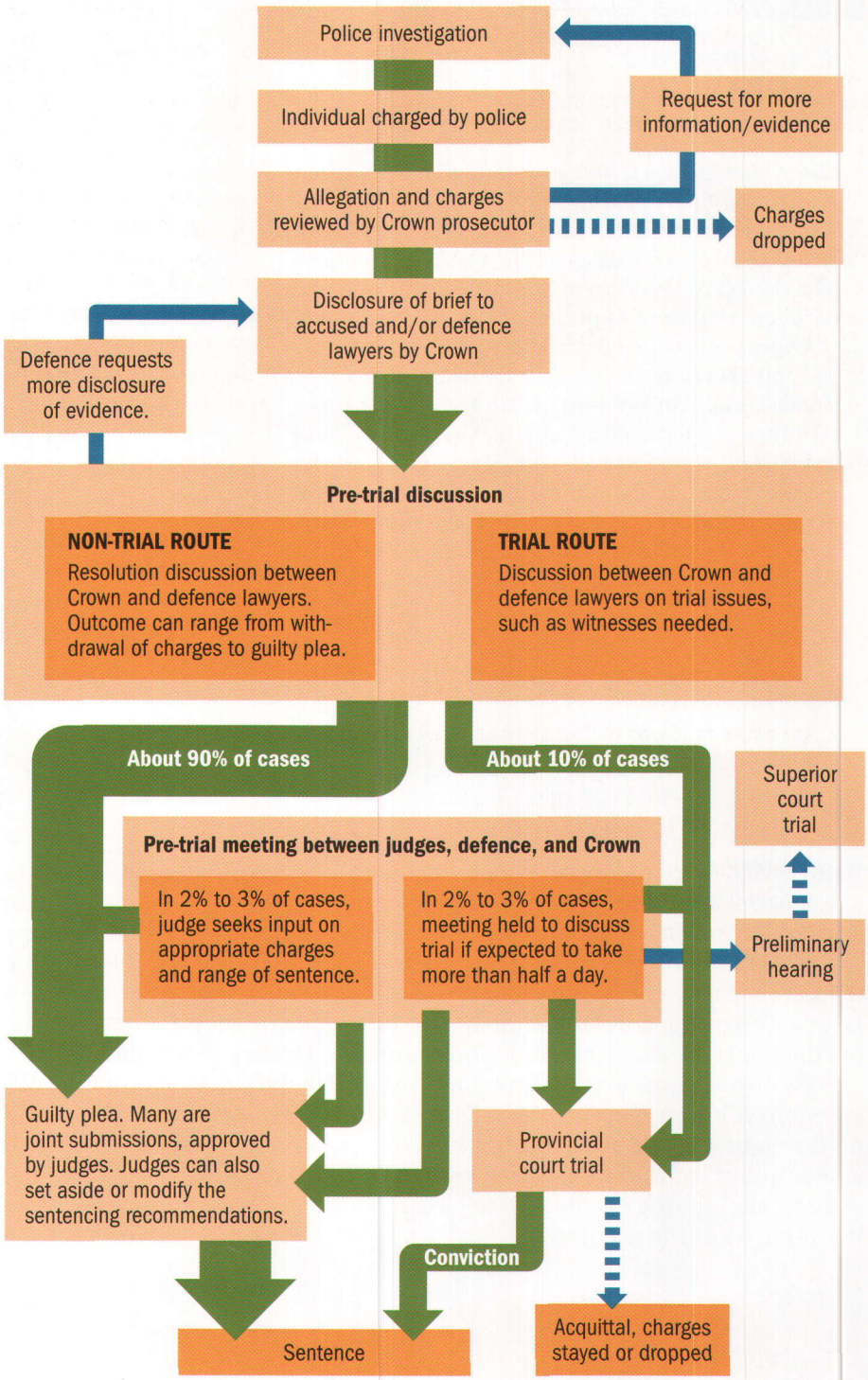

Figure 7-9

This diagram shows the process a case goes through, from the initial police investigation to sentencing.

Plea negotiations are often regarded as compromising justice. The 1993 plea bargain that resulted in a 12-year sentence for Karla Homolka led some experts to question its value and legitimacy. Homolka was sentenced before the public became aware of many of the gruesome facts that were revealed during the trial of her ex-husband Paul Bernardo. (The pair had been accused of torturing and killing several young women.) By court order, testimony in her case could not be reported until his trial was complete. Supporters of the Homolka plea bargain point out that Homolka's evidence, made available through plea negotiations, was needed to establish the strongest possible case against Bernardo (*R. v. Bernardo* (1995)).

Without plea negotiations, the court system would be overwhelmed by the number of cases going to trial. Through such negotiations, justice is served. The Crown obtains a conviction and the accused receives a penalty, although not the maximum one. It can save victims or their families a great deal of suffering. They do not have to take the witness stand and relive their ordeals.

Review Your Understanding (Pages 202 to 211)

1. **What information does a defence lawyer use to prepare the background for a case?**
2. **Why is legal aid an important part of the legal system?**
3. **Why is disclosure an essential part of the criminal justice system?**
4. **How is forensic science used in the criminal justice process?**
5. **Explain the purpose of the DNA data bank.**
6. **What is the purpose of an adjournment?**
7. **On what basis does the *Criminal Code* establish the court in which a case will be tried?**
8. **What is a plea? What percentage of accused Canadians plead guilty?**
9. **(a) Identify the purpose of a preliminary hearing.**
   (b) Under what circumstances would the accused skip a preliminary hearing?
10. **Explain plea negotiation and outline the advantages and disadvantages of the process.**

ISSUE

Should a Suspect Be Forced to Provide Samples for DNA Testing?

Deoxyribonucleic acid (DNA) contains the genetic code of life and is a powerful form of genetic fingerprinting. When a DNA sample is taken from someone, it is turned into an image that is unique to that individual, much like a fingerprint. The chances of any two individuals, except identical twins, having the same DNA image (print) is about one in 10 billion.

Since its discovery in 1984, DNA matching has been used over a thousand times in Canadian courts. Even microscopic traces of blood, bone, hair, saliva, or semen left at the scene of the crime contain DNA.

The importance of DNA testing was seen in the highly publicized case of Guy Paul Morin, who was convicted in 1992 of murdering nine-year-old Christine Jessop, his next-door neighbour (*R. v. Morin* (1993)). Six years earlier, he had been acquitted of the same crime. Following his second trial, he was sentenced

Figure 7-10

This scientist is working with DNA samples, an expensive and delicate operation.

to life imprisonment with no hope of parole for 25 years. In 1995, he was released from prison after DNA testing proved that he had not committed the crime. He received an apology from the Ontario government, and he and his family were awarded $1 250 000 in damages. (See also *Reference Re Milgaard* (1992), page 116.)

Despite its usefulness in solving crimes, DNA testing raises issues about the civil rights of Canadians. In 2000, the *Criminal Code* was changed to require that all persons convicted of serious crimes such as murder and sexual assault provide DNA samples to be kept on file. Crown attorneys can also ask judges for permission to obtain samples from people who have been convicted of lesser crimes. These samples must be given, even if the convicted person refuses to comply.

On One Side

Police consider DNA matching the biggest crime-solving breakthrough of the century. DNA testing can help to solve crimes quickly, and in many cases can eliminate suspects. Canadian police would like to follow the example of the British police force and collect DNA samples from anyone who is charged with a criminal offence. Arrested persons must provide these samples, even though they have not been convicted.

The public also largely supports DNA testing because it seems to increase public safety. Supporters of victims' rights want all suspects of violent crimes to provide DNA samples. A 1995 public opinion poll showed that 88 percent of Canadians support the use of DNA in criminal trials. They believe that since the purpose of DNA evidence is to determine the guilt or innocence of the suspect, there should be no argument about its use.

On the Other Side

Critics argue that compulsory DNA testing infringes upon the *Canadian Charter of Rights and Freedoms*. They feel that the individual's right to protection from unreasonable search and seizure is violated when suspects are forced to provide samples for DNA testing. They maintain compulsory DNA sampling is an invasion of privacy, similar to tapping a telephone or obtaining other evidence without a warrant.

Moreover, controversy surrounds the test itself. Scientists can never say with absolute certainty that two DNA samples are perfectly matched. They can only make a statement of probability. Critics say that more work needs to be done to improve the reliability and accuracy of DNA testing. They fear that juries could be overwhelmed by the scientific evidence of a DNA match. They may overlook other evidence that points to the innocence of accused persons.

The Bottom Line

There is no doubt that DNA tests are a powerful tool in police investigations. Should suspects be forced to provide samples for testing against their wishes? Or should the rights of the individual outweigh those of society?

What Do You Think?

1. **What is meant by genetic fingerprinting?**
2. **Why is the Guy Paul Morin case considered to be so important? What would have happened to him without DNA testing?**
3. **What civil rights issues are raised by DNA testing?**
4. **Why do the police and victims' rights groups support compulsory DNA testing?**
5. **What arguments do the critics of DNA testing present?**
6. **State and explain your position on DNA testing. Use information from this Issue to support your opinion.**

Chapter Review

Chapter Highlights

- Awareness of your legal rights and police powers will protect you.
- When making an arrest, the police must have reasonable grounds that the suspect committed the offence.
- When apprehending a suspect, the police can issue an appearance notice, arrest the suspect, or obtain a warrant.
- Police can use as much force as necessary to prevent an escape.
- Citizens can make an arrest under certain circumstances.
- Police are responsible for their behaviour and conduct when carrying out their duties.
- Police must inform those under arrest of their rights.
- Police must obtain a search warrant to search a private residence.
- Before trial, the accused can apply to be released on bail.
- Some arrested persons can apply for legal aid.
- Prior to a trial by jury, the Crown attorney and the defence meet to review the evidence.
- DNA testing has become an important part of collecting evidence.
- A preliminary hearing enables the provincial court to decide whether there is enough evidence to be tried by a higher court.

Review Key Terms

Name the key terms that are described below.

a) the use of medicine and science to solve legal problems

b) to look for evidence related to a charge

c) a lawyer on duty at the court

d) a document that names the offence with which the accused has been charged

e) a lie detector test

f) setting a trial over for a later date

g) an order to appear in court at a certain time and place

h) a document stating that the accused recognizes that he or she is being charged and promises to appear in court on a certain date

i) to be sent back into custody

j) the process of revealing all evidence to both sides

k) a document giving police the right to search a specific location

l) a written document made under oath by a police officer stating reasonable and probable grounds to believe an offence has been committed

m) the process of encouraging an accused to plead guilty to a lesser charge in hope of receiving a lighter sentence

n) to deprive a person of his or her liberty in order to lay a charge, preserve evidence, or prevent the person from committing another offence

o) a document signed by the accused with conditions to follow

p) a formal document naming the accused, listing the offence, and ordering the arrest

Check Your Knowledge

1. Outline the requirements for a legal arrest.
2. Identify the legal rights of an accused on arrest or detention.
3. Identify the powers of the police with regard to a proper search.
4. Identify the different types of pre-trial release and provide an example of each.

Apply Your Learning

5. Page was a back-seat passenger in a car stopped by police for speeding. When the police noticed several open beer cans near Page, they assumed he was guilty of drinking in public and demanded identification. Page refused to cooperate and became obnoxious and demanded to be let go. The police refused and Page became noisier and began to cause a disturbance. The police then arrested him. A shoving and pushing match then broke out. Page was charged with two counts of assault.
   a) Why was Page charged with assault?
   b) Should Page be found guilty of assault? Explain.

6. *R. v. Van Haarlem* (1991), 64 C.C.C. (3d) 543 (British Columbia Court of Appeal)

Van Haarlem was charged with attempted murder, robbery, and unlawful confinement. As part of his release conditions, he was not to contact any person who had been called as a witness at the preliminary hearing. The following day, by chance, he met an officer whom he had known for many years and who had testified at the preliminary hearing. They agreed not to talk about the case. In the course of their conversation, Van Haarlem made an incriminating remark, indicating that he would have pleaded guilty if not for the fact that an acquaintance had testified against him at the preliminary hearing.

a) For what reason did the accused plead not guilty at the preliminary hearing?
b) Should the incriminating remark evidence be admitted? Why or why not?

7. *R. v. Broyles*, [1991] 3 S.C.R. 595 (Supreme Court of Canada)

Broyles was convicted of second-degree murder. The body of the victim was found under a stairwell seven days after her death. The police arranged for a friend to visit him while he was in custody. They provided the friend with a body-pack recording device. The friend encouraged Broyles to ignore his lawyer's advice to keep silent. The tape recording established that Broyles knew the victim was dead the day that she went missing. On the recording, Broyles admitted, "the cops don't know that I knew she was downstairs." The evidence was admitted to the court and Broyles was convicted. He appealed to the Supreme Court of Canada.

a) On what basis would Broyles appeal his conviction?
b) Were the police justified in their actions in this case? Explain.
c) On the basis of the information provided, why do you think the Supreme Court of Canada allowed the appeal? Explain.

8. *R. v. Smith*, [1991] 1 S.C.R. 714 (Supreme Court of Canada)

Smith, severely beaten in a fight, left the scene but returned with a shotgun and shot the victim in the face and the chest. He surrendered to police. The police read him his rights and Smith indicated he understood them. Before consulting a lawyer, he made a statement in which he admitted the shooting. He said that he was drunk and provoked. After his statement was taken, the police advised Smith that the victim had died. Smith appealed his conviction on the basis that he was not informed on his arrest of the fact that the victim was dead.

a) How would the fact that Smith was drunk and provoked affect the charge laid against him?
b) Did the police proceed properly? Explain.

Communicate Your Understanding

9. In groups, role-play an arrest by outlining the dialogue that should take place between a police officer and a suspect. Select a *Criminal Code* offence that you have previously studied and identify the section number from the Code. Ensure that the requirements of the *Canadian Charter of Rights and Freedoms* are met with your arrest procedure.

10. Adapted from an article in *The Toronto Star*, March 10, 2001, p. A27

A motorist was ordered to pull over by a police officer. He refused and stepped on the gas. A chase took place at twice the speed limit and he went through a red light. Finally, he was cornered by four squad cars. He fell out of the car drunk. His blood–alcohol level was three times above the legal limit. In a plea bargain, the charges of having too much alcohol in his blood and fleeing police were dropped. He pleaded guilty to impaired driving. The *Criminal Code* states that the punishment for impaired driving for a first offender ranges from

a $600 fine to a one- to three-year licence suspension. A plea bargain was negotiated, and the Crown and the defence recommended a $600 fine and a one-year suspension in return for a guilty verdict. The judge considered the following factors: the defendant's apology; he had a steady job; he had not hurt anyone; and he was a first-time offender.

The judge suspended his licence for a year and sentenced him to 30 days. He was allowed to serve his time at home.

Outline the position of the Crown and defence in their plea bargain. Outline the position of the judge with respect to the sentence issued. Write a one-paragraph reaction to this case and how the process of plea bargaining is used in the criminal process.

11. In pairs, select one of the topics below. One student will prepare an argument in favour of the statement and the other student will prepare a counterargument against the statement. Support your arguments with examples. Share your opinions.

a) Police should have the right to go on strike.
b) Everyone in Canada should be photographed and fingerprinted to make law enforcement easier.
c) Police should not carry guns except under special circumstances.
d) Anyone with a criminal record should not be released on bail.
e) Police should be forbidden from engaging in high-speed chases.

Develop Your Thinking

12. Assume that you are a member of a civil liberties association that wants to ensure that individual rights are protected at all costs. Outline the legal rights that you feel must be given to an accused person. Now, assume you are the head of a police services board that wants to make sure that society is protected at all costs. Outline the types of actions that you feel police are justified in using to protect society. Use examples from the text or other sources to support each position.

13. A police officer was demoted for failing to meet quotas (fixed numbers) for laying charges. The officer was expected to lay four *Criminal Code* charges, three liquor-licence charges, and five radar-related traffic charges each month. Should police officers have a quota system? Explain.