

## OFFENCES

## TABLE OF CONTENTS

<b>PART I.....</b>	<b>9</b>
<b>A. Attempts: s.24.....</b>	<b>9</b>
 <b>PART III: FIREARMS AND OTHER WEAPONS.....</b>	<b>9</b>
<b>A. Is it a Real and operational Firearm? .....</b>	<b>9</b>
<b>B. Unauthorized Transfer of a Firearm: Section 99(1) .....</b>	<b>10</b>
<b>C. Using Firearm in Commission of Offence: Section 85.....</b>	<b>11</b>
<b>D. Weapons Dangerous, Section 88(1) .....</b>	<b>11</b>
i. Actus Reus .....	11
ii. Mens Rea .....	11
<b>E. Possession of a Weapon or Firearm Obtained by Commission of     Offence: S. 96(2) .....</b>	<b>12</b>
 <b>PART IV: OFFENCES AGAINST THE ADMINISTRATION OF LAW AND JUSTICE .....</b>	<b>13</b>

<b>A. Breach of Trust by Public Officer: s.122 .....</b>	<b>13</b>
<b>B. Obstruction of Justice: s.139 .....</b>	<b>14</b>
<b>C. Fail to Appear: s.145(5).....</b>	<b>14</b>
i. Proof of Identity .....	15
 <b>PART V: SEXUAL OFFENCES, PUBLIC MORALS, AND DISORDERLY</b>	
<b>CONDUCT .....</b>	<b>15</b>
<b>A. Sexual Interference: s.151 .....</b>	<b>15</b>
i. Elements of the Offence .....	15
<b>B. Invitation to Sexual Touching: S.152.....</b>	<b>16</b>
i. The Defence of Honest but Mistaken Belief in Age: s.150.1(4) ....	18
<b>C. Sexual Exploitation: s.153.....</b>	<b>20</b>
<b>D. Voyeurism: s.162 .....</b>	<b>20</b>
<b>E. Distribute Intimate Image: s.162.1 .....</b>	<b>22</b>
<b>F. Child pornography: s.163.....</b>	<b>22</b>
i. Definition of Child Pornography.....	22
ii. Mens Rea .....	22
iii. Advocating or Counselling Sexual Activity with Children: S.163.1(b)	23
iv. Making Child Pornography Available: s.163.1(3).....	23
v. Legitimate Purpose Defence: s.163.1(6)(a) .....	23
vi. The Private use Exception .....	25

<b>G. Child Luring: s.172.1 .....</b>	<b>25</b>
<b>H. Agreement of Sexual Offence Against child: s.172.2.....</b>	<b>27</b>
<b>PART VI: INVASION OF PRIVACY .....</b>	<b>28</b>
<b>A. S.193: Disclosure of Information.....</b>	<b>28</b>
<b>PART VIII: OFFENCES AGAINST THE PERSON AND REPUTATION .</b>	<b>28</b>
<b>A. Fail to Provide the Necessaries: s.215 .....</b>	<b>28</b>
i. General Principles.....	28
ii. Section 215(2) .....	29
iii. Section 215(2)(b).....	29
i. Harm and Necessaries - In respect of Children .....	30
ii. In respect of Accused in Police Custody.....	31
iii. The Lawful Excuse .....	31
<b>B. Criminal Negligence: s.219 .....</b>	<b>32</b>
<b>C. Criminal Negligence Causing Death: s.220 .....</b>	<b>33</b>
<b>D. Criminal Negligence Causing Bodily Harm: S. 221 .....</b>	<b>34</b>
<b>E. Unlawful Act Manslaughter: s.222(5).....</b>	<b>34</b>
<b>F. Second Degree Murder: s.229 .....</b>	<b>36</b>
i. Mens Rea under s.229(a)(i).....	36
ii. Mens Rea under s.229(a)(ii) .....	36
iii. Mens Rea under s.229(b) .....	38

iv. Mens Rea and Rolled Up Instruction Issues .....	38
v. Causation.....	39
vi. Party Liability .....	40
<b>G. First degree murder: s.231 .....</b>	<b>40</b>
i. Planned and Deliberate Murder: s.231(2) .....	40
ii. Transferred intent .....	41
iii. Constructive First Degree Murder: s.231(4) – (6.2) .....	42
<b>H. Party liability in murder .....</b>	<b>47</b>
i. Co-Principals to Murder .....	47
ii. Aiding and Abetting a Murder .....	47
iv. Aiding and Abetting a First Degree Murder .....	48
v. Common Intention Murder .....	49
<b>I. Manslaughter: S.234 .....</b>	<b>49</b>
i. Party Liability for Manslaughter .....	49
ii. Causation.....	50
<b>J. Attempt Murder .....</b>	<b>51</b>
<b>K. Criminal Harassment: s.264(1) .....</b>	<b>52</b>
<b>L. Assault: s.265(1) .....</b>	<b>53</b>
i. Defence of Consent .....	53
ii. Defence of exercise of authority .....	53
<b>M. Assault Causing Bodily Harm: S.267(B) .....</b>	<b>54</b>
<b>N. Assault with a Weapon: s.267(a) .....</b>	<b>54</b>

<b>O. Aggravated Assault, S. 268.....</b>	<b>55</b>
i. Party Liability to Aggravated Assault.....	55
<b>P. Sexual Assault: s.271 .....</b>	<b>56</b>
i. The Test.....	56
ii. Element #1: Touching a Person's Body .....	56
iii. Element #2: In circumstances of a Sexual Nature .....	56
iv. Element #3: Without Consent .....	57
i. General Principles .....	63
ii. Vitiating of Consent Based on Bodily Harm or Threats .....	63
iii. Vitiating of Consent based on Fraud .....	63
iv. Defence of Sexsomnia .....	66
v. Delayed Disclosure .....	66
vi. Indigenous Victims .....	66
<b>Q. Forcible Confinement: s.279(2) .....</b>	<b>67</b>
<b>R. Human Trafficking: s.279.01 .....</b>	<b>67</b>
i. Evidence of Violence.....	70
<b>S. Procuring OR HARBOURING: s. 286.3 .....</b>	<b>70</b>
<b>T. Advertising Sexual Services: S.286.4.....</b>	<b>72</b>
<b>U. Hate Speech: s.319(2) .....</b>	<b>72</b>
<b>PART VIII.1: OFFENCES RELATING TO CONVEYANCES.....</b>	<b>73</b>
<b>A. Dangerous Driving: s.320.13.....</b>	<b>73</b>

i. Actus Reus .....	73
ii. Mens Rea .....	74
iii. Analyzing the Evidence.....	76
iv. Standard of Review .....	77
<b>B. Street Racing.....</b>	<b>78</b>
<b>C. Impaired Driving: s.320.14 .....</b>	<b>78</b>
<b>D. Refusals: s.320.15 .....</b>	<b>79</b>
 <b>PART IX: OFFENCES AGAINST RIGHTS OF PROPERTY .....</b>	 <b>79</b>
A. Robbery: S.343 .....	79
B. False Information / Harrasing communications: s.372 .....	80
C. Selling/possessing Counterfeit Mark: s.376(2)(b) .....	80
D. Criminal Interest Rates: s.347 .....	80
E. Fraud: S.380 .....	81
 <b>PART XI: WILFUL AND FORBIDDEN ACTS IN RESPECT OF CERTAIN PROPERTY .....</b>	 <b>82</b>
A. Arson: s.433 .....	82
 <b>PART XIII: ATTEMPTS, CONSPIRACIES, ACCESSORIES .....</b>	 <b>83</b>
A. Accessory after the fact: s.463.....	83
B. Attempts: S.463 .....	84
i. Actus Reus .....	84

ii. Mens Rea .....	85
<b>C. Conspiracy: S.465(1).....</b>	<b>85</b>
i. General Principles .....	85
ii. Actus Reus .....	85
iii. Party Liability to a Conspiracy .....	86
iv. Evidentiary Issues .....	86
<b>D. Criminal organization: s.467.1(1) .....</b>	<b>86</b>
i. General Principles .....	86
<b>PART XXII: PROCURING ATTENDANCE .....</b>	<b>88</b>
<b>A. Contempt of Court: s.708(1).....</b>	<b>88</b>
<b>PART XXIII: SENTENCING .....</b>	<b>88</b>
<b>A. Breach of Probation: S. 733.1 .....</b>	<b>88</b>
<b>CONTROLLED DRUGS AND SUBSTANCES ACT .....</b>	<b>89</b>
<b>A. Possession - General Principles .....</b>	<b>89</b>
i. Exemption for Medical or Scientific Purposes: s. 55 and 56 of the CDSA .....	91
ii. Exemption for licensing .....	91
iii. Personal Possession.....	92
iv. Constructive Possession.....	92
v. Willful Blindness .....	93

vi. Examples from the Caselaw .....	93
<b>B. Possession for the Purpose of Trafficking.....</b>	<b>94</b>
<b>C. Trafficking .....</b>	<b>95</b>
<b>D. Importing .....</b>	<b>96</b>
<b>E. Exemption from Liability .....</b>	<b>97</b>
<b>F. Nature of the Substance.....</b>	<b>97</b>
<b>HIGHWAY TRAFFIC ACT OFFENCES OFFENCES.....</b>	<b>97</b>
<b>A. Drive no Insurance .....</b>	<b>97</b>
<b>PROCEEDS OF CRIME AND TERRORIST FINANCING ACT .....</b>	<b>97</b>
<b>A. Laundering Proceeds of Crime .....</b>	<b>98</b>
<b>INCOME TAX ACT OFFENCES.....</b>	<b>98</b>
<b>A. Tax Evasion.....</b>	<b>98</b>



## PART I

### A. ATTEMPTS: S.24

It is doubtful that “attempting to aid an offence” is a recognized form of criminal liability in Canada: *R v Grewal*, [2019 ONCA 630](#), at para 33

The gravity of the harm associated with an immature attempt is arguably less than with a mature completed offence. On the other hand, moral culpability is often measured by an actor's state of mind, which does not differ, in most cases at least, between the preliminary and the completed offence. Often, the fact that the crime is incomplete is not due to any want of effort on the part of the accused, nor any lesser degree of responsibility.

It is reasonable to conclude that Parliament had in mind this distinction between inchoate and completed crimes when it enacted the punishment provisions for attempts in s. 463(b). There, it set the maximum for attempts at "one-half of the longest term" to which a person who is guilty of the completed offence is liable: *R v Marshall*, [2021 ONCA 28](#), at paras 60-61

## PART III: FIREARMS AND OTHER WEAPONS

For a review of the element of possession, see Drug Offences, Possession

### A. IS IT A REAL AND OPERATIONAL FIREARM?

For the test to determine whether circumstantial evidence proves that a real firearm was used, see: *R v Richards*, 2001 CanLII 21219 (Ont CA) and *R v Charbonneau*, 2004 CanLII 9527 (Ont CA)

The question of whether a gun is a “firearm”, rather than merely an imitation gun or a real but non-functioning weapon, can be determined circumstantially. Relevant factors may include whether the accused loaded the weapon, cocked the weapon, or otherwise used the weapon in such a way that its operability could be inferred:: *R v Bzezi*, [2024 ONCA 530](#), at paras 38-40

Where an inoperable gun is used in the commission of an offence, such as robbery, it must be able to be adapted for use in the commission of that offence to come within the definition of “firearm.” On the other hand, where the offence is possession of the gun itself, the adaptation period is extended because the gun does not have to be usable on the spot. The evil that is targeted by the section is possession that is dangerous to the public: *R v Morris*, [2023 ONCA 816](#), at para 11

Where the firearm has a missing part that is necessary to render the firearm operable, the missing part must be easily or readily obtainable. In analyzing the evidence on this issue, the trial judge is entitled to rely on the common practice today of using internet searches and YouTube instruction videos. In *Morris*, the Court of Appeal upheld the trial judge’s decision finding that the missing part, a firearm pin, was obtainable within three weeks using the above methods, and was therefore easily or readily obtainable: *R v Morris*, [2023 ONCA 816](#), at paras 23-26

If the gun is complete and capable of firing when loaded, then it should be considered a firearm: *R v Donawa*, [2024 ONCA 279](#), at para 7

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## **B. UNAUTHORIZED TRANSFER OF A FIREARM: [SECTION 99\(1\)](#)**

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The meaning of “transfer” in [s. 84\(1\)](#) does not include “offer to purchase” a firearm: *R v Bienvenue*, [2016 ONCA 865](#) at para 5

The offence of trafficking by offer is made out if the accused intends to make an offer that will be taken as a genuine offer by the recipient. The Crown is not required to prove that the accused actually intended to go through with the offer and sell or otherwise provide the thing that is offered. actual access to a firearm is not an element of the offence under s. 99: *R v Hersi*, [2018 ONCA 1082](#), at paras 4, 8

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## C. USING FIREARM IN COMMISSION OF OFFENCE: SECTION 85

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In order to sustain a conviction under section 85(2), the Crown must prove beyond a reasonable doubt that the firearm was actually used to facilitate the commission of the predicate offence; mere possession of a firearm is insufficient: *R v Andrade*, 2015 ONCA 499 at paras 30, 33-37

As a precondition, the Crown must prove that the accused committed the predicate offence: *Andrade* at para 29

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## D. WEAPONS DANGEROUS, SECTION 88(1)

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### i. ACTUS REUS

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The actus reus is made out upon establishing that the accused possessed the weapon: *R v Andrade*, 2015 ONCA 499 at para 36

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### ii. MENS REA

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S. 88(1) is a “specific intent” offence requiring proof that the appellant’s subjective purpose in possessing the weapon was objectively dangerous to the public peace: *R v Andrade*, 2015 ONCA 499 at paras 15, 35

The trier of fact must find that the appellant possessed the weapon for a purpose dangerous to the public peace – not just for a dangerous purpose. The purpose must be determined at the instant of time which preceded the use of the weapon: *R v Budhoo*, 2015 ONCA 912 at paras 72-73

In other words, the Crown must prove the accused had possession of the weapon and formed the intention to use it for a dangerous purpose prior to its actual use: *R v Horner*, 2018 ONCA 971, at para 21

That being said, accused persons who initially possess a weapon with a non-dangerous purpose may be convicted if their purpose subsequently becomes dangerous: *Horner* at para 22

The fact that a weapon was used in a manner dangerous to the public peace does itself constitute the offence - but the formation of the unlawful purpose may be inferred from the circumstances in which the weapon was used: *R v Budhoo*, [2015 ONCA 912](#) at para 73

Possession of a weapon for protection can constitute unlawful possession for a dangerous purpose where the perceived attack is avoidable: *R v Bilodeau*, [2024 ABCA 148](#), at para 27 aff'd at [2025 SCC 2](#)

It is a purpose dangerous to the public peace to intentionally threaten to do an act which is likely to cause harm or puts another person in fear of harm. Similarly, the intention to possess a weapon for the purpose of threatening another person satisfies the purpose dangerous requirement: *Horner* at para 23

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#### **E. POSSESSION OF A WEAPON OR FIREARM OBTAINED BY COMMISSION OF OFFENCE: [S. 96\(2\)](#)**

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The elements of the offence are:

1. The accused was in possession of a firearm
2. The firearm was obtained by crime; and
3. The accused knew or was wilfully blind as to whether that the firearm had been obtained by crime: *R v Jean*, [2016 ONCA 137](#) at paras 10-11

The knowledge that the weapon was obtained by crime requires more than that the accused knows that his possession is illegal (e.g., because he does not have a valid license. The accused must:

1. know that the firearm was "obtained" by the commission of an offence that he committed (e.g., theft); OR
2. he must know that he is obtaining from another who obtained the firearm by the commission of an offence (e.g., knowing purchasing from someone he knows stole the firearm: *R v Jean*, [2016 ONCA 137](#) at para 14

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## PART IV: OFFENCES AGAINST THE ADMINISTRATION OF LAW AND JUSTICE

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### A. BREACH OF TRUST BY PUBLIC OFFICER: S.122

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Section 122 of the Criminal Code provides:

Every official who, in connection with the duties of his office, commits fraud or a breach of trust is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, whether or not the fraud or breach of trust would be an offence if it were committed in relation to a private person.

The elements of the offence of breach of trust by a public officer are as follows:

- (1) The accused is an official;
- (2) The accused was acting in connection with the duties of his or her office;
- (3) The accused breached the standard of responsibility and conduct demanded of him or her by the nature of the office;
- (4) The conduct of the accused represented a serious and marked departure from the standards expected of an individual in the accused's position of public trust; and
- (5) The accused acted with the intention to use his or her public office for a purpose other than the public good, for example, for a dishonest, partial, corrupt, or oppressive purpose: *R v Upjohn*, [2018 ONCA 1059](#), at para 6; *R v Darnley*, [2020 ONCA 179](#), at para 8; *R v Petrolo*, [2021 ONCA 498](#), at para 40

Historically, courts have used the term “motive” when describing this purpose element. In truth, purpose may not be the same as motive. For example, a person's purpose in using corporate resources may be to complete work on their property, but their motive may be financial: *R v Darnley*, [2020 ONCA 179](#), at para 46

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## **B. OBSTRUCTION OF JUSTICE: S.139**

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The essential elements of obstruct justice are:

- 1) The accused must have done enough for there to be a risk, without any further action by her, that injustice will result; and,
- 2) The attempt by the accused to obstruct justice must have been wilful: *R v Petrolo*, [2021 ONCA 498](#), at para 41

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## **C. FAIL TO APPEAR: S.145(5)**

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Section 145(5) makes it an offence when a person named in a promise to appear fails to appear at court or for fingerprinting as set out therein.

The provision allows for a defence of lawful excuse, the proof of which lies on the accused.

It also requires that the promise to appear must have been confirmed by a justice. The confirmation process entails accepting, approving and verifying that the promise to appear complies with s. 501(4), including the requirement of service on the accused: *R v St. Pierre*, [2016 ONCA 173](#) at para 7

Section 145(9) provides that a certificate of the clerk or judge of the court before which the accused fails to attend, or person in charge of the place the accused failed to attend for the Identification of Criminals Act, is evidence of the statements included in the certificate.

For these offences, s. 145(9) sets out that those statements are that the accused was named in the promise to appear, that the promise to appear was confirmed by a justice under s. 508, and that the accused failed to appear as stated therein: *St. Pierre* at para 8

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### **i. PROOF OF IDENTITY**

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The onus is on the Crown to prove (or in the case of a directed verdict, to present some evidence) that the person named in the information and before the court is the person who was the subject of the promise to appear.

It is not essential that the original arresting officer provide in-court identification of the accused where other circumstantial evidence provides evidence on the issue: *St. Pierre* at para 9

In *St. Pierre*, for example, the Court of Appeal held that the following evidence, taken together, afforded some evidence that the accused was the person identified in the promise to appear, sufficient to dismiss a motion for a directed verdict:

- The fact that the same name and date of birth were listed on the promise to appear and the information charging the accused with failing to attend (para 10)
- the fact that the accused turned himself in on his own volition for an outstanding warrant for failing to attend court (para 11)
- the fact that the accused conceded confirmation of the promise to appear "effectively accepting that he was named in a promise to appear and that the promise to appear was served on him" (para 12)
- the fact that the certificated tendered at trial demonstrate that the accused was named in the promise to appear, the promise to appear was confirmed by a justice, and that he failed to attend court as required (para 12)

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## **PART V: SEXUAL OFFENCES, PUBLIC MORALS, AND DISORDERLY CONDUCT**

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### **A. SEXUAL INTERFERENCE: S.151**

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#### **i. ELEMENTS OF THE OFFENCE**

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Exploitation is not a requirement for the offence of sexual interference. Overt indicia of exploitation may diminish the credibility of an accused's purported

mistaken belief in the complainant's age, or the reasonableness of the steps taken by that accused, but they are not required for the offence itself: *R v George*, [2017 SCC 38](#)

The *mens rea* for a sexual offence against a minor requires that the Crown prove beyond a reasonable doubt that (1) the accused did not take all reasonable steps to determine the complainant's age; and (2) the accused believed the complainant was underage; *R v Basso*, [2024 ONCA 168](#), at para 38. For a step-by-step breakdown of the analysis, see the summary of the jurisprudence in *R v Carbone*, [2020 ONCA 394](#) below

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## **B. INVITATION TO SEXUAL TOUCHING: S.152**

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The elements of the offence are:

- That the complainant was under 16;
- the accused invited, counselled, or incited the complainant to touch him; and,
- the proposed touching was for a sexual purpose.

The Crown does not have to prove that the complainant actually touched the accused for a sexual purpose. An invitation to touch includes acts and/or words by which an accused requests, suggests, or otherwise incites or encourages the complainant to touch him for a sexual purpose. The invitation may be express or implied.

The offence of invitation to sexual touching does not require the accused to initiate the communication or activity alleged. It is enough that the accused did and/or said something in the course of his interaction with the complainant that amounted to an invitation to the complainant to touch the accused for a sexual purpose. The invitation, incitement, or counselling may come in the form of an agreement to exchange something for sexual services to be provided by the complainant: *R v Carbone*, [2020 ONCA 394](#), at paras 60-62

Section 150.1(4) creates a “defence” based on a mistaken belief that the complainant was 16 or older if, and only if, an accused took “all reasonable steps” to ascertain the complainant’s age:

The Crown cannot prove the requisite *mens rea* for offences set out in s. 150.1(4) by disproving the defence created by that section. To convict, the Crown must



prove the accused had the requisite state of mind with respect to the complainant's underage status. This includes recklessness as to the age of the complainant.

The trial judge ought to proceed along the following lines of inquiry:

Step 1: The trial judge will first determine whether there is an air of reality to the s. 150.1(4) defence, that is, is there a basis in the evidence to support the claim the accused believed the complainant was the required age and took all reasonable steps to determine the complainant's age.

Step 2: If the answer to step 1 is no, the s. 150.1(4) defence is not in play, and any claim the accused believed the complainant was the required age is removed from the evidentiary mix. If the answer at step 1 is yes, the trial judge will decide whether the Crown has negated the defence by proving beyond a reasonable doubt, either that the accused did not believe the complainant was the required age, or did not take all reasonable steps to determine her age. If the Crown fails to negate the defence, the accused will be acquitted. If the Crown negates the defence, the judge will go on to step 3.

Step 3: The trial judge will consider, having determined there is no basis for the claim the accused believed the complainant was the required age, whether the Crown has proved the accused believed (or was wilfully blind) the complainant was underage, or was reckless as to her underage status. If the answer is yes, the trial judge will convict. If the answer is no, the trial judge will acquit.

Recklessness includes a failure to advert to the age of the complainant, save in those cases in which the circumstances did not permit the inference that in proceeding without regard to the complainant's age, the accused decided to treat her age as irrelevant to his conduct. While one can imagine circumstances in which the failure to advert to the age of the complainant should not be characterized as a decision to treat the age of the complainant as irrelevant and take the risk, those circumstances will seldom occur in the real world. For practical purposes, those rare circumstances, in which the failure to turn one's mind to the age of the complainant does not reflect the decision to take a risk about the complainant's age, will be the same rare circumstances in which the reasonable steps inquiry in s. 150.1(4) will be satisfied even though the accused took no active steps to determine the complainant's age: *R v Carbone*, [2020 ONCA 394](#), at paras 128-131

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**i. THE DEFENCE OF HONEST BUT MISTAKEN BELIEF IN AGE: S.150.1(4)**

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Where a mistake of age defence is raised under s. 150.1(4), the accused must point to some evidence that he or she honestly believed the complainant was 16 years or more and that he or she took all reasonable steps to ascertain the complainant's age. If the accused meets this evidentiary burden, the Crown is required to prove beyond a reasonable doubt that the accused did not have the requisite belief or that he or she failed to take all reasonable steps to ascertain the complainant's age: *R v Chapman*, 2016 ONCA 310 para 36

While the law does not require the accused's testimony to establish an air of reality to the defence of honest but mistaken belief in consent, the air of reality of the defence may be negated by his testimony (e.g., where he asserts he had no sexual contact of any kind with the complainant): *R v. ADH*, 2015 ONCA 690

The jurisprudence provides that the requirement set out in s. 150.1(4) is an earnest inquiry or some other compelling factor which negates the need for an inquiry. Whether an accused took all reasonable steps is fact-specific and depends on the circumstances: *Chapman* at paras 28-30. The more reasonable an accused's perception of the complainant's age, the fewer steps reasonably required of them: *R v George*, 2017 SCC 38

There must be some compelling factor that obviates the need for an enquiry by the accused and the accused's subjective belief as to the complainant's age is relevant but not determinative of this question: *Chapman* at para 31

The word "all" in respect of referencing "reasonable steps" is important. While it is only necessary for the accused to create a reasonable doubt, the evidence which he uses to establish such doubt must be directed to the word ["all"] as much as to any other part of the subsection: *Chapman* at para 32

One important part of the analysis is whether the complainants had portrayed themselves as "older than 16," including their age-related appearance, statements, behaviour, and conduct: *Chapman* at para 33

What steps would have been reasonable for the accused to take depends on the circumstances. Sometimes a visual observation alone may suffice. Whether further steps would be reasonable would depend upon the apparent indicia of the complainant's age, and the accused's knowledge of same, including: the

accused's knowledge of the complainant's physical appearance and behaviour; the ages and appearance of others in whose company the complainant is found; the activities engaged in either by the complainant individually, or as part of a group; the times, places, and other circumstances in which the complainant and her conduct are observed by the accused, and the age differential between the appellant and the complainant: *Chapman* at paras 41, 42, 43

Note, however, that a reasonable person would appreciate that underage children may apply make-up and dress and act so as to appear older: *Chapman* at para 53

Evidence as to the accused's subjective state of mind is relevant but not conclusive because an accused may believe that he or she has taken all reasonable steps only to find that the trial judge or jury may find differently: *Chapman* at para 41

In order to avail himself of the defence, an accused need not always expressly question a complainant about his or her age, or otherwise seek and obtain conclusive proof of age: *Chapman* at para 50

Reasonable steps must precede the sexual activity but the evidence to prove reasonable steps need not. When determining the relevance of evidence, both its purpose and its timing must be considered. Evidence properly informing the credibility or reliability of any witness, even if that evidence arose after the sexual activity in question, may be considered by the trier of fact. Similarly, evidence demonstrating the reasonableness of the accused person's perception of the complainant's age before sexual contact is relevant, even if that evidence happens to arise after the sexual activity or was not known to the accused before the sexual activity: *R v George*, [2017 SCC 38](#)

In some cases, an accused's visual observation of the complainant may be enough to constitute reasonable steps: *R. v. Duran*, 2013 ONCA 343, at para. 52:

In most cases, an accused who never turns their mind to the age of the other person is properly characterized as reckless. Reckless indifference also describes a subjective state of mind, a choice to treat age as irrelevant and to assume the risk associated with that choice: *R v Alexozai*, [2021 ONCA 633](#), at para 42

The law has long recognized the admissibility of a witness's inference about apparent age. It is no more "impressionistic" or improperly speculative for a judge to draw such an inference than it is for a witness to do so: *R v KS*, [2019 ONCA 474](#), at para 9

In *Saliba*, the Court of Appeal found that the trial judge was correct to admit evidence that, in a previous case, the accused had failed to inquire about the age of another complainant, who had lied to him about her age. This was relevant to the “reasonable steps” inquiry in respect of the complainant in the present case: *R v Saliba*, [2019 ONCA 22](#), at paras 6-7

The Crown may negate the defence of mistaken belief in age in either of two ways. The Crown may prove that the accused did not honestly believe that the other person was at least 18 years old at the time of the offence. Or the Crown may prove that, despite the accused’s claim that they honestly believed that the other person was at least 18, the accused did not take all reasonable steps to ascertain the other person’s age: *R v Alexozai*, [2021 ONCA 633](#), at para 44

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### **C. SEXUAL EXPLOITATION: S.153**

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It is not necessary for the Crown to prove that the complainant herself viewed the relationship as one of trust. It is sufficient if, having regard to the age differential between the young person and the accused, the evolution of their relationship, and the status of the accused in relation to the young person, the court is satisfied beyond a reasonable doubt that the accused was in a position of trust: *R v RS*, [2023 ONCA 626](#), at para 42

Although a 16-year-old is not entirely incapable of consenting to sex, it is arguable that because of her age she is legally incapable of consenting to sex in exchange for money. Pursuant to s. 153, a 16-year-old is incapable of consenting to sexual activity within an exploitive relationship. The relationship between the person who obtains sexual services for consideration and the sex worker is one that Parliament has chosen to treat as inherently exploitive. It is therefore possible that a complainant could not consent to what was transpiring: *R v Joseph*, [2021 ONCA 733](#), at para 100

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### **D. VOYEURISM: S.162**

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Section [162\(1\)\(a\)](#) requires proof that the accused surreptitiously observed or recorded the subject:

- (1) Intentionally
- (2) Surreptitiously
- (3) In circumstances that give rise to a reasonable expectation of privacy and
- (4) In a place in which a person can reasonably be expected to be nude.

The fourth factor has no implicit temporal component. In other words, the Crown need not establish that a person could reasonably be expected to be nude in the place at the specific time when the photos were taken. Nor need the Crown prove that the person was actually nude, exposing intimate parts of his or her body, or engaged in sexual activity; it suffices if they are in a place where a person may reasonably be expected to be in such a state, such as a changing room, toilet, shower stall, or bedroom. Finally, the Crown also need not prove that the accused acted for a sexual purpose. *R v Downes*, [2023 SCC 6](#)

Section [162\(1\)\(b\)](#) requires proof of the following elements:

- [1] The accused observed or recorded the subject;
- [2] The accused's observation or recording was done surreptitiously;
- [3] The subject was in circumstances that gave rise to a reasonable expectation of privacy;
- [4] The subject was nude or exposing sexual parts of her body or engaged in sexual activity; and
- [5] The observation or recording of the subject was done for the purpose of recording them in such a state.

Relevant Factors to consider include:

- (1) the location the person was in when she was observed or recorded;
- (2) the nature of the impugned conduct (whether it consisted of observation or recording);
- (3) awareness of or consent to potential observation or recording;
- (4) the manner in which the observation or recording was done;
- (5) the subject matter or content of the observation or recording;
- (6) any rules, regulations or policies that governed the observation or recording in question;
- (7) the relationship between the person who was observed or recorded and the person who did the observing or recording;
- (8) the purpose for which the observation or recording was done; and
- (9) the personal attributes of the person who was observed or recorded.

For more on the offence of voyeurism, see *R v Jarvis*, 2019 SCC 10; *R v Trinchì*, [2019 ONCA 356](#)

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## **E. DISTRIBUTE INTIMATE IMAGE: S.162.1**

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Ss. 162.1(1) and (2), criminalize the non-consensual visual sharing of an intimate image is prohibited – regardless of whether the intimate image being shared has the “capability of reproduction”. Further, the natural or ordinary meaning of “visual recording” includes a FaceTime call. there is nothing in s. 162.1 to suggest that the intimate image being shared must be capable of reproduction. The ordinary meaning of “visual recording” does not require proof that the intimate image that was shared is capable of reproduction: *R v Walsh*, [2021 ONCA 43](#), at paras 59-74

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## **F. CHILD PORNOGRAPHY: S.163**

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### **i. DEFINITION OF CHILD PORNOGRAPHY**

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Electronic communications between individuals, including private text messages, fall within the definition of “any written material” in ss. 163.1(1), and are therefore possible of constituting child pornography: *R v McSween*, [2020 ONCA 343](#), at paras 44-55

Section 163.1(1)(c) requires the court to ask whether the respondent’s text messages described sexual activity with a person under 18 for a sexual purpose. This requires the court to ask whether a reasonable viewer, looking at the material objectively, and in context, would see its dominate characteristic as the description of sexual activity with a person under 18 for a sexual purpose: *McSween* at para 74

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### **ii. MENS REA**

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The Crown must prove the intention to compose, assemble, or create the written materials (in this case by text messages), knowledge of the nature of the written materials, and the intention to send them to someone else. Motive is irrelevant: *R v McSween*, [2020 ONCA 343](#), at paras 84-93

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**iii. ADVOCATING OR COUNSELLING SEXUAL ACTIVITY WITH CHILDREN:  
S.163.1(B)**

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Section 163.1(1)(b) requires courts to determine if the material, viewed objectively, advocates or counsels sexual activity with a person under the age of 18. At stake is not whether the maker or possessor of the material intended to advocate or counsel the crime, but whether the material, viewed objectively, advocates or counsels the crime ... The mere description of the criminal act is not caught. Rather, the prohibition is against material that, viewed objectively, sends the message that sex with children can and should be pursued: *R v McSween*, [2020 ONCA 343](#), at para 64

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**iv. MAKING CHILD PORNOGRAPHY AVAILABLE: S.163.1(3)**

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In a prosecution under s. 163.1(3) for making available child pornography, the Crown must prove that the accused had knowledge that the pornographic material was being made available. In the context of a file sharing program, the *mens rea* element of making available child pornography requires proof of the intent to make computer files containing child pornography available to others using that program or actual knowledge, or wilful blindness to the fact, that the file sharing program makes files available to others. There is no additional requirement on the Crown to prove that the accused knowingly, by some positive act, facilitated the availability of the material: *R v Capancioni*, [2018 ONCA 173](#) at para 44

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**v. LEGITIMATE PURPOSE DEFENCE: S.163.1(6)(A)**

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Section 163.1(6) of the *Criminal Code* provides a defence to the offences of accessing and possessing child pornography where the accused:

- (a) has a legitimate purpose related to the administration of justice or to science, medicine, education or art; and
- (b) does not pose an undue risk of harm to persons under the age of eighteen years.

On the “legitimate purpose” prong of the defence, the court must evaluate: (1) whether it is left with a reasonable doubt that the accused, from a subjective standpoint, had a genuine, good faith reason for accessing and/or possessing child pornography for one of the listed grounds; and (2) whether, based on all of the circumstances, a reasonable person would conclude that (i) there is an objective connection between the accused’s actions and his or her stated purpose, and (ii) there is an objective relationship between his or her stated purpose and one of the protected grounds. Accessing or possessing child pornography need not be “necessary” to the accused’s legitimate purpose related to the administration of justice, science, medicine or art, in order for the accused to come within the s. 163.1(6) defence.

On the “undue risk of harm” prong of the defence, the court must consider whether the accused’s actions pose an “undue risk of harm to persons under the age of eighteen years.” If the court is satisfied beyond a reasonable doubt that the accused’s actions pose a significant risk of objectively ascertainable harm to children, the accused’s s. 163.1(6) defence will fail.

Where an accused accesses and/or possesses child pornography for a legitimate purpose enumerated in s. 163.1(6)(a), but with a corresponding personal interest in the material, this may increase the risk of harm to children. In particular, accessing and/or possessing child pornography in this context risks reinforcing cognitive distortions in the viewer and possibly inciting future offending; contributing to the market for child pornography and the abuse of children in producing such pornography; and re-victimizing the subjects of the pornography by subjecting them to the sexualized gaze of the viewer: *R v Kiefer*, [2018 ONCA 925](#), at paras 12-13, 44, 51

Section 163.1(6) does not provide a defence where an accused accesses and possesses child pornography for both a legitimate and an illegitimate purpose. The only purpose must be a legitimate one: *Kiefer* at paras 32-39

The concept of “undue risk” has no role to play in determining whether written material amounts to child pornography. Undue risk of harm to persons under the



age of eighteen years” in paragraph (b) may only be considered if it is tied to one of the four legitimate purposes identified in paragraph (a). In other words, as the provision only comes into play after the court has held that the accused had a ‘legitimate purpose related to the administration of justice or to science, medicine, education or art: *R v McSween*, [2020 ONCA 343](#), at para 61

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## **vi. THE PRIVATE USE EXCEPTION**

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The private use exception presupposes physical involvement in sex or the recording of sex. It does not expand to encompass sexting: *R v MM*, [2022 ONCA 441](#)

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## **G. CHILD LURING: [S.172.1](#)**

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Section 172.1(3), which provides that if the person with whom the accused was communicating (“other person”) was represented to the accused as being underage, then the accused is presumed to have believed that representation absent evidence to the contrary, is unconstitutional as it violates the right to be presumed innocent under s. 11 (d) of the *Charter*: *R v Morrison*, 2019 SCC 15

The Ontario Court of Appeal has reversed convictions where the trial judge relied on the unconstitutional conviction to establish, or help establish, an element of the offence: *R v Drury*, 2020 ONCA 502, and *R v Allen*, [2020 ONCA 664](#)

The Crown must establish the following elements beyond a reasonable doubt:

1. An intentional communication by means of telecommunication;
2. With a person who is, or who the accused believes is, under the requisite age; and
3. For the specific purpose of facilitating the commission of a designated offence:

A conviction under the “believes” mode of commission is typically pursued in cases of a sting operation where the accused believes he is communicating with a child but is actually communicating with an undercover police officer adopting a persona. However, a conviction under the “believes” mode of commission is available in circumstances where the Crown is unable to prove the age of the

victims – often because the identity is unknown and circumstantial evidence inadequate for that purpose – but can nevertheless prove that the accused believed the person to be under the age of 18: *R v Fox*, [2023 ONCA 674](#), at paras 15-16

In respect of the first mode of commission – i.e., where the person being communicated with is actually under age, recklessness as to age is sufficient *mens rea*. However, with respect to the second mode of commission – i.e., where the accused simply *believes* the person is under age – recklessness will not suffice. Rather, the Crown must prove actual belief or willful blindness: *R v Fox*, [2023 ONCA 674](#), at paras 15, 17

Section 172.1 does not require proof of a “sexual purpose”. The Crown must only prove the accused “engage[d] in the prohibited conduct with the specific intent of facilitating the commission of one of the designated offences: *R v McSween*, [2020 ONCA 343](#), at paras 103, 106

To satisfy the requirement of communications being for the “purpose of facilitating” one of the listed offences in s. 172.1(1)(c), it is not necessary that an accused have the intent to commit one of the listed offences or the intent to meet the person they are communicating with in person. Rather, the “purpose of facilitating” requirement would be satisfied by a purpose of: helping to bring about and making easier or more probable – for example, by ‘luring’ or ‘grooming’ young persons to commit or participate in the prohibited conduct; by reducing their inhibitions; or by prurient discourse that exploits a young person’s curiosity, immaturity or precocious sexuality: *R v Bowers*, [2022 ONCA 852](#), at paras 16-17

Where the offence arises from communications, once the communication was completed, the offence is complete. The accused need not be afforded the opportunity to verify the victim’s age by visually assessing or calling her first: *R v Veerasingam*, [2021 ONCA 350](#), at para 14

In most cases, an accused who never turns their mind to the age of the other person is properly characterized as reckless. Reckless indifference also describes a subjective state of mind, a choice to treat age as irrelevant and to assume the risk associated with that choice: *R v Alexozai*, [2021 ONCA 633](#), at para 42

The Crown may negate the defence of mistaken belief in age in either of two ways. The Crown may prove that the accused did not honestly believe that the other person was at least 18 years old at the time of the offence. Or the Crown may

prove that, despite the accused's claim that they honestly believed that the other person was at least 18, the accused did not take reasonable steps to ascertain the other person's age: *R v Alexozai*, [2021 ONCA 633](#), at para 44

Notwithstanding that the Crown must ultimately establish an affirmative *mens rea* relating to belief, the reasonable steps requirement in s. 172.1(4) of the *Criminal Code* continues to operate in any child luring prosecution where the accused claims to have been acting on an innocent belief about age, including when dealing with undercover officers posing as children. Its function is to prevent those who claim their state of mind to have been innocent from succeeding where they formed their belief without having taken reasonable steps before doing so. In effect, the risk-taking involved in sexual activity with a minor without taking reasonable steps to ensure that the subject is of legal age fails to qualify as morally innocent behavior.

If the mistaken belief defence is not in play, including where it lacks an air of reality because of the failure by the accused to take reasonable steps, any claim of mistaken belief is removed from the evidentiary mix in deciding whether the Crown has proved the requisite affirmative *mens rea* of the offence: *R v Kavanagh*, [2024 ONCA 521](#), at paras 5-6

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## **H. AGREEMENT OF SEXUAL OFFENCE AGAINST CHILD: [S.172.2](#)**

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The mens rea of s. 172.2 is the intent to agree to commit one of the underlying offences. This does not require proof of the intent to commit one of the underlying offences, nor need the Crown prove that the accused intended to follow through once the agreement crystallized. However, the accused must be genuine in purporting to make the agreement. In determining whether the Crown has proved an intention to enter into an agreement, the trier of fact may find it useful to consider whether the evidence demonstrates that the accused intended for the other person to take them seriously.

The actus reus of s.172.2 captures the coming together of two minds to commit an offence enumerated in s. 172.2(1). The actus reus is satisfied where those persons through telecommunication, establish or settle upon terms to commit an enumerated offence. This inquiry is objective and will involve determining whether the telecommunications themselves objectively disclose an agreement to commit an offence: *R v Stordy*, [2024 ONCA 284](#), at paras 36-37, 53-61

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## PART VI: INVASION OF PRIVACY

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### A. S.193: DISCLOSURE OF INFORMATION

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Sections 193(1) and 193.1(1) of the *Criminal Code* make the use or disclosure of an intercepted communication or disclosure “of any part, substance, or meaning thereof or its existence”, an indictable offence, subject to the exemptions in ss. 193(2) and (3). One of the exemptions is for disclosure in the course of a criminal investigation. The subjective belief of the person making the disclosure is the relevant factor for determining whether the exemption is engaged. There is no objective assessment of the necessity for the disclosure: *R v Petrolo*, [2021 ONCA 498](#), at paras 29-35

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## PART VIII: OFFENCES AGAINST THE PERSON AND REPUTATION

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### A. FAIL TO PROVIDE THE NECESSARIES: S.215

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#### i. GENERAL PRINCIPLES

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For a thorough review of the actus reus and mens rea for this offence, see the dissenting reasons of O’Ferrall J in *R v Stephen*, 2017 ABCA 380 at paras 218-274, aff’d at [2018 SCC 21](#)

The mens rea for s.215 is lower than the mens rea for manslaughter. Therefore, when the offence under [s. 215](#) is the predicate offence for either manslaughter or unlawfully causing bodily harm, if the Crown proves the requisite *mens rea* requirement for [s. 215](#), then, by necessary implication, the additional *mens rea* requirement for manslaughter or unlawfully causing bodily harm will be satisfied: *R v Goforth*, [2022 SCC 25](#), at para 31

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## **ii. SECTION [215\(2\)](#)**

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Under [s. 215\(2\)\(a\)\(i\)](#), it is an offence to fail to provide a legal duty to provide the necessities of life where the person to whom the duty is owed is in destitute or necessitous circumstances.

Foreseeable risk of harm is integral to the fault requirement for the offences created by s. 215(2)(a): *R v CO*, [2022 ONCA 103](#), at paras 41, 64-65

The mens rea can be analyzed by asking two questions: (1) whether, in light of all the relevant evidence, a reasonable person would have foreseen the risk and taken steps to avoid it if possible; and (2) If so, whether the accused’s failure to foresee the risk and take steps to avoid it, if possible, was a marked departure from the standard of care expected of a reasonable person in the accused’s circumstances: *R v Goforth*, [2022 SCC 25](#), at para 28

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## **iii. SECTION [215\(2\)\(B\)](#)**

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The offence created by [s. 215\(2\)\(b\)](#) has four essential elements. The Crown was required to prove:

1. The accused was under the legal duty created by s. 215(1) to provide the necessities of life;
2. The accused failed to provide the necessities of life;
3. The failure to provide the necessities of life endangered the victim’s life or is likely to cause their health to be endangered permanently; and
4. The conduct of the accused represented a marked departure from the conduct of a reasonable person in circumstances where it was objectively

foreseeable that the failure to provide the legal duty to the victim endangered their life or their health permanently: *R v Doering*, [2022 ONCA 559](#), at para 38

The mens rea can be analyzed by asking two questions: (1) whether, in light of all the relevant evidence, a reasonable person would have foreseen the risk and taken steps to avoid it if possible; and (2) If so, whether the accused's failure to foresee the risk and take steps to avoid it, if possible, was a marked departure from the standard of care expected of a reasonable person in the accused's circumstances: *R v Goforth*, [2022 SCC 25](#), at para 28

The increased risk of death constitutes an endangerment of the victim's life within the meaning of s. 215(2)(b): *Doering*, at para 46

The accused's belief as to what was necessary and whether risk would arise is relevant to, but not determinative of, both whether his conduct constituted a marked departure, and whether a reasonable person in their shoes would have been aware of the risk to the victim's wellbeing: *Doering*, at paras 64, 77

However, the fault component should not be personalized to reflect the accused's own experiences as the offence seeks to impose a common minimum behavioural standards: *Doering* at paras 72-76; but see para 77

A reasonably held honest mistake of fact will constitute a complete defence: *R v Marchant*, [2024 ONCA 537](#), at para 58

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#### **i. HARM AND NECESSARIES - IN RESPECT OF CHILDREN**

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"Necessaries of life" capture those things which are integral to the health and safety of the child. Some specifics, like food, are self-evidently "necessaries of life". Other things, like protection of children from physical harm, are also necessaries of life, but their meaning is situation specific. A necessary is something which, if not provided by the parent, will result in harm to the child's health or safety. Protection of a child from harm is itself a necessary of life. Defining the phrase "necessaries of life" by reference to those things necessary to protect a child from harm to the child's health or safety must include protection from risk of that harm: CO at paras 49-50

The harm in question must be reasonably foreseeable in the circumstances. The harm must also relate to the child's ongoing health and safety, and not merely the child's comfort or wellbeing. The duty imposed by s. 215(1)(a) is not to be the ideal parent. If the foreseeable harm to the child is minor and transitory, a failure to protect against that harm will not constitute a failure to provide the necessities of life.

The words "destitute or necessitous" means more than a child who has not been provided with the necessities of life. Given that neither offence in s. 215(2) makes it a crime to fail to provide the necessities of life without more, the duty of the parent to provide the necessities of life must be addressed separately from the further requirement that the child be in "destitute or necessitous circumstances". If the failure to provide the alleged necessary harms the child's health or safety, or puts the child's health or safety at risk, it can be said the child is in need of protection from that harm, and therefore in "destitute or necessitous circumstances."

It is likely that, in most cases, a child who is not provided with a necessary of life will be in necessitous circumstances. There may, however, be situations in which a parent has failed to provide a necessary, but that failure has not resulted in the child being harmed or facing the risk of harm: *R v CO*, [2022 ONCA 103](#), at paras 52-55

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## **ii. IN RESPECT OF ACCUSED IN POLICE CUSTODY**

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Section 215(1)(c) places a legal obligation on police officers to protect persons in their custody by providing them with the "necessaries of life". That phrase is not defined in the *Criminal Code*. Case law has defined the term as meaning those things needed to protect the health and safety of prisoners from harm or the risk of harm. Medical attention that is necessary to protect a prisoner's health or safety from harm or risk of harm is a necessary of life. In this context, harm, or risk of harm, refers to harm, or risk of harm, that is reasonably foreseeable and more than minor or transitory: *R v Doering*, [2022 ONCA 559](#), at para 37

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## **iii. THE LAWFUL EXCUSE**

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Section 215(2) provides a “lawful excuse” defence to the offences created under s. 215(2). A “lawful excuse” refers to exculpatory circumstances or events which justify an acquittal even if the essential elements of the offence are established. For example, a true financial inability to provide for a dependant’s needs may, in certain circumstances, constitute a “lawful excuse” defence to a charge of failing to provide the necessities of life to that dependant: *R v Doering*, [2022 ONCA 559](#), at para 50

The scope of the “lawful excuse” defence in s. 215(c) must be interpreted having regard to the nature and purpose of the offences created in that section. The phrase “lawful excuse” cannot be given a meaning which effectively eliminates the liability created by s. 215(2). This would arise, for example, if the objective analysis is allowed to be defeated by the absence of subjective fault – which is not required in the offence: *Doering* at paras 52-53

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## **B. CRIMINAL NEGLIGENCE: S.219**

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The test for criminal negligence requires the Crown to show that an accused’s conduct or omission constituted a “marked and substantial departure” from the conduct of a reasonably prudent person in the circumstances: *R v Javanmardi*, 2019 SCC 54, at para 21

In determining the question of mens rea, the court should consider the totality of the evidence, including evidence, if any, about the accused’s actual state of mind.” State of mind evidence includes evidence about the accused’s subjective awareness of – and willingness to undertake – the risks involved in a course of conduct: *R v Tabanao*, [2024 ONCA 85](#), at para 79

The circumstances in question are ones in which the accused either recognized and ran an obvious and serious risk to the public, or, alternatively, gave no thought to that risk: *R v Tabanao*, [2024 ONCA 85](#), at para 26

These circumstances can include the professional training that the accused has, or their prior experiences: see *R v Tabanao*, [2024 ONCA 85](#), at paras 46-47

The “marked and substantial departure” standard applies to both the physical and mental elements of the offence. The TJ should consider all of the circumstances surrounding the activity: *R v Laine*, [2015 ONCA 519](#)



Compliance with those standards in driving cases is assessed by asking whether a reasonable person in the position of the accused would have been aware of the risk posed by the manner of driving and would not have undertaken the activity.

In answering these questions, a “modified objective test” is applied. More specifically, the assessments just described are to be made in the circumstances the accused was in at the time of the alleged offence. However, the modification of the objective test has limits. Since such offences are meant to establish appropriate levels of objective care, the personal attributes of the offender are not to be considered: *R v Galletta*, [2020 ONCA 60](#), at paras 7-8

An offender charged with a penal negligence offence will be morally innocent and thereby excused from a finding of guilt where the person is shown to lack the capacity to appreciate the nature and quality or consequences of his or her acts: *R v Plein*, [2018 ONCA 748](#) at para 54

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### **C. CRIMINAL NEGLIGENCE CAUSING DEATH: S.220**

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The actus reus for criminal negligence causing death or bodily harm requires the accused to have done or omitted to do anything that it was their legal duty to do, and that the act or omission caused someone’s death or bodily harm. The fault element requires that the criminal act or omission represented a marked and substantial departure from the conduct of a reasonably prudent person in circumstances where they either recognized and ran an obvious and serious risk to the public, or, alternatively, gave no thought to that risk: *R v Tabanao*, [2024 ONCA 85](#), at para 26

For some negligence-based offences, such as dangerous driving, a “marked” departure satisfies the fault element. For criminal negligence causing death, however, the requisite degree of fault is elevated to a “marked and substantial” departure: *R v Tabanao*, [2024 ONCA 85](#), at para 42

In cases involving criminal negligence causing death by way of an unlawful omission, the Crown must prove that:

- this unlawful omission showed a wanton and reckless disregard for the individual’s life or safety, in the sense that it was a “marked and substantial

- departure from the conduct of a reasonably prudent person in circumstances in which the accused either recognized and ran an obvious and serious risk or, alternatively, gave no thought to that risk” to the individual’s life or safety; and
- the unlawful omission caused the individual’s death: *R v Plein*, [2018 ONCA 748](#) at para 29; *R v Javanmardi*, [2019 SCC 54](#); *R v HC*, [2022 ONCA 409](#), at paras 35-36

An activity-sensitive approach to the modified objective standard should be applied. While the standard is not determined by the accused’s personal characteristics, it is informed by the activity. Evidence of training and experience may be used to rebut an allegation of being unqualified to engage in an activity or to show how a reasonable person in the circumstances of the accused would have performed the activity: *R v Javanmardi*, [2019 SCC 54](#)

In terms of causation, liability turns on whether the Crown can prove that the accused’s conduct amounts to a “significant contributing cause” of the event in issue. Causing a risk of death cannot be equated with causing death *R v Doering*, [2022 ONCA 559](#), at paras 136, 143

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#### **D. CRIMINAL NEGLIGENCE CAUSING BODILY HARM: S. 221**

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Immediacy of harm may serve to provide evidence of a causal link between the criminally negligent act and the bodily harm; however, it is not an essential element of the offence. The Crown is free to prove the causal link by other means: *R v LK*, [2020 ONCA 262](#), at para 48

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#### **E. UNLAWFUL ACT MANSLAUGHTER: S.222(5)**

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To prove unlawful act manslaughter, the Crown must prove (i) an unlawful act or omission (*actus reus*); (ii) that the unlawful act or omission was inherently dangerous in that it presented an objectively foreseeable risk of causing injury and was a marked departure from the standards of a reasonable person (*mens rea*);

and (iii) that the act or omission caused the death (causation): *R v HC*, [2022 ONCA 409](#), at para 34

The *actus reus* of unlawful act manslaughter under [s. 222\(5\)](#) (a) of the [Criminal Code](#) requires the Crown to prove that the accused committed an unlawful act and that the unlawful act caused death.

The underlying unlawful act is described as the “predicate” offence. Where the predicate offence is one of strict liability, the fault element for that offence must be read as a marked departure from the standard expected of a reasonable person in the circumstances. The Crown is not required to prove that the predicate offence was objectively dangerous. An unlawful act, accompanied by objective foreseeability of the risk of bodily harm that is neither trivial nor transitory, is an objectively dangerous act.

The fault element that an accused’s conduct be measured against the standard of a reasonable person in their circumstances. An activity-sensitive approach to the modified objective standard should be applied. While the standard is not determined by the accused’s personal characteristics, it is informed by the activity. Evidence of training and experience may be used to rebut an allegation of being unqualified to engage in an activity or to show how a reasonable person in the circumstances of the accused would have performed the activity: *R v Javanmardi*, [2019 SCC 54](#)

The *mens rea* for manslaughter under section 21(2) is “objective awareness of the risk of harm”: *R v Bilodeau*, [2024 ABCA 148](#), at para 42 aff’d at [2025 SCC 2](#)

Proof of an unlawful act (i.e., an assault) that causes the death of another human being is, standing alone, insufficient to ground liability for manslaughter. The *mens rea* for manslaughter requires objective foreseeability of the risk of bodily harm that is neither trivial nor transitory: *R v Tubic*, [2024 ONCA 833](#), at para 56

The principles of reasonable foreseeability and independent intervening act are relevant but not dispositive on the issue of causation. The ultimate question is whether the dangerous, unlawful acts of the accused a significant contributing cause of the victim’s death?

An intervening act that is reasonably foreseeable will usually not break the chain of causation. An accused who undertakes a dangerous act, and in so doing contributes to a death, should bear the risk that other foreseeable acts may

intervene and contribute to that death. It is not the specific subsequent act that must be foreseen for an outcome to have been reasonably foreseeable. Rather, it is sufficient if the general nature of the intervening act and the risk of non-trivial harm are objectively foreseeable at the time of the dangerous and unlawful acts. The inquiry is whether intervening acts rendered the accused's actions so remote from the death such that the accused should not be held responsible, having regard to factors such as the time, place, circumstance, nature, and effect of the intervening act with the accused's act, and whether the accused's acts were still subsisting at the time of the intervening act: *R v HC*, [2022 ONCA 409](#), at para 44

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## **F. SECOND DEGREE MURDER: S.229**

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### **i. MENS REA UNDER S.229(A)(I)**

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Under ss.229(a)(i), the question is whether the accused meant to cause death. This can be made out by either direct intention or oblique intention. Direct intention exists if a person's direct purpose in acting is to kill another. Oblique intention will exist if a person decides to carry out some other purpose in the knowledge that killing is virtually certain to result. In this latter situation, the intention to kill is oblique because although the person does not desire the death of the victim, they have accepted that the death of the victim is a virtually certain consequence of their act. The culpable intention is therefore derived not from their purpose in acting, but from their knowledge of the consequences of acting, whether those consequences are desired or not. It is not enough that the accused knows that death "may flow" or even will "probably flow" from their act: *R v Aziga*, [2023 ONCA 12](#), at paras 25-26

Abandonment to the elements which either kills or accelerates death, depending on the circumstances, can support an inference of murderous intent: *R v Firlotte*, [2023 ONCA 854](#), see case law cited at para 62

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### **ii. MENS REA UNDER S.229(A)(II)**

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The requisite intent under [s. 229\(a\)\(ii\)](#) consists of the subjective intent to cause bodily harm and the subjective knowledge that bodily harm is of such a nature that it is likely to result in death. Subjective foresight of death is a requirement.

The recklessness component within s. 229(a)(ii) requires proof of knowledge that death will *likely* result and a deliberate disregard for this consequence by going ahead anyway: *R v Zoldi*, [2018 ONCA 384](#) at para 40

The aspect of recklessness can be considered an afterthought, since [o]ne who causes bodily harm that he knows is likely to cause death must, in those circumstances, have a deliberate disregard for the fatal consequences which are known to be likely to occur. That is to say he must, of necessity, be reckless whether death ensues or not”: *R v Van Every*, [2016 ONCA 087](#) at para 48; *R v McCracken*, [2016 ONCA 228](#) at para 98; *Zoldi* at para 40

The key issue is whether the jury would, in the context of the charge as a whole, have understood that the accused must foresee a likelihood of death flowing from the bodily harm that he or she is occasioning the victim: *McCracken* at para 102

A driver’s failure to apply the brakes upon striking a pedestrian is capable of providing some insight into whether the driver deliberately, as opposed to accidentally, struck the pedestrian. The insight is even stronger when the driver strikes the pedestrian with the front of his vehicle: *R v Ariarathnam*, [2018 ONCA 1027](#), at para 37

Lack of life experience affects the level of maturity and can affect the ability of youths to foresee the consequences of their actions. Youthful age and maturity are relevant considerations for the trier of fact in determining whether or not it is appropriate to draw the common sense inference that the accused actually intended the natural consequences of his/her actions in the circumstances of a given case. Whether or not the inference is ultimately drawn will depend on the evidence before the trial judge: *R v SK*, [2019 ONCA 776](#), at para 76, 88

A person may be convicted of murder under s.229(a)(ii) from assaultive behaviour causing death even where the evidence is that none of the individual actions in which the accused was involved was sufficient to cause death. Such evidence does not render the verdict unreasonable: *R v Firlotte*, [2023 ONCA 854](#), at paras 27-31

Abandonment to the elements which either kills or accelerates death, depending on the circumstances, can support an inference of murderous intent: *R v Firlotte*, [2023 ONCA 854](#), see case law cited at para 62

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### iii. MENS REA UNDER S.229(B)

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The contemporaneity principle – that the *mens rea* and actus reus must be concurrent – applies to murders under s.229(b). Thus, to establish liability under s. 229(b), the Crown must prove that the accused person had a murderous intent when they mistakenly or accidentally killed the unintended victim. However, the contemporaneity principle is applied flexibly. If a sequence of acts form part of the same transaction, and if the requisite intent coincides at any time with the sequence of acts, this would be sufficient for contemporaneity purposes: *R v Collins*, [2023 ONCA 394](#), at paras 37, 40.

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### iv. MENS REA AND ROLLED UP INSTRUCTION ISSUES

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Mental illness is capable of undermining the mental element for murder in s. 229(a) (thereby reducing liability from second-degree murder to manslaughter): *R v Spence*, [2017 ONCA 619](#) at para 49;

Evidence of mental illness may also undermine the added mental elements of planning and deliberation in cases of first degree murder: *R v Lawlor*, [2022 ONCA 645](#), at para 128 [dissenting reasons of Nordheimer J., adopted on appeal at [2023 SCC 34](#)

There is no requirement for an expert opinion on the issue: *R v Lawlor*, [2022 ONCA 645](#), at para 134 [dissenting reasons of Nordheimer J., adopted on appeal at [2023 SCC 34](#)

A jury should be instructed that they are to consider evidence of an accused's consumption of alcohol and drugs, together with evidence of the other circumstances surrounding an unlawful killing, in deciding whether the Crown has proven the mental or fault element required for murder beyond reasonable doubt.

The purpose of the “rolled-up” instruction is to advise the jury not to take a compartmentalized approach to the evidence by considering it only in connection with a discrete defence, such as intoxication. The “rolled-up” instruction ensures that the jury understands that the probative value of evidence, for example of intoxication, is not spent simply because they reject the substantive defence to which it relates. Insufficient on its own to raise a reasonable doubt about proof of the mental or fault element in murder, evidence of intoxication may gain sufficient strength, when combined with other evidence, to do so. No specific word formula need be followed to convey this principle to the jury: *R v Debassige*, [2021 ONCA 484](#), at paras 78-82

The failure of the trial judge to relate evidence of mental illness to the element of intent is a legal error, even when the evidence is not as strong as it could have been: *R v Lawlor*, [2022 ONCA 645](#), at paras 120, 134 [dissenting reasons of Nordheimer J., adopted on appeal at [2023 SCC 34](#)]

For further discussion of rolled up charges, see Jury Law: Jury Charge: Rolled Up Charges in Homicide Cases

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## **V. CAUSATION**

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The issue of causation is for the jury and not the experts. The jury’s finding of causation must be assessed in light of the entire record. A jury does not necessarily need medical evidence to establish causation.

If the accused’s actions accelerated the victim’s death, that would meet the legal definition of a significant cause of death: *R v Hong*, [2019 ONCA 170](#), at paras 23, 24, 28.

In order for a particular theory of factual causation to be open to the trier of fact to consider, it must have an air of reality. In other words, there must be some evidence upon which a properly instructed jury could find that the deceased’s death was caused, “in a medical, mechanical, or physical sense,” in that particular manner, beyond a reasonable doubt. In determining whether an evidentiary basis exists strong enough to establish an air of reality, any and all evidence that bears upon the question of factual causation is to be considered, including both expert and non-expert evidence. In reviewing the evidence, the trial judge must be careful not to evaluate the quality, weight or reliability of the evidence, but rather must

simply decide whether the evidentiary burden has been met: *R v Biddersingh*, [2020 ONCA 241](#), at para 57

Trial judges must be accorded the flexibility to put issues of causation to the jury in an intelligible fashion that is relevant to the circumstances of the case: *R v Lozada*, [2024 SCC 18](#)

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## **vi. PARTY LIABILITY**

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The *mens rea* requirement under s. 229(a) applies to the perpetrator. The aider's *mens rea* is different. To be guilty of murder, the aider must know that the perpetrator had the requisite intent and the aider must intend to assist the perpetrator in the homicide: *R v Josipovic*, [2019 ONCA 633](#), at para 50

An aider is not necessarily guilty of the same offence as the perpetrator. An aider may not know that the perpetrator intends to commit murder. In that case, the aider is guilty of manslaughter, even if the perpetrator is guilty of murder: *R v Josipovic*, [2019 ONCA 633](#), at para 72

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## **G. FIRST DEGREE MURDER: S.231**

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The *mens rea* for murder and the *actus reus* for first degree murder had to coexist to warrant a conviction for first degree murder. Contemporaneity between the *actus reus* and *mens rea* of an offence is a long-established principle of criminal law: *R v Cargioli*, [2023 ONCA 612](#), at paras 142, 154

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### **i. PLANNED AND DELIBERATE MURDER: S.231(2)**

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Although it will doubtless be rare for a jury to find lengthy planning without deliberation, the two findings are not *prima facie* incompatible or contradictory. A trial judge is entitled to accept the accused's confession that he planned the murder, while accepting that the jury's acquittal from first degree murder suggested that they found no deliberation: *R v French*, [2017 ONCA 460](#) at para 30



Mental illness may undermine the added mental elements of planning and deliberation in s. 231(2): *R v Spence*, [2017 ONCA 619](#) at para 49

The definition of planning and deliberation is something courts have long grappled with. Accepted phrases to leave with a jury include include: “considered,” “not impulsive,” “slow in deciding,” “cautious,” implying that the accused must take time to weigh the advantages and disadvantages of his intended action. The following definition is recommended in David Watt, *Watt’s Manual of Criminal Jury Instructions*, 2nd ed:

“Deliberate” is not a word that we often use when speaking to other people. It means “considered, not impulsive”, “carefully thought out, not hasty or rash”, “slow in deciding”, “cautious”.

A deliberate act is one that the actor has taken time to weigh the advantages and disadvantages of. The deliberation must take place before the act of murder...starts. A murder committed on sudden impulse and without prior consideration, even with an intention to kill is not a deliberate murder. [Emphasis in original.]: *R v Spence*, 2017 ONCA 619 at paras 68-74; *R v Campbell*, [2020 ONCA 221](#), at para 33

A finding that the accused decided seconds or a few minutes before inflicting the harm, to intentionally inflict bodily harm knowing that death was likely to ensue, is not the same as concluding that the accused planned and deliberated upon the attack before commencing that attack. There has to be evidence from which a jury could reasonably infer that the accused’s attack on the deceased was the product of a calculated scheme, arrived at after weighing the nature and consequences of that scheme. In addition to evidence of planning, there had to be evidence that having made the plan, the accused “deliberated”, that is weighed the pros and cons of putting the plan into action: *R v Robinson*, [2017 ONCA 645](#), at para 40

Evidence of motive and animus can relate to and help establish intent, as well as planning and deliberation. Whether an accused had the opportunity for a sufficient amount of time to plan and deliberate upon a murder is a relevant factor for the analysis: *R v Singh*, [2022 OCCA 584](#), at paras 101-102

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## **ii. TRANSFERRED INTENT**

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The doctrine of transferred intent applies when an injury intended for one falls on another by accident or where “the harm that follows is of the same legal kind as that intended.

In the context of first-degree murder, where a planned and deliberate act carried out to kill an intended target actually kills an unintended target, the act is still premeditated and would be first degree murder. This applies only where the act leading to the death of the third party was intended to be directed against the target.

In *Ching*, the accused, who planned and deliberated the murder of his ex-wife, killed the victim’s uncle who intervened to stop him. The Court of Appeal concluded that in circumstances like these an accused will be guilty of second-degree murder as the actual killing may well have been impulsive rather than planned and deliberate, and that one can only be found guilty of first degree murder if they planned and deliberated to kill both a specific victim and anyone who gets in their way: *R v Ching*, 2019 ONCA 619; see *R v Bush*, [2024 ONCA 469](#), at paras 21-22

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### **iii. CONSTRUCTIVE FIRST DEGREE MURDER: S.231(4) – (6.2)**

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#### **a) General Principles**

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Section 231 does not create a distinct and independent substantive offence of first degree constructive murder; rather, it classifies for sentencing purposes the crime of murder, defined elsewhere, as first degree murder or second degree murder:

Section 231 contains several provisions that classify as first degree murder unlawful killings which amount to murder, committed while the accused is also committing or attempting to commit another offence. In general terms, this classification requires proof that:

- i. the accused committed or attempted to commit a listed underlying crime (predicate offence);
- ii. the accused murdered the victim;
- iii. the accused participated in the murder in such a manner that he or she was a substantial cause of the victim’s death;

- iv. no intervening act of another resulted in the accused no longer being substantially connected to the death of the victim; and
- v. the listed crime and the murder of the victim were part of the same transaction; that is to say, the victim's death was caused while the accused was committing or attempting to commit the listed crime as part of the same series of events: *R v Province*, [2019 ONCA 638](#), at paras 125-126; *R v Al-Enzi*, [2021 ONCA 81](#), at para 152

To satisfy the “single transaction” requirement under s. 231, the predicate offence and the murder of the victim must be temporally and causally connected so as to form a continuous single transaction. But the predicate offence and the killing must also be distinct acts: *R v Province*, [2019 ONCA 638](#), at paras 128, 135; *R v Cummins*, [2023 ONCA 446](#), at para 25

#### **b) Via forcible confinement**

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The phrase “while committing” is to be interpreted (i) against the backdrop of an organizing principle that the enumerated offences are all crimes that involve the illegal domination of the victim, and (ii) as requiring the demonstration of a causal connection between the enumerated offence and the murder in the sense that the offender's *reason or motivation for the killing* arises from, or is linked to, the offender's unlawful domination of a victim: *R v Singh*, [2022 ONCA 584](#), at para 155-156

The jurisprudence has interpreted the phrase “while committing” in two ways: some cases talk in terms of an inquiry into whether the listed offence of domination and the killing form part of “one continuous sequence of events forming a single transaction”; other cases talk in terms of whether the underlying offence of domination and the murder have a close “temporal and causal” connection. However, these are not different inquiries: they are simply different ways of addressing the “same transaction” element, and are used interchangeably in the jurisprudence. When properly applied, they involve the same inquiry and will result in the same conclusion: *R v Singh*, [2022 ONCA 584](#), at para 137

The jurisprudence has overwhelmingly treated the required causal connection for the single transaction principle as one in which the act of committing or attempting to commit the enumerated offence prompts a further criminal act that culminates in the murder – the reason or motivation for the killing” – or, in a small number of

cases, where the murder was committed to facilitate the crime of domination: *R v Singh*, [2022 ONCA 584](#), at para 156

However, the exceptional punishment for first degree murder cannot flow from the opposite relationship, where the act of causing the death of a person plays a role in or prompts the subsequent commission of the enumerated offence. In *Singh*, for example, the Court of Appeal held that the trial judge erred by denying a directed verdict on the finding that constructive first degree murder could be made out where the appellant killed the victim, and then attempted to pursue another victim, who was forcibly confined in the process. In other words, the death of the deceased was caused before the appellant embarked upon his acts that had the effect of unlawfully confining another victim. The Court concluded that “ the trial judge’s reversal of the connective relationship between the enumerated offence and the murder would not satisfy the jurisprudence’s requirement of demonstrating that the offender’s reason or motivation for the killing arises from, or is linked to, the offender’s unlawful domination of a victim:” *R v Singh*, [2022 ONCA 584](#), at para 158

The Court further reasoned that, while there was evidence that could satisfy the single transaction’s temporal connection between the two criminal acts (occurring within minutes of one another), there was no evidence that the relationship between the two criminal acts could satisfy the causal connection aspect of a single transaction. That is because the evidence showed that appellant’s reason or motivation for killing the deceased did not arise from, and was not linked to, his later unlawful domination and confinement of another victim. Nor was there any suggestion in the evidence that the appellant’s pursuit and unlawful confinement of the second victim contributed to the deceased’s death by preventing her from receiving medical aid that could have saved her life: *R v Singh*, [2022 ONCA 584](#), at para 161

There is no minimal temporal requirement on the unlawful confinement that must occur to elevate the offence to first degree murder: *R v McLellan*, [2018 ONCA 510](#) at para 74

A temporal link alone between the forcible confinement and the murder is not sufficient to establish constructive first degree murder. It is not enough that the two offences be committed in succession. There must also be a causal link between the two offences. This link may be established in various ways. One way is where one offence was committed to facilitate the other, whether the predicate offence facilitated the commission of the murder or the murder facilitated the commission

of the predicate offence. Similarly, the causal link may be established where each offence was committed to facilitate some third offence, where the offences taken together can aptly be described as a single transaction. There must be some unifying relation among the events. The continuing course of domination, is that unifying relation: *R v Alexis*, [2020 ONCA 334](#), at paras 15, 18, 24

The act of killing and the act of confinement must be part of a single transaction, but must amount to distinct acts, such that the act of killing and the confinement are not the same; The acts of confinement must go beyond the acts causing death: *R v Smith*, [2015 ONCA 831](#) at para 11; *R v McGregor*, [2019 ONCA 307](#), at paras 62-63

Provided the required linkage exists between the underlying offence and the murder, the offence of first degree murder, regardless of the order in which the offences were committed: *R v Singh*, [2022 ONCA 584](#), at para 146-149; but see paras 151-152 re sexual assaults

The victim who has been dominated in the commission of the predicate offence need not be the same victim who was murdered: *R v Alexis*, [2020 ONCA 334](#), at para 16; *R v Singh*, [2022 ONCA 584](#), at paras 126-128

Kidnapping is an aggravated form of unlawful confinement. Kidnapping is also a continuing offence, one that is complete in law when the victim is first apprehended and moved, but not complete in fact until the victim is freed: *R v McGregor*, [2019 ONCA 307](#), at para 65

Not all robberies involve domination of the victim, and therefore not all robberies will satisfy s. 231(5)(e). What is required is a finding that the accused confined the victim and then *exploited* that domination by an act of killing. The unlawful confinement must be distinct from the act of killing, but both must be “part of the same single ‘transaction’ of coercion” and the domination must represent an “exploitation of the position of power created by the underlying crime”: *R v McLellan*, [2018 ONCA 510](#) at para 69

“illegal domination” is *not* a distinct element of first degree murder in s. 231(5). Further, the Crown need not prove that any unlawful confinement continued up to the time of the killing: *McGregor*, at paras 47-76; *R v Singh*, [2022 ONCA 584](#), at para 137

The legal standard for proving unlawful confinement is the same for children as for adults, but in the case of a parent-child relationship, courts must keep in mind that children are inherently vulnerable and dependent, and routinely receive — and expect — directions from their parents. The Crown does not have to prove some special or extreme form of confinement in cases involving parents and their children. A finding of confinement does not require evidence of a child being physically bound or locked up; it can also result from evidence of controlling conduct. Although parents are lawfully entitled to restrict the liberty of their children in accordance with the best interests of the child, if a parent engages in abusive or harmful conduct toward his or her child that surpasses any acceptable form of parenting, the lawfulness of his or her authority to confine the child ceases. Disciplining a child by restricting his or her ability to move about freely, by physical or psychological means, contrary to the child's wishes, which exceeds the outer bounds of punishment that a parent or guardian could lawfully administer, constitutes unlawful confinement: *R v Magoon*, [2018 SCC 14](#)

In *Cummins*, the Court of Appeal held that it was sufficient to ground liability for constructive first-degree murder that the accused was unlawfully confining a third party by assaulting the deceased and thereby creating a state of fear in the third party, and doing so intentionally, and thereby preventing the third party from rendering aid to the deceased: *R v Cummins*, [2023 ONCA 446](#), at para 21

### **c) Via Criminal Harassment**

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In s. 231(6) the listed crime or predicate offence is criminal harassment, whether completed or merely attempted. Further, the accused must also intend to cause the victim to fear for his or her own safety or the safety of another person whom the victim knows: *R v Province*, [2019 ONCA 638](#), at para 127

The offence under s.231(6) cannot be made out when the conduct alleged to constitute criminal harassment occurred while the victim slept, and was thereby unaware and unable to fear for her safety or the safety of another person: *Province* at paras 133-134

### **d) Via Sexual Assault**

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In respect of s. s. 231(5)(b), which elevates murder to first degree murder when it occurs while the accused is committing a sexual assault, physical domination akin

to forcible confinement is not a required element. Accordingly, a sexual assault arising from fraudulently obtained consent is sufficient for the purpose of s.231(5)(b): *R v Imona-Russell*, [2018 ONCA 590](#) at paras 10, 13-16

Provided the required linkage exists between the underlying offence and the murder, the offence of first degree murder, regardless of the order in which the offences were committed: *R v Singh*, [2022 ONCA 584](#), at para 146-149; but see paras 151-152 re sexual assaults

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## **H. PARTY LIABILITY IN MURDER**

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### **i. CO-PRINCIPALS TO MURDER**

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Co-principals to murder are liable where they “together form an intention to commit an offence, are present at its commission, and contribute to it, although each does not personally commit all the essential elements of the offence. The parties must have had the requisite intention.

The ultimate questions for the jury were: (1) who were the participants in and (2) can it be inferred from their conduct that they had the requisite intent for murder, namely, that (i) they intended to cause death; or (ii) they intended to cause bodily harm that they knew was likely to cause death and were reckless as to whether or not death ensued? *R v Abdulle*, 2020 ONCA 106, at paras 28-32

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### **ii. AIDING AND ABETTING A MURDER**

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An aider or abettor must have both knowledge and intention. He or she must know that the principal actor intends to commit the murder and must intend to assist or encourage the principal actor in committing it. Knowledge of the principal actor’s intention can involve knowledge of subjective foresight of death or intention to cause death (second degree murder), or knowledge of planning and deliberation (first degree murder): *R v Zoldi*, [2018 ONCA 384](#) at paras 22-23

Importantly, a party can aid or abet by acting in a way that furthers, facilitates, promotes, assists or encourages the principal, and be found liable “irrespective of

any causative role in the commission of the crime”: *R. v. Dooley*, 2009 ONCA 910 at para 123; *R v Patel*, [2017 ONCA 702](#) at para 73

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#### **iv. AIDING AND ABETTING A FIRST DEGREE MURDER**

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A person may commit planned and deliberate first degree murder as an aider and abettor, either by participating in the planning and deliberation [of a planned and deliberate murder] or by helping or encouraging what the aider and abettor knows is a planned and deliberate murder: *R v SB1*, [2018 ONCA 807](#), at para 184; *R v Millard*, [2023 ONCA 426](#), at para 68

To be found liable for first degree murder as an aider or abettor of a planned and deliberate murder, an accused must have knowledge that the murder was planned and deliberate; wilful blindness will satisfy the knowledge component of s. 21(1)(b) or (c). The accused must also have an intention to assist: *R v Almares*, 2008 ONCA 692, at para 70; *R v Johnson*, [2023 SCC 24](#), at para 2

The jurors need to know the essential elements of murder, the basis upon which murder becomes first degree murder, the constituent elements of aiding and abetting and, most especially, the specific basis upon which the accused’s liability as a secondary participant in first degree murder was to be decided. Drawing a clear distinction between the legal basis for the perpetrator’s liability and the basis of liability of the helper is important because the facts which the Crown must prove beyond a reasonable doubt differ depending upon whether liability flows as a perpetrator or as an aider: *R v Saleh*, [2019 ONCA 819](#), at paras 98-100, 134

For examples of party liability to a constructive first-degree murder based on forcible confinement and jury instructions of same, see *R v Bailey*, [2022 ONCA 502](#), at paras 39-49, 63-68

The active role of the party right up to the point of the execution by the principles makes him/her liable for first degree murder, provided that he knows that the murder will probably occur: see *R v Bailey*, [2022 ONCA 502](#),

In *Cummins*, the Court of Appeal held that it was sufficient to ground liability for constructive first-degree murder that the accused was unlawfully confining a third party by assaulting the deceased and thereby creating a state of fear in the third party, and doing so intentionally, and thereby preventing the third party from rendering aid to the deceased: *R v Cummins*, [2023 ONCA 446](#), at para 21



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## **V. COMMON INTENTION MURDER**

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To convict a secondary party of murder under s. 21(2), the Crown must prove that the party in fact foresaw that murder was a probable consequence of carrying out the original unlawful purpose: *R v McLellan*, [2018 ONCA 510](#) at para 81; *R v Patel*, [2017 ONCA 702](#) at para 42

The non-shooter had to know that the shooter would probably cause the death of the deceased with either the intent to cause death, or the intent to cause bodily harm that the principal knew would likely cause death, being reckless whether death ensued or not: *McLellan* at para 85

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## **I. MANSLAUGHTER: S.234**

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Manslaughter based on criminal negligence is indistinguishable from criminal negligence causing death: *R v Plein*, [2018 ONCA 748](#) at para 26; see also paras 29, 30

The *mens rea* for manslaughter is not subjective, but rather objective. foreseeability of the risk of bodily harm alone that is neither trivial nor transitory in the context of a dangerous act: *Plein* at paras 35-36

An offender charged with manslaughter will be morally innocent and thereby excused from a finding of guilt where the person is shown to lack the capacity to appreciate the nature and quality or consequences of his or her acts: *Plein* at para 54

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### **i. PARTY LIABILITY FOR MANSLAUGHTER**

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To convict a party of manslaughter relying on s. 21(2), the Crown must prove that a reasonable person in all the circumstances would have foreseen that a probable consequence of carrying out the original common purpose was perpetration of an inherently dangerous act creating a risk of bodily harm to the deceased that was neither trivial nor transitory; *R v Patel*, [2017 ONCA 702](#) at para 42

In the context of manslaughter arising from group assaults, triers of fact should focus on whether an accused's actions were a significant contributing cause of death, rather than focusing on which perpetrator inflicted which wound or whether all of the wounds were caused by a single individual. In the context of group assaults, absent a discrete or intervening event, the actions of all assailants can constitute a significant contributing cause to all injuries sustained: *R v Strathdee*, [2021 SCC 40](#)

To be found guilty of aiding a manslaughter arising from an assault, the accused may be found to have (i) participated in the physical assault, without the requisite intent for murder; or (ii) aided a co-accused to commit manslaughter by knowing the co-accused would assault the victim in a manner that would put the victim at risk of bodily harm even if he did not foresee that he would kill him: *R v Moreira*, [2023 ONCA 807](#), at para 77

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## **ii. CAUSATION**

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In *Lozada*, the SCC approved of the trial judge's jury instructions that allowed the jury to consider whether and how the conduct of the accused in the context of a group fight contributed to the deceased's death or whether the fatal act flowed reasonably from that conduct. Read in context, the instructions would have conveyed to the jury that they could find that the stabbing by another individual in the fight (which the accused subjectively did not foresee) did not break the chain of causation if the jury also found that the continuation of the assaults by the accused was of the same general nature as the stabbing, or that the stabbing flowed reasonably from the accused's conduct: *R v Lozada*, [2024 SCC 18](#)

The possibility of an intervening act occurring in the context of a group assault was contemplated in *R. v. Strathdee*, 2021 SCC 40, at para. 4. Joint/co-principal liability flows whenever two or more individuals come together with an intention to commit an offence, are present during the commission of the offence, and contribute to its commission. In the context of manslaughter, triers of fact should focus on whether an accused's actions were a significant contributing cause of death, rather than focusing on which perpetrator inflicted which wound or whether all of the wounds were caused by a single individual. In the context of group assaults, absent a discrete or intervening event, the actions of all assailants can constitute a significant contributing cause to all injuries sustained

The causation inquiry is case-specific and fact-driven. There is no single test or measure for determining whether a particular act has broken the chain of causation. The issue in considering joint liability as co-principals under s. 21(1)(a) is whether the unlawful acts of the accused were a significant contributing cause of the victim's death. The case of *Strathdee* leaves open the prospect of an instruction addressing "a discrete or intervening event" even in the case of co-participants in a group assault." : *R v Lozada*, [2024 SCC 18](#)

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## J. ATTEMPT MURDER

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The crime of attempted murder requires proof beyond a reasonable doubt that the accused intended to kill, coupled with conduct by the accused done for the purpose of carrying out that intention. The conduct must amount to "some act more than merely preparatory. The point at which an accused's actions pass beyond preparation to the actus reus component of an attempt to commit the crime is difficult to identify in the abstract. The conduct component need not be itself criminal or even unlawful. It can include, for example, consensual sexual activity.

The intention to inflict harm, even significant harm, combined with recklessness as to the consequence of inflicting that harm, does not suffice to establish the mens rea for attempted murder.

Courts have extended the intent mens rea to include the decision to carry out some purpose in the knowledge that killing is virtually certain to result, although the killing is neither the ultimate purpose in acting, nor the means chosen to achieve the desired purpose, and may even be deeply regretted. This is a higher mens rea than recklessness: *R v Boone*, 2019 ONCA 652, at paras 49, 51, 52, 54-57, 97

The intent to kill must be specific to the victim, not to another person. The doctrine of transferred intent does not apply to attempt murder: *R v Tyrell*, [2021 ONCA 15](#), at paras 14, 25

The *mens rea* for attempted murder corresponds with the direct intent for murder in s. 229(b) – meaning to cause death to a human being. However, the secondary or oblique intent in s. 229(a)(ii),(b) meaning to cause him bodily harm that he knows is likely to cause his death, and being reckless whether death ensues or not, is not an available pathway to a conviction for attempted murder. Nothing but a specific intent to kill will suffice: *R v Collins*, [2023 ONCA 394](#), at para 54

Not all defendants who cock handguns expect to kill other people. Sometimes they intend to intimidate. This intent, while still gravely blameworthy, is less grave than expecting to kill: *R v Habib*, [2024 ONCA 830](#), at para 26

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## **K. CRIMINAL HARASSMENT: S.264(1)**

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Offence of criminal harassment is committed when a person, without lawful authority and knowing that, or is reckless or wilfully blind as to whether another person is harassed, does something prohibited that causes the other person reasonably, in all the circumstances, to fear for their own safety, or the safety of another person whom they know. The “something prohibited” consists of conduct described in s. 264(2), which includes “engaging in threatening conduct directed at the other person or any member of their family.”

The essential elements of criminal harassment where the prohibited conduct falls within s. 264(2)(d) are these:

- i. the accused engaged in threatening conduct directed at the complainant or a member of the complainant’s family;
- ii. the complainant was harassed;
- iii. the accused knew or was reckless or wilfully blind as to whether the complainant was harassed;
- iv. the conduct caused the complainant to fear for her or his safety or the safety of someone she or he knew; and
- v. the complainant’s fear was, in all the circumstances, reasonable:  
*R v Province*, [2019 ONCA 638](#), at paras 119-120

The *actus reus* of criminal harassment is to be determined objectively. The threatening conduct must amount to a “tool of intimidation which is designed to instill a sense of fear in the recipient”. Instilling a sense of something undesirable to come constitutes engaging in an act designed to instill a sense of fear.

The impugned conduct is to be viewed objectively, with due consideration for the circumstances in which they took place, and with regards to the effects those acts had on the recipient. To determine whether conduct is designed to instill a sense of fear in the recipient requires focusing on the effect of the accused’s conduct on a reasonable person in the shoes of the target of the conduct”

Threatening conduct can be “directed at” a person where the communication was made to a third party with the knowledge and intent that it would be passed on to the targeted person: *R v McBride*, [2018 ONCA 323](#) at paras 21, 28, 33

Threatening conduct need not be repeated in order to violate s. 264(2)(d). A single threatening act directed at the complainant or a member of the complainant’s family may constitute criminal harassment. Nor need the conduct itself be harassment, provided it causes the complainant to be harassed:

It is not enough that the conduct vexes, disquiets or annoys the complainant. What is required is that the conduct “tormented, troubled, worried continually or chronically, plagued, bedevilled and badgered” the complainant: *R v Province*, [2019 ONCA 638](#), at paras 121-123

The mental element of intention to cause fear can be inferred from even a single act: *R v Faria*, [2022 ONCA 608](#), at para 40

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## **L. ASSAULT: S.265(1)**

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### **i. DEFENCE OF CONSENT**

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In order for the defence of consent to apply, the force applied to the complainant must not be excessive: *R v BW*, [2016 ONCA 96](#) at para 18.

The trial judge must relate the evidence to the law of consent in a way that brings home to the jury the relationship between the law and the evidence by discussing, in concrete terms, potential scenarios available on the evidence: *R v McDonald*, [2015 ONCA 791](#)

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### **ii. DEFENCE OF EXERCISE OF AUTHORITY**

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See *R v Geddes*, [2015 ONCA 292](#)

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## **M. ASSAULT CAUSING BODILY HARM: S.267(B)**

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The intent required for assault causing bodily harm is the intent to commit a simple assault where it is objectively foreseeable that the assault would subject the victim to the risk of bodily harm: *R v Pauls*, [2020 ONCA 220](#), at para 101

Mere participation in a melee in which the complainant suffered bodily harm will not support a conviction of assault causing bodily harm unless accused person's own act of participation must be intentional as opposed to accidental. Moreover, before he can be held responsible for bodily harm that may have been caused by another person involved in the group assault, it must be found that the accused knew that the others were engaging in an assault, and intended to assist in that assault: *R v Powell*, [2021 ONCA 271](#), at para 47

An accused who is involved in an intentional assault that results in bodily harm cannot argue that he only intended the assault and not the bodily harm that resulted, provided that a reasonable person, in the circumstances, would realize that the force intentionally applied would put the victim at risk of suffering some kind of bodily harm. This principle applies equally in group assaults. Where a reasonable person would realize that the group assault would put the victim at risk of suffering some kind of bodily harm, an accused person who has joined in a group assault cannot avoid responsibility by arguing that they did not intend to cause bodily harm: *R v Powell*, [2021 ONCA 271](#), at para 51

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## **N. ASSAULT WITH A WEAPON: S.267(A)**

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To prove assault with a weapon, the Crown must prove:

- The accused intentionally applied force to the complainant
- The complainant did not consent to the application of force
- The accused knew the complainant did not consent to the application of force
- In applying force to the complainant, the appellant used a weapon: *R v Walia*, [2018 ONCA 197](#) at para 9

The first element may be met if the accused threatens by an act or gesture to apply force to another person if he has, or causes that person to believe on reasonable grounds that he has, present ability to effect his purpose. Thus, the accused's intention of threatening an assault with a weapon is sufficient: The relevant *mens rea* lies in the accused's intention to threaten, and not in the intention to carry out the threat: *R v Horner*, [2018 ONCA 971](#), at paras 13, 14

The act of holding a knife can itself constitute a threat: *Horner* at para 16

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## **O. AGGRAVATED ASSAULT, S. 268**

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The *mens rea* for aggravated assault is the *mens rea* for the offence of assault coupled with objective foreseeability of harm. It is not necessary that there be an intent to wound or maim or disfigure: *R v Seip*, [2021 ONCA 101](#), at para 7.

Whether or not a victim has been maimed does not turn on whether the bodily harm inflicted upon the victim rendered the victim less able to fight back or to defend himself or herself. Rather, the definition of maim is the loss of the use of some part of the body or bodily function. This loss need not necessarily be permanent: *R v McPhee*, [2018 ONCA 1016](#), at paras 36, 40-42

The assault provisions under section 265(1)(a) and (b) constitute two pathways by which the trier of fact may find the accused guilty of aggravated assault under section 268(1) – and all members of the jury do not have to agree on the pathway chosen: *R v Budhoo*, [2015 ONCA 912](#) at paras 26-31

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### **i. PARTY LIABILITY TO AGGRAVATED ASSAULT**

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The *mens rea* of aggravated assault is objective foresight of bodily harm. The Crown need not show that an accused alleged to be a party to the offence of aggravated assault had any greater *mens rea* than the actual perpetrator and, in particular, need not show an objective foresight of the specific wounds resulting from the assault: *R v Seip*, [2021 ONCA 101](#), at para 8

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## **P. SEXUAL ASSAULT: S.271**

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### **i. THE TEST**

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1. Directly or indirectly touching a person's body
2. In circumstances of a sexual nature
3. Without their consent

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### **ii. ELEMENT #1: TOUCHING A PERSON'S BODY**

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To commit a sexual assault, it is not necessary for the accused to touch or even verbally threaten the complainant. A person's act or gesture, without words, force or any physical contact, can constitute a threat to apply force of a sexual nature, if it intentionally creates in another person an apprehension of imminent harm or offensive contact that affronts the person's sexual integrity. Coupled with a present ability to carry out the threat, this can amount to a sexual assault: *R v Edgar*, [2016 ONCA 120](#) at para 10

Regardless of whether the accused was motivated by a sexual purpose, a sexual assault will be made out if the touching was, objectively speaking, sexual in nature or was conduct capable of violating the complainant's sexual integrity: *R v Anderson*, [2018 ONCA 1002](#), at para 20

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### **iii. ELEMENT #2: IN CIRCUMSTANCES OF A SEXUAL NATURE**

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While the offences of sexual interference and sexual exploitation require that the touching be subjectively done for a sexual purpose, the offence of sexual assault only requires that the touching be in circumstances of a sexual nature. This is determined by examining the circumstances surrounding the conduct to determine whether, objectively, it was of a sexual nature and violated the sexual integrity of the complainant: *R v Trachy*, [2019 ONCA 622](#), at paras 70-85; see also *R v BJT*, [2019 ONCA 694](#)

The circumstances to be considered include the part of the body touched, the nature of the contact, the situation in which the contact occurred, and any words



or gestures accompanying the act, among other things. The intent or purpose of the person committing the act may also be a factor in considering whether the conduct was sexual, but it is only one factor to be considered in the analysis: *R v Farouk*, [2019 ONCA 662](#), at para 33

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#### **iv. ELEMENT #3: WITHOUT CONSENT**

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##### **a) General Principles**

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Consent to sexual activity can be communicated through conduct as well as words: *R v SB*, [2023 ONCA 784](#), at para 26

Subsection 273.1(1) of the *Criminal Code* provides that consent means the voluntary agreement of the complainant to engage in the sexual activity in question. Subsections 273.1(2)(b) and (d) provide that no consent is obtained where the complainant is incapable of consenting to the activity or where the complainant expresses by words or conduct, a lack of agreement to engage in the activity. Subsection 273.1(3) provides that nothing in s. 273.1(2) shall be construed as limiting the circumstances in which no consent is obtained.

Consent requires “the conscious agreement of the complainant to engage in every sexual act in a particular encounter. Consent is not considered in the abstract but rather must be linked to the sexual activity in question: *R v GF and RB*, [2021 SCC 20](#), at para 29

Consent means conscious and voluntary agreement as to (1) the touching, (2) its sexual nature and (3) the identity of the partner: *R v GF and RB*, [2019 ONCA 493](#), at paras 30, 33; *R v GF and RB*, [2021 SCC 20](#), at para 29

Consent exist at the time the activity occurs, and it can be withdrawn at any time: *R v AE*, [2022 SCC 4](#)

it is a mistake of law to suggest that the complainant could give broad advance consent to whatever the accused wanted to do to her. The only relevant period for ascertaining consent is while the touching is occurring.

This may mean that an accused is not permitted to ask a complainant about comments expressing sexual interest made in advance of the sexual activity in question: *R v Carrasco*, 2024 ONCA at para 50; see paras 43-50

A factor that prevents subjective consent must logically be linked to what subjective consent requires. Conversely, a factor that vitiates subjective consent is not tethered to the conditions of subjective consent and must find footing and justification in broader policy considerations: *R v GF and RB*, [2021 SCC 20](#), at para 36

Consent to the “sexual activity in question” extends to the requirement of condom use. A complainant who does not consent to sex without a condom does not consent to sex. Voluntary agreement to sex with a condom cannot be taken to imply consent to sex without one as consent cannot be implied from the circumstances or the relationship between the accused and the complainant: *R v Kirkpatrick*, [2022 SCC 33](#)

In cases of condom sabotage and deceit, the analysis proceeds under the vitiation of consent provisions. The complainant would be found to have consented to the sex (with a condom) but her consent would have been vitiated by fraud. This applies where the complainant finds out after the sexual act that the accused was wearing a knowingly sabotaged condom.

Instead of asking whether the complainant subjectively wanted the touching to take place, fraud shifts the focus to how the accused behaved and asks whether he attempted to, or succeeded in, deceiving the complainant about his lack of condom use. If, however, the complainant finds out during the sexual act that the condom was sabotaged, then they can revoke their subjective consent, the *actus reus* of sexual assault is made out, and there is no need to consider the fraud analysis: *R v Kirkpatrick*, [2022 SCC 33](#)

The legal meaning given to the “sexual activity in question” cannot be narrowly drawn or fixed for all cases — it is tied to context and cannot be assessed in the abstract, relates to particular behaviours and actions, and will depend on the facts and circumstances of the individual case. It will be defined by the evidence and the complainant’s allegations, and will emerge from a comparison of what actually happened and what, if anything, was agreed to: *R v Kirkpatrick*, [2022 SCC 33](#)

A complainant’s belief that she must submit does not amount to the “voluntary agreement” required by s. 273.1(1): *R v HE*, 2018 ONCA 879, at para 3

The absence of consent is subjective and determined by reference to the complainant's subjective internal state of mind towards the touching at the time it occurred: *R v GF and RB*, [2019 ONCA 493](#), at para 43

The Crown need not prove that the complainant made a conscious decision to refuse sexual contact, for which an operating mind might be required. Rather, the Crown is required to prove the absence of consent by reference to the complainant's subjective internal state of mind: *R v GF and RB*, [2019 ONCA 493](#), at para 48

It is not an error of law to instruct the jury that the charge of sexual assault required that the Crown prove that the accused knew of, or was wilfully blind or reckless as to, the complainant's non-consent, even where the defence of honest but mistaken belief in communicated consent is. The unavailability of the defence does not equate with proof by the Crown of the knowledge element: *R v HW*, [2022 ONCA 15](#); see, for example, paras 76-78

Where mistaken belief in consent is not a live issue, and provided the jury is satisfied that all required actus reus elements have been met, a trial judge can instruct the jury that, if they are satisfied that the Crown has proven beyond a reasonable doubt that the complainant did not consent to the sexual activity, they should have little difficulty in concluding that the accused knew or was wilfully blind to the fact that the complainant was not consenting or was reckless and chose to take the risk. Should more be required, the jury instructions should identify what the Crown must then prove in respect of the accused's mens rea: : *R v HW*, [2022 ONCA 15](#); *R v Degale*, [2024 ONCA 720](#), at para 18

In *D.S.*, the Court of Appeal upheld the trial judge's conclusion that, in the circumstances of the case, the fact that two years before the alleged offence the complainant explained to the appellant that she was not interested in sexual activity with him because they were like brother and sister was relevant and properly formed part of the evidentiary mix that the jury was entitled to consider in determining whether the appellant took reasonable steps to ascertain consent. The trial judge had also reasonably excluded evidence that the appellant persisted past the point of the complainant saying "no" on the prior occasion: *R v DS*, [2024 ONCA 831](#), at paras 34-38

## **b) Capacity to Consent**

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Issues of incapacity can arise in a multitude of circumstances, including sleep, intoxication, illness, and intellectual disability. Varying degrees of awareness, memory, and ability to articulate what happened have supported findings of incapacity: *R v GF and RB*, [2019 ONCA 493](#), at para 26

A complainant lacks the requisite capacity to consent if the Crown establishes beyond a reasonable doubt that, for whatever reason, the complainant did not have an operating mind capable of:

1. appreciating the nature and quality of the sexual activity; or
2. knowing the identity of the person or persons wishing to engage in the sexual activity; or
3. understanding she could agree or decline to engage in, or to continue, the sexual activity:

While mere proof of drunkenness, loss of inhibitions, regret for a bad decision or some memory loss do not of themselves negate capacity for consent, some physical actions such as walking a short distance, making a phone call, speaking, some memory of the events, and some awareness of or resistance to sexual activity do not necessarily preclude a finding of incapacity: *R v GF and RB*, [2019 ONCA 493](#), at paras 36-38; *R v GF and RB*, [2021 SCC 20](#), at para 57

Mere drunkenness, alcohol-induced imprudent decision-making, or loss of inhibition are not the equivalent of incapacity. Nor is the issue whether a person would have made a different decision if they were sober. It is an error in law for a trial judge to equate any degree of intoxication with incapacity to consent. Intoxication might deprive a complainant of capacity, but this is only a possible, not a necessary, result. A person may be intoxicated and still capable of understanding the factors prerequisite to capacity: *R v Le Goff*, 2022 ONSC 609, at para 78; see also *R v SB*, [2023 ONCA 784](#), at para 49;

A person who is asleep cannot consent to sexual activity: *R v Carson*, [2018 ONCA 1002](#), at para

In determining a case involving issues of both consent and capacity to consent, a trial judge should first consider whether the Crown has proven beyond a reasonable doubt that the complainant did not have the capacity to consent to sexual contact. Capacity to consent is a precondition for subjective consent. The trial judge must then consider whether the Crown has proven beyond a reasonable

doubt that the complainant did not subjectively consent: *R v GF and RB*, [2021 SCC 20](#), at paras 46-47

For the Crown to establish incapacity, it is not enough to prove the mere fact of loss of memory or intoxication on the complainant's part. Rather, to establish incapacity, the Crown must prove beyond a reasonable doubt that the complainant was incapable of understanding the physical act(s) or their sexual nature, the identity of the partner(s), or that they could refuse to participate. In other words, the Crown must prove beyond a reasonable doubt that the complainant's cognitive capacity is sufficiently impaired by the consumption of alcohol so as to make her incapable of knowing that she is engaging in a sexual act or that she can refuse to engage in the sexual act, or of knowing the identity of her partner(s): *R v Le Goff*, 2022 ONSC 609, at para 79

The factual circumstances of, for example, intoxication may be relevant to both whether there was subjective consent and to incapacity to consent. *R v GF and RB*, [2019 ONCA 493](#), at para 49

While the complainant will often provide relevant evidence, the question is not whether she subjectively believed that she had or did not have capacity, but whether, based on all the evidence, the Crown has proven lack of capacity beyond a reasonable doubt. The evidence of an accused person can be relevant both to the assessment of the complainant's credibility, and as circumstantial evidence to be considered on the question of capacity. While the complainant's evidence and their credibility are important, the court must consider all the relevant evidence, including the observations of other witnesses of the complainant's consumption of alcohol, level of intoxication and conduct, to determine whether the complainant lacked the capacity to consent when the sexual act occurred: *R v SB*, [2023 ONCA 784](#), at para 51 [separate opinion of Van Rensberg J.]

In *SB*, Van Rensberg J., in a separate opinion, held that the trial judge committed a material error by failing to consider the accused's evidence on the issue of the complainant's capacity to consent. A trial judge is obliged to consider the whole of the evidence in deciding the issue, and to apply the principles of *W.(D.)* to every element of the offence, including the actus reus of the offence which is engaged by the issue of capacity to consent: [2023 ONCA 784](#), at paras 30-33, 57-59

### **c) Evidence Complainant “would not have consented”**

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In the absence of direct evidence from a complainant in relation to her consent, including because she had no memory, triers of fact may rely on circumstantial evidence. This may include evidence of a complainant's pre-existing attitudes and assumptions regarding the period during which she has no recollection. Where a complainant with memory gaps testifies that they "would not have" consented to certain acts, such a statement is not direct evidence of a lack of consent, but rather a statement of her assumption or belief about how she behaved at a time she cannot recall. Such a statement may, however, be properly received as circumstantial evidence of whether consent was present at the operative time. The strength of any inference flowing from such a statement is fact specific and must be assessed in relation to the entire evidence including the possibility of the complainant behaving out of character due to her intoxication

The weight assigned to this circumstantial evidence, and the strength of the inferences that will be drawn from it, often depend on:

- \*whether there is other evidence supporting the complainant's testimony about what she would not do:
- whether there was evidence of the complainant's actions that contradicted her testimony about what she would not do
- whether the complainant had specific and compelling reasons for which she said she would not have consented or whether her evidence that she would not have consented depended on her general attitudes, character, or personal code of conduct

However, the Crown should be careful in eliciting evidence that a complainant "would not have consented." This is because such evidence can prejudice the defence, as they may not be able to cross-examine on it by operation of s. 276: *R v Le Goff*, 2022 ONSC 609, at paras 175-176 [citations omitted]

In *R. v. G.L.*, [2021 ONSC 271](#), the Court concluded that s. 276 applies to evidence of the complainant being less likely to have consented and more worthy of belief. The Court held that the prohibition against relying on sexual history as evidence of propensity applied regardless of whether it was tendered to prove that a complainant was "more likely to have consented" or "less likely to have consented." The opposite conclusion was reached by the Alberta Court of Appeal in *R v Way*, 2022 ABCA 1, which held that such evidence did not constitute s.276 evidence because it did not engage a twin myth that a complainant was "more likely to have consented" because of the prior sexual activity.

#### **d) Vitiating of Consent**

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## **i. GENERAL PRINCIPLES**

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Section 265(3) sets out four factors that will vitiate subjective consent to sexual activity. Subjective consent will not be given legal effect where it is the product of force, threats or fear of force, certain types of fraud, or the exercise of authority: s. 265(3)(a) to (d). Section 273.1(2)(c) also vitiates subjective consent where the complainant is induced into sexual activity by the accused abusing a position of trust, power, or authority: *R v GF and RB*, [2021 SCC 20](#), at para 35

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## **ii. VITIATION OF CONSENT BASED ON BODILY HARM OR THREATS**

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Bodily harm could negate or vitiate consent a complainant gave to sexual activity only if the accused actually intended to inflict bodily harm in the course of the sexual activity. Proof that the accused has caused bodily harm during non-consensual sexual activity is measured on an objective basis: *R v Graham*, [2019 ONCA 347](#), at para 23

It may be open to a trial judge to conclude, even in the absence of specific threatening conduct attached to an act of sexual touching, that based on the totality of the evidence of the conduct between the parties, the voluntariness of a complainant's subjective agreement to that act of sexual touching was vitiated by the control that the accused person exercised through violence and intimidation within their relationship. In other words, if a complainant agrees to sexual touching because of an operating fear of past acts of violence, their subjective agreement to sexual activity will be vitiated: *R v RH*, [2022 ONCA 69](#), at para 6

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## **iii. VITIATION OF CONSENT BASED ON FRAUD**

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To vitiate consent based on fraud, the Crown must prove:

- (1) a *dishonest act* (either falsehoods or failure to disclose HIV status);  
and
- (2) *deprivation* (denying the complainant knowledge which would have caused him or her to refuse sexual relations that exposed him or her

to a significant risk of serious bodily harm): *R v Mabior*, [2012 SCC 47](#)

The failure to disclose a condition that poses a significant risk of serious bodily harm amounts to fraud that vitiates consent to sex: *R v Boone*, [2016 ONCA 227](#) at para 15. The Crown still must prove beyond a reasonable doubt if the jury is satisfied beyond a reasonable doubt that: (1) there has been non-disclosure of HIV infection; (2) the complainant would have refused consent had disclosure been made; and (3) the sexual activity in question posed a “realistic possibility of HIV transmission”; *Boone* at para 16: *R v Aziago*, [2023 ONCA 12](#), at para 52

A significant risk of bodily harm is established where there exists a “realistic possibility of transmission of HIV” from the sexual contact at issue. In *Mabior*, the SCC in 2012 held that the presence of two factors will negate a realistic possibility of HIV transmission: (i) the accused’s viral load at the time of the sexual relations was “low”; and (ii) a condom was used. However, in *Murphy*, based on scientific advancements since that time, the Court of Appeal found that an undetectable viral load, combined with anti-viral treatment, even without the use of a condom, may be sufficient to negate a realistic possibility of HIV transmission” *R v Murphy*, [2022 ONCA 615](#), at paras 16-26. Importantly, the court did not limit its conclusion to say that this was the only circumstance in which an accused could negate a realistic possibility of transmission: see para 40

In *Rubara*, the Court of Appeal overturned a sexual assault conviction and entered an acquittal on the basis that new evidence demonstrated that the appellant was an “elite controller” of HIV at the time of the alleged assault. This meant that his immune system response is naturally effective against the virus; and that his viral load, as measured by blood tests, remains very low without medication. The evidence demonstrated that there was no realistic possibility of risk of HIV transmission sufficient to constitute a deprivation of consent: *R v Rubara*, [2022 ONCA 694](#)

Evidence of a complainant’s general disposition to expose himself to an unknown risk (i.e. by having casual unprotected sex) is not probative of whether or not a complainant would be willing to accept a serious known risk.: *R v Boone*, [2016 ONCA 227](#) at paras 38, 40.

However, evidence that a complainant previously consented to unprotected sex knowing his/her partner has a transmittable disease may be sufficiently



relevant to the determination of whether the complainant consented to the same risk with the accused: *Boone* at para 42

### **e) Honest but Mistaken Belief in Consent**

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A lack of verbal resistance is not “implied” consent and that a belief that silence, passivity or ambiguous conduct constitutes consent is a mistake of law and provides no defence to an accused asserting reasonable belief in consent: *R v GF and RB*, [2019 ONCA 493](#), at para 44

Testimony by an accused is not a prerequisite to an argument that the accused lacked the mental state necessary to support conviction. However, there must be some evidence to show that the “complainant communicated consent to engage in the sexual activity in question” and that the accused believed she had communicated that consent. That evidence may be derived from the circumstances surrounding the event and the behavior of the involved parties: *R v Notfall*, [2018 OnCA 538](#) at para 8

Honest but mistaken belief is *communicated* consent as opposed to *assumed* or *implied* consent: *R v Barton*, [2019 SCC 33](#); *R v LT*, [2019 ONCA 535](#), at para 4

Where the complainant and the accused have diametrically opposed versions of events, the defence of honest but mistaken belief in consent may lack an air of reality because there would be no room for the possibility of a mistaken understanding about what the complainant communicated: *R v Reimer*, [2024 ONCA 519](#), at para 61

To determine whether an accused had an honest but mistaken belief in consent, the trier of fact must factor in whether s/he took reasonable steps to ascertain consent in the first place. If there is an air of reality to the defence, it should be left with the jury. It then falls to the Crown to negate the defence beyond a reasonable doubt, which can occur if the Crown proves that the accused did not take reasonable steps to ascertain consent, or did not subjectively have an honest belief in consent: *R v Barton*, [2009 SCC 33](#)

To avoid conviction based on an honest but mistaken belief in consent, the accused must believe in a state of facts that amount to consent according to law: *R v HE*, [2018 ONCA 879](#), at para 3

Courts have “generally refused to put the defence of honest but mistaken belief in consent to a jury when the accused clearly bases his defence on voluntary consent and he also testifies that the complainant was an active, eager or willing partner whereas the complainant testifies that she had vigorously resisted. In such cases, the question is generally simply of credibility of consent or no consent:” *R v LT*, [2019 ONCA 535](#), at para 5 (citation omitted)

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#### **iv. DEFENCE OF SEXSOMNIA**

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See *R v Hartman*, [2015 ONCA 498](#)

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#### **v. DELAYED DISCLOSURE**

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For a discussion on the significance of delayed disclosure in sexual assault cases, see *R v DD*, [2000 SCC 43](#); see also *R v DP*, [2017 ONCA 263](#) at paras 28-31

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#### **vi. INDIGENOUS VICTIMS**

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In *Barton*, the Supreme Court of Canada held that, in sexual assault cases where the complainant is an Indigenous woman or girl, trial judges would be well advised to provide an express instruction aimed at countering prejudice against Indigenous women and girls. The Court went on to caution, however, that any such instruction must not privilege the rights of the complainant over those of the accused. The objective would be to identify specific biases, prejudices, and stereotypes that may reasonably be expected to arise in the particular case and attempt to remove them from the jury’s deliberative process in a fair, balanced way, without prejudicing the accused: *R v Barton*, [2019 SCC 33](#)

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## **Q. FORCIBLE CONFINEMENT: S.279(2)**

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Forcible confinement occurs where, for any significant length of time, the victim is coercively restrained contrary to her wishes so that she could “not move about according to her own inclination and desire”: *R v Smith*, [2015 ONCA 831](#) at para 11; *R v KM*, [2016 ONCA 347](#) at para 15; *R v McIlmoyle*, [2016 ONCA 505](#) at para 10

In *Palmer-Coke*, the Court of Appeal vacated a conviction for unlawful confinement where “the element of restraint that resulted from the appellant grabbing the complainant by her hair was momentary in nature. It was not for “any significant period of time:” [2019 ONCA 106](#), at para 31

The “lawful authority” defence at s. 279(2) in cases involving parents and their children recognizes that parents are entitled, if not obligated, by virtue of their parental duties and responsibilities to confine their children in the best interests of the children. The “lawful authority” defence however extends only to conduct which is a reasonable exercise of parental authority done in furtherance of parental duties and responsibilities. Parental conduct that is abusive, harmful to the child, degrading or otherwise beyond the bounds of acceptable parenting cannot shelter under the lawful authority defence.

It flows from the focus on the reasonableness of the parental exercise of authority that the “lawful authority” defence in s. 279(2) as applied in the parent/child situation must address not only the reason behind the confinement but also the factual context in which the confinement occurs. The court must consider the purpose, nature, and extent of the confinement in determining whether that confinement was a lawful exercise of parental authority over the child.

The parents’ reason for imposing the restraint on the child’s liberty will be a key consideration. It is not however, the only relevant consideration. Other factors such as the location, manner, and duration of the confinement will also be potentially relevant, as no doubt will other considerations: *R. v. Magoon*, 2018 SCC 14, at paras 64-68; *R v CO*, [2022 ONCA 103](#), at paras 21-22, 35-37

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## **R. HUMAN TRAFFICKING: S.279.01**

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The Crown must establish beyond a reasonable doubt two elements to make out the offence of human trafficking. First, it must prove that the accused did anything

that satisfies the conduct requirement set out in s. 279.01(1) in relation to a person. Second, it must prove that the accused intended to do anything that satisfies the conduct requirement, and that the accused acted with the purpose of exploiting or facilitating the exploitation of that person: *R v Gallone*, [2019 ONCA 663](#), at para 17

A finding of actual exploitation is not an essential element of the offence. The Crown need only prove that the accused intentionally engaged in any of the conduct described in s. 279.01(1) with the purpose of exploiting the complainant or facilitating her or his exploitation. No exploitation need actually occur or be facilitated by the accused's conduct. The focus of this element is on the accused's state of mind – *i.e.* his or her purpose in engaging in the prohibited conduct – and not on the actual consequences of his or her conduct for the complainant: *R v Gallone*, [2019 ONCA 663](#), at para 54

The various modes in which someone may commit the offence of human trafficking are disjunctive. Thus, the conduct requirement is made out if the accused engaged in any one of the specified types of conduct: *R v Gallone*, [2019 ONCA 663](#), at para 33

The phrase “exercises influence” over the movements of a person for the purposes of s. 279.01(1) means something less coercive than “exercises direction”. Exercising influence over a person's movements means doing anything to affect the person's movements. Influence can be exerted while still allowing scope for the person's free will to operate. This would include anything done to induce, alter, sway, or affect the will of the complainant. Both of these terms generally suggest a situation that results from a series of acts rather than an isolated act: *R v Gallone*, [2019 ONCA 663](#), at paras 47-48

See also *R v Sinclair*, [2020 ONCA 61](#)

Where exploitation, as defined in s. 279.04, arises from the facts, inferring that the accused's purpose was to exploit the victim will usually be a relatively straightforward task: *R v Tekin*, [2022 ONCA 740](#), at para 5; *R v Wilson*, [2022 ONCA 857](#), at para 39

“Exploitation” does not require that a person's safety actually be threatened. Nor is “safety” limited to being protected from only physical harm but also includes psychological harm. Circumstances that might be relevant when assessing

whether conduct could reasonably be expected to cause a complainant to fear for their safety include:

- the presence or absence of violence or threats;
- coercion, including physical, emotional or psychological;
- deception;
- abuse of trust, power, or authority;
- vulnerability due to age or personal circumstances, such as social or economic disadvantage, and victimization from other sources;
- isolation of the complainant;
- the nature of the relationship between the accused and the complainant;
- directive behaviour;
- influence exercised over the nature and location of the services provided;
- control over advertising of services;
- limitations on the complainant's movement;
- control of finances;
- financial benefit to the accused; and
- use of social media to assert control or monitor communications with others.

*R v Wilson*, [2022 ONCA 857](#), at para 43

The element of control does not necessarily mean complete physical control over or the absence of any choice by the complainant and can also refer to psychological coercion. As this court clarified in Gallone, at para. 50, while the terms, “control”, “direct” and “influence” involve different degrees of coercion, those terms all “evoke a scenario in which a person, by virtue of her or his relationship with the complainant, has some power – whether physical, psychological, moral or otherwise – over the complainant and his or her movements.” It is not necessary that control be complete, constant and absolute.

In *Wilson*, for example, the element of control was satisfied by the accused controlling complainant's movements by manhandling her, giving her drugs to keep her “high”, retaining her money, pressuring her to work, becoming angry with her if she wanted money or refused to work, arranging her clients and locations, preventing her from leaving the motel and hotel rooms to which he drove her, and emotionally manipulating the complainant through their romantic relationship to keep her with him and have her return to him, notwithstanding that she did return to her parents on occasion: *R v Wilson*, [2022 ONCA 857](#), at paras 28-29

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## **i. EVIDENCE OF VIOLENCE**

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Exploitation occurs when the accused engages in any conduct, including regular violence and threats of violence, that both causes the victim to provide (or offer to provide) labour or a service and could be reasonably expected to cause the victim to believe that their safety (or the safety of a person known to them) would be threatened if they failed to provide that labour or service. The latter must be assessed using an objective test, having regard to all the circumstances, including the victim's vulnerabilities.

Regular violence and threats of violence by an accused towards a victim and, more generally, a violent relationship with a victim, can be the means of perpetuating exploitation of a victim. the Crown can adduce evidence showing an accused's violent relationship with a victim, or regular violence and threats of violence against the victim, in an effort to establish the *actus reus* of the trafficking in persons offence. Such conduct can amount to exercising control, direction, or influence over their movements during a period of time, provided that the effect of that violence is that the victim's movements have been effectively controlled, directed, or influenced during that time.

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## **S. PROCURING OR HARBOURING: S. 286.3**

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There are two modes of committing the *actus reus* of the procuring offence

1. The accused "procures a person to offer or provide sexual services for consideration"; or
2. The accused "recruits, holds, conceals or harbours a person who offers or provides sexual services for consideration, or exercises control, direction or influence over the movements of that person"

*R v Gallone*, [2019 ONCA 663](#), at para 59

"Procure" means "to cause, or to induce, or to have a persuasive effect upon the conduct that is alleged."

The second mode of the *actus reus* for the procuring offence is satisfied by proof that the accused committed any one of the specified types of conduct – i.e. recruits, holds, conceals, harbours, or exercises control, direction or influence over movement.

Control does not necessarily mean complete physical control over or the absence of any choice by the complainant and can also refer to psychological coercion. As this court clarified in *Gallone*, at para. 50, while the terms, “control”, “direct” and “influence” involve different degrees of coercion, those terms all “evoke a scenario in which a person, by virtue of her or his relationship with the complainant, has some power – whether physical, psychological, moral or otherwise – over the complainant and his or her movements.” It is not necessary that control be complete, constant and absolute.

In *Wilson*, for example, the element of control was satisfied by the accused controlling complainant’s movements by manhandling her, giving her drugs to keep her “high”, retaining her money, pressuring her to work, becoming angry with her if she wanted money or refused to work, arranging her clients and locations, preventing her from leaving the motel and hotel rooms to which he drove her, and emotionally manipulating the complainant through their romantic relationship to keep her with him and have her return to him, notwithstanding that she did return to her parents on occasion: *R v Wilson*, [2022 ONCA 857](#), at paras 28-29

To prove *mens rea* for the first mode of the procuring offence, the Crown must prove that the accused intended to procure a person to offer or provide sexual services for consideration. To prove *mens rea* for the second mode, the Crown must prove that the accused intended to do anything that satisfies the *actus reus* for this mode in relation to a person who offers or provides sexual services for consideration, and that the accused acted with the purpose of facilitating an offence under s. 286.1(1) (the purchasing sexual services offence): *R v Gallone*, [2019 ONCA 663](#), at paras 61-63; see also *R v Joseph*, [2020 ONCA 733](#), at paras 63-73

It is an error to concentrate on what an accused did, without regard to the nature of the relationship between the accused and the complainant, and the impact of the accused’s conduct on the complainant’s state of mind. However, sometimes, the nature of the relationship and the impact of the accused’s conduct on the complainant’s state of mind will be evident from what an accused said or did and what the complainant said or did in response: *R v Ochrym*, [2021 ONCA 48](#)

Had Parliament intended s. 286.3(1) to criminalize any conduct affecting a complainant's movements that facilitates the provision of sexual service[s] for consideration, it would have done so more clearly.... Rather ... Parliament used terms which require consideration of whether because of the relationship between the accused and the complainant, the accused was in a position or had the ability to, and did, exercise control, direct or influence the movements of a person who provides sexual services for consideration. Some regard must be had to the nature of the relationship between the accused and the complainant; *R v Ochrym*, [2021 ONCA 48](#), at para 33; see also *R v AM*, [2024 ONCA 661](#), at para 137

The criminalization of harboring, under S.286.3, prohibits the provision by third parties of shelter, when this is being done for the purpose of facilitating an offence under s. 286.1(1) or s. 286.1(2). The provision of shelter does not have to be done clandestinely or with secrecy: *R v Joseph*, [2020 ONCA 733](#), at paras 74-92

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#### **T. ADVERTISING SEXUAL SERVICES: S.286.4**

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The *actus reus* of this offence is made out if the accused advertised an offer to provide sexual services for consideration. The *mens rea* is made out if: (i) the accused intended to advertise the offer; and (ii) the accused knew that the offer was one to provide sexual services for consideration: *R v Gallone*, [2019 ONCA 663](#), at para 78

The immunity provision under s.286.5 applies only to those who advertise their own sexual services and not to those who assist them: *Gallone* at paras 88, 99

There is no “genuine offer” requirement in the mens rea of advertising sexual services: *R v Khan*, [2024 ONCA 296](#), at para 7

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#### **U. HATE SPEECH: S.319(2)**

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The term “hate propaganda” denotes “expression intended or likely to create or circulate extreme feelings of opprobrium and enmity against a racial or religious group. This determination should be made *objectively*, the question being whether a reasonable person, aware of the context and circumstances surrounding the



expression, would view it as exposing or tending to expose the target group to hatred. The Crown is not required to prove that actual harm resulted from the communication in question, so long as the communication amounted to the promotion of hate against an identifiable group. In most cases, the overall context of the expression will affect the presentation, tone, or meaning of particular phrases or excerpts: *R v Whatcott*, [2023 ONCA 536](#), at paras 61-63, 65

The perspective of the target community is critically important to an assessment of whether the challenged speech causes “emotional distress” to the members of that community. Emotional distress caused to individual members of the group is one of the pressing harms that anti-hate speech laws aim to address. The second is the social impact of hateful speech against a targeted group: *R v Whatcott*, [2023 ONCA 536](#), at paras 43-44

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## PART VIII.1: OFFENCES RELATING TO CONVEYANCES

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### A. DANGEROUS DRIVING: S.320.13

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#### i. ACTUS REUS

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The *actus reus* of dangerous driving is whether the driving was dangerous to other users of the road: *R v Higgins*, [2018 ONCA 451](#) at para 3

The dangerousness inquiry must have regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place. The focus of the inquiry is the manner of operation of the vehicle, not the consequences of the driving: *R v Ibrahim*, [2019 ONCA 631](#), at para 23

It is clear that the *actus reus* of the dangerous driving offence is conduct which, viewed objectively in all the circumstances, constitutes a danger to the public actually present or who may reasonably be expected to be present. While it is the

manner in which the vehicle was driven that is at issue, and not the consequences of that driving, the consequences may nonetheless assist the trier of fact in assessing the risk involved: *R v Akthar*, [2022 ONCA 279](#), at para 29

In order to find an accused guilty of dangerous driving, there need not be some element of active misconduct. Omissions can result in dangerous driving, but the seriousness of the transgression must be considered in light of all the circumstances, and it must constitute a “marked departure” from the norm. Indeed, from a review of the case law, it would seem that in most cases of dangerous driving, the court has found the accused guilty where the transgression involved active misconduct: *R v Edwards*, [2024 ONCA 131](#), at para 44

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## **ii. MENS REA**

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The *mens rea* is established if the accused had a deliberate intention to create a danger for other users of the road. If not, the trier of fact can go on to consider whether the accused’s manner of driving, viewed on an objective basis, constitutes a marked departure from the standard of care of a prudent person: *R v Higgins*, [2018 ONCA 451](#) at para 3

The *mens rea* for dangerous driving is a modified objective test: was the degree of care exhibited by the accused a marked departure from the standard of care of a reasonable person in the accused’s circumstances? Evidence of the accused’s personal attributes, such as age, experience and education, is irrelevant unless it goes to the accused’s incapacity to appreciate or avoid the risk. Criminal fault can be based on the voluntary undertaking of the activity, the presumed capacity to properly do so, and the failure to meet the requisite standard of care: *R v Brown*, [2018 ONCA 814](#) at paras 6

In considering the issue of the fault element, it is helpful to ask two questions. The first is whether, in light of all the relevant evidence, a reasonable person would have foreseen the risk and taken steps to avoid it if possible. If the answer to the first question is “yes”, the second question is whether the accused’s failure to foresee the risk and take steps to avoid it, if possible, was a marked departure from the standard of care expected of a reasonable person in equivalent circumstances.

As a general rule, a trier of fact may infer the required objective fault element or *mens rea* from the fact that an accused drove in a manner that constituted

a *marked departure* from the norm. But this is an inference, not a presumption. And even where the manner of driving is a marked departure from the norm, the trier of fact must examine all the circumstances to decide whether it is appropriate to draw the inference of fault from the manner of driving: *R v Stennett*, [2021 ONCA 258](#), at paras 91-92

The Mens Rea of dangerous driving must not focus on the consequences of the driving. It is the manner in which the motor vehicle was operated that is at issue, not the consequences of the driving. The consequences, such as bodily harm, may make the offence more serious. But the consequences have no say on whether the offence of dangerous operation has been established: *R v Markos*, [2019 ONCA 80](#), at para 9; *R v Stennett*, [2021 ONCA 258](#), at para 87

However, the law does not proscribe all reference to the consequences of the driving in considering a dangerous driving charge. It permits consideration of the consequences to assist in assessing, or to verify, the risk involved. It recognizes that in some circumstances, the actions of the accused and the consequences flowing from them may be so interwoven that the consequences may be relevant in characterizing the conduct of the accused: *R v Romano*, [2021 ONCA 211](#), at para 46; see also *R v Stennett*, [2021 ONCA 258](#), at para 88

The offence of dangerous driving is not proved by showing only that the accused drove in a manner that was dangerous to the public. There is a fault element. The Crown must prove that the manner of driving amounted to a marked departure from the standard of care that a reasonable person would observe if placed in the circumstances in which the accused found himself. The fault component of dangerous driving focuses on the conduct of the accused and is intended to distinguish driving that is sufficiently egregious in all of the circumstances to warrant criminalization from other less serious forms of bad driving, such as careless driving.

Where a trial judge finds that the driving is dangerous in all of the circumstances, s/he must still engage in a similar analysis of the evidence as it related to the *mens rea* issue. It is an error of law for the trial judge to conclude that the act of driving dangerously necessarily constituted a marked departure from what a reasonable person would expect in the circumstances. The trial judge must identify the how and in what way the accused's driving went beyond negligence or carelessness and reached the level of a marked departure from the standard of care that a reasonable person would show in the same position: *R v Laverdure*, [2018 ONCA 614](#) at paras 23, 25

Dangerous driving should be sufficiently egregious in all of the circumstances to warrant criminalization, compared to other less serious forms of bad driving, such as careless driving. For example, conduct that occurs in such a brief timeframe in the course of driving, which is otherwise proper in all respects, is more suggestive of the civil rather than the criminal end of the negligence continuum. Equally, a momentary lapse in attention and judgment will not usually raise criminal liability unless the underlying conduct, when assessed in totality against the reasonable person standard, is a marked departure from the norm. *R v Qureshi*, [2024 ONCA 131](#), at para 26; see also paras 29-30.

Momentary excessive speeding on its own can establish the *mens rea* for dangerous driving where, having regard to all the circumstances, it supports an inference that the driving was the result of a marked departure from the standard of care that a reasonable person in the same circumstances would have exhibited. The focus should not be on the monetary nature of the driving, but on whether a reasonable person would foresee the dangers to the public from the momentary conduct. The duration and nature of the accused's conduct are only some of the factors to be considered with all of the circumstances in the mens rea analysis: *R v Chung*, [2020 SCC 8](#), at paras 19, 21, 23, 27; *R v Stennett*, [2021 ONCA 258](#), at para 93

More than carelessness, negligence, momentary lapses of attention, or understandable misjudgment is required: *R v Romano*, [2021 ONCA 211](#), at para 54; *R v Akthar*, [2022 ONCA 279](#), at para 30

It is not an error of law for a judge to use words other than “marked” to describe the level of departure from the standard of care that a reasonable person would observe in the accused's situation as long as the word is truly a synonym: *R v Akthar*, [2022 ONCA 279](#), at para 34

In determining whether the accused's conduct constituted a marked departure, the trial judge must consider plausible theories or other reasonable possibilities rooted in logic and experience applied to the evidence or absence of evidence. The theories must be reasonable when assessed logically and in light of human experience and common sense: *R v Edwards*, [2024 ONCA 131](#), at para 60

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### iii. ANALYZING THE EVIDENCE

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Under both the *actus reus* and *mens rea* component of the offence, evidence of the accused's state of mind and explanations offered by the accused should be considered by the trier of fact. If an explanation is offered by the accused, then in order to convict, the trier of fact must be satisfied that a reasonable person in similar circumstances ought to have been aware of the risk and of the danger involved in the conduct manifested by the accused: *R v Ibrahim*, [2019 ONCA 631](#), at paras 28-34, 48

A modified *W.(D.)* instruction is required due to the fact that, even if the accused's evidence is believed at the first stage of the analysis, s/he is not necessarily entitled to an acquittal, given the modified objective test involved: *R v Ibrahim*, [2019 ONCA 631](#), at paras 38, 47, 49, 61

An accused's licensing status may be relevant to indicate that the accused possessed the requisite *mens rea*, if, for example, it is indicative of an incapacity to appreciate or avoid the particular risk. For example, if an accused drives in violation of a licensing condition imposed because of some physical attribute that makes it unsafe for the accused to drive in some circumstances, driving in violation of that condition would be relevant. The Crown could use the accused's violation of the licensing condition to prove that the accused was subjectively reckless or willfully blind to the risk his or her actions posed to other users of the road. Such evidence about the accused's actual state of mind is relevant to a court's objective assessment of whether the accused's conduct constituted a marked departure. If, however, an accused's license suspension: *Brown* at paras 8-9

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#### **iv. STANDARD OF REVIEW**

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Where a trial judge fails to apply the correct test to determine whether there was a marked departure, this is an error of law for which the standard of review is correctness. Put differently, it would be an error of law if the trial judge failed to compare the accused's actions to what a reasonable person would have foreseen and done in all of the circumstances.

A trial judge is therefore required to provide an explanation for 'how and in what way' the nature of the accused's driving showed the necessary marked departure from the standard of care that a reasonable person would show in the same circumstances.

While a trial judge's finding as to the accused's manner of driving may, in some cases, be sufficiently egregious to permit the finding of the requisite fault element without additional analysis, the manner in which the accused's conduct is a departure from the standard must be evident. Failure to fully analyze the evidence as it relates to the fault element constitutes an error of law: *R v Qureshi*, [2024 ONCA 131](#), at paras 34-36

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## **B. STREET RACING**

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The mutuality component of street racing requires evidence of a common intention between the two parties to encourage or incite each other to race.

Evidence of a race is often drawn from circumstantial evidence such as synchronized or in-tandem aggressive movements of two vehicles, marked by high speed and close proximity over a material distance, often accompanied by abrupt lane changes, blocking, or bold manoeuvres in and out of traffic to name a few indicia.

The actus reus and mens rea components of the offence require the trier of fact to consider each party's overall driving conduct. For example, one party accused of street racing may raise an intervening event, such as evidence that he or she has withdrawn from the race, to avoid culpability. However, absent an intervening event, when two drivers engage in street racing, both are considered in law to have caused injury to those harmed by their racing.

Given the possibility of an intervening event, therefore, it is not true that the finding of guilt of one co-accused to an offence containing a mutuality requirement must result in a finding of guilt of another co-accused: *R v Akthar*, [2022 ONCA 279](#), at paras 59-62

Absent an intervening event, when two motorists engage in street racing, both are considered in law to have caused injury to an innocent third party who is harmed because of their racing: *R v Williams*, [2020 ONCA 30](#), at para 15

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## **C. IMPAIRED DRIVING: S.320.14**

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In prosecutions for impaired operation of a motor vehicle, the essential element of impairment is proven if the evidence establishes any degree of impairment ranging from slight to great: *R v Stennett*, [2021 ONCA 258](#), at para 111

There is no special test for determining impairment. The offence of impaired driving is established by evidence of any degree of impairment ranging from slight to great: *R v Ramroop*, [2021 ONCA 642](#), at para 11

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#### **D. REFUSALS: [S.320.15](#)**

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An initial refusal will not be criminal if the accused later agrees to provide a breath sample as part of the same transaction. This timeframe constitutes a window during which persons subjected to breath demands can change their minds about refusing before committing the *actus reus* of the refusal offence. This is an analytically distinct question from whether the accused's refusal to comply in a particular case was "unequivocal", which bears on both the *actus reus* and the *mens rea* of the refusal offence.

In approved screening device (ASD) refusal cases, the duration of the "transaction" is constrained by the requirement that ASD tests be conducted "immediately". In other words, when someone initially refuses to provide an ASD breath sample, the maximum time within which they can change their mind cannot exceed the time within which a compelled breath sample can lawfully be obtained by the police. This latter time is determined by the operational requirements of the ASD test process and by any "unusual circumstances" that extend the statutory "immediacy" window: *R v Khandakar*, [2024 ONCA 620](#), at paras 1-3

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### **PART IX: OFFENCES AGAINST RIGHTS OF PROPERTY**

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#### **A. ROBBERY: S.343**

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One mode of robbery cannot be an included offence in a charge specifying another mode of robbery because s. 343 creates only one offence of robbery, with different ways of committing it: *R v Robinson*, [2018 ONCA 741](#) at para 12

The Crown is not required to particularize a mode of robbery; however, having done so by particularizing the charge as one mode of robbery, the Crown cannot then obtain a conviction for a different mode of robbery where to do so would prejudice the accused: *Robinson*.

Assault with intent to steal under s. 343(c) of the *Criminal Code* does not require a “major” assault or a particular level of violence; even a trivial or “mere” assault is sufficient. Of note, the *de minimis* defence has never been definitely endorsed by the Court of Appeal. It is possible that even benign touching with an intent to steal may be sufficient. This might be contrasted, however, with the level of violence required to sustain a conviction under s.343(b): *R v Moreira*, [2023 ONCA 807](#), at paras 68-70

Robbery under s. 343(c) does not require a complete theft: The *mens rea* for robbery under s. 343(c) is an intent to steal, not an intent to commit violence: *R v Moreira*, [2023 ONCA 807](#), at para 72

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## **B. FALSE INFORMATION / HARRASING COMMUNICATIONS: S.372**

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Under s.372(2), a person may include an organization: *R v Berhe*, [2022 ONCA 853](#), at para 22

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## **C. SELLING/POSSESSING COUNTERFEIT MARK: S.376(2)(B)**

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Counterfeit marks are those that falsely purported to be genuine official marks. In the case of government cards with incorrect information, there must be evidence that they were not issued by the government in that form. In other words, for a mark on a government issued document to be counterfeit, the document on which it appears must at least have been altered in some way after the government issued the document and applied the mark: *R v Smith*, [2021 ONCA 310](#), at paras 21-28

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## **D. CRIMINAL INTEREST RATES: S.347**

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Subsections 347 (1) and (3) read as follows:



(1) Despite any other Act of Parliament, every one who enters into an agreement or arrangement to receive interest at a criminal rate, or receives a payment or partial payment of interest at a criminal rate, is

(a) guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; ...

(3) Where a person receives a payment or partial payment of interest at a criminal rate, he shall, in the absence of evidence to the contrary, be deemed to have knowledge of the nature of the payment and that it was received at a criminal rate.

Section 347(1) of the Criminal Code creates two offences: (i) entering into an agreement or arrangement to receive interest at a criminal rate (the “agreeing offence”); and (ii) receiving a payment or partial payment of interest at a criminal rate (the “receiving offence”).

The mens rea is knowledge, or its legal equivalent, wilful blindness, that the terms of the agreement call for an effective annual interest rate of over 60 percent.

Under s. 347(2), “criminal rate” is defined as an effective annual rate of interest calculated in accordance with generally accepted actuarial practices and principles that exceeds 60 percent on the credit advanced under an agreement or arrangement. As a result, effective annual rates of interest that are 60 percent or less when calculated in accordance with actuarial principles are not criminal rates of interest.

Whether an agreement or arrangement for credit is an agreement or arrangement to receive interest at a criminal rate should be narrowly construed and is determined as of the time the transaction is entered into.

Section 347(3) deems a person to have knowledge where the person receives a payment or partial payment of interest at a criminal rate.

*R v Saikaley*, 2017 ONCA 374 at paras 77-114

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## **E. FRAUD: S.380**

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The mens rea of fraud is established by proof of:

1. subjective knowledge of the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and
2. subjective knowledge that the prohibited act could have, as a consequence, the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk).

A person cannot escape criminal responsibility because of a sanguine belief that all will come out right in the end. Many frauds are perpetrated by people who sincerely believe that their act of placing other people's property at risk will not ultimately result in actual loss to those persons: *R v Leclair*, [2020 ONCA 230](#), at paras 3-4

Fraud by "other fraudulent means" does not require that the accused subjectively appreciate the dishonesty of his or her acts. The accused must knowingly, i.e., subjectively, undertake the conduct which constitutes the dishonest act, and must subjectively appreciate that the consequences of such conduct could be deprivation, in the sense of causing another to lose his or her pecuniary interest in certain property or in placing that interest at risk: *R v Earle*, [2021 ONCA 34](#), at paras 50-51

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## **PART XI: WILFUL AND FORBIDDEN ACTS IN RESPECT OF CERTAIN PROPERTY**

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### **A. ARSON: S.433**

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Section 433 is the most serious of the arson-related offences. It creates two crimes, both punishable by up to life imprisonment. Section 433(a) requires proof of two things:

- intentionally or recklessly causing damage to property by fire; and
- knowing that or being reckless with respect to whether the property is inhabited or occupied

Section 433(a) targets arsonists who endanger others by setting fires in places in which others live, or in places occupied by others. Knowledge or recklessness of

the presence, or perhaps the potential presence, of others in those locations is what warrants characterizing the accused's actions as the most serious kind of arson

Section 433(b), like s. 433(a), requires that the Crown prove that the accused intentionally or recklessly caused damage to property by fire. Unlike s. 433(a), however, s. 433(b) contains no additional *mens rea* requirement. Instead, liability attaches under s. 433(b) if the fire "causes bodily harm to another person"

Section 434 creates the offence of intentionally or recklessly causing damage to property by fire. The provision creates a pure property offence that contains no additional *mens rea* requirement. The section does not require proof that anyone was harmed or endangered by the fire. Section 434 does not, however, apply if the person causing the damage by fire wholly owns the damaged property. A person who intentionally or recklessly causes damage by fire to property that he wholly owns does not commit an offence under s. 434.

Section 434.1 requires proof that:

- the accused intentionally or recklessly caused damage to property by fire;
- the accused owned the property in whole or in part; and
- the fire threatened the health, safety or property of another person.

Section 434.1 applies to an accused who intentionally causes damage by fire to their own property, or to someone else's property, if that fire seriously threatens the health, safety, or property of another person.

The provisions outlined above do not make it a crime to intentionally cause damage by fire to one's own property unless that fire causes bodily harm to another or seriously threatens the health, safety or property of another: *R v Ludwig*, 2018 ONCA 885 at paras 32-38

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## PART XIII: ATTEMPTS, CONSPIRACIES, ACCESSORIES

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### A. ACCESSORY AFTER THE FACT: S.463

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Section 592 of the *Criminal Code* permits proceeding with an accessory after the fact charge prior to the principal's trial. However, proceeding in this manner places an added burden on the Crown, because proof of guilt of the principal offender is an essential element of the crime of being an accessory after the fact: *R. v. Duong* (1998), 124 C.C.C. (3d) 392 (Ont. C.A.), at para. 27. If the principal's murder conviction precedes the accessory after the fact trial, s. 657.2(2) of the *Criminal Code* permits evidence of the conviction to be admitted at trial as proof of the principal's guilt: *R v Dagenais*, 2018 ONCA 63 at para 7

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## **B. ATTEMPTS: S.463**

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### **i. ACTUS REUS**

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The accused's actions must go beyond mere preparation to commit the crime. In *R. v. Root*, 2008 ONCA 869, [2008] O.J. No. 5214 at para. 100, Watt J.A. described the difference between mere preparation and an attempt to commit an offence: *R v Ellis*, [2016 ONCA 358](#) at para 32

This requirement of proximity, expressed in the divide between preparation and attempt, has to do with the sequence of events leading to the crime that an accused has in mind to commit. To be guilty of an attempt, an accused must have progressed a sufficient distance (beyond mere preparation) down the intended path. An act is proximate if it is the first of a series of similar or related acts intended to result cumulatively in a substantive crime.

It is for the trial judge to decide, as a matter of law, where on the evidence the line between preparation and attempt must be drawn. It is for the jury to decide whether, on the facts as found by them, that line has been crossed: *R v Hersi*, [2019 ONCA 94](#), at para 45

Accordingly, the trial judge must give the jury direction about which specific acts would constitute acts going beyond mere preparation such as to amount to an attempt. It is then for the jury to decide what acts were done and with what intent. The failure to accordingly instruct the jury is an error of law: *R v RM*, [2023 ONCA 859](#), at paras 5-6

Impossibility is not a defence to a charge of attempting to commit a crime: *R v Boone*, [2019 ONCA 652](#), at para 114

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## **ii. MENS REA**

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The evidence must establish that the accused intended to perpetrate the specific offence in question, whether committing the offence was possible or not: *R v Ellis*, [2016 ONCA 358](#) at para 31

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## **C. CONSPIRACY: S.465(1)**

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### **i. GENERAL PRINCIPLES**

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The essential elements of a conspiracy are an intention to agree, the completion of the agreement, and a common design to do something unlawful. The object of the agreement must be a crime. The agreement is complete once there is “a meeting of minds, a consensus to effect an unlawful purpose.” *R v Duncan*, 2015 ONCA 928; see also *R v Dawkins*, [2021 ONCA 113](#), at para 8

There is no requirement that all members of a conspiracy play an equal role: *R v McGean*, [2019 ONCA 604](#), at para 20

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### **ii. ACTUS REUS**

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The actus reus of the crime of conspiracy lies in the formation of an agreement, tacit or express, between two or more individuals, to act together in pursuit of a mutual criminal objective. Co-conspirators share a common goal borne out of a meeting of the minds whereby each agrees to act together with the other to achieve a common goal.

A conspiracy is not established merely by proof of knowledge of the existence of a scheme to commit a crime or by the doing of acts in furtherance of that scheme. Neither knowledge of nor participation in a criminal scheme can be equated with the actus reus of a conspiracy.

Knowledge and acts in furtherance of a criminal scheme do, however, provide evidence, particularly where they co-exist, from which the existence of an agreement may be inferred.

The "mutuality of object" doctrine asks not whether there were the acts in pursuance of the agreement but whether there was a common agreement to which the acts are referable and to which all of the alleged offenders were privy.

The "mutuality of object" approach requires that each accused be privy to and agree to the larger scheme, although not necessarily to all of the details.

For example, the sale of legal products to purchasers whom the seller knows will use the products for some illicit purchase does not in itself infer the existence of a common agreement. Rather, the seller must make the venture his own before he will be guilty as a conspirator or abettor.

*R v Nguyen*, 2016 ONCA 182 at paras 20-25, 30-31 [citations omitted]

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### **iii. PARTY LIABILITY TO A CONSPIRACY**

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Aiding a conspiracy to achieve its unlawful object does not make someone a party to the conspiracy. Party liability to conspiracy is established only if someone encouraged or assisted the initial formation of the agreement, or encouraged or assisted new members to join a pre-existing agreement: *R v Nguyen*, 2016 ONCA 182 at paras 19-20

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### **iv. EVIDENTIARY ISSUES**

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Pleas of guilty or convictions of other alleged co-conspirators are not admissible to prove the existence or fact of the conspiracy in the trial of another or other alleged co-conspirators: *R v Tsekouras*, [2017 ONCA 290](#) at para 177; *R v Dawkins*, [2021 ONCA 113](#), at para 14

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## **D. CRIMINAL ORGANIZATION: S.467.1(1)**

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### **i. GENERAL PRINCIPLES**

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Section 467.1(1) of the *Criminal Code* defines a criminal organization, as follows:

“criminal organization” means a group, however organized, that

(a) is composed of three or more persons in or outside Canada; and

(b) has as one of its main purposes or main activities the facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group.

Central to the definition of a criminal organization is the presence of some structure and continuity, which differentiates a criminal organization from other groups of offenders who sometimes act in concert: *R. v. Venneri*, 2012 SCC 33; *R v Abdullahi*, [2023 SCC 19](#)

It does not include a group of persons that forms randomly for the immediate commission of a single offence.

The determination of whether the existence of a criminal organization has been established is a highly factual one. The guiding question in assessing whether a group of individuals forms a criminal organization is whether the group poses an elevated threat to society due to the ongoing and organized association of their members. Every criminal organization will involve a conspiracy but not every conspiracy is a criminal organization.

Stereotypical hallmarks such as territoriality, hierarchy, exclusive membership and violence, are indicia of a criminal organization, but are not necessary conditions. Rather, courts must take a flexible approach, appreciating that criminal organizations have no incentive to conform to any formal structure.

Courts have found that criminal organizations exist even in small drug operations, where they involve a division of labour, temporal continuity, and an intention by the members to advance their illicit goals through the organization.

No criminal organization can be said to exist where a group of people have an elaborate scheme and they divide labour but there is no evidence of any continuity

beyond the one isolated scheme: *R v Saikaley*, [2017 ONCA 374](#) at paras 117-127; *R v Abdullahi*, [2021 ONCA 82](#), at paras 69-70

While characteristics such as ethnicity, cultural background, neighbourhood, religion, language or dialect may indicate a common social or cultural identity among persons who commit offences, they are irrelevant in identifying the existence of a criminal organization. Just as the definition of a criminal organization must not be limited to stereotypical models of organized crime, care must also be taken not to identify a criminal organization merely because the group appears to satisfy some stereotypical model: *R v Abdullahi*, [2023 SCC 19](#)

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## PART XXII: PROCURING ATTENDANCE

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### A. CONTEMPT OF COURT: S.708(1)

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Contempt of court is a very serious crime, which strikes at the heart of the administration of justice. It is a sanction imposed by courts to maintain the dignity and authority of the judge and to ensure a fair trial.

Broadly speaking, contempt of court consists of any conduct that obstructs or interferes with the administration of justice or that shows disrespect for the court and its process. It includes a witness's (including an accused's) refusal to answer a question properly put to him or her at trial, including the identity of a person involved in criminal activity. It must be remedied in the court in such a way that the jury itself understands that compliance with the relevant law is not optional and understands the consequences for anyone who violates his or her oath: *R v Omar*, [2018 ONCA 599](#) at paras 22-23

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## PART XXIII: SENTENCING

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### A. BREACH OF PROBATION: S. 733.1

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In [Karman](#), 2018 YKTC 17, the Yukon Territorial Court held that ambiguous terms in a probation order must be interpreted in a manner most favourable to the accused. The Court held that the term “place of residence” referred to a structure or building and did not apply to the complainant’s entire property. The Court therefore acquitted the accused of passing within 100 feet of the complainant’s property, but within an excess of 100 feet from the complainant’s house.

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## CONTROLLED DRUGS AND SUBSTANCES ACT

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Click [here](#) to read memo on the elements of Possession of a Controlled Substance under s.4(1) of the CDSA

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### A. POSSESSION - GENERAL PRINCIPLES

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Possession, particularly under s.4(3) of the CDSA, may be made out by proof of personal possession, constructive possession or joint possession. Knowledge and control are essential elements in both personal and constructive possession: *R v Pannu*, 2015 ONCA 677 at para 155

Possession is a conduct crime that begins when possession is gained and continues until it is relinquished. In this sense, possession can be seen as a continuing offence: *Pannu*, at para 123

When personal possession is alleged, the knowledge element consists of two components. An accused must be aware that they have physical custody of the thing alleged. And an accused must be aware of what that thing is. These elements

of knowledge must co-exist with an act of control: *R v Lights*, [2020 ONCA 128](#), at para 45

When things are found in a premises or place occupied by an accused, no presumption of knowledge and control arises from proof of occupancy. Put simply, occupancy does not create a presumption of possession. In some instances, occupancy of premises, more particularly, the authority to control access to them, may support an inference of control over drugs found there when coupled with evidence of knowledge: *R v Lights*, [2020 ONCA 128](#), at paras 50, 98

A trial judge may rely on the common sense inference that guns and drugs are valuable items which would not be entrusted to just anyone: *R v Buchanan*, 2020 ONCA 245; *R v Thompson*, [2020 ONCA 361](#), at para 11

In *Brake*, the Newfoundland Court of Appeal overturned the Appellant's conviction for possession on the basis that, while the Trial Judge may have found that the Appellant had knowledge of the cocaine, the reasons do not include an explicit finding that he also had control of the brick of cocaine: *R v Brake*, [2019 NLCA 20](#)

In *Ali*, the Superior Court Overturn the committal for trial, on charges of possession for the purpose of trafficking, and discharged the applicant, on the basis that his mere presence as a passenger in a motor vehicle where drugs were found, was insufficient to give rise to an inference of control. Insect circumstances, the passenger does no more than merely acquiesce to the drivers possession of the contraband: *R v Ali*, [2016 ONSC 6872](#)

It is reasonable to infer that a person who volunteers information about the contents of a package knows what is contained in the package: *R v Zamora*, [2021 ONCA 354](#), at para 34

Where the subject matter of which an accused is alleged to be in possession is a controlled substance of significant value, it may be open to a trier of fact to infer not only knowledge of the nature of the subject, but also knowledge of the substance itself. It is a reasonable inference that such a valuable quantity of drugs would not be entrusted to anyone who did not know the nature of the contents of the bag or other container: *R v Pannu*, [2015 ONCA 677](#) at para 157; *R v Zamora*, [2021 ONCA 354](#), at para 35

Absent evidence of where in the house items are found, it is not reasonable to infer from the appellant's residence in the house that he is in possession of those items: *R v Maslowski*, [2015 ONCA 261](#) at para 5

The fact that an accused is present in a room where drugs/money was found not in plain view is not enough, in itself, to connect him/her to these items: *R v Mullings*, [2016 ONCA 171](#) at paras 19-20

The Crown is not required to prove that the accused knew that the item they possessed was a controlled substance. This would be tantamount to requiring the Crown to prove that the accused knew the law: *R v Lin*, [2022 ONCA 289](#), at para 22

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**i. EXEMPTION FOR MEDICAL OR SCIENTIFIC PURPOSES: S. 55 AND 56 OF THE CDSA**

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The federal Minister of Health can issue exemptions for medical and scientific purposes under s. 56 of the *CDSA*. Section 55 of the *CDSA* allows for the Governor in Council to make regulations for the medical, scientific and industrial use of illegal substances. In this manner, Parliament has attempted to balance the two competing interests of public safety and public health.

This scheme legitimizes the drug-related activities of many professionals, including doctors, by providing a controlled framework through which narcotics may be manufactured, stored, sold, distributed, prescribed and otherwise dealt with.

If a co-accused, charged with joint possession, believed that the other accused possessed drugs by virtue of a valid prescription and for personal use only, s/he could not be found guilty of possession under ss. 4 or 5(2) of the *CDSA*, despite satisfying the knowledge, consent, and control requirements of s.4(3)(b) of the Criminal Code: *R v Pilgrim*, [2017 ONCA 309](#) at paras 72-85

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**ii. EXEMPTION FOR LICENSING**

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The Crown is not required to prove that the accused knew they did not have a license or authorization to possession the drug in question. Further, ignorance of the law, or a lack of understanding of the legal framework in which the accused operates, is not a defence to the *mens rea* of possession of controlled substances: *R v Lin*, [2022 ONCA 289](#), at para 22

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### **iii. PERSONAL POSSESSION**

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While manual handling and knowledge is generally conclusive of personal possession, the absence of manual handling does not necessarily preclude possession, because “control” and knowledge combined with a sufficient degree of physical proximity may nonetheless establish possession. Whether physical proximity combined with control amounts to personal possession is a matter of degree: *R v Bird*, 2020 ABCA 236, at para 13

An individual may avail themselves of a defence of innocent possession where the accused established an intention to lawfully dispose of the item at the first reasonable opportunity: *R v Bird*, 2020 ABCA 236, at para 21

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### **iv. CONSTRUCTIVE POSSESSION**

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Constructive possession is established where an accused has the subject-matter in the actual possession or custody of another person, or in any place, whether belonging to or occupied by the accused or not, for the benefit of the accused or someone else: *R v Pannu*, [2015 ONCA 677](#) at para 156

To establish constructive possession the Crown must prove beyond a reasonable doubt that an accused:

- knows the character of the object;
- knowingly puts or keeps the object in a place; and
- intends to have the object in the place for his or her use or benefit or the use or benefit of some other person.

The Crown may prove the essential elements of constructive possession by direct evidence, by circumstantial evidence or by a combination of direct and circumstantial evidence: *Panu* at paras 156-157; *R v Lights*, [2020 ONCA 128](#), at para 47

A finding of constructive possession is not inconsistent with a finding that an accused has no standing to advance a section 8 argument in relation to a search of the premises where drugs were found: *R v Qiang Wu*, [2017 ONCA 620](#) at paras 23-25

Evidence of a person's occupancy of a premises alone is not sufficient to prove constructive possession is well-established. In any particular case, the court must assess all of the evidence, direct and circumstantial, to assess whether it is sufficient to prove constructive possession beyond a reasonable doubt: *R v Kaup*, [2022 ONCA 383](#), at para 32

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## **v. WILLFUL BLINDNESS**

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Wilful blindness involves a degree of awareness of the likely existence of the prohibited circumstances together with a blameworthy conscious refusal of self-enlightenment. A person, aware of the need for some inquiry, who declines to make that inquiry because they do not wish to know the truth, is wilfully blind. The doctrine is narrow in scope lest it become indistinguishable from negligence in failing to acquire knowledge: *R v Lights*, [2020 ONCA 128](#), at para 52

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## **vi. EXAMPLES FROM THE CASELAW**

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In *Lights*, the Ontario Court of Appeal set aside convictions for possession of a loaded firearm on the basis that “knowledge of the nature of the object he handled as a firearm, without more, does not establish knowledge, actual or imputed, that the firearm was loaded.” The Court held that this conclusion was “the product of speculation, not inference.” Further, knowledge was not the only reasonable inference available on the totality of the evidence. The Court came to the same conclusion with respect to the Appellant's conviction for possession of a prohibited device, holding that there was insufficient evidence to establish that the gun that the Appellant was possessing was a prohibited device: *R v Lights*, [2020 ONCA 128](#), at paras 75, 140-141

In *Walters*, the Ontario Court of Appeal found that it was not unreasonable for the trial judge to conclude that Walters had knowledge and control of drugs, magazines, and a firearm seized from the hamper and the night table of his

girlfriend's residence, where he spent approximately 70% of his time: *R v Walters*, [2023 ONCA 4](#), at paras 27-29

In *Stewart*, the Superior Court of Justice found a reasonable doubt that the accused possessed a firearm found in the glovebox of his car, which he owned and drove, in light of evidence that another person also drove the car and may have left it there the night before: [2025 ONSC 1277](#), at paras 124-137

In *Brown*, the Superior Court of Justice found that the accused's mere presence in a residence where a firearm was found was insufficient to sustain a committal for possession of the firearm. His presence in the apartment did not that he lived in or owned the contents of the bedroom where the firearm was found. The court granted a writ of *certiorari*, reversing the accused committal to stand trial: *R v Brown*, 2012 ONSC 6565

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## **B. POSSESSION FOR THE PURPOSE OF TRAFFICKING**

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Click [here](#) to read memo on the elements of Trafficking of a Controlled Substance under s.5(2) of the CDSA

The definition of “traffic” in the *Controlled Drugs and Substances Act* includes “give.” Where the accused admits he intends to share a controlled substance in his possession with others, he possesses it for the purpose of trafficking. It is unnecessary to prove there was a settled plan with a third person who was prepared to share the drugs: *R v Kernaz*, [2019 SCC 48](#) affirming [2019 SCKA 37](#)

In *Jahangiri*, the Court of Appeal found that “the fact that the appellant had a large quantity of cash in his bedroom safe was contemporaneous circumstantial evidence that, at the time of the offence, he was a drug trafficker: *R v Jahangiri*, [2022 ONCA 644](#), at paras 4, 28-36

In *MacAdam*, the Court of Appeal found that the Crown had failed to prove that the appellant was in possession of 4.2 ounces (112 g) of cocaine for the purpose of

trafficking. The expert agreed that the hypothetical raised in cross-examination could be consistent with personal possession. The hypothetical included an individual living in a remote area, who was a heavy cocaine user, suffered from severe pain, had a good relationship with a seller willing to supply in bulk, and had an income capable of supporting significant drug use. Although none of the factors in the hypothetical were in evidence, except for the Appellant living in a remote area, the Court held that, in a circumstantial evidence case, inferences inconsistent with guilt do not have to be based on proven facts but must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation. Important to that conclusion was the fact that, beyond the quantity of drugs seized, there were no indicia of trafficking present, such as debt lists, scales, or multiple cell phones. Neither was there any surveillance of the appellant engaging in suspicious behaviour consistent with drug trafficking: [2024 ONCA 13](#)

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## C. TRAFFICKING

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Click [here](#) to read memo on the elements of Trafficking of a Controlled Substance under s.5(1) of the CDSA

As a matter of logic, experience and common sense, whether or not an accused's storage method put his children in danger does not shed any light on the purpose for which he possessed the drugs. A trier of fact may not avail himself of this evidence to come to a circumstantial inference that the accused possessed the pills for the purpose of trafficking. This would give rise to serious concerns about both moral and reasoning prejudice: *R v Pilgrim*, [2017 ONCA 309](#) at para 61

The offence of trafficking by offer is made out if the accused intends to make an offer that will be taken as a genuine offer by the recipient. The Crown is not required to prove that the accused actually intended to go through with the offer and sell or otherwise provide the thing that is offered: *R v Hersi*, [2018 ONCA 1082](#), at para 4

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## D. IMPORTING

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Click [here](#) to read memo on the elements of Importing a Controlled Substance under s.6(1) of the CDSA

The offence of importing is a continuing offence. While importing may be legally complete on entry into Canada, it is not factually complete until the drugs clear customs and become available to the ultimate recipient: *R v Foster*, 2018 ONCA 53, *R v Onyedinefu*, [2018 ONCA 795](#), at para 8. In *Onyedinefu*, for example, the Court held that the offence of importing was not complete until the accused took possession of an imported package of heroin (para 8). See also *R v Buttazzoni*, [2019 ONCA 645](#), at paras 45-46

The offence of importing is also made out where the items are detected by officials who seize them at customs instead of releasing them back to the person carrying them: *R v Dhatt*, [2023 ONCA 699](#), at para 23

For the purpose of a duress defence, the jury can be instructed on whether the accused availed herself of a safe avenue of escape with the Canadian Border Services Agency or other law enforcement officers at any time prior to clearing customs: *R v Foster*, 2018 ONCA 53

Where an accused is said to be in possession of a controlled substance of significant value, a trier of fact may infer:

- i. knowledge of the nature of the subject-matter; and
- ii. knowledge of the substance itself.

These inferences may be available from the objective improbability that such a valuable quantity of drugs would be entrusted to anyone who did not know the nature of the contents in the means of transport: *R v Burnett*, 2018 ONCA 790 at para 64; *R. v. Bains*, 2015 ONCA 677 at para 157



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## E. EXEMPTION FROM LIABILITY

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Regulations SOR/97-234 of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 provides an exemption to liability for individuals acting under the direction and control of a member of the police force. For an analysis of the factors relevant to assessing this defence, see *R v Budimirovic*, [2019 ONCA 65](#)

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## F. NATURE OF THE SUBSTANCE

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There is no requirement for the seizure and testing of a substance to support a conviction for trafficking of a substance contrary to s. 5(1) of the *CDSA*. The nature of the substance can be proven by circumstantial evidence in the absence of a seizure: *R v AM*, [2024 ONCA 661](#), at para 147

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# HIGHWAY TRAFFIC ACT OFFENCES

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## A. DRIVE NO INSURANCE

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In the absence of evidence to the contrary, a statutory declaration from an insurance company under s.13.2(2) of the *Compulsory Automobile Insurance Act* provides clear evidence that the vehicle driven by the accused was or was not covered by a valid policy of insurance at the time of the alleged offence: *R v Gilchrist*, 2018 ONCA 430

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# PROCEEDS OF CRIME AND TERRORIST FINANCING ACT

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## A. LAUNDERING PROCEEDS OF CRIME

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The essential elements of laundering proceeds of crime are: (1) that the accused dealt with property (in this case, the bank draft) or proceeds of property; (2) that the property was obtained by crime (in this case, fraud); (3) that the accused knew or believed that the property had been obtained by crime; and (4) that the accused intended to conceal or convert the property: *R v Barna*, [2018 ONCA 1034](#), at para 12

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## INCOME TAX ACT OFFENCES

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### A. TAX EVASION

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The essential elements of tax evasion are:

1. That the accused knew that tax was owed under the Act as charged
2. That the accused did something or engaged in a course of conduct that avoided or attempted to avoid the payment of tax;
3. That the accused intended to avoid or intended to attempt to avoid payment of that tax: *R v Mahmood*, 2016 ONCA 75 at paras 7-8

There is no legal distinction between fraudulently receiving government funds and failing to pay government taxes: *R v Mahmood*, [2016 ONCA 75](#) at paras 19-20