CHAPTER

1

# INTRODUCTION TO CANADIAN CRIMINAL LAW

## Learning Objectives

After reading this chapter, you will be able to understand:

- the nature and sources of criminal law in Canada;
- the difference between "true crimes" and "regulatory offences";
- the significance of the exclusive jurisdiction of the federal Parliament to enact criminal law;
- the impact of the *Canadian Charter of Rights and Freedoms* [the *Charter*] on the judicial interpretation and application of the criminal law; and
- the extent to which infringements of the rights of Canadians under the *Charter* may be justified by the "pressing and substantial" concerns that motivated federal and provincial/territorial legislatures to enact the legislation subjected to a *Charter* challenge.

# WHAT IS CRIMINAL LAW?

## The Definition of Crime in Canada

Before embarking on an analysis of criminal law, it is necessary to define the legal concept of a crime and to explain how crimes are classified within the Canadian criminal justice system. It is essential to recognize the importance of legal definitions and categories because they have enormously practical consequences. For example, the legal definition of a crime is a matter of critical significance because only the Parliament of Canada has the jurisdiction under the ***Constitution Act*, 1867**, 30 & 31 Vict, c. 3, to enact **criminal law** and thereby create crimes; this jurisdiction is known as the **federal criminal law power**. Similarly, the manner in which individual crimes are categorized determines how they are tried and the penalties that may be imposed on conviction.

In Canada, a **crime** consists of two major elements:

1. conduct that is prohibited because it is considered to have an "evil or injurious or undesirable effect upon the public,"[1] and
2. a penalty that may be imposed when the prohibition is violated.

The conduct that is prohibited may include not only actions but also a failure to act when there is a legally imposed duty to take action. The penalty may range from a fine to a sentence of imprisonment.

In Canada, crimes are classified into three categories, as illustrated in Figure 1.1.

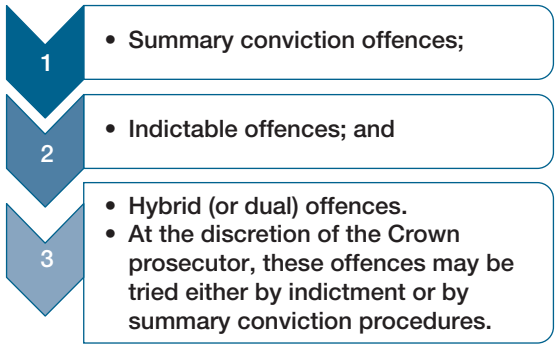


***Figure 1-1***

*The Three Categories of Crimes in Canada*

1. The phrase "evil or injurious or undesirable effect upon the public" was coined by Justice Rand in the *Margarine Reference* case (1949), which is discussed later in this chapter.

**Summary conviction offences** may be tried only before a provincial/territorial court judge or justice of the peace sitting alone, and the maximum penalty is normally a fine of $5000 or a sentence of six months in prison or both. "Summary" refers to the fact that these offences are tried rapidly within the provincial/territorial court and without any complex procedures. Examples of summary conviction offences are carrying a weapon while attending a public meeting; obtaining food, a beverage, or accommodation by fraud; wilfully doing an indecent act in public; being nude in a public place without lawful excuse; causing a disturbance in a public place; disturbing a religious service; and taking a motor vehicle without consent ("joyriding").

**Indictable offences** are more serious in nature and are punishable by more severe sentences (in some cases, life imprisonment). The indictment is the formal document that sets out the charge(s) against the **accused** person and is signed by the Attorney General or their agent. Unlike summary conviction offences, indictable offences may be tried by more than one court procedure, depending on the seriousness of the offence concerned. Some serious indictable offences, such as murder, may be tried only by a superior court judge sitting with a jury, while some less serious indictable offences may be tried only by a provincial/territorial court judge without a jury. However, in most cases, a person charged with an indictable offence may elect to be tried by a provincial /territorial court judge, a superior court judge sitting alone, or a superior court judge sitting with a jury. There are, therefore, three categories of indictable offences, as seen in Figure 1.2.

In most cases, individuals charged with an indictable offence have the right to a preliminary inquiry before a provincial/territorial court judge, who will

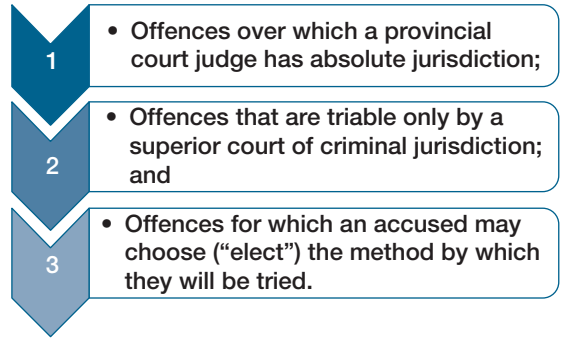


***Figure 1-2***

*The Three Categories of Indictable Offences*

decide whether there is "sufficient evidence" to put the accused person on trial. Examples of indictable offences are murder, manslaughter, sexual assault with a weapon, aggravated sexual assault, robbery, theft over $5000, and breaking and entering.

Most offences in Canada's *Criminal Code* are **hybrid (or dual) offences**. There are very few *Criminal Code* offences that may be tried only by summary conviction procedures; however, it is significant that most hybrid (or dual) offences are, in practice, tried by summary conviction procedures. Examples of hybrid (or dual) offences are assault, assaulting a peace officer, sexual assault, unlawful imprisonment, theft under $5000, fraud not exceeding $5000, and failing to comply with a probation order.

## True Crimes and Regulatory Offences

A noteworthy distinction that must be drawn before one embarks on a study of criminal law is the distinction between **true crimes** and **regulatory offences**. The courts treat these two types of offence in a significantly different manner and the consequences for a person convicted of one of the two types of offence differ significantly in terms of the severity of the penalties that may be imposed, and the degree of stigma associated with a finding of guilt. Justice Cory of the Supreme Court articulated the nature of the distinction between true crimes and regulatory offences in his judgment in *Wholesale Travel Group Inc.* (1991):

> Acts or actions are criminal when they constitute conduct that is, in itself, so abhorrent to the basic values of society that it ought to be prohibited completely. Murder, sexual assault, fraud, robbery and theft are all so repugnant to society that they are universally recognized as crimes. At the same time, some conduct is prohibited, not because it is inherently wrongful, but because unregulated activity would result in dangerous conditions being imposed upon members of society, especially those who are particularly vulnerable.

The objective of regulatory legislation is to protect the public or broad segments of the public (such as employees, consumers, and motorists, to name but a few) from the potentially adverse effects of otherwise lawful activity. Regulatory legislation involves a shift of emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interests. While criminal offences are usually designed to condemn and punish past, inherently wrongful conduct, regulatory measures are generally directed to the prevention of future harm through the enforcement of minimum standards of conduct and care. As Moldaver J. stated, on behalf of the Supreme Court of Canada in *Wilson v. British Columbia (Superintendent of Motor Vehicles* (2015): "… it has long been recognized that regulatory legislation … differs from criminal legislation in the way it balances individual liberties against the protection of the public. Under regulatory legislation, the public good often takes on greater weight."

Regulatory offences arise under both federal and provincial/territorial legislation and deal with diverse matters such as the maintenance of the quality of meat sold to the public, the regulation of the packaging of food products, the establishment of rigorous standards concerning the weights and measures used by retailers, the regulation and control of pollution, the control of misleading advertising, and the establishment and maintenance of a regime of traffic regulation. Indeed, as Justice Cory stated in *Wholesale Travel Group Inc.*, "Regulatory measures are the primary mechanisms employed by governments in Canada to implement public policy objectives," and "it is through regulatory legislation that the community seeks to implement its larger objectives and to govern itself and the conduct of its members." He went on to say that:

> … regulation is absolutely essential for our protection and well being as individuals, and for the effective functioning of society. It is properly present throughout our lives. The more complex the activity, the greater the need for and the greater our reliance upon regulation and its enforcement. … Of necessity, society relies on government regulation for its safety.

One of the most significant aspects of the distinction between true crimes and regulatory offences is to be found in the differing concepts of fault that underlie the two categories of prohibited conduct. Conviction of a true crime (such as murder or robbery) necessarily involves a judgment that the offender has seriously infringed basic community values and is, therefore, considered to be morally culpable for their actions. In contrast, conviction of a regulatory offence (such as accidentally mislabelling a food item) may involve very little (if any) moral culpability on the part of the offender. Similarly, the penalties that may be imposed following conviction of a true crime are generally far more severe than

those that may be imposed when a person has been found guilty of a regulatory offence.

In the *Roy* case (2012), the Supreme Court of Canada examined the essential difference between the *Criminal Code* offence of dangerous operation of a motor vehicle, a *true crime*, and the provincial *regulatory offence* of careless driving (or driving without due care and attention). On behalf of the Court, Justice Cromwell stated that:

> Dangerous driving causing death is a serious criminal offence punishable by up to 14 years in prison. Like all criminal offences, it consists of two components: prohibited conduct—operating a motor vehicle in a dangerous manner resulting in death—and a required degree of fault—a marked departure from the standard of care that a reasonable person would observe in all the circumstances. The fault component is critical, as it ensures that criminal punishment is only imposed on those deserving the stigma of a criminal conviction. …
>
> Giving careful attention to the fault element of the offence is essential if we are to avoid making criminals out of the merely careless. …

Justice Cromwell emphasized that the criminal law does not punish the type of ordinary negligence or carelessness that may render an individual liable in a civil law suit or that may lead to the imposition of a fine for "careless driving" or "driving without due care and attention"—offences that are contained in provincial/territorial motor vehicle legislation. Instead, the offence of dangerous operation of a motor vehicle, a *Criminal Code* offence, requires a much higher degree of negligence in order to sustain a conviction. The requirement is that the Crown prove that the accused's driving represented "a marked departure" from the standard of care expected of a reasonable driver acting prudently. The greater degree of fault, embodied in the "marked departure" standard, justifies the imposition of a harsher penalty and enhanced measure of stigma under the *Criminal Code*.

In brief, true crimes are acts that are generally considered to be inherently wrong by the majority of Canadians (e.g., murder, burglary, and sexual assault). On the other hand, regulatory offences are directed toward the control of activities that are considered by the majority of Canadians to be inherently lawful (selling food, driving a motor vehicle, or placing an advertisement in the local newspaper). Business, trade, and industry need to be regulated for the benefit of society as a whole, and penalties may be imposed for breach of the requirements of the regulatory regime. For example, whether Canadians should drive on the left or right side of the road does not raise a question of fundamental values. To avoid chaos, however, each country has to make a choice as to which side of the road its motorists should use; it would be absurd to permit individual motorists to make that choice for themselves. In other words, although driving is an inherently legitimate activity, there has to be a regulatory regime to protect the interests of all those individuals who use the highways. The penalties associated with regulatory offences are directed not at the underlying activities themselves but rather at breaches of the regulatory regime that ensures the orderly and safe conduct of those activities.

It should be noted, however, that a federal regulatory statute may create a true crime. For example, the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), is a regulatory statute, but the offence of tax evasion, under section 239(1), is a real crime, carrying a maximum penalty of up to two years' imprisonment and a potentially large fine. Evasion of taxation would rightly be considered an action that is inherently wrong and deserving of punishment.

In Chapter 6, we shall examine regulatory offences in more depth and demonstrate that the prosecution (the Crown) has been granted the benefit of certain advantages that render it easier to obtain a conviction in relation to a regulatory offence than in relation to a true crime. Most significantly, when an accused person is charged with a true crime, the general rule is that the Crown must prove all the elements of the offence beyond a reasonable doubt. However, when the charge in question concerns a regulatory offence, the Crown merely has to prove that the accused person committed the act prohibited by the legislation in question: once the commission of the prohibited act has been established, then the accused person must prove, on the balance of probabilities, that they were not negligent.

Since regulatory offences differ significantly from true crimes, they are frequently characterized as constituting a body of **quasi-criminal law**.[2] This term means that the body of regulatory offences closely resembles criminal law but nevertheless lacks two key characteristics of criminal law—namely, the prohibition of conduct that is regarded as inherently wrong and the potential severity of the sentences that may

2. The prefix **quasi-** means "seeming," "not real," or "halfway."

be imposed. Later in this chapter, we shall explore the implications of the concept of quasi-criminal law for the field of constitutional law in Canada.

## CRIMINAL LAW AS A FORM OF PUBLIC LAW

Law may generally be defined as the collection of rules and principles that govern the affairs of a particular society and that are enforced by a formal system of control (courts, police, etc.). It is usual to divide law into two parts: public law and private law.

*Public law* is concerned with issues that affect the interests of the entire society. Constitutional law deals with the allocation of powers between the various provinces/territories of Canada and the various levels of government (legislature, courts, and executive). It also deals with the relationship between the state and individual citizens. Administrative law defines the powers, and regulates the activities, of government agencies, such as the Immigration and Refugee Board and the Canadian Radio-television and Telecommunications Commission. Criminal law is also considered to be part of public law because the commission of a crime is treated as a wrong against society as a whole and it is the Crown that prosecutes criminal cases on behalf of all Canadians; indeed, all criminal cases are catalogued as *Regina* (the Queen) versus the accused person concerned.

*Private law* is concerned with the regulation of the relationships that exist among individual members of society. It includes the legal rules and principles that apply to the ownership of property, contracts, torts (injuries inflicted on another individual's person or damage caused to the individual's property), and the duties of spouses and other family members toward one another. The resolution of private disputes may be sought through the commencement of a "civil suit" in the appropriate court.

## THE SOURCES OF CRIMINAL LAW IN CANADA

Perhaps the most basic question we can raise in relation to the Canadian criminal law is, "Where does it come from?" The answer is that there are two **primary sources of law** (or main **sources of criminal law**): (1) legislation and (2) judicial decisions that either interpret such legislation or state the "common law."

### Federal Legislation

Since Canada is a federal state, legislation may be enacted by both the Parliament of Canada and the provincial or territorial legislatures. However, under the Canadian *Constitution*, there is a distribution of legislative powers between the federal and provincial/territorial levels of government. Which level of government has the power to enact criminal law? It is clear that criminal law is a subject that falls within the exclusive jurisdiction of the Parliament of Canada. Indeed, by virtue of section 91(27) of the *Constitution Act, 1867*, the federal Parliament has exclusive jurisdiction in the field of "criminal law and the procedures relating to criminal matters."

Just how extensive is the scope of the criminal law power under section 91(27) of the *Constitution Act*? As we have seen, two essential characteristics of a crime are a *prohibition* of certain conduct and an accompanying *penalty* for violating that prohibition. Does that mean that the Canadian Parliament can pass legislation on any issue that it chooses and justify it on the basis that, because it contains both a prohibition and a penalty, it must be criminal law? If this were the case, there would be absolutely no limits on the scope of the criminal law power. In fact, the Supreme Court of Canada has stated clearly that there must be a third factor, in addition to a prohibition and a penalty, for legislation to be recognized as a genuine exercise of the criminal law power. What is this third factor?

In the famous *Margarine Reference* case (1949), Justice Rand of the Supreme Court of Canada argued that the additional factor is the requirement that the prohibition and penalty contained in the legislation are directed toward a "public evil" or some behaviour that is having an injurious effect upon the Canadian public:

> A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened.

Justice Rand asserted that, if the Parliament of Canada chooses to prohibit certain conduct under the criminal law power, then this prohibition must be enacted "with a view to *a public purpose which can support it as being in relation to criminal law*. …" The public purposes that would be included in this category are "public peace, order, security, health, [and] morality," although Justice Rand acknowledged that this is not an exclusive list.

In *Syncrude Canada Ltd. v. Canada (Attorney General)* (2016), the Federal Court of Appeal considered the significant question of whether the federal criminal law power could be used to punish those who engage in acts that contribute to environmental pollution. Federal regulations, issued under the *Canadian Environmental Protection Act*, 1999, S.C. 1999, c. 33, required that all diesel fuel produced, imported or sold in Canada contain at least 2 percent renewable fuel. Syncrude Canada Ltd. produced diesel fuel at its oil sands project in Alberta and it sought a declaration that the regulations were invalid on, *inter alia*, constitutional grounds. The Federal Court of Appeal, relying on an earlier decision of the Supreme Court of Canada in *Hydro-Québec* (1997), ruled that the regulations were valid because protecting the environment was unequivocally a legitimate exercise of the federal criminal law power.

The Federal Court of Appeal noted that the Supreme Court of Canada had established a three-part test for determining whether there has been a valid exercise of the federal criminal law power: (1) a prohibition, (2) backed by a penalty, (3) for a criminal purpose. In this case, the only issue at play was the third requirement, the "criminal purpose." Referring to the *Margarine Reference Case*, the Court took account of the jurisprudence which indicated that the requirement of a "criminal purpose" turned on whether the law in question was aimed at suppressing or reducing "an evil." More specifically, the "law must address a public concern relating to peace, order, security, morality, health or some other purpose." The Federal Court of Appeal had absolutely no doubt that protecting the environment was a "criminal law purpose." Quoting the Supreme Court of Canada, Rennie J.A. said "pollution is an 'evil' that Parliament can legitimately seek to suppress."

However, the Parliament of Canada may not purport to exercise its criminal law power in those areas of jurisdiction that are assigned exclusively to the provinces unless the legislation really does meet the test set out in the *Margarine Reference* case: namely, there must be a prohibition and a penalty that are designed to combat a "public evil" or some other behaviour that is having an injurious effect upon the Canadian public. For example, the Supreme Court of Canada struck down most of the provisions of the *Assisted Human Reproduction Act*, S.C. 2004, c. 2 because they did not constitute "in pith and substance" criminal law. This legislation was enacted to address various concerns about certain undesirable practices that had arisen with the development of new medical technologies designed to assist the conception and birth of children (these included *in vitro* fertilization, artificial insemination, egg or embryo donation, and drug therapies). However, the Act was challenged on the grounds that most of its provisions did not represent a valid exercise of Parliament's criminal law power. Indeed, it was argued that, insofar as these provisions were really concerned with the comprehensive regulation of medical practice and research in relation to assisted reproduction, they actually constituted *health*—and not criminal—legislation. Health falls within the exclusive legislative jurisdiction of the provinces and, therefore, it was contended that the "impugned" provisions of the Act were invalid. In *Reference re Assisted Human Reproduction Act* (2010), the Supreme Court of Canada agreed with this argument and declared *most* of the sections of the Act to be invalid since Parliament did not have the authority to enact health legislation. Justice Cromwell, who cast the deciding vote in a 5-4 split decision stated that:

> [T]he essence of the impugned provisions of the *Assisted Human Reproduction Act*, *S.C. 2004*, *c. 2*, is regulation of virtually every aspect of research and clinical practice in relation to assisted human reproduction. …
>
> [T]he "matter" of the challenged provisions, viewed as a whole, is best classified as being in relation to three areas of exclusive provincial legislative competence: the establishment, maintenance and management of hospitals; property and civil rights in the province; and matters of a merely local or private nature in the province … the "matter" of the challenged provisions cannot be characterized as serving any criminal law purpose recognized by the Court's jurisprudence.

However, the Supreme Court upheld a *few* of the provisions of the *Assisted Human Reproduction Act* because they did constitute a valid exercise of the criminal law power. These provisions were concerned with preventing the use of a donor's

reproductive material or an *in vitro* embryo from being used for purposes to which the donor had not given consent. They also prohibited the use of sperm or human eggs from a donor under the age of 18 and required that any consent given must be free and informed. Finally, they prevented the commercialization of the reproductive functions of women and men (e.g., engaging in surrogacy for profit). Justice Cromwell concluded that these provisions "prohibit negative practices associated with assisted reproduction and that they fall within the traditional ambit of the federal criminal law power."

What important pieces of legislation (or statutes) has the Canadian Parliament enacted in the field of criminal law? Undoubtedly, the most significant federal statute, dealing with both the substantive criminal law and the procedural law relating to criminal matters, is the ***Criminal Code***, R.S.C. 1985, c. C-46 (first enacted in 1892). **Substantive criminal law** refers to legislation that defines the nature of various criminal offences (such as murder, manslaughter, and theft) and specifies the various legal elements that must be present before a conviction can be entered against an accused person. Similarly, in this context, the term refers to legislation that defines the nature and scope of various defences (such as provocation, duress, and self-defence).

The term **criminal procedure** refers to legislation that specifies the procedures to be followed in the prosecution of a criminal case and defines the nature and scope of the powers of criminal justice officials. For example, as we have already noted, the procedural provisions of the *Criminal Code* classify offences into three categories: indictable offences, offences punishable on summary conviction, and dual (or hybrid) offences. These provisions then specify the manner in which these categories of offences may be tried in court. For example, they specify whether these offences may be tried by a judge sitting alone or by a judge and jury and indicate whether they may be tried before a judge of the superior court or a judge of the provincial (or territorial) court.

The procedural provisions of the *Criminal Code* are also concerned with the powers exercised by criminal justice officials. For example, the *Code* clearly specifies the nature and scope of the powers of the police in relation to the arrest and detention of suspects. Similarly, it also specifies the powers of the courts in relation to matters such as sentencing. In addition to the *Criminal Code*, there are a number of other federal statutes that undoubtedly create "criminal law." These include the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, the *Crimes against Humanity and War Crimes Act*, S.C. 2000, c. 24, and the *Youth Criminal Justice Act*, S.C. 2002, c. 1.

It should be noted that two other significant federal statutes have an indirect impact upon the criminal law. These are the *Canada Evidence Act*, R.S.C. 1985, c. C-5, and the *Constitution Act, 1982*, as enacted by the *Canada Act 1982* (U.K.), c. 11. The *Canada Evidence Act*, as its name would suggest, is concerned with establishing various rules concerning the introduction of evidence before criminal courts. For example, the Act indicates when a wife or husband may be compelled to give evidence against their spouse and indicates in what circumstances the evidence of a child under 14 years of age may be admissible in a criminal trial. The *Constitution Act, 1982* is of great significance to both the substantive criminal law and the law of criminal procedure, since Part I of the Act contains the *Canadian Charter of Rights and Freedoms.* The *Charter* is of immense importance because, as we shall shortly see, it permits courts to strike down, and declare invalid, any legislative provisions that infringe upon the fundamental rights and freedoms of Canadians.

## Quasi-Criminal Law: Regulatory Offences and the Constitution

In the preceding section, it was established that the *Constitution Act, 1867* granted the federal Parliament exclusive jurisdiction in the field of criminal law and the procedures relating to criminal matters. At this point, readers no doubt feel that they have a clear grasp of the principle involved. Unfortunately, the situation is rendered considerably more complex by the existence of the body of regulatory offences that we have described as "quasi-criminal law." Under the *Constitution Act, 1867*, the provincial/territorial legislatures have been granted the power to enact laws in relation to a number of specific matters. For example, section 92 of the Act indicates, ***inter alia***, that "property and civil rights in the province" and "generally all matters of a merely local or private nature in the province" fall within the exclusive jurisdiction of the provincial/territorial legislatures. By virtue of judicial interpretation of the various provisions of section 92, it is clear that a number of other critical matters fall within the legislative jurisdiction of the provinces/territories, such as municipal institutions, health, education, highways, liquor control, and hunting and fishing.

Significantly, section 92(15) of the *Constitution Act, 1867* provides that the provincial/territorial legislatures may enforce their laws by "the imposition of punishment by fine, penalty or imprisonment." At this point, the reader will immediately exclaim that the imposition of fines, penalties, or imprisonment looks suspiciously like the apparatus of criminal law. One is compelled to ask whether this means that the *Constitution Act, 1867* is contradicting itself, since criminal law is a matter reserved to the exclusive jurisdiction of the federal Parliament. However, the answer is in the negative because such provincial/territorial legislation is not considered "*real*" criminal law. Instead, lawyers have termed it "*quasi-criminal law*." Since this type of provincial/territorial legislation is considered "quasi" rather than "real" criminal law, it is possible to argue that it does not impinge upon the federal Parliament's exclusive jurisdiction in the field of (real) criminal law.

Cynics will, no doubt, point to the semantic acrobatics involved in the categorization of the provincial/territorial offences as quasi-criminal laws. However, the designation of quasi-criminal law can be very well justified on a pragmatic basis. As mentioned earlier in this chapter, regulatory offences are generally far less serious in nature than the "true crimes" that may be committed in violation of the *Criminal Code* or other federal legislation, such as the *Controlled Drugs and Substances Act*.

Provincial/territorial legislatures may delegate authority to municipalities to enact municipal ordinances or **bylaws**. This municipal "legislation" may also be enforced by the "big stick" of fines or other penalties. Municipal bylaws or ordinances may be considered to fall within the category of quasi-criminal law.

It should be added that regulatory offences may also be found in a broad range of federal statutes (e.g., the *Canada Consumer Product Safety Act*, S.C. 2010, c. 21; *Competition Act*, R.S.C. 1985, c. C-34; the *Food and Drugs Act*, R.S.C. 1985, c. F-27; the *Fisheries Act*, R.S.C. 1985, c. F-14; the *Migratory Birds Convention Act*, S.C. 1994, c. 22; the *Motor Vehicle Safety Act*, S.C. 1993, c. 16; the *Nuclear Safety and Control Act*, S.C. 1997, c. 9; the *Plant Protection Act*, S.C. 1990, c. 22; *Safe Food for Canadians Act*, S.C. 2012, c. 24; the *Species at Risk Act*, S.C. 2002, c. 29; the *Tobacco and Vaping Products Act*, SC 1997, c. 13; and the *Trade-Marks Act*, R.S.C. 1985, c. T-13).

Taken together with quasi-criminal offences generated under provincial/territorial and municipal legislation, these federal offences contribute to a vast pool of regulatory law that has become increasingly complex as modern society has developed. As Justice Cory remarked in *Wholesale Travel Group Inc.* (1991), "There is every reason to believe that the number of public welfare [or regulatory] offences at both levels of government has continued to increase." Indeed, the Law Commission of Ontario noted that in 2009 more than two million charges involving regulatory offences were laid, just in Ontario, under the *Provincial Offences Act*, R.S.O. 1990, c. P.33.

This vast body of regulatory criminal law does not make good bedtime reading for the average citizen. Indeed, even the average lawyer is acquainted with only a fraction of the regulatory offences that currently exist. Nevertheless, as we shall see in Chapter 9, it is a firm principle of criminal law that "ignorance of the law is no excuse."

## Problems of Jurisdiction in the Enactment of Legislation

Before leaving the complex area of quasi-criminal law, it is important to remember that the provincial/territorial legislatures are restricted to the enactment of legislation genuinely falling within the jurisdiction assigned to them under the *Constitution Act, 1867*. More specifically, it is clear that provincial/territorial legislatures may not encroach upon the exclusive federal jurisdiction to legislate "real" criminal law. Unfortunately, it is often difficult for the courts to determine whether provincial/territorial legislation has strayed beyond the boundaries of the jurisdiction assigned to the provinces/territories under the *Constitution Act* and whether such legislation is invalid because it has infringed upon the federal Parliament's exclusive criminal law domain. The formidable challenge posed by this task can best be demonstrated by some illustrative cases.

Municipalities are enabled to pass bylaws by provincial/territorial legislation and they may not enact bylaws that usurp the federal criminal law power. For example, in *Smith v. St. Albert (City)* (2012), a judge of the Alberta Court of Queen's Bench declared two City bylaws to be invalid because they constituted "in pith and substance" criminal legislation and, therefore, fell within the

exclusive jurisdiction of the Parliament of Canada. The bylaws were enacted to discourage certain stores from trading in drug paraphernalia (such as "any device intended to facilitate smoking activity"). The Judge noted that the "practical effect of the bylaw is to preclude the licensing or successful operation of what have become colloquially known as bong or head shops."[3] In the words of T.D. Clackson J.:

> In my view the amending bylaw has the look and feel of morality legislation. What was plainly in the mind of the City was illegal narcotics. The amending bylaw has the look and feel of a statement that "this kind of thing isn't going to happen in my City" and it is plainly designed to address the perceived enforcement difficulties associated with the *Criminal Code* provisions relating to items which might be considered drug paraphernalia.

By way of contrast, in *Goodwin v. British Columbia (Superintendent of Motor Vehicles)* (2015), the Supreme Court of Canada upheld the constitutionality of British Columbia's Automatic Roadside Prohibition (ARP) scheme, which it introduced in 2010. This program, incorporated in the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318, represented an extension of the Province's administrative scheme to take impaired drivers off the road by means of on-the-spot licence suspensions, penalties, and remedial courses. Using an approved screening device, police officers were empowered to take and analyze breath samples taken from drivers at the roadside. Depending on the results of the breath tests, drivers' licences could be suspended for 90 days or they could be handed a shorter suspension of between 3 and 30 days.

Goodwin argued that the program of automatic roadside suspensions was beyond the power of the Province to enact because it fell within the exclusive criminal law jurisdiction of the federal Parliament. However, on behalf of the Supreme Court of Canada, Karakatsanis J. rejected this argument and ruled that the scheme fell within the scope of provincial legislation. He agreed that the "pith and substance of the ARP scheme is the licensing of drivers, the enhancement of traffic safety and the deterrence of persons from driving while impaired by alcohol." More specifically, the ARP program is a valid exercise of the Province's jurisdiction to legislate in the area of "property and civil rights" under section 92(13) of the *Constitution Act, 1867*. The fact that the *Criminal Code* also contains provisions that criminalize drunk driving or being in care of control of a vehicle while intoxicated by alcohol and/or another drug does not prevent the provinces and territories from enacting preventive legislation. In this respect, Karakatsanis J. stated that:

> Provinces thus have an important role in ensuring highway safety, which includes regulating who is able to drive and removing dangerous drivers from the roads. Provincial drunk-driving programs and the criminal law will often be interrelated. Some provincial schemes have relied incidentally on criminal convictions. … A number of provincial courts of appeal have also upheld schemes that are not dependent on criminal convictions but rely incidentally on *Criminal Code* provisions. … This jurisprudence makes clear that a provincial statute will not invade the federal power over criminal law merely because its purpose is to target conduct that is also captured by the *Criminal Code*.

Deciding whether provincial/territorial legislation should be struck down on the basis that it infringes on the federal criminal law power clearly involves a considerable degree of judicial discretion, and the outcome may be almost impossible to predict with any degree of certainty. Indeed, there may well be some justification for the view that criminal law, like beauty, lies in the eye of the beholder. In general, the courts are reluctant to strike down laws passed by elected members of a legislature and will exercise a certain degree of judicial restraint when called upon to determine whether specific laws or parts of laws fall outside provincial jurisdiction. If the courts find that the "impugned" legislation has both a federal (criminal law) aspect and a provincial aspect, it may apply the "double aspect doctrine of judicial restraint" and affirm the validity of the provincial legislation.

In *Kesbane* (2012), the central question was whether part of a bylaw passed by the City of Edmonton was valid (the city's authority to pass a bylaw was derived from an act of the provincial legislature, which could delegate such authority only within the scope of the powers granted to the province under the *Constitution Act, 1867*). The bylaw provision in question prohibited fighting in a public place and was challenged on the basis that, since the fighting ban was in reality a matter of criminal law, it was an issue that fell

3. A bong is a device (usually a pipe with a filter) generally used for smoking drugs.

Illustrations by Greg Holoboff

*B.C. legislation establishing a scheme of automatic roadside suspensions for drivers whose breath samples indicate certain levels of alcohol in their blood streams is valid and does not infringe the exclusive criminal law power of the federal Parliament.*

exclusively within federal jurisdiction: therefore, it was argued that this part of the bylaw was invalid because it fell outside the city's authority to enact. However, the Alberta Court of Appeal upheld the validity of the fighting prohibition in the bylaw. The Court stated that:

> Where the dominant feature of a provincial law relates to a federal head of power, the provincial law will be declared invalid as being *ultra vires*, or beyond the jurisdiction of the province, and *vice versa*.
>
> If no dominant purpose can be ascertained, i.e., the provincial and federal aspects of the impugned provision are of "roughly equal importance," at least where there is no actual conflict with other validly enacted legislation … the "double aspect doctrine" of judicial restraint applies to uphold the validity of the provision.

The Court took the view that the aim of the fighting ban was to "regulate the conduct and activities of people in public places so as to promote the safe, enjoyable, and reasonable use of such property for the benefit of all citizens of the City." This objective falls with the legislative authority of the province (and the city) since it involved property and civil rights under section 92(13) of the *Constitution Act,1867* and/or should be considered a matter of a merely local nature under section 92(16). The Court readily agreed that there was also a federal (criminal law) aspect to the fighting ban because it engaged the public interest in preserving public peace and order and overlapped with various offences in the *Criminal Code*. However, the Court held that neither the provincial nor the federal aspect of the fighting ban was "dominant": therefore, it applied the dual aspect doctrine of judicial restraint and upheld the validity of the fighting ban in the bylaw.

## Judicial Decisions as a Source of Criminal Law

In addition to legislation, such as the *Criminal Code*, a major source of criminal law is the numerous judicial decisions that either interpret criminal legislation or expound the "common law." A significant proportion of this book is concerned with the interpretation of the provisions of the *Criminal Code* by Canadian courts. However, the common law still plays an important role in Canadian criminal jurisprudence. Essentially, **common law** refers to that body of judge-made law that evolved in areas that were not covered by legislation.

Historically, a considerable proportion of English criminal law was developed by judges, who were required to deal with a variety of situations that were

not governed by any legislation. Indeed, until relatively recently, much of the English law concerning theft and fraud was developed by judges in this way. One common law offence that is of particular relevance to present-day criminal law in Canada is **contempt of court**. However, the common law not only expanded the number of offences in the criminal law but also developed special defences that were not covered by any legislation. For example, the Canadian courts have single-handedly developed the law relating to the defence of necessity (a defence that does not appear in the *Criminal Code*); hence, necessity is known as a common law defence. They have also developed a common law defence of duress that has largely replaced the statutory version of this defence, defined in section 17 of the *Criminal Code* (see the discussion in Chapter 11).

It should be noted that, since 1954, *with the single exception of the offence of contempt of court*, it has not been possible for a Canadian to be convicted of a common law offence (see section 9 of the *Criminal Code*). However, section 8(3) of the *Criminal Code* preserves any common law "justification," "excuse," or "defence" to a criminal charge "except in so far as they are altered by or are inconsistent with this Act or any other Act of the Parliament of Canada." This provision is particularly significant since it means that common law defences, such as necessity and duress, are still applicable in a Canadian criminal trial. In short, although Canadian judges cannot create any new offences at common law, they may still apply the common law principles relating to certain defences, provided, of course, that these principles are not inconsistent with legislation enacted by the Canadian Parliament.

## THE IMPACT OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS* ON THE CRIMINAL LAW IN CANADA

The enactment of the *Canadian Charter of Rights and Freedoms* as part of the *Constitution Act, 1982* heralded a dramatic new era in the relationship between the members of Canada's judiciary, on the one hand, and the elected representatives of Canada's federal Parliament and provincial/territorial legislatures, on the other. As an entrenched bill of rights, the *Charter* empowers judges, in certain circumstances, to declare any piece of legislation to be invalid—and of no force or effect—if the latter infringes upon an individual's protected rights. As (then) Chief Justice Dickson pointed out, in the case of *Morgentaler, Smolig and Scott* (1988):

> Although it is still fair to say that courts are not the appropriate forum for articulating complex and controversial programs of public policy, Canadian courts are now charged with the crucial obligation of ensuring that the legislative initiatives pursued by our Parliament and legislatures conform to the democratic values expressed in the *Canadian Charter of Rights and Freedoms*.

Canadian judges have demonstrated their willingness to use this far-reaching power where they believe that it is absolutely necessary to do so. A dramatic example of the judicial power under the *Charter* to strike down provisions of the *Criminal Code* is the case of *Canada (Attorney General) v. Bedford* (2013). In this case, three current or former sex workers sought a declaration that three *Criminal Code* provisions[4] relating to the sex trade were invalid in light of section 7 of the *Charter*, which guarantees the "right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." In declaring these *Criminal Code* provisions to be invalid, (then) Chief Justice Beverley McLachlin argued that they put the physical security of sex trade workers at risk by denying them the opportunity to employ protective measures, such as hiring security guards or implementing measures to screen clients. In her words, "the impugned laws deprive people engaged in a risky, but legal, activity of the means to protect themselves against [the] risks of disease, violence and death" at the hands of "pimps and johns." Significantly, the Supreme Court suspended the implementation of its ruling for one year in order to grant the Parliament of Canada sufficient time to enact new legislation which would regulate the sale and purchase of sexual services in a manner that does not place the physical security of sex workers at risk. As the Chief Justice noted, striking down the impugned

4. Section 210 (keeping or being in a bawdy-house), insofar as that section related to prostitution; section 212(1)(j) (living on the avails of prostitution); and section 213(1)(c) (communicating in public for the purposes of prostitution).

prostitution-related provisions of the *Criminal Code* did not mean that "Parliament is precluded from imposing limits on where and how prostitution may be conducted." Parliament responded by enacting the *Protection of Communities and Exploited Persons Act* (S.C. 2014, c. 25), which amended the *Criminal Code* so as to criminalize the *purchase*, but not the *sale*, of sexual services a crime.[5]

Another illustration of the importance of the judicial power to strike down legislation that infringes the *Charter* is the decision to rule that a mandatory minimum sentence imposed by Parliament is invalid because it infringes section 12 of the *Charter*, which protects citizens from "cruel and unusual punishment." For example, in *Lloyd* (2016), the Supreme Court of Canada stuck down subsection 5(3)(a)(i)(D) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, which provided a mandatory minimum sentence of one year of imprisonment for trafficking or possession for the purpose of trafficking of certain drugs, if the offender had been convicted of any drug offence (except possession) within the past 10 years. (Then) Chief Justice McLachlin stated that the courts will consider a mandatory minimum sentence to

5. See revisions to sections 213 of the *Criminal Code* and new sections 286.1 to 286.5.

**Supervised Injection Sites and Section 7 of the *Canadian Charter of Rights and Freedoms*.**


THE CANADIAN PRESS/Darryl Dyck

Local, provincial and federal authorities came together to create a legal framework for a safe injection facility in which clients could inject drugs under medical supervision without fear of arrest and prosecution. Insite was widely hailed as an effective response to the catastrophic spread of infectious diseases such as HIV/AIDS and hepatitis C, and the high rate of deaths from drug overdoses in the DTES.

Between 2003 and 2008, Insite had been able to operate legally because it had received an exemption from the provisions of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. Section 56 of this Act grants the federal Minister of Health the authority to exempt any person or class of persons from the application of all or any of the provisions of the Act on the basis of a "medical purpose." An exemption in the case of Insite was necessary because, otherwise, the staff and clients could be charged with possession of proscribed drugs.

In 2008, the federal Health Minister failed to extend Insite's exemption and an action was brought seeking, in part, a declaration that the Minister's actions constituted a violation of the rights of the Insite staff and their clients under section 7 of the *Charter*. The Supreme Court of Canada ruled that the Minister's actions did indeed constitute a violation of the section 7 rights of the Insite staff and their clients and the Court ordered the Minister to issue an exemption under section 56 of the *Controlled Drugs and Substances Act*. In summarizing the conclusions of the Court, Chief Justice McLachlin stated that, if the Minister's decision not to extend the exemption had been upheld, drug users would have been prevented from accessing the health services provided by Insite and the absence of these services would have threatened the health and even the lives of Insite's vulnerable clients. In these circumstances,

The *Charter* grants the courts very wide powers that are not limited to declaring certain elements of legislation invalid. In fact, there is a variety of remedies that may be granted when a *Charter* right has been violated. Indeed, section 24(1) of the *Charter* empowers courts to provide such remedy as they consider "appropriate and just in the circumstances." For example, the courts may grant a declaration that a *Charter* right has been infringed and order that a minister or a government department carry out a certain action. This situation occurred in *PHS Community Services Society v. Canada (Attorney General)*, decided by the Supreme Court of Canada in 2011. The case involved the rights of health care workers to operate, and intravenous drug users to access, a safe injection facility in Vancouver (a facility known as "Insite"). In the words of (then) Chief Justice McLachlin,

the section 7 *Charter* interests of the Insite clients were engaged and their rights were undoubtedly infringed. In these circumstances, it was the view of the Supreme Court that the Minister's decision was:

> … arbitrary, undermining the very purposes of the *CDSA*, which include public health and safety. It is also grossly disproportionate: the potential denial of health services and the correlative increase in the risk of death and disease to injection drug users outweigh any benefit that might be derived from maintaining an absolute prohibition on possession of illegal drugs on Insite's premises.

The year 2015 saw the election of a new federal government, which was more sympathetic to the need to support the creation of "supervised consumption sites." Furthermore, by 2016, there was a rapid increase in the number of fatal opioid overdoses in Canada: for example, in that year, there were 726 such deaths just in the province of Ontario. The ready availability of street drugs, contaminated by synthetic opioids such as fentanyl and carfentanil, has created an opioid crisis in Canada. In 2017, there were 1125 overdose deaths in British Columbia, the province most severely affected. Against the background of this crisis, supervised consumption sites have now been established or are in development in four provinces as a means of preventing deaths from opioid overdoses, particularly those involving contaminated street drugs. The decision of the Supreme Court of Canada in *PHS Community Services Society v. Canada (Attorney General)* vividly demonstrates the broad powers conferred on the courts by the *Charter* and the use that can be made of those powers to safeguard the lives and health of Canadians.

Do you think that the majority of Canadians favour the view taken by the Minster of Health and the government of Canada in 2008, or the view that harm-reduction strategies with respect to illegal drug use constitute an essential element in protecting public health and safety? Should judges be in a position to override the policy choices of an elected government? What role should scientific evidence play in judicial decision making with respect to the *Canadian Charter of Rights and Freedoms*? What should judges do when the scientific evidence is conflicting?*

* Beyrer, C. (2011). Safe injection facilities save lives. *The Lancet*, 377(9775), 1385–1386.

constitute "cruel and unusual punishment" if it is "grossly disproportionate to the offence and its circumstances."[6]

However, it is important to recognize that the *Charter* does not require that the courts strike down every legislative provision that is considered to be in violation of an accused person's constitutional rights. Indeed, as we have already seen, section 1 of the *Charter* states that:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. [emphasis added]

As Chief Justice McLachlin said in delivering the judgment of the Supreme Court of Canada in *Canada (Attorney General) v. JTI-Macdonald Corp.* (2007), "Most modern constitutions recognize that rights are not absolute and can be limited if this is necessary to achieve an important objective and if the limit is appropriately tailored, or proportionate."

Section 1, in effect, requires the courts to engage in an elaborate balancing act in which they must decide whether the infringement of an individual's rights can be justified in the name of some "higher good." In the *Oakes* case (1986), the Supreme Court of Canada devised a specific test for the purpose of identifying the factors that should be considered when the courts attempt to decide whether the violation of a *Charter* right is justifiable as a "reasonable limit" in a "free and democratic society." This test has since become known as the ***Oakes* test**.

In delivering the judgment of the majority of the justices of the Supreme Court of Canada in the *Oakes* case (1986), Chief Justice Dickson prefaced his remarks concerning section 1 of the *Charter* by emphasizing that the burden of establishing that an infringement of a *Charter* right is justified as a reasonable limit is on the "party seeking to uphold the limitation": in a criminal case, this will nearly always be the Crown. In other words, there will have to be very strong grounds for overriding individual rights guaranteed by the *Charter*. However, the Chief Justice recognized that rights and freedoms

6. See also *John* (2018) and *Swaby* (2018), which declared the mandatory minimum sentences then applicable for possession of child pornography, under subsections 163.1(4)(a) & (b) respectively, of the *Criminal Code*, to be invalid and of no force and effect because they contravened section 12 of the *Charter*.

guaranteed by the *Charter* "are not absolute" and that "it may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance."

What issues should a court address when attempting to decide whether a *Charter* violation is justified under section 1? In the *Oakes* case, Chief Justice Dickson stated that this process should be divided into two separate questions:

> To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom." … It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
>
> Secondly, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test." … Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means, even if rationally connected to the objective in the first sense, should impair "as little as possible" the right or freedom in question. … Thirdly, there must be a proportionality between the *effects* of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance."
>
> With respect to the third component, it is clear that the general effect of any measure impugned under s. 1 will be the infringement of a right or freedom guaranteed by the *Charter*; that is the reason why resort to s. 1 is necessary. … Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it intends to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

In the *Oakes* case itself, the Supreme Court of Canada had been faced with the question of whether or not to rule that section 8 of the (now repealed) *Narcotic Control Act*, R.S.C. 1985, c. N-1 was invalid in light of the *Charter*. Section 8 placed a peculiar burden upon the shoulders of an accused person charged with trafficking in narcotics (contrary to section 4(1) of the Act): specifically, the provision stated that once the Crown had proved that the accused was in possession of a narcotic, then the **burden of proof** automatically fell on the accused to establish that they were *not* in possession for the purpose of trafficking.

The Supreme Court briskly found that section 8 infringed an accused person's right—enshrined in section 11(d) of the *Charter*—"to be presumed innocent until proven guilty." Undoubtedly, section 8 of the *Narcotic Control Act* forced accused persons into the position of having to prove their innocence and, in so doing, constituted a clear breach of section 11(d) of the *Charter*. However, the critical issue in *Oakes* was whether section 8 of the *Narcotic Control Act* could be "saved," under the terms of section 1 of the *Charter*, as a "reasonable limit" on the presumption of innocence. Ultimately, the Supreme Court took the view that section 8 did not constitute a reasonable limit that could be "demonstrably justified in a free and democratic society" and declared it to be invalid and "of no force and effect."

In applying what is now known as the *Oakes* test, Chief Justice Dickson first inquired whether Parliament's objective in enacting section 8 of the *Narcotic Control Act* was sufficiently important to justify overriding a *Charter* right. The chief justice noted that Parliament's objective was manifestly that of "curbing drug trafficking" by rendering it easier for the Crown to obtain convictions of those who engaged in such harmful conduct. There was absolutely no doubt that Parliament's objective of reducing the extent of drug trafficking in Canada could be characterized as being "pressing and substantial" in nature, and Chief Justice Dickson was clearly convinced that there was a need to protect society "from the grave ills associated with drug trafficking."

Having determined that Parliament's objective in enacting section 8 of the Narcotic Control Act was sufficiently important to warrant overriding a Charter right, Chief Justice Dickson turned to the

second part of the test that he articulated in the *Oakes* case. More specifically, were the means used by Parliament (placing the onus of proof on the shoulders of an accused person found in possession of narcotics to establish that they were not in such possession for the purpose of trafficking) proportional to Parliament's objective? As we noted, Chief Justice Dickson referred to three different components of the proportionality test. However, in the *Oakes* case itself, he stated that it was necessary to refer only to the first of these components; namely, was there a rational connection between section 8 and Parliament's objective of reducing drug trafficking? Chief Justice Dickson concluded that there was no such rational connection. Possession of a minute amount of narcotics does not automatically warrant drawing the inference that the accused intended to traffic in such drugs. Indeed, he said that it "would be irrational to infer that a person had an intent to traffic on the basis of their possession of a very small quantity of narcotics." Although section 8 might ensure that more accused persons will be convicted of drug trafficking, a conviction of a person found in possession of only a minimal amount of drugs does nothing to reduce the actual incidence of trafficking in narcotics because such an individual is clearly not involved in such activity in the first place! As the chief justice remarked, "The presumption required under s. 8 of the Narcotic Control Act is overinclusive and could lead to results in certain cases which would defy both rationality and fairness."

It should be noted that the nature of the third step in the proportionality test articulated in Oakes was subsequently clarified by the Supreme Court of Canada in the *Dagenais* case (1994), in which Chief Justice Lamer suggested that it is important for the courts to examine both the salutary and deleterious effects of an impugned legislative provision on both individuals and groups in Canadian society. He therefore stipulated that the third step in the Oakes test should be rephrased in the following manner: "[T]here must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, and there must be a proportionality between the deleterious and the salutary effects of the measures."

In *R. v. N.S.* (2012), the Supreme Court emphasized that the weighing of salutary and deleterious effects under the *Oake*s test may involve attempting to reconcile a conflict between opposing *Charter* rights. In this case, the issue concerned the right of a Muslim witness who, for religious reasons, wished to testify with her face covered by a niqab (or veil). The Court noted that there was a potential conflict between the witness's *Charter* right to religious freedom and the accused person's *Charter* right to a fair trial. Chief Justice McLachlin emphasized that resolution of this potential conflict between *Charter* rights must be undertaken on a case-by-case basis, carefully balancing the salutary and deleterious effects of prohibiting or permitting the wearing of the niqab on the rights of both the witness and the accused person:

> A secular response that requires witnesses to park their religion at the courtroom door is inconsistent with the jurisprudence and Canadian tradition, and limits freedom of religion where no limit can be justified. On the other hand, a response that says a witness can always testify with her face covered may render a trial unfair and lead to wrongful conviction. What is required is an approach that balances the vital rights protecting freedom of religion and trial fairness when they conflict. The long-standing practice in Canadian courts is to respect and accommodate the religious convictions of witnesses, unless they pose a significant or serious risk to a fair trial. The *Canadian Charter of Rights and Freedoms*, which protects both freedom of religion and trial fairness, demands no less.

The Supreme Court, therefore, resolved any potential conflict between the right to religious freedom and the right to a fair trial by articulating a test that would require the removal of the niqab only when it is necessary to do so because there are no other viable alternatives, and only when the salutary effects outweigh the deleterious effects (particularly with respect to the impact such a requirement might have on the right to freedom of religion):

> [A] witness who for sincere religious reasons wishes to wear the niqab while testifying in a criminal proceeding will be required to remove it if:
>
> (a) requiring the witness to remove the niqab is necessary to prevent a serious risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
>
> (b) the salutary effects of requiring her to remove the niqab, including the effects on trial fairness, outweigh the deleterious effects of doing so, including the effects on freedom of religion.

It is possible that a court might find that a particular legislative provision—adopted by Parliament to achieve a "pressing and substantial" objective—creates relatively few deleterious effects. However, this should not mean that the provision automatically meets the requirements of the third component of the proportionality test. Indeed, it may well be the case that the legislative provision in question, although it does not have any significantly harmful effects, does not produce any significantly salutary effects either! If a court should come to this conclusion, then it should rule that the legislative provision has failed the third component of the proportionality test; after all, any infringement of *Charter* rights is a serious matter and certainly cannot be justified if it does not have any significantly positive effects. Section 1 of the *Charter* should not be used to "save" legislation from invalidation unless the positive benefits of the legislation substantially outweigh any of its potentially negative impacts upon both individual Canadians and Canadian society as a whole.

The *Oakes* test has been routinely applied by Canadian courts whenever they have been confronted with the arduous, but nevertheless delicate, task of balancing the individual rights of Canadians against the collective rights of society under section 1 of the *Charter*. Therefore, in applying the *Oakes* test, the courts are required to pay very close attention to the broader social context within which a particular case may be located. As Justice Bastarache stated, in delivering the majority opinion of the Supreme Court of Canada in *Thomson Newspapers v. Canada (Attorney General)* (1998),

> The analysis under s. 1 of the *Charter* must be undertaken with a close attention to context. This is inevitable as the test devised in *R. v. Oakes* … requires a court to establish the objective of the impugned provision, which can only be accomplished by canvassing the nature of the social problem which it addresses. Similarly, the proportionality of the means used to fulfil the pressing and substantial objective can only be evaluated through a close attention to detail and factual setting. In essence, context is the indispensable handmaiden to the proper characterization of the objective of the impugned provision, to determining whether that objective is justified, and to weighing whether the means used are sufficiently closely related to the valid objective so as to justify an infringement of a *Charter* right.

Before leaving this discussion of the impact of the *Charter* on the fabric of the criminal law in Canada, it should be emphasized that there may well be a tendency to exaggerate the extent to which the courts may use their *Charter* powers to override the will of democratically elected legislators. Indeed, it is highly significant that the Supreme Court of Canada stated in the *Mills* case (1999) that, in the context of the application of the *Charter*, it is more useful to view

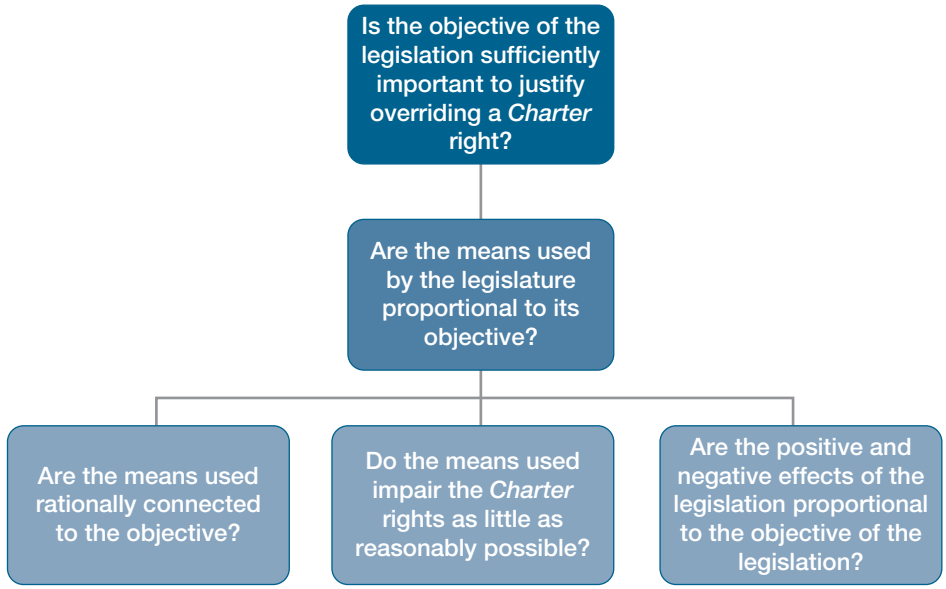


***Figure 1-3***
*The* Oakes *Test*

the relationship between Parliament and the courts as being one of *constructive "dialogue."* For example, Justices McLachlin and Iacobucci emphasized the view that the courts must always presume that Parliament intends to enact legislation that meets the requirements of the *Charter* and, therefore, must do all they can to give effect to that intention. What the Supreme Court appears to be suggesting is that the invalidation of legislation enacted by democratically elected representatives is a step that should be undertaken only very reluctantly on the part of the courts. Furthermore, even when legislation is struck down as being of no force or effect, it is always possible for Parliament or the provincial or territorial legislature to enact new statutory provisions that respond to the *Charter* concerns expressed by the courts. The *Mills* case (1999) suggests that, ultimately, these new provisions will be upheld if the legislators have "listened" to what has been said by the judges in their ongoing dialogue with Parliament and the provincial/territorial legislatures. In essence, according to the Supreme Court in the *Mills* case, the appropriate role of the courts is to assist legislators to implement the will of the people in a manner that is consistent with the Canadian values expressed in the *Charter*. In this view, legislators and courts are working in a partnership and it would be wrong to suggest that the *Charter* is being used to frustrate decisions made in a democratic manner.

In *Mills*, the Supreme Court rejected a *Charter* challenge to provisions of the *Criminal Code* that were enacted in 1997 with the objective of restricting the use that may be made by lawyers for the accused of the confidential therapeutic records of complainants in trials involving charges of sexual assault. Such records may have been made by psychiatrists, psychologists, or counsellors when a victim of sexual assault has sought assistance and may give intimate information that the victim has every reason to believe will be kept in confidence. In Mills, **counsel** for the defence had claimed that, by restricting access to such records and by limiting the circumstances in which they could be used in evidence, the new provisions of the *Criminal Code* seriously infringed the accused's right to make "full answer and defence"—a right that is enshrined in sections 7 and 11(d) of the *Charter*. However, the Supreme Court firmly rejected this argument and declined to invalidate provisions that represented the will of elected members of Parliament to protect the victims of sexual assault from unconscionable attacks by defence counsel. Justices McLachlin and Iacobucci advanced the view that "constitutionalism can facilitate democracy rather than undermine it" and that "one way in which it does this is by ensuring that fundamental human rights and individual freedoms are given due regard and protection." It is noteworthy that the two justices admitted that "Courts do not hold a monopoly on the protection and promotion of rights and freedoms; Parliament also plays a role in this regard and is often able to act as a significant ally for vulnerable groups." In their view, this principle is of particular importance in the context of sexual violence and they conclude that:

> If constitutional democracy is meant to ensure that due regard is given to the voices of those vulnerable to being overlooked by the majority, then this court has an obligation to consider respectfully Parliament's attempt to respond to such voices.

In addition to the notion that the courts should engage in a "constructive dialogue" with Parliament, it is important to bear in mind that, when judges interpret legislation such as the *Criminal Code*, they will *presume* that Parliament intended to conform to the basic values enshrined in the *Charter*. The implications of this approach were clearly articulated by Justices Iacobucci and Arbour in *Application under s. 83.28 of the Criminal Code (Re)*, decided by the Supreme Court of Canada in 2004. In their judgment, they referred to "the presumption that legislation is enacted to comply with constitutional norms, including the rights and freedoms enshrined in the *Charter*" and added:

> This presumption acknowledges the centrality of constitutional values in the legislative process, and more broadly, in the political and legal culture of Canada. Accordingly, where two readings of a provision are equally plausible, the interpretation which accords with *Charter* values should be adopted …

It is clear that the Supreme Court of Canada is far from being overzealous in its application of the *Canadian Charter of Rights and Freedoms* to legislation enacted by the Parliament of Canada under the authority of its criminal law power. The fear expressed by some politicians and commentators that the democratic will of Canadians may be thwarted by unelected judges using the *Charter* to strike down criminal legislation is not based on a sound analysis of the manner in which the Supreme Court of Canada has actually interpreted and applied the *Charter*. Although the Court has indeed declared certain legislation to be

invalid, it has generally expressed its reluctance to do so. Following the *Mills* case, it would appear that the Supreme Court of Canada will view its role as being that of assisting Parliament and the various provincial and territorial legislatures to implement the will of Canadians in legislation that is consistent with the basic principles expressed in the *Charter*.

Finally, it is important to recognize that declaring a statutory provision invalid in light of the *Charter* is considered a measure of last resort. For example, a court may decide that the provision may be found valid if one or more offending phrases are "*severed*," or removed, from it. Furthermore, a court may rule that the constitutional validity of a statutory provision may be affirmed by "*reading in*" (adding) words that would safeguard the individual's *Charter* rights or by giving it a very narrow interpretation so that it does not violate the *Charter* ("*reading down*"). As Chief Justice McLachlin stated, in delivering the judgment of the Supreme Court of Canada in *Ferguson* (2008),

> Section 52(1) [of the *Constitution Act, 1982*] grants courts the jurisdiction to declare laws of no force and effect only "to the extent of the inconsistency" with the Constitution. It follows that if the constitutional defect of a law can be remedied without striking down the law as a whole, then a court must consider alternatives to striking down. Examples of alternative remedies under s. 52 include severance, reading in and reading down.

However, the courts cannot "read in" or "read down" words in a statutory provision if to do so would clearly contravene the intention of the Parliament of Canada or of the relevant provincial or territorial legislature. Chief Justice McLachlin also addressed this issue in *Ferguson*:

> [I]t has long been recognized that in applying alternative remedies such as severance and reading in, courts are at risk of making inappropriate intrusions into the legislative sphere. An alternative to striking down that initially appears to be less intrusive on the legislative role may in fact represent an inappropriate intrusion on the legislature's role. This Court has thus emphasized that in considering alternatives to striking down, courts must carefully consider whether the alternative being considered represents a lesser intrusion on Parliament's legislative role than striking down. Courts must thus be guided by respect for the role of Parliament, as well as respect for the purposes of the *Charter*.

A recent example of the willingness of the Supreme Court of Canada to remove ("sever") words that infringe a *Charter* right while upholding the constitutionality of what remains of the statutory provision in question is *Saskatchewan (Human Rights Commission) v. Whatcott* (2013). This case involved a challenge to the constitutionality of section 14(1)(b) of the *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, which prohibited publications that promoted hatred of individuals on the basis of a "prohibited ground," such as sexual orientation. Section 14(1)(b) stated:

> No person shall publish or display, or cause or permit to be published or displayed, on any lands or premises or in a newspaper, through a television or radio broadcasting station or any other broadcasting device, or in any printed matter or publication or by means of any other medium that the person owns, controls, distributes or sells, any representation, including any notice, sign, symbol, emblem, article, statement or other representation …
>
> (b) that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground.

The Supreme Court ruled that section 14(1)(b) infringed both the right to freedom of expression (section 2(b) of the *Charter)* and the right to freedom of conscience and religion (section 2(a) of the *Charter*). However, the Court ruled that, since it was designed to prohibit hate speech, section 14(1)(b) was saved by section 1 of the *Charter*. Indeed, it was a reasonable limit on *Charter* rights that was demonstrably justified in a free and democratic society. However, in order to uphold the constitutionality of section 14(1)(b), the Court held that the words "ridicules, belittles or otherwise affronts the dignity of" had to be severed, or removed, from the provision. The Court reasoned that there has to be a very strong justification for the Saskatchewan legislature to impinge on the fundamental rights to freedom of speech and freedom of conscience and religion. Such justification lies in the fact that hate speech legislation targets only those who promote the very powerful feelings associated with the word "hatred." According to the Supreme Court, only such terms as "vilification" and "detestation" reflect "the ardent and extreme nature of feelings constituting 'hatred.'" Statements that do not promote such strong feelings should not be prohibited by legislation. The Supreme Court held that the words "ridicules, belittles or otherwise affronts the dignity of" had to be severed from section 14(1)(b) because they "are not synonymous with 'hatred' or 'contempt.'" Indeed, human "expression that 'ridicules, belittles or otherwise affronts the dignity

| PRESUMPTION OF CONSTITUTIONALITY: | SEVERANCE: | READING DOWN: | READING IN: | APPLYING SECTION 1: |
|---|---|---|---|---|
| A presumption that the legislature intended to enact legislation that conforms with *Charter* requirements | Cutting out offending words and leaving the remainder of the legislation in compliance with the *Charter* | Interpreting legislation in a strict, narrow manner so that it does not violate the *Charter* | Adding words to the legislation that renders it in compliance with the *Charter* | An infringement of a *Charter* right may be justified as a reasonable limit in a free and democratic society |

***Figure 1-4***

*Methods of Avoiding Declaring a Statutory Provision Invalid under the* Canadian Charter of Rights and Freedoms

of' [protected groups] does not rise to the level of ardent and extreme feelings" that justify an infringement of fundamental *Charter* rights:

> Rather, they refer to expression which is derogatory and insensitive, such as representations criticizing or making fun of protected groups on the basis of their commonly shared characteristics and practices, or on stereotypes.

By severing the unconstitutional words from section 14(1)(b) of the *Saskatchewan Human Rights Code*, the Supreme Court of Canada was able to declare the remainder of the provision to be valid.

## Study Questions

1. In what ways does criminal law differ from private law?
2. What are the main branches of public law?
3. Do you think that the Parliament of Canada may use its criminal law power under the *Constitution Act, 1867* to prohibit any conduct that it considers harmful to Canadians?
4. May a provincial legislature prohibit any conduct it considers harmful and impose a fine if the prohibition is violated?
5. Why are judicial decisions considered one of the sources of criminal law in Canada?
6. Do you think that the so-called *Oakes* test is an appropriate mechanism for determining whether a particular legislative provision should be considered valid even though it infringes one or more of the rights guaranteed by the *Canadian Charter of Rights and Freedoms*?
7. Did the Parliament of Canada respond appropriately to the decision of the Supreme Court of Canada's decision in the *Bedford* case, when legislators decided to adopt the so-called "Nordic Model" and criminalize those who *purchase* sexual services, but not those sex workers who *sell* such services? Could this approach drive the purchasers of sexual services underground, thereby exposing sex workers to the very same dangers identified by Chief Justice McLachlin in her judgment on behalf of the Court?
8. How do the courts distinguish between true crimes and regulatory offences?
9. Why are Canadian courts reluctant to invalidate legislation enacted by Parliament and provincial/territorial legislatures? What mechanisms do they use to avoid invalidating legislation unnecessarily?
10. What is meant by the suggestion that interpretation of the *Canadian Charter of Rights and Freedoms* should be viewed as a "constructive dialogue" between the courts and the Parliament of Canada and provincial/territorial legislatures?