OFFENCES

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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 if for a dangerous purpose prior to its actual use: *R v Horner,* 2018 ONCA 971, at para 21

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E. POSSESSION OF A WEAPON OR FIREARM OBTAINED BY COMMISSION OF OFFENCE: S. 96(2)

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

PART IV: OFFENCES AGAINST THE ADMINISTRATION OF LAW AND JUSTICE

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

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

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

B. FAIL TO APPEAR: S.145(5)

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

i. PROOF OF IDENTITY

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 confeded 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)

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

A. SEXUAL INTERFERENCE: S.151

i. ELEMENTS OF THE OFFENCE

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

B. INVITATION TO SEXUAL TOUCHING: S.152

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 step1 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

i. The Defence of Honest but Mistaken Belief in Age: s.150.1(4)

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 takes 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 facy. 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: *George*

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

C. VOYEURISM

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 Trinchi,* 2019 ONCA 356

D. CHILD PORNOGRAPHY: S.163

i. Definition of Child Pornography

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

ii. Mens Rea

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

iii. Advocating or Counselling Sexual Activity with Children: s.163.1(b)

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

iv. Making Child Pornography Available: s.163.1(3)

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

v. Legitimate Purpose Defence: s.163.1(6)(a)

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

E. CHILD LURING

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 Crown must establish the following elements beyond a reasonable doubt:

1. An intentional communication by means of telecommunication;
2. With a person the accused person knows to be under the requisite age; and
3. For the specific purpose of facilitating the commission of a designated offence:

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

PART VIII: OFFENCES AGAINST THE PERSON AND REPUTATION

A. FAIL TO PROVIDE THE NECESSARIES: S.215

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

B. CRIMINAL NEGLIGENCE: S.219

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

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

C. CRIMINAL NEGLIGENCE CAUSING DEATH: S.220

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

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

D. CRIMINAL NEGLIGENCE CAUSING BODILY HARM: S. 221

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

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

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

F. SECOND DEGREE MURDER: S.229

i. MENS REA

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

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

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

ii. CAUSATION

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

iii. Party Liability

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

G. FIRST DEGREE MURDER: S.231

i. Planned and Deliberate Murder: s.231(2)

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

The transferred intent provision under s.229(b) does not apply to a planned and deliberate first degree murder: *R v Ching,* 2019 ONCA 619, at paras 17-38

a) Party Liability

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

ii. Constructive First Degree Murder: s.231(4) – (6.2)

a) General Principles

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

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

b) Via forcible confinement

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

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

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

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 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

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

"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

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

c) Via Criminal Harassment

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

H. AIDING AND ABETTING HOMICIDE

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

I. MANSLAUGHTER: S.234

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

J. ATTEMPT MURDER

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

K. DANGEROUS DRIVING: S.249(1)

The *actus reus* of dangerous driving is whether the driving was dangerous to other users of the road. 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 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

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

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

Under both the *actus reus* ands *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

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 concluded 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

The *Mens Rea* of dangerous driving must not focus on the consequences of the driving: *R v Markos,* 2019 ONCA 80, at para 9

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

L. CRIMINAL HARASSMENT: S.264(1)

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

M. ASSAULT: S.265(1)

i. DEFENCE OF CONSENT

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

ii. DEFENCE OF EXERCISE OF AUTHORITY

See *R v Geddes*, 2015 ONCA 292

N. ASSAULT CAUSING BODILY HARM: S.267(B)

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

O. ASSAULT WITH A WEAPON: S.267(A)

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

P. AGGRAVATED ASSAULT, S. 268

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

Q. SEXUAL ASSAULT: S.271

i. THE TEST

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

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

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 pr was conduct capable of violating the complainant's sexual integrity: *R v Anderson,* 2018 ONCA 1002, at para 20

iii. Element #2: In circumstances of a Sexual Nature

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

iv. Element #3: Without Consent

a) General Principles

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 means conscious and voluntary agreement as to the touching, its sexual nature and the identity of the partner: *R v GF and RB,* 2019 ONCA 493, at paras 30, 33

A complainant's belief that she must submit does not amount to the "voluntary agreement" required by s. 273.1(1): *HE* 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

b) Capacity to Consent

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

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 consent to sexual contact. If the complainant did not consent, then there is no ostensible consent which is vitiated by lack of capacity. The actus reus is established and there need not be an inquiry into capacity. If, on the other hand, the complainant consented, or there is a reasonable doubt on that issue, the next step is to determine whether there are any circumstances that may vitiate her apparent consent: *R v GF and RB,* 2019 ONCA 493, at para 41

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

c) Vitiation of Consent

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

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 that the complainant would have refused to engage in unprotected sex with the accused if she had been advised that he was HIV-positive: *Boone* at para 16

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

d) Honest but Mistaken Belief in Consent

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

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 believe 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)

iii. Defence of Sexsomnia

See *R v Hartman*, 2015 ONCA 498

iv. Delayed Disclosure

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

v. Indigenous Victims

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

R. FORCIBLE CONFINEMENT: S.279(2)

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

S. HUMAN TRAFFICKING: S.279.01

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

T. PROCURING: S. 286.3

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.

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

U. ADVERTISING SEXUAL SERVICES: S.286.4

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

PART IX: OFFENCES AGAINST RIGHTS OF PROPERTY

A. ROBBERY: S.343

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*.

B. CRIMINAL INTEREST RATES: S.347

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

C. FRAUD: S.380

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

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

A. ARSON: S.433

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

PART XIII: ATTEMPTS, CONSPIRACIES, ACCESSORIES

A. ACCESSORY AFTER THE FACT: S.463

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

B. ATTEMPTS: S.463

i. ACTUS REUS

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

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

ii. MENS REA

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

C. CONSPIRACY: S.465(1)

i. General Principles

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.

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

ii. Actus Reus

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 "mutality 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 illict 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 ommitted]

iii. Party Liability to a Conspiracy

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

D. CRIMINAL ORGANIZATION: S.467.1(1)

i. General Principles

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.

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

PART XXII: PROCURING ATTENDANCE

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

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

PART XXIII: SENTENCING

A. BREACH OF PROBATION: S. 733.1

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.

CONTROLLED DRUGS AND SUBSTANCES ACT

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

A. POSSESSION - GENERAL PRINCIPLES

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

i. Exemption for Medical or Scientific Purposes: s. 55 and 56 of the CDSA

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

ii. Personal Possession

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 themself 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

iii. Constructive Possession

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

iv. Wilful Blindness

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

v. Examples from the Caselaw

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

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

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

B. POSSESSION FOR THE PURPOSE OF TRAFFICKING

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

C. TRAFFICKING

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

D. IMPORTING

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

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

E. EXEMPTION FROM LIABILITY

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

HIGHWAY TRAFFIC ACT OFFENCES OFFENCES

A. DRIVE NO INSURANCE

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

PROCEEDS OF CRIME AND TERRORIST FINANCING ACT

A. LAUNDERING PROCEEDS OF CRIME

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

INCOME TAX ACT OFFENCES

A. TAX EVASION

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 recieving government funds and failing to pay government taxes: *R v Mahmood,* 2016 ONCA 75 at paras 19-20