CHAPTER 1

Introduction to Canadian Criminal Law

LEARNING OUTCOMES

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

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

CHAPTER OUTLINE

What Is Criminal Law?

The Definition of Crime in Canada

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

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

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

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

criminal law
The area of the law that delineates the rules and principles of culpability for acts and omissions deemed by the state to be crimes.

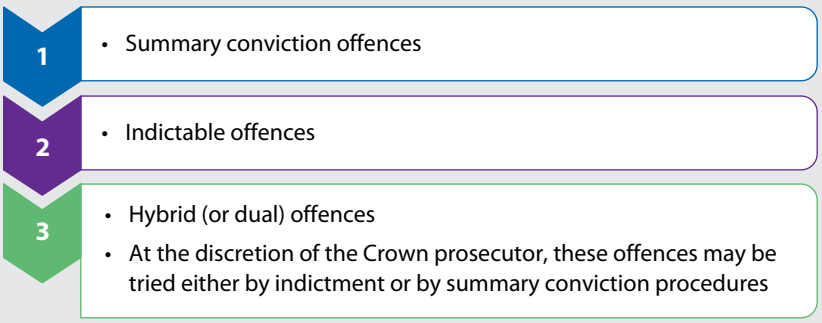
federal criminal law power
Under the *Constitution Act, 1867*, the Parliament of Canada has exclusive jurisdiction in the field of "criminal law and the procedures relating to criminal matters."

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

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

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

FIGURE 1.1 The Three Categories of Crimes in Canada



summary conviction offence
A less serious offence that is tried using a simplified set of rules of procedure.

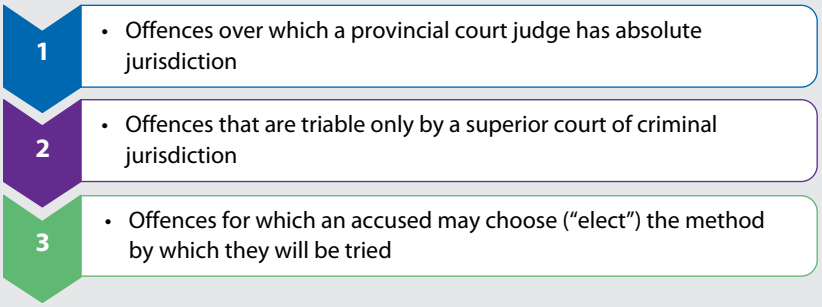
indictable offence
Serious offences, such as murder, with longer periods of imprisonment and more complex prosecution procedures than those for summary conviction offences.

accused
The person against whom a criminal charge has been laid.

Summary conviction offences may be tried only before a provincial/territorial court judge or justice of the peace sitting alone, and the maximum penalty is normally a fine of $5,000 or a sentence of two years less a day in prison or both. "Summary" refers to the fact that these offences are tried rapidly within the provincial/territorial court and without any complex procedures. Examples of summary conviction offences include carrying a weapon while attending a public meeting; obtaining food, a beverage, or accommodation by fraud; being nude in a public place without lawful excuse; and causing a disturbance in a public place. The two-years-less-a-day maximum prison sentence reflects the maximum period of time for which an offender can serve their sentence in a provincial prison as opposed to a federal penitentiary.

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

FIGURE 1.2 The Three Categories of Indictable Offences



In most cases, individuals charged with an indictable offence have the right to a preliminary inquiry before a provincial/territorial court judge, who will decide whether there is "sufficient evidence" to put the accused person on trial. Prosecutors may also request a preliminary inquiry for these offences. Examples of indictable offences include murder, manslaughter, sexual assault with a weapon, aggravated sexual assault, robbery, theft over $5,000, and breaking and entering.

Most offences in Canada's *Criminal Code*, R.S.C. 1985, c. C-46, are **hybrid (or dual) offences**. There are very few *Criminal Code* offences that may be tried only by summary conviction procedures; however, it is significant that most hybrid (or dual) offences are, in practice, tried by summary conviction procedures. Examples of hybrid (or dual) offences include assault, assaulting a peace officer, sexual assault, unlawful imprisonment, theft under $5,000, fraud not exceeding $5,000, and failing to comply with a probation order.

hybrid (or dual) offence
An offence that may be prosecuted as an indictable or summary conviction offence, at the discretion of the Crown.

True Crimes and Regulatory Offences

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

true crimes
Offences that represent a serious breach of community values and are considered both "wrong" and deserving of punishment.

regulatory offence
An offence arising under regulatory legislation (federal, provincial/territorial, or municipal); generally not considered to be serious in nature and usually results in the imposition of only a relatively minor penalty.

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

The objective of regulatory legislation is to protect the public or broad segments of the public (such as employees, consumers, and motorists, to name but a few) from the

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

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

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

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

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

> [d]angerous driving causing death is a serious criminal offence punishable by up to 14 years in prison. Like all criminal offences, it consists of two components: prohibited conduct—operating a motor vehicle in a dangerous manner resulting in death—and a required degree of fault—a marked departure from the standard of care that a reasonable person would observe

> in all the circumstances. The fault component is critical, as it ensures that criminal punishment is only imposed on those deserving the stigma of a criminal conviction. …
>
> Giving careful attention to the fault element of the offence is essential if we are to avoid making criminals out of the merely careless.

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

In brief, true crimes are acts that are generally considered to be inherently wrong by the majority of Canadians (e.g., murder, burglary, and sexual assault). On the other hand, regulatory offences are directed toward the control of activities that are considered by the majority of Canadians to be inherently lawful (selling food, driving a motor vehicle, or placing an advertisement in the local newspaper). Business, trade, and industry need to be regulated for the benefit of society as a whole, and penalties may be imposed for breach of the requirements of the regulatory regime. The penalties associated with regulatory offences are directed not at the underlying activities themselves but rather at breaches of the regulatory regime that ensures the orderly and safe conduct of those activities.

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

In Chapter 6, we shall examine regulatory offences in more depth and demonstrate that the prosecution (the Crown) has been granted the benefit of certain advantages that render it easier to obtain a conviction in relation to a regulatory offence than in relation to a true crime.

Since regulatory offences differ significantly from true crimes, they are frequently characterized as constituting a body of "**quasi-criminal law**."[2] This term means that the body of regulatory offences closely resembles criminal law but nevertheless lacks two key characteristics of criminal law—namely, the prohibition of conduct that is regarded as inherently wrong and the potential severity of the sentences that may be imposed. Later in this chapter, we shall explore the implications of the concept of quasi-criminal law for the field of constitutional law in Canada.

quasi-criminal law
Laws involving regulatory offences as opposed to true crimes.

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

Criminal Law as a Form of Public Law

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

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

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

The Sources of Criminal Law in Canada

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

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Federal Legislation

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

Just how extensive is the scope of the criminal law power under section 91(27) of the *Constitution Act, 1867*? As we have seen, two essential characteristics of a crime are a *prohibition* of certain conduct and an accompanying *penalty* for violating that prohibition. Does that mean that the Canadian Parliament can pass legislation on any issue that it chooses and justify it on the basis that, because it contains both a prohibition and a penalty, it must be criminal law? If this were the case, there would be absolutely no limits on the scope of the criminal law power. In fact, the Supreme Court has stated

clearly that there must be a third factor, in addition to a prohibition and a penalty, for legislation to be recognized as a genuine exercise of the criminal law power. What is this third factor?

In the famous *Reference re Validity of Section 5(a) of the Dairy Industry Act* (1949) [*Margarine Reference*] case, Rand J of the Supreme Court stated that the additional factor is the requirement that the prohibition and penalty contained in the legislation are directed toward a "public evil" or some behaviour that is having an injurious effect upon the Canadian public:

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

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

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

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

However, the Supreme Court upheld a *few* of the provisions of the *Assisted Human Reproduction Act* because they did constitute a valid exercise of the criminal law power. These provisions were concerned with preventing the use of a donor's reproductive material or an *in vitro* embryo from being used for purposes to which the donor had not given consent. They also prohibited the use of sperm or human eggs from a donor under the age of 18 and required that any consent given must be free and informed. Finally, they prevented the commercialization of the reproductive functions of women and men (e.g., engaging in surrogacy for profit). Justice Cromwell concluded that these provisions "prohibit negative practices associated with assisted reproduction and that they fall within the traditional ambit of the federal criminal law power."

More recently, a court reference sought to ascertain whether certain provisions in the federal *Genetic Non-Discrimination Act,* S.C. 2017 c. 3, constituted valid "criminal law." This legislation also pertained to health. The law made it illegal to require people to subject themselves to genetic testing for a variety of purposes, such as entering into continuing contracts or agreements, and if they did go through a genetic test, it required the individual's consent if their genetic information was to be used, collected, or disclosed. Penalties are attached for violation of its provisions. The government of Quebec challenged the legislation in a reference to its Court of Appeal, alleging the federal law was simply an attempt to regulate the insurance industry by prohibiting insurance companies from requiring genetic testing for individuals seeking life or health insurance. Its Court of Appeal agreed with this assertion; however, the Supreme Court disagreed, finding the legislation to be a valid exercise of the criminal law-making power in *Reference re Genetic Non-Discrimination Act* (2020). This was a very narrow 5–4 ruling (with the majority splitting 3–2 on their precise reasoning). The Court found the law had a public purpose to preserve interests normally protected by criminal law, such as "autonomy, privacy and the fundamental social value of equality, as well as public health" (at para. 80). The Court recognized the potential for genetic information to be used and abused in a variety of ways, saying the legislation aims to "protect people from emerging threats to privacy, autonomy and equality" (at para. 92).

substantive criminal law
Legislation that defines the nature of various criminal offences (such as murder, manslaughter, and theft) and specifies the various legal elements that must be present before a conviction can be entered; also, legislation that defines the nature and scope of various defences (such as provocation, duress, and self-defence).

What important pieces of legislation (or statutes) has the Canadian Parliament enacted in the field of criminal law? Undoubtedly, the most significant federal statute, dealing with both the substantive criminal law and the procedural law relating to criminal matters, is the *Criminal Code* (first enacted in 1892). "**Substantive criminal law**" refers to legislation that defines the nature of various criminal offences (such as murder, manslaughter, and theft) and specifies the various legal elements that must be present

before a conviction can be entered against an accused person. Similarly, in this context, the term refers to legislation that defines the nature and scope of various defences (such as provocation, duress, and self-defence).

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

criminal procedure
Legislation that specifies the procedures to be followed in the prosecution of a criminal case and defines the nature and scope of the powers of criminal justice officials.

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

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

Quasi-Criminal Law: Regulatory Offences and the Constitution

In the preceding section, it was established that the *Constitution Act, 1867* granted the federal Parliament exclusive jurisdiction in the field of criminal law and the procedures relating to criminal matters. At this point, readers no doubt feel that they have a clear grasp of the principle involved. Under the *Constitution Act, 1867*, the provincial legislatures were granted the power to enact laws in relation to a number of specific matters. For example, section 92 of the Act indicates, *inter alia*, that "property and civil rights in the province" and "generally all matters of a merely local or private nature in the province" fall within the exclusive jurisdiction of the provincial legislatures. By virtue of judicial interpretation of the various provisions of section 92, it is clear that a number

of other critical matters fall within the legislative jurisdiction of the provinces, such as municipal institutions, health, education, highways, liquor control, and hunting and fishing. The federal government is responsible for the territories of northern Canada. Under its authority, the federal government has created legislation through which it delegates powers to the three territorial legislatures. Through these legislative enactments, the various territories have been granted powers almost identical to the provincial legislatures; however, these powers are not constitutionally entrenched.

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

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

by-law
Legislation enacted by an inferior body that acts under delegated authority, such as the laws passed by a municipal council that has been granted authority under provincial government legislation.

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

It should be added that regulatory offences may also be found in a broad range of federal statutes (e.g., the *Canada Consumer Product Safety Act*, S.C. 2010, c. 21; the *Competition Act*, R.S.C. 1985, c. C-34; the *Food and Drugs Act*, R.S.C. 1985, c. F-27; the *Fisheries Act*, R.S.C. 1985, c. F-14; and the *Migratory Birds Convention Act*, S.C. 1994, c. 22).

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

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

CRIMINAL LAW IN PRACTICE

Indigenous Hunters Crossing the Border from the US to Hunt in Canada

Provinces and territories have typically enacted legislation that regulates the hunting and trapping of wildlife. In British Columbia, this is covered in the *Wildlife Act*, R.S.B.C. 1996 c. 488. In *Morris* (2006), the Supreme Court clearly stated (at para. 42) that such laws are a valid exercise of provincial jurisdiction under the *Constitution Act, 1867*, section 92(13), Property and Civil Rights in the Province.

In the *Morris* case, the main issue that was addressed was whether the valid provincial *Wildlife Act* was inapplicable to Indigenous hunters belonging to the Tsartlip Indian Band on Vancouver Island whose hunting activities have not substantially changed, possibly for millennia. The *Wildlife Act* sets out a series of quasi-criminal offences for which two Indigenous hunters were charged. Those offences related to their hunting at night, where they were caught shooting a decoy deer set up by conservation officers to catch illegal hunters. The offences included:

1. hunting wildlife with a firearm during prohibited hours (nighttime) (s. 27(1)(d));
2. hunting with the aid of a light/illuminating device (s. 27(1)(e)); and
3. hunting without reasonable consideration for the lives, safety, or property of other persons (s. 29).

While hunting with illumination had been practised by the Tsartlip since before colonial contact, the trial judge convicted the hunters on count 1, but stayed count 2 for double jeopardy reasons, and entered acquittals on count 3. The trial judge stated that hunting at night was "inherently unsafe." Those convictions were upheld on appeal. The hunters took their case to the Supreme Court of Canada.

A narrow majority in the top court allowed the appeal and substituted acquittals for the two men. The Court found that their hunting was protected by the North Saanich Treaty. The majority found that this treaty protected all of their traditional forms of hunting, including hunting with illumination at night.

A subsequent case looked at whether Indigenous hunters who were residents and citizens of the United States could be exempted from the application of the BC *Wildlife Act* for their hunting practices in Canada since their ancestors hunted both in what is now part of Western Canada and Western United States. In *R. v. Desautel* (2021), the Supreme Court addressed a charge of hunting without a licence and hunting big game while not being a resident of the province contrary to the BC *Wildlife Act* (ss. 11(1), 47(a)). The hunter in question was a member of the Lakes Tribe in Washington State, an Indigenous group that is descended from the Sinxt Tribe that occupied northern Washington State and Southern British Columbia at the time of first contact with colonial settlers. Up until 1930, members of the Lakes Tribe continued to hunt, fish, and gather in both jurisdictions but restricted their activities from that year onward to securing food south of the border.

The trial judge and all court levels on appeal found the Aboriginal rights of the hunter were infringed by the BC *Wildlife Act*. The Supreme Court noted that section 35 of the *Constitution Act, 1982* protects Aboriginal rights, including the right to hunt in traditional territories. The provision applies to "aboriginal peoples of Canada," but the top Court interpreted this to include the modern-day successors of Aboriginal societies that occupied Canadian territory at the time of European contact and that this can include groups that now fully reside outside of Canada. As members of the

Continued on next page.

Lakes Tribe, which is the modern-day successor of the Sinxt Tribe, Aboriginal rights still attach to them. Therefore, the restrictions imposed by the BC *Wildlife Act* are of no force or effect with respect to those peoples.

Discussion Questions

1. Do you think Indigenous hunters and fishers whose ancestors had a historic connection to Canada should have a right to hunt and fish in Canada without regard to duly enacted regulations and offences?
2. Is it right that Indigenous people are able to hunt and kill protected species in Canada, such as bald eagles, so they can take their feathers for ceremonial purposes?
3. Do the special rights accorded to Indigenous people amount to a denial of equality for non-Indigenous people?

Problems of Jurisdiction in the Enactment of Legislation

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

Municipalities are enabled to pass by-laws by provincial/territorial legislation, and they may not enact by-laws that usurp the federal criminal law power. For example, in *Smith v. St. Albert (City)* (2012), a judge of the Alberta Court of Queen's Bench declared two City by-laws to be invalid because they constituted "in pith and substance" criminal legislation and, therefore, fell within the exclusive jurisdiction of the Parliament of Canada. The by-laws were enacted to discourage certain stores from trading in drug paraphernalia (such as "any device intended to facilitate smoking activity"). The Judge noted that the "practical effect of the bylaw is to preclude the licensing or successful operation of what have become colloquially known as bong or head shops."[3] In the words of Clackson J,

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

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

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

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

Illustration by Greg Holoboff

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

the provinces and territories from enacting preventive legislation. In this respect, Karakatsanis J stated that

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

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

In *Keshane* (2012), the central question was whether part of a by-law passed by the City of Edmonton was valid (the city's authority to pass by-laws was derived from an act of the provincial legislature, which could delegate such authority only within the scope of the powers granted to the province under the *Constitution Act, 1867*). The by-law provision in question prohibited fighting in a public place and was challenged on the basis that, since the fighting ban was in reality a matter of criminal law, it was an issue that fell exclusively within federal jurisdiction. Therefore, it was argued that this part of the by-law was invalid because it fell outside the city's authority to enact. However, the Alberta Court of Appeal upheld the validity of the fighting prohibition in the by-law. The Court stated that

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

The Court took the view that the aim of the fighting ban was to "regulate the conduct and activities of people in public places so as to promote the safe, enjoyable, and reasonable use of such property for the benefit of all citizens of the City." This objective falls with the legislative authority of the province (and the city) since it involved property and civil rights under section 92(13) of the *Constitution Act,1867* and/or should be

considered a matter of a merely local nature under section 92(16). The Court readily agreed that there was also a federal (criminal law) aspect to the fighting ban because it engaged the public interest in preserving public peace and order and overlapped with various offences in the *Criminal Code*. However, the Court held that neither the provincial nor the federal aspect of the fighting ban was "dominant": therefore, it applied the dual aspect doctrine of judicial restraint and upheld the validity of the fighting ban in the by-law. An application to appeal this case to the Supreme Court was rejected by the top court in 2013.

In *Murray-Hall v. Attorney General of Quebec* (2023), the Supreme Court upheld provisions in the Quebec *Cannabis Regulation Act,* CQLR, c. C-5.3, that appeared to be at odds with the effect of certain provisions in the federal *Controlled Drugs and Substances Act*. The federal legislation made it an offence to possess and cultivate more than four cannabis plants in the home. The effect of this law was to legalize possession of up to four plants in the home. Quebec's legislation completely prohibited the possession of cannabis plants in the home, requiring cannabis users to obtain their cannabis from a government-created organization that held a monopoly on cannabis production in the province. The Court found that the rationale behind the Quebec scheme was to enhance health by regulating where cannabis could be obtained. "Health" is not an enumerated category belonging to any one level of government but rather has a double aspect, allowing each level of government to enact laws on the matter as long as the law is not in operational conflict or acts to frustrate the purpose behind the federal law. Finding no such conflict or frustration of purpose, the top court decided the provincial law should be upheld as ***intra vires*** the power of the Quebec legislature, also relying on the property and civil rights clause under section 92(13) and laws of a local or private nature under section 92(16) of the *Constitution Act, 1867*.

intra vires
Within the jurisdictional power of.

Judicial Decisions as a Source of Criminal Law

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

common law
A body of law set out in court decisions that derives its authority from the recognition given by the courts to the role of precedent and to principles, standards, customs, and rules of conduct (generally reflecting those accepted in society) in deciding disputes; distinguished from statute law, and often called "case law."

Historically, a considerable proportion of English criminal law was developed by judges, who were required to deal with a variety of situations that were not governed by any legislation. Indeed, until relatively recently, much of the English law concerning theft and fraud was developed by judges in this way. One common law offence that is of particular relevance to present-day criminal law in Canada is **contempt of court**. However, section 9 of the *Criminal Code* abolishes common law offences in Canada with the exception of contempt of court. Yet the provision does not speak to special defences that are not covered by any legislation. Accordingly, courts are free to use the common law to develop new defences. For example, the Canadian courts have single-handedly developed the law relating to the defence of necessity (a defence that does not appear

contempt of court
Any wilful conduct on the part of the accused that tends to interfere with the proper administration of justice or to bring it into disrepute, including but not limited to the deliberate defiance or disobedience of a court order in a public manner.

in the *Criminal Code*); hence, necessity is known as a common law defence. They have also developed a common law defence of duress that has largely replaced the statutory version of this defence, defined in section 17 of the *Criminal Code* (see the discussion in Chapter 11).

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

The Impact of the Canadian Charter of Rights and Freedoms

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

> Although no doubt it is still fair to say that courts are not the appropriate forum for articulating complex and controversial programs of public policy, Canadian courts are now charged with the crucial obligation of ensuring that the legislative initiatives pursued by our Parliament and legislatures conform to the democratic values expressed in the *Canadian Charter of Rights and Freedoms*.

Canadian judges have demonstrated their willingness to use this far-reaching power where they believe that it is absolutely necessary to do so. A dramatic example of the judicial power under the Charter to strike down provisions of the *Criminal Code* is the case of *Canada (Attorney General) v. Bedford* (2013). In this case, three current or former sex workers sought a declaration that three *Criminal Code* provisions[4] relating to the sex trade were invalid in light of section 7 of the Charter, which guarantees the "right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." In declaring these *Criminal Code* provisions to be invalid, (then) McLachlin CJ stated that they put the physical security of sex trade workers at risk by denying them the opportunity to

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

employ protective measures, such as hiring security guards or implementing measures to screen clients. In her words, "the impugned laws deprive people engaged in a risky, but legal, activity of the means to protect themselves against [the] risks" of disease, violence, and death at the hands of "pimps and johns." Significantly, the Supreme Court suspended the implementation of its ruling for one year in order to grant the Parliament of Canada sufficient time to enact new legislation that would regulate the sale and purchase of sexual services in a manner that does not place the physical security of sex workers at risk. As the Chief Justice noted, striking down the impugned prostitution-related provisions of the *Criminal Code* did not mean that "Parliament is precluded from imposing limits on where and how prostitution may be conducted." Parliament responded by enacting the *Protection of Communities and Exploited Persons Act*, S.C. 2014, c. 25, which amended the *Criminal Code* so as to criminalize the *purchase*, but not the *sale*, of sexual services as a crime.[5]

Another illustration of the importance of the judicial power to strike down legislation that infringes the Charter is the decision to rule that a mandatory minimum sentence imposed by Parliament is invalid because it infringes section 12 of the Charter, which protects citizens from "cruel and unusual punishment." For example, in *Bertrand Marchand* (2023), the Supreme Court struck down paragraphs 172.1(2)(a) and (b) of the *Criminal Code*, which provided a mandatory minimum sentence of one year of imprisonment for child luring when prosecuted by indictment and a mandatory six-month minimum if prosecuted as a summary conviction offence. Justice Martin stated that the courts may consider a mandatory minimum sentence to be permissible for most offenders, but where the offence is inordinately broad, it will constitute "cruel and unusual punishment" if it is "grossly disproportionate" for "other offenders who are far less culpable or whose conduct is far less harmful."[6]

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

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

5 See revisions to s. 213 of the *Criminal Code* and new ss. 286.1-286.5.

6 See also *Hills* (2023) and *Hilbach* (2023). In the *Hills* case, the Supreme Court declared the mandatory minimum sentence applicable for discharging a firearm at a place knowing or being reckless to whether it was occupied, under paragraph 244.2(3)(b) of the *Criminal Code*, to be invalid and of no force and effect because it contravened s. 12 of the Charter. However, in *Hilbach*, the same court, on the same day, declared the mandatory minimum for the offence of robbery with a firearm to be constitutionally valid.

Decriminalization, Legalization, Supervised Injection Sites, and Section 7 of the Charter

Health Canada has granted an exemption, effective January 31, 2023 until January 31, 2026, from the provisions in the federal *Controlled Drugs and Substances Act* that make it an offence to possess certain illegal drugs. The exemption provides that adults in British Columbia are not subject to criminal charges for possessing small quantities of specific drugs. This allows for the possession of the following drugs for personal use:

- opioids (including heroin, morphine, and fentanyl),
- cocaine (in both its crack and powder forms),
- methamphetamine, and
- MDMA (ecstasy).

The Canadian Press / Darryl Dyck

Provided the person possessing any of these drugs holds 2.5 grams or less, they are not subject to arrest or charge. Anyone found in possession of these small amounts will be offered information about health and social support when they encounter the police, and their drugs will not be seized.

The exemption does not apply to those under the age of 18 and does not allow drug possession in schools or places where children can be expected to be found (such as playgrounds and wading pools).

The idea behind the decriminalization of the possession of these drugs is that it should reduce the barriers and stigma that interfere with drug users gaining access to support and services, which could be lifesaving. This approach goes a long way toward treating drug use as a public health matter rather than a criminal justice matter. In May of 2024, the BC government walked back part of its drug decriminalization experiment when the federal government agreed to fulfill a request from the BC government to again prohibit drug use in public places. Drug possession and consumption remains decriminalized in the province, provided it does not occur in public.

This change in approach follows the Canadian federal government's decision to legalize and regulate access to cannabis (marijuana), which came into effect on October 17, 2018. Under federal regulations, adults are permitted to possess up to 30 grams of legally produced cannabis. This was made possible through the enactment of the *Cannabis Act*, S.C. 2018, c. 16.

The decision to decriminalize the possession of small amounts of the drugs listed above also arises after considerable experimentation with the provision of safe injection sites in Canada since 2003 when Insite, the first legal supervised injection site, opened in the Downtown Eastside of Vancouver. The facility operates under an exemption from federal drug laws granted by Health Canada. It provides trained staff who monitor those consuming drugs; these health care professionals stand by to provide a quick response to any overdoses that occur. The provision of safe injection sites has been a subject of considerable controversy.

In *PHS Community Services Society v. Canada (Attorney General)* (2011), decided by the Supreme Court in 2011, the rights of healthcare workers to operate, and intravenous drug users to access, Insite (the above-mentioned safe injection facility in Vancouver) was challenged. In the words of (then) McLachlin CJ,

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

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

In 2008, the federal Minister of Health failed to extend Insite's exemption, and an action was brought seeking, in part, a declaration that the Minister's actions constituted a violation of the rights of the Insite staff and their clients under section 7 of the Charter. The Charter grants the courts very wide powers that are not limited to declaring certain elements of legislation invalid. In fact, there are a variety of remedies that may be granted when a Charter right has been violated. Indeed, section 24(1) of the Charter empowers courts to provide such remedy as they consider "appropriate and just in the circumstances." For example, the courts may grant a declaration that a Charter right has been infringed and order that a minister or a government department carry out a certain action. The Supreme Court ruled in the *PHS Community Services Society* case that the Minister's actions did indeed constitute a violation of the section 7 rights of the Insite staff and their clients, and the Court ordered the Minister to issue an exemption under section 56 of the *Controlled Drugs and Substances Act*. In summarizing the conclusions of the Court, McLachlin CJ stated that, if the Minister's decision not to extend the exemption had been upheld, drug users would have been prevented from accessing the health services provided by Insite, and the absence of these services would have threatened the health and even the lives of Insite's vulnerable clients. In these circumstances, the section 7 Charter interests of the Insite clients were engaged, and their rights were undoubtedly infringed. In these circumstances, it was the view of the Supreme Court that the Minister's decision was

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

The year 2015 saw the election of a new federal government that was more sympathetic to the need to support the creation of "supervised consumption sites." Furthermore, by 2016, there had been a rapid increase in the number of fatal opioid overdoses in Canada. For example, in that year, there were 726 such deaths just in the province of Ontario. The ready availability of street drugs contaminated by synthetic opioids, such as fentanyl and carfentanil, has created an opioid crisis in Canada. The BC Coroner reported that in 2023, there were 2,511 overdose deaths in British Columbia, the

Continued on next page.

province most severely affected. Against the background of this crisis, supervised consumption sites have now been established in five provinces as a means of preventing deaths from opioid overdoses, particularly those involving contaminated street drugs. The decision of the Supreme Court in *PHS Community Services Society* vividly demonstrates the broad powers conferred on the courts by the Charter and the use that can be made of those powers to safeguard the lives and health of Canadians.

Questions to Consider

1. Do you think that the majority of Canadians favour the view taken by the Minster of Health and the government of Canada in 2008, or the view that harm-reduction strategies with respect to illegal drug use constitute an essential element in protecting public health and safety?
2. Should judges be in a position to override the policy choices of an elected government? What role should scientific evidence play in judicial decision-making with respect to the Charter? What should judges do when the scientific evidence is conflicting?
3. British Columbia has been experimenting with providing people at high risk for overdose with alternative "safer supply" pharmaceuticals, such as morphine and hydromorphone, to help users avoid consuming more dangerous street drugs. Do you think this is a viable approach to dealing with the overdose crisis?*

*Beyrer, C. (2011). Safe Injection Facilities Save Lives. *The Lancet*, 377(9775), 1385–86.

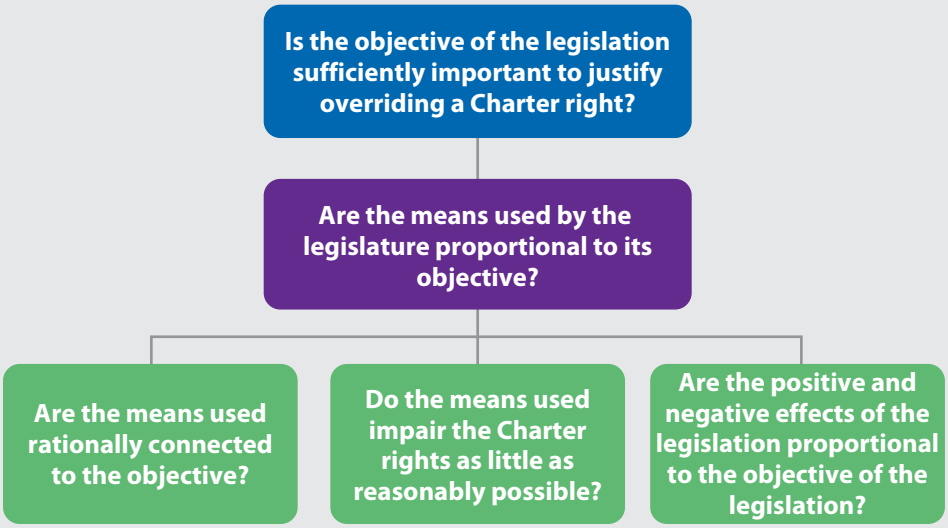
As McLachlin CJ said in delivering the judgment of the Supreme Court in *Canada (Attorney General) v. JTI-Macdonald Corp.* (2007), "Most modern constitutions recognize that rights are not absolute and can be limited if this is necessary to achieve an important objective and if the limit is appropriately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

Section 1, in effect, requires the courts to engage in an elaborate balancing act in which they must decide whether the infringement of an individual's rights can be justified in the name of some "higher good." In the *Oakes* case (1986), the Supreme Court devised a specific test for the purpose of identifying the factors that should be considered when the courts attempt to decide whether the violation of a Charter right is justifiable as a "reasonable limit" in a "free and democratic society." This test has since become known as the ***Oakes* test**. See Figure 1.3.

***Oakes* test**
The test, developed by the Supreme Court of Canada in the *Oakes* case, to establish whether a limit placed on a Charter right or freedom can be justified under section 1 of the Charter; the measure limiting the right or freedom must be sufficiently important, and the means chosen must be reasonable and demonstrably justified.

In delivering the judgment of the majority of the justices of the Supreme Court in the *Oakes* case, Dickson CJ prefaced his remarks concerning section 1 of the Charter by emphasizing that the burden of establishing that an infringement of a Charter right is justified as a reasonable limit is on the "party seeking to uphold the limitation." In a criminal case, this will nearly always be the Crown. In other words, there will have to be very strong grounds for overriding individual rights guaranteed by the Charter. However, the Chief Justice recognized that rights and freedoms guaranteed by the Charter "are not absolute" and that "it may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance."

FIGURE 1.3 The Oakes Test



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

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

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

burden of proof
The responsibility for proving a fact, proposition, guilt, or innocence can rest with either party in a civil or criminal matter, according to the applicable rules of procedure.

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

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

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

place! As the Chief Justice remarked, "The presumption required under s. 8 of the *Narcotic Control Act* is overinclusive and could lead to results in certain cases which would defy both rationality and fairness."

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

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

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

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

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

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

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

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

CRIMINAL LAW IN PRACTICE

Constitutionality of Criminalizing the Conduct Associated with Being Involved in the Sex Trade

In 2013, the Supreme Court in *Canada (Attorney General) v. Bedford* unanimously struck down three provisions in the *Criminal Code* as unconstitutional. The provisions in question were:

1. Section 210, which prevented sex workers from working in a "bawdy house" (a set indoor location), resulting in them having to carry out their trade on the street or in outcalls (usually a hotel room rented by their customer).
2. Section 212(1)(j), which criminalized "living on the avails of prostitution," making it illegal to hire security or drivers to reduce the risk inherent in the sex trade. This was generally known as the "pimping" provision.

3. Section 213(1)(c), which prohibited communicating in public for the purpose of prostitution—a process that was often used by sex workers to negotiate the terms of their activities with their clients.

By striking down these provisions, the Court believed it would eliminate some of the risk associated with working in the sex trade. The government's claim was that the provisions were in place to reduce the nuisance brought about by the sex trade, but the Court felt that the laws were a grossly disproportionate response to that objective.

By 2014, the federal government had responded to this case by enacting the *Protection of Communities and Exploited Persons Act* (Bill C-36). This law amended the *Criminal Code* in a variety of ways, bringing in new offences pertaining to sex work:

1. Purchasing Offence—Section 286.1 created an offence of obtaining sexual services for consideration or communicating for that purpose. Sex trade workers who sold their own sexual services were protected from criminal liability by a new section (286.5(2)).
2. Advertising Offence—Section 286.4 makes it an offence to advertise an offer to provide sexual services for consideration; however, advertising one's own sexual services is not considered an offence (s. 286.5(1)(b) and s. 286.5(2)).
3. Material Benefit Offence—Section 286.2 makes it an offence to receive a financial or other material benefit from the commission of the purchasing offence. Sex workers themselves are exempted from criminal culpability if the only benefit they receive arises from the sale of their own sexual services (s. 286.5(1)(a) and s. 286.5(2)).
4. Procuring Offence—Section 286.3 prohibits procuring a person to offer or provide sexual services for consideration.
5. Communicating Offence—Section 213(1.1) criminalizes communicating for the purpose of providing sexual services close to school grounds, playgrounds, and daycare centres.
6. Several additional offences were added to the *Criminal Code* pertaining to sex trafficking.

The effect of many of the changes has been to criminalize the acts of potential customers in the sex trade (so-called "Johns") and decriminalize the actions of the sex trade workers.

A number of those involved in the sex trade argued that these amendments did nothing to improve the safety of sex trade workers. By eliminating the ability to advertise services online or in newspapers (advertisers, but not the sex workers themselves, could be prosecuted), sex trade workers may find they have to take to the streets to solicit clients. It also increases the likelihood of miscommunication with clients regarding their prices and safer sex requirements, which could lead to an increased risk of misunderstandings, resulting in aggression and violence. The law has been criticized for making it an offence to purchase sexual services. These provisions, it is argued, results in street-based sex workers being displaced to remote, often unsafe areas where customers can minimize the likelihood of being detected by the police. It has been argued that limitations on advertising and communication make it more difficult for sex workers to screen clients and negotiate transactions, including communicating the need for clients to use a condom. The law prohibits sex workers from working together, which would aid the screening process, and it still prohibits the use of paid third parties to aid in ensuring safety during a sexual interaction.

Continued on next page.

Advocates of the new law claim the provisions make the sex trade safer. They argue that it helps to reduce the exploitative aspects of the sex trade and promotes the ultimate goal of reducing or eliminating the sex trade altogether.

In *R. v. N.S.* (2022), the Ontario Court of Appeal overturned a trial decision that had struck down various provisions in the new law. The provisions pertaining to "material benefit," "procuring," and "advertising" had all been ruled unconstitutional in the lower court. The Court found that the three provisions in question took the initial ruling in *Bedford* into account and the result was provisions that did not run afoul of either section 7 of the Charter (right to life, liberty, and security of the person) or section 2(b) of the Charter (freedom of expression).

More recently, the Ontario Superior Court in *Canadian Alliance for Sex Work Law Reform v. Attorney General* (2023) undertook a review of a larger collection of provisions brought into play by Bill C-36, including a "stopping traffic" offence (connected to the communicating in public offence), the "communication offence" itself, the "purchasing offence," the "procuring offence," and the "advertising offence." The Court in this case dismissed all of the claims by the Canadian Alliance for Sex Work Law Reform and upheld the constitutional validity of all of the contested provisions.

Discussion Questions

1. Read the *Canadian Alliance for Sex Work Law Reform* case and indicate whether the Court makes a compelling argument to uphold the new Bill C-36 provisions.
2. Do you think society's goal should be the elimination of the sex trade altogether, or is this an unacceptable policy approach? Why or why not?
3. Would decriminalization be a better approach than the so-called Nordic approach (which Bill C-36 emulates due to its similarities with the Swedish, Norwegian, and Icelandic approaches, all of which criminalize the clients, not the sex trade workers)?
4. Some sex trade workers now advertise their services on websites hosted outside of Canada so the website owner can escape criminal liability. Do you think sex trade workers will always find a way around the law so as to continue to engage in their profession?

Before leaving this discussion of the impact of the Charter on the fabric of criminal law in Canada, it should be emphasized that there may well be a tendency to exaggerate the extent to which the courts may use their Charter powers to override the will of democratically elected legislators. Indeed, it is highly significant that the Supreme Court stated in the *Mills* case (1999) that, in the context of the application of the Charter, it is more useful to view the relationship between Parliament and the courts as being one of *constructive dialogue*. For example, McLachlin and Iacobucci JJ emphasized the view that the courts must always presume that Parliament intends to enact legislation that meets the requirements of the Charter and, therefore, must do all they can to give effect to that intention. What the Supreme Court appears to be suggesting is that the invalidation of legislation enacted by democratically elected representatives is a step that should be undertaken only very reluctantly on the part of the courts. Furthermore, even when legislation is struck down as being of no force or effect, it is always possible for Parliament or the provincial or territorial legislature to enact new statutory provisions that respond to the Charter concerns expressed by the courts. The *Mills* case suggests that, ultimately, these new provisions will be upheld if the legislators have

"listened" to what has been said by the judges in their ongoing dialogue with Parliament and the provincial/territorial legislatures. In essence, according to the Supreme Court in the *Mills* case, the appropriate role of the courts is to assist legislators in implementing the will of the people in a manner that is consistent with the Canadian values expressed in the Charter. In this view, legislators and courts are working in a partnership, and it would be wrong to suggest that the Charter is being used to frustrate decisions made in a democratic manner.

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

counsel
The lawyer representing a party in a trial; in criminal cases, Crown counsel represents the King (that is to say, they are the prosecuting lawyer), whereas defence counsel represents the accused.

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

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

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

It is clear that the Supreme Court is far from being overzealous in its application of the Charter to legislation enacted by the Parliament of Canada under the authority of its criminal law power. The fear expressed by some politicians and commentators that the democratic will of Canadians may be thwarted by unelected judges using the Charter to strike down criminal legislation is not based on a sound analysis of the manner in which the Supreme Court has actually interpreted and applied the Charter. Although the Court has indeed declared certain legislation to be invalid, it has generally expressed its reluctance to do so. Following the *Mills* case, it would appear that the Supreme Court will view its role as being that of assisting Parliament and the various provincial and territorial legislatures to implement the will of Canadians in legislation that is consistent with the basic principles expressed in the Charter.

Finally, it is important to recognize that declaring a statutory provision invalid in light of the Charter is considered a measure of last resort. For example, a court may decide that the provision may be found valid if one or more offending phrases are *severed*, or removed, from it. Furthermore, a court may rule that the constitutional validity of a statutory provision may be affirmed by *reading in* (adding) words that would safeguard the individual's Charter rights or by giving it a very narrow interpretation so that it does not violate the Charter (*reading down*). See Figure 1.4.

However, the courts cannot "read in" or "read down" words in a statutory provision if to do so would clearly contravene the intention of the Parliament of Canada or of the relevant provincial or territorial legislature.

FIGURE 1.4 Methods of Avoiding Declaring a Statutory Provision Invalid Under the Charter

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

KEY TERMS

accused, 2
burden of proof, 22
by-law, 10
common law, 15
contempt of court, 15
counsel, 27
crime, 1
criminal law, 1
criminal procedure, 9
federal criminal law power, 1
hybrid (or dual) offence, 3
indictable offence, 2
intra vires, 15
Oakes test, 20
quasi-criminal law, 5
regulatory offence, 3
sources of criminal law, 6
substantive criminal law, 8
summary conviction offence, 2
true crimes, 3

STUDY QUESTIONS

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