Criminal Law in Canada

CASES, QUESTIONS, AND THE CODE

Seventh Edition

Simon N. Verdun-Jones

Criminal Law in Canada

CASES, QUESTIONS, AND THE CODE

Seventh Edition

Criminal Law in Canada

CASES, QUESTIONS, AND THE CODE

Seventh Edition

Simon N. Verdun-Jones
School of Criminology
Simon Fraser University

NELSON

NELSON

Criminal Law in Canada: Cases, Questions, and the Code, Seventh Edition

by Simon N. Verdun-Jones

VP, Product Solutions, K–20:
Claudine O'Donnell

Director, Qualitative Publishing:
Jackie Wood

Publisher:
Leanna MacLean

Marketing Manager:
Sydney Pope

Content Manager:
Helena Ng

Photo and Permissions Researcher:
Natalie Barrington

Production Project Manager:
Shannon Martin

Production Service:
SPi Global

Copy Editor:
Karen Rolfe

Proofreader:
SPi Global

Indexer:
SPi Global

Design Director:
Ken Phipps

Post-secondary Design PM:
Pamela Johnston

Interior Design:
Diane Robertson

Cover Design:
Colleen Nicholson

Cover Image:
LdF/Getty Images

Compositor:
SPi Global

Printed and bound in the United States of America
1 2 3 4 22 21 20 19

For more information contact
Nelson Education Ltd.,
1120 Birchmount Road,
Toronto, Ontario, M1K 5G4.
Or you can visit our Internet site at nelson.com

Library and Archives Canada Cataloguing in Publication

Title: Criminal law in Canada : cases, questions, and the code / Simon Verdun-Jones (School of Criminology, Simon Fraser University).

Names: Verdun-Jones, Simon N. (Simon Nicholas), author.

Description: Seventh edition. | Previously published: Toronto, Ontario: Nelson Education, 2015.

Identifiers: Canadiana 20190149094 | ISBN 9780176724412 (softcover)

Subjects: LCSH: Canada. Criminal Code. | LCSH: Criminal law—Canada—Textbooks. | LCSH: Criminal law—Canada—Cases. | LCGFT: Textbooks.

Classification: LCC KE8809 .V47 2019 | LCC KF9220.ZA2 V47 2014 kfmod | DDC 345.71—dc23

ISBN-13: 978-0-17-672441-2
ISBN-10: 0-17-672441-9

This book is dedicated to Dr. Ardashes Avanessian,
without whom it would not have been possible.

"Honour a physician with the honour due unto him for the uses
which ye may have of him: for the Lord hath created him."

Ecclesiasticus, Ch. 38, verse 1

BRIEF CONTENTS

CONTENTS

PREFACE FOR STUDENTS

For many people, the prospect of studying a legal textbook may be somewhat daunting. Practitioners of the law tend to employ a dense and opaque form of technical language that is alien to those who have not been the beneficiaries of a law school education and on-the-job training in law offices and the courts. However, *Criminal Law in Canada: Cases, Questions, and the Code* is designed to be user-friendly to readers who require a broad and reasonably detailed understanding of the criminal law but do not intend to join the legal profession in the near future.

To make the study of criminal law as user-friendly as possible, this textbook makes considerable use of the *case method* of studying law. In other words, it seeks to discuss the general principles underlying Canadian criminal law in the context of specific cases decided by the courts. Each chapter contains not only a statement of the relevant principles of law but also a discussion of the facts of decided cases and significant extracts from the judgments of the courts. This case-oriented approach is intended to equip the reader to apply the general principles of Canadian criminal law to the kinds of concrete factual situations they may encounter in everyday life or read/hear about in the media or online. The quotations from the judgments delivered in decided cases should provide some degree of insight into the legal method of analysis judges use to deal with the harmful or potentially harmful events that occur in real life and represent an infringement of Canadians' fundamental values.

Provided the reader progresses step by step through the book, there should be no difficulty in understanding the basic concepts that underlie Canadian criminal law. It is hoped that each chapter of the book will gradually increase the reader's knowledge of the basic principles of Canadian criminal law so that, by the end of the book, all the "pieces of the puzzle" will fit neatly together in the reader's mind. Provided the reader is patient and thorough, the study of criminal law should prove to be a rewarding challenge that need arouse none of the fears so frequently associated with it.

Associated with the case method is the inclusion in the textbook of a series of problems, or "Study Questions," that appear at the end of each chapter. Most of these problems are based on relatively uncomplicated fact patterns and are designed to prompt the reader to devise legal solutions by applying the legal principles discussed in the preceding chapter. These problems may well serve as the basis for classroom debate or for discussion within less formal student study groups. By working through the study questions in each chapter, the reader should not only acquire a more comprehensive understanding of criminal law but also find it easier to remember the information learned. When the problems are discussed in the classroom or in groups, the experience should also prove to be enjoyable and stimulating.

Over and above the use of the case method, some noteworthy features of this textbook should advance the objective of making the learning experience both agreeable and informative. There are 48 diagrams (figures) designed to assist the reader's comprehension of legal principles and rules and assist in the preparation for examinations, quizzes, and tests. Furthermore, in each chapter, there is a box intended to provide an in-depth focus on a specific case or issue raised in the chapter. It is suggested that readers undertake online research that will expand their knowledge of the cases and/or issues discussed in the 12 boxes: this research will assist in stimulating classroom and small-group discussions. Finally, each chapter contains eye-catching illustrations drawn by Greg Holoboff. These illustrations, coupled with their respective captions, provide a valuable and memorable insight into the most important legal principles discussed in the textbook.

An extensive glossary will also facilitate the reader's understanding of the most important of the technical terms used in the textbook. It is always a good idea to consult the glossary if the reader is seeking a brief definition or explanation of what might, on first acquaintance, appear to be a complex and indecipherable concept. Furthermore, the appendix provides a very brief overview of the system of criminal courts in Canada. The information in the appendix may help the reader comprehend the various steps that a case may take from trial through to a final appeal.

Finally, readers are strongly urged to supplement their study of this book with an in-depth exploration of some of the leading criminal cases that have been decided by Canadian courts. A closer study of some of the critical cases that have helped shape the contemporary body of Canadian criminal law will certainly add new—and valuable—dimensions to the task of understanding the vital issues that confront Canadian courts on an ongoing basis. A very good resource is the website of the Canadian Legal Information Institute (www.canlii.org/en). This website provides easy access to decisions of the Supreme Court of Canada and, in particular, the *Supreme Court Reports*, which include lengthy headnotes summarizing the decisions in a manner that enables readers to quickly grasp the important legal issues raised therein. The website also enables readers to review the complete judgments of nearly all of the cases discussed in this textbook, whether the decisions were made in appellate courts (other than the Supreme Court of Canada) or in trial courts.

PREFACE FOR INSTRUCTORS

The seven editions of this book have all been informed by the author's lengthy experience with the challenging task of teaching criminal law to students who, for the most part, do not intend to enter the legal profession. This book was designed to meet the very specific needs of these particular students. Law school textbooks are not appropriate because the depth of their coverage goes far beyond the needs of such students, who would also tend to perceive them as somewhat "dry." Paradoxically, other criminal law textbooks in Canada, although they were specifically written for non-lawyers, are far too general in their approach and do not provide sufficiently detailed information about the law for these students. Indeed, many of these students will be required to acquire a broad and reasonably sophisticated understanding of criminal law in order to carry out their future duties in various professions related to the criminal justice system (probation, police, and parole officers, court workers, forensic mental-health professionals, etc.) and related systems (such as social work and mental health). The prime objective of the first edition of *Criminal Law in Canada: Cases, Questions, and the Code* was to meet the requirements of these students, and this objective has remained constant right up to the current, seventh, edition.

One of the most effective methods of teaching criminal law to criminology, criminal justice, or law and security students is the *case-oriented approach*, in which students are encouraged to study not only the general principles of criminal law but also the specific details of decided cases. By combining the study of general principles with a close analysis of specific cases, students learn to apply these principles of criminal law to concrete, factual situations that arise in everyday life or to situations that they may encounter in their professional lives. This book unequivocally adopts the case-oriented approach to the study of criminal law. Individual decided cases are discussed in considerable detail and there are significant extracts from the opinions of judges. It is hoped that this approach will more adequately meet the needs of students who seek to acquire a working knowledge of Canadian criminal law and, at the same time, render the study of law somewhat more palatable. Indeed, reading real-life "stories" should be an inherently appealing task for those students who are seeking employment in the criminal justice system or in closely related areas, such as mental health and social work.

As part of the case-oriented approach, a number of study questions have been included at the end of each chapter. These are specifically designed to encourage students to test the extent to which they have absorbed the major principles of law covered in each substantive chapter. However, it is important to recognize that the questions are not intended to be particularly complex or difficult; if they were, they would not serve the function of permitting the average student to test their understanding of the major principles covered in the chapter. In the author's experience, answering the study questions is a necessary first step in the student's assimilation of the principles of criminal law and should be followed by more complex problem-solving exercises that draw together a number of different topics and encourage the student to see the criminal law as a whole rather than as a series of separate compartments. It usually takes a few weeks before students are ready to tackle these more complex exercises; instructors might wish to delay their use until students have completed at least the first three chapters of the book.

NEW TO THIS EDITION

The seventh edition retains the basic structure of the sixth edition. The seventh edition brings the criminal law up to date, including more than 60 new cases decided since the writing of the sixth edition and covers important legislative changes made to the *Criminal Code* since the previous edition.

In addition, each chapter was modified to update a box that focuses on the issues raised by a particular case or a specific topic that will stimulate student discussion. It is suggested that student discussion of the cases and/or topics will be enhanced by encouraging them to search for contemporary Internet coverage of the cases discussed in the 12 boxes. This process will also enable them to develop their research skills and enrich classroom or small-group discussions. In addition, 12 new illustrations, specifically produced for this book by Greg Holoboff, were added to provide strong visual images that underscore critical legal principles discussed in the text.

The most dramatic changes to the *Criminal Code* include the enactment of provisions that permit "medical assistance in dying" (MAID): Bill C-14, as assented to on June 17, 2016. These are discussed in Chapter 3. The legislation represented the response of the Parliament of Canada to the decision of the Supreme Court of Canada in *Carter v Canada (Attorney General)* (2015). The amendments to the *Criminal Code* permit medical practitioners and nurse practitioners, in certain closely defined circumstances, to both assist suicide and carry out active euthanasia with respect to suffering patients whose "natural death has become reasonably foreseeable." The Box in Chapter 3 explores the legislation in some depth and raises potential questions about its constitutionality in light of the Supreme Court's judgment in *Carter*. The Box should provide the basis for some spirited student discussion.

An important series of legislative changes to the *Criminal Code* were enacted by *An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts*, S.C. 2018, c. 21. The Act made significant changes to the law relating to impaired driving and being in care or control while impaired as well as to the various offences associated with dangerous and impaired driving. In addition, the legislation made some noteworthy reforms to the *Criminal Code* provisions relating to the law of consent in the context of charges of sexual assault as well as removing some reverse-onus clauses from a number of *Criminal Code* sections. The relevant provisions of this very recent legislation have been incorporated into the seventh edition.

Another critically important amendment to the *Criminal Code*, which is highlighted in the seventh edition, is the amendment to Section 232 (S.C. 2015, c. 29, s. 7). This amendment sharply limits the availability of the defence of provocation as a defence to a charge of murder. In order to qualify for the defence, the accused must now show that the conduct of the victim would constitute "an indictable offence" that "is punishable by five or more years of imprisonment." The significance of this change is discussed in Chapter 10. The question of whether the defence should be abolished because of its frequent association with domestic violence should engage students in some basic questions about legal and social policy.

Among the important recent decisions by the Supreme Court of Canada that are discussed in this edition are:

- *Canada (Attorney General) v. Bedford* (2013), which provides an example of the importance of the Canadian *Charter of Rights and Freedoms* and the power of the courts to strike down legislation that infringes *Charter* rights and is not justifiable under Section 1 of the *Charter*.
- *R. v. Borowiec* (2016), in which the Supreme Court provided a detailed analysis of what it called "a particularly dark corner of the criminal law, the law of infanticide."
- *R. v. Buzizi* (2013), *R. v. Cairney* (2013), and *R. v. Pappas* (2013), which examined critical aspects of the defence of provocation.
- *Carter v. Canada* (Attorney General) (2015), which struck down the ban on physician-assisted suicide and led to the enactment of the medical assistance in dying legislation described above.
- *R. v. D.L.W.* (2016), in which the Supreme Court reasserted the principle that "Parliament is presumed to intend that true crimes have a subjective fault component."
- *R. v. Flaviano* (2014), in which the Supreme Court affirmed an important decision by the Alberta Court of Appeal, concerning the application of section 273.2(b) of the *Criminal Code*, which requires the accused person who claims mistaken belief in consent as a defence to a charge of sexual assault to "take reasonable steps" to ascertain that the complainant was consenting.
- *R. v. George* (2017), in which the Supreme Court analyzed the application of section 150.1(4) of the *Criminal Code*, which requires an accused person who claims an honest mistake as to the age of the

complainant with respect to a charge of sexual interference or sexual assault, to show that they took "all reasonable steps to ascertain the age of the complainant."

- *R. v. Hutchinson* (2014), an extremely important case in which the Supreme Court articulated the nature of the "voluntary agreement of the complainant to engage in the sexual activity in question" [s. 273.1(1)] and the circumstances in which fraud may vitiate such consent under s. 265(3)(c).
- *La Souveraine, Compagnie d'assurance générale v. Autorité des marchés financiers* (2013), a case in which the Supreme Court reviewed the nature of the defence of due diligence with respect to a charge of a provincial regulatory offence.
- *R. v. Lloyd* (2016), which provides an example of the Supreme Court using the *Charter* to strike down a mandatory minimum sentence [section 5(3)(a)(i)(D) of the Act, S.C. 1996, c. 19].
- *R. v. Riesberry* (2015), in which the Supreme Court reviewed the nature of fraud under section 380 of the *Criminal Code*.
- *R. v. Simpson* (2015), a case in which the Supreme Court defined the nature of the "colour of right" defence.
- *Wilson v. British Columbia (Superintendent of Motor Vehicles)* (2015), in which the Supreme Court examined the nature of regulatory offences in contrast to true crimes.

The seventh edition also includes important appellate and trial cases decided in other courts between 2013 and 2019.

The seventh edition contains an extensive glossary, which students should be encouraged to consult because it frequently provides answers to the most basic questions that they may have following their first acquaintance with new—and sometimes challenging—material. It is strongly recommended that students also read some of the most significant cases discussed in this book. Ideally, they should read at least one or two cases in their original form (perhaps through the Canadian Legal Information Institute's website, **canlii.org**, which is easily accessible online and includes the *Supreme Court Reports*, which include headnotes that greatly facilitate beginning students' appreciation of the important and relevant legal issues raised in decisions of the Supreme Court).

ABOUT THE NELSON EDUCATION TEACHING ADVANTAGE (NETA)

neta
engagement | assessment | success
NELSON EDUCATION TEACHING ADVANTAGE

The **Nelson Education Teaching Advantage (NETA)** program delivers research-based instructor resources that promote student engagement and higher-order thinking to enable the success of Canadian students and educators. To ensure the high quality of these materials, all Nelson ancillaries have been professionally copy edited.

Be sure to visit Nelson education's **Inspired Instruction** website at **http://www.nelson.com/inspired** to find out more about NETA. Don't miss the testimonials of instructors who have used NETA supplements and seen student engagement increase!

Assessing Your Students: NETA Assessment relates to testing materials. **NETA Test Bank** authors create multiple-choice questions that reflect research-based best practices for constructing effective questions and testing—not just recall but also higher-order thinking.

INSTRUCTOR RESOURCES

All instructor ancillaries for this title are provided on the Instructor Companion Site at **http://www.nelson.com/site/crimlawincanada7e**, giving instructors the ultimate tool for customizing lectures and presentations.

Combined NETA Instructor's Manual and Test Bank: This resource was written by Tamara O'Doherty, Simon Fraser University. It is organized according to the textbook chapters and addresses key educational concerns, such as typical stumbling blocks students face and how to address them. Other features include key ideas or concepts that students should grasp; common misconceptions or difficult topics to help instructors address them through lectures, out-of-class work, or in-class activities; instruction on how to engage students; and activities to connect and bridge concepts, reveal misconceptions, and further understanding of key concepts.

ACKNOWLEDGMENTS

The various editions of this textbook have been wonderfully informed by the numerous generations of excellent students with whom I have had the privilege of exploring criminal law over more than 40 years. Their enthusiasm and creative support have encouraged me to continue writing for them, and their constructive criticism has greatly assisted me in the preparation of the seven editions of this textbook.

In addition, I owe a profound debt to my colleagues, both graduate students and faculty members, at the School of Criminology at Simon Fraser University who have contributed directly and indirectly to many aspects of the seventh edition. In particular, I would like to recognize Neil Boyd, Danielle Brown, Tiana Gaudette, Soraya Janus, David MacAlister, Tamara O'Doherty, and Marsha-Ann Scott.

I would like to move a very special vote of thanks to Greg Holoboff who created the superb original illustrations for this textbook. Greg consistently managed to produce visual images that perfectly demonstrated the application of legal principles that I asked him to illustrate. He has certainly proved that a picture can very well be worth a thousand words.

Finally, but by no means least in terms of importance, there are a number of individuals who played an important role in the production of this textbook. I have greatly enjoyed my lengthy association with Nelson Education. Special recognition is owing to Helena Ng, Content Developer with Nelson, who provided support in the development of the manuscript and Shannon Martin, Production Project Manager, also with Nelson. I was particularly fortunate to be able to work with an exceptionally skillful and diligent copy editor, Karen Rolfe. In addition, thanks are due to Natalie Barrington, Photo and Permissions Researcher, and Daniela Glass, Senior Rights Project Manager at Nelson. Finally, I should single out Udhaya Harisudan and Magesh Rajagopalan, Project Managers, SPi Global.

The seventh edition would never have been completed without the amazing medical treatment and support provided to me by the specialists, physicians, and nurses at the Lion's Gate Hospital, North Vancouver, and the British Columbia Cancer Agency in Vancouver. Their dedication and expertise are truly exceptional.

Lastly, but of very great importance, is the unflinching support provided by my wife, Valerie, who had to act as caregiver to a sick author of a book that was completely outside her own area of expertise. I have no doubt that this author was not an easy patient to deal with, given the very lengthy process that moves from writing to ultimate publication in many stages over an extended period.

CHAPTER

1

INTRODUCTION TO CANADIAN CRIMINAL LAW

Learning Objectives

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

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

WHAT IS CRIMINAL LAW?

The Definition of Crime in Canada

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

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

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

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

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

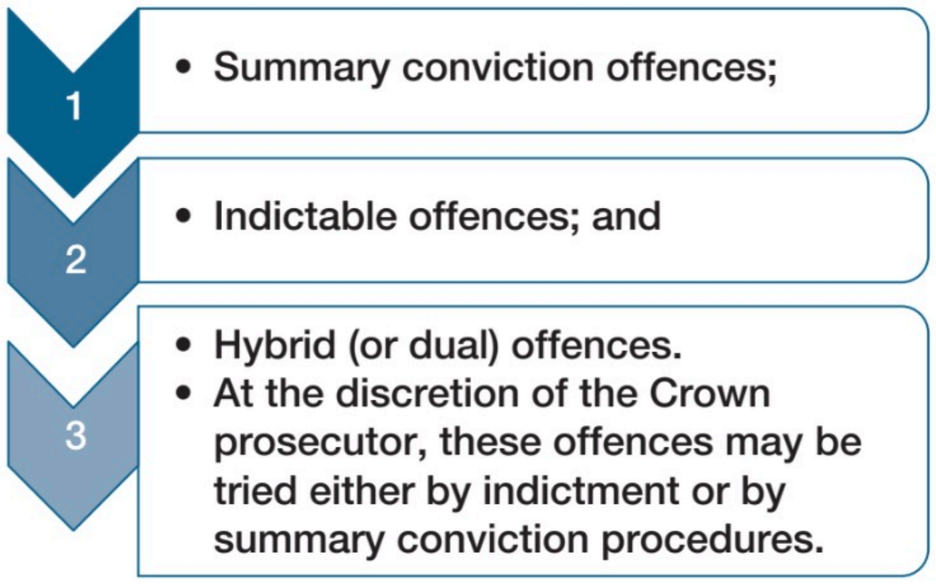

Figure 1-1

The Three Categories of Crimes in Canada

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

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

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

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

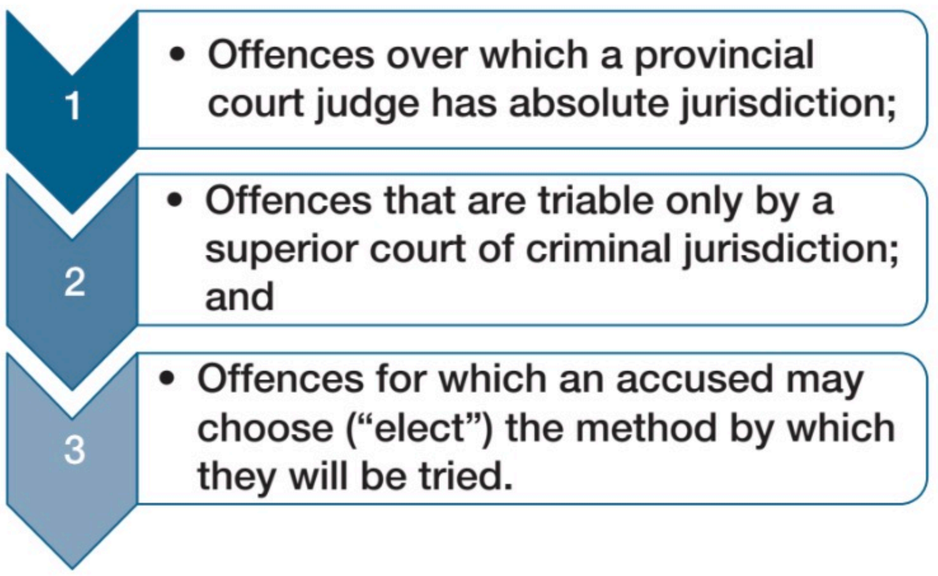

Figure 1-2

The Three Categories of Indictable Offences

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

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

True Crimes and Regulatory Offences

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CRIMINAL LAW AS A FORM OF PUBLIC LAW

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

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

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

THE SOURCES OF CRIMINAL LAW IN CANADA

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

Federal Legislation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Quasi-Criminal Law: Regulatory Offences and the Constitution

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

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

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

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

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

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

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

Problems of Jurisdiction in the Enactment of Legislation

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

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

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

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

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

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

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

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

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

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

Illustrations by Greg Holoboff

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

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

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

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

Judicial Decisions as a Source of Criminal Law

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

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