

Exhibit 2

**In the District Court
For the District of South Dakota**

JOHN GRAHAM,)	
Petitioner)	
)	
v.)	Civ. No. _____
)	
DOUG WEBER, acting in his capacity as the)	
warden of the South Dakota State Penitentiary,)	
Respondent.)	

**Declaration of Howard Rubin Esq.
in Support of Petitioner John Graham**

I, Howard Rubin Q.C. hereby declare, under penalty of perjury under the laws of the United States of America, as follows:

1. I have practiced law in Canada since August 1967. On December 15, 2006 I was appointed a Queen’s Council, by the Attorney General of British Columbia, Order in Counsel 930, in recognition of my work in the area of criminal law. I have appeared in the Supreme Court of Canada in over 25 cases beginning in 1970 and my last appearance being a criminal law appeal in February 2012. I have represented accused persons in the Courts of Appeal in British Columbia, Alberta, and Manitoba and in trial criminal defense in British Columbia, Alberta, Saskatchewan, and Manitoba. I was a prosecutor in the Federal Department of Justice in British Columbia representing the crown in criminal law trials, appeals and extradition in the 1970’s re-entering private practice in 1978. I have presented in CLE Criminal Law matters for the Trial Lawyers of British Columbia and for the Law Society of British Columbia CLE program in Criminal Law. I have been appointed by the Trial Lawyers of British Columbia as an intervener on their behalf in criminal trial applications both in the Supreme Court of Canada and in the trial courts in the Province of British Columbia.

2. I make this Declaration on the basis of my personal knowledge, in support of John Graham’s Petition for Habeas Corpus in the state and federal courts of South Dakota.

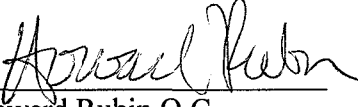
3. The Supreme Court of Canada has struck down our felony murder offenses on the basis that they violate the constitutional rights of Canadians under our Charter of Rights. The first such case is *R. v. Vaillancourt*, [1987] 2 S.C.R. 636. It was held that as a result of our Charter of Rights a minimum mental state is an essential element of an offense, and as a result s. 213(d) of the Criminal Code of Canada, a felony murder offense, was *prima facie* in violation of ss.7 and 11(d) of the Charter of Rights. This first pronouncement of the Supreme Court of Canada was limited to the point that the Criminal Code of Canada did not even guarantee *mens rea* or mental state of the lesser of two recognized standards, objective foreseeability of death.
4. Subsequently the Supreme Court of Canada was called upon to consider the residual issue left undecided by its ruling in *R. v. Vaillancourt*, in *R. v. Martineau*, [1990] 2 S.C.R.633. The majority of the Supreme Court of Canada held that for a murder conviction it was a constitutional requirement that the crown prove beyond a reasonable doubt subjective knowledge of the likelihood that death would ensue, and that for constitutional reasons it was not sufficient to employ a *mens rea* or mental state of the lesser of two recognized standards, objective foreseeability of death. Then Justice L'Heureux-Dubé dissented and would have permitted the lower standard of objective foresight of death, but this was in dissent and the current state of the law in Canada has ever since been that the Criminal Code of Canada must provide for proof of a subjective knowledge that the associates of the accused in a kidnapping or any other similar felony murder offence must lay down a requirement for murder of subjective knowledge and it is impermissible for there to be a felony murder kidnapping law in Canada.
5. One of our leading academics, Kent Roach, of the Faculty of Law and Center of Criminology, University of Toronto has described the result of *Vaillancourt* and *Martineau* being that “[i]n the result section 230 [our felony murder offense] has been rendered a dead letter that is no longer used...” p.350 of the Roach text *Criminal Law*, fourth edition 2009, Irwin Law. The felony murder provision has not been formally removed from the text of the Criminal Code of Canada, but as a result of the rulings of the Supreme Court of Canada in *Vaillancourt* and *Martineau* there is no offense of felony

murder in Canada, and Professor Roach is correct to describe felony murder as a “dead letter” in Canada. The felony murder offense is no longer an offense known to law in Canada and for that reason anyone accused of felony murder in another jurisdiction could not be extradited on that offense.

6. Attached to this declaration is a true and correct copy of the decisions of the Supreme Court of Canada in *R. v. Vaillancourt*, [1987] 2 S.C.R. 636 and *R. v. Martineau*, [1990] 2 S.C.R.633 *Martineau* being the most recent and leading cases on the concept of “felony murder” in Canada. Also attached to this declaration is a true and correct excerpted copy of Kent Roach’s fourth edition text Criminal Law.

Pursuant to 28 U.S.C. § 1746, I declare that the foregoing is true and correct.

Executed on May 31, 2013.


Howard Rubin Q.C.

ATTACHMENT A

R. v. Vaillancourt, [1987] 2 SCR 636



R. v. Vaillancourt, [1987] 2 SCR 636

Date: 1987-12-03
 Docket: 18963
 Parallel citations: 1987 CanLII 2 (SCC); 68 Nfld & PEIR 281; 47 DLR (4th) 399; 39 CCC (3d) 118; 60 CR (3e) 289; 32 CRR 18
 URL: <http://canlii.ca/t/1fthw>
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R. v. Vaillancourt, [1987] 2 S.C.R. 636

Yvan Vaillancourt *Appellant*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General for Ontario *Intervener*

INDEXED AS: R. v. VAILLANCOURT

File No.: 18963.

1986: December 10; 1987: December 3.

Present: Dickson C.J. and Beetz, Estey, McIntyre, Chouinard*, Lamer, Wilson, Le Dain and La Forest JJ.

*Chouinard J. took no part in the judgment.

on appeal from the court of appeal for quebec

Constitutional law --Charter of Rights -- Fundamental justice -- Presumption of innocence -- Constructive murder -- Death caused by accomplice during robbery -- Proof of intentional dangerous conduct causing death substituted for proof of mens rea with respect to death of victim-- Accused's conviction possible notwithstanding existence of reasonable doubt on essential element -- Whether s. 213(d) of the Criminal Code violates ss. 7 or 11(d) of the Charter -- If so, whether such violation justifiable under s. 1 of the Charter.

Criminal law --Constructive murder -- Fundamental justice --Presumption of innocence -- Death caused by accomplice during robbery -- Proof of intentional dangerous conduct causing death substituted for proof of mens rea with respect to death of victim --Accused's conviction possible notwithstanding existence of reasonable doubt on essential element -- Whether

s. 213(d) of the Criminal Code violates ss. 7 or 11(d) of the Charter -- If so, whether such violation justifiable under s. 1 of the Charter.

During an armed robbery in a pool hall, appellant's accomplice shot and killed a client. The accomplice managed to escape but appellant was arrested and convicted of second degree murder as a party to the offence pursuant to ss. 21(2) and 213(d) of the *Criminal Code*. Section 213(d) provides that "Culpable homicide is murder where a person causes the death of a human being while committing or attempting to commit ... robbery ... whether or not the person means to cause death to any human being and whether or not he knows that death is likely to be caused to any human being, if ... he uses a weapon or has it upon his person during or at the time he commits or attempts to commit the offence ... and the death ensues as a consequence." At his trial before judge and jury, appellant testified that at the time of the robbery, he was certain that the gun in possession of the accomplice was not loaded. He stated that they had agreed to commit the robbery armed only with knives and when, on the night of the crime, the accomplice arrived with a gun he insisted that it be unloaded. The accomplice removed three bullets from the gun and gave them to the appellant. Appellant's glove containing the three bullets was recovered by the police at the scene of the crime. The Court of Appeal dismissed appellant's appeal from conviction. In this Court, he challenged the constitutional validity of s. 213(d) of the *Criminal Code*. This appeal raises two constitutional questions: (1) Is section 213(d) of the *Code* inconsistent with either ss. 7 or 11(d) of the *Charter* and, therefore, of no force or effect? (2) If not, is the combination of ss. 21 and 213(d) of the *Code* inconsistent with either ss. 7 and 11(d) of the *Charter* and is s. 21 therefore of no force or effect in the case of a charge under s. 213(d)?

Held (McIntyre J. dissenting): The appeal should be allowed and a new trial ordered. The first constitutional question should be answered in the affirmative. No answer was given to the second constitutional question.

Per Dickson C.J. and Estey, Lamer and Wilson JJ.: Prior to the enactment of the *Charter*, Parliament had full legislative powers with respect to criminal law, including the determination of the essential elements of any given crime. But the *Charter* has restricted these powers. Under section 7, if a conviction will result in a deprivation of the life, liberty or security of the person of the accused, then Parliament must respect the principles of fundamental justice. One of these principles is that a minimum mental state is an essential element of an offence. However, because of the special nature of the stigma attached to a conviction for murder, the principles of fundamental justice require a *mens rea* reflecting the particular nature of that crime. While the current view of the justices is that such a conviction cannot rest on anything less than proof beyond a reasonable doubt of subjective foresight, for the purpose of this appeal, it is sufficient to say that, as a principle of fundamental justice, there cannot be a conviction in the absence of proof beyond a reasonable doubt of at least objective foreseeability.

The presumption of innocence in s. 11(d) of the *Charter* is offended when an accused may be convicted despite the existence of a reasonable doubt on an essential element of the offence. Where Parliament substituted proof of a different element for proof of an essential element, such substitution is constitutionally valid if, upon proof beyond reasonable doubt of the substituted element, it would be unreasonable for the trier of fact or a jury not to be satisfied beyond a reasonable doubt of the existence of the essential element. Therefore, an accused cannot be found guilty of murder absent proof beyond a reasonable doubt of at least objective foreseeability, and a murder provision which allows a conviction in the absence of proof beyond reasonable doubt of at least that essential element infringes ss. 7 and 11(d) of the *Charter*.

In the present case, s. 213(d) of the *Code* is *prima facie* in violation of ss. 7 and 11(d) of the *Charter*. The *mens rea* required for s. 213 consists of the *mens rea* for the underlying offence and the intent to commit one of the acts set forth in paras. (a) to (d). Section 213 does not completely exclude the need to prove any objective foreseeability. Rather, it has substituted for proof beyond a reasonable doubt of objective foreseeability, if that is the essential element, proof beyond a reasonable doubt of certain forms of intentional dangerous conduct causing death. But this substitution is not constitutionally valid because it is still possible that, notwithstanding proof beyond a reasonable doubt of the matters set forth in paras. (a) and (d), a jury could reasonably be left in doubt as to whether the accused ought to have known that death was likely to ensue.

Section 213(d) cannot be saved by s. 1 of the *Charter*. It is clear that Parliament's objective to deter the use or carrying of a weapon in the commission of certain offences, because of the increased risk of death, was of sufficient importance for the purpose of s. 1. However, the measures adopted were not reasonable and demonstrably justifiable. While these measures appear to be rationally connected to the objective, they unduly impair the rights and freedoms in question. Indeed, it is not necessary to convict of murder persons who did not intend or foresee the death and who could not even have foreseen the death in order to deter others from using or carrying weapons. If Parliament wishes to deter the use or carrying of weapons, it should, as in s. 83 of the *Code*, punish the use or carrying of weapons.

Per Beetz and Le Dain JJ.: For the reasons given by Lamer and La Forest JJ., s. 213(d) of the *Criminal Code* does not conform to the principles of fundamental justice entrenched in the *Charter* and cannot be saved under s. 1. For the reasons given by Lamer J., s. 213(d) also violates s. 11(d) of the *Charter* and cannot be justified under s. 1. Given these conclusions, it is not necessary to decide whether there exists a principle of fundamental justice that a conviction for murder cannot rest on anything less than proof beyond a reasonable doubt of subjective foresight.

Per La Forest J.: Because of the stigma attached to a conviction for murder, the principles of fundamental justice require a *mens rea* reflecting the particular nature of that crime, namely one referable to causing death. In addition to the intention to cause death, this can include a closely related intention such as intention to cause bodily harm likely to result in death combined with recklessness as to that result. It is sufficient to say in this case that the mental element required by s. 213(d) of the *Criminal Code* is so remote from the intention specific to murder that a conviction under that paragraph violates fundamental justice. The provision is so broad that under it a person may be found guilty of murder even though the death was the result of an accident.

Section 213(d) of the *Code* cannot be saved by s. 1 of the *Charter*. The objective of discouraging the use of weapons in the commission of crimes can be achieved by means other than attaching the stigma of a conviction for murder to a person who has caused death in the circumstances like those described in the provision.

Per McIntyre J. (dissenting): The two constitutional questions should be answered in the negative. Parliament has decided that possession and use of weapons in the course of the commission of offences is a gravely aggravating factor and has chosen to term a killing arising in the circumstances described in s. 213(d) as murder. While it may be illogical to characterize an unintentional killing as murder, no principle of fundamental justice is offended because serious criminal conduct, involving the commission of a crime of violence resulting in the killing of a human being, is classified as murder and not in some other manner.

In this case, the accused was properly convicted of murder under the combined effect of ss. 21(2) and 213(d) of the *Code*. The terms of s. 21(2) were fully met as there was evidence of the accused's active participation in the commission of the robbery, the underlying offence. The section gives expression to a principle of joint criminal liability long accepted and applied in the criminal law, and there is no basis upon which one could exempt conduct which attracts criminal liability, under s. 213 of the *Code*, from the application of that principle.

Cases Cited

By Lamer J.

Considered: *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486; *R. v. Corporation of the City of Sault Ste. Marie*, 1978 CanLII 11 (SCC), [1978] 2 S.C.R. 1299; **disapproved:** *R. v. Bezanson* ~~reflex~~, (1983), 8 C.C.C. (3d) 493; referred to: *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103; *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295; *Swietlinski v. The Queen*, 1980 CanLII 53 (SCC), [1980] 2 S.C.R. 956; *Reference re Validity of s. 5(a) of the Dairy Industry Act*, 1948 CanLII 2 (SCC), [1949] S.C.R. 1, aff'd [1951] A.C. 179; *Dubois v. The Queen*, 1985 CanLII 10 (SCC), [1985] 2 S.C.R. 350; *R. v. Vasil*, 1981 CanLII 46 (SCC), [1981] 1 S.C.R. 469; *R. v. Trinneer*, 1970 CanLII 177 (SCC), [1970] S.C.R. 638; *R. v. Farrant*, 1983 CanLII 118 (SCC), [1983] 1 S.C.R. 124; *R. v. Ancio*, 1984 CanLII 69 (SCC), [1984] 1

S.C.R. 225; *People v. Aaron*, 299 N.W.2d 304 (1980); *State v. Doucette*, 470 A.2d 676 (1983); *Sir John Chichester's Case* (1647), Ayleyn 12, 82 E.R. 888; *Hull's Case* (1664), Kelyng, J. 40; *R. v. Plummer* (1702), Kelyng, J. 109, 84 E.R. 1103; *R. v. Woodburne and Coke*(1722), 16 St. Tr. 53.

By La Forest J.

Referred to: *Rowe v. The King*, 1951 CanLII 7 (SCC), [1951] S.C.R. 713.

By McIntyre J. (dissenting)

R. v. Munro and Munro ~~reflex~~, (1983), 8 C.C.C. (3d) 260; *R. v. Trinneer*, 1970 CanLII 177 (SCC), [1970] S.C.R. 638; *R. v. Ancio*, 1984 CanLII 69 (SCC), [1984] 1 S.C.R. 225.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 7, 11(d).

Constitution Act, 1867, s. 91(27).

Criminal Code, R.S.C. 1970, c. C-34, ss. 21(2), 83 [rep. & subs. 1976-77, c. 53, s. 3], 205(5) (a), 212(a)(i), (ii), (c), 213 [am. 1974-75-76, c. 93, s. 13; c. 105, s. 29 item 1(4)].

Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11 (U.K.)

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Foster, Sir Michael. *Crown Law*. Oxford, 1762.

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Lanham, David. "Felony Murder--Ancient and Modern" (1983), 7 *Crim. L.J.* 90.

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- Stephen, Sir James Fitzjames. *A History of the Criminal Law of England*, vol. 3. London: MacMillan & Co., 1883.
- Stephen, Sir James Fitzjames. *Stephen's Digest of the Criminal Law*, 9th ed. By Lewis Frederick Sturge. London: Sweet & Maxwell, 1950.
- Stuart, Don. *Canadian Criminal Law*. Toronto: Cars-wells, 1982.
- Willis, John. "Case and Comment" (1951), 29 *Can. Bar Rev.* 784.

APPEAL from a judgment of the Quebec Court of Appeal *Reflex*, (1984), 31 C.C.C. (3d) 75, dismissing the accused's appeal from his conviction on a charge of second degree murder. Appeal allowed and new trial ordered, McIntyre J. dissenting.

Michel Marchand and Michael Brind'Amour, for the appellant.

Bernard Laprade and Jean-François Dionne, for the respondent.

James K. Stewart, for the intervener.

The judgment of Dickson C.J. and Estey, Lamer and Wilson JJ. was delivered by

LAMER J.--

Introduction

1 Vaillancourt was convicted of second degree murder following a trial before a judge and jury in Montréal. He appealed to the Quebec Court of Appeal, arguing that the judge's charge to the jury on the combined operation of ss. 213(d) and 21(2) of the *Criminal Code*, R.S.C. 1970, c. C-34, was incorrect. His appeal was dismissed and the conviction was affirmed: *Reflex*, (1984), 31 C.C.C. (3d) 75. Before this Court, he has challenged the constitutional validity of s. 213(d) alone and in combination with s. 21(2) under the *Canadian Charter of Rights and Freedoms*.

The Facts

2 For the purposes of this appeal, the Crown does not contest the following statement of the facts.

3 The appellant and his accomplice committed an armed robbery in a pool hall. The appellant was armed with a knife and his accomplice with a gun. During the robbery, the appellant remained near the front of the hall while the accomplice went to the back. There was a struggle between the accomplice and a client. A shot was fired and the client was killed. The accomplice managed to escape and has never been found. The appellant was arrested at the scene.

4 In the course of his testimony, the appellant said that he and his accomplice had agreed to commit this robbery armed only with knives. On the night of the robbery, however, the accomplice arrived at their meeting place with a gun. The appellant said that he objected because, on a previous armed robbery, his gun had discharged accidentally, and he did not want that to happen again. He insisted that the gun be unloaded. The accomplice removed three bullets from the gun and gave them to the appellant. The appellant then went to the bathroom and placed the bullets in his glove. The glove was recovered by the police

at the scene of the crime and was found at trial to contain three bullets. The appellant testified that, at the time of the robbery, he was certain that the gun was unloaded.

Constitutional Questions

5 Before this Court, the following constitutional questions were formulated:

1. Is section 213(d) of the *Criminal Code* inconsistent with the provisions of either s. 7 or s. 11(d) of the *Canadian Charter of Rights and Freedoms*, and, therefore, of no force or effect?
2. If not, is the combination of s. 21 and s. 213(d) of the *Criminal Code* inconsistent with the provisions of either s. 7 or s. 11(d) of the *Canadian Charter of Rights and Freedoms* and is s. 21 of the *Criminal Code* therefore of no force or effect in the case of a charge under s. 213(d) of the *Criminal Code*?

The Law

Narrowing the Issue

6 The appellant has framed his attack on s. 213(d) of the *Code* in very wide terms. He has argued that the principles of fundamental justice require that, before Parliament can impose any criminal liability for causing a particular result, there must be some degree of subjective *mens rea* in respect of that result. This is a fundamental question with far reaching consequences. If this case were decided on that basis, doubt would be cast on the constitutional validity of many provisions throughout our *Criminal Code*, in particular s. 205(5)(a), whereby causing death by means of an unlawful act is culpable homicide, and s. 212(c) whereby objective foreseeability of the likelihood of death is sufficient for a murder conviction in certain circumstances.

7 However, the appellant was convicted under s. 213(d) and the constitutional question is limited to this provision. In my opinion, the validity of s. 213(d) can be decided on somewhat narrower grounds. In addition, the Attorney General of Canada has seen fit not to intervene to support the constitutionality of s. 213(d), which is clearly in jeopardy in this case, though he may have intervened to support ss. 205(5)(a) and 212(c) and other similar provisions. I will thus endeavour not to make pronouncements the effect of which will be to predispose in *obiter* of other issues more properly dealt with if and when the constitutionality of the other provisions is in issue. I do, however, find it virtually impossible to make comments as regards s. 213(d) that will not have some effect on the validity of the rest of s. 213 or that will not reveal to some extent my views as regards s. 212(c). However, the validity of those sections and of paras. (a) to (c) of s. 213 is not in issue here and I will attempt to limit my comments to s. 213(d).

8 The appellant has also challenged the combined operation of ss. 21(2) and 213(d). Given my decision on the validity of s. 213(d) and in view of the importance of s. 21(2) and the absence of the Attorney General of Canada, I do not find it necessary or advisable to deal with s. 21(2) in this appeal.

Analysis of s. 213(d)

Section 213(d) in the Context of the Murder Provisions

9 It is first necessary to analyze s. 213(d) in the context of the other murder provisions in the *Code* in order to determine its true nature and scope. Murder is defined as a culpable homicide committed in the circumstances set out at ss. 212 and 213 of the *Code*. There is a very interesting progression through s. 212 to s. 213 with respect to the mental state that must be proven.

10 The starting point is s. 212(a)(i), which provides:

212. Culpable homicide is murder

(a) where the person who causes the death of a human being

(i) means to cause his death,

This clearly requires that the accused have actual subjective foresight of the likelihood of causing the death coupled with the intention to cause that death. This is the most morally blameworthy state of mind in our system.

11 There is a slight relaxation of this requirement in s. 212(a)(ii), which provides:

212. Culpable homicide is murder

(a) where the person who causes the death of a human being

...

(ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;

Here again the accused must have actual subjective foresight of the likelihood of death. However, the Crown need no longer prove that he intended to cause the death but only that he was reckless whether death ensued or not. It should also be noted that s. 212(a)(ii) is limited to cases where the accused intended to cause bodily harm to the victim.

12 Section 212(c) provides:

212. Culpable homicide is murder

...

(c) where a person, for an unlawful object, does anything that he knows or ought to know is likely to cause death, and thereby causes death to a human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being.

In part, this is simply a more general form of recklessness and thus the logical extension of s. 212(a)(ii), in that it applies when the accused "does anything that he knows . . . is likely to cause death" (emphasis added). However, there is also a further relaxation of the mental element required for murder in that it is also murder where the accused "does anything that he . . . ought to know is likely to cause death" (emphasis added). This eliminates the requirement of actual subjective foresight and replaces it with objective foreseeability or negligence.

13 The final relaxation in the definition of murder occurs at s. 213:

213. Culpable homicide is murder where a person causes the death of a human being while committing or attempting to commit high treason or treason or an offence mentioned in section 52 (sabotage), 76 (piratical acts), 76.1 (hijacking an aircraft), 132 or subsection 133(1) or sections 134 to 136 (escape or rescue from prison or lawful custody), 143 or 145 (rape or attempt to commit rape), 149 or 156 (indecent assault), subsection 246(2) (resisting lawful arrest), 247 (kidnapping and forcible confinement), 302 (robbery), 306 (breaking and entering) or 389 or 390 (arson), whether or not the person means to cause death to any human being and whether or not he knows that death is likely to be caused to any human being, if

(a) he means to cause bodily harm for the purpose of

(i) facilitating the commission of the offence, or

(ii) facilitating his flight after committing or attempting to commit the offence,

and the death ensues from the bodily harm;

(b) he administers a stupefying or overpowering thing for a purpose mentioned in paragraph (a), and the death ensues therefrom;

(c) he wilfully stops, by any means, the breath of a human being for a purpose mentioned in paragraph (a), and the death ensues therefrom; or

(d) he uses a weapon or has it upon his person

(i) during or at the time he commits or attempts to commit the offence, or

(ii) during or at the time of his flight after committing or attempting to commit the offence,

and the death ensues as a consequence.

Under this provision, it is murder if the accused causes the victim's death while committing or attempting to commit one of the enumerated offences if he performs one of the acts in paras. (a) to (d). Proof that the accused performed one of the acts in paras. (a) to (d) is substituted for proof of any subjective foresight or even objective foreseeability of the likelihood of death.

14 I should add that there appears to be a further relaxation of the mental state when the accused is a party to the murder through s. 21(2) of the *Code* as in this case. However, as I have said, it is sufficient to deal with s. 213(d) in order to dispose of this appeal.

The Historical Development of s. 213

15 Although the concept of felony murder has a long history at common law, a brief review of the historical development of s. 213 indicates that its legitimacy is questionable.

16 In the early history of English criminal law, *murdrum* or murder referred to a secret killing or the killing of a Dane or, later, a Norman by an Englishman and to the fine levied on the township where the killing occurred. By the early 14th century, the fines had been abandoned and murder had come to be the name used to describe the worst kind of homicide. The expression "malice aforethought" was subsequently adopted to distinguish murder from manslaughter, which denoted all culpable homicides other than murder. Malice aforethought was not limited to its natural and obvious sense of premeditation, but would be implied whenever the killing was intentional or reckless. In these instances, the malice was present and it is the premeditation which was implied by law.

17 Coke took this one step further and implied both the malice and the premeditation in cases where the death occurred in the commission of an unlawful act. He wrote in *The Third Part of the Institutes of the Laws of England* (London: W. Clarke & Sons, 1817), at p. 56:

Unlawfull. If the act be unlawful it is murder. As if A. meaning to steale a deere in the park of B, shooteth at the deer, and by the glance of the arrow killeth a boy that is hidden in a bush: this is murder, for that the act was unlawfull, although A. had no intent to hurt the boy, nor knew not of him. But if B. the owner of the park had shot at his own deer, and without any ill intent had killed the boy by the glance of his arrow, this had been homicide by misadventure, and no felony.

So if one shoot at any wild fowle upon a tree, and the arrow killeth any reasonable creature afar off, without any evill intent in him, this is *per infortunium*: for it was not unlawful to shoot at the wilde fowle: but if he had shot at a cock or hen, or any tame fowle of another mans, and the arrow by mischance had killed a man, this had been murder, for the act was unlawfull.

- 18 Coke's statement of the unlawful act murder rule has been much criticized. Stephen demonstrated that Coke's statement was not supported by the authorities cited (*A History of the Criminal Law of England* (1883), vol. 3, at pp. 57-58). Further, a recent author has suggested that Coke's statement was just "a slip of the quill" and that Coke intended to say that accidental killing by an unlawful act was manslaughter (see D. Lanham, "Felony Murder--Ancient and Modern" (1983), 7 *Crim. L.J.* 90, at pp. 92-94). Other 17th century writers (Dalton, *Countray Justice* (1619), at pp. 225-26, and Hale, *History of the Pleas of the Crown* (1736), vol. 1, at p. 475) and cases (*Sir John Chichester's Case* (1647), Aleyn 12, 82 E.R. 888, and *Hull's Case* (1664), Kelyng, J. 40) rejected the unlawful act murder rule as set out by Coke. Despite all of this, Coke's doctrine seems to have been accepted by the writers and the cases in the 18th century, and their only contribution was to limit it to killings in the course of felonies (see *R. v. Plummer* (1702), Kelyng, J. 109, 84 E.R. 1103, at p. 1107; Hawkins, *Pleas of the Crown* (1716), vol. 1, ch. 29, s. 11; *R. v. Woodburne and Coke* (1722), 16 St. Tr. 53; Foster, *Crown Law* (1762), at p. 258; East, *Pleas of the Crown* (1803), vol. 1, at p. 255). Of course, at that time, both the underlying felony and the murder were punishable by death, so the definition of a homicide in the course of a felony as a murder had little practical effect.
- 19 In the 19th century, the felony murder rule was accepted as part of the common law (see *Stephen's Digest of the Criminal Law* (9th ed. 1950), art. 264(c)). However, the rule was strongly criticized by Stephen, who labelled it "cruel" and "monstrous" (*A History of the Criminal Law of England, supra*, at p. 75).
- 20 Despite the rule's questionable origins and the subsequent criticisms, s. 175 of the English Draft Code of 1879 included a restricted form of felony murder which was subsequently adopted in the first Canadian *Criminal Code* in 1892. Through subsequent amendments, this provision has been widened and it is now s. 213. It is more restricted than the common law rule in that it is limited to deaths occurring in the commission of certain enumerated offences and it requires that the accused have committed one of the acts set out in paras. (a) to (d).
- 21 Section 213 and its predecessors in the *Code* have long been subject to academic criticism (see J. Willis, "Case and Comment" (1951), 29 *Can. Bar Rev.* 784, at pp. 794-96; J. Ll. J. Edwards, "Constructive Murder in Canadian and English Law" (1961), 3 *Crim. L.Q.* 481, at pp. 506-9; A. Hooper, "Some Anomalies and Developments in the Law of Homicide" (1967), 3 *U.B.C. L. Rev.* 55, at pp. 75-77; P. Burns and R. S. Reid, "From Felony Murder to Accomplice Felony Attempted Murder: The Rake's Progress Compleat?" (1977), 55 *Can. Bar Rev.* 75, at pp. 103-5; G. Parker, *An Introduction to Criminal Law* (1977), at pp. 145-48; D. Stuart, *Canadian Criminal Law* (1982), at pp. 222-25; I. Grant and A. W. MacKay, "Constructive Murder and the Charter: In Search of Principle" (1987), 25 *Alta. L. Rev.* 129; cf. A. W. Mewett and M. Manning, *Criminal Law* (2nd ed. 1985), at p. 545). It has also been subject to judicial criticism. In *R. v. Farrant*, 1983 CanLII 118 (SCC), [1983] 1 S.C.R. 124, Dickson J., as he then was, wrote that s. 213 seemed harsh (p. 130). In *R. v. Ancio*, 1984 CanLII 69 (SCC), [1984] 1 S.C.R. 225, dealing with the *mens rea* of attempted murder, McIntyre J. wrote at pp. 250-51:

It was argued, and it has been suggested in some of the cases and academic writings on the question, that it is illogical to insist upon a higher degree of *mens rea* for attempted murder, while accepting a lower degree amounting to recklessness for murder. I see no merit in this argument. The intent to kill is the highest intent in murder and there is no reason in logic why an attempt to murder, aimed at the completion of the full crime of murder, should have any lesser intent. If there is any illogic in this matter, it is in the statutory characterization of unintentional killing as murder. [Emphasis added.]

- 22 Finally, the Law Reform Commission of Canada criticized s. 213 in *Homicide* (1984), Working Paper 33, at pp. 47-51, and excluded the notion of constructive murder from its Draft Criminal Code (*Recodifying Criminal Law* (1986), Report 30, cl. 6(3), at p. 54).

Felony Murder in Other Jurisdictions

- 23 Felony murder is a peculiarly common law concept which appears to be unknown outside a small circle of common law jurisdictions, and it has not fared well in those jurisdictions. In the United Kingdom, where the rule originated, it was abolished by the *Homicide Act*, 1957, 5 & 6 Eliz. 2, c. 11 (U.K.) The rule is still quite widespread in the United States, though it is said to be in decline (R. M. Perkins and R. N. Boyce, *Criminal Law* (3rd ed. 1982), at p. 70). The rule has been abolished by statute or by the courts in several jurisdictions (see *People v. Aaron*, 299 N.W.2d 304 (Mich. 1980), *State v. Doucette*, 470 A.2d 676 (Vt. 1983)), and it has been downgraded to manslaughter in others. In addition, the courts and the legislatures have limited the scope of the common law rule by limiting the felonies to which it is applicable, requiring some degree of *mens rea* with respect to the death, establishing affirmative defences or limiting the punishments available. The rule also exists in New Zealand and certain Australian states but it is narrower and abolition has been recommended in some jurisdictions.

Section 213(d) and the Charter

- 24 This appeal calls into play two principles of fundamental justice.

The First Principle: The Essential Elements of Certain Crimes and s. 7 of the Charter

- 25 Prior to the enactment of the *Charter*, Parliament had full legislative power with respect to "The Criminal Law" (*Constitution Act, 1867*, s. 91(27)), including the determination of the essential elements of any given crime. It could prohibit any act and impose any penal consequences for infringing the prohibition, provided only that the prohibition served "a public purpose which can support it as being in relation to criminal law" (*Reference re Validity of s. 5(a) of the Dairy Industry Act*, 1948 CanLII 2 (SCC), [1949] S.C.R. 1, at p. 50; appeal to the Privy Council dismissed, [1951] A.C. 179). Once the legislation was found to have met this test, the courts had very little power to review the substance of the legislation. For example, in *R. v. Corporation of the City of Sault Ste. Marie*, 1978 CanLII 11 (SCC), [1978] 2 S.C.R. 1299, Dickson J., as he then was, held that, when an offence was criminal in the true sense, there was a presumption that the prosecution must prove the *mens rea*. However, it was always open to Parliament expressly to relieve the prosecution of its obligation to prove any part of the *mens rea*, as it is said to have done in s. 213 of the *Codewith* respect to the foreseeability of the death of the victim. It is thus clear that, prior to the enactment of the *Charter*, the validity of s. 213 could not have been successfully challenged.

- 26 However, federal and provincial legislatures have chosen to restrict through the *Charter* this power with respect to criminal law. Under section 7, if a conviction, given either the stigma attached to the offence or the available penalties, will result in a deprivation of the life, liberty or security of the person of the accused, then Parliament must respect the principles of fundamental justice. It has been argued that the principles of fundamental justice in s. 7 are only procedural guarantees. However, in *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486, this Court rejected that argument

and used s. 7 to review the substance of the legislation. As a result, while Parliament retains the power to define the elements of a crime, the courts now have the jurisdiction and, more important, the duty, when called upon to do so, to review that definition to ensure that it is in accordance with the principles of fundamental justice.

27 This Court's decision in *Re B.C. Motor Vehicle Act* stands for the proposition that absolute liability infringes the principles of fundamental justice, such that the combination of absolute liability and a deprivation of life, liberty or security of the person is a restriction on one's rights under s. 7 and is *prima facie* a violation thereof. In effect, *Re B.C. Motor Vehicle Act* acknowledges that, whenever the state resorts to the restriction of liberty, such as imprisonment, to assist in the enforcement of a law, even, as in *Re B.C. Motor Vehicle Act*, a mere provincial regulatory offence, there is, as a principle of fundamental justice, a minimum mental state which is an essential element of the offence. It thus elevated *mens rea* from a presumed element in *Sault Ste. Marie, supra*, to a constitutionally required element. *Re B.C. Motor Vehicle Act* did not decide what level of *mens rea* was constitutionally required for each type of offence, but inferentially decided that even for a mere provincial regulatory offence at least negligence was required, in that at least a defence of due diligence must always be open to an accused who risks imprisonment upon conviction. In *Sault Ste. Marie*, Dickson J. stated at pp. 1309–10:

Where the offence is criminal, the Crown must establish a mental element, namely, that the accused who committed the prohibited act did so intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them. Mere negligence is excluded from the concept of the mental element required for conviction. Within the context of a criminal prosecution a person who fails to make such enquiries as a reasonable and prudent person would make, or who fails to know facts he should have known, is innocent in the eyes of the law.

It may well be that, as a general rule, the principles of fundamental justice require proof of a subjective *mens rea* with respect to the prohibited act, in order to avoid punishing the "morally innocent". It must be remembered, however, that Dickson J. was dealing with the *mens rea* to be presumed in the absence of an express legislative disposition, and not the *mens rea* to be required in all legislation providing for a restriction on the accused's life, liberty or security of the person. In any event, this case involves criminal liability for the result of an intentional criminal act, and it is arguable that different considerations should apply to the mental element required with respect to that result. There are many provisions in the *Code* requiring only objective foreseeability of the result or even only a causal link between the act and the result. As I would prefer not to cast doubt on the validity of such provisions in this case, I will assume, but only for the purposes of this appeal, that something less than subjective foresight of the result may, sometimes, suffice for the imposition of criminal liability for causing that result through intentional criminal conduct.

28 But, whatever the minimum *mens rea* for the act or the result may be, there are, though very few in number, certain crimes where, because of the special nature of the stigma attached to a conviction therefor or the available penalties, the principles of fundamental justice require a *mens rea* reflecting the particular nature of that crime. Such is theft, where, in my view, a conviction requires proof of some dishonesty. Murder is another such offence. The punishment for murder is the most severe in our society and the stigma that attaches to a conviction for murder is similarly extreme. In addition, murder is distinguished from manslaughter only by the mental element with respect to the death. It is thus clear that there must be some special mental element with respect to the death before a culpable homicide can be treated as a murder. That special mental element gives rise to the moral blameworthiness which justifies the stigma and sentence attached to a murder conviction. I am presently of the view that it is a principle of fundamental justice that a conviction for murder cannot rest on anything less than proof beyond a reasonable doubt of subjective foresight. Given the effect of this view on part of s. 212(c), for the reasons I have already given for deciding this case more narrowly, I need not and will not rest my finding that s. 213(d) violates the *Charter* on this view, because s. 213(d) does not, for reasons I will set out hereinafter, even meet the lower threshold test of objective foreseeability. I will therefore, for the sole purpose of this appeal, go no further than say

that it is a principle of fundamental justice that, absent proof beyond a reasonable doubt of at least objective foreseeability, there surely cannot be a murder conviction.

The Second Principle: s. 11(d) and the Burden of Persuasion

29 The presumption of innocence in s. 11(d) of the *Charter* requires at least that an accused be presumed innocent until his guilt has been proven beyond a reasonable doubt: *Dubois v. The Queen*, 1985 CanLII 10 (SCC), [1985] 2 S.C.R. 350, at p. 357; *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, at pp. 120–21. This means that, before an accused can be convicted of an offence, the trier of fact must be satisfied beyond reasonable doubt of the existence of all of the essential elements of the offence. These essential elements include not only those set out by the legislature in the provision creating the offence but also those required by s. 7 of the *Charter*. Any provision creating an offence which allows for the conviction of an accused notwithstanding the existence of a reasonable doubt on any essential element infringes ss. 7 and 11(d).

30 Clearly, this will occur where the provision requires the accused to disprove on a balance of probabilities an essential element of the offence by requiring that he raise more than just a reasonable doubt. It is for this reason that this Court struck down the reverse onus provision in s. 8 of the *Narcotic Control Act*, R.S.C. 1970, c. N-1, in *Oakes, supra*.

31 Sections 7 and 11(d) will also be infringed where the statutory definition of the offence does not include an element which is required under s. 7. As Dickson C.J. wrote for the majority of the Court in *Oakes, supra*, at pp. 132–33:

In general one must, I think, conclude that a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence in s. 11(d). If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt. This would arise if the accused adduced sufficient evidence to raise a reasonable doubt as to his or her innocence but did not convince the jury on a balance of probabilities that the presumed fact was untrue. [Emphasis added.]

It is clear from this passage that what offends the presumption of innocence is the fact that an accused may be convicted despite the existence of a reasonable doubt on an essential element of the offence, and I do not think that it matters whether this results from the existence of a reverse onus provision or from the elimination of the need to prove an essential element. With respect, the Nova Scotia Court of Appeal was thus clearly incorrect when it stated in *R. v. Bezanson*, *supra*, (1983), 8 C.C.C. (3d) 493, at p. 508:

In my view, there was no attempt by Parliament to reverse the onus of proof under s. 213, and s. 11(d) of the *Charter* has no application. Parliament has not reversed the burden of proof, it has simply omitted what the appellant argues is an essential element from the definition of the offence so that no evidence is required at all on that issue.

The omission of an essential element does bring s. 11(d) into play.

32 Finally, the legislature, rather than simply eliminating any need to prove the essential element, may substitute proof of a different element. In my view, this will be constitutionally valid only if upon proof beyond reasonable doubt of the substituted element it would be unreasonable for the trier of fact not to be satisfied beyond reasonable doubt of the existence of the essential element. If the trier of fact may have a reasonable doubt as to the essential element notwithstanding proof beyond a reasonable doubt of the substituted element, then the substitution infringes ss. 7 and 11(d).

33 Given the first principle I have enunciated earlier and my assumption for the sole purpose of disposing of this appeal with respect to objective foreseeability, an accused

cannot be found guilty of murder absent proof beyond a reasonable doubt of that element, and a murder provision which allows a conviction in the absence of proof beyond reasonable doubt of at least that essential element infringes ss. 7 and 11(d).

Application of the Principles to s. 213

34 The *mens rea* required for s. 213 consists of the *mens rea* for the underlying offence and the intent to commit one of the acts set forth in paras. (a) to (d) (*Swietlinski v. The Queen*, 1980 CanLII 53 (SCC), [1980] 2 S.C.R. 956). Section 213 does not impose on the accused the burden of disproving objective foreseeability. Further, it does not completely exclude the need to prove any objective foreseeability. Rather, s. 213 has substituted for proof beyond a reasonable doubt of objective foreseeability, if that is the essential element, proof beyond a reasonable doubt of certain forms of intentional dangerous conduct causing death.

35 The question is, therefore, can Parliament make this substitution without violating ss. 7 and 11(d)? As I have discussed earlier, if Parliament frames the section so that, upon proof of the conduct, it would be unreasonable for a jury not to conclude beyond a reasonable doubt that the accused ought to have known that death was likely to ensue, then I think that Parliament has enacted a crime which is tantamount to one which has objective foreseeability as an essential element, and, if objective foreseeability is sufficient, then it would not be in violation of s. 7 or s. 11(d) in doing so in that way. The acid test of the constitutionality of s. 213 is this ultimate question: Would it be possible for a conviction for murder to occur under s. 213 despite the jury having a reasonable doubt as to whether the accused ought to have known that death was likely to ensue? If the answer is yes, then the section is *prima facie* in violation of ss. 7 and 11(d). I should add in passing that if the answer is no, then it would be necessary to decide whether objective foreseeability is sufficient for a murder conviction. However, because in my view the answer is yes and because I do not want to pass upon the constitutionality of s. 212(c) in this case, I will not address that issue.

36 To varying degrees it can be said that in almost any case a jury satisfied beyond a reasonable doubt that an accused has done one of the prohibited acts described in paras. (a) to (d) will be satisfied beyond a reasonable doubt that the accused ought to have known that death was likely to be caused. But not always. Indeed, as a first example, drunkenness would under certain circumstances leave the jury in doubt in that regard. The rule as regards the effect of drunkenness on objective foreseeability was unanimously laid down by this Court in *R. v. Vasil*, 1981 CanLII 46 (SCC), [1981] 1 S.C.R. 469, a murder prosecution under s. 212(c). This Court addressed the issue at some length and then summarized its conclusion as follows, *per* Lamer J. at pp. 500-501:

- (5) Whilst the test under 212(c) is objective and the behaviour of the accused is to be measured by that of the reasonable man, such a test must nevertheless be applied having regard, not to the knowledge a reasonable man would have had of the surrounding circumstances that allegedly made the accused's conduct dangerous to life, but to the knowledge the accused had of those circumstances;
- (6) As a result, drunkenness, though not relevant in the determination of what a reasonable man, with the knowledge the accused had of those circumstances, would have anticipated, is relevant in the determination of the knowledge which the accused had of those circumstances.

It is clear to me that under s. 213 as drafted there will be cases where the effect of drunkenness on an accused's knowledge of the circumstances would leave a jury with a reasonable doubt as to whether the accused ought to have known of the likelihood of death ensuing, even though it has been proven beyond a reasonable doubt that the accused actually did one of the acts described under paras. (a) to (d).

37 A second example, and this case amply illustrates the point, is the accused who is brought into s. 213 not as a principal but through the operation of s. 21(2) of the *Criminal Code*. In *R. v. Trinneer*, 1970 CanLII 177 (SCC), [1970] S.C.R. 638, this Court had the opportunity to consider the combined operation of ss. 21(2) and 213 (s. 202 at the time). Cartwright C.J., delivering the judgment of the Court, stated at pp. 645-46.

At the risk of repetition, it is my opinion that on the true construction of s. 202 and s. 21(2) as applied to the circumstances of this case it was necessary to support a verdict of guilty against the respondent that the Crown should establish (i) that it was in fact a probable consequence of the prosecution of the common purpose of the respondent and Frank to rob Mrs. Vollet that Frank for the purpose of facilitating the commission of the robbery would intentionally cause bodily harm to Mrs. Vollet, (ii) that it was known or ought to have been known to the respondent that such consequence was probable and (iii) that in fact Mrs. Vollet's death ensued from the bodily harm. It was not necessary for the Crown to establish that the respondent knew or ought to have known that it was probable that Mrs. Vollet's death would ensue. [Emphasis added.]

It is clear that an accused can be convicted of murder under the combined operation of ss. 21(2) and 213 in circumstances where the death was not objectively foreseeable. As section 21(2) requires proof of objective foreseeability, the culprit, in my view, must be s. 213.

38 These two examples suffice, in my view, for one to conclude that notwithstanding proof beyond a reasonable doubt of the matters set forth in paras. (a) to (d) a jury could reasonably be left in doubt as regards objective foreseeability of the likelihood that death be caused. In other words, s. 213 will catch an accused who performs one of the acts in paras. (a) to (d) and thereby causes a death but who otherwise would have been acquitted of murder because he did not foresee and could not reasonably have foreseen that death would be likely to result. For that reason, s. 213 *prima facie* violates ss. 7 and 11(d). It is thus not necessary to decide whether objective foreseeability is sufficient for murder as s. 213 does not even meet that standard. This takes us to s. 1 for the second phase of the constitutional inquiry.

Section 1

39 Finding that s. 213 of the *Criminal Code* infringes ss. 7 and 11(d) of the *Charter* does not end the inquiry on the constitutional validity of s. 213. Any or all of paras. (a) to (d) of s. 213 can still be upheld as a reasonable limit "demonstrably justified in a free and democratic society" under s. 1 of the *Charter*.

40 In this case and at this stage of the inquiry, we need only consider para. (d) of s. 213. The criteria to be assessed under s. 1 have been set out by this Court in several cases, particularly *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295, and *R. v. Oakes*, *supra*. First, the objective which the measures are designed to serve must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom" (*Big M Drug Mart*, *supra*, at p. 352). Through s. 213(d) of the *Code*, Parliament intended to deter the use or carrying of a weapon in the commission of certain offences, because of the increased risk of death. In my view, it is clear that this objective is sufficiently important.

41 In addition, the measures adopted must be reasonable and demonstrably justified. The measures adopted appear to be rationally connected to the objective: indiscriminately punishing for murder all those who cause a death by using or carrying a weapon, whether the death was intentional or accidental, might well be thought to discourage the use and the carrying of weapons. I believe, however, that the measures adopted would unduly impair the rights and freedoms in question (see *Big M Drug Mart*, *supra*, at p. 352). It is not necessary to convict of murder persons who did not intend or foresee the death and who could not even have foreseen the death in order to deter others from using or carrying weapons. If Parliament wishes to deter the use or carrying of weapons, it should punish the use or carrying of weapons. A good example of this is the minimum imprisonment for

using a firearm in the commission of an indictable offence under s. 83 of the *Criminal Code*. In any event, the conviction for manslaughter which would result instead of a conviction for murder is punishable by, from a day in jail, to confinement for life in a penitentiary. Very stiff sentences when weapons are involved in the commission of the crime of manslaughter would sufficiently deter the use or carrying of weapons in the commission of crimes. But stigmatizing the crime as murder unnecessarily impairs the *Charter* right.

42 In my view, therefore, s. 213(d) of the *Code* is not saved by s. 1.

Conclusion

43 As a result of the foregoing, I would answer the first constitutional question in the affirmative, as s. 213(d) violates both s. 7 and s. 11(d) of the *Charter*, and I would declare s. 213(d) of the *Criminal Code* to be of no force or effect. I would, for the reasons which I have given, decline to answer the second constitutional question. It follows that the appeal must be allowed, the appellant's conviction for murder set aside, and a new trial ordered.

The reasons of Beetz and Le Dain JJ. were delivered by

44 BEETZ J.--For the reasons given by Justice Lamer and Justice La Forest, I agree that s. 213(d) of the *Criminal Code* does not conform to the principles of fundamental justice entrenched in the *Canadian Charter of Rights and Freedoms* and cannot be saved under s. 1. I also agree with Lamer J. that s. 213(d) of the *Code* violates s. 11(d) of the *Charter* and cannot be justified under s. 1 of the *Charter*.

45 Given these conclusions, I do not find it necessary to decide whether there exists a principle of fundamental justice that a conviction for murder cannot rest on anything less than proof beyond a reasonable doubt of subjective foresight.

46 I would dispose of the appeal in the manner proposed by Lamer J. and answer the first constitutional question as he does. I would also decline to answer the second constitutional question.

The following are the reasons delivered by

47 MCINTYRE J. (dissenting)--I have had the advantage of reading the reasons for judgment in this appeal prepared by my colleague, Lamer J. I find myself unable to agree with his disposition of the appeal and, with the greatest respect for his view on the matter, I would dismiss the appeal and answer both constitutional questions in the negative.

48 My colleague has set out the facts of the case. They need not be repeated here. It is evident as well from his reasons that, save for the *Canadian Charter of Rights and Freedoms*, he is in agreement that the appellant would be properly convicted of murder under the combined effect of s. 21(2) and s. 213(d) of the *Criminal Code*. He would allow the appeal essentially on the basis that a conviction for murder which will result in the deprivation of liberty or security of the person of the accused can only be upheld if, in accordance with the terms of s. 7 of the *Charter*, it is procured in accordance with the principles of fundamental justice. While Parliament has the power to define the elements of a crime, in his view the courts must now review that definition to insure that it is in accordance with the principles of fundamental justice. These principles would require that there be no murder conviction without proof of a *mens rea* of at least objective foreseeability of death. Such foreseeability is not a necessary requirement under s. 213(d) of the *Code*.

49 I am not prepared to accept the proposition that s. 213(d) of the *Criminal Code* admits of a conviction for murder without proof of objective foreseeability of death or the likelihood of death, but in the view I take of this case it is not necessary to reach a firm conclusion on that point. The Crown sought the conviction of Vaillancourt on the basis of the interaction of s. 21(2) and s. 213(d) of the *Code*. For the Crown to succeed in such a

prosecution, it would be required to prove that the accused and another had formed an intention in common to carry out an unlawful purpose and to assist each other therein. In addition, in the circumstances of this case, the Crown would be required to prove that the appellant knew or ought to have known that his associate was armed with a pistol and would, if necessary, use it during the commission of the offence or the attempt to commit the offence, or during his flight after committing or attempting to commit the offence, and that as a consequence a death occurred: see *R. v. Munro and Munro* ~~reflex~~, (1983), 8 C.C.C. (3d) 260 (*per* Martin J.A.), at p. 301, and the pre-*Charter* case in *R. v. Trinneer*, 1970 CanLII 177 (SCC), [1970] S.C.R. 638.

50 It must be recognized at the outset that Parliament has decided that the possession and use of weapons, particularly firearms, in the course of the commission of offences is a gravely aggravating factor. Experience has shown that the presence of firearms leads to personal injury and loss of life. Parliament has chosen to term a killing arising in the circumstances described here as "murder". In *R. v. Munro and Munro*, *supra*, Martin J.A., speaking for the Ontario Court of Appeal (Arnup, Martin and Houlden JJ.A.), said this, at p. 293:

Under the provisions of s. 213(d) liability for murder attaches if death ensues as a consequence of the use of the weapon or as a consequence of the possession of a weapon which he has on his person. Manifestly, s. 213(d) is very stringent, but it is equally obvious that Parliament intended to create a stringent basis of liability where death ensued as a consequence of the use or possession of a weapon which the offender has upon his person during the commission or attempted commission of certain offences or the offender's flight after the commission or attempted commission of the offence. It is clear that Parliament intended to provide a strong deterrent to the carrying of weapons in the commission of certain crimes because of the high risk to life which experience has shown attends such conduct.

51 The principal complaint in this case is not that the accused should not have been convicted of a serious crime deserving of severe punishment, but simply that Parliament should not have chosen to call that crime "murder". No objection could be taken if Parliament classified the offence as manslaughter or a killing during the commission of an offence, or in some other manner. As I have observed before (see *R. v. Ancio*, [1984] 1 S.C.R. 225, at p. 251), while it may be illogical to characterize an unintentional killing as murder, no principle of fundamental justice is offended only because serious criminal conduct, involving the commission of a crime of violence resulting in the killing of a human being, is classified as murder and not in some other manner. As Martin J.A. said in *R. v. Munro and Munro*, *supra*, at p. 301:

This legislation has frequently been criticized as being harsh, but that is a matter for Parliament and not for the courts.

I would refer, as well, to the words found in A. W. Mewett and M. Manning, *Criminal Law* (2nd ed. 1985), at pp. 544-45:

Section 213 and the concept of constructive murder have been much criticized and, in fact, abolished in many jurisdictions. The criticism is that it imposes liability for murder in situations where death was not intended nor even, in some cases, foreseen. But murder is a legal concept; it does not have to be defined in terms of intentional killing, and even under s. 212 the definition is not this narrow. The policy behind s. 213 is to put the risk of killing a victim during the course of the commission of certain offences upon the offender to a higher degree than if it were merely classified as manslaughter. In any case, with the present distinction between murder punishable by death and murder punishable by life imprisonment now abolished, much of the criticism loses its force. It was the thought of someone being executed for a non-intended homicide that led to the feeling that the definition of murder should

somehow be limited to the old common law concept of "murder with malice aforethought".

52 As has been noted, the appellant's conviction is based on a combination of s. 21(2) and s. 213(d) of the *Criminal Code*. There was in this case evidence of active participation in the commission of the robbery, the underlying offence, and the terms of s. 21(2) were fully met. It must be accepted that the section gives expression to a principle of joint criminal liability long accepted and applied in the criminal law. I am unable to say upon what basis one could exempt conduct which attracts criminal liability, under s. 213 of the *Criminal Code*, from the application of that principle. In *R. v. Munro and Munro, supra*, Martin J.A. said, at p. 301:

Patently, Parliament has decided that the carrying of weapons during the commission of certain crimes, such as robbery, so manifestly endangers the lives of others, that one who joins a common purpose to commit one of the specified offences and who knows or ought to know that his accomplice has upon his person a weapon which he will use if needed, must bear the risk if death, in fact, ensues as a consequence of the use or possession of the weapon during the commission of one of the specified offences or during the flight of the offender after the commission or attempted commission of the underlying offence . . .

In my view, Martin J.A. has stated the policy considerations which have motivated Parliament in this connection and I would not interfere with the Parliamentary decision. I would, therefore, dismiss the appeal and answer the two constitutional questions in the negative.

The following are the reasons delivered by

53 LA FOREST J.--I have had the advantage of reading the judgment of Lamer J. and would dispose of the appeal in the manner proposed by him. I am in agreement with him that because of the stigma attached to a conviction for murder, the principles of fundamental justice require a *mens rea* reflecting the particular nature of that crime, namely one referable to causing death. In addition to the intention to cause death, this can include a closely related intention such as intention to cause bodily harm likely to result in death combined with recklessness as to that result. Whether and how much further the intention can be extended it is not necessary to explore for the purposes of this case. It is sufficient to say that the mental element required by s. 213(d) of the *Criminal Code* is so remote from the intention specific to murder (which intention is what gives rise to the stigma attached to a conviction for that crime) that a conviction under that paragraph violates fundamental justice. All the provision requires is an intention to commit another crime and to possess a weapon while carrying out this intention or in fleeing afterwards. The provision is so broad that under it a person may be found guilty of murder even though the death was the result of an accident. This occurred in *Rowe v. The King*, 1951 CanLII 7 (SCC), [1951] S.C.R. 713, and more extreme examples can easily be imagined. The section is thus not only remote from the *mens rea* specific to murder, but even removes its *actus reus* as traditionally defined; see I. Grant and A. W. MacKay, "Constructive Murder and the Charter: In Search of Principle" (1987), 25 *Alta. L. Rev.* 129.

54 As my colleague notes, the objective of discouraging the use of weapons in the commission of crimes can be achieved by means other than attaching the stigma of a conviction for murder to a person who has caused death in the circumstances like those described in the provision.

Appeal allowed and new trial ordered, MCINTYRE J. dissenting.

Solicitor for the appellant: Michel Marchand, Montréal.

Solicitor for the respondent: Bernard Laprade, Montréal.

Solicitor for the intervener: The Ministry of the Attorney General, Toronto.

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ATTACHMENT B

R. v. Martineau, [1990] 2 SCR633



R. v. Martineau, [1990] 2 SCR 633

Date: 1990-09-13
Docket: 21122
Parallel citations: 1990 CanLII 80 (SCC); [1990] 6
WWR 97; 58 CCC (3d) 353; 79 CR
(3d) 129; 50 CRR 110; 76 Alta LR
(2d) 1
URL: <http://canlii.ca/t/1fssd>
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(SCC), [1990] 2 SCR 633,
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R. v. Martineau, [1990] 2 S.C.R. 633

Her Majesty The Queen *Appellant*

v.

Roderick Russell Martineau

Respondent

and

**The Attorney General of Canada,
the Attorney General for Ontario,
the Attorney General of Quebec,
the Attorney General of Manitoba and
the Attorney General of British Columbia**

Interveners

indexed as: r. v. martineau

File No.: 21122.

1990: March 26; 1990: September 13.

Present: Dickson C.J.* and Lamer C.J.** and Wilson, L'Heureux-Dubé, Sopinka, Gonthier and Cory JJ.

on appeal from the court of appeal for alberta

Constitutional law -- Charter of Rights -- Fundamental justice -- Constructive murder -- Whether s. 213(a) of the Criminal Code violates ss. 7 or 11(d) of the Charter -- If so, whether such violation justified under s. 1 of the Charter -- Criminal Code, R.S.C. 1970, c. C-34, s. 213(a), (d) -- Canadian Charter of Rights and Freedoms, ss. 1, 7, 11(d).

Criminal law -- Constructive murder -- Whether s. 213(a) of the Criminal Code violates ss. 7 or 11(d) of the Charter -- If so, whether such violation justified under s. 1 of the Charter.

Martineau and a friend, Tremblay, set out armed knowing that they were going to commit a crime; Martineau testified that he thought it would only be a break and enter. Tremblay shot and killed two people after robbing them and their house. Martineau allegedly said or thought, after he heard the shot which killed the first victim, "Lady, say your prayers". As they left, Martineau asked Tremblay why he killed them and Tremblay answered, "They saw our faces". Martineau responded, "But they couldn't see mine 'cause I had a mask on".

Respondent was convicted of second degree murder. The trial judge charged the jury on s. 213(a) and (d) and on s. 21(1) and (2) of the *Criminal Code*. The Court of Appeal held that s. 213(a) was inconsistent with ss. 7 and 11(d) of the *Charter* for reasons given in *R. v. Vaillancourt* and that it was not saved by s. 1 of the *Charter*. The Court could not conclude that a conviction should be entered pursuant to s. 613(1)(b)(iii) of the *Code* because the jury had not been instructed on any portion of s. 212.

The constitutional questions queried whether s. 213(a) of the *Criminal Code* infringed s. 7 and/or s. 11(d) of the *Charter*, and if so, whether or not it was justified by s. 1.

Held (L'Heureux-Dubé J. dissenting): The appeal should be dismissed. Section 213(a) of the *Criminal Code* infringes both ss. 7 and 11(d) of the *Charter* and is not justified by s. 1.

Per Dickson C.J. and Lamer C.J. and Wilson, Gonthier and Cory JJ.: The principles of fundamental justice require that a conviction for murder be based upon proof beyond a reasonable doubt of subjective foresight of death. This appeal was disposed of on the basis of the principle of subjective foresight of death, even though it could have been disposed of on the basis of objective foreseeability.

The introductory paragraph of s. 213(a) expressly removes the Crown's burden of proving beyond a reasonable doubt that the accused had subjective foresight of death. This section is an anomaly as regards the other murder provisions, especially in light of the common law presumption against convicting a person of a true crime without proof of intent or recklessness. In a free and democratic society that values the autonomy and free will of the individual, the stigma and punishment attaching to murder should be reserved for those who choose intentionally to cause death or who choose to inflict bodily harm knowing that it is likely to cause death. Requiring subjective foresight of death in the context of murder maintains a proportionality between the stigma and punishment attached to a murder conviction and the moral blameworthiness of the offender.

A special mental element with respect to death is necessary before a culpable homicide can be treated as murder and gives rise to the moral blameworthiness that justifies the stigma and punishment attaching to a murder conviction. It is a principle of fundamental justice that a conviction for murder cannot rest on anything less than proof beyond a reasonable doubt of subjective foresight of death. Section 213 of the *Code* expressly eliminates the requirement for proof of subjective foresight and therefore infringes ss. 7 and 11(d) of the *Charter*.

The objective of deterring the infliction of bodily harm during the commission of certain offences because of the increased risk of death is sufficiently important to warrant overriding a *Charter* right. The section, however, unduly impairs *Charter* rights because it is not necessary to convict of murder persons who do not intend or foresee the death in order to achieve this objective.

Since subjective foresight of death must be proven beyond a reasonable doubt before a conviction for murder can be sustained, the phrase "ought to know is likely to cause death" in s. 212(c) of the *Code* probably infringes ss. 7 and 11(d) of the *Charter*. Section 212(c) would not likely be saved by s. 1.

Per Sopinka J.: The issue of subjective foresight of death should be addressed only if it is necessary to do so in order to decide this case or if there is an overriding reason making it desirable to do so. Overbroad statements of principle are inimical to the tradition of incremental development of the common law. Here, ruling on the issue of subjective foresight was not necessary for the disposition of this case because *R. v. Vaillancourt*, 1987 CanLII 2 (SCC), [1987] 2 S.C.R. 636, applied. Since objective foreseeability of death is a constitutional minimum for the definition of murder, the conclusion must follow that s. 213(a) does not meet this constitutional minimum. This section places a restriction on s. 7 of the *Charter* by permitting a person to be convicted of murder without proof beyond a reasonable doubt of objective foreseeability of death, or of an equivalent substitute

requirement, and cannot be saved by s. 1 for the reasons expressed by Lamer J., as he then was, in *Vaillancourt* and in the case at bar.

Per L'Heureux-Dubé J. (dissenting): Section 213(a) does not offend the principles of fundamental justice and accordingly does not violate ss. 7 and 11(d) of the *Charter*.

Neither the subjective foresight of death test nor the objective foreseeability test violate the principle of fundamental justice. It has been decided in a number of cases, including *R. v. Vaillancourt*, that subjective foresight of death is not the exclusive standard for murder and no other common law jurisdiction has adopted that standard as the exclusive standard for murder. Significant policy considerations favour upholding the existing legislation.

The invocation of s. 213(a) may not have been necessary in the instant case. The statement, "Lady, say your prayers", whether it was actually said or thought, reflected a mental state of mind sufficient to anchor a charge under s. 212(a) which is the only truly subjective foresight murder provision of the *Criminal Code*.

The tests of subjective foresight and objective foreseeability are not static or distinct concepts and are not mutually exclusive. In most instances, and certainly those delineated by s. 213(a), death will be both objectively and subjectively foreseeable. The two are profoundly interrelated, especially when dealing with a crime committed during the execution of a predicate crime. The validity of a provision should not be evaluated on a strict "either-or" approach. A fastidious adherence to prescribed labels becomes particularly obdurate when gauging the constitutionality of legislation.

Vaillancourt settled only two legal questions. First, it established a standard of objective foreseeability of death for the crime of murder. Second, it only disposed of s. 213(d) of the *Criminal Code*.

The legislature, rather than simply eliminating any need to prove the essential element, may substitute proof of a different element. This will be constitutionally valid only if, upon proof beyond reasonable doubt of the substituted element, it would be unreasonable for the trier of fact not to be satisfied beyond reasonable doubt of the existence of the essential element. Section 213(d) could not meet that test; s. 213(a) does. Section 213(a) is completely different in its historical development in its consistency with the objective foreseeability of death test established in *R. v. Vaillancourt* and in the parallel provisions adopted in other common law jurisdictions.

An exacting combination of factors must be proven, all beyond a reasonable doubt, before the accused can be found guilty of murder under s. 213(a). The offender must: (1) cause the death by committing a "culpable homicide"; (2) cause the death while committing or attempting to commit one of a limited number of very serious, inherently dangerous and specific intent crimes; (3) intentionally inflict bodily harm while committing one of these offences; (4) inflict the bodily harm purposefully in order to perpetrate the underlying crime or to facilitate escape; and (5) the death must ensue from the bodily harm intentionally inflicted.

No *Charter* violation of ss. 7 or 11(d) takes place if the test of objective foreseeability has been met. The accused must specifically intend to, and actually commit the underlying offence, and must specifically intend to, and actually inflict bodily harm. The law necessitates conclusive proof beyond a reasonable doubt of factors that are collectively tantamount to an objective foreseeability requirement. The inexorable conclusion is that the resulting death is objectively foreseeable. Neither the presumption of innocence nor the other reference provisions which give content and scope to s. 7 are impugned.

How harm or injury is to be defined and what level of harm or injury is required are matters for Parliament to consider and decide. Many factors enter into the determination of an appropriate penalty for a particular offence; the degree of blameworthiness is only one. So long as Parliament does not act irrationally or arbitrarily or in a manner otherwise inconsistent with the fundamental principles of justice, its choice must be upheld.

Concentration on social "stigma" is overemphasized, and in the great majority of cases, completely inapplicable. The "stigma" and punishment attached to murder need not be proportionate to the *mens*

rea alone. Rather they must correspond to the combination of the physical and mental elements that collectively define a murder.

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By Lamer C.J.

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By Sopinka J.

Applied: *R. v. Vaillancourt*, 1987 CanLII 2 (SCC), [1987] 2 S.C.R. 636.

By L'Heureux-Dubé J. (dissenting)

R. v. Rodney, [1990] 2 S.C.R. 000; *R. v. Logan*, [1990] 2 S.C.R. 000; *R. v. Arkell*, [1990] 2 S.C.R. 000, affg 1988 CanLII 3126 (BC CA), (1988), 43 C.C.C. (3d) 402; *R. v. Luxton*, [1990] 2 S.C.R. 000; *R. v. Vaillancourt*, 1987 CanLII 2 (SCC), [1987] 2 S.C.R. 636; *R. v. Munro and Munro* ¶reflex, (1983), 8 C.C.C. (3d) 260; *R. v. Hughes* (1942), 78 C.C.C. 257; *R. v. Ashman* (1858), 1 F. & F. 88, 175 E.R. 638; *R. v. Archibald* (1898), 4 C.C.C. 159; *R. v. Bottrell* 1981 CanLII 352 (BC CA), (1981), 60 C.C.C. (2d) 211; *R. v. Marshall* (1987), 26 A. Crim. R. 259; *R. v. Van Beelen* (1973), 4 S.A.S.R. 353; *Tison v. Arizona*, 107 S.Ct. 1676 (1987); *Gregg v. Georgia*, 428 U.S. 153 (1976); *People v. Rose*, 227 Cal. Rep. 570 (1986); *R. v. Edwards Books and Art Ltd.*, 1986 CanLII 12 (SCC), [1986] 2 S.C.R. 713; *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927; *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486; *R. v. Smith*, 1987 CanLII 64 (SCC), [1987] 1 S.C.R. 1045; *R. v. Guiller*, Ont. Dist. Ct., Sept. 23, 1985, unreported.

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- APPEAL from a judgment of the Alberta Court of Appeal 1988 ABCA 274 (CanLII), (1988), 61 Alta. L.R. (2d) 264, 89 A.R. 162, 43 C.C.C. (3d) 417, [1988] 6 W.W.R. 385, allowing the respondent's appeal from a conviction on a charge of second degree murder by Foisy J. sitting with jury. Appeal dismissed, L'Heureux-Dubé J. dissenting.
- Jack Watson, for the appellant.
- Philip Lister and Sheila Schumacher, for the respondent.
- Bruce MacFarlane, Q.C. and Don Avison, for the intervener the Attorney General of Canada.

W. J. Blacklock and Ken Campbell, for the intervener the Attorney General for Ontario.

Jacques Gauvin, for the intervener the Attorney General of Quebec.

J. G. Dangerfield, Q.C., and Marva J. Smith, for the intervener the Attorney General of Manitoba.

James D. Taylor, for the intervener the Attorney General of British Columbia.

//Lamer C.J.//

The judgment of Dickson C.J and Lamer C.J. and Wilson, Gonthier and Cory JJ. was delivered by

LAMER C.J. -- This is the first of a series of appeals that raises the constitutionality of s. 213(a) of the *Criminal Code*, R.S.C. 1970, c. C-34, (now s. 230(a), *Criminal Code*, R.S.C., 1985, c. C-46). The appeal arises as a result of the application to s. 213(a) by the Alberta Court of Appeal of this Court's decision in *R. v. Vaillancourt*, 1987 CanLII 2 (SCC), [1987] 2 S.C.R. 636, in which s. 213(d) of the *Criminal Code* was declared of no force or effect because it infringed ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*, and could not be saved by s. 1 of the *Charter*.

Facts

The facts of this case are not central to the disposition of this appeal, and therefore, may be briefly summarized as follows. On February 7, 1985 the bodies of James McLean and Ann McLean were found in the bathroom of their home, a trailer, in Valleyview, Alberta. A police investigation led to Martineau and one Patrick Tremblay. Martineau, who was fifteen at the time, was charged with both murders and was transferred to adult court.

Martineau was tried by a judge and jury starting on September 12, 1985. Thirty witnesses gave evidence including the accused. The evidence revealed that Martineau and his friend, Tremblay, had set out one evening armed with a pellet pistol and rifle respectively. Martineau testified that he knew that they were going to commit a crime, but that he thought it would only be a "b and e". After robbing the trailer and its occupants, Martineau's friend Tremblay shot and killed the McLeans.

As they left the trailer, Martineau asked Tremblay why he killed them and Tremblay answered, "they saw our faces". Martineau responded, "But they couldn't see mine 'cause I had a mask on". They drove James McLean's car to Grande Prairie where they abandoned it. The respondent was convicted of second degree murder. The trial judge charged the jury on s. 213(a) and (d) of the *Criminal Code* and on s. 21(1) and (2) of the *Criminal Code*.

Judgment Below

Alberta Court of Appeal 1988 ABCA 274 (CanLII), (1988), 61 Alta. L.R. (2d) 264

The respondent's appeal was first heard in September of 1987 on grounds relating to the trial judge's charge to the jury. After the decision of this Court in *Vaillancourt*, a re-hearing was ordered before a five-person panel of the Court of Appeal. The Court of Appeal held that, given the law as it then stood, the charge to the jury could not be criticized. The Court then considered the impact of *Vaillancourt*, and stated the following interpretation of that case, at p. 274:

The effect of these passages [from *Vaillancourt*], in my view, is to emphasize that s. 213(d) offends the Charter, not because Parliament lacks the constitutional power to create a crime, an element of which is unforeseen or unforeseeable death, but because in this case three other factors were present. First, Parliament chose to label the crime as murder. Second, it imposed the same punishment as that provided for an intentional killing. Third, and perhaps most important, that punishment is mandatory life imprisonment, as severe a punishment as is available in Canadian law. The combined effect of these three factors was to proclaim that an unforeseen and unforeseeable killing was the moral equal of an intended killing, a proposition so inaccurate as to be unjust.

The Court of Appeal then drew the following conclusion, at pp. 277-78:

In my opinion, s. 213(a) of the Criminal Code must be held to be inconsistent with ss. 7 and 11(d) of the Charter for the reasons given in *Vaillancourt* with respect to s. 213(d). The section is not restricted to situations where there was an intention to inflict an injury of a life threatening nature. An accused person may find himself within the ambit of s. 213 (a) even though he did not foresee, and could not reasonably have foreseen, that death would likely result from the injury which he intended to inflict.

The Court went on to hold that the section could not be saved by s. 1 of the Charter. Since the jury was not instructed on any portion of s. 212 of the Criminal Code, the Court could not conclude that a conviction should be entered pursuant to s. 613(1)(b)(iii) of the Code. The Court quashed the convictions and ordered a new trial.

Legislation

Criminal Code, R.S.C. 1970, c. C-34, s. 213(a)

213. Culpable homicide is murder where a person causes the death of a human being while committing or attempting to commit high treason or treason or an offence mentioned in section 52 (sabotage), 76 (piratical acts), 76.1 (hijacking an aircraft), 132 or subsection 133(1) or sections 134 to 136 (escape or rescue from prison or lawful custody), section 246 (assaulting a police officer), section 246.1 (sexual assault), 246.2 (sexual assault with a weapon, threats to a third party or causing bodily harm), 246.3 (aggravated sexual assault), 247 (kidnapping and forcible confinement), 302 (robbery), 306 (breaking and entering) or 389 or 390 (arson), whether or not the person means to cause death to any human being and whether or not he knows that death is likely to be caused to any human being, if

- (a) he means to cause bodily harm for the purpose of
 - (i) facilitating the commission of the offence, or
 - (ii) facilitating his flight after committing or attempting to commit the offence,
- and the death ensues from the bodily harm;

Issues

The following constitutional questions were stated by Chief Justice Dickson:

1. Does s. 213(a) of the *Criminal Code* infringe or deny the rights or freedoms guaranteed by s. 7 and/or s. 11(d) of the *Canadian Charter of Rights and Freedoms*?
2. If the answer to question 1 is affirmative, is s. 213(a) justified by s. 1 of the *Canadian Charter of Rights and Freedoms*, and therefore not inconsistent with the *Constitution Act, 1982*?

Analysis

Parliament, of course, decides what a crime is to be, and has the power to define the elements of a crime. With the advent of the Charter in 1982, Parliament also has, however, directed the courts to review those definitions to ensure that they are in accordance with the principles of fundamental justice. We, as a Court, would be remiss not to heed this command of Parliament. This is an unassailable proposition since the decision of Parliament to entrench into our constitutional framework a Charter of Rights and Freedoms and also the principle that the Constitution is the supreme law of the land. Since 1982, this Court has consistently assumed its duty to measure the content of legislation against the guarantees in our Charter designed to protect individual rights and freedoms. See for example *Singh v. Minister of Employment and Immigration*, 1985 CanLII 65 (SCC), [1985] 1 S.C.R. 177; *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486; and *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103.

In *R. v. Vaillancourt*, *supra*, s. 213(d) of the *Criminal Code* was declared of no force or effect because it violated ss. 7 and 11(d) of the *Charter*. The ratio of *Vaillancourt*, strictly speaking, was that it is a principle of fundamental justice that before a person could be convicted of murder there must be proof beyond a reasonable doubt of at least objective foreseeability of death. The impugned section in that case did not accord with this principle because it would be possible for a conviction for murder to occur under s. 213(d) despite the jury's having a reasonable doubt as to whether the accused ought to have known that death was likely to ensue.

In *Vaillancourt* I analyzed a number of matters, including s. 213 of the *Code* in the context of the other murder provisions, the historical development of s. 213, felony murder provisions in other jurisdictions, the essential elements of certain crimes at common law, and the principles of fundamental justice under the *Charter* and their application to s. 213 of the *Code*. As a result of this analysis I concluded that objective foreseeability of death was the minimum threshold test before a conviction for murder could be sustained. I went on to state, however, that it was my view that the principles of fundamental justice require more; they demand that a conviction for murder requires proof beyond a reasonable doubt of subjective foresight of death. The Chief Justice, Estey and Wilson JJ. agreed with that position. I am still of that view today, and indeed, while I agree with the Alberta Court of Appeal and could dispose of this appeal on the basis of objective foreseeability, it is on the basis of the principle of subjective foresight of death that I choose to dispose of this appeal. I choose this route because I would not want this case, a very serious matter, to return to this Court once again on the grounds that there is some doubt as to the validity of the portion of s. 212(c) of the *Code* that allows for a conviction for murder if the accused "ought to know" that death is likely to result. I need not, therefore, repeat the analysis from *Vaillancourt* here, except to add some brief observations as regards s. 213(a) and the principle of fundamental justice that subjective foresight of death is required before a conviction for murder can be sustained.

Section 213(a) of the *Code* defines culpable homicide as murder where a person causes the death of a human being while committing or attempting to commit a range of listed offences, whether or not the person means to cause death or whether or not he or she knows that death is likely to ensue if that person means to cause bodily harm for the purpose of facilitating the commission of the offence or flight after committing or attempting to commit the offence. The introductory paragraph of the section, therefore, expressly removes from the Crown the burden of proving beyond a reasonable doubt that the accused had subjective foresight of death. This section stands as an anomaly as regards the other murder provisions, especially in light of the common law presumption against convicting a person of a true crime without proof of intent or recklessness: *R. v. Sault Ste. Marie*, 1978 CanLII 11 (SCC), [1978] 2 S.C.R. 1299, at pp. 1309-10, *per* Dickson J., as he then was.

A conviction for murder carries with it the most severe stigma and punishment of any crime in our society. The principles of fundamental justice require, because of the special nature of the stigma attached to a conviction for murder, and the available penalties, a *mens rea* reflecting the particular nature of that crime. The effect of s. 213 is to violate the principle that punishment must be proportionate to the moral blameworthiness of the offender, or as Professor Hart puts it in *Punishment and Responsibility* (1968), at p. 162, the fundamental principle of a morally based system of law that those causing harm intentionally be punished more severely than those causing harm unintentionally. The rationale underlying the principle that subjective foresight of death is required before a person is labelled and punished as a murderer is linked to the more general principle that criminal liability for a particular result is not justified except where the actor possesses a culpable mental state in respect of that result: see *R. v. Bernard*, 1988 CanLII 22 (SCC), [1988] 2 S.C.R. 833, *per* McIntyre J., and *R. v. Buzzanga and Durocher*, *reflex*, (1979), 49 C.C.C. (2d) 369 (Ont. C.A.), *per* Martin J.A. In my view, in a free and democratic society that values the autonomy and free will of the individual, the stigma and punishment attaching to the most serious of crimes, murder, should be reserved for those who choose to intentionally cause death or who choose to inflict bodily harm that they know is likely to cause death. The essential role of requiring subjective foresight of death in the context of murder is to maintain a proportionality between the stigma and punishment attached to a murder conviction and the moral blameworthiness of the offender. Murder has long been recognized as the "worst" and most heinous of peace time crimes. It is, therefore, essential that to satisfy the principles of fundamental justice, the stigma and punishment attaching to a murder conviction must be reserved for those who either intend to cause death or who intend to cause bodily harm that they know will likely cause death. In this regard, I refer to the following works as support for my position, in addition to those cited in *Vaillancourt*: Cross, "The Mental Element in Crime" (1967), 83 L.Q.R. 215; Ashworth, "The Elasticity of *Mens Rea*," in *Crime, Proof and*

Punishment (1981); Williams, *The Mental Element in Crime* (1965); and Williams, "Convictions and Fair Labelling", [1983] 42 C.L.J. 85.

In sum then, I am of the view that a special mental element with respect to death is necessary before a culpable homicide can be treated as murder. That special mental element gives rise to the moral blameworthiness that justifies the stigma and punishment attaching to a murder conviction. For all the foregoing reasons, and for the reasons stated in *Vaillancourt*, I conclude that it is a principle of fundamental justice that a conviction for murder cannot rest on anything less than proof beyond a reasonable doubt of subjective foresight of death. That was my position when *Vaillancourt* was decided, and that is my position today. Therefore, since s. 213 of the *Code* expressly eliminates the requirement for proof of subjective foresight, it infringes ss. 7 and 11(d) of the *Charter*.

As regards s. 1 of the *Charter*, there is no doubt that the objective of deterring the infliction of bodily harm during the commission of certain offences because of the increased risk of death is of sufficient importance to warrant overriding a *Charter* right. Further, indiscriminately punishing for murder all those who cause death irrespective of whether they intended to cause death might well be thought to discourage the infliction of bodily harm during the commission of certain offences because of the increased risk of death. But it is not necessary in order to achieve this objective to convict of murder persons who do not intend or foresee the death. In this regard the section unduly impairs the *Charter* rights. If Parliament wishes to deter persons from causing bodily harm during certain offences, then it should punish persons for causing the bodily harm. Indeed, the conviction for manslaughter that would result instead of a conviction for murder is punishable by, from a day in jail to confinement for life. Very stiff sentences for the infliction of bodily harm leading to death in appropriate cases would sufficiently meet any deterrence objective that Parliament might have in mind. The more flexible sentencing scheme under a conviction for manslaughter is in accord with the principle that punishment be meted out with regard to the level of moral blameworthiness of the offender. To label and punish a person as a murderer who did not intend or foresee death unnecessarily stigmatizes and punishes those whose moral blameworthiness is not that of a murderer, and thereby unnecessarily impairs the rights guaranteed by ss. 7 and 11(d) of the *Charter*. In my view then, s. 213(a), indeed all of s. 213, cannot be saved by s. 1 of the *Charter*.

The fact that I have based my reasons on the principle of subjective foresight casts serious if not fatal doubt on the constitutionality of part of s. 212(c) of the *Code*, specifically the words "ought to know is likely to cause death". The validity of s. 212(c) of the *Code* has not been directly attacked in this appeal, but the Court has had the benefit of hearing argument from the Attorney General of Canada and from the Attorneys General for Alberta, British Columbia, Ontario, Quebec, and Manitoba, who chose to intervene, on the issue of whether subjective foresight or objective foreseeability of death is the constitutionally required minimum *mens rea* for murder. In my view, subjective foresight of death must be proven beyond a reasonable doubt before a conviction for murder can be sustained, and as a result, it is obvious the part of s. 212(c) of the *Code* allowing for a conviction upon proof that the accused ought to have known that death was likely to result violates ss. 7 and 11(d) of the *Charter*. I find further support for this view in the following passage from Professor Stuart's treatise *Canadian Criminal Law* (2nd ed. 1987), at pp. 217-18, dealing specifically with the objective element of s. 212(c) of the *Code* and the principle of subjective foresight:

This is a clear instance where our legislation has not kept up with developments in other jurisdictions. We have seen that a similar objective test for murder resorted to by the House of Lords in the notorious decision in *Director of Public Prosecutions v. Smith* (1960) [[1961] A.C. 290 [1960] 3 All E.R. 161 (H.L.)] was rejected by the British Legislature and by the Australian High Court. Very few jurisdictions, including those in the United States, resort to anything but the subjective approach in defining murder. The only direct parallels to our section 212(c) are to be found in the codes of Queensland, Tasmania, and New Zealand. The wording in these provisions is almost identical to ours except that in New Zealand the words "or ought to have known" were deleted as a result of a quick and firm rejection of *Smith*. The New Zealand section now reads in part:

... if the offender for any unlawful object does an act that he knows to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting anyone.

Indeed, Lord Goff in his article "The Mental Element in the Crime of Murder" (1988), 104 L.Q.R. 30, at p. 36, had this to say about the *Smith* decision and about objective foreseeability as a test for murder:

This decision was very much criticised, by judge and jurist alike. What they disliked about it was that it imposed an objective instead of a subjective test for ascertaining the existence of the relevant mental element for the crime of murder. In due course, it was reversed by statute; later, on an appeal from a jurisdiction where that statute did not apply at the relevant time, *Smith* was, in effect, held by the Judicial Committee of the Privy Council to have been wrongly decided (see *Frankland and Moore v. R.*), [1987] 2 W.L.R. 1251. So the objective test was never part of the common law, properly understood; and we can now forget about it. [Emphasis added.]

Although it would be open to save that part of s. 212(c) unders. 1 of the *Charter*, it seems to me that the attempt would fail for the reasons I have given in respect of the attempt to similarly save s. 213 of the *Code*. I would therefore answer the constitutional questions as follows:

Q: Does s. 213(a) of the *Criminal Code* infringe or deny the rights or freedoms guaranteed by s. 7 and/or s. 11(d) of the *Canadian Charter of Rights and Freedoms*?

A: Yes, the section infringes both ss. 7 and 11(d) of the *Charter*.

Q: If the answer to question 1 is affirmative, is s. 213(a) justified by s. 1 of the *Canadian Charter of Rights and Freedoms*, and therefore not inconsistent with the *Constitution Act, 1982*?

A: No.

The only remaining issue is the potential application of s. 613(1)(b)(iii) (now s. 686(1)(b)(iii)) of the *Criminal Code*. The Court of Appeal for Alberta declined to invoke the section and enter a conviction for the following reason, at p. 279:

The jury in this case was not instructed on any portion of s. 212. I am unable to say that a properly instructed jury must necessarily have found that the appellant had, at some point, the requisite intention under that section rather than being carried along by events.

I agree. In the present case, the respondent was convicted pursuant to a combination of ss. 213 and 21 of the *Code*. Since in this case the jury was left only with s. 213 which has been declared to be inoperative, a new trial must be ordered. Accordingly, the Court of Appeal's decision quashing the convictions and directing a new trial is affirmed. The appeal is, therefore, dismissed.

//L'Heureux-Dubé J.//

The following are the reasons delivered by

L'HEUREUX-DUBÉ J. (dissenting) -- I have had the opportunity of reading the reasons of Chief Justice Lamer, and with respect, I must dissent. I fully agree with my colleague's characterization, at p. 000, of this Court's "duty to measure the content of legislation against the guarantees in our *Charter* designed to protect individual rights and freedoms" while however, in my view, the *Canadian Charter of Rights and Freedoms* is not impermeable to the rights of the collectivity. I also heartily concur with my colleague's assertion that this Court is directed to review, when challenged, Parliament's definitions of the elements of a crime to ensure that they are in accordance with fundamental justice. In my view, however, this Court must stop short of effectively legislating on its own. The question should not be what is the "best" test, but rather what is a constitutionally valid test.

The following constitutional questions were stated by Chief Justice Dickson:

1. Does s. 213(a) [nows. 230(a)] of the *Criminal Code* infringe or deny the rights or freedoms guaranteed by s. 7 and/or s. 11(d) of the *Canadian Charter of Rights and Freedoms*?
2. If the answer to question 1 is affirmative, is s. 213(a) justified by s. 1 of the *Canadian Charter of Rights and Freedoms*, and therefore not inconsistent with the *Constitution Act, 1982*?

The same constitutional questions were stated in *R. v. Rodney*, [1990] 2 S.C.R. 000, heard concurrently, judgment also rendered concurrently. *R. v. Logan*, [1990] 2 S.C.R. 000, *R. v. Arkeil*, [1990] 2 S.C.R. 000 and *R. v. Luxton*, [1990] 2 S.C.R. 000, were also heard and are released concurrently with this appeal. *Logan* deals with the constitutionality of s. 21(2) of the *Criminal Code*, R.S.C. 1970, c. C-34, *Arkeil* with s. 214(5) of the *Criminal Code*, and *Luxton* with s. 214(5)(e) of the *Criminal Code*. The latter two appeals also raise the constitutionality of s. 213(a) of the *Criminal Code*, which is the focus of the present appeal.

Section 213 of the *Criminal Code* reads as follows:

213. Culpable homicide is murder where a person causes the death of a human being while committing or attempting to commit high treason or treason or an offence mentioned in section 52 (sabotage), 76 (piratical acts), 76.1 (hijacking an aircraft), 132 or subsection 133(1) or sections 134 to 136 (escape or rescue from prison or lawful custody), section 246 (assaulting a peace officer), section 246.1 (sexual assault), 246.2 (sexual assault with a weapon, threats to a third party or causing bodily harm), 246.3 (aggravated sexual assault), 247 (kidnapping and forcible confinement), 302 (robbery), 306 (breaking and entering) or 389 or 390 (arson), whether or not the person means to cause death to any human being and whether or not he knows that death is likely to be caused to any human being, if

- (a) he means to cause bodily harm for the purpose of
 - (i) facilitating the commission of the offence, or
 - (ii) facilitating his flight after committing or attempting to commit the offence,and the death ensues from the bodily harm;
- (b) he administers a stupefying or overpowering thing for a purpose mentioned in paragraph (a), and the death ensues therefrom;
- (c) he wilfully stops, by any means, the breath of a human being for a purpose mentioned in paragraph (a), and the death ensues therefrom; or
- (d) he uses a weapon or has it upon his person
 - (i) during or at the time he commits or attempts to commit the offence, or
 - (ii) during or at the time of his flight after committing or attempting to commit the offence,and the death ensues as a consequence.

My colleague concludes that s. 213(a) is unconstitutional because it violates ss. 7 and 11(d) of the *Charter* and cannot be saved by s. 1. In his opinion, the principles of fundamental justice demand that subjective foresight of death be proven beyond a reasonable doubt before a conviction for murder can be secured. I reach a contrary conclusion on the basis that subjective foresight is not the only appropriate standard that can be applied to conform to ss. 7 and 11(d) of the *Charter*. My reasons are as follows: the test of objective foreseeability of death for the crime of murder does not offend the principles of fundamental justice; this Court's decisions, including *R. v. Vaillancourt*, 1987 CanLII 2 (SCC), [1987] 2 S.C.R. 636, do not commend such a result; the exclusive standard of subjective foresight of death for the crime of murder has found no parallel in other common law

jurisdictions; and there are significant policy considerations in favour of upholding the existing legislation.

Before discussing the substantive legal issues, I wish to recall the particular facts of this case. Martineau and a friend, Tremblay, had set out one evening armed with a pellet pistol and rifle. Martineau had the pellet pistol and Tremblay had the rifle. Martineau's testimony is unclear as to when he first saw the rifle. Martineau testified that he knew that they were going to commit a crime which he thought would be a "b & e" (breaking and entering, which is one of the predicate crimes mentioned in s. 213). They forced their way into a trailer and Martineau put a quilt over the occupant, James McLean's head, and Tremblay tied his hands. The female occupant, Ann McLean, then came home and was similarly covered and bound. Martineau testified that as soon as he heard the first shot, he realized that James McLean had been shot. He then either said, or thought, "Lady, say your prayers". He did nothing to stop his friend from proceeding further. Ann McLean was then shot and killed by Tremblay. During cross-examination, Martineau admitted that he knew James McLean had been shot before Ann McLean was shot.

Martineau's testimony did not account for some of the physical evidence in the trailer. There were bullet casings from the rifle and bullet holes showing that it had been fired more often than recounted by Martineau. There was also evidence that there were pools of blood in three rooms of the trailer and that the man had suffered a protracted beating prior to his death and was also probably dragged about.

In the trial judge's charge to the jury both s. 213(a) and (d) were reviewed and the jury was informed that if the Crown could prove the accused was a party then he would be just as guilty as if he had pulled the trigger. After explaining the meaning of aiding and abetting the trial judge proposed to the jury that they proceed in the following sequence: First, consider whether the Crown had proven guilt beyond a reasonable doubt, based upon s. 21(1)(b) and (c), and s. 213(d), with respect to both counts of murder; next, if the Crown's case did not meet that test, they were to consider s. 21(2) as it related to s. 213(d) on both counts; finally, if the Crown did not meet this onus, they were to consider s. 21(1)(a) and (b) in conjunction with s. 213(a), as they related only to the death of the female occupant, Ann McLean. The accused was convicted of two counts of second degree murder.

While s. 21 of the *Criminal Code* was included in the charge to the jury, its constitutionality is not at issue in this appeal. Section 21 reads:

21. (1) Every one is a party to an offence who

(a) actually commits it,

(b) does or omits to do anything for the purpose of aiding any person to commit it; or

(c) abets any person in committing it.

(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

The accused's appeal from his convictions was first heard exclusively on grounds relating to the trial judge's charge to the jury. The Court of Appeal 1988 ABCA 274 (CanLII), (1988), 61 Alta. L.R. (2d) 264, found that the judge's charge to the jury was appropriate given the state of the law at the time of trial. However, following this Court's decision in *Vaillancourt*, a re-hearing was ordered. As a result of *Vaillancourt*, s. 213(d) had been rendered unconstitutional. It failed to meet the objective foreseeability of death test for the crime of murder. Therefore, only the third component of the trial judge's instructions, s. 213(a) as it applies to the killing of Ann McLean, remains to be examined.

I would like to point out that the invocation of s. 213(a) may not have been necessary. In my view, "Lady, say your prayers", whether it was actually said or thought, reflects a mental state of mind sufficient to anchor a charge under s. 212(a), the only truly subjective foresight murder provision of the *Criminal Code*:

212. Culpable homicide is murder

- (a) where the person who causes the death of a human being
- (i) means to cause his death, or
- (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;

However, the prosecution chose to proceed under s. 213(a), and the trial judge charged the jury accordingly. Hence, the necessity to deal with this provision here.

My colleague has chosen to introduce subjective foresight of death as the exclusive standard for the crime of murder. In his view, anything short of that requirement would render a provision constitutionally infirm. Given this inauguration in the criminal law, it may be helpful to discuss both the distinction and the interrelationship between subjective foresight and objective foreseeability.

I. Subjective Foresight v. Objective Foreseeability

Definitionally, a standard of subjective foresight to ground criminal responsibility dictates that:

... the trier of fact must determine what was actually going on in the mind of this particular accused at the time in question. This is variously stated as a requirement of awareness, conscious thought, advertence or simply a requirement that the person was actually thinking.

What is vital is that *this accused* given his personality, situation and circumstances, actually intended, knew or foresaw the consequence and/or circumstances as the case may be. [Stuart, *Canadian Criminal Law* (2nd ed. 1987), at pp. 121, 123.]

In *The Common Law*, Holmes discussed objective foreseeability, at pp. 53-54, as follows:

If the known present state of things is such that the act done will very certainly cause death, and the probability is a matter of common knowledge, one who does the act, knowing the present state of things, is guilty of murder, and the law will not inquire whether he did actually foresee the consequences or not. The test of foresight is not what this very criminal foresaw, but what a man of reasonable prudence would have foreseen. [Emphasis added.]

Gordon, "Subjective and Objective Mens Rea", [1975] 17 *Crim. L.Q.* 355, at p. 359, not only discusses distinctions between subjective foresight and objective foreseeability, but also the interrelationship between them:

... what is important in the context of proof of mens rea is that certain objective descriptions of actions are in themselves descriptions of intentional actions, so that once the Crown has proved what happened they have established their case, and need not go on to prove separately the existence of some particular event or condition in the agent's mind. In these cases proof of the external behaviour is proof that he was acting intentionally; his only defence, unless of course he can show he was not a voluntary agent, is to show that the objective description offered by the Crown is incorrect, by producing witnesses who describe as an accident what the Crown witnesses describe as intentional, by showing, e.g., that he did not push the victim but accidentally fell against him. [Emphasis added.]

Furthermore, at p. 368:

We resort to the reasonable man in an endeavour to make it possible for the Crown to prove mens rea. We stress that the reasonable man is only a tool to help us discover the accused man's state of mind; that the law goes no further than to entitle the jury to apply this tool

to conclude that the accused had the *mens rea* of the reasonable man; and that they are not obliged so to conclude. But very often we have nothing other than the reasonable man to guide us, so the difference between the position I have just described, and a rule that the accused may be held to have acted with a particular intent, if any reasonable man must have had that intent, is not a real one. [Emphasis added.]

Mewett & Manning, *Criminal Law* (2nd ed. 1985) also addresses the association between subjective foresight and objective foreseeability. When assessing the accused's own state of mind, certain inferences may be drawn from the circumstances surrounding the event at issue. As they point out at p. 138:

[The question becomes] whether this is really an objective test or is merely a disguised evidentiary technique for determining what the accused actually foresaw. If the accused were to say that he did not anticipate events that a reasonable man, given the facts as actually appreciated by the accused, would have anticipated, one may wonder whether the jury would have any difficulty in finding that the accused "must have" anticipated them, thus finding not only that a reasonable man would have anticipated them but that the accused actually did appreciate them in spite of what he says.

As Gordon, *supra*, expressed it, at p. 371:

... what is more likely to happen, is that the innocent man will be so nervous and unskilled that he will make a bad witness, while the man the jury believes will be the plausible psychopath. One of the problems of an excessively "subjective" approach is that it is likely to feed what I often fear is an unfounded conceit in our ability to gauge a witness' truthfulness by his demeanor.

Gordon feels that the ultimate distinction is a "moral" one. In some instances, the subjective failure to foresee certain consequences of one's criminal activity may merit greater public opprobrium than the assumption of a foreseen calculated risk of death. This recognition warrants a classification whereby flagrant callous, ruthless, or selfish acts causing death, perpetrated by one whose purpose is already criminal, will be treated more harshly than a mere accidental killing. As Gordon explains at pp. 389-90:

If, then, it is appropriate to classify certain forms of unintentional killing in a way which distinguishes them from grossly negligent killing, what should be the basis of the classification? Well, the main purpose of the classification, perhaps the only purpose since the disappearance of capital punishment, is stigmatization, and the basis of the classification should be, simply, moral guilt. . . . We should distinguish the most heinous, from the not quite so bad, and from the merely venial. And the assessment of moral guilt depends on a view of the whole circumstances, and not on the distinction between the presence or absence of a particular mental event such as the foresight and acceptance of a risk.

... any realistic approach to the problem must recognize that what is ultimately in issue is the community's moral judgment on the accused's behaviour, and not the satisfaction of a legal formula. [Emphasis added.]

The above analysis indicates that tests of subjective foresight and objective foreseeability cannot be seen as static or distinct concepts. They are certainly not mutually exclusive. In most instances, and certainly in those limited circumstances delineated by s. 213(a), discussed below, death will be both objectively and subjectively foreseeable. There is a profound interrelationship between the two, especially when dealing with a crime committed during the execution of a predicate crime. The validity of a provision should not be evaluated on a strict "either-or" approach, and a fastidious adherence to prescribed labels becomes particularly obdurate when gauging the constitutionality of Parliamentary legislation.

II. R. v. Vaillancourt

My colleague suggests that *Vaillancourt* bears potentially upon the present appeal. However, *Vaillancourt* settled only two legal questions, and this critical feature of the decision must be kept in mind before it is applied to any subsequent holdings of this Court. First, *Vaillancourt* established a standard of objective foreseeability of death for the crime of murder. Second, the decision only disposed of s. 213(d) of the *Criminal Code*, and no other. Any discussion relating to subjective standards or to the constitutional survival of any other provisions was strictly *obiter*. Furthermore, to the extent that such discussion did take place, it did so only in one of the four separate opinions rendered.

The facts themselves in *Vaillancourt* negated *mens rea* as Vaillancourt testified that, at the time of the robbery during which the killing occurred, he was convinced that his accomplice's gun was unloaded. He had agreed to commit the robbery on the condition that only knives were to be used as weapons. When his accomplice arrived with a gun, Vaillancourt insisted that the bullets be removed, and he subsequently placed these bullets in a glove which was later recovered by the police at the scene and produced at trial. Given these facts, it seems unlikely that Vaillancourt, or any reasonable person in his position, had reason to foresee that anyone would be killed in the course of the robbery. Unlike the accused in the present appeal, Vaillancourt could not have been prosecuted under any provision except for s. 213(d). Section 213(d) did not impose the stringent criteria that must be proven before a conviction under s. 213(a) can be secured. Under section 213(d), death caused by the commission of any of the crimes listed in s. 213 was murder, if

213. . . .

(d) [the offender] uses a weapon or has it upon his person

(i) during or at the time he commits or attempts to commit the offence, or

(ii) during or at the time of his flight after committing or attempting to commit the offence,

and the death ensues as a consequence.

Admittedly, under this definition, an offender could theoretically be convicted for murder while only minimally to blame for causing death. No intention to injure, physically impair, or to even use a weapon was required. Under section 213(d), anyone who resisted a police officer during the course of an arrest, and happened to have a weapon on his person which accidentally discharged causing death, would be labelled a murderer. No intentional use of the weapon in any fashion was required.

In *Vaillancourt*, Lamer J. (as he then was) determined, at p. 654, that:

. . . it is a principle of fundamental justice that, absent proof beyond a reasonable doubt of at least objective foreseeability, there surely cannot be a murder conviction.

Furthermore, my colleague's specific displeasure with s. 213(d) emanated from the possibility that a jury could convict in the shadow of "a reasonable doubt as to whether the accused ought to have known that death was likely to ensue", at p. 657:

. . . if Parliament frames the section so that, upon proof of the conduct, it would be unreasonable for a jury not to conclude beyond a reasonable doubt that the accused ought to have known that death was likely to ensue, then I think that Parliament has enacted a crime which is tantamount to one which has objective foreseeability as an essential element, and, if objective foreseeability is sufficient, then it would not be in violation of s. 7 or s. 11(d) in doing so in that way. [Emphasis added].

Hence the proposed test is whether the *mens rea* requirement under s. 213(d) was such that it must be apparent to the reasonable person in similar circumstances that death was likely to ensue. This *mens rea* requirement is an essential element that the Crown must prove beyond a reasonable doubt, at p. 656:

... the legislature, rather than simply eliminating any need to prove the essential element, may substitute proof of a different element. In my view, this will be constitutionally valid only if upon proof beyond reasonable doubt of the substituted element it would be unreasonable for the trier of fact not to be satisfied beyond reasonable doubt of the existence of the essential element.

Section 213(d) could not meet that test. Section 213(a) does. Section 213(d) had substituted proof of a different element in a manner that could leave a jury in doubt as to the objective foreseeability of the likelihood that death would be caused. Proof beyond a reasonable doubt of objective foreseeability of death was replaced with proof beyond a reasonable doubt of the intention to commit or attempt to commit one of the enumerated predicate crimes, coupled with the intent to use a weapon or have it upon one's person.

In *Vaillancourt*, Lamer J. found that this was an invalid substitution, and that the objective foreseeability test was not met. He also made *obiter* remarks, at p. 654, to the effect that:

I am presently of the view that it is a principle of fundamental justice that a conviction for murder cannot rest on anything less than proof beyond a reasonable doubt of subjective foresight.

This notion of "subjective mental element" from the reasons of Lamer J. in *Vaillancourt* is neither constitutionally mandated nor necessitated by elemental principles of the criminal law. The insistence on a subjective foresight requirement was not germane to the decision in *Vaillancourt*. The *obiter* statements were endorsed by only four of the eight Justices who participated in *Vaillancourt*. Beetz J. (for himself and Le Dain J.), at p. 661, held that:

... I do not find it necessary to decide whether there exists a principle of fundamental justice that a conviction for murder cannot rest on anything less than proof beyond a reasonable doubt of subjective foresight.

La Forest J. held at p. 665 that:

... the principles of fundamental justice require a *mens rea* reflecting the particular nature of that crime, namely one referable to causing death. In addition to the intention to cause death, this can include a closely related intention such as intention to cause bodily harm likely to result in death combined with recklessness as to that result. [Emphasis added.]

McIntyre J. dissented, and quoted Martin J.A. in *R. v. Munro and Munro* ~~reflex~~, (1983), 8 C.C.C. (3d) 260, that the required *mens rea* element "is a matter for Parliament and not for the courts".

The other four Justices also exercised deliberate prudence to address only s. 213(d), and not speak to the other paragraphs under s. 213. As La Forest J. held at p. 665:

It is sufficient to say that the mental element required by s. 213(d) of the *Criminal Code* is so remote from the intention specific to murder ...if, then that a conviction under that paragraph violates fundamental justice. All the provision requires is an intention to commit another crime and to possess a weapon while carrying out this intention or in fleeing afterwards. The provision is so broad that under it a person may be found guilty of murder even though the death was the result of an accident. [Emphasis added.]

Beetz J., for himself and Le Dain J., held at p. 661:

I agree that s. 213(d) of the *Criminal Code* does not conform to the principles of fundamental justice. ... [Emphasis added.]

Recognizing the difference between the two provisions, the discussion of s. 213(a) was reserved for a later day. Today is that day.

III. Section 213(a) of the Criminal Code

Vaillancourt held that s. 213(d) of the *Criminal Code* violated ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*, and could not be saved by s. 1. Section 213(a) of the *Criminal Code* is completely different --in its historical development, in its consistency with the objective foreseeability of death test established in *Vaillancourt*, and in the parallel provisions adopted in other common law jurisdictions.

(a) *Historical Background*

The historical background to s. 213(a) reveals that it must be analyzed in a fundamentally different manner than s. 213(d). The language of s. 213(a) can be traced as far back as Coke, *The Third Part of the Institutes of the Laws of England* (6th ed. 1680), where at p. 47, murder was defined as the killing of any human "with malice forethought, either expressed by the party, or implied by Law". By the early part of the nineteenth century the rule had crystallized: if during the commission of an unrelated felony the perpetrator unintentionally killed someone, he was guilty of murder and not merely manslaughter: Archbold, *Pleading and Evidence* (1822). The British Parliamentary Papers "Criminal Law" 1879, vol. 6, stated at pp. 468-70:

For practical purposes we can make no distinction between a man who shoots another through the head, expressly meaning to kill him, a man who strikes another a violent blow with a sword, careless whether he dies of it or not, and a man who, intending for some object of his own, to stop the passage of a railway train, contrives an explosion of dynamite or gunpowder under the engine, hoping indeed that death may not be caused, but determined to effect his purpose whether it is so caused or not.

The equivalent of section 213(a), (b), and (c) [now s. 230(a), (b), (c)] was incorporated as part of Canada's first *Criminal Code* in 1892. Paragraph (d) did not exist, nor had it even been recommended by any of the Commissioners' Reports. It did not appear until 55 years later, in the 1947 version of the *Criminal Code*. It represented an attempt by Parliament to reverse this Court's decision in *R. v. Hughes* (1942), 78 C.C.C. 257, that homicide committed by the accidental discharge of a firearm by an accused during a robbery does not amount to murder. One writer has commented that this new amendment was indeed a "strange bedfellow" when compared to the rest of s. 213: Edwards, "Constructive Murder in Canadian and English Law" (1959), 3 *Crim. L.Q.* 481, at p. 491.

Section 213(a) is much more restrictive than the common law rule. The bodily harm inflicted by the perpetrator must have been done for the purpose of facilitating the commission of the offence or the subsequent flight of the offender. Furthermore, only a narrowly circumscribed list of predicate criminal offences can trigger the application of the section. Under the old common law rule, a killing in the midst of any felony would support a charge of murder.

Admittedly, up until the 1955 version of the *Criminal Code*, culpable homicide was murder if the accused meant to inflict "grievous" bodily harm for the purpose of facilitating the commission of the underlying offence or flight from it. For "grievous bodily harm", the injury did not have to be "either permanent or dangerous, if it be such as seriously to interfere with comfort or health, it is sufficient": *R. v. Ashman* (1858) 1 F. & F. 88, 175 E.R. 638; *R. v. Archibald* (1898), 4 C.C.C. 159 (Ont. H.C.); *R. v. Bottrell* 1981 CanLII 352 (BC CA), (1981), 60 C.C.C. (2d) 211 (B.C.C.A.).

The common law definition of "bodily harm" has been substantially incorporated in s. 245.1(2) of the *Criminal Code*, and means "any hurt or injury to the complainant that interferes with the health or comfort of the complainant and that is more than merely transient or trifling". As Laycraft C.J. pointed out at the Court of Appeal, at p. 277:

The addition of the word "grievous" to the term merely added the connotation of "serious"; in neither case would the injury necessarily be life threatening.

Senator Hayden, who had served on the committee considering the amended *Code* in 1953, explained in the Proceedings of the Standing Committee on Banking and Commerce, June 27, 1961, at p. 41:

There would not be any charge unless death resulted, and then there is the bodily harm which caused the death. We felt that "grievous" in most circumstances was only a complication. If a man means to administer or to do bodily harm to the extent that would enable him to commit any of the enumerated offences, and death results, then we felt that that was enough to constitute murder.

Section 213(d) did not require any intent on the part of the perpetrator to do bodily injury. It only required, minimally, that one of the participants possess a weapon which accidentally discharged and caused death. That is a substantially discounted mental element, one much lower than that required under s. 213(a).

(b) *Section 213(a) Passes the Objective Foreseeability Test*

An exacting combination of factors must be proven, all beyond a reasonable doubt, before the accused can be found guilty of murder under this section. The offender must:

- (1) cause the death by means of the commission of a "culpable homicide";
- (2) cause the death while committing or attempting to commit one of a limited number of very serious crimes all of which are, by their very nature, inherently dangerous;
- (3) intentionally inflict bodily harm while committing one of these inherently dangerous offences, all of which are specific intent crimes;
- (4) inflict the bodily harm purposefully in order to perpetrate the dangerous underlying crime or for the purpose of facilitating his flight; and
- (5) the death must ensue from the bodily harm intentionally inflicted.

It should be noted that in the present case the underlying offence was committed, and the intent to inflict bodily harm was clear. Moreover, this amalgamation of indispensable prerequisites establishes that this crime, as phrased by Lamer J. in *Vaillancourt*, is "tantamount to one which has objective foreseeability as an essential element, and, if objective foreseeability is sufficient, then it would not be in violation of s. 7 or s. 11(d) in doing so in that way". I am of the view that in light of these requirements, the test of objective foreseeability is sufficient, and that if that test has been met, then no *Charter* violation has taken place. The above list requires that the accused specifically intend to, and actually commit the underlying offence, and specifically intend to, and actually inflict bodily harm. In my view, the inexorable conclusion is that the resulting death is objectively foreseeable.

Those who are critical of all forms of the "felony-murder" rule base their denunciation on the premise that *mens rea* is the exclusive determinant of the level of "stigma" that is properly applied to an offender. This appears to me to confuse some very fundamental principles of criminal law and ignores the pivotal contribution of *actus reus* to the definition and appropriate response to proscribed criminal offences. If both components, *actus reus* as well as *mens rea*, are not considered when assessing the level of fault attributable to an offender, we would see manslaughter and assault causing bodily harm as no more worthy of condemnation than an assault. Mere attempts would become as serious as full offences. The whole correlation between the consequences of a criminal act and its retributive repercussions would become obscured by a stringent and exclusive examination of the accused's own asserted intentions.

As stated in Crump and Crump, "In Defense of the Felony Murder Doctrine" (1985), 8 *Harv. J. of L. and P.P.* 359, at p. 366:

Scholarly criticisms of felony murder have tended to neglect its relationship to proportionality and grading. The criticisms erroneously tend to regard *mens rea* as the only legitimate determinant of the grade of a homicide resulting from a felony. This reasoning sometimes leads modern writers into the same rigid formalism, divorced from policy,

that they rightly reject in historical justifications of the rule. Mens rea is not a "unified field theory" of homicide, and while such a theory might make the subject artificially "logical" or "consistent", it does not reflect our society's more complex understanding of the nature, function, and purpose of the criminal law. The fallacy of this approach is its denigration of actus reus and its failure to include the result of defendant's conduct as a determinant of just disposition. [Emphasis added.]

Having found that an objective foreseeability of death test is sufficient for the crime of murder, I believe that the test has been met in this appeal. Section 213(a) enumerates a catalogue of criteria, all of which must be conclusively demonstrated before a murder conviction can obtain. In this case, the predicate crime was committed, there was a clear intention to effect bodily harm, and such harm did in fact result in the death of Ann McLean.

(c) *A Comparative Analysis*

This sudden introduction of a subjective foresight standard for the crime of murder is most novel, and finds no parallel in Great Britain, Australia, New Zealand or the United States. While each of these jurisdictions imposes different requirements for the crime of murder, none has adopted the requirement of subjective foresight of death.

(i) England and Scotland

While England did abolish the felony-murder rule in its *Homicide Act, 1957* (U.K.), 5 & 6 Eliz. 2, c. 11, murder is still defined to include killings in circumstances that require a mental state short of a subjective foresight of death; causing death while intending to merely inflict grievous bodily harm is sufficient. Furthermore, Lord Goff, while admittedly rejecting a strict objective foreseeability test, in "The Mental Element in the Crime of Murder" (1988), 104 *L.Q.R.* 30, at p. 58, has advocated that killings in circumstances which manifest "wicked indifference" are properly classified as murder even though at the time of the killing no subjective awareness of the risk of death exists in the killer. This is the law in Scotland and it is "inherently desirable that the crime of murder should be the same both north and south of the River Tweed":

I am . . . urging that English law should adopt the Scottish concept of wicked recklessness. . . . [although] I would prefer to describe the concept as indifference to death.

The reactions of the judges and juries ... demonstrate, I think, a strong feeling that the mental element in murder, restricted to intention -- whether to kill or to cause grievous bodily harm -- is too closely confined to do justice in all cases.

(ii) Australia

Each of the Australian jurisdictions continues to recognize some version of the felony-murder rule. In South Australia, the following mental states constitute the *mens rea* for murder:

- (a) intention to kill;
- (b) intention to cause grievous bodily harm;
- (c) knowing that the probable consequence of an act is either death or grievous bodily harm and nevertheless committing the act; and,
- (d) causing unintended death during the course of certain offences by acts of violence.

R. v. Marshall (1987), 26 A. Crim. R. 259, at p. 266 (Ct. Cr. App. S. Aust.); *R. v. Van Beelen* (1973), 4 S.A.S.R. 353, at pp. 400-404 (S.C. S. Aust.).

Victoria has similar legislation which was recently amended as follows:

- 3A. (1) A person who unintentionally causes the death of another person by an act of violence done in the course or furtherance of a crime the necessary elements of which include violence for which a person upon first conviction may, under or by virtue of any

enactment, be sentenced to life imprisonment or to imprisonment for a term of 10 years or more shall be liable to be convicted of murder as though he had killed that person intentionally.

(2) The rule of law known as the felony-murder rule (whereby a person who unintentionally causes the death of another by an act of violence done in the course or furtherance of a felony of violence is liable to be convicted of murder as though he had killed that person intentionally) is hereby abrogated. [Emphasis added.]

Crimes Act 1958 (Victoria) as amended by the *Crimes (Classification of Offences) Act 1981* (No. 9576, 1981 Statutes of Victoria), s. 3.

In New South Wales murder is defined by s. 18 of the *Crimes Act* as including killing:

- (a) with intent to kill;
- (b) with intent to inflict grievous bodily harm;
- (c) with reckless indifference to human life;
- (d) during or immediately after the commission of a qualifying felony [one punishable by death or life imprisonment].

Queensland, Tasmania, and Western Australia have classified murder in statutory provisions similar to those in the Canadian *Criminal Code*. They provide that an unlawful killing is murder in the following circumstances:

- (1) an intentional killing

Queensland, *Criminal Code Act, 1899*, 63 Vic., No. 9, s. 302(1)

Western Australia, *Criminal Code, 1913*, s. 278
[guilty of "wilful murder"]

Tasmania, *Criminal Code Act, 1924*, 14 Geo. V, No. 69, s. 157(a)

- (2) an intention to do the person killed some grievous bodily harm

Queensland, *Criminal Code Act, 1899*, 63 Vic., No. 9, s. 302(1)

Western Australia, *Criminal Code, 1913*, s. 279(1)

Tasmania, *Criminal Code Act, 1924*, 14 Geo. V, No. 69, s. 157(b) ["intention to cause bodily harm which the offender knew to be likely to cause death ... although he had no wish to cause death"]

- (3) death caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life

Queensland, *Criminal Code Act, 1899*, 63 Vic., No. 9, s. 302(2)

Western Australia, *Criminal Code, 1913*, s. 279(2)

Tasmania, *Criminal Code Act, 1924*, 14 Geo. V, No. 69, s. 157(c)
[by means of any unlawful act ... which the offender knew or ought to have known, to be likely to cause death in the circumstances, although he had no wish to cause death or bodily harm to any person]

- (4) intention to do grievous bodily harm for the purpose of committing certain serious crimes (or the use of a stupefying thing or wilfully stopping breath in the commission of such a crime)

Queensland, *Criminal Code Act, 1899*, 63 Vic., No. 9, s. 302(3), (4), (5)

Western Australia, *Criminal Code, 1913*, s. 279(3), (4), (5)

Tasmania, *Criminal Code Act, 1924*, 14 Geo. V, No. 69 s. 157(1)(d), (e), (f) and s. 157(2)

(iii) New Zealand

New Zealand's definition of murder also includes killings which occur in circumstances not involving subjective foresight of death. Homicide is murder if the offender means to cause grievous bodily injury (or administers a stupefying or overpowering [thing or wilfully stops the breath of a person) for the purpose of facilitating the commission of a number of enumerated serious offences or for the purpose of resisting lawful apprehension. In these circumstances a homicide is classified as murder "whether the offender means or does not mean death to ensue, or knows or does not know that death is likely to ensue": *New Zealand Crimes Act 1961*, 1961 (N.Z.), No. 43, s. 168.

(iv) United States

In the United States the common law notion of felony-murder continues to exist in a modified form in all but three states. Gilbert, "Degrees of Felony Murder" (1983), 40 *Wash. & Lee L. Rev.* 1601. While a number of jurisdictions have limited the rule by requiring the felony to be inherently violent or by requiring violent means to be used during the course of the felony, the rule still contains no requirement of subjective foresight of death. Apart from certain limits when combined with the death penalty, the United States Supreme Court has consistently upheld the constitutional validity of the felony-murder rule: *Tison v. Arizona*, 107 S.Ct. 1676 (1987); *Gregg v. Georgia*, 428 U.S. 153 (1976).

In *Substantive Criminal Law* (vol. 2, 1986), LaFave and Scott discuss "depraved-heart murder" in {SS} 7.4, at pp. 199-200:

Extremely negligent conduct, which creates what a reasonable man would realize to be not only an unjustifiable but also a very high degree of risk of death or serious bodily injury to another or to others -- though unaccompanied by any intent to kill or do serious bodily injury -- and which actually causes the death of another, may constitute murder.

Wharton's Criminal Law (14th ed. 1979), {SS} 145, at pp. 204, 207-08, addresses the rationale behind the felony-murder rule as follows:

In the typical case of felony-murder, there is no malice in "fact", express or implied; the malice is implied by the "law". What is involved is an intended felony and an unintended homicide. The malice which plays a part in the commission of the felony is transferred by the law to the homicide. As a result of the fictional transfer, the homicide is deemed committed with malice; and a homicide with malice is common law murder.

... ordinarily, the doctrine of felony-murder involves an unintended homicide.... Under the most common pattern [of state law], an unintended homicide in the course of certain enumerated felonies constitutes murder in the first degree, and an unintended homicide in the course of some other felony constitutes murder in the second degree. Although the felonies which are enumerated vary from state to state, the ones that seem to have found their way into most statutes are arson, rape, robbery, and burglary. Other felonies, such as kidnapping, mayhem, and forcible sodomy, are often added to the list. What the enumerated felonies always seem to have in common is the element of danger or violence. By holding a felony-murderer strictly accountable, even though the homicide is unintended, the law is attempting to protect innocent lives -- victims, law enforcement officers, bystanders. The law is not attempting merely to deter the commission of dangerous or violent felonies; presumably, the punishment authorized by law for such felonies is sufficiently severe to accomplish that purpose. But rather, the law is attempting to deter the commission of such felonies in a dangerous or violent way. For

example, a potential robber may be encouraged to use an unloaded gun, to use a club rather than a gun, to use no weapon at all; or a potential arsonist or burglar may be encouraged to make certain that a target building is unoccupied. [Emphasis added.]

In *People v. Rose*, 227 Cal. Rep. 570 (1986), the defendant urged that the felony-murder rule is unconstitutional since it lacks both a legitimate deterrent rationale and a legitimate retributive rationale. The court rejected both these arguments, at p. 574:

The Legislature has said in effect that this deterrent purpose [to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit] outweighs the normal legislative policy of examining the individual state of mind of each person causing an unlawful killing to determine whether the killing was with or without malice, deliberate or accidental, and calibrating our treatment of the person accordingly. Once a person perpetrates or attempts to perpetrate one of the enumerated felonies, then in the judgment of the Legislature, he is no longer entitled to such fine judicial calibration, but will be deemed guilty of first degree murder for any homicide committed in the course thereof. [Emphasis added.]

It must be recalled that the felony-murder rule in the United States includes the potential that accidental homicides might be labelled murder. As England abolished this possibility, however remote, so did this Court in *Vaillancourt*. What remains is a test of objective foreseeability, as well as specific intent for at least two underlying serious and dangerous crimes. The chance that an accidental homicide will be encompassed within this definition has been judicially eliminated.

In conclusion, no other common law jurisdiction has found that fundamental justice is offended by something less than an exclusive subjective foresight standard for the crime of murder. On the whole, s. 213(a) is comprehensively disparate from s. 213(d). It finds enduring support in criminal legislation. It satisfies all the components of the objective foreseeability test established by this Court in *Vaillancourt*. It is consistent with similar provisions enacted in other common law jurisdictions. For these reasons, I am of the view that s. 213(a) does not offend the principles of fundamental justice, and therefore ss. 7 and 11(d) of our *Canadian Charter of Rights and Freedoms* have not been violated in the present case.

IV. Policy Considerations

During the 27-year period from 1961-1987, the evidence reveals that 2177 homicide offences occurred during the commission of another criminal act. The percentage of homicide offences committed during the commission of another criminal act has varied from 11.9% in 1965 to 28.4% in 1970. The annual average for the period was 16.7%. See "Homicide in Canada: Offences Committed During the Commission of Another Criminal Act", statistics provided by R.C.M.P. for the period 1961-1987. The homicide offences committed during another criminal act are divided into four categories:

Robbery: includes robbery, theft, and break and enter offences. 1315 victims; 61.7% of all homicide offences committed during another criminal act.

Sexual Assault & Rape: includes all sexual attacks on either males or females. 483 victims; 22.3% of all homicide offences committed during another criminal act.

Escape: involves attempts to escape from correctional institutions or lawful custody, to avoid arrest, or to escape detection as a parole or probation violator. 346 victims; 14.2% of all homicide offences committed during another criminal act.

Other: includes other types of criminal acts such as arson, assault, kidnapping, etc. 33 victims; 1.8% of all homicide offences committed during another criminal act.

These statistics reflect a matter of critical public concern, and sustain the Legislature's compulsion to deliver an appropriate response. It is constitutionally permissible under the *Canadian Charter of Rights and Freedoms* to define the mental element required for murder with reference to an intention by the perpetrator to harm or injure the victim, with death resulting. How that harm or injury is to be

defined, and what level of harm or injury is required are matters for Parliament to consider and decide. As La Forest J. said in *R. v. Edwards Books and Art Ltd.*, 1986 CanLII 12 (SCC), [1986] 2 S.C.R. 713, at p. 795:

It must be remembered that the business of government is a practical one. The Constitution must be applied on a realistic basis having regard to the nature of the particular area sought to be regulated and not on an abstract theoretical plane.

In this same case, Dickson C.J. noted at p. 782 that:

The courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line. [Emphasis added.]

Dickson C.J. expanded on this notion recently in *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927, at p. 990:

Where the legislature mediates between the competing claims of different groups in the community, it will inevitably be called upon to draw a line marking where one set of claims legitimately begins and the other fades away without access to complete knowledge as to its precise location. If the legislature has made a reasonable assessment as to where the line is most properly drawn, ... it is not for the court to second guess. [Emphasis added.]

The criminal law must reconcile two "competing claims" as well. Social protection must be measured against justice to the individual accused. The appropriate balance between these two will certainly vary, and "A monolithic approach to the proper basis of culpability will be unable to respond to the varying nature of that conflict": Wells, "Swatting the Subjectivist Bug", [1982] *Crim. L.R.* 209, at p. 212.

As Lamer J. held in *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486, at p. 512:

The term "principles of fundamental justice" is not a right, but a qualifier of the right not to be deprived of life, liberty and security of the person; its function is to set the parameters of that right.

Consequently, the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system.

The fact that the principles embraced by s. 213(a) have existed for over 300 years is in itself relevant, though not necessarily determinative, of whether or not a rule of "fundamental justice" has been breached by virtue of their adoption by the Parliament of Canada. In my view, while the guarantee entrenched in s. 7 of the *Charter* is to have broad application, it cannot go so far as to grant the courts judicial licence to modify or strike down legislation in the absence of a constitutional violation.

Lamer J. infused s. 7 with palpable content in *Re B.C. Motor Vehicle Act*, at p. 512:

Sections 8 to 14 address specific deprivations of the "right" to life, liberty and security of the person in breach of the principles of fundamental justice; and as such, violations of s. 7. They are therefore illustrative of the meaning, in criminal or penal law, of "principles of fundamental justice"; they represent principles which have been recognized by the common law, the international conventions and by the very fact of entrenchment in the *Charter*, as essential elements of a system for the administration of justice which is founded upon the belief in the dignity and worth of the human person and the rule of law. [Emphasis added.]

Of sections 8 to 14, only s. 11(d) is being challenged here. Section 11(d) of the *Charter* guarantees that:

11. Any person charged with an offence has the right

...

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal; . . .

It is difficult for me to see how this right has been violated in the present appeal. The accused has been presumed innocent. His trial was "a fair and public hearing by an independent and impartial tribunal". He was subsequently "proven guilty according to law". The alleged infringement is that the presumption of innocence is displaced by the lack of a subjective foresight requirement. This is just not so. The law as it stands necessitates conclusive proof beyond a reasonable doubt of factors that are collectively tantamount to an objective foreseeability requirement. According to *Vaillancourt*, this condition does not defeat the presumption of innocence. None of the other reference provisions which give content and scope to s. 7 is impugned. Therefore, in my view, no *Charter* guarantee has been offended.

Section 213(a) is intended to carve out certain killings and place them in a category of the most serious culpable homicides, murder. This is a designation which Parliament is entitled to ascribe pursuant to its responsibility for the protection of those under its dominion. This legislative objective can be anchored in Parliament's legitimate attempt to deter persons from conduct which falls within s. 213(a). In particular, Parliament is attempting to deter those who commit crimes from intentionally inflicting actual bodily harm on their victims in order to achieve their unlawful purpose. The killings subsumed within s. 213(a) are regarded as sufficiently heinous to warrant being placed in the category of the gravest culpable homicides. Parliament felt that this was the appropriate manner to ensure that the criminal law is in accordance with social values as to the gravity of such killings, and that this was an effective method to preserve the lives and safety of Canadians.

In *R. v. Arkeil* 1988 CanLII 3126 (BC CA), (1988), 43 C.C.C. (3d) 402 (B.C.C.A.), at pp. 412-13, McLachlin J.A. (now of this Court) considered the validity of s. 214(5) (now s. 231(5)). Writing for the British Columbia Court of Appeal -- this Court's decision in *Arkeil* is being rendered concurrently with the present one -- she held that:

. . . it must be recognized that many factors other than the accused's degree of moral blameworthiness must be considered by Parliament in establishing a sentencing scheme. General deterrence, the degree of perceived danger to the public and the prevalence of certain types of offences are only some of the other considerations which Parliament may properly consider. It follows that the mere fact that a harsher sentence may be imposed for one offence than for another offence which is arguably more blameworthy, does not mean that the scheme that permits the sentence violates s. 7 of the *Charter*.

...

Many factors enter into the determination of an appropriate penalty for a particular offence; the degree of blameworthiness is only one. The question is one of policy, to be determined by Parliament. So long as Parliament does not act irrationally or arbitrarily or in a manner otherwise inconsistent with the fundamental principles of justice, its choice must be upheld. [Emphasis added.]

I agree completely, and find that the test applies to s. 213(a) as well. If Parliament chooses to label a crime "murder" and attach commensurate penalties, so long as a *mens rea* requirement is imposed, as it is here, this Court should not lightly interfere with that legislative decision. Mewett & Manning, writing before this Court's decision in *Vaillancourt*, acknowledged at pp. 544-45 that:

Section 213 [now section 230] and the concept of constructive murder have been much criticized and, in fact, abolished in many jurisdictions. The criticism is that it imposes liability for murder in situations where death was not intended nor even, in some cases, foreseen.

But murder is a legal concept: it does not have to be defined in terms of intentional killing, and even under s. 212[now s. 229] the definition is not this narrow. The policy behind s. 213 is to put the risk of killing a victim during the course of the commission of certain offences upon the offender to a higher degree than if it were merely classified as manslaughter. In any case, with the present distinction between murder punishable by death and murder punishable by life imprisonment now abolished, much of the criticism loses its force. It was the thought of someone being executed for a non-intended homicide that led to the feeling that the definition of murder should somehow be limited to the old common law concept of "murder with malice aforethought". [Emphasis added.]

Parliament can abrogate s. 213 in its entirety and pioneer a strict subjective standard for the crime of murder, but the Constitution does not require that it do so. As McIntyre J. said, dissenting in *Vaillancourt*, at p. 663:

The principal complaint in this case is not that the accused should not have been convicted of a serious crime deserving of severe punishment, but simply that Parliament should not have chosen to call that crime "murder". No objection could be taken if Parliament classified the offence as manslaughter or a killing during the commission of an offence, or in some other manner. . . .while it may be illogical to characterize an unintentional killing as murder, no principle of fundamental justice is offended only because serious criminal conduct, involving the commission of a crime of violence resulting in the killing of a human being, is classified as murder and not in some other manner. [Emphasis added.]

In *R. v. Smith*, 1987 CanLII 64 (SCC), [1987] 1 S.C.R. 1045, Lamer J. cited numerous examples of curial deference to Parliamentary enactments. My colleague then adopted, at p. 1070, the following passage of Borins Dist. Ct. J. from *R. v. Guiller*, Ont. Dist. Ct., Sept. 23, 1985, unreported:

It is not for the court to pass on the wisdom of Parliament with respect to the gravity of various offences and the range of penalties which may be imposed upon those found guilty of committing the offences. Parliament has broad discretion in proscribing conduct as criminal and in determining proper punishment. While the final judgment as to whether a punishment exceeds constitutional limits set by the *Charter* is properly a judicial function the court should be reluctant to interfere with the considered views of Parliament and then only in the clearest of cases where the punishment prescribed is so excessive when compared with the punishment prescribed for other offences as to outrage standards of decency. [Emphasis added.]

In the present appeal, my colleague's justification (at p. 000) for insisting on the narrowest of all possible definitions for the crime of murder is that:

A conviction for murder carries with it the most severe stigma and punishment of any crime in our society. . . . [and] should be reserved for those who choose to intentionally cause death or who choose to inflict bodily harm that they know is likely to cause death.

The menacing component of "stigma" was discussed in *Vaillancourt* as well. As Lindsay pointed out in "The Implications of *R. v. Vaillancourt*: Much Ado About Nothing?" (1989), 47 *U. of T. Fac. Law Rev.* 465, at p. 472:

It should also be noted that Lamer J. justified a requirement of a "special mental element" based on *either* the stigma associated with a crime *or* the penalties available. A murder conviction qualified on both grounds. However, theft can involve penalties as low as an absolute discharge. Thus, the inclusion of theft in Lamer J.'s list of crimes requiring a "special mental element" must have been based on stigma rather than available penalties. [Emphasis added.]

I find this concentration on social "stigma" to be overemphasized, and in the great majority of cases, completely inapplicable. The facts in the present appeals reveal the truly heinous nature of the criminal acts at issue. The concern that these offenders not endure the Mark of Cain is, in my view, an egregious example of misplaced compassion. If the apprehension is that the offenders in question will suffer from their "murderer" label, I suspect they will fare little better tagged as "manslaughterers". Accidental killings cannot, after *Vaillancourt*, result in murder prosecutions. Only killings resulting from circumstances in which death is, at a minimum, objectively foreseeable will be prosecuted under s. 213(a). Furthermore, the duration of imprisonment, if at all different, will not attenuate the "stigma". To the extent that any such "stigma" can be said to exist, it is at least as palpable upon release to the outside world as it is within the prison environment itself.

The "stigma" and punishment attached to murder need not be proportionate to the *mens rea* alone. Rather they must correspond to the combination of the physical and mental elements that collectively define a murder. As stated in Crump and Crump, "In Defense of the Felony Murder Doctrine," *supra*, at pp. 362-63:

The classification and grading of offenses so that the entire scheme of defined crimes squares with societal perceptions of proportionality ... is a fundamental goal of the law of crimes.

The felony murder doctrine serves this goal, just as do the distinctions inherent in the separate offenses of attempted murder and murder, or impaired driving and vehicular homicide. ... [T]he felony murder doctrine reflects the conclusion that a robbery that causes death is more closely akin to murder than to robbery. If this conclusion accurately reflects societal attitudes, and if classification of crimes is to be influenced by such attitudes in order to avoid depreciation of the seriousness of the offense and to encourage respect for the law, then the felony murder doctrine is an appropriate classificatory device. [Emphasis added.]

Recalling all the necessary hurdles which the Crown must prove beyond a reasonable doubt before s. 213(a) can operate, the elements of deterrence as well as retribution become critical. As the Crumps discuss at pp. 370-71:

The conclusion does not follow, however, that felons cannot be deterred, or that criminals are so different from other citizens that they are impervious to inducements or deterrents that would affect people in general. There is mounting evidence that serious crime is subject to deterrence if consequences are adequately communicated. The felony murder rule is just the sort of simple, commonsense, readily enforceable, and widely known principle that is likely to result in deterrence.

...

The proposition that accidental killings cannot be deterred is inconsistent with the widespread belief that the penalizing of negligence, and even the imposition of strict liability, may have deterrent consequences. [Emphasis added.]

Section 213(a) does not deal with accidental killings, but rather with killings that are objectively foreseeable as a result of the abominable nature of the predicate crimes, committed with specific intent, coupled with the intentional infliction of bodily harm. Given the dual subjective requirement already in place, the deterrence factor is most cogent in these circumstances. Whatever the competing arguments may be with respect to deterring the merely negligent, here we are dealing with those who have already expressly acted with the intent to commit at least two underlying serious crimes. If deterrence is to ever have any application to the criminal law, and in my view it should, this is the place.

Deterrence can neither be analyzed in the abstract nor in isolation from the context of the provision in question. Section 213(a) deals with one who has already proven to be a "hijacker", a "kidnapper", a "rapist", or an "arsonist". Furthermore, this person has already proven willing to cause bodily harm to commit the offence or to enable himself to escape after having committed the offence. In these circumstances, it is certainly appropriate for Parliament to put this person on notice, that if these purposeful acts result in death, you will be charged as a "murderer" as well.

This notion of Parliamentary autonomy cannot be displaced unless a *Charter* violation has occurred. In my view that has not taken place here. Repeating my colleague's own test, as articulated in *Vaillancourt* at p. 657, if the legislation is "tantamount to one which has objective foreseeability as an essential element, and, if objective foreseeability is sufficient, then it would not be in violation of s. 7 or s. 11(d) in doing so in that way."

V. Conclusion

Policy considerations in Canada as well as in other jurisdictions have inspired legislation that considers objective foreseeability sufficient as the minimum *mens rea* requirement for murder. While it may not be the very best test for all cases, it is certainly a constitutionally valid one.

Parliament did not have to enact s. 213(a), but that is not the question before this Court. The issue is whether it could. In my view, the answer rests on what level of foreseeability will be required before a conviction for murder can be returned. Based on this Court's precedents, and the principles of fundamental justice, I believe that the objective foreseeability of death test for the crime of murder is constitutionally valid. The additional mandatory elements demanded by s. 213(a) lend even greater force to this conclusion.

Striking down the legislation simply because some other scheme may be preferable would be an unwarranted intrusion into Parliament's prerogative, and would undermine the means it has chosen to protect its citizens. The *Charter* is not designed to allow this Court to substitute preferable provisions for those already in place in the absence of a clear constitutional violation. Such a task should be reserved for the Law Reform Commission or other advisory bodies. This Court's province is to pronounce upon the constitutionality of those provisions properly before it. The *Charter* does not infuse the courts with the power to declare legislation to be of no force or effect on the basis that they believe the statute to be undesirable as a matter of criminal law policy. For the aforementioned reasons, I do not believe that s. 213(a) offends the *Canadian Charter of Rights and Freedoms*.

Therefore, I would allow this appeal, restore the conviction for second degree murder with respect to the death of Ann McLean, and answer the constitutional questions as follows:

Q: Does s. 213(a) of the *Criminal Code* infringe or deny the rights or freedoms guaranteed by s. 7 and/or s. 11(d) of the *Canadian Charter of Rights and Freedoms*?

A: No.

Q: If the answer to question 1 is affirmative, is s. 213(a) justified by s. 1 of the *Canadian Charter of Rights and Freedoms*, and therefore not inconsistent with the *Constitution Act, 1982*?

A: I need not answer this question in light of my answer to the first question.

//Sopinka J.//

The following are the reasons delivered by

SOPINKA J. -- I have had the advantage of reading the reasons of Chief Justice Lamer and Justice L'Heureux-Dubé. I agree with Lamer C.J. that there must be a new trial in this case. I would give the same answers to the constitutional questions as Lamer C.J. but, with respect, I cannot agree with his reasons.

In my view, the issue of subjective foresight of death should be addressed only if it is necessary to do so in order to decide this case or if there is an overriding reason making it desirable to do so. Overbroad statements of principle are inimical to the tradition of incremental development of the common law. Likewise, the development of law under the *Canadian Charter of Rights and Freedoms* is best served by deciding cases before the courts, not by anticipating the results of future cases.

The first inquiry is whether ruling on the issue of subjective foresight is necessary for the disposition of this case. In my view, the case at bar is governed by the reasons given in this Court's

decision in *R. v. Vaillancourt*, 1987 CanLII 2 (SCC), [1987] 2 S.C.R. 636. The Court need go no further.

In *Vaillancourt*, the majority of the Court held that s. 213(d) of the *Criminal Code*, R.S.C. 1970, c. C-34, was unconstitutional. Lamer J. (as he then was), Dickson C.J. and Estey and Wilson JJ. concurring, held that it is a principle of fundamental justice that a person cannot be convicted of murder without proof beyond a reasonable doubt of at least objective foreseeability of the victim's death. La Forest J. held that fundamental justice requires that the *mens rea* requirement for murder be one referable to causing death. Beetz and Le Dain JJ. agreed with the reasons of both Lamer and La Forest JJ. supporting the conclusion that s. 213(d) of the *Criminal Code* did not conform to the principles of fundamental justice.

Each of these three sets of reasons stated that it was not necessary to address the issue of whether subjective foresight of death is a constitutional requirement for a valid murder charge. However, Lamer J. (and therefore four of the eight judges participating) adopted the view, in *obiter*, that subjective foresight of death is indeed the standard demanded by s. 7 of the *Charter*.

Accepting the majority position in *Vaillancourt* that objective foreseeability of death is a constitutional minimum for the definition of murder, the conclusion must follow that s. 213(a) does not meet this constitutional minimum. With respect, I cannot agree with the contrary conclusion reached by L'Heureux-Dubé J.

Section 213(a) applies "whether or not the person means to cause death to any human being". It substitutes for proof of these mind-states the requirement that culpable homicide is murder when a person intentionally causes bodily harm and death ensues from the bodily harm, if the harm is caused for the purpose of facilitating the commission of or flight from certain offences. It is not difficult to imagine a case in which the underlying offence is committed, bodily harm is intended, and death ensues which is not objectively foreseeable. For instance, A shoves B out of the way to facilitate flight from a robbery, intentionally inflicting bodily harm in the sense of a non-trivial interference with the health or comfort of B. B unexpectedly missteps as a result of being pushed, falls, strikes his head, and dies. Section 213(a) would label this state of affairs murder, even though there is reasonable doubt that B's death was objectively foreseeable. Section 213(a) therefore offends the principle of fundamental justice described in *Vaillancourt*.

I conclude that in the case at bar it is clearly not necessary to address the issue of subjective foresight of death to dispose of the case. The question is then whether there is an overriding reason making it desirable to do so.

In *Vaillancourt*, Lamer J. explicitly narrowed his decision to address only objective foreseeability of death as a constitutional requirement for murder, because otherwise his comments would have had a bearing on sections not challenged in the case, namely ss. 212(c) and 205(5)(a). A significant factor behind this approach was that only the Attorney General for Ontario appeared as intervener in that case. The Attorney General of Canada did not appear, although he may well have done so had ss. 212(c) and 205(5)(a) been raised.

In the case at bar, Lamer C.J. does not narrow the issue to avoid commenting on the validity of s. 212(c); rather he widens the issue in order to cast "serious if not fatal doubt" upon it. He gives two reasons. First, unlike *Vaillancourt* there was wide participation by the Attorneys General. The Attorneys General of Canada, Ontario, Quebec, Manitoba and British Columbia intervened on the issue of whether subjective foresight or objective foreseeability of death is the constitutionally required minimum *mens rea* for murder. Second, justice would not be served if this case were to return to this Court a second time on the ground that there is doubt as to the validity of s. 212(c).

In my view, it is dangerous to justify a wider scope of decision in this case than in *Vaillancourt* by reason of the participation of a greater number of Attorneys General. If the fact of their participation puts at risk a wider range of legislation, this practically creates a disincentive to the exercise of their right to intervene. A more important consideration is that it is not strictly accurate to state that the Attorneys General intervened on the issue of whether subjective foresight or objective foreseeability is the constitutionally required minimum *mens rea* for murder. While this was, of course, canvassed, the focus of argument was on whether s. 213(a) met constitutional standards or whether it could be justified under s. 1, in distinction from s. 213(d). I am not convinced that the submissions of the

Attorneys General, not to mention the parties, would have been the same had s. 212(c) or other sections been challenged.

Admittedly, it is an important function of this Court to provide guidance to lower courts. In the context of this case, it would also be desirable that the validity of s. 212(c) be known with certainty for the purposes of the new trial. However, this desirable result does not outweigh the importance of deciding on the validity of s. 212(c) in a case where it is directly in issue and is fully argued by the parties.

I would therefore limit myself to the conclusion that s. 213(a) is unconstitutional because (i) it places a restriction on s. 7 of the *Charter* by permitting a person to be convicted of murder without proof beyond a reasonable doubt of objective foreseeability of death, or of an equivalent substitute requirement, and (ii) for the reasons expressed by Lamer C.J. in *Vaillancourt* and in the case at bar, it cannot be saved by s. 1. Other constitutional issues with respect to the murder provisions of the *Criminal Code* I would leave for another day.

Appeal dismissed, L'HEUREUX-DUBÉ J. dissenting.

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Solicitor for the intervener the Attorney General of Manitoba: The Attorney General of Manitoba, Winnipeg.

Solicitor for the intervener the Attorney General of British Columbia: The Attorney General of British Columbia, Victoria.

* Chief Justice at the time of hearing.

** Chief Justice at the time of judgment.

ATTACHMENT C

Roach, Kent, excerpt from the text *Criminal Law*, fourth edition 2009, Irwin Law

ESSENTIALS OF
CANADIAN LAW

CRIMINAL LAW

FOURTH EDITION

KENT ROACH

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CHAPTER 10

THE SPECIAL PART: HOMICIDE, SEXUAL, PROPERTY, AND TERRORISM OFFENCES

This book has so far provided an overview of the general principles of criminal liability and defences. These principles are sometimes called the general part of the criminal law because they provide general principles, excuses, and justifications that apply to all offences. It is important to have a sense of the principles that apply to all criminal offences. Such general principles also inform how the courts interpret the principles of fundamental justice found in section 7 of the *Charter*.

That said, the criminal law, as well as *Charter* jurisprudence, has in recent years taken a more contextual approach. The increased emphasis on context makes it helpful to have a sense of how the courts interpret some specific offences. Those parts of the *Criminal Code* that set out specific offences are often referred to as the special part of the *Code*.

As discussed in previous chapters, it is important when examining specific offences to distinguish between matters relating to the prohibited act or *actus reus* and matters relating to the required fault element or *mens rea*. In addition, there is one defence—provocation—that belongs to the special part because it only applies when a person is charged with murder. Unlike the other defences examined in the previous chapters, a successful provocation defence does not produce an acquittal: it only reduces murder to manslaughter.

Any attempt to discuss the special part, especially in a book such as this that is designed to provide a concise introduction to criminal law, must be selective. To this end, this chapter will only examine homicide, some sexual, some property, and some terrorism offences. Each of these

offences could merit a book in its own right and there are indeed books on each of these subjects. The offences examined in this chapter have been selected because they are some of the most important offences and they have been informed by contextual considerations that may not naturally be discussed in the general part with its focus on the general principles of criminal liability, excuses, and justifications. Because of their severity, homicide, sexual, and terrorism offences are subject to frequent litigation in the appellate courts and amendment by Parliament.

A. HOMICIDE OFFENCES

There are three homicide offences: murder, manslaughter, and infanticide. Section 234 of the *Criminal Code* provides that manslaughter is the residual offence so that culpable homicide that is not murder or infanticide is manslaughter. All murder convictions carry with them a mandatory penalty of life imprisonment, whereas manslaughter without the use of a firearm and infanticide have no mandatory minimum penalty. Murder is classified as either first or second degree with first-degree murder under section 231 of the *Code* generally requiring that the accused serve twenty-five years in prison before being eligible for parole. Section 232 provides a defence of provocation that reduces murder to manslaughter. Murder with its special stigma and mandatory penalty of life imprisonment is distinguished from manslaughter or infanticide mainly on the basis of its higher requirements of subjective fault, involving as a minimum the accused's subjective knowledge that the victim would die.

1) The *Actus Reus* of Causing Death

The common *actus reus* for all homicide offences is the causing of the death of a human being. A human being is defined as a child who has completely proceeded from its mother in a living state whether or not the child has breathed, has an independent circulation, or has had its navel string severed.¹ A person can commit homicide if he or she causes injury to a child before or during its birth and the child dies as a result after becoming a human being as defined above.²

1 *Criminal Code of Canada*, R.S.C. 1985, c. C-46, s. 223(1) [Code].

2 *Ibid.*, s. 223(2). Section 238 also provides a separate offence punishable by up to life imprisonment for causing death in the act of birth before the fetus becomes a human being, as defined in s. 223 with an exemption for acts done in good faith to preserve the life of the mother. This offence is distinct from infanticide.

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a) Statutory Provisions in Homicide Cases

Section 222(1) of the *Code* provides that a person commits homicide when, directly or indirectly, by any means, he or she causes the death of a human being. This is a broad definition that has been satisfied in a case where an accused abducted a child who subsequently was left in a car and died of hypothermia.³

There are a variety of specific statutory rules relating to causation in homicide cases. Section 224 provides that a person is responsible for a death even though it might have been prevented by resorting to proper means. This section would apply where victims die as a result of a wound but could have been saved if they had accepted or received proper medical treatment.⁴ A person who stabs another in a remote location will be held responsible for causing that person's death even though the very same wound may not have been life-threatening if inflicted in a place with medical facilities. Section 225 provides that a person who causes a dangerous injury is responsible for death, notwithstanding that the immediate cause of death is proper or improper treatment rendered in good faith. A person who stabs another will be responsible for causing death even though the immediate cause of death might be negligent treatment of the wound by a doctor. Indeed, section 225 might be less favourable to the accused than judge-made common law, which has held that very bad treatment that overtakes the initial wound can break the chain of causation, so that it is unfair to conclude that the accused caused the death.⁵ Under section 226, a person is deemed to have caused death even though the bodily injury that results in death accelerates a pre-existing disease. This provision suggests that an accused must assume responsibility if the victim's "thin skull" takes the form of a pre-existing disease. Section 222(5)(c) provides that a person commits homicide when he or she causes another person by threats, fear of violence, or by deception to do anything that causes the person's death. The Supreme Court has observed that "these statutory provisions and others like them preempt any speculation as to whether the

3 *R. v. Younger* (2004), 186 C.C.C. (3d) 454 (Man. C.A.). In that case, the accused was also convicted of first-degree murder under the stricter requirement that his actions were the "substantial cause" of the child's death. This requirement will be examined later in this chapter.

4 In *R. v. Blaue*, [1975] 1 W.L.R. 1411 (C.A.), a manslaughter conviction was upheld when the victim refused a blood transfusion because of her religious beliefs. In *R. v. Smith* (1959), 43 Cr. App. Rep. 121 (C.A.), the accused was held to have caused death even though proper medical treatment would have probably saved the victim's life.

5 *R. v. Jordan* (1956), 40 Cr. App. Rep. 152 (C.C.A.).

triggering of a chain of events was then interrupted by an intervening cause which serves to distance and exonerate the accused from any responsibility for the consequences.”⁶

b) General Principles of Causation in Homicide Cases

The *Criminal Code* does not comprehensively codify all causation issues that may arise in a homicide case. As the Supreme Court has stated, “[w]here the factual situation does not fall within one of the statutory rules of causation in the *Code*, the common law general principles of criminal law apply to resolve any causation issues that may arise.”⁷

In *R. v. Smithers*,⁸ the Supreme Court upheld a manslaughter conviction on the basis that the accused’s action of kicking the deceased in the stomach “was at least a contributing cause of death, outside the *de minimis* range,” even though the death was in part caused by the victim’s malfunctioning epiglottis, which caused him to choke to death on his own vomit. Dickson J. upheld the applicability of the thin skull principle in the criminal law of homicide by stating:

Death may have been unexpected, and the physical reactions of the victim unforeseen, but that does not relieve the [accused]. . . .

It is a well-recognized principle that one who assaults another must take his victim as he finds him.⁹

One Court of Appeal has stated that the contributing cause and thin skull principles set out in *Smithers* establish “a test of sweeping accountability” for causing death that might be vulnerable to challenge under section 7 of the *Charter* as infringing the principles of fundamental justice.¹⁰ This test has been applied in a case to hold that the accused caused a victim’s death by a minor assault that was followed by a fatal heart attack even though the victim had a history of severe heart disease.¹¹ The accused had to accept that the victim had a “thin skull,” in this case heart disease and anxiety that may have led to the heart attack.

Despite its breadth, the *Smithers* approach to causation in homicide cases has survived under the *Charter*. In *R. v. Cribbin*,¹² the Ontario Court of Appeal concluded that the *de minimis* causation test and thin

⁶ *R. v. Nette*, [2001] 3 S.C.R. 488 at para. 48 [*Nette*].

⁷ *Ibid.*

⁸ (1977), 34 C.C.C. (2d) 427 (S.C.C.) [*Smithers*].

⁹ *Ibid.* at 437.

¹⁰ *R. v. F.(D.L.)* (1989), 52 C.C.C. (3d) 357 at 365 (Alta. C.A.).

¹¹ *R. v. Shanks* (1996), 4 C.R. (5th) 79 (Ont. C.A.).

¹² (1994), 89 C.C.C. (3d) 67 (Ont. C.A.) [*Cribbin*].

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skull principles approved in *Smithers* are consistent with the principles of fundamental justice that forbid the punishment of the morally innocent. Arbour J.A. stated:

As the law of manslaughter stands, if a person commits an unlawful dangerous act, in circumstances where a reasonable person would have foreseen the risk of bodily harm which is neither trivial nor transitory, and the unlawful act is at least a contributing cause of the victim's death, outside the *de minimis* range, then the person is guilty of manslaughter. Both causation and the fault element must be proved beyond a reasonable doubt before the prosecution can succeed. Combined in that fashion, both requirements satisfy the principles of fundamental justice in that any risk that the *de minimis* test could engage the criminal responsibility of the morally innocent is removed by the additional requirement of objective foresight.¹³

The result is that a person could be convicted of manslaughter on the basis that his or her unlawful acts played more than a minimal role in the death, even though death was not reasonably foreseeable. A manslaughter conviction was upheld in *Cribbin* because the accused's assault had contributed to the victim's death, even though the victim had been subject to more serious assaults by another person and had died because he drowned in his own blood.

In *R. v. Nette*,¹⁴ the Supreme Court revisited *Smithers*. Although the Court did not overrule *Smithers*, it reformulated and arguably elevated the test for causation in homicide cases. Arbour J. for a majority of the Court concluded that "the causation standard expressed in *Smithers* is still valid and applicable to all forms of homicide" (that is, murder, manslaughter, and infanticide). Nevertheless, she added:

In order to explain the standard as clearly as possible to the jury, it may be preferable to phrase the standard of causation in positive terms using a phrase such as "significant contributing cause" rather than using expressions phrased in the negative such as "not a trivial cause" or "not insignificant." Latin terms such as *de minimis* are rarely helpful.¹⁵

L'Heureux-Dubé J. with three other judges dissented and would have maintained the negative formulation contemplated under *Smithers*. She argued that "[t]here is a meaningful difference between expressing the

¹³ *Ibid.* at 88.

¹⁴ *Nette*, above note 6.

¹⁵ *Ibid.* at para. 71.

standard as 'a contributing cause that is not trivial or insignificant' and expressing it as a 'significant contributing cause.'¹⁶

All the judges in *Nette* were agreed, however, that the accused had caused the death of a ninety-five-year-old widow he had left hog-tied and alone after robbing her home. The victim died of asphyxiation some twenty-four to forty-eight hours later. Medical evidence showed that a number of factors contributed to the death, including the hog-tied position, a moderately tight ligature that the accused had left around the victim's neck, as well as the victim's age, asthma, and congestive heart failure. Arbour J. concluded that "the fact that the appellant's actions might not have caused death in a different person, or that death might have taken longer to occur in the case of a younger victim, does not transform this case into one involving multiple causes."¹⁷

Courts now articulate causation in the positive terms of whether the accused's actions were a significant contributing cause of death as opposed to the older formulation of a cause that is not trivial, *de minimis*, or insignificant.¹⁸ There are some signs that the verbal reformulation of the test has produced a more demanding standard of causation. For example, the Ontario Court of Appeal has held that "evidence that an act was possibly a cause of death cannot provide the evidentiary basis for a finding beyond a reasonable doubt that the act significantly contributed to the death." Thus a kick to the head was found not to be a significant cause of death when the deceased was punched in self-defence and fell to the ground hitting his head.¹⁹ As will be seen below, courts after *Nette* have been more willing to contemplate that the accused's responsibility for causing death has been broken or interrupted by an intervening event. That said, it is not necessary to establish that the accused's actions were the sole or even a substantial cause of death.²⁰ In addition, the specific statutory rules in sections 224 to 226 of the *Criminal Code* that specifically address some issues involving thin skulls and intervening events should not be forgotten. They remain valid unless successfully challenged under section 7 of the *Charter* as infringing a principle of fundamental justice as they might relate to the requirement that an accused's action be a cause of the victim's death. Section 225 might be vulnerable to *Charter* challenge to the

16 *Ibid.* at para. 6.

17 *Ibid.* at para. 81. See also *R. v. Knight*, [2003] 1 S.C.R. 156.

18 *R. v. Pangowish* (2003), 171 C.C.C. (3d) 506 (B.C.C.A.), leave to appeal to S.C.C. refused (2003), 176 C.C.C. (3d) vi.

19 *R. v. Talbot* (2007), 217 C.C.C. (3d) 415 at para. 82 (Ont. C.A.).

20 See, e.g., *R. v. Reid and Stratton* (2003), 180 C.C.C. (3d) 151 (N.S.C.A.) [*Reid and Stratton*], discussed below in this chapter.

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extent that it holds an accused who caused a dangerous but relatively minor bodily injury such as a stabbing accountable for a death that is really caused by grossly improper treatment such as giving the victim drugs that caused a severe allergic reaction.

c) Substantial Cause Requirements for Some Forms of
First-Degree Murder

Although the Supreme Court stressed in *Nette* that there is one causation test for all homicide cases, it also recognized that section 231(5) contemplates an additional and more stringent causation test for that particular form of first-degree murder. Section 231(5) requires that the death be caused while the accused is committing or attempting to commit a list of enumerated offences, including sexual assault, kidnapping, and hostage-taking. In *Harbottle*, the Supreme Court concluded that an accused may only be convicted of first-degree murder under section 231(5) if his or her actions "form an essential, substantial and integral part of the killing of the victim." Cory J. elaborated:

The substantial causation test requires that the accused play a very active role—usually a physical role—in the killing Obviously, this requirement is much higher than that described in *R. v. Smithers* . . . which dealt with the offence of manslaughter. There it was held . . . that sufficient causation existed where the actions of the accused were "a contributing cause of death, outside the *de minimis* range." That case demonstrates the distinctions in the degree of causation required for the different homicide offences.²¹

The Court found that there was substantial causation in *Harbottle* because the accused had held the victim's legs to stop her from struggling while his co-accused strangled her to death. The Court rejected an even stricter causation test that would have required the Crown to prove that the accused's acts were a physical cause of death, because it would lead to impractical and non-purposive distinctions. On the facts of the case, it was impossible "to distinguish between the blameworthiness of an accused who holds the victim's legs, thus allowing his co-accused to strangle her, and the accused who performs the act of strangulation."²² At the same time, section 231(5) will in most cases require the accused to play a physical role in the killing.

²¹ *R. v. Harbottle* (1993), 84 C.C.C. (3d) 1 at 13–14 (S.C.C.) [*Harbottle*].

²² *Ibid.* at 12.

In *Nette*,²³ the Supreme Court rejected the idea that the substantial causation standard articulated in *Harbottle* should apply in all homicide cases. Rather, it was restricted to sections 231(5) and 231(6), which both have the wording “when death is caused by that person.” In cases under those sections, the jury must be given two different causation tests. The first that applies to the causing of death is “that the acts of the accused have to have made a ‘significant’ contribution to the victim’s death to trigger culpability for the homicide.” The second causation test under sections 231(5) or (6) is that “the accused’s actions must have been an essential, substantial and integral part of the killing of the victim.”²⁴ Multiple causation tests, especially those that hinge on the fine distinction between “significant” and “substantial” causation, may be difficult for the jury to understand.

To further complicate matters, the *Harbottle* substantial cause test does not apply to all forms of first-degree murder. There is no substantial cause requirement in section 231(2) that provides for planned and deliberate murders, section 231(3) that applies to contract murders, and section 231(4) that applies to murders of police officers and prison guards. Even more striking is the fact that sections 231(6.01), 6.1, and 6.2 all avoid the *Harbottle* substantial cause test by only requiring that death be caused while committing or attempting to commit certain crimes as opposed to death “being caused by that person” during the crimes.²⁵ Parliament could amend sections 231(5) and (6) to reject the requirement in *Harbottle* that each accused play a substantial role in the killing of the victim. Although this would expand the ambit of liability for first-degree murder, it would end the need for the jury to be instructed about two causation tests in some cases where first-degree murder is charged.

d) Concurrent Causes of Death and New Acts That Break the Chain of Causation

Courts have concluded that an accused caused death when he or she set off a chain of events that ended in a person’s death, even though the immediate cause of death had not been at the accused’s hands. In *R. v. Kitching*,²⁶ an accused who had assaulted the victim, causing his “brain death,” was held responsible, even though the immediate cause of death was the medical withdrawal of life support. The accused’s conduct “need not be shown to be the sole or ‘effective’ cause of a crime . . .

²³ *Nette*, above note 6.

²⁴ *Ibid.* at paras. 73 and 82.

²⁵ *Ibid.* at para. 63.

²⁶ (1976), 32 C.C.C. (2d) 159 at 175 (Man. C.A.).

there may be two or more independent operative causes of death." An accused who shot a person who then cut his own throat was still held to have caused the person's death.²⁷ Similarly, an accused who shot a person who had already been grievously shot by another person was still held to have caused the victim's death.²⁸ In a manslaughter case, the accused was responsible for causing the death of a victim he had used as a shield even though the victim had been shot by the police returning the accused's fire.²⁹ Reasonable acts performed by a victim trying to escape³⁰ or police officers enforcing the law are not intervening acts breaking the chain of causation, because they are compelled by the accused's actions.

Although an accused may still be held responsible for causing death when there are concurrent causes of the death, it will be necessary in some cases for the jury to be instructed about whether an intervening event has "severed the chain of causation" in such a manner that the accused's actions are no longer a significant contributing cause of the victim's death. A person engaged in illegal drag racing may be held responsible for causing the death of a fellow racer, a passenger, persons in other vehicles, and pedestrians, but only so far as the accused's actions constitute a significant cause of the death.³¹ A racer has been held not responsible for a fatal crash of a fellow racer because of a reasonable doubt that the deceased would have recognized that the accused "was backing away and had given up the race before the fatal crash."³² In other words, the Crown failed to prove beyond a reasonable doubt that the accused's actions in racing constituted a significant contributing cause of the death.

A new trial was ordered in another case in which the accused caused the victim to become unconscious because of a headlock, but the victim died when his friends' attempts at resuscitation had the unfortunate effect of causing the victim to choke to death on his own vomit. The Nova Scotia Court of Appeal concluded that the jury should be asked whether it was "satisfied beyond a reasonable doubt that the actions [of the accused] are so connected to the death . . . that they can be said to have had a significant causal effect which continued up to the time of his death, without having been interrupted" by the intervening act of the botched resuscitation. The Court of Appeal added that the

27 *People v. Lewis*, 57 P. 470 (S.C. Cal. 1899).

28 *R. v. Green* (1988), 43 C.C.C. (3d) 413 (B.C.S.C.).

29 *R. v. Pagett* (1983), 76 Cr. App. Rep. 279 (C.A.).

30 See also *Code*, above note 1, s. 222(5)(c).

31 *R. v. Menzies* (2002), 50 C.R. (5th) 343 at para. 105 (Ont. S.C.J.).

32 *Ibid.* at para. 125.

jury must not be convinced that the accused's actions were "the sole cause" of the death but rather, consistent with *Nette*, that they were "a significant contributing cause."³³ At the same time, however, the Court of Appeal indicated that it was not sufficient to instruct the jury on the *Nette* test of causation; the jury must also be instructed about the intervening event and asked to determine if the accused's actions remained a significant contributing cause of death. In another case, an impaired driver was acquitted of impaired driving causing death because the victim was jaywalking and the accused's impaired driving did not cause death.³⁴ These cases indicate that while the accused's actions do not have to be the sole cause of death, there may be situations where the chain of causation will be broken so that the accused's actions are no longer the significant cause of death.

2) Murder

The main offence for murder is section 229. Any person charged with murder, even first-degree murder, must now be charged under section 229. It provides:

Culpable homicide is murder

- a) where the person who causes the death of a human being
 - i) means to cause his death or
 - ii) means to cause him bodily harm that he knows is likely to cause his death and is reckless whether death ensues or not;
- b) where a person, meaning to cause death to a human being or meaning to cause him bodily harm that he knows is likely to cause his death, and being reckless whether death ensues or not, by accident or mistake causes death to another human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being; or
- c) where a person, for an unlawful object, does anything that he knows or ought to know is likely to cause death, and thereby causes death to a human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being.

a) The Constitutionally Required Fault for Murder

As discussed in chapter 2, the Supreme Court has interpreted section 7 of the *Charter* to require that a few offences because of the special stig-

³³ *Reid and Stratton*, above note 20 at para. 89.

³⁴ *R. v. Horton* (2003), 20 C.R. (6th) 161 (Sask. Q.B.).

ma and penalty require a minimum form of *mens rea* or fault element. The constitutionally required minimum *mens rea* for murder is subjective knowledge of the likelihood or probability of death. In *R. v. Martineau*, the majority of the Court explained:

A conviction for murder carries with it the most severe stigma and punishment of any crime in our society. The principles of fundamental justice require, because of the special nature of the stigma attached to a conviction for murder, and the available penalties, a *mens rea* reflecting the particular nature of that crime. . . . The rationale underlying the principle that subjective foresight of death is required before a person is labelled and punished as a murderer is linked to the more general principle that criminal liability for a particular result is not justified except where the actor possesses a culpable mental state in respect of that result In my view, in a free and democratic society that values the autonomy and free will of the individual, the stigma and punishment attaching to the most serious of crimes, murder, should be reserved for those who choose to intentionally cause death or who choose to inflict bodily harm that they know is likely to cause death. The essential role of requiring subjective foresight of death in the context of murder is to maintain a proportionality between the stigma and punishment attached to a murder conviction and the moral blameworthiness of the offender. Murder has long been recognized as the "worst" and most heinous of peace time crimes. It is, therefore, essential that to satisfy the principles of fundamental justice, the stigma and punishment attaching to a murder conviction must be reserved for those who either intend to cause death or who intend to cause bodily harm that they know will likely cause death.³⁵

In that case, the Court struck down section 230(a) of the *Criminal Code*. That section provided for a murder conviction where the accused caused death while committing or attempting to commit one of a long list of serious crimes if he or she meant to cause bodily harm for the purpose of facilitating the underlying offence or escape from it. The Court held that section 230(a) violated sections 7 and 11(d) of the *Charter* because it substituted the intent to commit the underlying offence and to cause bodily harm for the constitutionally required *mens rea* of subjective knowledge of the likelihood of death. Proof of the intent to cause bodily harm would not lead inexorably to proof of the constitutionally required fault element of knowledge of the likelihood of death.

³⁵ *R. v. Martineau*, [1990] 2 S.C.R. 633 at 645 [*Martineau*].

The Supreme Court in *Martineau* held that the violation of sections 7 and 11(d) could not be justified under section 1 of the *Charter*. Even though the deterrence of violence during the commission of serious crimes was an important objective, it could be pursued in a more proportionate way. Chief Justice Lamer commented:

Very stiff sentences for the infliction of bodily harm leading to death in appropriate cases would sufficiently meet any deterrence objective that Parliament might have in mind. The more flexible sentencing scheme under a conviction for manslaughter is in accord with the principle that punishment be meted out with regard to the level of moral blameworthiness of the offender. To label and punish a person as a murderer who did not intend or foresee death unnecessarily stigmatizes and punishes those whose moral blameworthiness is not that of a murderer and thereby unnecessarily impairs the rights guaranteed by ss. 7 and 11(d) of the *Charter*. In my view then, s. 213(a) [now s. 230(a)], indeed all of s. 213 [now s. 230], cannot be saved by s. 1 of the *Charter*.³⁶

One judge, Justice L'Heureux-Dubé, dissented in *Martineau* and would have maintained that the constitutionally required fault for murder was only objective foresight of death. She stressed the need to consider not only fault, but also the harm caused by the *actus reus* of death and the fact that other democracies including the United Kingdom and the United States used "felony murder" or constructive murder provisions that applied even though an accused who killed while committing a serious crime would not have known that the victim would die. Justice L'Heureux-Dubé held that the fault requirement of objective foresight of death would be satisfied by proof of a subjective intent to cause bodily harm while committing another serious offence, but Justice Sopinka disputed this conclusion even though he otherwise agreed that the constitutionally required fault for murder should only be objective foresight of death. In any event, the majority of the Court clearly established that the constitutionally required fault for murder is subjective knowledge of the likelihood of death.

In a previous case, *R. v. Vaillancourt*, the Supreme Court had struck down section 230(d), which had provided for a murder offence when death results from the use or possession of a firearm while committing one of a long list of serious offences, on the limited basis that it did not even guarantee that there would be objective foreseeability of death in a case, for example, where a firearm accidentally discharged

³⁶ *Ibid.* at 647.

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during a robbery.³⁷ In a subsequent case, the Court also held that section 230(c) violated sections 7 and 11(d) of the *Charter* by substituting proof of wilfully stopping the breath of a human for the constitutionally required fault of subjective knowledge of the likelihood of death.³⁸ In most cases, a person who wilfully stopped another's breath would know that the victim was likely to die, but this might not be true in every case. Consistent with concerns about the presumption of innocence and any presumptions that could prevent the jury from having a reasonable doubt, the Court struck down this provision. In the result, section 230 has been rendered a dead letter that is no longer used even though Parliament has only formally repealed section 230(d). Hence, all people charged with murder have to be charged under section 229. Those charged with first-degree murder will be charged under section 229, but the Crown will also have to prove additional fault under section 231.

b) Section 229(a)(i)

Section 229(a)(i) requires that the person who causes the death of a human being means to cause death. "This clearly requires that the accused have actual subjective foresight of the likelihood of causing death coupled with the intention to cause that death." This fault requirement has been described as "the most morally blameworthy state of mind in our system."³⁹ It could be argued that a person who plants a bomb to achieve some political objective does not mean to cause the death of those killed by the bomb but rather means to cause the advancement of the political objective. Courts would likely reject this argument based on the distinction between motive and intention discussed in chapter 5 on fault.

c) Section 229(a)(ii)

Section 229(a)(ii) requires that the person who causes the death means to cause the victim "bodily harm that he knows is likely to cause his death and is reckless whether death ensues or not." This offence requires proof of a) subjective intent to cause bodily harm; and b) subjective knowledge that the bodily harm is of such a nature that it is likely to result in death. The Supreme Court has explained that the reference to recklessness in section 229(a)(ii) is an "afterthought"⁴⁰ because a person who knows of the probability of death will of necessity

37 *R. v. Vaillancourt*, [1987] 2 S.C.R. 636 [Vaillancourt].

38 *R. v. Sit*, [1991] 3 S.C.R. 124.

39 *Vaillancourt*, above note 37 at para. 10.

40 *R. v. Nygaard*, [1989] 2 S.C.R. 1074 at 1088 [Nygaard].

have the lesser form of fault of being reckless in the sense of subjectively advertent to the possibility of death. The reference to recklessness in this section is not only superfluous but dangerous. New trials have been ordered in cases in which trial judges erroneously left the jury with the impression that recklessness was a sufficient form of fault for a murder conviction or that the accused need only be aware of a danger or risk as opposed to the likelihood of death.⁴¹

Section 229(a)(ii) requires proof of subjective knowledge that the victim is likely to die. As Martin J.A. explained,

An intention to cause bodily harm that the offender ought to have known was likely to cause death is merely evidence from which, along with all the other circumstances, the jury may infer that the accused actually had the requisite intention and knowledge It does not, however, constitute the requisite state of mind.⁴²

As with all crimes, there must be some degree of correspondence between the commission of the *actus reus* of causing death and the *mens rea* required under section 229. That said, the Supreme Court in *R. v. Cooper*⁴³ indicated that so long as the accused knew at some point during two minutes of strangulation that the victim was likely to die, then there was a sufficient overlap between the *actus reus* and the *mens rea*. In other words, “if death results from a series of wrongful acts that are part of a single transaction then it must be established that the requisite intent coincided at some point with the wrongful acts.” As long as the *mens rea* existed at some point in the transaction leading to death, it would not matter that the victim died some time later.⁴⁴

d) Section 229(b) and Transferred Intent

Section 229(b) codifies the common law doctrine of transferred intent. The *mens rea* of intentionally or knowingly causing death to one person is transferred to the killing of the victim, even though the accused “does not mean to cause death or bodily harm” to the victim and does so “by accident or mistake.” This provision was applied in *R. v. Droste (No. 2)*⁴⁵ to convict an accused who, in a deliberate attempt to kill his wife, set fire to a car, causing two children buckled in the back seat to

41 *R. v. Czibulka* (2004), 189 C.C.C. (3d) 199 (Ont. C.A.); *R. v. Patterson* (2006), 205 C.C.C. (3d) 171 (Ont. C.A.).

42 *R. v. Simpson* (1981), 58 C.C.C. (2d) 122 (Ont. C.A.).

43 (1993), 78 C.C.C. (3d) 289 (S.C.C.) [*Cooper*].

44 *Mell v. The Queen*, [1954] 1 W.L.R. 228 (P.C.), cited with approval in *Cooper*, *ibid.* at 297.

45 (1984), 10 C.C.C. (3d) 404 (S.C.C.).