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Criminal Law

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1. The Criminal Code

Pursuant to section 91 of the *Constitution Act 1867*, 30 & 31 Vict, c 3, the federal government has jurisdiction over the creation of criminal law, and the provinces have jurisdiction over the administration of criminal law. Canadian criminal law is codified in the federal *Criminal Code*, RSC 1985, c C-47 (the Code), which defines all offences, sets the rules of procedure for criminal matters, and establishes guidelines for sentencing.

Not appearing in the Code are provincial regulatory offences, which usually attract less serious penalties and are subject to fewer defences. These are codified in various provincial statutes (e.g., the *Highway Traffic Act*, RSO 1990, c H.8).

Unlike civil law, criminal law is codified because people have a recognized right to know ahead of time what constitutes an offence, as the penalties may have serious consequences for a person's life.

2. Legal Proof and Elements of an Offence

The Canadian criminal legal system has adopted the presumption of innocence as the basis for its procedure and its rules of evidence. This means that an accused will be presumed innocent until proven guilty, which is a principle of fundamental justice. As a result, the prosecution bears the burden of proving that the accused is guilty beyond a reasonable doubt. In other words, if there is even a small doubt in the mind of the trier of fact (i.e., jury or judge) as to whether the accused is guilty, then he or she must be found innocent. The trier of fact determines if the prosecution has met the burden of proof. The defence's only objective is to present evidence that will raise a reasonable doubt so that the prosecution cannot meet the required burden of proof.

There are exceptions to who bears the burden of proof. For example, in breaking and entering to commit an indictable offence (i.e., very serious offence), the burden of proof is placed on the accused to prove that he or she did not have the requisite intent (*mens rea*) to commit the offence.

a. The Structure of a Criminal Offence

For most offences, a finding of guilt depends on proof beyond a reasonable doubt of two separate elements:

1. an objective component, or *actus reus* (Latin for "guilty act"), an action, omission, or state of being; and
2. a subjective component, or *mens rea* (Latin for "guilty mind"), which is the state of mind and/or intention of the accused.

b. Building Blocks of an Offence

The actions, circumstances, and consequences making up the *actus reus* help to define the crime and fit it into a specific section of the Code. To establish the *actus reus* of an offence, the relevant Code section must be considered in its entirety. Failure of the prosecution to prove any required element amounts to failure to prove the offence. Code offences build on each other to reflect crimes of differing severity. The offence of assault with a weapon or assault causing bodily harm (s 267(1)) builds upon the offence of simple assault (s 266) by adding either a circumstance (e.g., the use of a weapon) or a consequence (e.g., bodily harm). This means of organization makes it possible for less serious offences to be included in more serious ones.

3. Actus Reus

The objective element (*actus reus*) of an offence may be an act, an omission, or even simply a state of being.

a. State-of-Being Offences

Most such offences are offences of possession (e.g., of weapons, controlled drugs, break-in tools, etc.). A finding that an accused was in possession of an illegal item and thereby guilty of an offence will usually depend on certain factors such as knowledge, consent, or control on the part of the accused.

b. Offences of Omission

An offence of omission results when there is a duty imposed by law to take action in certain circumstances and the action was not taken. The common law imposes three general types of duties:

1. those arising out of relationships of care and protection,
2. those arising out of voluntary assumptions of obligation, and
3. those arising out of causal responsibility for dangerous situations.

Besides creating offences based on these common law duties, the criminal law has imposed its own circumstances (specific statutory duties in response to dangerous behaviour). These include a driver's duty to give a breath sample when so required by the police.

In many cases, there is a fine line between innocent and guilty omissions. In such cases, the court may apply the continuing act theory to impose guilt for a chain of events where the *mens rea* necessary to establish a guilty omission developed at an undetermined point.

In determining whether a duty has been breached, courts have traditionally compared the behaviour of the accused to the standard of behaviour of a "reasonably prudent person" and have required that the omission be very closely connected to the harm alleged.

c. Action Offences

Voluntariness is an essential component of criminal acts. While a lack of voluntariness may be understood as the absence of the required *mens rea*, a defence of involuntariness is based on an assertion that there is no act on which to impose criminal sanction, which makes this defence applicable even to offences of strict and absolute liability (i.e., where *mens rea* need not be shown).

Some involuntary acts occur in circumstances where the accused lacks fair opportunity to adjust his or her behaviour to the law because of external and unforeseeable circumstances which break the chain of causation. Others are alleged to relate to a lack of capacity on the part of the accused. An accused's lack of capacity to judge behaviour and to anticipate consequences is usually dependent on factors internal to the accused, such as a disease of the mind or mental disorder.

Causation is an important element of proof in any offence alleging consequences of an accused's action.

Factual causation is established when it is shown that a consequence would not have resulted but for the actions of the accused. Legal causation is a measure of the importance of one factual cause as against all other causes of the same consequence. The Code provides statutory guidance for the resolution of some recurring problems of legal causation, but novel issues are resolved by reference to the common law concepts of foreseeability of consequences and culpable intervention by a third party. These concepts are imported from tort law and take into account factors such as special vulnerabilities on the part of the victim.

Attempts to commit certain crimes are punishable in and of themselves. The *actus reus* for an attempt is not dependent on the proof of consequences. However, intent (*mens rea*) alone will not be enough to convict an accused of a crime, unless there was evidence of an act (*actus reus*) committed for the purpose of carrying out the intended objective and going beyond mere preparation.

Consent on the victim's part can be an exculpatory factor for the accused in some offences. The prosecution will then have to prove beyond a reasonable doubt that consent was not given by the victim. Consent must be informed and voluntary and can be either explicit or implicit depending on the nature of the offence. Even when consent is given, sanctions may be imposed when an accused acts outside of the parameters permitted by law.

4. Mens Rea

The second element required for a finding of guilt is the accused's state of mind and/or intent (*mens rea*). Most sections of the Code describe not only physical acts, but the mindset of the accused at the time of commission of those acts. Offences may depend not only on the action committed, but also on how it is committed (e.g., willfully, recklessly, or with intent to injure). The modifiers chosen to define offences often bring public policy content into the criminal law, reflecting societal norms and expectations.

The law recognizes degrees of intent (which range from direct intent to negligence) that are ascribed to individual offences and attract corresponding degrees of punishment.

An important key to measuring an accused's state of mind on the intent continuum is the subjective level of foresight of consequences attributed to the accused at the time of committing the alleged criminal act.

Intent may sometimes be confused with motive. The two concepts are related, but while proof of intent is necessary to establish *mens rea*, motive may simply be relevant as evidence of intent, and as a factor to be considered for sentencing purposes.

At the lower end of the intent spectrum are issues of recklessness, willful blindness, negligence, and mistake. Recklessness and willful blindness are different from negligence and mistake in that they involve the presence of knowledge or not exercising the capacity for knowledge of the potential consequences of the action. All four are described as unjustifiable risk-taking.

Recklessness describes a level of *mens rea* whereby the accused has knowledge of the potential consequences of his action and takes an unjustifiable risk in the face of that knowledge. Willful blindness is related to the concept of recklessness whereby a person wants to avoid criminal liability by intentionally avoiding learning the applicable law and claiming ignorance as an excuse. Factual mistakes occur when a person commits an act as a result of an innocent reliance on a mistaken fact. For example, a person pays for 20 litres of gas but in reality fills up 30 litres since the pump is defective and shows the wrong amount. The person gets arrested but does not have the requisite intent to be charged with theft.

However, if a mistake of fact has been established, the accused may still be held criminally liable if the Crown can prove that the mistake of fact was not material to the commission of the crime (i.e., the

mistake of fact does not go to the essence of the case and therefore is not material to proving the offence).

In contrast to material mistakes of fact, a mistake of law, or ignorance of the law, is not a defence in criminal law except in limited circumstances where access to legislation or government orders is so difficult that a usually diligent person would be unable to readily inform himself or herself of the prohibited act or when the mistake has been officially induced (e.g., by inaccurate government advice or information). Negligence, as such, has not traditionally been culpable under criminal law because of the absence of a *mens rea* element; however, criminal negligence is an offence under the Code. Case law suggests that a failure to take the precautions that a reasonable person would take in a similar situation may be the basis for criminal negligence. For example, failing to take proper care in driving in a snow storm, such as going too fast, would show that the driver demonstrated "wanton or reckless disregard for the lives or safety of other persons" (s 219(1) of the Code). Thus, the driver failed to foresee that injury or death could result from his or her actions.

a. Liability of Corporations

Corporate criminal liability poses special problems in that states of mind cannot be directly attributed to corporations. Instead, the *mens rea* of the directing minds (persons having control and direction of corporate action) is attributed to the corporation itself and satisfies the *mens rea* requirement.

b. Strict and Absolute Liability

While criminal offences depend almost without exception on a *mens rea* component, regulated government agencies are entitled, as a matter of public policy, to punish certain violations in the absence of *mens rea*. These special offences are not true crimes but, rather, public welfare offences. Strict liability offences depend on proof of only the *actus reus*, and there are a limited number of defences available. Absolute liability offences permit immediate conviction based on breach of a specific legal prohibition. In these instances, there are no defences that could be offered except that the accused was not at the scene. Because of the lack of a *mens rea* requirement, the scope of strict and absolute offences is closely limited by the courts.

5. Defences

Much of the most dynamic change in criminal law occurs in the area of defences. Two of the most important defences available to the accused are not true defences but, rather, instances of reliance on the rules of evidence. One such instance is the assertion that the prosecution has failed to establish proof beyond a reasonable doubt of an essential element of the offence—usually either the *mens rea* (mental element) or the *actus reus* (physical element).

True defences may be subdivided into three categories:

1. **Justification**—these defences are rare, but when proven, the accused will not be liable under the Code (e.g., self defence).
2. **Excuse**—these defences involve admission of the wrongfulness of an accused's actions but assert the influence of external or internal forces which would negate the required mental element (*mens rea*) of the offence. These defences usually depend on issues of physical involuntariness or cognitive or normative impairment (e.g., duress).
3. **Procedural defences and non-exculpatory public policy defences**—the prosecution may not be entitled to a conviction due to the methods used to obtain the necessary evidence (e.g., entrapment, illegal search and seizure).

As stated in section 4 above, ignorance of the law is no defence, except in limited circumstances where access to legislation or government orders is so difficult that a reasonably diligent person would be unable to readily inform himself or herself of the prohibited act, or when the mistake has been officially induced (by inaccurate government advice or information).

6. Specific Defences

Necessity is a common law defence and is not codified in the Code. However, its application is confirmed by section 8(3) of the Code. Section 8(3) states that "every rule and principle of the common law that renders any circumstances a justification or excuse for an act or defence to a charge" applies "in respect of proceedings for an offence under [the Code] or any other Act of Parliament except in so far as they are altered by or are inconsistent with this Act or any other Act of Parliament."

This defence provides a legal excuse rather than a justification. It is to be strictly limited to situations of true involuntariness: *R v Perka*, [1984] 2 SCR 232.

There are three elements to this defence:

1. The accused must be in imminent peril or danger (See *Morgentaler v The Queen*, [1976] 1 SCR 616) which must be unavoidable. According to *R v Perka* (above) at 251, "the situation must be so emergent and the peril must be so pressing that normal human instincts cry out for action and make a counsel of patience unreasonable."
2. The accused did not have a reasonable legal alternative to the course of action taken.
3. The harm inflicted by the accused must be proportional to the harm the accused avoided.

Duress is related to necessity, whereby an accused may be acquitted if he or she committed the offence under threat of immediate death or bodily harm by a person present at the time of the offence. There are limitations on the offences to which this defence applies.

Self-defence can be a defence against unprovoked assault if the force used in self-defence is no more than is necessary to protect against the assault. Self-defence causing death or grievous bodily harm is justified if committed in circumstances of reasonable apprehension of death or grievous bodily harm where there is no reasonable alternative.

Disease of the mind or mental disorder is the statutory phrase used to describe what is traditionally known as the insanity defence. An accused must show that he or she has a disease or disorder rendering him or her incapable of either appreciating the nature and quality of the act or of understanding the moral wrongfulness of the act.

A finding of not guilty by reason of mental disorder may attract terms of detention for treatment where the accused is found to be

dangerous to society. This defence is to be distinguished from a determination that the accused is not fit to stand trial—a finding of unfitness to stand trial relates not to the accused's state of mind at the time of commission of the offence, but to his or her condition at the time of the hearing.

Non-insane automatism is a condition leading to involuntary action which negates the *actus reus* of the offence charged. In alleging automatism, there is an onus on the defence to provide at least some evidence that the accused suffers from this unusual condition.

Provocation, a concept related to automatism, may reduce a charge of murder to manslaughter in certain circumstances where there is evidence that the killing in question was done in the heat of passion and as a result of sudden provocation.

Drunkenness, in its extreme form, may be asserted as a defence insofar as it may interfere with the ability of the accused to form the requisite level of intent. Despite section 33.1 of the Code, which does not permit self-induced intoxication as a defence to an offence that "includes as an element, an assault or any other interference or threat of interference by a person with the bodily integrity of another person," the case of *R v McCaw*, 2018 ONSC 3464 allowed this defence in a sexual assault case. Developments in this area of the law are beyond the scope of this outline.

7. The Canadian Charter of Rights and Freedoms

The majority of Charter-based legal arguments are advanced in criminal matters. Section 7 of the Charter guarantees an accused (and all persons) the right to "life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Other Charter sections guarantee important procedural protections for an accused and for all people, including: protection against unreasonable search and seizure, protection against arbitrary detention, rights on arrest (including the right to remain silent and to obtain the advice of legal counsel), and the right to trial in a reasonable time. An accused who believes that his or her rights have been infringed in the course of the prosecution can apply for relief under one of the remedy sections of the Charter.

Section 24 of the Charter is used when asserting infringement of an accused's rights by government action. Remedies available include exclusion of evidence obtained through infringement of an accused's Charter rights. An application to strike down or modify infringing law (either statute or common law) may be brought under section 52 of the Charter. In presenting an argument under either of these sections, it must be borne in mind that Charter rights are limited by section 1, which allows rights to be subject to "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

8. Other Parties to an Offence

The criminal responsibility of other accused, such as those aiding the principal accused, is judged independently based on individual findings of *actus reus* and *mens rea*. These acts include offences such as aiding, abetting, counselling, and being an accessory after the fact. Also, an accused who is part of an unlawful plan that he or she knows or ought to know would result in the commission of a crime may be subject to extended secondary liability.

The *actus reus* of "aiding" is material facilitation for a specified purpose. "Abetting" means to encourage an offender or an offence. The two offences are often charged together, and both offences may require proof of direct or oblique intent. It is possible for an accused to aid or abet by omission, where he or she has the ability to prevent the commission of the offence and fails to do so, because failure to protest can be interpreted as tacit support or encouragement.

"Counselling" is charged where a person counsels (or procures, solicits, or incites) another person to be a party to an offence and that other person becomes, in fact, a party to that offence.

An "accessory after the fact" is a person who, knowing another person has committed an offence, "receives, comforts or assists" that person for the purpose of helping him or her to escape.

9. Sentencing

After an accused is convicted of an offence, the court turns to the imposition of a sentence. The applicable sentences for each offence are described in the Code, with different ranges of sentences corresponding to particular classes of offences. Within the prescribed range, the court generally has discretion with respect to the sentence imposed. However, this discretion must be exercised judiciously and by reference to the relevant jurisprudence. Canadian law does not prescribe capital or corporal punishment. The most common sentences imposed include imprisonment, fines, and probation. In some cases, a convicted accused may be discharged, either on an absolute or a conditional basis.