**Criminal** (Benedet)

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# Chapter 1: Introduction to Canadian Criminal Law

## A. Sources of the Criminal Law

### 1. Constitution Act, 1867

* s. 91 grants Parliament with jurisdiction over:
  + 27. Criminal law and procedure, except constitution of courts
  + 28. Establishment, maintenance, management of penitentiaries
* s. 92 grants provincial legislature with jurisdiction over
  + 6. Prisons
  + 13. Property and civil rights
  + 14. Administration of justice including courts
  + 15. Imposition of punishment by fine, penalty, or imprisonment for provincial classes of subjects

*Challenges to jurisdiction*

* Provincial legislation can be challenged as being "ultra vires" – outside the domain of provincial legislation; should be dealt with by federal Parliament
* "Dual competency" – can be punished by both levels (e.g. motor vehicle issues)
* In the event of a direct conflict b/t 2 levels, "federal paramountcy" would apply

*Differences between penitentiaries and prisons/jails*

* Decided based on prison term – 2 years (e.g. "2 years less a day")
* Different programs available in different facilities

### 2. Criminal Code, R.S.C. 1985, c. C-46

* Codified – all offences listed; not in separate acts and statutes
* That means there are no common law offences in Canada, as per CC s. 9(3)
  + Issue of notice
  + Prevents provincial variations, different standards of justice, persecution, difficulty of application, inconsistency, etc.
* Exception: criminal contempt – violating standards of Ct
  + Remains b/c J of superior Ct have power of "inherent jurisdiction" from Constitution (i.e. Parliamentary sovereignty)
  + No limits to punishment, fine, etc.
* Common law defences remain, as per CC s. 8(3) (e.g. entrapment – Mack case, 1982)
  + Preserved to grant benefit of fairness to accused
  + Parliament can overrule CL defence and say it's unconstitutional

### 3. Canadian Charter of Rights and Freedoms

* s. 1 Guarantee of rights and freedoms
* s. 2 Fundamental freedoms
* s. 7 to 14 Legal rights
* s. 15 Equality rights

## B. The Commencement of Criminal Proceedings

* Formal charging document is called an Information; sworn before justice of the peace (JP)
* If there is reasonable grounds to proceed, JP will issue process, which will compel the accused to come to court to answer the charge against him

## C. Classification of Offences

*Summary Conviction Offences*

* Trial in provincial court without a jury and no preliminary inquiry
* Max penalty is 6 mo. in jail and $2,000 fine
* Some exceptions: Super-Summary Offences e.g. sexual assault – 18 mo. in jail

*Indictable Offences*

* Generally more serious
* Can only be created by federal Parliament; found in CC and federal statutes
* Maximum penalty and mode of trial will vary
* Some have minimum sentences; most do not

*Different types of trial*

1. Offences in s. 553 of CC (e.g. theft under $5,000)

* Absolute jurisdiction of provincial court
* Judge alone, no preliminary inquiry

2. s. 469 of CC (e.g. murder)

* Exclusive jurisdiction of superior court (BCSC)
* Usually preliminary inquiry (PI) to determine if there is sufficient evidence
* If not, accused is discharged (not acquitted)
* If enough, accused is committed to stand trial; Information replaced by Indictment
* Before judge and jury unless both accused and Crown consent to trial by judge alone

3. All other indictable offences

* Hybrid offences – state can decide whether to proceed by #1 or #2
* Accused may elect to proceed by trial in provincial Ct, in superior Ct by J alone after PI, or in superior Ct by J and jury after PI
* Considerations for electing to proceed by particular mode
  + Seeking jury sympathy; all 12 have to agree (e.g. OJ Simpson)
    - If cannot agree, "hung jury" results in mistrial
    - No max # of trials, but can claim abuse of process
    - e.g. Kelly Elland (Reena Virk) – trial # 4
    - Jury trials not used as commonly in Canada as in US, UK
  + Majority of cases tried in Prov Ct b/c faster process, simpler, less costly
  + May opt to avoid PI out of consideration for victim who has to testify twice

## D. Outline of a Criminal Trial

1. Arraignment – formal reading of charge to accused
2. Plea entered ("Guilty" – sentenced; "Not guilty" – continue)
3. Crown Case
4. Crown Case is closed
5. Defence may make No Evidence Motion (if J rules in favour, accused is acquitted; if J denies motion, Defence may go to 6 or may not choose to call evidence and go to 7)
6. Defence Case – evidence, cross-examination
7. Defence Case closed
8. Closing Arguments – if Defence called evidence under 6, Defence will make closing arguments first; if not, Defence will make closing arguments last)
9. Judge's Ruling

# Chapter 2: Proving the Crime

## A. The Adversary System

* In Canada, J does not present evidence or question witnesses; remains impartial
* Contrasted with inquisitorial model in civil law jurisdictions (e.g. France, Italy), where J may investigate, collect evidence, actively participate in questioning witnesses

## B. An Introduction to Evidence

* Most evidence introduced through oral testimony of witnesses under oath
* Relevant – probative of a material fact or conclusion
* Material – probative of a matter in issue in the case
* Admissible – must meet rules of evidence
* Jury will make findings of fact based on assessment of evidence, will apply to law as explained by trial judge to arrive at verdict; no reasons
* J will perform these functions and give oral or written reasons

## C. The Evidentiary Burden and the Burden of Proof

* Crown has burden of proof on each element of offence – known as legal or persuasive burden
* Standard of proof is "beyond a reasonable doubt" (BARD)
* Crown has evidentiary burden as well
  + "No evidence" motion is argument that Crown has failed to meet this burden so J should grant acquittal
* Reverse onus – places initial evidentiary burden on accused to prove on a balance of probabilities or "some evidence to the contrary"
  + Challenged under s. 11(d) of *Charter of Rights and Freedoms*
* Permissive presumptions – allow inference of one fact from existence of another
* Evidentiary burden on accused for defences

R v. Lifchus [1997] 3 S.C.R. 320

* Lifchus appealed conviction on the grounds that trial J erred in instructing jury on expression "proof BARD"
* Man. CA allowed appeal, set aside conviction, ordered new trial
* Crown appealed Man. CA's judgment to SCC
* SCC found trial J erred, ordered new trial.

*How should a trial J explain "reasonable doubt" (RD) to the jury?*

* Burden on proof rests on prosecution, never shifts to accused
* Specific legal meaning, not ordinary concept
* Based on reason and common sense
* Not based on sympathy or prejudice
* Not proof to an absolute certainty, but greater than on a balance of probabilities

R. v. J.H.S. [2008] S.C.J. No. 30

* J.H.S. convicted of sexually assaulting stepdaughter
* NSCA set aside conviction b/c trial J insufficiently instructed jury on issue of credibility
* Crown appealed NSCA's judgment before SCC
* SCC found no error in trial J's instructions; restored conviction

*How should trial J explain the assessment of credibility to the jury?*

* Must explain relationship b/t assessment of credibility and Crown's ultimate burden
* If jury does not believe testimony of accused but left in RD by evidence, must acquit

R. v. Starr [2000] 2 S.C.R. 144

* Starr convicted of first-degree murder, appealed to Man. CA (dismissed) and then SCC
* SCC allowed appeal, set aside judgment of Man. CA and ordered new trial

*How should trial J explain "RD" to the jury?*

* Cannot define RD as ordinary, every day meaning of words
* Must explain what something less than an absolute certainty of guilt is
* Charge must be studied in entirety

R. v. Oakes [1986] 24 C.C.C. (3d) 321 (S.C.C.)

* Oakes convicted for unlawful possession of narcotic for trafficking
* Oakes challenged constitutional validity of s. 8 of *Narcotic Control Act*, which imposed a burden on accused to prove not in possession for the purpose of trafficking (on a balance of probabilities), and violated presumption of innocence in s. 11(d) of the *Charter*
* Ont. CA held provision constituted a "reverse onus" clause and was unconstitutional
* Crown appealed to SCC
* SCC dismisses appeal, upholds decision of Ont. CA; s. 8 ruled as inconsistent with s. 11 and thus of no force and effect

*Oakes Test* – can a *Charter* violation be justified under s. 1?

* 1. Look at **objective** of law – is it pressing and substantiated
  2. **Rational connection** – is there a connection between the objective and steps that Parliament has taken?
  3. **Minimal impairment** – is this the least restrictive measure?
  4. **Proportionality** – b/t importance of object and degree of infringement of rights?
* Balance b/t objective, means, and ends
* This case, fails at test #2 – not rational to assume that a small amount of narcotic means an intent to traffic

R. v. Whyte [1988] 42 C.C.C. (3d) 97 (S.C.C.)

* Whyte charged with being in care/control or motor vehicle while impaired; claimed only sitting inside with no intention to operate
* Whyte had onus to prove on a balance of probabilities that he/she did not enter the vehicle with intention of setting it into motion

*Is requirement to prove a lawful excuse, rather than disprove an essential element of the offence, one that violates the presumption of innocence?*

* SCC finds requirement a violation of s. 11, satisfies first two parts of Oakes test but not last two
* Reverse onus grants Whyte a defense, Crown is successful

R. v. Downey [1992] 72 C.C.C. (3d) 1 (S.C.C.)

* Downey and companion charged with living on avails of prostitution
* Presumption to be living on avails unless there is evidence to contrary

*Does this presumption violate the Charter?*

* Yes, imagine: Crown introduces evidence and presumption. Defence calls no evidence. J says if presumption did not exist, would not charge person. J has RD but convicts
* However, SCC rules that justified by s.1 of the *Charter*

## D. Appellate Review

* Appellate Ct have limited jurisdiction, limited grounds of appeal:
* Error in law – most common
* Error in fact – generally difficult to dispute
* Unreasonable verdict – e.g. "perverse" jury finding
* Miscarriage of justice – attack based on bias or misconduct
* Remedies: overturn conviction, order new trial, acquittal, substitute conviction

# Chapter 3: The Elements of an Offence

* Actus reus – prohibited act
* Mens rea – requirement mental element(s) of fault

## A. Analyzing the Actus Reus and Mens Rea of Criminal Offences

### 1. How to determine the actus reus

* Conduct
* Circumstances
* Consequences

### 2. How to determine the mens rea

* Fault can be measured on subjective or objective basis
* Subjective fault – actual intention, knowledge, or recklessness
  + Intent – act carried out purposely or deliberately; consequences intended or substantially certain of their occurrence
  + Knowledge – actual awareness (wilful blindness – suspect but deliberately refrain from confirming is equated with knowledge)
  + Recklessness- understands and foresees risks/consequences, but proceeds anyways
* Objective fault – what ordinary person should have known or would have intended in the circumstances (e.g. gross negligence)

## B. Use and Interpretation of Statutes

(see pp. 3-4 to 3-7 in course pack)

## C. Included Offences

* Those necessarily committed in commission of offence charged
* Each charge includes attempts

# Chapter 4: The Actus Reus

## A. The Principle of Legality

Frey v. Fedoruk [1950] S.C.R. 517

* Fedoruk (D) threatened Frey (P) with knife after seeing P peeping at D's mother through bedroom window. Police charged P with "an act likely to cause a breach of peace"
* Trial J dismissed action against all three
* CA found P guilty of CL criminal offence ("an act likely to cause a breach of peace") and stated D justified in arresting him w/o warrant
* SCC found no criminal offence committed by P and that D failed satisfy onus of showing some justification for imprisoning P

## B. Omissions

* Tendency for criminal law to punish for positive actions and not failure to act except where there is a duty of care to act (e.g. failure to assist police officer (s. 29), to remain at scene of accident, where duty to provide necessities for care)

Fagan v. Commissioner of Metropolitan Police [1968] 3 All E.R. 442 (Eng C.A.)

* Fagan (A) convicted of assaulting police constable (R) after accidentally stopping car on R's foot and deliberately allowing car to remain so
* Did an assault occur, given that the failure to remove the vehicle can be seen as an omission to act?
  + Is this a continuous act, during which mens rea occurs at some point?
  + Is there a duty to act, wherein a failure to act is criminal?
* CA found no initial assault, quashed A's conviction

R. v. Moore [1978] 43 C.C.C. (2d) 83 (S.C.C.)

* Cyclist ran red light on bridge and refused to identify self to police
* Is he obstructing a police officer by refusing to identify himself, or is this an omission?
* Statute: *Motor Vehicle Act* s. 58 does not apply to bicycles
* CL: duty of police officer to investigate, is there a reciprocal CL duty to respond? Of minimal interference for person, major interference for police
* SCC upheld Moore's acquittal
* (Benedet: would be unlikely to occur nowadays b/c *Charter*)

R. v. Thornton [1991] 1 O.R. (3d) 480 (C.A.)

* D charged with common nuisance endangering the lives or health of the public by donating contaminated blood to Red Cross
* Is the D's failure to disclose his HIV+ a crime or an omission?
* CA states there is a CL duty to refrain from conduct which would cause injury to another (CC s. 219 on "duty imposed by law")
* CA upholds conviction

## C. Voluntariness

* Can be no finding of guilt unless offence would committed voluntarily
* Recent decisions view involuntariness as negating actus reus
* See: defences of intoxication, mental disorder, state of automatism

R. v. Lucki [1955] 17 W.W.R. 446 (Sask. Police Court)

* R's car skidded into opposite direction traffic due to road conditions
* R found not guilty b/c involuntary act

R. v. Wolfe [1974] 20 C.C.C. (2d) 382 (Ont. CA)

* Complainant punched R, R responded by hitting complainant in forehead with telephone receiver in reflex action
* Trial J found no offence was committed b/c reflex action contained no intent

# Chapter 5: Causation

* When is the legal standard satisfied?
* What unforeseen acts break the chain of causation?  
  Are there different causation standards for murder?

## A. English Cases

* Rule in English cases codified in CC s. 224 and 225

R. v. Smith [1959] 2 All E.R. 193 (Eng. C.A.)

* R was soldier who stabbed deceased with bayonet during fight b/t 2 regiments. Victim could have recovered but died b/c inappropriate and insufficient medical care
* Should R be charged with victim's death?
* Was the wound an operating cause or substantial cause of death?
* Death resulted from original wound
* R's conviction upheld

R. v. Blaue [1975] 3 All E.R. 466

* R attempted to sexually assault victim, attacked her with knife. At hospital victim refused blood transfusions and died.
* Should R be charged with manslaughter, or did victim's refusal to have a blood transfusion break chain of causation b/t her stabbing and death?
* Trial J convicted R of manslaughter
* Ct rejects appeal b/c stabbing still cause of death; refusal to accept blood transfer did not break chain of causation
* Criminal law, unlike tort, does not have duty to mitigate. Cannot say victim should've taken better care of self or taken different course of action
* Reasonable threshold for victim's action cannot be judged – reasonable by whose std?
* R's conviction upheld

## B. Causation of Death in the Canadian Law of Homicide

R. v. Smithers [1978] 1 S.C.R. 506

* Accused charged with manslaughter. Kicked victim in stomach, causing epiglottis to malfunction and victim to asphyxiate
* Should accused be charged with manslaughter given couldn't have anticipated victim's epiglottis to malfunction?
* Accused's conviction upheld
* Smithers test for causation of death: whether actions of accused were "a contributing cause of death, outside the *de minimis* range"

R. v. Harbottle [1993] 84 C.C.C. (3d) 1 (S.C.C.)

* Accused charged with first degree murder for pinning down rape victim's legs as co-accused strangled her
* Should accused be charged with first degree murder, since he did not personally cause the victim's death?
* Ct applied higher standard b/c seriousness of first degree murder conviction
* Harbottle test for causation of death: "substantial and integral cause of death"
* R found guilty of first degree murder

*First degree murder*

* Historical distinction: capital/non-capital murder … first degree murder/murder
* Prove elements of murder, can be elevated to first degree if certain conditions met (usually involve additional dominance)
* Person who is party of offence can have same conviction of principal
* First and second degree murder have different eligibilities for parole: after 25, or somewhere between 10-25 years

*Unanswered questions*

* Does the Harbottle test apply to all first degree murders or only those under s. 231(5)?
* Are there thresholds in between the "de minimus" (manslaughter – low) and "substantial and integral" (first degree murder – high)?

R. v. Nette [2001] 158 C.C.C. (3d) 486 (S.C.C.)

* R charged with first degree murder after robbing elderly woman. Victim asphyxiated, forensic pathologist identified numerous factors contributing to asphyxiation, including hog-tied position, ligature, age, lack of muscle tone, congestive heart failure, asthma
* At trial, J charges jury with instructions on first degree murder, second degree murder, and manslaughter
  + First degree – Harbottle test
  + Manslaughter – Smithers test
  + Second degree – Smithers test
* Jury convicted R of second degree murder (jury nullification – jury doesn't follow law; split difference and choose one with lighter sentence)
* R appealed, said J should have applied Harbottle test (in hopes that he would've been acquitted of second degree murder as well and would've had verdict of manslaughter)
* BCCA dismisses appeal, SCC unanimously dismisses appeal and upholds conviction
* SCC states wording of Smithers test is potentially problematic. Suggestion: "significant contributing cause"

# Chapter 6: The Mental Element (Mens Rea)

## A. The Subjective Approach

R. v. Beaver [1957] 118 C.C.C. 129 (S.C.C.)

* R charged with possession of narcotic. Claimed he thought package contained something else, argued that mistake of fact meant did not have mens rea of knowledge and could not be charged
* Does this offence have an intent requirement?
* SCC says there is a presumption of a mens rea requirement, will not view offence as one of absolute liability unless Parliament excplictly states this
* R found guilty of selling (more serious charge), even if not guilty of possession

*Tangents*

SCC could previously designate R as habitual criminal, modern equivalent is "dangerous offender" and deny bail, request longer prison term, prison term without definite end

Cannot use criminal history of person in trial (aka "propensity reasoning" – done it four times before, so likely a fifth time as well), but can make application to question someone for past convictions under certain circumstances (e.g. fraud, perjury 🡪 propensity to lie) or if person calls character witness

R. v. City of Sault Ste. Marie [1978] 40 C.C.C. (2d) 353 (S.C.C.)

How to classify mens rea of regulatory offences (those enforced through criminal law but usually dealing with civil matters)

Somewhere between absolute liability (only actus reus required) and full mens rea?

SCC creates third category for these kinds of offences: strict liability, wherein R must show precautionary measures or "due diligence"

## B. Intent and Recklessness

* Intent – desire for outcome or knowledge to substantial certainty that it will happen, act to make it happen
* Recklessness – see risk and take chance

R. v. Buzzanga and Durocher [1980] 49 C.C.C. (2d) 369 (Ont. CA)

* Rs printed purposefully inflammatory handbills to engender protest and rally people to their cause. Charged with wilfully promoting hatred of identifiable group. R argued that intent was satirical.
* Does Crown have to prove mere recklessness or actual intent?
* Ct says use of word "wilful" shows Crown must prove intention (to create uproar, not intention to promote hatred; no need to prove that hatred actually arose)
* CA set aside convictions, ordered new trial

R. v. Théroux [1993] 2 S.C.R. 5

* R charged with fraud for representing that deposits taken from investors in building project were protected by deposit insurance
* R's defence: did not intend to deprive investors, believed that project would be concluded and insurance not necessary
* SCC says no need to prove intent to deprive, only recklessness/knowledge that deprivation could result
* SCC says mens rea is not knowing that lying is wrong (otherwise, a possible defence would be ignorance of law)
* SCC says R's knowledge that investors at risk of deprivation is enough for mens rea of fraud, and upholds R's conviction

## C. Wilful Blindness

* Where proof of knowledge is required, individual deliberately chooses not to inquire further
* Deliberately choosing not to know sth is seen as tantamount to having knowledge
* Not same as negligence (i.e. should have known, should have found out)
* Inferred from "reasonable person" test

R. v. Blondin [1971] 2 C.C.C. (2d) 118 (BCCA)

* R's scuba tank seized at customs, hashish found inside
* R said he was paid to transport scuba tanks, knew there was something illegal inside the tanks, but did not inquire further
* R charged with importing a narcotic into Canada
* What mens rea is required?
* R had to know/suspect it was a narcotic (not that it was hashish – too specific, not that it was illegal – too general)
* If thought it was a less serious one, could be convicted of included offence or Crown could charge him with the law of attempt

## D. Motive

R. v. Lewis [1979] 47 C.C.C. (2d) 24 (S.C.C.)

* R hired by Tatlay to mail package to Tatlay's daughter. Package contained electric kettle bomb that exploded, killing Tatlay's daughter and son-in-law
* R claimed he had been innocent dupe, motive was financial
* SCC says motive is not element of criminal offence, but can be used as evidence to prove intent
* SCC upheld convictions of Lewis and Tatlay

## E. Transferred Intent

* Accused intends one offence but another occurs because of mistake or accident
* On victim can be substituted for another; mens rea does not have to be tied to the identity of a person
* e.g. A shoots B, believing B is in fact C (mistake as to identity of victim)
* e.g. A aims at C, but by chance or lack of skill, shoots B (an accident)
* Codified in CC s. 229 (murder) but applied in other cases as well