NOTES ON CANADIAN CRIMINAL LAW

(For NCA Candidates)

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Editor's Note

I was already working on updating my Criminal Law notes to make it more resourceful and helpful for NCA Candidates. Whilst working on this, NCA updated the syllabus to November 2022, which meant I had no choice than to update the Note again to sync with the new syllabus update. I must however make it clear that I had to rush through this version just to meet up for the November 2022 exam, so as to not to deprive candidates using my notes of materials to read for the exam. This means that my major update on the Criminal Law note is still on the way, but that may come after the November exams. Suffice to say that this version is still sufficient to make you pass.

To allay the fears of many, there is no great difference between the previous syllabus and this of November 2022. In addition to about 8 recent cases that were added, the major difference is in Chapter 16 which had to do with Extreme Intoxication and General Intent Crimes, in line with the latest decision of the Supreme Court of Canada (SCC) in **R. v. Brown** which was delivered on May 13, 2022. In that case, the SCC invalidated the erstwhile provision of s. 33.1 of the Criminal Code (CC or Code) which prohibited an accused person from raising the defence of self-induced intoxication in response to a criminal charge. Remember that the previous s. 33.1 was itself Parliament's amendment of the Code in response to SCC decision in **R. v. Daviault**. But since this latest decision in *Brown* declared s. 33.1 unconstitutional, Parliament again amended the Criminal Code in June 2022. (This is why it is important for you to get the latest edition of the Code for your exam).

As a general exam tip, please dedicate some time to study the amended provisions of s. 33.1 of the Code and the Brown case. I suspect that NCA may want to set some exam questions on this topic to test if your knowledge is current. So, let me just provide you with a general overview of the case, as follows:

> Brown consumed some alcohol and "magic mushrooms" which contained some illegal drug that can cause hallucinations. He then lost grip with reality and broke into a nearby home, violently attacking a woman. He also broke into anther house whose occupants called the police and Brown was arrested and charged with aggravated assault, breaking and entering. But prior to this, he had no previous criminal record or history of mental illness.
>
> At the trial, Brown raised the defence of automatism, i.e., that he was so intoxicated or impaired that he had no complete control of himself. The Crown argued against this defence because the erstwhile

s. 33.1 of the Code prevents a person from raising this defence when the crime involves assault or interference with the bodily integrity of another. In response, Brown argued that that provision in s. 33.1 was unconstitutional as it violates s. 7 of the Charter which guarantees right to life, liberty and security of the person and s. 11(d) which guarantees the presumption of innocence to everyone charged with a crime.

(Remember again that Parliament had added s. 33.1 to the *Criminal Code* in response to *R. v. Daviault*, where the SCC had confirmed the common law rule that intoxication is not a defence to crimes of general intent, but a majority recognized that the *Charter* mandated an exception where intoxication is so extreme that an accused falls into a condition akin to automatism and is incapable of voluntarily committing a guilty act or of having a guilty mind. Section 33.1 was enacted to address the constitutional failings identified by the majority in *Daviault* in a manner that would properly reflect the blameworthiness of the extremely self-intoxicated accused identified by the dissent. Section 33.1 blocks the defence of automatism for general intent crimes designated in s. 33.1(3), including aggravated assault and sexual assault).

In its judgment, the SCC agreed with Brown and held that s. 33.1 of the Code was in violation of ss. 7 and 11(d) in a way that cannot be justified in a free and democratic society and therefore unconstitutional. This is because that provision could lead the society to interpret someone's intent to become intoxicated as an intention to commit a violent crime. This means that someone who merely wanted to become intoxicated could be taken as intending to commit a violent offence.

The section also violates s. 7 because a person could be convicted without the prosecution needing to prove that the action was voluntary or that the person intended to commit the offence.

The Court observed that convicting someone for how they conducted themselves while in a state of automatism violates the principles of fundamental justice, which demands personal responsibility (*actus reus* and *mens rea*) as basis for criminal convictions. But neither of these two elements is present when a person is in a state of automatism.

The Court explained that Parliament could, as a pressing and substantial purpose, enact legislation to address violence caused by extreme intoxication and hold the offenders accountable, particularly in the interest of women and children who are most vulnerable to intoxicated sexual and domestic acts.

Please note that in response to this judgment, as noted above, Parliament has now amended s. 33.1 in June of 2022.

Manuel Akinshola

Section A

GENERAL OVERVIEW AND PRELIMINARY MATTERS

This Section introduces you to the Criminal Law of Canada. You will be shown the sources of criminal law as well as which level of government has the authority to create criminal law as per constitutional division of powers. The Criminal Code of Canada is the primary source of criminal law and procedure, which you will need to get familiar with. You will also be introduced to the Canadian Charter of Rights and Freedom and its impact on criminal law and procedure.

The Criminal Code contains various definitions, at the beginning of the Code and at the beginning of each Part. You will need to get familiar with the definitions of some of the important offences in the syllabus.

There is equally a change of attitude in the way criminal statutes are interpreted: it used to be interpreted strictly and any ambiguity in the provision of any criminal statute is resolved in favour of the accused. However, the courts have now adopted a purposive interpretation in which case, the language of the provision being considered is interpreted harmoniously with the statute as a whole, so as to determine the purpose which the provision was designed to serve.

Chapter 1

The Sources of Criminal Law

With the exception of contempt of court, criminal offences are created in Canada by statute. Most criminal offences are created by the Criminal Code but it is not the only statutory source. Drug trafficking, for example, is made a criminal offence by the Controlled Drugs and Substances Act.

The common law cannot be used to create offences in Canada because of concerns related to the principle of legality, and the notion that criminal offences should be clear, certain, and should pre-exist the act being prosecuted.

As will be seen below, many rules of criminal procedure are created in the Criminal Code, and many other rules of procedure are common law based.

There are three sources of criminal law in Canada, which are: the Constitution, including the Charter (which specifies the division of power between the federal Parliament and the provincial legislative assemblies and gives Parliament exclusive jurisdiction to enact the criminal law), statutes enacted by the legislatures, and this includes the Criminal Code as well as other statutes that create criminal offences, and judge-made common law defences.

The main source of substantive and procedural criminal law in Canada is the Criminal Code. It defines crime and the criminal law in terms of the community. However, a person may be prosecuted for any offence whether found in the Criminal Code or in any other federal statute containing criminal offences.

Common law offences are no longer part of the law in Canada. They were abrogated in 1955 and became codified in s. 9 of the Criminal Code which states that criminal offences are to be under the law of Canada, and in s. 9(a), states that no person shall be convicted or discharged of an offence at common law. The only exception here is the offence of contempt of court because even though s. 9 prohibited conviction of persons for common law offences, it specifically preserves the "power, jurisdiction or authority" of a court to impose punishment for contempt of court. **Puddester v. Newfoundland, 2001 NLCA 25.**

- **Frey v. Fedoruk (1950)** – *(Peeping Tom)* – Common Law offences not allowed.

  It was held that Section 30 authorizes peace officer to arrest without warrant only if he on reasonable and probable grounds believes that an offence for which the offender may be arrested

without warrant has been committed but not if he erroneously concludes that the facts amount to an offence when as matter of law they do not.

> I am of opinion that the proposition implicit in the paragraph quoted above ought not to be accepted; I think that if adopted it would introduce great uncertainty into the administration of the Criminal Law leaving it to the officer trying any particular charge to decide that the acts proved constituted crime or otherwise, not by reference to any defined standard to be found in the code or in reported decisions, but according to his individual view as to whether such acts were disturbance of the tranquility of people tending to provoke physical reprisal.
>
> I think it safer to hold that no one shall be convicted of crime unless the offence with which he is charged is recognized as such in the provisions of the Criminal Code or can be established by the authority of some reported case as an offence known to the law. I think that if any course of conduct is now to be declared criminal which has not up to the present time been so regarded such declaration should be made by Parliament and not by the Courts

- See Section 9, Criminal Code (CC).

While common law offences are not allowed, common law defences are available under Canadian criminal law and can still be created by the courts. As will be seen below, the Supreme Court of Canada recognized a common law defence in Levis (City) v. Tetrault, [2006] 1 S.C.R. 420 (officially induced error) and R. v. Mack, [1988] 2 S.C.R. 903 (entrapment).

Moreover, the common law can deeply influence the way that statutory criminal offences are interpreted, particularly the mental elements.

- See Section 8, CC.
- **Levis (City) v. Tetrault [2006] 1 S.C.R. 420**

  Accused charged with offence of putting motor vehicle back into operation without having paid required registration fees. Accused claimed to have been misled by erroneous information obtained from official regarding procedure for paying fees relating to registration. Issue is whether defence of officially induced error available in Canadian criminal law.

  SCC held:

  - As for the defence of officially induced error, although it is available in Canadian criminal law, the company has not established that the conditions under which it is available have been met. Two fundamental conditions that must be met for this defence to be available were missing: the company could not have considered the legal consequences of its conduct on the basis of advice

from the official in question, nor could it have acted in reliance on that opinion, since no information regarding the nature and effects of the relevant legal obligations had been requested or obtained.

- **R. v. Mack, [1988] 2 S.C.R. 903** *(see page 92 below for more facts)*

  Accused who was once an addict of narcotics induced with large money, threatened and entrapped by police informer to sell him drug; convicted of drug trafficking.

  Court held as follows:

  1. Entrapment occurs when:
     a) the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a bona fide inquiry, and
     b) although having such a reasonable suspicion or acting in the course of a bona fide inquiry, they go beyond providing an opportunity and induce the commission of an offence.
  2. Objective entrapment involving police misconduct, and not the accused's state of mind, is a question to be decided by the trial judge, and the proper remedy is a stay of proceedings.

- ***R. v. Jobidon***, *(a case you will be asked to review again when considering the meaning of consent)*.

  There was a fist fight with consent. The accused appealed against his conviction for manslaughter. S. 265 provides general rule that there is no assault if the other party consents to the use of force. This section did not define the limitations.

  - Common Law however has a set of rules that illuminates the meaning of consent and place certain limitations on its legal effectiveness in the criminal law.

  - Common Law also sets limits on the types of harmful actions to which one can validly consent, and to which the accused can use as defense.

  - note that s. 8 of the Criminal Code indicates that Common Law principles continue to apply so long as they are not inconsistent with the Criminal Code or other Acts of Parliament, nor altered by them.

  - The provisions of the Criminal Code have not ousted the common law limitations on consent.

Chapter 2

The Power to Create Criminal Offences and Rules of Criminal Procedure

a) Constitutional Division of Powers Introduced

Both the Federal Government and Provincial governments have jurisdiction to create non-criminal offences (regulatory offences) and to use jail to enforce those regulatory offences, but only the Federal Government can create "criminal" offences, or "true crimes", pursuant to its powers under s. 91 (27) of the Constitution Act, 1867.

The principles that apply to true crimes differ from those that apply to regulatory offences. These principles will be examined below when regulatory offences are discussed.

Although they cannot create criminal offences, Canadian provinces do have jurisdiction over the administration of justice within the province under s. 92(14) of the Constitution Act, 1867. For example, the provinces have set up the lowest level of criminal court where the vast majority of cases are actually prosecuted (i.e., the provincial courts); it is the provincial Attorneys General who prosecute most offences, including serious offences; and the provinces have passed statutes setting out juror eligibility within the province. The procedure during criminal hearings, however, is governed by federal rules and by the common law.

Under the Constitution Act, 1867, only the federal Parliament can enact laws concerning criminal law and procedure, as provided by s. 91(27). And by virtue of this power, Parliament has enacted the Criminal Code which deals with most criminal offences in Canada. This notwithstanding, some other statutes contain prohibitions which are backed by sanctions.

Under the Constitution, the provinces cannot enact laws which have as its dominant purpose the prohibition of act followed by criminal sanction. Such laws would be considered *ultra vires* the provinces. Nevertheless, provinces and municipalities have the power under s. 92(15) to make laws which create offences punishable by fine, penalty or imprisonment when the dominant purpose of such a law is to regulate a matter within provincial jurisdiction. For example, the provinces have been able to prohibit and punish advertisement of tobacco products and impose fines under their property and civil rights power, and power over matters of local and private nature. Such laws have

been upheld as valid because the dominant purpose is not criminal law but to regulate the advertisement of tobacco. See **Rothmans v. Saskatchewan**.

For a summary of the criminal law power, see R. v. Malmo-Levine, 2003 SCC 74 at paras. 73 – 79.

- **R. v. Malmo-Levine** – *(2 cases in one)*

  In the 1st case, Caine was caught in car with possession of 0.5 grams of partially smoked marihuana by 2 RCMP on regular patrol. He claimed weed was for his own use and not trafficking, and that it was a violation of principles of fundamental justice to provide imprisonment for possession for acts which caused little or no harm to other members of the society.

  In second case, Malmo-Levine who claimed to be a "marihuana/freedom activist" was caught with 300 grams of marihuana in his Harm Reduction Club. He was charged with possession of marihuana for the purpose of trafficking. He contended against the constitutional validity of the prohibition against possession for the purpose of trafficking in marihuana.

  Issue before the court is to consider whether Parliament has the legislative authority to criminalize simple possession of marihuana, and if so, whether that power has been exercised in a manner contrary to the Charter

  <u>SCC held as follows:</u>

  - To advance the protection of people vulnerable to the harmful effect of marihuana through criminalization of the possession of marihuana is a policy choice that falls within the broad legislative scope conferred on Parliament. It is equally open to Parliament to decriminalize or otherwise modify any aspect of the marihuana laws that it no longer considers to be good public policy.
  - The questions before the court were issues of law and not policy. The court was to determine whether the prohibition of possession (with imprisonment) is not a valid legislation, either because it does not properly fall within Parliament's legislative competence or because the prohibition with imprisonment violates the guarantees of the Charter.
  - That the use of marihuana is therefore a proper subject matter under the criminal law power of Parliament, as it seeks to control a psychoactive drug that causes alteration in the mental functions, which raises issues of public health and safety for both the user and the society which may be affected by the conduct of the user. Criminal law power extends to those

laws that are designed to promote public peace, safety, order, health or some other legitimate public purpose, and the Narcotic Control Act fits within the criminal law power.

- A criminal law that is shown to be arbitrary or irrational will infringe s.7 of the Charter. In this case however, the State's interest in avoiding harm to its citizens by prohibiting the possession of marihuana is neither arbitrary nor irrational.

At Pars. 73 – 79 -

- For a law to be clarified as a criminal law, it must possess three prerequisites: a valid criminal law purpose, backed by a prohibition, and a penalty.

b) The Canadian Charter of Rights and Freedoms

The Canadian Charter of Rights and Freedoms (the "Charter") imposes limits on the jurisdiction of all governments, subject to s.1, the "reasonable limitations" clause, and the seldom-used s. 33 "notwithstanding clause." Since its passage in 1982, the Charter has had such a profound impact on criminal law and procedure that all criminal practitioners need to develop expertise in its operation.

Section 52 of the Constitution Act, 1982 can be used by courts to invalidate offences that Parliament has created, and courts have done so on a number of occasions, but this is not common. It has also been used to strike down rules of criminal procedure, defences, or punishments that violate the Charter rights of the accused, although this too is uncommon.

The Charter was added to the Constitution Act, 1982 and places new restraints on the ability of the government to enact and apply criminal laws. These restraints include the right of the people to be free from unreasonable search and seizure, the right to counsel, the right to fair trial, prohibiting the use of improperly obtained evidence from being admitted when it impinges on fair trial, etc. When any of these Charter rights is violated in the course of a criminal prosecution, then the accused is entitled to invoke the Charter provisions. S. 24(1) of the Charter provides that "anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied, may apply to a court of competent jurisdiction to obtain such remedy as the court considers just and appropriate in the circumstances". Such remedies may include striking down the offending provision or law.

The same influence is wielded by the Charter on criminal procedure. All criminal procedures must be conducted in a manner that ensures the fair trial of the accused. Any criminal procedure statute or enactment which violates the Charter will also be struck down.

Read Canada (Attorney General) v. Bedford, 2013 SCC 72 as an illustration of criminal offences being struck down.

- **Canada (Attorney General) v. Bedford, 2013 SCC 72**

  3 current or former prostitutes brought an application seeking declarations that three provisions of the *Criminal Code*, which criminalize various activities related to prostitution, infringe their rights under s. 7 of the *Charter*.

  SCC held that Sections 210, as it relates to prostitution, and ss. 212(1) (j) and 213(1) (c) of the Criminal Code are declared to be inconsistent with the Charter. The word "prostitution" is struck from the definition of "common bawdy-house" in s. 197(1) of the Criminal Code.

Read R. v. Oakes, [1986] 1 S.C.R. 103 as an example of a rule of criminal procedure being struck down, and note the operation of section 1 as a limiting provision (though be aware that the approach has evolved since Oakes was decided)... The concepts identified in Oakes will be revisited below in discussing the burden of proof.

- **R. v. Oakes**

  Respondent was charged with unlawful possession of narcotic for the purpose of trafficking but was convicted only for unlawful possession. Trial judge's finding was that it was beyond reasonable doubt that the Respondent was indeed in possession of a narcotic. However, s. 8 of the Narcotic Control Act (NCA) provided that if the court finds an accused to be in possession of a narcotic, the accused is presumed to be in such possession for the purpose of trafficking, and that unless the accused establishes it to the contrary, he must be convicted of trafficking. The Ontario Court of Appeal held that this provision constitutes a "reverse onus" clause and is unconstitutional because it violates the presumption of innocence in s.11(d) of the Charter.

  Issues:

  1) Whether s. 8 of the NCA violated s.11(d) of the Charter and was therefore of no force and effect;

  2) And if s.11(d) was violated, Whether or not s. 8 of NCA was a reasonable limit prescribed by law and demonstrably justified in a free and democratic society for the purpose of being saved under s.1 of the Charter.

  Held:

- Presumption of innocence lies at the very heart of the criminal law and is protected expressly by s.11(d) and inferentially by s.7 right to life, liberty and security of person. Right to be presumed

innocent requires that an individual be proven guilty beyond reasonable doubt; that the State must bear the burden of proof, and that criminal prosecutions must be carried out in accordance with lawful procedures and fairness. Therefore, a provision which requires an accused to disprove on a balance of probabilities violates the presumption of innocence in s.11(d).

- S. 1 of the Charter has 2 functions: first, it guarantees the rights and freedoms set out in the provisions which follow it; and secondly, it states explicitly the exclusive justificatory criteria (outside of s.33) against which limitations may be measured.
- The presumption is that Charter rights are guaranteed unless the party invoking s.1 can bring itself within the exceptional criteria justifying their being limited. Thus, the onus of proving that a limitation on any Charter right is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation.
- For a limitation to accepted as reasonable and demonstrably justified in a free and democratic society, the following 2 criteria must be satisfied:

    1) The objectives to be served by such limiting measures must be sufficiently important to warrant overriding a constitutionally protected right or freedom. The standard must be high so as to prevent trivial objectives, hence at a minimum, such objectives must relate to societal concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

    2) The party invoking s.1 must show that the means of limitation is reasonable and demonstrably justified, and to do this, it involves a proportionality test involving 3 important components, viz:

        a) The measures limiting the right must be fair and not arbitrary; it must be carefully designed to achieve the objective and must be rationally connected to that objective;

        b) The means of limiting a right should impair the rights in question as little as possible;

        c) There must be a proportionality between the effects of the limiting measure and the objective, i.e. the more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

- Parliament's concern about decreasing drug trafficking and protecting the society from its effect was substantial and pressing, and could in certain cases warrant the overriding of a constitutionally protected right. In this case however, there was no rational connection between

the basic fact of possession and the presumed fact of possession for the purposes of trafficking. Possession of a small quantity of narcotic would not support the inference of trafficking.

The Charter can also be used as in important interpretive tool. Even when it is not used to strike down a provision, it is the practice of courts to permit constitutional values to influence the way statutes are interpreted.

Read R. v. Labaye, [2005] 3 S.C.R 728 as an illustration of how the Charter changed the criminal concept of indecency through a progression of cases described therein. You will see that this case provoked a strong dissenting judgment. Bear in mind that what dissenting judges say in opposition to the majority judges is not the law, but that obiter dictum explaining the law when no opposition is taken can be a valuable source for legal argument.

- **R. v. Labaye**

The Accused operated a private club in Montreal, which permitted couples and single people to meet each other for group sex. the trial judge found that the accused's apartment fell within the meaning of a "public place" as defined in s.197(1) CC, and also that there was social harm in the sexual exchanges that took place in the presence of other members of the club. The Accused appealed against his conviction for keeping a common bawdy-house for the practice of acts of indecency contrary to s. 210(1) CC.

Issue was whether the acts committed in the club were acts of indecency within the meaning of our criminal law

Held:

- Indecency has two meanings, one moral and one legal, though the concern here is not with the moral indecency but the legal. Historically, the legal concepts of indecency and obscenity, as applied to conduct and publications, respectively, have been inspired and informed by the moral views of the community. But over time, courts increasingly came to recognize that morals and taste were subjective, arbitrary and unworkable in the criminal context.
- In order to establish indecent criminal conduct, the Crown must prove beyond a reasonable doubt that two requirements have been met:
    1) That the conduct complained of, by its nature, causes harm or presents a significant risk of harm to the individuals or the society in a way that undermines or threatens to undermine a value that is reflected in and formally endorsed through the Constitution or

similar fundamental laws, by:

- Confronting members of the public with conduct that significantly interferes with their autonomy and liberty,
- Predisposing others to anti-social behavior,
- Physically or psychologically harming the persons involved in the conduct.

2) The harm or risk of harm must be of a degree that is incompatible with the proper functioning of the society.

- In this case, the autonomy and liberty of members of the public was not affected by unwanted confrontation with the sexual conduct in question. On the evidence, only those already disposed to this sort of sexual activity were allowed to participate and watch.
- Since the Crown failed to establish the first requirement to prove indecent criminal conduct, it is unnecessary to proceed to the second branch of the test.

The Charter's largest impact on criminal procedure has been in creating constitutional procedural protections, including the presumption of innocence, as discussed in great details below.

These constitutional procedural protections include scrutiny of the way the police conducted the investigation, (which may include whether there was a failure to warn suspects that their statements might be used against them, or whether their right to counsel was denied or they were not informed of same, or failure to inform the suspect of the reason for her arrest), of protection against arbitrary detention or imprisonment, of freedom from unreasonable search and seizure, and exclusion of evidence unfairly obtained.

Where any of these guaranteed procedural protections is violated, it may lead to the exclusion of relevant evidence during the trial if the admission of such evidence will bring the administration of justice into disrepute.

Chapter 3

The Procedural Classification of Offences

In Canada, criminal offences are divided into two general categories: "indictable offences" and "summary" (or "summary conviction") offences. Offences can be "hybrid" in the sense that the prosecutor has the right to elect whether to treat the offence as "indictable" or "summary."

The classification of offences has important implications for the penalties that are possible, and for the procedure that will be used, including the mode of trial. For example, jury trials are not available for criminal offences prosecuted by summary conviction and are also precluded for indictable offences listed in s.553 of the Code as being in the absolute jurisdiction of provincial court judges.

Under the Code, offences are divided into two main categories:

- Summary conviction offences – these are minor or less serious offences including trespassing at night, false statement, causing disturbance, carrying weapon while attending public meeting, etc. Section 787(1) of the Code prescribes the general punishment for summary conviction offences by stating that unless otherwise provided by law, a person convicted of an offence punishable by summary conviction is liable to a fine of not more than $5,000 or to a term of imprisonment of not more than two years less a day, or both.

  Summary conviction offences are tried by a judge alone in the provincial courts, and a person charged with a summary conviction offence is usually not arrested unless he is found committing the offence.

- Indictable offences – these are offences more serious than summary offences and come with heavier penalties. Indictable offences include theft of a value over $5,000, murder, kidnap, aggravated sexual assault, break and enter and robbery. Maximum penalties for indictable offences vary and may include life imprisonment. Equally, some indictable offences have minimum penalties. In Canada, indictable offences go to the Superior Court of Justice which is a superior court of criminal jurisdiction with power to try any indictable offence under the Code. Here, the court process is more complicated and takes