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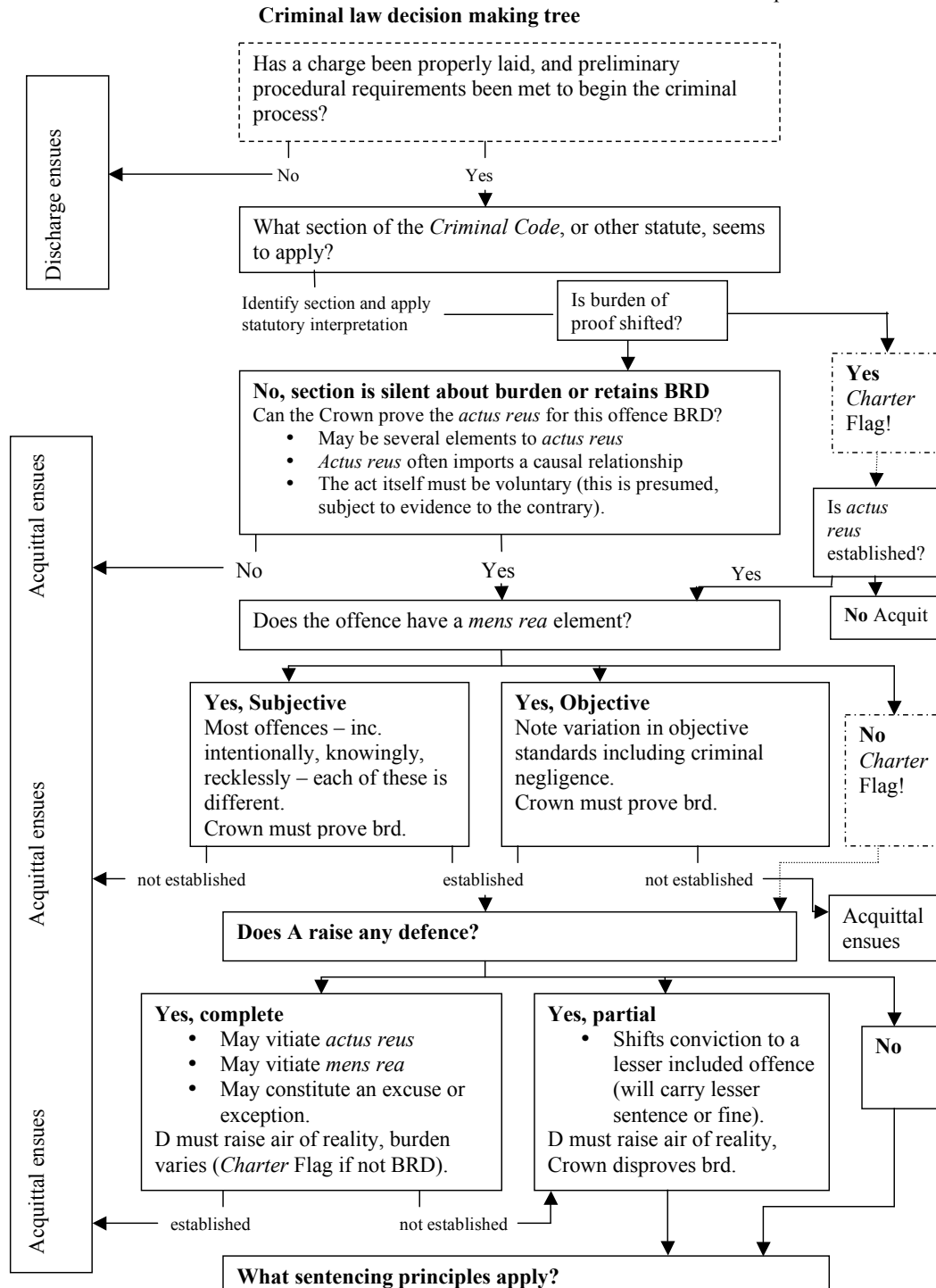
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Chapter One: Introduction to Criminal Law

Criminal Law Decision Making Tree

Fall 19 Sep 10



Reading and Interpreting a Case and the Limits of Criminalization

R. v. Hamilton 2005 SCC 47 (s 464 counseling fraud)

R. v. Hamilton 2005 SCC 47	
Facts	A sends out email advertising credit card number generator which worked, and other illegal schemes, which didn't – charged with fraud and others – A didn't believe generator worked, no crime was committed – question over the MR of counselling (s.464(a))
Procedural History	TJ acquitted - MR doubted, dual MR was needed (A intended conduct AND A intended offense to be committed), appeal dismissed, Crown applied to SCC
Issues	<i>Is there a lesser mens rea standard in s.464 than pure intention?</i> i.e. recklessness
Law	s.464 counseling fraud (also s.350 - theft, fraud, s.22.3 defined counseling, s.22.1 "it is as if they committed the crime themselves") Crown argues: 1) recklessness is enough, not full intention required 2) even if intention is required, TJ mixed up motive and intention Defense argues: 1) if recklessness is enough, this will open floodgates - full intention is needed in inchoate offenses 2) motive v. intention - single sentence of TJ - there was enough RD
Application	How do you understand the word "counseling"? 1) plain meaning - dictionary = "advise" or "recommend", but Law Reform Commission = "unjustifiably increasing the risk of harm" 2) purpose of prohibition - concerns limits of criminal liability on policy level (Charron J dissent = strike a balance between risk of harm to society and freedom of expression and other Charter values of individuals - danger not high enough in this case) (Fish J = risk of harm to society is paramount) MR for Counseling = intent or conscious disregard of the substantial and unjustified risk inherent in counseling AR is deliberate encouragement or active inducement of the crime Counseling must be prohibited for policy reasons as it could lead to more crime overall.
Conclusion	TJ got it wrong on motive/intent issue and the intent test (def'n of counsel), so therefore, a new trial is needed on "counseling fraud"

BURDEN OF PROOF - Presumption is the the Crown must show BRD, however, when there is an assumed fact taken from a proven fact, the Accused must now show proof that it should not be assumed - then a Charter issue (rights can be lifted if certain standards are met - s.1)

STARI DECISIS

Value gets translated into a principle which gets translated to a rule in certain cases

A. SOURCES OF CRIMINAL LAW AND CONSTITUTIONAL REQUIREMENTS

Constitution Act, 1867 (U.K.) 30& 31 Vic., c. 3

Constitution Act, 1867 (U.K.) 30& 31 Vic., c. 3, reprinted in R.S.C. 1985 App. II No. 5 – 1-1

Outlines Division of Powers:

Federal – s. 91

(27) – Criminal law and procedure but not courts

(28) – Penitentiaries (more than 2 year sentences)

Provincial – s. 92

(6) – Public prisons and reformatory prisons, youth prisons

(13) – Property and civil rights (traffic laws, etc.)

(14) – Administration of justice including criminal courts

(15) – Punishment (including imprisonment) for contravening provincial laws

Criminal Code R.S.C. 1985, c. C-46 – 1-2

Criminal Code R.S.C. 1985, c. C-46 – 1-2

s. 8(3) – Preserves common law justifications and defences except where inconsistent with this statute or others.

s. 9 – Removes common law offences (except contempt of court), UK criminal law, pre-federation provincial criminal law

Canadian Charter of Rights and Freedoms [Canada Act 1982 (U.K.), 1982, c. 11] – 1-3

Canadian Charter of Rights and Freedoms [Canada Act 1982 (U.K.), 1982, c. 11] – 1-3

s. 1 – Allows for reasonable justifications (*Oakes* test)

s. 2 – Freedom of conscience, religion, thought, belief, expression, peaceful assembly, association

s. 7 – Life, liberty, security of the person and not to be deprived thereof except through justice

s. 11 – Rights of the accused

(d) – Innocent until proven guilty

(g) – Not guilty unless the offence was criminal at the time of commission

B. CLASSIFICATION OF OFFENSES AND APPELLATE REVIEW

Classification of Offenses (1-9)

Summary Offense: Minor offenses tried by judges in provincial courts. Usually 6 months imprisonment and a \$5,000 fine are the maximum penalties (s. 787)

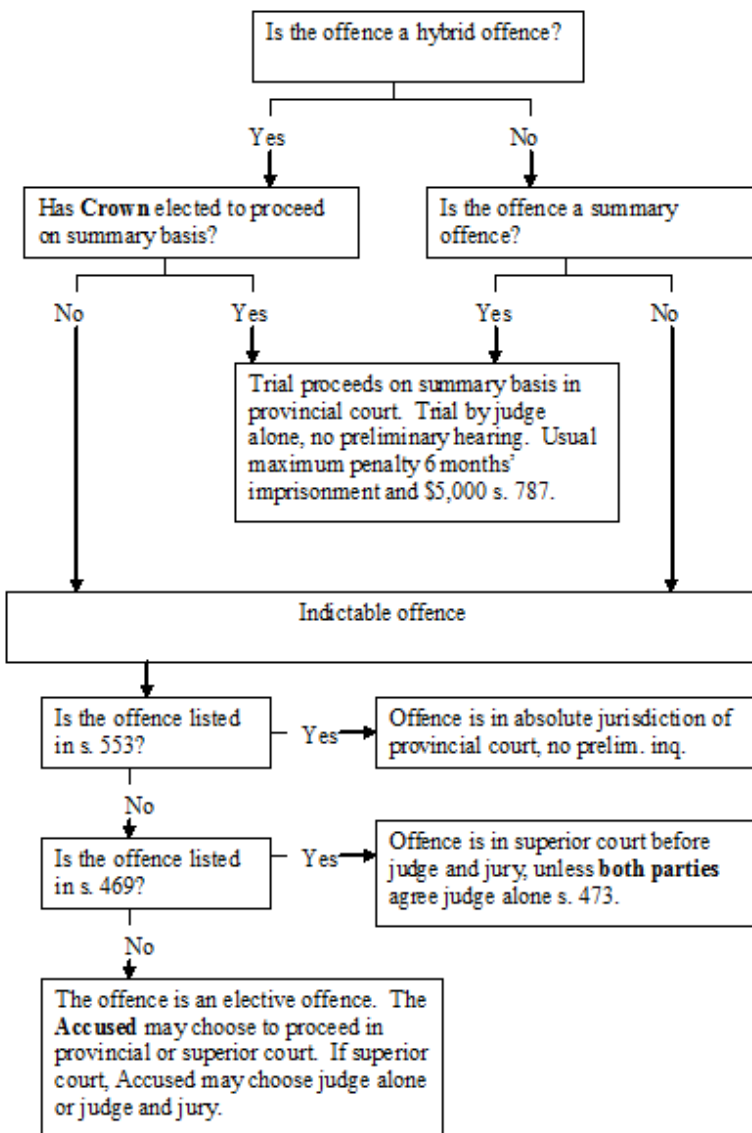
Indictable Offense: Major offenses created by federal statute.

s. 553: Provincial court jurisdiction (no preliminary, no jury) - absolute jurisdiction

s. 469: Superior court, jury unless both waive it (s. 473)

All others: Elective, A may choose court level and whether to use a jury in superior court.

Hybrid Offense: C chooses to try as summary or indictable and place and mode of trial.



Appellate Review (2-49)

For summary offences, see ss. 673 – 696, for indictable offences see ss. 812 – 839.

Appellate courts should always defer to TJ on facts.

Grounds for appeal:

Ground	Crown	Defense	If successful
Error in law (ex. misinterprets MR in <i>Hamilton</i>)	yes	yes	Verdict overturned if there is a reasonable possibility of a different result. Court may substitute new verdict or order new trial
Unreasonable verdict unsupported by the evidence	no	yes	Conviction overturned and acquittal entered
Miscarriage of justice (ex. biased jury, new info)	no	yes	Court may order a new trial or substitute an acquittal

If question of fact or mixed law and fact, then need leave from court appealing to or certificate from former judge - permission needed

Chapter Two: Proving the Crime (Evidential Burdens)**A. General Thresholds (2-2)**

Preliminary Hearing: C must introduce evidence in each area of the offence that could lead a reasonable jury to convict if it is believed.

End of Crown Case: A may make a “no evidence motion” – where the C has not introduced evidence on some element of the offence.

General: C must prove all elements of the offense BRD.

Reverse Onus: A must introduce evidence and establish a proposition on a balance of probabilities. Possible Charter s. 11(d) breach, see *Oakes* and *Whyte*.

Mandatory Statutory Presumption: A must introduce evidence to the contrary and create a reasonable doubt. Possible Charter s. 11(d) breach, see *Downey*.

Permissive Presumptions: Allow the jury to infer one fact from another (ex: A had stolen goods, therefore the good were stolen) but A may disprove.

Defences: A may give an air of reality to a defence; if this is done C must disprove BRD. Some defences operate as reverse onus tests; these raise Charter s. 11(d) issues.

B. Beyond a Reasonable Doubt (BRD) (2-2)

BRD exists well above 51% certainty of guilt (BoP) but slightly below 100% certainty

3 cases have in common: Was the TJ's instructions to the jury adequate to ensure that they understood the concept of "reasonable doubt"?

Lifchus is the basic: here are the rules - somewhere between BoP and AC

Starr - elaborates - need to be closer to AC (absolute certainty)

J.H.S. - elaborates - if you do not know who to believe, you must acquit

R.v. Lifchus [1997] 3 S.C.R. 320 (fraud)

page 2-4	R.v. Lifchus [1997] 3 S.C.R. 320
Facts	A, a stockbroker, charged with one count each of fraud and theft, both over \$1000. Alleged A defrauded his employer of a large sum of money by misrepresenting the value of a bond in his personal account
Procedural History	A convicted of fraud, acquitted of theft. Appealed to Manitoba CA (on grounds that TJ erred in instructing the jury on meaning of BRD, CA ordered new trial but Crown is now appealing to SCC
Issues	<i>Should the expression "beyond a reasonable doubt" be explained to a jury and if so, in what manner?</i>
Law	<ol style="list-style-type: none"> 1. Explaining the meaning of BRD is an essential element of the instructions given to a jury (linked to presumption of innocence) (2-5) 2. Test for appellate review is whether it is reasonably likely that the instruction left a misapprehension as to the correct burden and standard of proof (2-9) 3. Certain analogies should be avoided when describing RD to jury. Instead, <i>"a RD is a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence"</i> (2-6) Cory J proposed an appropriate instruction (2-8) but it is not a "magical incantation" 4. RD is not based on sympathy or prejudice, nor is it an imaginary or frivolous doubt. <i>It requires more than a BoP, and is much closer to an absolute certainty.</i> See the summary at 2-7.
Application	<i>TJ erred by not defining "reasonable doubt" and by telling the jury to evaluate the term as ordinary, everyday words</i>
Conclusion	appeal dismissed, new trial needed

R. v. Starr [2000] 2 SCR 144 (1st degree murder)

<i>page 2-14</i>	R. v. Starr [2000] 2 SCR 144
Facts	Bo Cook and Darlene W. shot and killed by A by side of a Winnipeg highway. Crown's theory was that the killing of Cook was a gang-related execution with Darlene W. an unfortunate victim who happened to be in the car with him.
Procedural History	A convicted by a judge and jury of 2 counts of 1st degree murder Appeal to the Manitoba Court of Appeal was dismissed (1 dissenting) The defense argued that the Crown had failed to prove identity, and that the evidence by the Crown did not dispel the real possibility that other gang-related individuals were the killers. Appeal to SCC
Issues	<i>Is there a reasonable likelihood that the jury was under a misapprehension as to the correct standard of proof to apply?</i>
Law	<i>TJ needs to say that BRD is much closer to AC than BoP and is defined unique to the legal system (w/o reference to every day life, w/o synonym, w/o invoking morality)</i> -by asserting that AC was not required, and then linking the standard of proof to the "ordinary everyday" meaning of the words "RD, TJ could easily have been understood by the jury as asserting only BoP standard needed -the error in the charge is that the jury was not told HOW a reasonable doubt is to be defined
Application	The reasonable doubt instructions given in this case falls prey to many of the same difficulties outlined in <i>Lifchus</i> , and likely misled the jury as to the content of the criminal standard of proof.
Conclusion	Appeal allowed, CA judgement set aside, new trial ordered (3 dissents)
Dissent	L'Heureux-Dube J: "when read as a whole", the charge was clear, <i>Lifchus</i> is a broad template not a mandatory checklist

R.v. J.H.S. [2008] SCJ No.30 (sexual assault, W(D) credibility test)

<i>page 2-9</i>	R.v. J.H.S. [2008] SCJ No.30
Facts	Complainant testified that A started sexually abusing her at 4 yrs old, consistent abuse moved to intercourse as she got older, told her mother about assault at 8 & 15 yrs of age. Finally at age of 15, mother asked him to leave and girl went to the police. A denied all allegations of impropriety (defense: girl began to act up when her biological father came back into life & left again. A threatened to send her to Catholic school when she was acting out and she retaliated with false allegations of sexual assault) HE SAID, SHE SAID
Procedural History	A convicted of sexual assault of his stepdaughter (issue at trial was whether the alleged events ever happened), Nova Scotia CA set aside conviction Crown now appealing to SCC

page 2-9	R.v. J.H.S. [2008] SCJ No.30
Issues	<i>Was the jury insufficiently instructed on their duty, namely, were they not clearly instructed that lack of credibility on the part of A does not equate to proof of his guilt BRD (not believing him is not enough proof)?</i>
Law	<i>R. v. W.(D.) [1991] 1 SCR 742 Test (2-12): where credibility is a central issue at trial, TJ must instruct the jury on the relationship between credibility and Crown's burden of proof</i> 1. If you believe A, acquit 2. If you do not (entirely) believe A, but there is still RD, acquit 3. If you do not believe A but Crown has not proven guilt BRD, acquit 4. JHS: If you do not know who to believe, you must acquit.
Application	<i>Reading the charge as a whole, I believe the instruction to this jury satisfied the ultimate test formulated by Cory J. in W.(D). as being whether "the jury could not have been under any misapprehension as to the correct burden and standard of proof to apply. (2-13)</i>
Conclusion	Appeal allowed, CA judgement set aside, conviction restored

C. Burdens of Proof and The Charter (2-3)

Ratio: Per Oakes, any law that raises the possibility that A will be convicted despite the existence of a RD will violate Charter s.11(d). Includes reverse onus provisions (Oakes), reverse onus excuses (Whyte) and mandatory statutory presumptions (Downey). A must show that the Charter has been violated. Then the Oakes test must be conducted to see if the law can be saved under Charter s.1. The burden of proof at this stage shifts to Crown on BoP -evidence

Process to follow for Charter Case

1. Interpret the provision being challenged (correct construction of impugned statute)
2. Purposive construction of the relevant Charter provision
3. Bring them together - does the impugned provision breach a Charter right or freedom? (BoP burden on person claiming a breach)
4. If yes, can it be saved by section 1? (BoP burden on the Crown). If no, stop analysis.

OAKES TEST:

1. Pressing and substantial objective which is demonstrably justified (define objective)
2. Are the means proportional?
 - a) rational connection between objective and means adopted (in Whyte, does not deal with wider objective but shows only connection between presumed fact and proven fact)
 - b) does the measure minimally impair the right? (in Downey, Parliament not required to choose absolutely least intrusive alternative - issue: could P have chosen an alternative means which would have achieved the identified objective as effectively?)
 - c) is there proportionality between the effects of the measure and the objective actually being secured (social cost/benefit)?

R. v. Oakes (1986), 24 CCC (3d) 321 (SCC) (s 8 of NCA)

<i>page 2-20</i>	R. v. Oakes (1986), 24 CCC (3d) 321 (SCC)
Facts	A caught with money and 10 vials of hashish. He was charged under section 4 of the Narcotic Control Act for possession and trafficking. Trafficking charge based on criminal law that assumed everyone with a certain amount of a drug was a trafficker (presumption)
Procedural History	TJ gave A the right to show that he did not intend to traffic through s.8 (if he fails to do this, he could receive penalty of life imprisonment) - Ontario CA decided that section 8 is unconstitutional
Issues	<i>Does section 8 of the Narcotic Control Act violate section 11(d) of the Charter?</i>
Law	<p>Dickson J:</p> <ol style="list-style-type: none"> 1. Discuss the meaning of s.8 (the offense creating section) - “establish” is crucial word as it requires A to prove by BoP that he did not intend to traffic 2. Does a provision that places a persuasive burden on A to disprove an essential element of an offense by a BoP violate the Charter? s.11(d) - purpose (values protected), identifies minimum content to presumption of innocence (Crown proof BRD is necessary!) 3. Bring them together: Does section 8 provide what is required by s.11(d)? - unconstitutional because a person can still be convicted despite RD (2-27) - Crown burden has been moved from BRD to less than that. YES, violates! 4. Is s.8 a reasonable and demonstrably justified limit pursuant to s.1 of the Charter? Is it saved? (Crown has BoP burden here) <p>OAKES TEST:</p> <ol style="list-style-type: none"> 1. Sufficient Importance - Is the objective of the section important enough to warrant overriding a right or freedom? substantial and pressing objective 2. Proportionality Test - means chosen are reasonable <ol style="list-style-type: none"> a) there must be a rational connection between means adopted and objective b) the right needs to be impaired as little as possible c) there must be proportionality between the effects of the measures and the objective - the more severe the deleterious effects, the more important the objective must be to be reasonable and justified
Application	<p>Section 8 has the following minimum content: Failed 2a of Oakes Test: possession of a small or negligible quantity of narcotics does not support the curbing of trafficking (no rational connection)</p>
Conclusion	Appeal dismissed. Charged with possession but not trafficking.
Clarification	<p><i>Per R. v. Big M Drug Mart: Law’s objective is that at the time of drafting; the government may not introduce additional justifications (shifting purposes)</i> <i>Per Dagenais v. Canadian Broadcasting Corp: 2c must consider the law’s effects against its means. Even if the purpose of a law is proportional to the means, it must be struck down if its effects are not.</i></p>

R. v. Whyte (1988), 42 CCC (3d) 97 (SCC) (s 234 care or control)

<i>page 2-33</i>	R. v. Whyte (1988), 42 CCC (3d) 97 (SCC)
Facts	A found slumped over the steering wheel of his car impaired by alcohol, hood warm but engine not running. Charged with offense that required “care of control of a motor vehicle”
Procedural History	TJ convicts D for impaired care or control, contrary to s.234 of CC. Appeal to BCCA dismissed, appeal to SCC
Issues	<i>Does section 237(1) violate section 11(d) of the Charter?</i>
Law	<p>s. 234(1) CC - everyone who drives a motor vehicle or has the care or control of a motor vehicle, whether it is in motion or not, while his ability to drive a motor vehicle is impaired by alcohol or a drug, is guilty...</p> <p>s. 237(1)(a) legislates a presumption - where it is proved that A occupied the driver’s seat, he shall be deemed to have had the care or control of the vehicle unless he established that he did not enter or mount the vehicle for the purpose of setting it in motion”</p> <p>s.11(d) - presumed innocent (from Oakes) means proof BRD, onus on Crown, prosecutions must be carried out with lawful procedures and principles of fairness</p> <p>Crown argues this is unlike Oakes since disproving a collateral fact - no, issue is that A may be convicted while a RD exists</p>
Application	<p><i>Apply Oakes Test:</i></p> <ol style="list-style-type: none"> 1. objective substantially important 2. (a) yes, rational connection - every reason to believe that person in driver’s seat has the care or control of the vehicle (b) yes, minimal interference with presumption of innocence - A can escape conviction if he can show he had some reason other than driving (2-39) (c) yes, proportionality between effects of measure and objective - threat to public safety of drinking and driving <p><i>While s.237(1)(a) does infringe the s.11(d) rights of the Charter, it does so in the context of a statutory setting which makes it impractical to require the Crown to prove an intention to drive. The reverse onus provision, in effect, affords a defense to A which could not otherwise be made available.</i></p>
Conclusion	Appeal dismissed.

R. v. Downey (1992), 72 CCC (3d) 1 (SCC) (s 195 living on avails)

<i>page 2-40</i>	R. v. Downey (1992), 72 CCC (3d) 1 (SCC)
Facts	Reynolds owned and operated an escort agency. Clients charged an intro or agency fee which was turned over to the agency which was deposited in a bank account maintained by Reynolds in the name of CLR Holdings. Escorts kept money paid to them for sexual services. Reynolds and Downey knew of this sexual activity. Downey worked at the agency even running it for a month and firing one escort.
Procedural History	A jointly charged with his companion with 2 counts of living on the avails of prostitution. Both convicted. Alberta CA dismissed appeal. Now appealing to SCC. During course of the trial, an application was made for a declaration that s.195(2) of CC was of no force or effect because of s.11(d) of Charter - application dismissed - TJ ruled section was constitutionally valid
Issues	<i>Does the evidential burden placed on an accused in s. 195(2) contravene the right to be presumed innocent in s. 11(d) of the Charter? If so, is it saved?</i>
Law	s.195(1)(j) makes it an offense to live wholly or in part on the avails of another person's prostitution s.195(2)(now 212(3)) makes presumption "evidence that a person lives with or is habitually in the company of prostitutes...is, in the absence of evidence to the contrary, proof that the person lives on the avails of prostitution" s.11(d) of Charter - presumption of innocence
Application	The presumption contained in s.195 infringes s.11(d) of the Charter since it can result in the conviction of an accused despite the existence of a reasonable doubt. The fact that someone lives with a prostitute does not lead inexorably to the conclusion that the person is living on avails. Is the violation justified? use Oakes test 1. yes, sufficient importance - prosecution of pimps 2. (a) yes, rational connection between maintaining close ties to prostitutes and living on the avails of prostitutes (b) minimal impairment of rights, not least intrusive - yes, relatively minor (c) infringement relatively minor and objective fundamentally important - accused only need to point to evidence capable of raising RD
Conclusion	Appeal dismissed. Section 195(2) is justified under s.1 of the Charter
Dissent	McLachlin & Iacobucci J: s.212(3) failed rational connection test LaForest J: did not agree it failed the rational connection test but decided basic facts contained in s.195(2) are not intrinsically blameworthy and simply cast too wide a net - catches people who have legitimate non-parasitic living arrangements with prostitutes - why cast the net so wide? (new trial)

Chapter Three: The Elements of an Offence

A. Actus Reus & Mens Rea (3-1)

1. Find the relevant statutory provision(s) describing the elements of the offence charged.
2. Give meaning and effect to each and every word in the relevant provision(s).
3. Look for statutory definitions of key words (near statute or in definition section - s.2, *lAct*)
4. If no statutory definition, use case law to guide you.
5. If no statutory definition or case law, starting point is context of the word & ordinary meaning

Actus Reus: The prohibited act. Divided into three parts, but each offense may not have all 3:

Conduct: What acts or omissions must C prove?

Circumstances: Presence or absence of surrounding facts.

Consequences: C may have to prove a certain result, in which case it must also prove causation.

Mens Rea: Fault or mental element. Often not stated in the Code, will correspond with AR and must take place at the same time. **In the absence of clear words, subjective MR is presumed for a true crime.**

a) **Subjective MR:** From the perspective of the accused, must be proved BRD. Types:

Intent: To commit an act or bring about a consequence.

Knowledge: Knowing that circumstance exists, or wilfully not confirming that one exists.

Recklessness: Reasonable foresight than an event might occur but proceeding anyway.

The various types of subjective fault correspond to the components of the actus reus:

Conduct	Must be intentional or reckless act or omission
Circumstances	Must have knowledge of the circumstance, or be reckless or wilfully blind to its existence (tricky)
Consequences	Must intend or be reckless as to the consequences, wilful blindness also enough

b) **Objective MR:** "Criminal Negligence" – marked departure from the reasonable person standard.

c) How do you determine MR? - look at the wording of the statute, c.l. presumptions

Chapter Four: The *Actus Reus*

A. The Principle of Legality (4-1)

In order to be convicted of a crime, it must be a crime known to law.

- s.9 only crimes listed in statutes (federal/some provincial) - except contempt of court
- s.11(g) must have been a crime at the time of the act or omission

FREY v. FEDORUK [1950] S.C.R. 517 (breach of King's peace)

4-1 to 4-6	FREY v. FEDORUK [1950] S.C.R. 517
Cause of Action	tort of false imprisonment
Procedural History	TJ said that he was guilty of potentially breaching the King's peace (a crime), CA agrees (his conduct as a whole must be regarded as criminal)
Facts	P is a "peeping tom" in D's mom's window, D runs after P with knife and brings him back to house, police come and arrest P
Issues	Is being a "peeping tom" an actual crime, therefore providing a lawful excuse for the imprisonment?
Legal Principles	once P proved imprisonment, then burden shifted to D to show there was a lawful excuse for the imprisonment
Ratio/holding	<i>No one should be convicted of a crime unless the offence...is recognized as such in the provisions of the CC or can be established by the authority of some reported case as an offence known to the law</i> - we are not going to create new criminal offences
Reasoning	CA creating a new offence since this is "breach of the King's peace" - too generic, then anything can become criminal and the person would not know that his act is an offence. P wins as arrest was invalid.

B. Omissions (4-23)

Courts are very reluctant to punish omissions w/o a statutory directive or w/o statutory language that indicates that an offence can be committed by failing to perform a common law duty. Also, an omission may be seen as part of a continuing illegal act. Moral blameworthiness important.

In the absence of clear language to the contrary, an omission will not be criminalized.

3 devices to include omissions = imply a correlative duty (Moore), construct omission as a continuous act (Fagan), statutory language gives rise to CL duty (Thornton)

FAGAN v COMMISSIONER of METRO POLICE [1968] 3 All ER 442 (CA) (assault by omission)

4C - 23	FAGAN v COMMISSIONER of METRO POLICE [1968] 3 All ER 442 (CA)
Cause of Action	assault by omission
Procedural History	TJ found that "driving over foot" was an accident (no intention)
Facts	A unintentionally stops his car on policeman's foot - refuses to move

4C - 23	FAGAN v COMMISSIONER of METRO POLICE [1968] 3 All ER 442 (CA)
Issues	<i>Do AR and MR coincide?</i>
Legal Principles	Mens Rea must be contemporaneous with the Actus Reus
Ratio/holding	Generally AR and MR will coincide in time, however, as is the case here, they were both part of a continuing action. Distinct from a complete act for which A would later develop MR
Reasoning	<ul style="list-style-type: none"> -he did mean/intend to leave the tire there? - the actus reas is a "continuous act" - decision to leave the car there is in itself an action - is this a legal fiction? - did car stall or he turned off?
Additional Comment	majority would convict, the minority would not - dissent said that AR was complete, assault law does not punish an omission

R v MOORE (1978), 43 CCC (2d) 83 (SCC) (obstructing PO)

4C - 26	R v MOORE (1978), 43 CCC (2d) 83 (SCC)
Cause of Action	unlawfully and willfully obstructing a police officer (2 years)
Facts	P rode his bike through a red light, failed to stop for police officer
Issues	<i>Did the cyclist have a duty to stop and show i.d.? If he didn't do that, what was he guilty of?</i>
Legal Principles	s.495(2) imposes duty on PO to ascertain A's identity
Ratio/holding	because constable has obligation to investigate, Mr. Moore has a duty to cooperate (implied duty)
Reasoning	<p>definition sections - s.2 - "motor-vehicle" excludes bicycle -cyclists have to obey traffic rules (173(1)) as a vehicle but s.58 talks about motor vehicles - court decided s.58 does not apply - did not have to stop and give his name</p> <ul style="list-style-type: none"> -Mr. Moore was not able to ride through red light -law did not allow him to arrest A unless he could not get identity - had obligation to investigate and ascertain A's identity - s.58 does not show this duty clearly (only for motor vehicles) but courts read in a corrolative/reciprocal duty

4C - 26	R v MOORE (1978), 43 CCC (2d) 83 (SCC)
Additional Comments	<ul style="list-style-type: none"> - Moore has not been followed by BCCA anymore (<i>Greaves</i>) - dissenting - Justice Dickson: General Principle 1. No Statutory Duty - no obligation unless there is a source of obligation, looks in statute - s.58 does not apply to cyclists 2. the law gives him the power to arrest if he doesn't give him name - should have done this 3. no common law rule that you have to identify yourself to police -it's up to Parliament to decide he has a correlative/implied duty - only put the duty on motor vehicles - we shouldn't

R v THORNTON (1991), 1 OR (3d) 480 (CA) (s 180 nuisance)

4C - 33	R v THORNTON (1991), 1 OR (3d) 480 (CA)
Cause of Action	committing a common nuisance that endangers the life, health or safety of the public (s.180)
Facts	P knew he was HIV+, chooses to donate blood
Issues	<i>Was there an offense committed?</i>
Legal Principles	Common nuisance defined: includes a "failure to discharge a legal duty" which is in c.l. The common law duty to avoid acting in a way that is reasonably foreseeably likely to cause harm is a legal duty for the purposes of Code
Ratio/holding	Omission included through common law duty connected to statutory words - particular statutory language allows for using common law duty
Reasoning	unlawful act does not apply because it is not proscribed by statute (it is not criminal to donate contaminated blood), however <ul style="list-style-type: none"> - did not discharge a legal duty - clearly implicates an omission - how broad is the language "failure to discharge a legal duty"?, includes common law duties - legal duty to refrain from injuring your neighbour - Parliamentary intent to do this

C. Voluntariness (4-37)

In addition to showing that actions were involuntary (ex: from a seizure) A may be acquitted if he/she can raise a defence of intoxication (voluntarily consuming alcohol or drugs), an involuntary consumption of alcohol or drugs, a mental disorder defence, or the defence of automatism (ex: sleepwalking).

Voluntariness is always analyzed as part of the *actus reus* - as a society, we only punish those who mean what they do

R v LUCKI (1955) 17 WWR 446 (Sask Police Court)

4C - 38	R v LUCKI (1955) 17 WWR 446 (Sask Police Court)
Facts	A's car skidded to the wrong side of the road due to poor conditions
Ratio	Action was involuntary due to road conditions; this offense requires voluntariness as minimum MR. Not guilty.

R v WOLFE (1974), 20 CCC (2d) 382 (Ont CA) (assault)

4C - 39	R v WOLFE (1974), 20 CCC (2d) 382 (Ont CA)
Facts	V refused to leave hotel, A hits V with a telephone after being punched
Ratio	Intent is necessary for assault causing bodily harm; a reflex action is not voluntary for AR purposes. Acquitted. (Court sees voluntariness as a piece of the AR.)

D. Statutory Interpretation and the Actus Reus (4-7)**R v CLARK [2005] 1 SCR 6, 205 SCC 2 (s 173 indecent act in public place)**

4C - 7	R v CLARK [2005] 1 SCR 6, 205 SCC 2
Cause of Action	committing an indecent act in a public place (s.173(1)(a))
Procedural History	TJ - "in a public place" can be satisfied where A converts his home into a public place. "Presence" satisfied if actions can be seen from outside. No MR requirement of "presence" - did not need to know he was being watched. Act (indecent act) found BRD Court of Appeal - reaffirmed this. Said wanted to draw attention to himself - should not have said this (finding of fact differed)
Facts	A looks to be masturbating at a desk in front of a window, neighbour call police
Issues	<i>What does "in a public place" mean and can you convert your home into a public place by being seen?</i>
Legal Principles	s.173(1)(a) def'n of "in a public place" - any place to which the public have access as of right or by invitation, express or implied (narrower French def'n used)
Ratio/holding	If there is more than one possible interpretation, use the ordinary meaning of the language (in context) and then parliamentary intention (ascertained by the text itself).

4C - 7	R v CLARK [2005] 1 SCR 6, 205 SCC 2
Reasoning	<p>Characteristics</p> <ol style="list-style-type: none"> 1. public access - they don't have physical access, could mean visual <ol style="list-style-type: none"> a. court does not accept this argument because must read statutory language in context - access is modifying a place - which in its ordinary sense suggests physical access (access - not just ability to look into a window) b. section 174 nudity - distinguish between "in a public place" and "exposed to public view while on private property" - put in Code at same time - Parliament did this intentionally c. would not be any need for s.173(1)(b) if they meant that in (a) d. s. 213 distinguish "in a public place or in any place open to public view"
Additional Comments	<i>Words of the Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament. Rizzo Shoes</i>

R v MOQUIN 2010 MBCA 22, 253 CCC (3d) 96 (assault causing bodily harm)

4C - 16	R v MOQUIN 2010 MBCA 22, 253 CCC (3d) 96
Facts	A charged with assault causing bodily harm - only convicted of assault after TJ found that V's injuries didn't meet the s.2 definition
Ratio	Bodily harm is defined as interference with comfort or health that is more than merely transient or trifling. Note comfort or health per Dixon. Serious bodily harm is a higher standard that requires hurt or injury that interferes in a grave or substantial way with the physical integrity or wellbeing of the complainant per McGraw. TJ erred in applying the higher standard and not recognizing that bodily harm did not need to impair function. Acquitted.

Chapter Five: Causation

A. English Cases: If there is a consequence in the AR area, you need to think about causation, a common law principle. Words: *caused, as a result of, causing, by, effects*, something that needs to be concluded.

Requires the AR to be a "significant contributing cause" (higher than tort standard which requires "but for") to any required consequence by the offense. Irrelevant if no consequence is required. If there is no statutory explanation of causation, turn to common law.

Factual causation: there is no break in the chain of causation (more than "but, for..." test)

R v Smith [1959] 2 All ER 193 (CA) (death)

5A-1	R v Smith [1959] 2 All ER 193 (CA)
Facts	fight in barracks between regiments, victim stabbed with bayonet twice, friend carries him to station but drops him twice, then leaves him for help, at station left while they are attending others, however, he had a punctured lung -bad medical treatment - would have 75% chance of surviving, but dies
Issues	<i>Is A responsible for V's death?</i>
Ratio/holding	<i>If at the time of death the original wound is still a functional cause of death, it doesn't matter how bad the treatment was, you are still responsible for the death.</i>
Reasoning	- <i>novus actus interveniens</i> - an intervening act - chain of events overwhelmed the original events and interrupted the chain of causation (died of bad treatment, not stabbing) - but for..if this can't be said, then there is no causation (not absurd) - but this is not enough to prove causation!
Additional Comments	R.v.Jordan within this case - there is a point where the original wound is no longer the cause (allergic reaction) - abnormal treatment

R. v. Blaue [1975] 3 All ER 466 (death)

5-3	R. v. Blaue [1975] 3 All ER 466
Facts	A goes to victim's house demanded sex, is denied, stabs her, punctured lung, she refuses a blood transfusion
Issues	<i>Did the original stabbing cause her death?</i>
Legal Principles	thin skull rule (<i>Smithers</i> - punched in head, epiglottis malfunctioned - a contributing cause outside a "de minimus range") - if you do something that might reasonably cause death, then you take your victim as they are, with all of their weaknesses (and choices) -moral luck problem
Ratio/holding	If the victim makes choices, that may even be unreasonable, that results in the death, then you are still responsible for the death.
Reasoning	- argues that chain of causation was broken by her choice of refusing treatment (had she been more reasonable, she would not have died, refusal unreasonable) - a person who did a wrongful act was deemed morally responsible for the natural and probable consequences of that act (morally blameworthy)

B. Causation of Death in the Canadian Law of Homicide

The legal standard for causation of death was first set out by the Supreme Court of Canada in **R v Smithers, [1978] 1 SCR 506**. **Test for causation of death is whether the actions of the accused were “a contributing cause of death, outside the *de minimus* range”.**

The question of causation was again at issue in **R v Harbottle (1993), 84 CCC (3d) 1 (SCC)** - Court used higher standard than Smithers because of the seriousness of the 1st degree murder charge. Held the Crown had to prove that A “committed an act or series of acts which are of such a nature that they must be regarded as **a substantial and integral cause of death.**”

1. The Actus Reus of Homicide in s.222

Crown must prove beyond a reasonable doubt: *Lifchus, Starr*

The act must be voluntarily performed: *Wolfe*

Causation for s.222 is that A’s act was “more than a de minimum cause”: *Smithers*

To be convicted of 1st degree murder, A’s action must be “a significant and contributing cause” to V’s death: *Harbottle, Nette*

2nd degree murder	AR	MR
conduct	an act - must be voluntarily performed: Wolfe	
circumstances	not specified	planned
consequences	directly or indirectly, by any means, caused the death of another person	deliberate

2. Elevating Homicide to 1st Degree Murder in s.231(2) and s.231(5) (AR only)

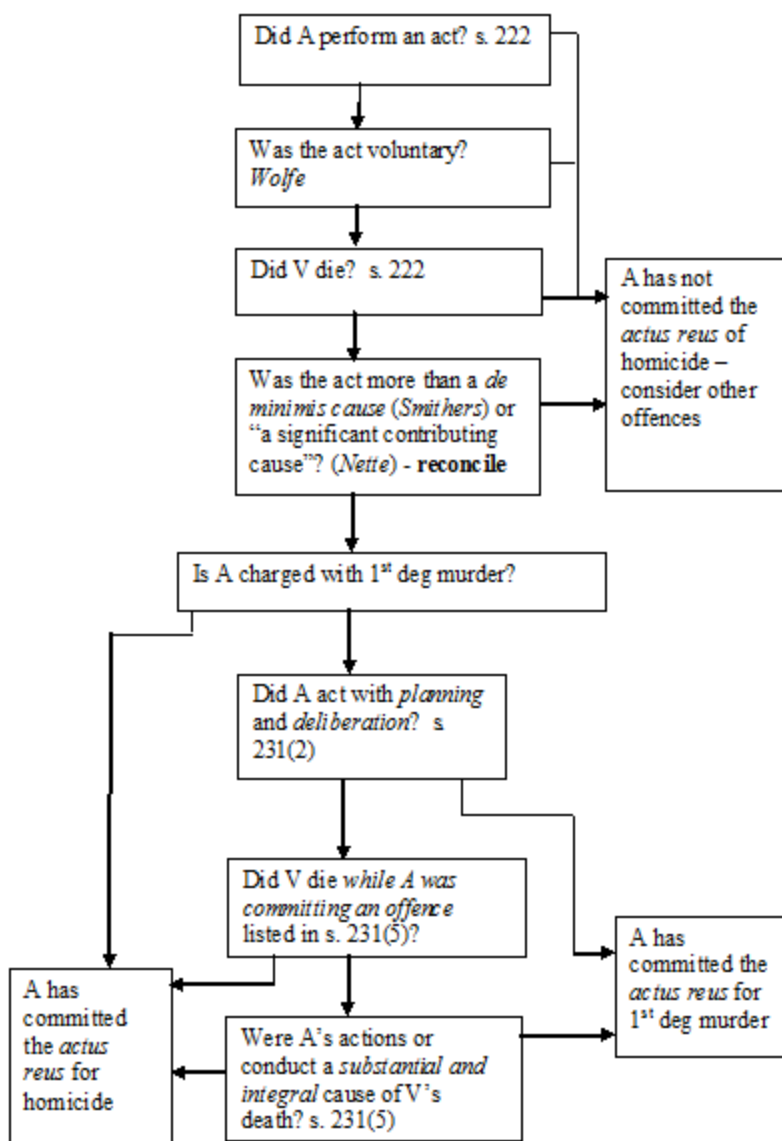
2 paths to 1st degree murder: s.231(2) - planned and deliberate OR s.231(5) while committing or attempting a list of offences (now must also prove the ancillary offense as well - not separate)

s. 231(2) Planned and Deliberate

1st degree murder	AR	MR
conduct	an act - must be voluntarily performed: Wolfe	
circumstances	planned	
consequences	directly or indirectly, by any means, caused the death of another person	deliberate

s. 231(5) While Committing or Attempting...(must have killed WHILE committing another crime)

1st degree murder	AR	MR
conduct	an act - must be voluntarily performed: <i>Wolfe</i>	
circumstances	"while" committing (or attempting) a list of offenses	
consequences	directly or indirectly, by any means, caused the death of another person	



R v Nette (2001), 158 CCC (3d) 486 (SCC) (2nd degree murder)

5-7	R v Nette (2001), 158 CCC (3d) 486 (SCC)
Facts	Nette broke into victim's house, tied her up and left her, she died, A convicted of 2nd degree murder
Issues	What is the standard of causation for 2nd degree murder and how should it be explained to a jury?
Legal Principles	<p>Harbottle standard for 1st degree: substantial and integral cause</p> <p>Smithers standard: "beyond de minimis" range</p> <p>- jury should be told "more than a trivial cause" - better to say a "significant contributing cause"</p> <p>- Nette could only be guilty of 2nd degree murder if his actions were an integral cause of victim's death (<i>Smithers</i>)</p> <p>- Courts must distinguish between factual (direct cause) and legal (moral culpability) causation.</p>
Ratio/holding	<p><i>Smithers</i> standard is the legal test for all murder and manslaughter (except 231(5) - 1st degree while committing another offense)</p> <p>There is a legal test of causation (<i>Smithers</i>) - we are not changing this test, but think it is hard for juries to understand. Therefore, it is fine for judges to say "significant contributing cause" instead.</p>
Reasoning	1st degree murder carries substantial social stigma (more morally blameworthy than any other)
Additional Comments	L'Heureux-Dube and concurring judges say that "significant contributing cause" raises "not a trivial or insignificant cause" - don't like the wording

Chapter Six: The Mental Element (*Mens Rea*)**A. The Subjective Approach**

If MR is not specified within the statute, it is assumed to be subjective.

R. v BEAVER (1957), 118 C.C.C. 129 (SCC) (possession & trafficking)

6-1	R. v BEAVER (1957), 118 C.C.C. 129 (SCC)
Procedural History	TJ - as long as Beaver knew he had something, they did not have to consider if he knew the character of what he had - convicted of possession and trafficking
Facts	A charged with possession and sale of heroin - evidence indicates A believed it to be lactose while X knew it was heroine

6-1	R. v BEAVER (1957), 118 C.C.C. 129 (SCC)
Issues	Does A have the necessary MR?
Legal Principles	section
Ratio/holding	- absent clear language, mens rea is presumed - in circumstances - simple illustration: thought he bought baking soda - ruling of early court does not make sense - no mens rea
Reasoning	Must prove BRD that he knew package contained forbidden substance - <i>“The essence of the crime is the possession of the forbidden substance and in a criminal case there is in law no possession without knowledge of the character of the forbidden substance.”</i>
Additional Comments	Note that the Code made selling a substance presented as a drug part of the offense of selling drugs so A is still guilty of selling heroin, even though not convicted of possessing

Presumptions applicable for true crimes compared with strict and absolute liability

	True crimes	Strict Liability	Absolute Liability
actus reus	crown proves BRD	crown proves BRD	crown proves BRD
mens rea	crown proves BRD (presumptively subjective)	not required	not required
defense of due diligence	not necessary	available to A if proved BoP	not available, but no jail time here

R v City of Sault Ste. Marie (1978), 40 CCC (2d) 353 (SCC)

6-6	R v City of Sault Ste. Marie (1978), 40 CCC (2d) 353 (SCC)
Facts	city charged with pollution (garbage dump leaking into a river), regulatory offense on which A challenges MR requirements
Issues	<i>What is the necessary mens rea of offenses variously referred to as “statutory”, “public welfare”, “regulatory”, “absolute liability” or “strict liability”, which are not criminal but are prohibited in the public interest?</i>
Legal Principles	Public Welfare: ex. speeding, selling liquor without a license, pollution
Ratio/holding	In a public welfare offense, the starting presumption is that they do not have to prove mens rea (regulatory in nature, high volume, effect on public health, etc.)

6-6	R v City of Sault Ste. Marie (1978), 40 CCC (2d) 353 (SCC)
Reasoning	distinction made between public welfare offenses and true crime 1. protection of social interests requires a high standard of care - remove loopholes - start from different presumption - no mens rea 2. aim to prevent risky behaviour 3. costs too high to prove MR, mere negligence is enough 4. defense of due diligence allowed here - new trial

To determine *Mens Rea*:

1. Look at the statute
2. If it is silent, decide if it is a true crime or a public welfare offense
3. If a true crime, starting presumption is to prove subjective *mens rea* (*Beaver*)
4. If a public welfare offence, starting presumption is that they do not have to prove *mens rea* (regulatory in nature, high volume, effect on public health) (*SS Marie*)

B. Intent and Recklessness (6-9)

R. v. Buzzanga and Durocher (1980), 49 CCC (2d) 369 (OntCA) (wilfully promoting hatred)

<i>page 6-9</i>	R. v. Buzzanga and Durocher (1980), 49 CCC (2d) 369 (OntCA)
Facts	Both French speaking - upset that money not used to build French school (promise broken). Wrote brochure as a call to action to band together. Charged with wilfully promoting hatred against an identifiable group
Issues	<i>What does wilfully mean in this context (section 319(2))?</i>
Rule	D argument that must desire to promote hatred Court: wilfully means “intention” not “recklessness” Intention includes foreseeing a particular result even if that is not their purpose (means to an end) <i>Wilfully can have different meanings in different contexts</i> <i>Here Wilfully = “intention” = subjective foresight of near certain consequences coupled with action</i> <i>Distinguished from recklessness = subjective foresight of possible consequences and a decision to proceed regardless per Sansregret</i>
Application	6-17 - “wilfully” either (1) conscious purpose to promote hatred or (2) foresaw promotion of hatred was certain or morally certain to result, but distributed it as a means of achieving their purpose of obtaining the French-language high school -intention of Parliament must have been to narrow “wilfully” to intention - subjective foresight that the prohibited consequences are near certain, coupled with the decision to proceed
Conclusion	Set aside convictions, new trials ordered

s. 319 wilfully promoting hatred	AR	MR
conduct	communicating statements	Crown: wilfully
circumstances	not private conversation identifiable group	
consequences	risk of promoting hatred	D: wilfully, intention

R. v. Theroux [1993] 2 SCR 5 (fraud)

6-19	R. v. Theroux [1993] 2 SCR 5
Facts	A committed fraud by promising home buyers that their deposits were covered by insurance knowing this to be false but believing that it would never matter
Issues	<i>What does his mens rea have to be?</i>
Rule	MR of Fraud: subjective awareness that one is undertaking a prohibited act that could cause deprivation (can be satisfied by recklessness). Per Olan, a loss need not result; the risk is enough. In certain cases A's subjective understanding of the possible consequences can be inferred from his actions. D argued must have subjective foresight of deprivation to be fraud - but he didn't think insurance would ever have to be called on Court - subjective deprivation concerning insurance/no ins. - loss of the opportunity to call on the insurance
Application	-A's belief that the conduct is not wrong or that no one will in the end be hurt affords no defence to a charge of fraud -any misrepresentation or practice which induces an incorrect understanding or belief in the minds of customers, or which causes deprivation, will become criminal - policy choice (captures classic delusional con artist, pyramid sch) -not necessary to demonstrate that there was a possibility of the insurance being drawn upon; enough that he knew it mattered to some buyers that the insurance was there and they based their decision on that
Conclusion	Guilty

fraud	AR	MR
conduct	act	
circumstances	deceit, falsehood, other fraud	knowledge
consequences	risk of deprivation	knowledge of risk of deprivation

C. Wilful Blindness (6-27)**R. v. Briscoe 2010 SCC 13**

6-28	R. v. Briscoe 2010 SCC 13
Facts	2 teenagers lured into a car, A drove X and Vs to golf course under false pretense, A knew X wanted to kill someone and says he didn't want to know what exactly happened at the golf course once X and Vs left the car. A charged with aiding a criminal offense (murder) - s.21(1)(b)
Issues	<i>Can Briscoe be convicted of murder as an accessory? Whether wilful blindness applies here?</i>
Rule	- need to intend to assist the principle in the crime they are committing - need to know what the principal is doing and intend to assist them in doing it Definition of wilful blindness: (subjective) is something very close to intention to assist, can almost be said that A knew (suspected the fact, realized its probability) but refrained from obtaining the final confirmation because A wanted to be able to deny knowledge
Application	Wilful blindness (deliberate ignorance) can substitute for knowledge
Conclusion	acquitted at trial (because judge did not look at wilful blindness), sent back for new trial

D. Motive**R. v. Lewis (1979), 47 C.C.C.(2d) 24 (S.C.C.) (murder)**

6-33	R. v. Lewis (1979), 47 C.C.C.(2d) 24 (S.C.C.)
Facts	Lewis mailed a package that he knew contained a bomb, charged father on theory he was displeased with marriage, charged Lewis on 2 theories (built the bomb or knew it was a bomb and mailed it) even though he had no connected to V, appeal based on TJ not defining motive to the jury - argued this was error in law
Issues	<i>Should the jury have been instructed more on motive?</i>
Rule	Crown never has to prove motive unless statute requires it (murder does not) Motive is not the same as MR, but its presence or absence may be useful in determining MR and is therefore always admissible by either side. - Proven absence of motive helps A and is worth noting. - Confirmed motive can help C, especially if identity is an issue. - TJ has discretion on telling jury about motive based on relevant importance - sometimes instruction is necessary and sometimes not - def'n of motive = explanation for the crime, proceeds the exercise of the will, the things that explains why this A killed this V - distinguished from intention = ulterior intentions, background for WHY you have the intention
Application	-motive was not proved either way, so TJ had no obligation
Conclusion	conviction upheld

E. Transferred Intent (6-39)

Code can either allow for transferred intent (ex: for murder in s. 229(b)), but if it does not the common law doctrine may apply (s. 8(2)).

However, the transferred injury must be the same as the one initially intended. If the harm transferred is of a different magnitude then MR can't transfer with AR and A is not guilty, even of an attempt, but he may still be guilty of a lesser crime.

R v Gordon [2009] OJ No 724 (Ont CA)

6-40	R v Gordon [2009] OJ No 724 (Ont CA)
Facts	A and 2 friends approached a drug dealer, offered insulting price, so dealer punched them. A came back with sawed-off shot gun to shoot Thompson (who runs away) but shoots Victims 1,2&3 instead, TJ convicted A of attempted murder of all 4
Issues	<i>Does the intent to kill transfer from one intended victim to actual victims?</i>
Rule	AR and MR must be contemporaneous in time, however, if attempted to harm one person and harms someone else instead, you can combine the AR and MR of the two to create a whole offense (however, here no one died) - Justice Watts (CA) has objection to TJ's charge that the MR of the one is transferred to the other 3 because it is not clearly bounded and too broad since attempted murder does not require actual harm - distinction made for inchoate offenses (no consequences element of AR but MR exceeds the AR)
Application	-can only be convicted of attempted murder of the person you were trying to kill -bring back aggravated assault charges for other 3
Conclusion	conviction upheld

s.268(1) aggravated assault	AR	MR
conduct	act	
circum		
consequences	endangering life	recklessness, intention

MENS REA REVIEW

Account for EVERY WORD in the provision

Common law presumptions:

- Where statute is silent, presumption for true crime is subjective MR (*Beaver*)**
- Presumption for public welfare offense - Crown need not prove MS (*SSMarie*)**
- Where clear language to the contrary, language can elevate MR (*Buzzanga*) or diminish/remove the MR requirement**

	AR	MR
conduct	(voluntary)	intention
circumstances		knowledge - <i>Beaver</i> recklessness - <i>Buzzanga, Thereux</i> wilful blindness - <i>Briscoe</i>
consequences		recklessness - <i>Buzzanga, Thereux</i> intention - <i>Lewis, Buzzanga</i> wilful blindness - <i>Briscoe</i>

Don't bother looking at the MR aspect of Conduct, unless there is a voluntary issue.

Look at the Statute! If there is clear language, use SI to interpret it

What some MR terms mean:

Knowledge (*Beaver*)

- no possession without knowledge of the substance

“Wilfully” (*Buzzanga* - “wilfully promoting hatred”)

- can have different meanings - determined by plain meaning and Parliamentary intention discerned in surrounding sections
- in *Buzzanga*, wilful means intention, not mere recklessness

Intention (*Buzzanga*)

- subjective foresight of near certain consequences coupled with action
- distinguished from desire

MR of Consequences (*Thereux*)

- subjective awareness that one is undertaking a prohibited act that could cause deprivation (Court willing to infer MR from A's actions)
- a loss need not result; the risk is enough (per *Olan*)
- risk of deprivation enough even if honestly believed risk would never happen, enough that he knows there is a risk (policy reasons)

Wilful Blindness (*Briscoe*)

- something very close to intention to assist, can almost be said that A knew but did not receive final confirmation because wanted to plead ignorance

- when related to consequences, suspicion coupled with decision to not ask when you should have

Recklessness (*Thereux, Buzzanga, Sansregret*)

- distinguished from intention (B)
- subjective awareness that one is undertaking a prohibited act that could cause deprivation (Court willing to infer MR from A's actions) - lower standard of foresight than intention
- subjective foresight of possible consequences and a decision to proceed (S)

Motive (*Lewis*)

- motive is always relevant, always admissible, but not a required part of the crime nor essential part of the Crown's case at law
- proved presence of motive in important factor in favour of A
- proved presence of motive noteworthy, especially where identity issue
- motive is a question of fact and evidence & TJ duty to charge depends on whether motive is "essential in arriving at a just conclusion"
- can help you be satisfied about intention, w.b. or knowledge

Transferred Intent (*Gordon*)

- need both AR and MR of consequences for it to be in play
- can transfer the intention to harm (MR) one person on the AR of harming someone else, if harm is the same

PARSING AR & MR

s 229 murder conduct - by any means
 consequences - a death (caused directly or indirectly)
 MR - cons - means to cause death, means to cause bodily harm (reckless as to whether or not death ensues) - see possibility but choose to proceed anyways knowing death is likely

Breaking and Entering	Actus Reus	Mens Rea
conduct	breaking & entering (any part of body, any part of instrument (s.350))	intent, reckless
circumstances	defined place, without lawful excuse, where entered by opening	intent to commit indictable offense - but 348(2) presumption
consequences	(presumption allows for no cir.)	

fraud	AR	MR
conduct	act	
circumstances	deceit, falsehood, other fraud	knowledge
consequences	risk of deprivation	knowledge of risk of deprivation

s 76 hijacking	AR	MR
conduct	an act	
circumstances	by force or threat, or other intimidation unlawfully	
consequences	seizes or exercises control of aircraft	intention, recklessness or wilful blindness work in regard to "seizes" intention to cause person to be transported against their will

Infanticide (s.233)	Actus Reus	Mens Rea
conduct	act or omission	wilful
circumstances	-female -her newly born child (under the age of 1) -balance of mind disturbed by birth/lactation, not yet recovered	
consequences	death of infant (causation question)	intention or not? on appeal to SCC right now

- s. 272(1) sexual assault causing bodily harm
- s. 347(1)(b) receiving interest at a criminal rate
- s. 218 abandoning a child
- s. 255(3) impaired driving causing death
- s. 173(1) indecent act in a public place (Clark p 15)