

# LexisNexis® Reference Card: Criminal Law



## Extracted from:

### [Halsbury's® Laws of Canada – Criminal Offences and Defences](#)

**Author:** Alan D. Gold, B.Sc., LL.B.

#### Referenced as HCR in this document

[Click here to search this volume on the Quicklaw® service](#)

### [Halsbury's® Laws of Canada – Criminal Procedure \(2012 Reissue\)](#)

**Author:** Alan D. Gold, B.Sc., LL.B.

#### Referenced as HC2 in this document

[Click here to search this volume on the Quicklaw® service](#)

▼**HCR-1▼ Overview.** This title sets out the offences and defences in criminal law – *i.e.*, as either expressly set out or as contemplated in the *Criminal Code* of Canada (hereinafter referred to as the “Code”).<sup>1</sup>

#### Notes

1. (CAN) R.S.C. 1985, c. C-46.

▼**HCR-2▼ What is a “Crime”.** The criminal law is concerned with setting minimum standards of behaviour in defined circumstances.<sup>1</sup> Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences? Morality and criminality are far from co-extensive; nor is the sphere of criminality necessarily part of a more extensive field covered by morality – unless the moral code necessarily disapproves all acts prohibited by the State, in which case the argument moves in a circle. It is of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of “criminal jurisprudence;” for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished.<sup>2</sup>

Because “crime” in the abstract is not the prohibited in the Code, the only practical definition is to say that “a crime is an act prohibited by the criminal law.”<sup>3</sup> A criminal offence is a crime as defined in the Code.<sup>4</sup> Acts or actions are criminal when they constitute conduct that is, in itself, so abhorrent to the basic values of human society that it ought to be prohibited completely. Some conduct is prohibited, not because it is inherently wrongful, but because unregulated activity would result in dangerous conditions being imposed upon members of society, especially those who are particularly vulnerable.<sup>5</sup>

**Other statutes.** Other federal statutes that create criminal offences include the *Controlled Drug and Substances Act*,<sup>6</sup> which criminalizes the possession and trafficking in narcotics. Where another statute creates an offence,

- the offence is deemed to be an indictable offence if the enactment provides that the offender may be prosecuted for the offence by indictment;
- the offence is deemed to be one for which the offender is punishable on summary conviction if there is nothing in the context to indicate that the offence is an indictable offence; and
- if the offence is one for which the offender may be prosecuted by indictment or for which the offender is punishable on summary conviction, no person shall be considered to have been convicted of an indictable offence by reason only of having been convicted of the offence on summary conviction.<sup>7</sup>

All the provisions of the Code relating to indictable offences apply to indictable offences created by an enactment, and all the provisions of that Code relating to summary conviction offences apply to all other offences created by an enactment, except to the extent that the enactment otherwise provides.<sup>8</sup> However, it also an offence under the Code to contravene any federal statute without lawful excuse by wilfully doing anything that it forbids or by wilfully omitting to do anything that it requires to be done. Where no punishment is expressly provided by law, this is an indictable offence.<sup>9</sup>

**Rationales for dichotomy.** There are two constitutional reasons as to why it is relevant whether a given act is “criminal” or not. The first is to determine whether the subject matter of the offence falls under the criminal law sphere for the purposes of s. 91(27) of the *Constitution Act, 1867*.<sup>10</sup> The second is to determine the extent to which Charter<sup>11</sup> guarantees apply to the offence, which can include whether or not the Parliament

has jurisdiction to criminalize the particular conduct.

#### Notes

1. *R. v. Creighton*, [1993] S.C.J. No. 91, 83 C.C.C. (3d) 346 at 378-79 (S.C.C.).
2. *Proprietary Articles Trade Association v. Canada (A.G.)*, [1931] A.C. 310 at 324, per Lord Atkin (P.C.).
3. T. Grygier “Crime and Society” from *Crime and Its Treatment in Canada*, W.T. McGrath, ed. (Toronto: MacMillan, 1976).
4. (CAN) *Criminal Code*, R.S.C. 1985, c. C-46, s. 9. See also *R. v. Jobidon*, [1991] S.C.J. No. 65 [1991] 2 S.C.R. 714 (S.C.C.).
5. *R. v. Wholesale Travel Group Inc.*, [1991] S.C.J. No. 79, 67 C.C.C. (3d) 193 at 241, per Cory J. (S.C.C.).
6. (CAN) S.C. 1996, c. 19.
7. (CAN) *Interpretation Act*, R.S.C. 1985, c. I-21, s. 34(1).
8. (CAN) *Interpretation Act*, R.S.C. 1985, c. I-21, s. 34(2).
9. (CAN) *Criminal Code*, R.S.C. 1985, c. C-46, s. 126(1).
10. (U.K.) 30 & 31 Vict., c. 3.
11. (CAN) *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

▼**HCR-3▼ Types of offences.** There are three categories of offences: *mens rea* offences, strict liability offences and absolute liability offences. Offences that are criminal in the true sense are *mens rea* offences. Public welfare offences *prima facie* fall into the strict liability category unless words denoting *mens rea*, such as “wilfully”, “with intent”, “knowingly” or “intentionally” are used. Strict liability offences permit the defence of due diligence.<sup>1</sup> Absolute liability offences admit of no defences. However, such offences can never carry the risk of imprisonment for the combination of absolute liability and risk of imprisonment violates s. 7 of the Charter.<sup>2</sup>

Where the legislature has not expressly addressed the requirement of fault, or where it has done so in a manner that violates the Constitution, a “public welfare offence” that carries the possibility of imprisonment will be construed as setting up a rebuttable mandatory presumption of negligence. Once the Crown proves the *actus reus*, the accused will carry the evidentiary burden of pointing to some evidence (led either by the Crown or the defence), that is capable of raising a reasonable doubt as to his or her negligence, short of which a conviction will properly ensue.<sup>3</sup>

**Regulatory offences.** The objective of regulatory legislation is to protect the public or broad segments of the public – *e.g.*, employees, consumers and motorists – from the potentially adverse effects of otherwise lawful activity. Regulatory legislation involves a shift of emphasis from the protection of individual interests and

the deterrence and punishment of acts involving moral fault to the protection of public and societal interests. While criminal offences are usually designed to condemn and punish past, inherently wrongful conduct, regulatory measures are generally directed to the prevention of future harm through the enforcement of minimum standards of conduct and care. It follows that regulatory offences and crimes embody different concepts of fault. It is contrary to the Charter to require the accused to establish a defence of due diligence with respect to a criminal offence. However, it is legitimate for such an onus to be on the accused charged with a regulatory offence. While the availability of imprisonment as a sanction for breach of a statute might be taken to indicate that the provision is criminal in nature, as opposed to regulatory, this fact is not itself dispositive of the character of an offence. Rather, one must consider the conduct addressed by the legislation and the purposes for which such conduct is regulated.<sup>4</sup>

#### Notes

1. *R. v. City of Sault Ste. Marie*, [1978] S.C.J. No. 59, 3 C.R. (3d) 30 (S.C.C.); *Lévis (City) v. Tétreault; Lévis (City) v. 2629-4470 Québec Inc.*, [2006] S.C.J. No. 12 (S.C.C.).
2. *Reference re Motor Vehicle Act (British Columbia)* s. 94(2), [1985] S.C.J. No. 73, 48 C.R. (3d) 289 (S.C.C.); *R. v. Cancoil Thermal Corp.*, [1986] O.J. No. 290, 52 C.R. (3d) 188 (Ont. C.A.).
3. *R. v. Wholesale Travel Group Inc.*, [1991] S.C.J. No. 79, 67 C.C.C. (3d) 193 at para. 28, per Lamer C.J. (S.C.C.).
4. *R. v. Wholesale Travel Group Inc.*, [1991] S.C.J. No. 79, 67 C.C.C. (3d) 193 at 241, per Cory J. (S.C.C.).

▼HC2-1▼ **Overview.** The criminal law consists of two distinct but interactive elements. The first deals with the identification of the substantive law, and enumerates and classifies the various criminal offences and their respective punishments. This element sets out the minimum standards of behaviour in defined circumstances and encompasses such acts or omissions as are prohibited under appropriate penal provisions by authority of the state.<sup>1</sup>

**Criminal procedure.** The second element, criminal procedure, provides the framework for administering the substantive law, and, as its name implies, primarily concerns itself with the procedural rules that support the implementation and enforcement of the substantive criminal law.

The phrase “criminal procedure” does not lend itself to precise definition. In one sense, it is concerned with proceedings in the criminal courts and such matters as conduct within the courtroom, the competency of witnesses, oaths and affirmations, and the presentation of evidence. Some cases have defined procedure

even more narrowly in finding that it embraces the three technical terms – pleading, evidence and practice. In a broad sense, it encompasses such things as the rules by which, according to the *Criminal Code*, police powers are exercised, the right to counsel, search warrants, interim release, and procuring attendance of witnesses.<sup>2</sup>

**Constitutional framework.** Parliament’s power in matters of criminal law, under s. 91(27) of the *Constitution Act, 1867*<sup>3</sup> expressly includes “the Procedure in Criminal Matters” but excepts the constitution of courts of criminal jurisdiction. The administration of justice in each province, including the constitution, maintenance, and organization of provincial courts of civil and of criminal jurisdiction, and procedure in civil matters in those courts, falls under provincial jurisdiction.<sup>4</sup>

The power given to the federal Parliament to legislate in criminal law and criminal procedure is the power to determine what shall or what shall not be “criminal”, and to determine the steps to be taken in prosecutions and other criminal proceedings before the courts.<sup>5</sup>

“Administration of justice in the province.” The phrase “administration of justice in the province” has been broadly interpreted by the courts. Criminal law, substantive and procedural, comes under the exclusive legislative authority of the Parliament of Canada, but subject to s. 92(17) provision and to the paramountcy of federal law enacted under primary or ancillary action, the provinces remain responsible in principle for the enforcement of criminal law and to retain such power as they had before Confederation with respect to the administration of justice. They continue to have the constitutional authority to police their respective territories, to investigate crime, to gather and to keep records and informations relating to crime, to prosecute criminals and to supervise police forces, sheriffs, coroners, fire commissioners, officers of justice, the summoning of juries and recognizances in criminal cases.<sup>6</sup>

Although a province may establish provincial or local police forces, it cannot invest its police officers with some fresh power if no such power was conferred by the existing federal criminal law. To the extent to which enforcement of the criminal law is left with these police forces, it is there by virtue of federal law or by the continuation of pre-confederation powers. Thus, while Parliament defines the substantive criminal law, the administration and enforcement of that law is under provincial control, making for a balance between the roles of the respective levels of government in the criminal justice system.

**Establishments of courts.** Establishment of provincial superior, district or county courts is a co-operative matter between federal and

provincial authority. Section 96 provides for the appointment by the Governor General of the Judges of the Superior, District and County Courts in each province. Accordingly, procedure in criminal matters rests with the federal authority whereas, generally speaking, procedure in civil matters in provincial courts, as well as the constitution, maintenance and organization of these courts, falls under provincial jurisdiction.

**Law enforcement.** By virtue of s. 92(14) law enforcement is primarily a provincial responsibility and the provincial Attorney General is the chief law enforcement officer of the Crown in his or her province. He has broad responsibilities for most aspects of the Administration of Justice. Among these within the field of criminal justice, are the court system, the police, criminal investigation and prosecutions, and corrections. The provincial police are answerable only to the Attorney General as are the provincial Crown Attorneys who conduct the great majority of criminal prosecutions in Canada.<sup>7</sup>

#### Notes

1. For a discussion of these substantive criminal law issues, see the *Criminal Offences and Defences* title.
2. (CAN) *Criminal Code*, R.S.C. 1985, c. C-46; *Di Iorio v. Montreal (City) Common Jail*, [1976] S.C.J. No. 113, [1976] 1 S.C.R. 152 (S.C.C.).
3. (U.K.), 30 & 31 Vict., c. 3.
4. *Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c. 3, s. 92(14).
5. *Di Iorio v. Montreal (City) Common Jail*, [1976] S.C.J. No. 113, [1976] 1 S.C.R. 152 (S.C.C.).
6. *Di Iorio v. Montreal (City) Common Jail*, [1976] S.C.J. No. 113, [1976] 1 S.C.R. 152 (S.C.C.); *O’Hara v. British Columbia*, [1987] S.C.J. No. 69, [1987] 2 S.C.R. 591 (S.C.C.).
7. *Di Iorio v. Montreal (City) Common Jail*, [1976] S.C.J. No. 113, [1976] 1 S.C.R. 152 (S.C.C.).

## Supplemental Readings

### Criminal Law

[Criminal Procedure in Canada](#) (Rondinelli, Penny and Stribopoulos)

[The Practitioner's Criminal Code, 2014 Edition, Student Edition + E-Book](#) (Gold)

[Canadian Youth & Criminal Law – One Hundred Years of Youth Justice Legislation in Canada](#) (Davis-Barron)

[Sentencing, 8<sup>th</sup> Edition](#) (Ruby, Chan and Hasan)

[Sentencing – Practical Approaches](#) (Ferris)

[The Sentencing Code of Canada – Principles and Objectives](#) (Renaud)

### General

[Legal Problem Solving – Reasoning, Research & Writing, 6<sup>th</sup> Edition and The Ultimate Guide to Canadian Legal Research](#) (Fitzgerald)

[Legal Writing and Research Manual, 7<sup>th</sup> Edition, Student Edition](#) (Whitehead and Matthewman)

[Understanding Lawyers' Ethics in Canada](#) (Woolley)

[Lawyers' Ethics and Professional Regulation, 2<sup>nd</sup> Edition](#) (Woolley, Cotter, Devlin and Law)