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## INDEX

Sl. No.	Chapters	Page Nos.
<b>General Overview and Preliminary Matters</b>		
1.	The Sources of Criminal Law	4 - 8
2.	The Power to Create Criminal Offences and Rules of Criminal Procedure	9 - 14
3.	The Procedural Classification of Offences	15 - 18
4.	Interpreting Criminal Provisions	19 - 21
<b>The Elements of a Criminal or Regulatory Offence</b>		
5.	The <i>Actus Reus</i>	22 - 28
6.	Subjective <i>Mens Rea</i>	29 - 33
7.	Objective Mens Rea and True Crimes	34 - 35
8.	Regulatory Offences	36 - 38
<b>Extensions of criminal liability</b>		
9.	Aiding and Abetting	39 - 42
10.	Counselling	43 - 45
11.	Attempts	46 - 48
12.	Corporate and Association Liability	49 - 50
<b>Select criminal defences</b>		
13.	Mental Disorder	51 - 53
14.	Automatism and Involuntary Acts "Negating" the Actus Reus	54 - 57
15.	Simple Intoxication and Specific Intent Crimes	58 - 60
16.	Extreme Intoxication and General Intent Crimes	61 - 63
17.	Defence of the Person	64 - 67

18.	Necessity	68 - 69
19.	Duress	70 - 73
20.	Provocation	74 - 78
21.	Entrapment	79 - 84
22.	Error of Law and Colour of Right	85 - 87
<b>The adversarial proceeding</b>		
23.	The Adversarial Process	88-93
<b>Getting to the trial: the criminal investigation</b>		
24.	Police Powers	94 - 99
<b>Getting to the trial: taking control over the accused</b>		
25.	Securing Jurisdiction over the Accused and Interim Release	100 - 106
<b>Getting ready for trial</b>		
26.	Disclosure and Production	107 - 110
27.	Preliminary Inquiries	111
28.	The Jury Trial	112 - 116
29.	Pre-Trial Motions	117
30.	Trial Within a Reasonable Time Applications	118 - 119
<b>Sentencing</b>		
31.	General Principles of Sentencing	120 - 128
<b>Appeals and review</b>		
32.	Appeals of Final Decisions and Judicial Review of Interim Decisions	129 - 130

## CHAPTER 1: THE SOURCES OF CRIMINAL LAW

### 1. Introduction:

Canadian criminal law is founded on the principle that **criminal liability must be created by law enacted by Parliament**. With very limited exceptions, conduct can attract criminal punishment **only if it has been expressly prohibited by statute**. This reflects a deliberate constitutional and policy choice to ensure fairness, certainty, and restraint in the use of the criminal law.

As a result, criminal law in Canada differs from many areas of private law, where courts have historically played a larger creative role through the common law. In criminal law, **judicial creativity is restricted**, and the power to define crimes rests primarily with the legislature.

### 2. Statutory Sources of Criminal Law

#### (a) The Criminal Code as the Primary Source

The **Criminal Code of Canada** is the principal source of criminal law. It contains:

- Definitions of most criminal offences,
- Prescribed punishments,
- Rules governing criminal procedure,
- General principles applicable across offences (such as parties to offences, attempts, and defences).

For most exam questions, the Criminal Code will be the **starting point** for identifying whether particular conduct is criminal.

#### (b) Other Federal Statutes Creating Criminal Offences

Although the Criminal Code is central, it is **not exhaustive**. Parliament has also enacted other federal statutes that create criminal offences in specialized areas. For example:

- The **Controlled Drugs and Substances Act** creates offences related to drug possession, trafficking, production, and importation.
- Other federal statutes may criminalize conduct relating to national security, competition, or environmental protection.

The key point is that **only federal legislation can create criminal offences**, regardless of whether those offences appear inside or outside the Criminal Code.

### 3. Abolition of Common Law Offences

#### (a) Section 9 of the Criminal Code

Section 9 of the Criminal Code abolishes common law offences in Canada. As a result, **no person may be convicted of a criminal offence unless that offence is defined by statute.**

This provision reflects Parliament's clear intention to remove from courts the authority to declare new crimes.

#### (b) The Principle of Legality

The abolition of common law offences is grounded in the **principle of legality**, which is a foundational principle of criminal law. This principle requires that:

- Criminal offences must be **defined in advance**,
- The law must be **clear and accessible**,
- Individuals must be able to **predict the legal consequences** of their actions,
- No one should be punished for conduct that was **not criminal at the time it occurred.**

Allowing courts to create criminal offences after the fact would undermine legal certainty and violate basic notions of justice and fairness.

### 4. Frey v. Fedoruk (1950): Limits on Judicial Power

The Supreme Court of Canada's decision in **Frey v. Fedoruk (1950)** provides a classic illustration of the limits placed on courts in criminal law.

#### Facts

The accused was observed looking through a lighted window of a private residence at night. He was chased, detained, and later arrested without a warrant. He was charged with acting in a manner likely to cause a breach of the peace, based on his conduct as a so-called "peeping tom."

#### Issue

Could the accused's conduct be treated as criminal, even though no statute expressly prohibited it?

## Decision

The Supreme Court held that the accused had **not committed a criminal offence**. Although the conduct may have been improper or disturbing, it had **not been criminalized by Parliament**, nor did it fall within any recognized statutory offence.

Justice Cartwright emphasized that the creation of new crimes is a matter for Parliament, not the courts. If certain conduct is to be punished criminally, **it must be clearly defined in legislation**.

## Significance

Frey v. Fedoruk confirms that:

- Courts cannot expand criminal liability based on moral judgment alone,
- Criminal offences must have a **statutory foundation**,
- Judicial restraint is essential in criminal law.

This case remains a cornerstone for understanding the **separation of powers** in criminal lawmaking.

## 5. Survival of the Common Law in Criminal Law

Although common law offences are abolished, **the common law continues to play a significant role** in Canadian criminal law.

### (a) Common Law Defences

One of the most important surviving functions of the common law is the recognition and development of **criminal defences**. Courts retain the authority to:

- Recognize new common law defences,
- Clarify the scope and limits of existing defences,
- Ensure that criminal liability is consistent with principles of justice and fairness.

The Supreme Court of Canada has confirmed this role in cases such as:

- **Levis (City) v. Tetrault (2006)**, where the Court recognized the defence of officially induced error;
- **R. v. Mack (1988)**, where the Court confirmed entrapment as a common law defence.

Thus, while courts cannot create crimes, they **can shape and refine defences**.

## 6. Influence of Common Law on Statutory Interpretation

### (a) Section 8 of the Criminal Code

Section 8 of the Criminal Code preserves the application of common law principles in interpreting criminal statutes, unless those principles are displaced by legislation.

This means that even when offences are statutory, their **meaning and application are often informed by common law concepts**, particularly in relation to:

- Mental elements (mens rea),
- Defences,
- Concepts such as consent, voluntariness, and fault.

### (b) R. v. Jobidon (1991): Consent and Common Law Limits

The decision in **R. v. Jobidon (1991)** demonstrates how common law principles can limit the scope of statutory offences.

#### Issue

Whether consent between participants in a fight could negate criminal liability for assault causing bodily harm.

#### Holding

The Supreme Court held that **consent does not automatically excuse assault**, especially where serious bodily harm is intentionally inflicted. The Court relied on common law principles of public policy to limit the availability of consent as a defence.

#### Importance

Jobidon shows that:

- Statutory offences must often be interpreted in light of common law values,
- Consent has **limits shaped by public policy**,
- The common law continues to influence how criminal statutes operate in practice.

## 7. Conclusion:

In Canadian criminal law, **Parliament alone has the authority to create criminal offences**, primarily through the Criminal Code and other federal statutes. Common law offences have been abolished to uphold the principle of legality and ensure certainty in criminal liability.

However, the common law remains highly influential. It continues to:

- Shape criminal defences,
- Guide statutory interpretation,
- Influence the meaning of key concepts such as mens rea and consent.



CRIMINAL LAW QUESTIONS & ANSWERS

## INDEX

Sl. No.	Topics	Page Nos.
1.	Offence [under Section 24(1) & 286.3(1) of Criminal Code (CC)]	3 – 5
2.	Bail Hearing [offence: Section 344(1)(a) of CC]	6 – 8
3.	Aiding and Abetting	9 – 11
4.	Counselling and Attempts	12 – 15
5.	Mental Disorder Defence	16 – 18
6.	Extreme Intoxication Defence	19 – 21
7.	Defence of Person	22 – 24
8.	Preliminary Inquiry	25 – 27
9.	Offence [under Section 231 (2) & 229 (b) of CC]	28 – 29
10.	Offence [under Section 221 of CC]	30 – 32
11.	Sentencing [offence: Section 221 of CC]	33 – 35
12.	Regulatory Offence	36 - 39

## 1. QUESTION ON OFFENCE

Kevin had released a television advertisement calling for a personal assistant to run his clothing store, HSNN Clothing located in Downtown Toronto. It was a very popular clothing store and working at the brand would open up several career opportunities to various interested candidates.

In addition to this, Kevin had a great reputation as a leading fashion designer all across Toronto. The advertisement indicated that Kevin was only looking for female candidates and they would have a detailed in-person interview before they were hired.

Owing to the reputation enjoyed by Kevin, several women signed up for the interview. At the interview, several candidates were informed that they would have to engage in sexual intercourse in order to secure the job. This was discreetly made known to the concerned police who then went as undercover agent and confirmed this.

Owing to the explicit requirements, none of the women who interviewed were ultimately hired. Based on the incident, Kevin was charged with attempting to procure women for illicit intercourse.

You are clerking with the Attorney General who has to decide whether the charges against Kevin must be proceeded with. You have been asked to provide a memo indicating your opinion as to whether there is a reasonable prospect of conviction giving a complete analysis of the concerning legal standard.

### Sample Answer

**ISSUE:** Whether the act of Kevin constitutes the offence of attempting to procure women for illicit intercourse?

**RULE:**

- Section 24(1) of Criminal Code (CC);
- Section 286.3(1) of CC;
- Cases: [add from notes]

## ANALYSIS:

As the Clerk for Attorney General, while providing opinion on whether there is a reasonable prospect of conviction, I will adhere to the basic principle of Criminal Law that, the Accused's Act shall be proved beyond reasonable doubt by the Crown Counsel in the Criminal Offence. This standard of beyond reasonable doubt has been established in *R v. Cinuous*.

As per the case of *R v. Williams*, the Crown must prove both elements of Actus Reus and Mens Rea of the Offence committed by the Accused. In the instant case, Attorney General must be able to prove Actus Reus and Mens Rea of the Attempt to procure women for illicit intercourse committed by Kevin.

## ACTUS REUS:

Actus Reus (AR) of the offence of Attempt to procure women for illicit intercourse charged on Kevin under Section 286.3(1) read with Section 24(1).

The AR of Section 286.3 (1) i.e., Procuring (as per *R v. Gallone (2019) ONCA*) is:

- i. procures a person to offer or provide sexual services for consideration; or
- ii. recruits, holds, conceals or harbors a person who offers or provides sexual services for consideration, or exercises control, direction or influence over the movements of that person.

As Kevin is Charged with the attempt to commit the Offence under Section 286.3 (1), it is necessary to prove that, Kevin has acted or omitted to act something that is *beyond mere preparation* (Ref. Section 24(1), Commentary) to commit the offence of Procuring under Section 286.3(1).

In the instant case, the following facts that Kevin released a television advertisement calling for a personal assistant to run his clothing store, HSNN Clothing located in Downtown Toronto. The advertisement indicated that Kevin was only looking for female candidates and they would have a detailed in-person interview before they were hired. At the interview, several candidates were informed that they would have to engage in sexual intercourse in order to secure the job. These series of event and conduct of Kevin suggests that, Kevin has acted beyond mere preparation to fulfil the Actus Reus under the aforementioned CC provisions.

Therefore, even as per the case of \_\_\_\_\_ (choose from Syllabus Actus Reus Cases), applied to the present facts, provides that, the Actus Reus of Kevin has been proved beyond reasonable doubt.

**MENS REA:**

In the instant case, the type of the Mens Rea is Subjective Mens Rea. As it is the State of mind of Kevin that the Attorney General has to prove.

Mens Rea of the Section 286.3(1) as per the Case of *R v. Gallone (2019) ONCA* the Attorney General has to establish that Kevin,

- i. Intended to advertise the offer; and
- ii. knew that the offer was an offer to provide sexual services for consideration.

In the instance case, the fact '...At the interview, several candidates were informed that they would have to engage in sexual intercourse in order to secure the job' suggests that Kevin had every intention to commit the offence of Procuring as per Section 286.3 (1) of CC.

Therefore, even as per the case of \_\_\_\_\_ (choose from Syllabus Mens Rea Cases), applied to the present facts, provides that, the Mens Rea of Kevin has been proved beyond reasonable doubt.

Moreover, the evidence by the undercover agents (police officers), who attended the interview clarifies and confirms the act and intention of Kevin.

Specific Cases: *R v. Deutsch (1986)*

**CONCLUSION:**

The act of Kevin constitutes the offence of attempting to procure women for illicit intercourse under Section 286.3(1) read with Section 24 (1) of CC.

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